



## LIMITED ELECTION OBSERVATION MISSION

### United States of America – General Elections, 6 November 2012

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#### STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS

**Washington D.C., 7 November 2012** – Following an invitation from the United States Mission to the OSCE, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) deployed a Limited Election Observation Mission (LEOM) for the 6 November general elections.

The elections were assessed for their compliance with OSCE commitments and other international standards for democratic elections, as well as with national legislation. This statement of preliminary findings and conclusions is delivered prior to the completion of the election process. The final assessment of the elections will depend, in part, on the conduct of the remaining stages of the election process, including the handling of possible post-election complaints and appeals. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for potential improvements, some eight weeks after the completion of the election process.

In line with standard OSCE/ODIHR methodology for LEOMs, the mission included long-term observers but not short-term observers. The OSCE/ODIHR LEOM did not undertake a comprehensive and systematic observation of election day proceedings, but visited a limited number of polling stations.

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#### PRELIMINARY CONCLUSIONS

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The 6 November general elections took place in a pluralistic environment and were administered in a professional manner. However, decisions on technical aspects of the electoral process were often unduly politicized. Highly competitive campaigns were covered extensively in the media, allowing voters to make informed choices. While characterized by broad public confidence, further steps should be taken to improve the electoral process, in areas such as voting rights, the accuracy of voter lists, campaign finance transparency, recount procedures, and access of international election observers.

The legal framework for general elections is highly decentralized and complex. Federal legislation sets only minimum standards, while the implementation and details of the electoral process are regulated by state laws. Contrary to good electoral practice, in some states amendments to electoral law were only finalized in the weeks before election day, leading to a lack of clarity about which regulations would apply.

Elections were administered at the state level with many responsibilities delegated to county-level officials, resulting in a wide variety of practices. Overall, elections were conducted in a professional and transparent manner and enjoyed the trust of the majority of stakeholders. There is no federal election management body with oversight responsibility. The Election Assistance Commission, an advisory body on election administration, and the Federal Election Commission, which oversees campaign finance, were both marginalized due to political party polarization.

The election campaigns were vibrant and highly competitive. The presidential campaign received most of the national attention and focussed on undecided voters in only a few closely contested states. Third-party candidates received minimal attention.

These elections were characterized by a high level of campaign spending and were estimated as the most expensive to date. Based on the principle of freedom of speech, there are no limits on campaign spending, including from corporations and unions. While the financing of candidates and parties is closely regulated, spending by some independent groups is exempt from disclosure requirements, raising transparency concerns.

US citizens who are at least 18 years old on election day and residents of a state were eligible to vote. Some 4.1 million citizens that are residents of US territories were not eligible to vote, while some 600,000 citizens that are residents of the District of Columbia were eligible to vote only for the president. An estimated 5.9 million citizens were disenfranchised due to a criminal conviction, including some 2.6 million citizens who have served their sentences. This is at odds with the principle of universal suffrage and the commitment to ensure proportionality in the restriction of voting rights as enshrined in paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document.

Voter registration is implemented at state level through an active system. A number of states launched initiatives to improve the accuracy of their voter lists. Civil society was active in encouraging citizens to register, as well as checking the accuracy of voter registers. Nevertheless, an estimated 50 million eligible citizens were not registered to vote, bringing into question the effectiveness of existing measures to ensure that all persons entitled to vote are able to exercise that right.

Voter identification rules vary across the states and the issue is politically polarized. While efforts to ensure the integrity of the vote are important, these should not lead to the disenfranchisement of eligible voters. While a number of regulations were introduced for identification at the polling stations, similar provisions do not exist for postal voting.

Candidacy requirements are provided by the Constitution and candidate registration is regulated by a number of laws that vary across the states. While 32 presidential candidates appeared on ballots across the country, only 4 were registered in a sufficient number of states to be potentially elected. A large number of candidates contested Congressional races. The overall field of candidates provided voters with a wide degree of choice.

Overall, media is pluralistic and diverse and provided voters with a wide range of information and views on candidates, issues, and electoral platforms. The obligations imposed on media for election coverage are very limited, with a preference given to self-regulation. While public and national broadcasters reported in a balanced manner, leading cable television networks were highly partisan.

Election observation is regulated by state law and generally does not provide for international observers, which is contrary to paragraph 8 of the 1990 OSCE Copenhagen Document. In several states the OSCE/ODIHR LEOM were not provided with full and unimpeded access to polling stations. Domestic observers were active throughout the country, providing an important layer of transparency and confidence.

