

INTERIM REPORT
9 - 22 October 2008

I. EXECUTIVE SUMMARY

- General elections will take place on 4 November 2008, comprised of elections for the President, 35 seats in the Senate and all 435 seats in the House of Representatives.
- The OSCE/ODIHR Limited Election Observation Mission (LEOM) opened on 10 October and on 18 and 19 October deployed 47 Long-Term Observers (LTOs) who cover a total of 40 states.
- A wealth of public information about the candidates and the elections is disseminated in a genuinely competitive environment.
- Regulations on equal opportunities and reasonable access to broadcast media and a system of self-regulation ensure pluralistic and comprehensive media coverage of the elections. The two leading presidential candidates are the main focus of journalistic reporting and contestants extensively use paid advertising.
- Federal laws provide only minimum standards for elections. Implementation and details of the electoral process are regulated by state laws, with some decisions taken at county level.
- Most states have achieved overall compliance with the 2002 Help America Vote Act (HAVA); the Department of Justice continues to monitor state compliance.
- Electoral issues generally and voter registration specifically have been subjects of intensive and contentious discussions by civil society groups, the media and the candidates.
- The high number of some 10 million newly registered voters raises questions about the capacity of polling stations. Election administrators, political parties and candidate campaigns have called on voters to vote early. Early voting is ongoing.
- Possible narrow margins in the candidates' results are expected in some states and have raised concerns about the verification and counting of provisional ballots.
- Decreased trust in electronic voting machines resulted in wider use in some jurisdictions of computer counted optical scan paper ballots.
- The presidential campaign has seen record donations to candidates, one third of them smaller than 200 USD. Campaign finance provisions enable candidates to receive donations to so-called joint fundraising committees well in excess of the individual donation limit of USD 2,300.
- Lawsuits countrywide have been dominated by challenges to voter identification laws and maintenance of voter registration lists.
- Access of election observers is regulated by state law. This frequently does not provide for international observers as required by paragraph 8 of the OSCE 1990 Copenhagen Document.

II. INTRODUCTION

Following an invitation to the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to observe the 4 November 2008 general elections, the OSCE/ODIHR on 10 October 2008 deployed a Limited Election Observation Mission to the United States of America (US). The mission is headed by Ambassador Audrey Glover and consists of 13 core team experts based in Washington DC and 47 Long-Term Observers (LTOs) who cover a total of 40 states. LTOs were deployed on 18 and 19 October. OSCE/ODIHR has previously published reports on electoral processes in the US and issued recommendations.¹

III. ELECTION ENVIRONMENT

General elections will take place on 4 November 2008, comprising elections for the President, 35 seats in the Senate² and all 435 seats in the House of Representatives³. In addition, elections for state and local government authorities as well as voting on referenda, ballot initiatives and propositions will take place.

President George W. Bush has completed two terms in office and is ineligible to stand for re-election. The presidential election process started in late 2007 with a total of some 17 candidates from the two leading political parties running in over 50 primary elections and caucuses. The two main candidates, Republican Party nominee John McCain and Democratic Party nominee Barack Obama are US Senators, having served terms of 22 years and 4 years in the Senate respectively. Alongside the nominees of the two leading parties, some 30 presidential candidates contest the presidential race, but only four candidates have placed their names on enough ballots to be able to theoretically win the presidential election.⁴

The electoral process takes place during global economic slowdown. Economic issues dominate the campaign agenda and candidate plans to address the economic difficulties have been analyzed by the media and the general public. The election process has sparked voter enthusiasm and many civil society groups are engaging in voter education, get-out-the-vote and election monitoring activities.

IV. LEGAL FRAMEWORK AND ELECTION SYSTEM

The US has a highly decentralized and complex legal framework for elections. Federal laws provide only minimum standards, with implementation and details of the electoral process regulated by state laws, and some decisions taken at county level. There is a diverse body of state election laws which impact differently on voting rights and procedures. Among states,

¹ See previous OSCE/ODIHR reports on the 2002, 2004 and 2006 elections in the US at: <http://www.osce.org/odihr-elections/14676.html>

² These include 33 Class II Senators, not more than one per state, and two elections to fill current vacancies.

