



Office for Democratic Institutions and Human Rights

UNITED STATES OF AMERICA

2 NOVEMBER 2004 ELECTIONS

OSCE/ODIHR Election Observation Mission Final Report



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UNITED STATES OF AMERICA
2 November 2004 Elections

OSCE/ODIHR Election Observation Mission Final Report

I. EXECUTIVE SUMMARY

In response to an invitation from the Government of the United States of America¹ to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the OSCE conducted an Election Observation Mission (EOM) of a targeted nature to the 2 November 2004 elections. The OSCE EOM assessed the elections in terms of their compliance with the 1990 OSCE Copenhagen Document and other international standards for democratic elections. Implementation of the 2002 Help America Vote Act (HAVA) with regard to elections for federal office, notably the presidential election, was of particular interest.

The 2 November 2004 elections in the United States mostly met the OSCE commitments included in the 1990 Copenhagen Document. They were conducted in an environment that reflects a long-standing democratic tradition, including institutions governed by the rule of law, free and generally professional media, and a civil society intensively engaged in the election process. There was exceptional public interest in the two leading presidential candidates and the issues raised by their respective campaigns, as well as in the election process itself. However, a number of issues were identified, particularly in the context of the ongoing electoral reform process, which merit further consideration.

The presidential elections took place in a highly competitive environment that resulted in a close race. The two leading candidates enjoyed the full benefits of extensive media coverage, which enabled voters to make informed choices. However, in order to safeguard the genuine competitiveness of congressional election contests, there may be a need to review procedures for drawing borders of congressional districts.

The elections were held in the context of an ongoing electoral reform process, and in the framework of a highly decentralized system of government. While HAVA represents a bi-partisan response to problems identified during the 2000 elections, establishing minimum federal standards for the conduct of elections, it also reflected a political compromise. A number of procedural issues, including the regulation of provisional balloting, remained to be addressed during implementation, which varied from state to state. HAVA's impact to date has been positive but limited, due in part to delays in funding and the late establishment of the Election Assistance Commission (EAC), a key institution for facilitating HAVA implementation.

The principal state and county election officials, most of whom are either elected to their office or nominated by political parties, generally performed their duties in a professional and dedicated manner. Although the method of appointment of election administrators enjoys overall confidence, there is the potential for a conflict of interest when a state or county election official simultaneously runs for public office or is actively involved in the campaign of a candidate. The overall transparency of the election administration was enhanced by broad media coverage of the process.

¹ Letter from Ambassador Stephan M. Minikes, Chief of Mission, U.S. Delegation to the OSCE, Vienna, to Ambassador Christian Strohal, OSCE/ODIHR Director, 9 June 2004.

During the pre-election period, campaign expenditures by the candidates were subject to limits imposed by federal law. However, these limits were circumvented by the so-called “527” groups, tax exempt groups which are not subject to statutory limits on financial contributions. Towards the end of the campaign, “527” groups were effectively deployed in support of both leading presidential candidates.

Federal law establishes minimum standards for states to ensure absentee voting for federal offices by out-of-country voters. Some states further facilitate out-of-country-voting by allowing marked ballots to be returned by facsimile transmission. While in particular circumstances, such a method of voting may represent a unique option to enfranchisement, those who choose this option willfully forego the secrecy of their votes. OSCE commitments determine that a secret vote is fundamental to a democratic process.

The U.S. constitutional framework grants full representation and voting rights in elections for federal office to US citizens, who are also citizens of individual states. However, to varying degrees, these rights are limited for citizens of other U.S. jurisdictions, such as Washington D.C. Additionally, in some states, there is a disproportionate restriction on voting rights of persons who have previously been convicted on a felony charge, but who have since completed their prison sentence. Ensuring equal voter rights is a fundamental OSCE commitment.

In a system of pro-active voter registration, voter rights are best protected when voters themselves undertake the responsibility to ensure their registration status. At the same time, the authorities should be equally accountable for fulfilling their responsibilities to process voter registration forms in an accurate and timely manner. The OSCE EOM received reports to the effect that partisan groups mishandled or lost registration forms, or allegedly facilitated fraudulent registration of voters.

