



## **OSCE/ODIHR LIMITED ELECTION OBSERVATION MISSION United States of America — General Elections, 4 November 2008**

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### **STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS**

**Washington, D.C., 5 November 2008** – The Limited Election Observation Mission (LEOM) for the 4 November general elections in the United States of America was deployed by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

The election is assessed for its compliance with OSCE commitments for democratic elections and national legislation. This statement of preliminary findings and conclusions is delivered prior to the completion of the election process, including the tabulation and announcement of final results, the handling of possible post-election day complaints or appeals, and the instalment into office of the newly elected President and Congressional representatives. The final assessment of the election will depend, in part, on the conduct of the remaining stages of the election process. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for potential improvements, approximately two months after the completion of the election process.

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### **PRELIMINARY CONCLUSIONS**

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The 4 November 2008 general elections in the United States of America demonstrated the essential principles of a pluralistic democracy characterized by the respect for fundamental freedoms, the rule of law and transparency of the electoral process. Voters were able to make informed choices in competitive and vigorously fought elections. However, concerns that arose during recent elections have yet to be fully addressed in some states. Efforts to further enhance public confidence in the election process should continue. These elections generally met OSCE commitments for democratic elections.

The presidential election attracted most public attention. A wealth of information about the candidates, their platforms and the election process as a whole was disseminated by free and pluralistic media and through extensive campaign activities and paid advertising by the candidates. The regulatory framework for election coverage in the media guaranteed equal opportunities to candidates, and facilitated a competitive and vigorously debated campaign.

The presidential campaign saw unprecedented levels of campaign spending. Based on the principle of freedom of speech, legislation *de facto* does not limit spending for presidential campaigns. Candidate campaigns drew a large number of small donations which were thoroughly disclosed. Legal provisions to limit the amount of individual donations were undermined by the possibility to contribute to a candidate's campaign through other donation mechanisms.

Consistent with the US political system, the legal framework for elections is highly decentralized and complex with minimum federal standards and widely varying state election laws, thus leading to a lack of uniformity among states in conducting elections. The interpretation of federal laws differed and resulted in some inconsistencies in their implementation across individual states.

The election was overall professionally administered. While some states have taken steps to limit

the political activity of election officials during elections, it is of concern that chief election officers of states and counties are often elected as party candidates. They at times run in elections which they themselves administer, allowing for conflicts of interest.

Allegations related to the administration of the elections, such as fraudulent voter registration, disenfranchisement of voters and malfunctioning of some voting systems featured prominently in the public debate. These issues were widely covered and investigated by the media, and legal actions were taken to address them in some states. The active involvement by political party activists, civil society organizations and the media contributed to a high level of transparency, ensuring checks and balances on the activities of the candidates and the election administration.

Different state practices in voter registration, maintenance of voter lists and voter identification resulted in litigation in some states. Deadlines for voter registration and list maintenance were generally met. However, the lack of clear procedures for the matching of voter registration databases with other official population databases led to inconsistencies in the process. At times the process may have lacked transparency and possibly disenfranchised some voters. Voter registration in particular featured as a controversial campaign issue in connection with registration drives by a civil society group.

The record number of newly registered voters and expected high voter turnouts in some states prompted election stakeholders to call on voters to vote early. Long lines of early voters were observed in most states where early voting is permitted. While most states' laws provide sufficient safeguards to ensure the integrity of the early voting process, some do not guarantee the secrecy of early in-person and absentee by-mail voting.

To address public concerns about certain voting systems, there has been an effort to enhance confidence in the voting process by decreasing the use of direct electronic recording machines in favour of scanned paper ballots. However, to the extent that such systems may be retained, standards and practices to ensure accuracy and transparency of electronic voting systems have yet to be fully developed and implemented.

The system for election dispute resolution is complex. Courts were widely used and provided effective remedies. In the pre-election period, numerous lawsuits were initiated in state and federal courts.

Falling short of an important OSCE commitment, most states' election legislation does not provide for access of international observers. Access for domestic observers varies by state. On election day, OSCE/ODIHR LEOM observers faced difficulties in having access to polling stations in some instances.