Alternative voting methods are an established practice in the US and it is estimated that 40 per cent of voters cast their vote before election day through early in-person voting or postal voting, including by voters abroad. While the modalities of alternative voting vary considerably across the states, they generally enjoy a high level of trust.

The use of new voting technologies (NVT) is extensive but varies considerably across and within states. Federal guidelines for NVT are voluntary, resulting in a wide range of electronic voting systems regulated according to different standards. While the trend to return to paper-based voting

continues, 11 states still use machines that do not allow the voter to verify that their vote was cast as intended.

There are many avenues to seek legal redress, although not all are adjusted to the context and pace of an electoral process. Provisions on recounts vary widely and are often insufficiently defined, which could result in complaints not being addressed in a consistent and timely manner.

Election day was calm and although most voters were generally able to cast their vote without difficulty, there were reported instances of long queues of voters and shortages in polling station staff that caused delays in voting. While provisional ballots were provided to voters who could not be identified on the voter list, deadlines and rules for counting these ballots varied across the states, which could potentially delay the announcement of results in closely contested races.

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## PRELIMINARY FINDINGS

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### Background and Electoral System

On 6 November, US citizens voted to elect the President and Vice President, 33 of 100 Senators, and all 435 Representatives. Since the 2010 mid-term congressional elections, when the Republican Party gained control of the House of Representatives, the 2012 general elections have been eagerly anticipated by the two dominant political forces, the Democratic Party and the Republican Party. Incumbent President, and Democratic nominee, Barack Obama sought re-election for a second and final term. His main contender was the Republican nominee, and former Massachusetts Governor, Mitt Romney. Control of the Congress was also at stake, with several close races expected.

The President and Vice-President are elected for a four-year term with an absolute majority by an Electoral College consisting of 538 Electors. Each state is assigned as many Electors as congressional representatives and the District of Columbia is assigned three Electors as if it were a state. Electors are elected by popular vote, mostly through “winner-takes-all” contests.<sup>1</sup> Under the current system, it is possible that a presidential candidate might win the popular vote nationwide but not be elected. While any formal change to the Electoral College would require a constitutional amendment, several states have recently passed a National Popular Vote (NPV) act whereby states would pool their electoral votes in favour of the candidate that wins the national popular vote. For the NPV to take effect, states with at least 270 electoral votes in total must join.<sup>2</sup>

Senators and Representatives are elected directly, mostly through “first-past-the-post” contests. Each state is represented in the Senate by two Senators who serve staggered six-year-terms with no state’s two Senators scheduled to be elected in the same year. Each state is represented in the House with at least one Representative; the remaining House seats are allocated to states proportional to their population. Representatives serve two-year terms. While electoral districts for the Senate race are the entire state, Representatives are elected in congressional districts updated every ten years after a nationwide census. Following the 2010 census, the House seats were reapportioned among the 50 states to reflect population changes and district boundaries were redrawn to ensure that each district represented approximately the same number of people. While OSCE/ODIHR LEOM interlocutors noted some improvements in the transparency of the process, concerns were expressed that redistricting was often driven by partisan considerations, thereby limiting the competitiveness of a number of contests.<sup>3</sup>

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<sup>1</sup> With the exception of Maine and Nebraska, where some Electors are elected from the respective congressional districts via “first-past-the post” contests and the remainder via a state-wide “winner-takes-all” system.

<sup>2</sup> Currently, eight states and the District of Columbia (in total 132 electoral votes) have enacted NPV bills.

<sup>3</sup> Legal challenges regarding redistricting are ongoing in Florida, Louisiana, and Texas.

## Legal Framework

Consistent with the federal political system established by the Constitution, the legal framework for general elections is highly decentralized and complex. Federal legislation sets only minimum standards, while the implementation and details of the electoral process are regulated by state laws. Federal and state court decisions also form an integral part of the legal framework.

Federal legislation includes the 1993 National Voter Registration Act (NVRA) that facilitates voter registration; the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the 2009 Military and Overseas Voter Empowerment Act (MOVE) that allow citizens living abroad to register and vote absentee in federal elections; the 1971 Federal Electoral Campaign Act (FECA) and the 2002 Bipartisan Campaign Reform Act (BCRA) that regulate campaign finance; and the 2002 Help America Vote Act (HAVA) that establishes minimum standards in certain areas of election administration.