Concerns regarding the integrity of the ballot and alleged vote suppression, primarily among minorities, were shared with the OSCE EOM in the pre-election period. Although the OSCE EOM could not verify them, it noted that the scale of expressed concern could have undermined confidence in the electoral process.

This election witnessed the broad introduction of Direct-Recording Electronic (DRE) voting machines. While voter education efforts familiarized many voters with these new technologies, a general lack of voter verified audit capabilities², combined with certification procedures that at times lacked transparency and inclusiveness, lessened the potential for building confidence in DREs.

Election day was characterized by broad participation indicating high voter interest in the contest. Long lines of voters were reported in a number of areas, with polling boards appearing to do their best to ensure the efficient processing of voters. The OSCE EOM heard concerns that due to variances in the numbers, quality and type of voting equipment units in usage in polling stations, disparities in exercising the right to vote could have occurred. The OSCE EOM was made aware of limited reports of concern with regard to the performance of DREs and the regulation of provisional balloting. The announcement of preliminary results was prompt and transparent.

In keeping with its OSCE commitments, the United States invited the OSCE/ODIHR to observe these elections. OSCE observers were granted access to polling stations in a number of states,

² Only the State of Nevada required that all DRE's have a voter verified manual audit capacity.

although sometimes only in specific counties. However, in other states, access was not possible or was limited. This was a result of state law, either because international observers were not included in the statutory categories of persons permitted to be in polling places, or because the lack of reference to international observers in state law was deemed to constitute an obstacle to their presence in polling places. Lack of observer access to the election process, both international and domestic, including at polling station level, is contrary to OSCE commitments, and limited the possibility of the OSCE EOM to comment more fully on the election process.

The OSCE/ODIHR issues this final report after expiration of deadlines for legal challenges to the election results and the installation in office of the elected candidates. The OSCE/ODIHR stands ready to support the authorities and civil society in the United States of America in furthering the electoral reform process.

II. INTRODUCTION AND ACKNOWLEDGEMENTS

The OSCE deployed an Election Observation Mission, of targeted nature, from 4 October 2004. The EOM was a joint effort of the OSCE/ODIHR and the OSCE Parliamentary Assembly (OSCE PA).

Professor Rita Suessmuth (Germany), former Speaker of the German Parliament, headed the OSCE/ODIHR Election Observation Mission and Ms. Barbara Haering MP (Switzerland), Vice President of the OSCE PA, was appointed by the OSCE Chairman-in-Office as Special Co-ordinator to lead the short-term observation.

On election day, 92 OSCE observers from 34 OSCE participating States were deployed throughout the country. In response to the OSCE/ODIHR request to OSCE participating States for 100 short-term observers, the OSCE EOM mission comprised 56 members of the OSCE Parliamentary Assembly and 36 observers including members of the OSCE/ODIHR long-term observation.

The OSCE EOM wishes to express appreciation to the U.S. Department of State, the Department of Defense, the Department of Justice, the Federal Election Commission, the Election Assistance Commission, representatives of state and county authorities, and polling station officials, as well as to representatives of civil society, for their co-operation and assistance during the course of the observation. The OSCE EOM is also grateful for the support from Embassies of OSCE participating States in Washington DC.

The Election Preview 2004, generously provided by *ELECTIONLINE.ORG* to the OSCE EOM, was highly appreciated.

III. BACKGROUND

A. U.S. SYSTEM OF GOVERNMENT

The United States of America comprises 50 states. It also exercises jurisdiction over the District of Columbia³ (the city of Washington DC), Puerto Rico, Guam, the Virgin Islands, American Samoa,

³ In accordance with the U.S. Constitution, the U.S. Congress created a seat for the federal government. The geographical size of this seat of government could not exceed ten miles square and would have exclusive

Swain's Island, the Harcon Tract and the Northern Mariana Islands. Each state and jurisdiction consists of a number of counties, in excess of 3,100⁴ throughout the U.S.