On election day, voters were able to cast their votes in a professionally and efficiently administered process that allowed for prompt delivery of the results. High levels of voter participation resulted in occasional long waiting times, especially during the morning hours. While there were minor technical problems with voting machines, these had little impact on the efficiency of the process. Secrecy of the vote was compromised at some polling stations due to the manner in which ballots were inserted into the optical scan devices and due to the positioning of voting equipment and voting booths.

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## PRELIMINARY FINDINGS

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### Background

On 4 November, US citizens voted to elect the President and Vice-President, 35 Senators and 435 Representatives. The President and Vice-President are elected by an Electoral College consisting of 538 Electors.<sup>1</sup> Electors, Senators and Representatives are directly elected by popular vote in their respective states. Electors are elected through the “winner-takes-all” system, except in Maine and Nebraska. Senators and Representatives are elected through the “first-past-the-post” system.

Senator John McCain was nominated by the Republican Party and Senator Barack Obama by the Democratic Party. They were selected in over 50 primary elections and caucuses from a total of 15 aspiring presidential candidates. In addition, 22 independent and third-party presidential candidates contested the presidential election in one or more states; only four of these had placed their names on ballots in a sufficient number of states to theoretically receive more than 270 votes in the Electoral College to win the election. The low campaign profile of these candidates was reportedly due to burdensome requirements and insufficient resources to gain ballot access in a considerable number of states and to campaign, as well as a lack of interest from the national media. Some states grant ballot access to third-party and independent candidates after the collection of signatures of 3 per cent from the voters who participated in the last presidential election.

### Legal Framework and Voter Eligibility

Consistent with the US political system, the legal framework for elections is highly decentralized. Federal laws provide only minimum standards and leave room for differing interpretations. Implementation of the electoral process is regulated by state laws. There is a diverse body of state election laws which impact differently on a broad range of issues from voting rights to election procedures. Interpretation of federal and state laws by various courts form part of the legal framework, adding to its complexity.

Federal legislation has evolved over time with the aim to enfranchise voters while maintaining the integrity of the process. Federal laws have been passed to protect the rights of racial and linguistic minorities by outlawing discriminatory practices, to allow overseas military personnel and civilians to vote absentee in federal elections, and to ease the voter registration process. Federal legislation also regulates campaign income and expenditure.

In response to problems that arose during the 2000 general elections, a significant electoral reform law, the Help America Vote Act (HAVA), was passed in 2002. HAVA included minimum standards for voting systems and introduced provisional ballots for voters who thought they were registered but on election day could not find their names on the voter list, state-wide voter registration databases, voter identification requirements for by-mail registration of first-time voters and access for disabled voters. Most states have achieved overall HAVA compliance, but some states and counties are still under court supervision.

US citizens, who are at least 18 years old on election day and are residents of a state, are eligible to

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<sup>1</sup> In each state, the number of Electors equals the number of Senators and Representatives in Congress. The District of Columbia (DC) is allocated three Electors, as if it were a state.

vote in general elections. Citizens of US territories<sup>2</sup> are not eligible to vote in general elections. Residents of the District of Columbia are entitled to vote in presidential elections but do not have voting representatives in Congress.<sup>3</sup> State law determines restrictions on the voting rights of felons and ex-felons, which are often disproportionate and vary widely between states, leaving an estimated 5.3 million Americans potentially disenfranchised. Recent legal amendments in Alabama, Florida, Indiana and Maryland have eased legal restrictions on ex-felons' voting rights.

## **Election Administration**

There is no federal electoral body overseeing the entire election process. The Federal Election Commission (FEC) administers and enforces federal campaign finance regulations. The Election Assistance Commission (EAC), established under HAVA, has an advisory role. It provides guidance on meeting HAVA requirements and serves as a national clearinghouse of information about election administration. Individual states are responsible for conducting elections with authority for some aspects devolved to counties. Chief election officers of states and counties are often elected as party candidates. It is of concern that they at times run in elections which they themselves administer, allowing for conflicts of interest. Several states, including Colorado, Florida, Massachusetts, Ohio and Virginia, have taken steps to limit the political activity of election officials during elections, addressing previous OSCE/ODIHR recommendations.