³ At least one Representative per state. The remaining seats are allocated proportionally to states' population. Electoral districts are updated every ten years to reflect possible changes in population numbers. Where there are considerable minority populations, electoral district boundaries should comply with the Voting Rights Act of 1965.

⁴ Chuck Baldwin, Bob Barr, Cynthia McKinney, and Ralph Nader.

there have been different interpretations of federal election laws. Court decisions at various levels also form a part of the legal framework.

Federal legislation includes the Voting Rights Act (VRA) of 1965, enacted at the height of the civil rights movement with an aim to protect the rights of racial and linguistic minorities by outlawing discriminatory practices; the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986 that requires states and territories to allow citizens living abroad, including overseas military personnel, to register and vote absentee in federal elections; the National Voter Registration Act (NVRA) of 1993; the Federal Electoral Campaign Act (1971) and Bipartisan Campaign Reform Act (2002) that regulate campaign income and expenditures, and provide for a detailed reporting; and the Help America Vote Act (HAVA) (2002), a significant piece of electoral reform legislation designed to address problems that arose during the 2000 Presidential election. HAVA includes minimum standards for voting systems, provisional ballots, state-wide voter registration databases, and access for disabled voters. Most states have achieved overall HAVA compliance, and the Department of Justice (DoJ) continues to monitor state compliance.

A number of draft bills addressing a range of technical and voter rights issues are currently being considered by Congress. Civil rights groups have noted a lack of federal legislation that would prevent voter intimidation and vote suppression, while the DoJ has contended that current federal laws are sufficient to protect voters' rights.⁵

Senators and Representatives are elected through a "first-past-the post" system by popular vote in a direct election. The president is elected by a special body, the Electoral College, made up by 538 Electors⁶ elected by popular vote. Electors will elect the President and Vice-President by absolute majority.⁷ Except for Nebraska and Maine, Electors are elected through a "winner-takes-all" system. Both the congressional and presidential election system favour a two-party rather than multiparty competition. Each state is one election district in the presidential and senatorial elections, but they are broken down into smaller electoral districts for elections of members of the House of Representatives. President and Vice-President serve four-year terms, Senators serve staggered six-year terms and Representatives serve two-years.

V. ELECTION ADMINISTRATION

Election administrations at all levels are preparing for the 4 November elections. Recruitment of poll workers continues in some states and their training is ongoing. The US Election Assistance Commission (EAC) has provided guidance, including on "contingency and disaster planning" that addresses issues of, for example, possible shortage of poll workers, shortage of election material, and problems arising from equipment failures. Expecting high voter turnout on election day, election stakeholders have called on voters to vote early. Unofficial estimates suggest that some 30 per cent of voters nationwide may cast an early ballot. OSCE/ODIHR LEOM observers have reported queues of early voters in polling stations in some states and are looking into how early voting is regulated.

⁵ Senate Judiciary Committee hearing on oversight of Department of Justice preparations for the 2008 general elections, 9 September 2008.

⁶ In each state, the number of Electors equals the number of Members of Congress. The District of Columbia is allocated three Electors, as if it were a state. Electors are mandated to elect the President and Vice President in separate votes.

⁷ It is noteworthy that a President and Vice-President ticket can receive a majority of votes in the Electoral College without winning the popular vote.

In addition to early in-person voting, voting by-mail is gaining popularity, encouraged by the fact that some 33 states do not require an excuse for absentee voting. Oregon votes entirely by mail. In Washington state 37 counties (of 39) also vote by mail, however there should be at least one polling station in each county for voters with special needs. It is generally estimated that there are 6 million eligible voters abroad who can vote by absentee ballot.

HAVA requires that provisional ballots be provided to voters who, upon arrival at the polling station, believe that they were registered but are not on the voter list. Domestic experts indicate that the verification and counting of provisional ballots could put additional strain on the election administration. This could be compounded by possible narrow margins between the leading presidential candidates and public expectations of early announcement of results.