The 1965 Voting Rights Act (VRA) aims to protect the rights of racial and linguistic minorities by prohibiting voting practices and procedures that are discriminatory by intent or impact. Section 5 of the VRA requires certain jurisdictions with a history of voting discrimination to obtain administrative or judicial pre-clearance of changes to their electoral law from the Department of Justice (DoJ) or the federal district court in the District of Columbia.<sup>4</sup> In such cases, the burden of proof lies with the state that introduces the legislation. The VRA foresees a mechanism for jurisdictions to obtain termination of the pre-clearance requirement. The constitutionality of Section 5 is currently being challenged in several pending court cases.<sup>5</sup>

## Election Administration

In line with the decentralized nature of the US political system, general elections are administered at the state level and there is no federal election management body with oversight responsibilities. Administrative authority is vested in the respective state secretary or state election board. However, the greater part of election administration is typically delegated to county or lower-level election officials,<sup>6</sup> resulting in a wide variety of electoral practices across the country. While some election officials are appointed, others are elected, which raises possible conflicts of interest. Women and minorities are well represented at all levels of election administration. Overall, the election administration performed their duties in a professional and transparent manner and enjoyed the trust of the majority of stakeholders.

While training of polling staff was extensive, a number of counties experienced problems identifying a sufficient number of experienced poll workers. In some counties, this led to a reduced number of polling stations or less poll workers.<sup>7</sup> Election officials at state and county level used various channels to inform voters about the elections and their voting rights, including information leaflets, the media, and the internet. In jurisdictions with minority populations, officials prepared election materials in minority languages, as required by the VRA and HAVA. Several election officials informed the OSCE/ODIHR LEOM that the training of election officials and voter awareness efforts were complicated by budgetary constraints and late changes to the legal framework, particularly regarding redistricting, early voting, and voter identification.

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<sup>4</sup> Unlike other Sections of the VRA, Section 5 has an expiration date. In 2006, it was reauthorized by Congress for 25 more years.

<sup>5</sup> For instance, *Shelby County, Alabama v. Eric Holder*, *Nix v. Eric Holder*, and *State of Texas v. United States of America*.

<sup>6</sup> Notable exceptions are Alaska and the District of Columbia, where election administration is centralized.

<sup>7</sup> For example, in Jackson county in Kansas, Leon and Duval counties in Florida, and Fairfax county in Virginia.

The bipartisan Election Assistance Commission (EAC), an advisory body on election administration that provides guidance on meeting HAVA requirements, functions at a limited capacity. In addition to a reduced staff and budget, all four commissioner posts are vacant thereby leaving the EAC without decision-making authority. Several OSCE/ODIHR LEOM interlocutors questioned the future role of the EAC. Two longstanding Democratic nominees for EAC commissioners remain unconfirmed and, last year, the House of Representatives passed a Republican-initiated bill to disband the EAC.<sup>8</sup>

## Voter Rights

US citizens who are at least 18 years old on election day and residents of a state are eligible to vote in general elections. Some 4.1 million citizens that are residents of US territories are not eligible to vote, while some 600,000 citizens that are residents of the District of Columbia are eligible to vote only for the president. This is at odds with the principle of universal suffrage and the commitment to ensure proportionality in the restriction of voting rights as enshrined in paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document.

In addition, some 5.9 million citizens are estimated to be disenfranchised due to a criminal conviction, including 2.6 million citizens who have served their sentence.<sup>9</sup> Minorities are disproportionately affected, with some 2.2 million disenfranchised. Prisoner and ex-prisoner voting rights are determined by state law and vary widely, but most states impose burdensome procedures for reinstating voting rights, including long waiting periods.<sup>10</sup> Four states deprive all people with a criminal conviction of the right to vote, irrespective of the gravity of the crime or if the sentence has been served, unless pardoned by the state governor.<sup>11</sup> In 2011, Florida and Iowa reversed legislation that had previously provided restoration of voting rights for ex-prisoners. The deprivation of the right to vote is a severe penalty and it should be proportionate to the underlying crime. In addition, once a sentence has been served, authorities should take effective measures to facilitate the restoration of voting rights.<sup>12</sup>

## Voter Registration

Voter registration is active and implemented at state level. Voters are required to submit signed applications to register or change their information within state-prescribed deadlines, either in person, by post, or through an authorized third-party. Recent legislation in a number of states placed restrictions on third-party registration drives, including reduced timeframes for the collection and submission of applications, as well as strict sanctions for any errors. Georgia and Tennessee required prospective first-time voters to provide documentary evidence of US citizenship when registering. While the NVRA provides that voter registration must remain open until at least 30 days before election day, deadlines varied widely. Eight states and the District of Columbia provided voter registration on election day and North Dakota did not require voter registration. Thirteen states introduced online systems to facilitate voter registration.