The record number of newly registered voters and expected high turnout initially raised concerns about the overall preparedness of the election administrators who planned their resources on the basis of past federal elections with lower voter turnout. OSCE/ODIHR LEOM interlocutors noted an uneven distribution of resources among jurisdictions with different numbers of poll workers and voting equipment "per voter", raising questions about the potential disenfranchisement and unequal conditions for voters. It was reported that such unequal allocations could disproportionately impact minority communities. OSCE/ODIHR LEOM interlocutors also indicated that there is a deficiency of poll workers and that not all poll workers received sufficient training.

Early in-person voting and absentee by-mail voting are regulated in detail by most state laws which provide sufficient safeguards to ensure the integrity of the early voting process. Anticipating that polling stations might have insufficient capacity to deal with voters on election day, election stakeholders encouraged voters to vote early. Long lines of voters were observed in the states that permit early in-person voting. Early voting hours were extended in several counties in the states. The Governor of Florida announced a state of emergency to extend early voting hours due to long lines. Ballots cast during the extended hours of early voting are provisional, subject to exhaustion of court challenges filed against the extension of polling hours.

Counting of early in-person and absentee by-mail ballots generally takes place on election day after the polls close. However some states, including Arizona, California, Florida and New York, allow the counting of votes prior to election day. The OSCE/ODIHR LEOM noted that in some states, including in Maryland, Nevada, North Carolina, Oregon and Wyoming, laws do not guarantee the secrecy of early in-person and absentee by mail votes. Previously, the OSCE/ODIHR recommended reconsidering the possibility of faxing marked ballots by out-of-country voters because of secrecy considerations.

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<sup>2</sup> Puerto Rico, Guam, the Virgin Islands, American Samoa, Swain Islands and the Northern Mariana Islands.

<sup>3</sup> The OSCE Parliamentary Assembly, in its 2005 Washington Declaration, has called on the US Congress to adopt "such legislation as may be necessary to grant the residents of Washington DC equal voting rights". A draft bill on this issue is currently being reviewed by Congress.

HAVA mandates that provisional ballots must be available to voters. Detailed regulations and deadlines for their verification and counting are the prerogative of the states and vary widely – from up to two days in Florida to up to 35 days in California. While provisional ballots are meant to prevent disenfranchisement of voters, concerns exist related to the checking of eligibility and counting of these ballots, especially in cases of possible narrow margins between the leading candidates.

## **Voter Registration**

In most states, eligible citizens are required to register as voters by filing a form with the election authorities, with deadlines for submission determined by state law. Eight states allow for election day registration and North Dakota does not require voter registration. Federal and state deadlines for voter registration and list maintenance were generally adhered to.

HAVA requires each state to coordinate and match its State-wide Voter Registration Database (SVRD) with other state and federal databases.<sup>4</sup> HAVA leaves the definition of what constitutes a “match” between the records of one person contained in two separate databases, as well as the procedures for matching the SVRD with other databases and for addressing possible mismatches, to the discretion of the states. This resulted in inconsistent matching practices and at times a lack of transparency. While time may not permit for a conclusive enquiry on each mismatch, removal of mismatches without such an enquiry creates the potential for disenfranchisement.

In a case lodged by civil society groups, a Michigan federal court ruled that authorities were using illegal procedures to remove voters. Two settlements were reached in Michigan and Montana following lawsuits against use of *en masse* challenges to the eligibility of registered voters, including the use of foreclosure lists and data from the US Postal Service.

The estimated number of registered voters was in excess of 180 million, including a record of some 10 million newly registered voters. Intensive drives to register new voters focused on states expected to have closely fought contests and often specifically concentrated on low income and minority populations.

The voter registration efforts of one civil society organization, the Association of Community Organizations for Reform Now (ACORN), led to controversy. The group admitted that, instead of the 1.3 million new registrations it had initially announced, the real number of newly registered voters was some 450,000. About 400,000 applications had been rejected by election officials for a variety of reasons, including duplicate registrations, incomplete forms and fraudulent submissions. The remainder were registered voters who had changed their address. After information about the ongoing investigations into efforts by ACORN was improperly leaked to the media<sup>5</sup>, the issue gained additional prominence in the campaign. While fraudulent registration is illegal, it does not necessarily result in voter fraud on election day due to safeguards inherent in the system.