The U.S. Head of State and chief executive is the President, elected for a four-year term in indirect elections. The legislature, a bicameral Congress, consists of the Senate and the House of Representatives. The Senate has 100 seats. Two members are elected from each state by popular vote, according to the first-past-the-post system, to serve six-year terms; one third of the Senate is up for election every two years. The House of Representatives has 435 seats. Members of the House are elected by popular vote in single seat constituencies, according to the first-past-the-post system, to serve two-year terms.

The number of seats in the House of Representatives varies according to a state's population and is updated every ten years, following the U.S. census, last conducted in 2000. The distribution formula⁵ for the seats in the House of Representatives reflects the constitutional requirement that seats are allocated proportionally to population, and each state is allocated at least one seat. The allocation of these seats is currently done according to what is known as the formula of Huntington-Hill.⁶

B. VOTING IN U.S. FEDERAL ELECTIONS

Voting in elections for federal office is regulated primarily by the Constitution. Federal elections include direct elections for the House of Representatives and the Senate, and indirect elections for the President and Vice President. Participation in these elections derives from the constitutional status of a State, which is a legal unit that comprises specific geographical territory.

The Constitution is explicit that only citizens of a state⁷ elect members of the Senate and House of Representatives. The result is that U.S. citizens, who are not citizens of a state⁸, are not able to vote in federal legislative elections. This includes not only the citizens of Washington D.C. (District of Columbia), but also citizens residing in other U.S. jurisdictions. Voting in presidential elections is regulated in a similar manner, with citizens of Washington DC, who do have the right to vote for the presidency, presenting an exception among U.S. jurisdictions that are not states.

The District of Columbia and some U.S. territories have been granted a "voice" in the U.S. Congress through non-voting Delegates to the House of Representatives. The District of Columbia, American Samoa, Guam, and the Virgin Islands each elect a Delegate for a two-year term in direct elections. Puerto Rico elects a Resident Commissioner, instead of a Delegate, for a four-year term in direct elections. Although none can vote on questions that come for decision to the full House, they can vote in committee hearings.

legislative powers on its soil. This is how the District of Columbia (the city of Washington, DC) was established. The states of Maryland and Virginia contributed the land and Congress enacted legislation creating a police force, court system and other services for the District. Later, Maryland and Virginia legally transferred the land to the District of Columbia.

⁴ Including parishes, e.g. in Louisiana, and similar legal subdivisions.

⁵ U.S. Census Bureau, Internet release date 17 October 2000; see also <http://www.census.gov/population/www/censusdata/apportionment.html>.

⁶ The Huntington-Hill formula is also known as the equal proportions method.

⁷ Article 1 of the U.S. Constitution. Amendment XIV of the Constitution, Section 1 provides that U.S. citizens in the 50 states also have state citizenship. This is a legal term, not formalized by a particular identification document, which as a concept is similar to permanent residence and is based on a number of factors.

⁸ "Citizens" of the Swain's Island and American Samoa are not U.S. citizens, but are "U.S. nationals".

There is criticism that U.S. citizens of U.S. jurisdictions, other than states, are denied the right to send elected representatives to the U.S. Congress and the right to vote in federal elections. As these citizens are subject to U.S. laws, including laws regarding taxation, it is argued that this denial of representation and voting rights is particularly unfair. Court cases challenging this situation in Washington DC have been unsuccessful.⁹ The U.S. Constitution grants the right to vote in federal legislative elections and establishes the conditions for its exercise. The grant of this right is expressly conditioned upon a person being a citizen of a State. Thus, as this limiting condition is part of the granting language, courts have not considered this denial to be a violation of the voting rights of citizens who reside on territory that is not part of a State.

C. ELECTORAL SYSTEM

The U.S. President and Vice President are elected by an Electoral College consisting of 538 Electors. Each state elects a number of Electors that is equal to the sum of the number of senators and the number of representatives of that state to the House of Representatives. This means that each state will have at least three Electors. Additionally, Washington DC has Electors as if it were a state.¹⁰ All 50 states and Washington DC currently choose their electors by popular vote. U.S. voters cast a single ballot for the Electors for a particular team of candidates for President and Vice President. The Electors for the team of candidates must be U.S. citizens, and are “elected” with the sole task of electing the President and Vice President. Electors cast their votes in their own state capitals, on the Monday following the second Wednesday of December in the election year.