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<sup>8</sup> See, <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3463rfs/pdf/BILLS-112hr3463rfs.pdf>. The bill is currently referred to the Senate.

<sup>9</sup> See, [http://sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf) and [http://www.sentencingproject.org/doc/publications/publications/fd\\_bs\\_fdlawsinus\\_Sep2012.pdf](http://www.sentencingproject.org/doc/publications/publications/fd_bs_fdlawsinus_Sep2012.pdf).

<sup>10</sup> Only Maine and Vermont allow voters serving a prison sentence to vote.

<sup>11</sup> Florida, Iowa, Kentucky, and Virginia.

<sup>12</sup> Paragraphs 11 and 14 of General Comment No. 25 (1996) to Article 25 of the International Covenant on Civil and Political Rights by the UN Human Rights Committee, and paragraph 24 of the 1990 OSCE Copenhagen Document.

HAVA mandates states to co-ordinate and match their voter registration databases with other state and federal databases. However, modalities are not sufficiently regulated and database formats vary considerably, resulting in uneven application and potential errors. Several OSCE/ODIHR LEOM interlocutors stated that the absence of a nationwide exchange of voter registration data affected the accuracy of voter lists, including multiple and outdated entries.<sup>13</sup> A number of states have taken steps to improve the accuracy of their voter lists by engaging in one of two multi-state projects that identify duplicate and outdated entries.<sup>14</sup>

Some 237 million citizens were eligible to vote in these elections. While the registered number of voters will not be determined until after the elections, it has been estimated that some 50 million eligible citizens were not registered. This brings into question the effectiveness of existing measures to ensure that all persons entitled to vote are able to exercise that right.<sup>15</sup>

### **Voter Identification**

Voter identification is a highly polarized issue. While Republicans push for stricter legislation to prevent potential fraud and safeguard electoral integrity, Democrats generally claim that the risk of fraud is minimal and does not warrant restrictions that could disenfranchise voters. A number of states enacted new voter identification laws requiring voters to present government-issued photo identification. Some OSCE/ODIHR LEOM interlocutors stated that the cost associated with travelling to identification issuing offices and obtaining accompanying documentation placed an unreasonable restriction that disproportionately affected minority and low-income voters, as well as single mothers. Several new identification laws were struck down by courts or vetoed by governors and were ultimately not implemented in these elections.<sup>16</sup> While efforts to ensure the integrity of the vote are important, these should be clearly defined and not lead to disenfranchisement of eligible voters.

Some 30 states required voters to present proof of identity at the polling station. Voters were required to provide photo identification documents in four states,<sup>17</sup> while in five other states they were requested to show photo identification but were permitted by law to cast a ballot after signing an affidavit to confirm identity, under penalty of perjury.<sup>18</sup> In contrast, postal voting, despite its increasing usage, does not require similar voter identification checking.

In most states, party representatives and individuals have the right to challenge the eligibility of voters at the polling station. Provisions vary considerably among states. Several OSCE/ODIHR

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<sup>13</sup> See, “Inaccurate, Costly and Inefficient” Pew Center on the States, February 2012, [pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election\\_reform/Pew\\_Upgrading\\_Voter\\_Registration.pdf](http://pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Pew_Upgrading_Voter_Registration.pdf).

<sup>14</sup> One is initiated by the Pew Center on the States and encompasses 7 states, the other is the Interstate Cross Check Project that includes some 15 states. Several other states are considering joining one of these efforts.

<sup>15</sup> Paragraph 11 of General Comment No. 25 (1996) to Article 25 of the International Covenant on Civil and Political Rights by the UN Human Rights Committee states that “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed.”

<sup>16</sup> For example, governors in Michigan, Missouri, Montana, and North Carolina vetoed identification laws passed in their state legislature, while in Minnesota the governor vetoed a ballot initiative on voter identification. Texas and South Carolina voter identification laws were denied administrative and judicial pre-clearance by the DoJ for these elections. A state court ruled that Pennsylvania’s proposed identification law could not be implemented in the short time before the elections.

<sup>17</sup> Georgia, Indiana, Kansas, and Tennessee. If voters do not have photo identification with them, they will be asked to complete a provisional ballot, counted only if they return with the appropriate documentation.