## **Voting Systems**

One of the goals of HAVA was to address the lack of accuracy of the voting systems revealed in the 2000 general elections. HAVA mandated that Congress allocate funding for the replacement of

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<sup>4</sup> Such databases include the state database of the Motor Vehicle Authority and the federal database of the Social Security Agency as well as state records of deceased and felons.

<sup>5</sup> Reportedly by senior law enforcement officials, who acknowledged that the leak was in contravention of DoJ regulations, which forbid discussing ongoing investigations so close to an election.

mechanical lever and punchcard-based voting systems. The states have used federal funds to purchase electronic voting machines designed to address the HAVA requirements, including support for multiple languages, accessibility for the disabled, and improvement of the handling of complex ballots.

As the voting machines were introduced nationwide, academics, civil society groups and media raised concerns about the security and integrity of electronic voting systems. To address those issues, the EAC in 2005 published voluntary voting systems standards and in 2007 launched a federal certification process. However, for the 2008 elections no electronic voting system had been certified by the federal authorities.

In these elections, most voters were able to cast a vote or have their vote counted with the help of some electronic device. To address public concerns about certain DRE systems, there have been efforts to enhance confidence in the voting process by decreasing the use of DRE machines in favour of scanned paper ballots and providing voters with the possibility to check their vote through voter-verifiable paper audit trails (VVPAT). A trend to return to paper ballots scanned by optical scan systems is noticeable. Since 2006, eighty five jurisdictions have decided to switch from DRE voting systems to the optical scan systems.<sup>6</sup> The states of Maryland and Virginia will move away from DREs after the 2008 election. Eighteen out of 26 states that use DREs are providing VVPAT in order to enhance system transparency.

## **Election Campaign**

Voters were able to make informed choices due to a wealth of public information about the candidates, disseminated in a genuinely competitive environment. The election process was characterized by vigorous campaigning and a plurality of opinions. The campaign focused on the presidential election with tax policies, health care, education and military engagement in Iraq and Afghanistan high on the agenda. Increased public interest in the presidential race mobilized voters in other state and local level elections. Personal records of the candidates were scrutinized by their opponents and the media.

Due to anticipated shifts in traditional voting patterns of some states, voters were exposed to extensive levels of campaigning. Presidential candidate rallies in such states drew tens of thousands of supporters.

For the first time since its introduction in 1974, a presidential candidate, Senator Obama, decided to opt out of public funding for the campaign. Senator McCain accepted public funding totalling some 84 million USD. The 2008 presidential campaign saw record amounts of campaign spending which was of concern to some OSCE/ODIHR LEOM interlocutors. Based on the principle of freedom of speech, there are no spending limits for a candidate when opting out of public funding. Even if presidential candidates receive public funding, the nominating parties can engage in additional fundraising from private sources and spend unlimited amounts to promote their candidate. Civil society groups, unions, companies and other stakeholders freely promoted candidates and their ideas.

The federal campaign finance system is designed to build on small individual donations and frequent and detailed campaign finance disclosure. One third of all presidential campaign donations

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<sup>6</sup> All data according to: 2008 National Voting Equipment Report, Election Data Services, Inc., Washington DC, 17 October 2008, [www.edsurvey.com/images/File/NR\\_VoteEquip\\_Nov-2008wAppendix2.pdf](http://www.edsurvey.com/images/File/NR_VoteEquip_Nov-2008wAppendix2.pdf).

were smaller than 200 USD. Senator Obama received a record amount of approximately 640 million USD in donations, reportedly with an average donation under 100 USD.

The detailed public disclosure of campaign income allowed political opponents, media and civil society to question the legality of some donations received by Senator Obama, as safeguards were apparently missing for the initial identification of obviously false donations. Senator Obama's campaign had 30 days to vet these donations and refunded some. Information about complaints lodged with the FEC, including those about possibly fictitious donations to Senator Obama, was released by plaintiffs and discussed in public. The actual number of complaints was undisclosed as the FEC has 90 days to decide and then make them public.