HAVA requires first-time voters to present identification if they registered as voters by mail. Twenty-five states now require presentation of either photo or non photo ID in a polling station and two states require government-issued ID. Generally, Republicans regard ID requirements as safeguards against voter fraud while Democrats believe it could disenfranchise voters.

VI. VOTER ELIGIBILITY AND REGISTRATION

US citizens who are at least 18 years old on election day and are citizens of a state, are eligible to vote in general elections. Citizens of US territories are not eligible to vote in general elections, except residents of the District of Columbia who are entitled to vote only for Electors and two non-voting representatives in Congress.⁸ Voting rights of felons and ex-felons are determined by state law. While such laws vary broadly and are often disproportionate, recent amendments to the laws of some states somewhat ease legal restrictions on voting rights of ex-felons. There is also a draft federal bill including similar provisions.

The voter registration system requires that eligible citizens state their wish to become a registered voter and submit a registration form. Once registered, a voter can be removed from voter lists in case of loss of eligibility, death or a request to be removed submitted in person. If voters change residence, they must register to vote in the new jurisdiction.

The federal rules for voter registration are provided in the National Voter Registration Act, which prescribes two federal deadlines for voter registration. States are allowed to conduct systematic programs to detect voter records that may need to be deleted from voter registers up to 90 days before election day. Corrections of individual records, including deletions, are exempt from this deadline. Closure of voter registration in states is not permitted earlier than 30 days before election day.

While HAVA requires states to coordinate and match their state-wide voter registration databases with other state and federal databases, it does not provide for a sequence of matching operations⁹ and procedures to address possible mismatches. Implementation of

⁸ Two court cases to remove this restriction have failed on constitutional grounds. A draft bill to address the issue has been passed by the House in 2007 and is yet to be passed by the Senate.

⁹ Statewide voter registration databases have to be coordinated and matched on the basis of agreements with the states' Motor Vehicle Authorities (MVA), and the records of felonies and deaths. For eligible citizens without a driving license, data should be matched with the federal database of the Social Security Agency (SSA) through the MVA, and for eligible citizens without a social security number – through special procedures. Media reported allegations that SSA data were not sufficiently accurate.

these requirements is left to the discretion of the states, which appears to have created confusion among some state officials and sparked concerns of civil society groups with regard to some states and extensive media reports about alleged problems with voter registration.

Voter registration has closed in many states, but is ongoing in Alabama, Connecticut, Nebraska, and Vermont. Eight states permit voter registration on election day (Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin and Wyoming) and in one state there is no voter registration (North Dakota). According to unofficial estimates, there are some 187 million registered voters nationwide.¹⁰

The 2008 general elections have seen a record number of newly registered voters, possibly in excess of some 10 million. This high number is a result of the active involvement of civil society groups and candidates' campaigns and has become a significant and contentious element in the election campaign. Voter registration efforts by civil society groups for the most part have targeted low-income and minority segments of the population. The involvement of one community organizing group, Association of Community Organizations for Reform Now (ACORN), in massive voter registration efforts involving some alleged fraudulent registrations has additionally contributed to the political debate related to enfranchisement of voters versus integrity of the election process.

VII. VOTING SYSTEMS

The minimal federal requirements under HAVA mandate that every voting system used for federal elections provides the voter with the possibility to cast their vote in an independent manner, preserving the privacy of the voter and the secrecy of the vote. Complexity of voting related to numerous elections taking place at the same time and accessibility requirements for the disabled and non-English speaking voters are the major reasons for using electronic voting machines in the electoral process.

Some 93 per cent of voters will have the possibility to cast a vote or have their vote counted with the help of some electronic device. Direct recording electronic (DRE) machine voting systems will be used in 26 states and will be the only method of voting in 9 states. Optical scan systems will be used in 41 states, including statewide in 17 states. Some jurisdictions in 10 different states will be using hand-counted paper ballots. There are 85 jurisdictions using more than one voting method.

HAVA stipulates that all voting systems produce a permanent paper record for a manual audit as the official record in the case of recount. However, it does not specify if such a paper record should be made available to voters. A voter-verifiable paper audit trail (VVPAT) will be provided in 18 states for voters using DRE machines. There are some jurisdictions in the states of New York and Idaho that will be using lever and punch-card machines. An Internet-based absentee voting system has been introduced for this election in Okaloosa County, Florida.