<sup>18</sup> Idaho, Louisiana, Michigan, New Hampshire, and South Dakota. In Hawaii, voters need to verbally provide their information. In Florida, voters failing to present photo identification were issued a provisional ballot and the county election officials were to determine the eligibility of the voter within 48 hours.

LEOM interlocutors criticized such laws for delaying the voting process and for being used to intimidate certain categories of voters, such as minorities and the elderly.

## Candidate Registration

Candidacy requirements are provided by the Constitution and candidate registration is regulated by a number of state laws that vary significantly between states. In general, a political party could nominate candidates if it obtained a certain percentage of votes in previous elections, although this threshold differed considerably among the states. Smaller political parties and independent candidates could run if they collected a certain number of supporting signatures. The number of signatures required and the signature submission deadlines varied among the states.

Although 32 presidential candidates, including 8 women, were on ballots across the country, only 4 obtained ballot access in a sufficient number of states to be potentially elected.<sup>19</sup> In addition, 120 candidates, including 20 women, ran for the 33 Senate seats and some 1,200 candidates, including 192 women, ran for the 435 House seats. There were ten congressional seats where either a Democratic or Republican candidate was elected unopposed. The overall field of candidates provided voters with a wide degree of choice.

## Campaign Finance

The 2012 elections were characterized by a high level of campaign spending and were the most expensive to date. During this election cycle, presidential and congressional candidates spent more than USD 2.5 billion.<sup>20</sup> Campaign finance for general elections is regulated by federal law under the supervision of the six-member, bipartisan Federal Election Commission (FEC). However, partisan voting has limited the FEC's ability to reach decisions on key campaign finance issues.

By law, donations are subject to a range of monetary limitations. There are, however, no limits on campaign spending as the Supreme Court held that any limitation would be an infringement of the right to free speech as protected by the First Amendment to the Constitution.<sup>21</sup> Candidates, political parties, and Political Action Committees (PACs)<sup>22</sup> are subject to extensive reporting requirements and disclosure obligations at regular intervals before and after election day. The FEC makes the reports public on its website within 48 hours of their receipt. While public financing is available for presidential elections, it is subject to several limitations. For the first time, both major party nominees opted out of public financing in favour of private funding, raising questions about the future of the system in its current form.

Corporations and unions cannot make direct contributions to parties and federal candidates, but they can make contributions through a PAC, subject to limitations. In the wake of the 2010 Supreme Court ruling on *Citizens United v. FEC*, which struck down the longstanding ban on corporate spending on elections, corporations and unions are now allowed to make independent expenditures that explicitly advocate for or against the election of a candidate. Expenditures can be made directly

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<sup>19</sup> Apart from President Obama and former Governor Romney, this includes: former New Mexico Governor Gary Johnson, the nominee of the Libertarian Party, who is on the ballot in 48 states and the District of Columbia, and Jill Stein, the Green Party nominee, who is on the ballot in 38 states and District of Columbia.

<sup>20</sup> Data from the FEC, [www.fec.gov/disclosure/pnational.do](http://www.fec.gov/disclosure/pnational.do) and [www.fec.gov/disclosure/hsnational.do](http://www.fec.gov/disclosure/hsnational.do), according to the last reports submitted by the presidential candidates on 25 October.

<sup>21</sup> See, *Buckley v. Valeo* (424 U.S. 1,23(1976)).

<sup>22</sup> PACs are not legally tied to a candidate or party but they may make direct contributions to their campaign funds. A PAC may act independently or may be connected to a specific corporation or union.

or through outside groups, namely Super PACs and the so-called 501(c) and 527 organizations.<sup>23</sup> Overall spending by independent outside groups was estimated at some USD 800 million during this election cycle,<sup>24</sup> the majority of which was spent on negative TV advertisements.

Several OSCE/ODIHR LEOM interlocutors expressed concerns regarding the transparency and co-ordination of independent spending. A defining element of the US campaign finance system has been transparency, ensured by frequent and detailed campaign finance disclosure. However, unlike candidates, parties, and PACs, the 501(c) organizations are not required to file regular reports to the FEC disclosing the funds they raise and spend on the campaign provided that political campaign activities are not their primary activity. Furthermore, in order to be considered independent, expenditures must not be co-ordinated with a candidate or a political party. However, co-ordination rules are overly complex and difficult to interpret. The FEC received a large number of complaints alleging co-ordination and the media reported several cases of apparent co-ordination.