With the exception of the states of Nebraska and Maine, Electors are elected through the “winner take all” system¹¹: the list of Electors for a presidential candidate that wins the popular vote in each state wins all Electors for that state. Once the Electoral College is elected and certified, it elects the President and the Vice President by absolute majority vote, on separate ballots. Failure of the Electoral College to elect the President, the Vice President, or both, transfers the process to Congress. The House of Representatives would then determine the President, from the top three candidates, in a vote in which each state delegation casts one vote. The Senate would decide the Vice President between the top two candidates, each Senator having one vote.

D. PRESIDENTIAL CANDIDATES

Each party can register its candidates’ ticket in any state, provided it meets the registration requirements in accordance with state law. In order to register its ticket, each party usually has to present to state election officials lists containing specified numbers of voters’ signatures supporting the participation of the respective candidates in the election. Leading parties nominate their

⁹ E.g. *Albaugh v. Tawes* in 1964, and *Adams v. Clinton* in 2000, both heard by the U.S. Supreme Court. However, it is possible for a citizen of a particular state, while residing in Washington DC, to establish or retain his or her voting rights in his or her state of citizenship.

¹⁰ Three electors are attributable to the District of Columbia, which is a city and not a State, but has been granted by the 23rd amendment to the U.S. Constitution, effective in 1961, the number of electors to which it would be entitled if it were a State.

¹¹ This underscores the fact that it is a state-by-state decision to adhere to the winner-take-all-system. It is not required in the U.S. Constitution. In 2004, the State of Colorado held a referendum on whether to change to a proportional system for electing Electors. The proposed change was defeated.

candidates at a national convention that officially determines the party's nominees for the general election. Delegates to these conventions are selected variously by primary elections, caucuses, state conventions or other national party rules.

The Republican Party and the Democratic Party, two long-standing and well-established parties, with substantial material and institutional resources, dominate the political landscape. The Republican candidates for the offices of President and Vice President were the incumbents, President George W. Bush and Vice President Richard Cheney. The Democratic Party nominees for the offices of President and Vice President were Senator John Kerry and Senator John Edwards.

While consistent with the American federal structure and tradition, it is difficult for third party presidential candidates to appear on the ballot in all 50 states. Among other registered tickets in various states, there were none with a practical likelihood of winning the U.S. presidency, although in previous years some third party candidates have posed challenges. According to media reports, there was wide speculation that the ticket of Ralph Nader and Peter Camejo would attract voters who might otherwise have voted for Senators Kerry and Edwards. Nader/Camejo were able to get on the ballot in 35 states and Washington DC. In four states they did not try to get on the ballot, and in another eight states Nader/Camejo could not get on the ballot because of failure to submit the required number of signatures. In 17 states, the Democratic Party or third parties engaged in legal challenges to the Nader/Camejo candidacy claiming that it had not met the minimum signature requirements. As a result of such litigation, the ticket of Nader/Camejo was not registered in three states where challenged.

E. OSCE ELECTION OBSERVATION MISSION

In line with the commitments outlined in the 1990 Copenhagen Document, the OSCE/ODIHR was invited to observe the U.S. elections in 1996, 1998, 2000, 2002 and 2004.

In the beginning of September 2004, the OSCE/ODIHR conducted a Needs Assessment Mission (NAM) to Washington DC. As the OSCE Parliamentary Assembly (OSCE PA) also expressed an interest to observe the 2 November 2004 elections, jointly with OSCE/ODIHR, an OSCE PA representative joined the NAM. In its NAM report¹², and in line with the growing level of OSCE/ODIHR activity in assessing specific electoral issues in advanced democracies, the OSCE/ODIHR recommended to undertake an Election Observation Mission of a targeted nature. The Office also determined that EOM activities should focus on the implementation of the 2002 Help America Vote Act (HAVA) with regard to elections for federal office, and therefore the presidential elections were of special interest.

An advance team of the OSCE/ODIHR and the OSCE PA visited the United States in early October 2004 and conducted a series of meetings, immediately prior to the deployment of the OSCE EOM core team. As the United States of America is a signatory to the OSCE 1990 Copenhagen Document, it was assumed that individual states would abide by Paragraph 8 of the Document, with regard to access for OSCE observers at polling stations.