A number of concerns have been raised by academics, some civil society groups and the media about the integrity of electronic voting systems. These concerns have contributed to a lower number of DRE machines to be used in the 2008 elections and the increased use of optical scan systems as compared to 2006.

¹⁰ Election Data Services, leaflet of 17 October 2008.

VIII. ELECTION CAMPAIGN

A wealth of public information about the candidates and the elections is widely available in a genuinely competitive environment. The primary focus of the campaign has been the presidential race with the economy, tax policies, health care and education as well as the ongoing military engagement in Iraq and Afghanistan high on the agenda. Candidate rallies in states where tightly fought races are expected have drawn tens of thousands of supporters. Issues of broader electoral significance such as voter registration, requirements of photo identification at the polling stations, and expected high voter turnout have gained prominence in the campaign discussions.

This presidential election process is witnessing record campaign contributions of 1.5 billion USD raised by all candidates. For the first time since its introduction in 1974 a presidential candidate, Democratic Party nominee Barack Obama, has decided to opt out of public campaign financing. Republican Party nominee John McCain has accepted public funding, a total of some 84 million USD.

The campaign finance system aims to build on small individual donations and frequent and detailed campaign finance disclosure. According to the latest reports of presidential candidates, one third of all campaign donations came from a broad base of donations smaller than 200 USD. However, enforcement of this system has been somewhat weakened by the fact that the Federal Election Commission (FEC), which oversees campaign finance, for the first part of 2008 lacked four of its members and could not pass decisions or issue binding advisory opinions.

The intent of the campaign finance regulation to seriously limit the amount of individual donations is weakened by the so-called joint fundraising committees which at times received as much as 40,000 USD from one individual donor.¹¹ As part of broader freedom of speech considerations, there are no spending limits for presidential campaigns in case a candidate does not accept public funding. Even if presidential candidates receive public funding, the nominating parties can engage in additional fundraising from private sources and spend this money to promote their candidate. OSCE/ODIHR EOM interlocutors expressed concern about the increase in spending for campaign advertisements.

IX. MEDIA

The Communications Act passed in 1934 (later amended) and regulations issued by the Federal Communications Commission (FCC) form the basic rules that establish how candidates, parties, and various groups may access the broadcast media (TV and radio) during elections. By contrast, print media outlets are not bound by any statutory requirements.

Commercial broadcasters must comply with a number of provisions mainly related to access of candidates to airtime for paid advertising; editorial programmes are normally exempt from statutory regulation. At least sixty days prior to general elections, broadcasters must provide “reasonable access” to their airtime to all federal candidates, giving contestants the right to purchase airtime. Legal provisions stipulate that, when a broadcaster grants access to airtime to one candidate, it must allow for equal conditions to others. However, this “equal

¹¹ According to reports submitted to the FEC.

opportunity” principle is subject to a number of exemptions excluding certain genres of programmes.¹² Federal candidates have the right to purchase airtime at the lowest price that is offered to advertisers qualifying for the best price conditions. Broadcasters are required to keep a publicly accessible file that includes information about purchased airtime. Censorship of candidates’ advertising is forbidden.

Media coverage of the elections is extensive and comprehensive, and a plurality of platforms, views and beliefs are presented in different formats and programs. The two leading presidential opponents are the major focus of media reporting, while other presidential candidates receive considerably less coverage.¹³ Paid advertising is extensively used by the two major contestants to campaign in the broadcast media. Many newspapers publicly endorsed one of the two leading presidential candidates following traditional practice in the US. While broadcasters are still the main channel for voters to receive information, the Internet has become an important source for news about this presidential campaign,¹⁴ especially among those of the younger generation.

X. COMPLAINTS AND APPEALS

There are various avenues by which election disputes and issues can be formally addressed. Administrative complaints of HAVA violations can be filed with state election boards and of federal campaign law violations to the FEC. Individuals, parties, and interest groups may bring civil suits in court if harmed by a violation of state or federal election law. The Department of Justice (DoJ), responsible for overseeing the implementation and enforcement of federal election laws, may bring civil suits against state or local governments for non-compliance with such laws. Prosecution may also be sought for election-related criminal activities.