## Election Campaign

The election campaigns for federal office were vibrant and highly competitive. Although exchanges between candidates were often personalized and negative in tone, only a few isolated incidents took place.<sup>25</sup> The presidential campaign received most of the national attention, with a major focus on undecided voters in the so-called “swing” or “battleground” states.<sup>26</sup> Third-party presidential candidates received minimal exposure. Campaigning centred on issues related to the economy, job creation, tax cuts, the budget deficit, health care, education, foreign policy and issues of special concern to women. There were several cases of misleading campaign information in television advertisements, billboards, and in letters and text messages sent to voters.<sup>27</sup>

Traditional campaign activities such as mass rallies, billboards, door-to-door canvassing and telephone banks were effectively used in order to reach out to voters, including minorities, women, and youth. In addition, candidates made wide use of the internet, including social media, as well as extensive television advertising. Three presidential, and one vice-presidential, debates between the candidates of the Democratic and the Republican parties were widely watched and played a significant role in framing the campaign. Three televised debates were held for third-party presidential candidates.<sup>28</sup> A hurricane in the week prior to the elections led to some interruptions in the presidential campaign, as well as a toning down of the rhetoric.

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<sup>23</sup> 501(c) and 527 organizations are named after their respective sections in the Internal Revenue Code. A Super PAC, also known as an ‘independent-expenditure-only-committee,’ is a political committee whose primary purpose is to influence elections. A Super PAC can receive unlimited donations so long as the money is spent independently of a candidate’s campaign.

<sup>24</sup> According to reports submitted by Super PACs to FEC: [http://www.fec.gov/portal/super\\_pacs.shtml](http://www.fec.gov/portal/super_pacs.shtml).

<sup>25</sup> On 12 October shots were fired through a window of an Obama campaign office in Denver. On 16 October, the Green Party presidential candidate Jill Stein and her running mate Cheri Honkala were arrested while protesting their lack of inclusion in the presidential debate in New York.

<sup>26</sup> These are considered to be Colorado, Florida, Iowa, Nevada, New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin.

<sup>27</sup> For example, in Pennsylvania, a utility company posted voter information leaflets to some 1.3 million voters that erroneously informed voters that photo identification is required to vote, information which was not corrected. In Maricopa county, Arizona, voters received erroneous information about the date of the elections. In Florida, citizens received anonymous fake letters questioning their citizenship.

<sup>28</sup> Gary Johnson, the Libertarian Party nominee, Jill Stein, the Green Party nominee, Virgil Goode, the Constitution Party nominee, and Rocky Anderson, the Justice Party nominee participated in the first two debates and Gary Johnson and Jill Stein took part in the third one.



## Media

The US media has a robust system of guarantees protecting freedom of speech and freedom of the press. There is a plural, diverse and independent media system allowing voters to access a wide range of information and views on candidates, issues, and electoral platforms.

The obligations imposed on the media for election coverage are very limited, in line with the protection afforded by the First Amendment. Federal regulation of editorial matters is minimal, with a preference given to self-regulation. The print media are not bound by any statutory requirements. National TV networks are required to operate in the public interest, but there are no statutory requirements for equal and balanced news coverage. Paid airtime is subject to an equal opportunity rule whereby candidates must be afforded airtime commensurate with that provided to other legally qualified candidates on a channel by channel basis. Political advertising was a major avenue for campaigning with large sums of money spent on TV advertising, mostly negative in tone.

TV is the main source of political information, as provided through public, national, and cable broadcasters.<sup>29</sup> The presidential contest was the main focus of national media. OSCE/ODIHR LEOM media monitoring results show that public electronic media fulfilled their remit as public service broadcasters by covering the elections and candidates in a comprehensive manner, with substantive news and analysis of the candidates' platforms and the issues. PBS evenly allocated airtime in news and current affairs programmes between Barack Obama (53 per cent) and Mitt Romney (47 per cent) that was balanced in tone. Likewise, NPR coverage was equitable, with 45 per cent devoted to Obama and 55 per cent to Romney, and was balanced in tone. The main national networks also provided equitable coverage of Obama (50 per cent) and Romney (50 per cent) that was also balanced in tone.

In contrast, leading cable TV channels were highly partisan in their election coverage, with both Obama and Romney receiving more negative than positive coverage. Fox News dedicated 66 per cent of its coverage to Obama and 34 per cent to Romney. Coverage of Obama on Fox News was mostly negative in tone (72 per cent). MSNBC dedicated 34 per cent of its coverage to Obama and 66 per cent to Romney. Coverage of Romney on MSNBC was mostly negative in tone (87 per cent).