The intent of the campaign finance regulation to limit the amount of individual donations was undermined by the so-called joint fundraising committees which at times received as much as 70,000 USD from one individual donor. In addition, families are allowed to "bundle" their contributions and donate funds in excess of the individual donation limits.<sup>7</sup> The enforcement of the campaign finance system has been weakened by the fact that, for the first part of 2008, the FEC lacked four of its members and could not pass decisions or issue advisory opinions.

## Media

The media landscape is diverse and characterized by a long-standing tradition of freedom of speech and media independence. Commercial television and radio stations dominate the broadcasting sector, while the public broadcasting service has more limited audience and reach.

The regulatory framework for the media coverage of elections is based on a mix of statutory rules and self-regulation. Legal provisions for paid advertising on broadcast media ensure transparency and enforce principles of equal opportunity, non-discrimination and publicity of sponsorship. Editorial coverage by print and broadcast media is essentially based on self-regulation.

Media coverage of the elections was extensive, and provided voters with diverse information, views and opinions. Candidates and electoral administration issues were covered in a variety of formats. However, at the height of the campaign the media sometimes provided information that could have had a confusing effect on voters by adding undue prominence to certain electoral and political issues.

The presidential election dominated media reporting while the congressional races attracted comparatively less attention. Print and broadcast media focused on the two leading presidential candidates and devoted equitable attention to both candidates in their editorial coverage. However, according to reports issued by two different domestic media monitoring organizations, Senator McCain overall received less favourable coverage than his opponent, Senator Obama. Reporting on third party and independent presidential candidates was marginal.

The Commission on Presidential Debates organized three debates between the two leading presidential candidates as well as a debate between the Democratic and Republican vice-presidential candidates. These events were widely covered by the main national media. The debates focused on substantial issues and provided voters with information about alternative policies and programmes.

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According to reports submitted to the FEC.

The main political actors were able to present their platforms to the electorate. Parties and candidates used paid advertising on broadcast media and the internet to campaign; the volume of Senator Obama's advertising was considerably larger than that of his main opponent. The volume of advertising for third-party and independent candidates was very limited.

### **Complaints and Appeals**

The system for resolution of election disputes in the courts was widely used and provided effective remedy for complainants who filed complaints about violations of state or federal election laws. The system is complex as civil suits may be filed in state or federal courts. In addition, state election boards established a complaint process for HAVA-related violations, although it is apparently not widely used. On election issues, there is some overlapping jurisdiction among state courts, federal courts and administrative complaint bodies. Although courts and state election boards do not have expedited timelines for the resolution of election complaints, temporary restraining orders and preliminary injunctions can be requested from courts and were being used as effective remedies.

In the pre-election period, numerous lawsuits were initiated in state and federal courts, mostly by parties, interest groups and individuals against state and local election bodies. Cases related to the validity of voter identification laws, voter registration and list maintenance procedures, felon/ex-felon disenfranchisement, redistricting, third party ballot access, campaign finance, absentee ballots, voting technology, early voting, extension of voting hours and allocation of polling place resources. Cases were concentrated in states with tight races. The US Supreme Court heard several cases. In a split decision earlier this year, the court upheld a new Indiana voter identification law requiring photo identification, but allowed for the possibility that the implementation of the law may be challenged if applied in a discriminatory manner. In another case, the court set aside (on technical grounds) a lower court order for the Ohio Secretary of State to release and verify a list of about 200,000 voters whose registration data did not exactly match other databases.<sup>8</sup>

The Department of Justice (DoJ), responsible for overseeing the implementation of federal election laws by state and local governments and bringing enforcement suits, has recently initiated some civil suits, including on the failure to protect voter rights.

### **Participation of Women**

Women play a very active role in civil society and the election administration. They are increasingly taking on prominent roles in US politics. After the 2006 mid-term elections, the Speaker of the House of Representatives, Nancy Pelosi, became the highest-ranking woman in the history of the House of Representatives. Six out of twenty-one members of the outgoing President's Cabinet are women. Senator Hillary Clinton was narrowly defeated by Senator Obama in the vigorously fought Democratic Party primaries. Senator McCain selected Alaska Governor Sarah Palin as his vice presidential nominee. Representation of women in the Senate and outgoing House of Representatives amounts to 16 per cent. In the congressional elections, only seven women have won nominations for Senate seats by the two leading parties in six states (approximately 10 per cent of all candidates). On the other hand, 133 women have won nominations for a seat in the House of Representatives (some 15 per cent).