In this election period, many lawsuits have been initiated in state and federal courts by political parties, interest groups, and individuals against state and local election bodies, mostly concerning voter identification laws, voter registration, and maintenance of voter lists. Other court cases relate to felon and ex-felon disenfranchisement, third party ballot access, absentee ballots, voting technology, redistricting and campaign finance. The US Supreme Court, in a split decision earlier this year upheld Indiana’s voter identification law and recently unanimously set aside a court order (on technical grounds) requiring Ohio’s Secretary of State to provide local election bodies with a list of those whose registration data conflicted with government records. A North Carolina case seeking clarification on minority rights to challenge redistricting decisions is pending.

Although there has been some recent election-related litigation initiated by the DoJ, some interlocutors have maintained that the department is not sufficiently active in overseeing and

¹² The main exemptions are candidates’ appearances on bona fide newscasts, regularly scheduled news interview programs, incidental appearance of a candidate in news documentaries, and on-the-spot coverage of bona fide news events (including candidate debates and political conventions).

¹³ The main media events of this campaign so far were the three presidential debates between Senator McCain and Senator Obama and the debate between the two vice-presidential candidates organized by the Commission on Presidential Debates respectively on 26 September, 7 October, 15 October and 2 October 2008.

¹⁴ According to the quadrennial survey by the Pew Research Center for the People & the Press and the Pew Internet & American Life Project on campaign news and political communication, Nearly a quarter of Americans (24%) say they regularly learn something about the campaign from the internet, almost double the percentage from a comparable point in the 2004 campaign (13%).

enforcing protection of voter rights. At present, federal criminal investigation into alleged voter registration fraud, highly profiled in the presidential campaign, is actively pursued. Information about the investigation was leaked to the press, reportedly by senior law enforcement officials who acknowledged the leak was in contravention of DoJ regulations, which forbid discussing ongoing investigations so close to an election.

XI. ELECTION OBSERVERS

In keeping with its OSCE commitments, the United States has regularly invited the OSCE/ODIHR to observe elections for federal office. Legal conditions for access of international observers vary, falling short of OSCE Commitments in a number of jurisdictions. The National Association of Secretaries of States has been very helpful in facilitating access for OSCE/ODIHR observer at state level.

With regard to election observation by domestic observers, both partisan and from civil society, state laws vary broadly. Most states do not regulate observation, with access of observers left to the discretion of election officials, while in other states laws limit or restrict access.

Federal observers deployed by the DoJ will monitor jurisdictions certified under the VRA and those under court orders, regarding discriminatory voting practices. DoJ attorneys will monitor jurisdictions where problems are expected. Political parties and civil rights organizations are expected to mobilize thousands of attorneys and volunteers as election monitors to provide legal assistance to voters and to initiate lawsuits. The main focus of Democrats and civil rights groups will be to ensure that all eligible voters are able to cast their ballots, whereas Republicans are concerned about possible voter fraud.

XII. OSCE/ODIHR LEOM ACTIVITIES

The OSCE/ODIHR LEOM began work on 10 October and has met with a wide range of public officials at the federal level, as well as major political parties, civil society groups and media representatives. LTOs have started to meet electoral officials and political parties at state level, and observed early voting and voter registration activities in several states. Members of the OSCE/ODIHR LEOM have been met in an open and transparent manner by election stakeholders at all levels. According to standard practice, an OSCE/ODIHR LEOM does not envisage comprehensive and systematic observation of election day procedures, although members of the OSCE/ODIHR LEOM will visit polling stations around the country on election day.

On 8 October, the OSCE/ODIHR was informed that the OSCE Chairman in Office had designated the President of the OSCE Parliamentary Assembly, Mr. João Soares, as Special Co-ordinator to lead the OSCE Short-Term Observers on 4 November. The OSCE/ODIHR has furthermore been informed that the OSCE Parliamentary Assembly plans to deploy about 100 observers to some 10 states shortly before election day.