All broadcast media dedicated the greater part of their electoral coverage to non-substantive issues such as daily opinion polls and the holding of campaign events (64 per cent), often at the expense of substantive discussion of policy (36 per cent). Press and online media provided extensive and comprehensive coverage of the elections, often with a greater focus on policy issues.

## Complaints and Appeals

Complaints and appeals can be brought before state and federal courts by individuals, parties, organizations, and interest groups in cases of violation of electoral rights. HAVA requires that states establish a state-based administrative complaints procedure. The DoJ monitors state implementation of federal election legislation and may initiate federal lawsuits in cases of non-compliance or to remedy denial or abridgement of voting rights. Complaints regarding federal campaign finance are resolved by the FEC, and media-related campaign complaints by the Federal Communications

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<sup>29</sup> The OSCE/ODIHR LEOM conducted media monitoring from 12 October until 5 November, including TV: public broadcasters *PBS* and *NPR*, national TV networks *ABC*, *CBS*, and *NBC*, cable TV channels *CNN*, *Fox News*, and *MSNBC*; newspapers: *New York Times*, *USA Today*, and *Wall Street Journal*; and news websites: *The Huffington Post* and *Politico*.

Commission. In general, the dispute resolution mechanism provides for effective remedy, although certain aspects are not adjusted to the context and pace of an electoral process.

The majority of electoral disputes in this election cycle pertained to new legislation regarding voter identification, early voting, voter registration, and redistricting. Contrary to good electoral practice, some amendments to state electoral law were only finalized in the weeks shortly before election day. Late changes to the legal framework can adversely impact electoral participants' understanding of provisions and their ability to fulfil their roles effectively.

Provisions on recounts vary widely. They can be requested from the state election boards or the courts. In some states the plaintiff is required to pay the costs of the recount which can amount to several thousands of dollars, with the possibility of reimbursement only if the election results are reversed by the recount. Some states provide for an automatic recount in case of a narrow margin in results, with costs covered by the state. In some state laws, there is no deadline set for recounts,<sup>30</sup> while in New York and Wyoming the law does not establish recount procedures.

### **Election Observation**

In line with OSCE commitments, the US has regularly invited the OSCE/ODIHR to observe federal elections. However, election observation is regulated by state law, which generally does not provide for international observers, as required by paragraph 8 of the 1990 OSCE Copenhagen Document. In 2010, the National Association of Secretaries of States (NASS) extended its 2005 resolution encouraging federal, state and local election officials to co-operate with and provide access to international observers. Missouri, New Mexico, North Dakota, South Dakota, and the District of Columbia explicitly provide for international election observation, while other states interpreted their laws in a way that permits access or delegated the decision to county officials. In several states OSCE/ODIHR observers were not provided full and unimpeded access to polling stations.<sup>31</sup> In some cases, OSCE/ODIHR observers were publicly threatened with criminal sanctions if they entered polling stations. This is in contravention of paragraphs 8 and 10 of the 1990 OSCE Copenhagen Document.

Domestic observation was widespread throughout the country, with a focus on battleground states, providing an important layer of transparency and confidence. However, domestic observers informed the OSCE/ODIHR LEOM that they faced challenges gaining access to documentation related to new voting technologies, including source codes. The DoJ deployed more than 780 federal observers to 23 states to monitor the implementation of federal electoral law.

### **Alternative Voting Methods**

Alternative voting methods are an established practice in the US and it is estimated that up to 40 per cent of voters cast their ballots before election day through early in-person voting or through postal voting, including by voters abroad. The methods and modalities of alternative voting vary across the states. In general, there is high public trust in election authorities to perform early and postal voting impartially and according to the law. The OSCE/ODIHR LEOM noted adequate measures to prevent unauthorized access to election materials, as well as for overnight security.

Although all states provide for postal voting, 29 states and the District of Columbia did not require voters to provide a reason for voting by mail. Oregon, Washington, and some counties in other

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<sup>30</sup> Arkansas, Michigan, Missouri, Oregon, and Vermont.