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<sup>8</sup> After the ruling, at the request of the Republican House Minority Leader, President Bush asked the Department of Justice to pursue the case. Democrats and civil rights groups viewed this intervention as partisan, particularly as Ohio was seen as a state critical to win.

## **Election Observers**

Falling short of an important OSCE commitment, most states' election legislation does not provide for access of international observers. The National Association of Secretaries of State supported and facilitated access for OSCE/ODIHR observers at the state level. Members of the OSCE/ODIHR LEOM have mostly been met in an open and transparent manner by election stakeholders.

State laws vary broadly with regard to election observation by partisan and non-partisan domestic observers. Most states do not regulate observation, with access of observers left to the discretion of election officials, while some state laws limit or restrict access.

The DoJ deployed federal observers to monitor jurisdictions authorized by the US Attorney General or certified by court order under the Voting Rights Act as a result of complaints about discriminating practices. Separately, DoJ attorneys monitored jurisdictions for compliance with federal law. Political parties and civil society organizations mobilized thousands of attorneys and volunteers as election monitors and party poll watchers to provide legal assistance to voters, to challenge voter eligibility and to initiate lawsuits, with the aims of ensuring that all eligible voters were able to cast their ballots and preventing voter fraud. The widespread presence and involvement of party observers and civil society organizations in monitoring the election process greatly contributed to the transparency of the process.

## **Election Day**

In accordance with standard practice for limited election observation missions, the OSCE/ODIHR LEOM did not conduct comprehensive and systematic observation of election day procedures, although members of the LEOM visited a limited number of polling stations in 26 states and Washington DC.

On election day, voters were able to cast their votes in a professionally and efficiently administered process that allowed for prompt delivery of the results. In most polling stations visited, poll workers were experienced and well-trained. High voter participation resulted in occasional longer waiting times, especially during the morning hours. While there were minor technical problems with voting machines, these had little impact on the efficiency of the process. The secrecy of the vote was compromised at some polling stations visited due to the manner in which ballots were inserted into the optical scan devices and due to the positioning of voting equipment and voting booths.

OSCE/ODIHR observers could not follow election day proceedings in Alabama, Arizona, Florida, Georgia, Ohio and Texas because laws in these states do not allow access of non-party observers to polling stations. Furthermore, OSCE/ODIHR LEOM observers faced difficulties in gaining access to polling stations in some counties or specific polling stations in Colorado, Louisiana, Pennsylvania and Virginia.

The media extensively reported on the voting process, campaign activities of the candidates and exit poll results. Some media outlets and civil society groups set up help lines for voters reporting problems at polling stations. Few lawsuits were filed on election day, including those regarding concerns over access for party poll watchers and the timing and procedures for counting special ballots, including provisional, overseas, and emergency paper ballots.

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## MISSION INFORMATION & ACKNOWLEDGEMENTS

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Following an invitation from United States Government, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) deployed a Limited Election Observation Mission (LEOM) on 10 October 2008, headed by Ambassador Audrey Glover. The OSCE/ODIHR LEOM consists of 13 core team experts based in Washington, D.C. and 47 long-term observers (LTOs) who covered a total of 40 states.

The OSCE/ODIHR LEOM wishes to thank the State Department, the Federal Election Commission, the Election Assistance Commission and the National Association of Secretaries of State for their assistance and support. The OSCE/ODIHR LEOM also wishes to express its appreciation to representatives of other state institutions, election authorities, political parties, representatives of the media and civil society organizations for their co-operation.

The OSCE/ODIHR LEOM also wishes to express its gratitude to the following participating States who seconded LTOs: Austria, Finland, France, Germany, Iceland, Kazakhstan, Netherlands, Russian Federation, and the United Kingdom.

The Interim Report of the OSCE/ODIHR LEOM is available at [www.osce.org/odihr](http://www.osce.org/odihr).

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