<sup>31</sup> For example, Alabama, Alaska, Florida, Iowa, Michigan, Mississippi, Ohio, Pennsylvania, Tennessee, and Texas.

states, conducted elections entirely by post. Regulations to protect the secrecy of postal ballots vary across the country. Some states do not require a secrecy envelope and the ballot paper is returned in an envelope containing voter information, which may violate the right to a secret ballot as provided by paragraph 7.4 of the 1990 OSCE Copenhagen Document.<sup>32</sup>

Early in-person voting is available in 32 states and the District of Columbia. The dates and working hours for early voting vary significantly across states, from 4 to 45 days, and have been recently shortened in four states.<sup>33</sup> Courts reinstated early voting that was curtailed by state laws in Florida and Ohio. The widespread use of early in-person voting resulted in long queues in a number of states. The flow of voters was slowed down in some states by ballot papers that were several pages long and included multiple electoral contests and referenda. In the eastern states, early voting was cancelled for two days due to a hurricane, but was generally compensated by extended opening hours or adding extra days.

The MOVE and UOCAVA acts provide citizens abroad with the possibility to vote in general elections. The Federal Voting Assistance Program (FVAP) of the Department of Defense provided considerable assistance to facilitate voter registration and ballot requests, as well as voter information campaigns. The MOVE act requires states to distribute ballots to voters abroad at least 45 days before election day to ensure that the ballots will be returned on time.<sup>34</sup> Some 31 states allow voters to return their completed ballots by email or fax, which requires voters to waive the right to secrecy of their vote.

### **New Voting Technologies**

The use of new voting technologies (NVT) in US elections is extensive and varies considerably across and within states. Most states use more than one type of NVT, either because of county variations or to accommodate voters with special needs. Although the EAC is mandated by HAVA to certify NVT, the guidelines are voluntary and few systems have been tested against national standards. Contrary to international good practices, there is also a lack of state-level provisions regarding certification, and auditing, resulting in a broad range of systems regulated according to different standards.

The trend to return to paper-based voting continues and 32 states now provide for electronic counting of paper ballots for almost all voters. Several election officials indicated to the OSCE/ODIHR LEOM that they returned to paper-based voting in response to voter concerns about the integrity of NVT. However, 11 states continue to mostly use Direct Recording Electronic (DREs) voting machines that do not provide any form of Voter Verified Paper Audit Trail (VVPAT).<sup>35</sup> Using a VVPAT gives the voter the opportunity to verify that their vote has been cast correctly, and allows for a recount, leading to more transparency and confidence in the process. Overall, election officials were well-trained, experienced, and comfortable in using NVT.

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<sup>32</sup> For example, California, Illinois, North Carolina, Virginia, and Wisconsin.

<sup>33</sup> Florida, Georgia, Tennessee, and West Virginia.

<sup>34</sup> For example, jurisdictions in Alabama, Mississippi, and Vermont.

<sup>35</sup> Delaware, Georgia, Indiana, Louisiana, Maryland, New Jersey, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

## 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 LEOM members visited a limited number of polling stations in 13 states and the District of Columbia.

Voters seemed able to cast their votes in a calm atmosphere and poll workers were experienced and well trained. While most voters were generally able to cast their vote without difficulties, there were reported instances of long queues of voters and shortages in polling station staff that caused delays in voting. In several states, polling station officials used electronic voter registers with online access to county-level voter information, which allowed officials to redirect voters to correct polling places where necessary. In states affected by the hurricane, commendable efforts were made by election officials to ensure that voters could cast their vote.

The OSCE/ODIHR LEOM noted that the use of provisional ballots varied across states. HAVA requires that provisional ballots be provided to voters who believe they are registered at a polling station, but could not be identified on the voter list. While some states have rules to count provisional ballots regardless of where they were cast, others count the provisional ballots only if they were cast in the precinct where the voter is registered. Deadlines and rules for counting provisional ballots vary across the states and could delay the announcement of results in closely contested races.

Campaigning continued on election day including through adverts and get-out-the-vote efforts, as allowed by law. The media reported on the activities of the candidates, the voting process, and exit poll findings throughout the day. The television networks starting announcing unofficial election results shortly after polls closed.

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## MISSION INFORMATION & ACKNOWLEDGEMENTS

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The OSCE/ODIHR Limited Election Observation Mission (LEOM) was deployed to the US on 3 October. The mission, led by Ambassador Daan Everts, consists of a 13-member core team based in Washington D.C. and 44 long-term observers deployed to 40 locations across the US. LEOM members come from 23 OSCE participating States.

The OSCE/ODIHR LEOM wishes to thank the government of the United States of America for the invitation to observe the elections, and the Department of State 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 federal and state institutions, election authorities, political parties, media, and civil society for their co-operation.

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