¹² OSCE/ODIHR Needs Assessment Mission Report, United States of America, September 2004, <http://www.osce.org/odihr>

Previously, the Office undertook an Election Assessment Mission to follow the congressional mid-term elections, with a focus mainly on Florida. As a result of that assessment, the OSCE/ODIHR identified a number of issues that were brought to the attention of the U.S. authorities.¹³ These included access of domestic non-partisan observers to all levels of the election administration, reform in the use of the felons' list, and the development of more effective links between the state and county levels of election administration.

In addition, the OSCE/ODIHR sent two members of its Election Department to the gubernatorial recall election in California in October 2003, to follow the electoral process and to see developments in voting technologies. In February 2004, OSCE/ODIHR representatives visited Washington DC to meet with the newly established Election Assistance Commission, the congressional staff involved in the drafting of HAVA, and to attend the winter session of the National Association of Secretaries of State (NASS) which dealt largely with the implementation of HAVA.

This report follows the preliminary statement issued by the OSCE Election Observation Mission, which is also available on the ODIHR website.¹⁴

IV. LEGISLATIVE FRAMEWORK

A. INTRODUCTION

The legal regulation of U.S. elections is highly decentralized. Few aspects of the election administration and technical voting processes are governed by federal rules. Much of the detailed regulation in key areas, such as voter registration, voting procedures and processing of results, is determined at state level. Further, regulations and important decisions, including those regarding the choice of voting technology, are frequently taken at county level. Thus, there are a significant number of different legal regimes determining the manner in which elections are conducted.

Generally, federal law has tended to focus on providing minimum standards, particularly in the broad field of voter protection and enfranchisement. The Voting Rights Act (1965) sought to protect the rights of racial and linguistic minorities with measures including a ban on literacy tests for voters. The National Voter Registration Act (1993) introduced reforms intended to ease citizens' actions to register as voters. The Uniformed and Overseas Citizens Absentee Voting Act, last amended in 2005, required the Department of Defense to facilitate absentee voting by U.S. citizens living abroad, including those serving in the armed forces.

B. 2002 ELECTORAL REFORM: HELP AMERICA VOTE ACT (HAVA)

The 2 November 2004 elections were held in the context of an ongoing electoral reform process, which is yet to be completed, and in the framework of a highly decentralized system of election administration. The 2002 Help America Vote Act¹⁵ ("HAVA"), was a bi-partisan reaction to develop minimum standards addressing problems identified during the 2000 elections. At the same time, it

¹³ OSCE/ODIHR Election Assessment Mission Report on the Implementation of Election Reforms during General Elections in the USA, November 2002, <http://www.osce.org/odihr>

¹⁴ <http://www.osce.org/odihr>

¹⁵ HAVA was enacted on 29 October 2002.

reflected a political compromise. A number of issues, such as the regulation of provisional balloting, were left to be addressed in the course of implementation, which varied from state to state.

A number of provisions of HAVA, including the introduction of statewide voter registration databases and tighter requirements for voter identification for first time voters, were designed to enhance the integrity of the electoral process. Others, including the introduction of provisional ballots across the U.S., were intended to ensure that all eligible voters, including those not appearing on the voter register, are able to vote and to have their votes counted.

Key aspects of electoral reform include:

- **Replacement of voting equipment and minimum standards.** Substantial federal funds have been made available to cover the cost of replacing lever and punch card voting machines with new voting equipment, mostly DIRECT-RECORDING electronic (DRE) machines and optical scan technology. Those states, which take up the offer of federal funds, must implement these changes no later than 1 January 2006.

HAVA identifies a number of minimum voting standards which must be met by 1 January 2006. These include requirements that DRE voting systems produce permanent paper records, with a manual audit capacity, that they are accessible for voters with disabilities and that they provide for alternative language accessibility.¹⁶

- **Election Assistance Commission.** A federal Election Assistance Commission (EAC) was created, to be established within 120 days after enactment of HAVA. The EAC should "... serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections..."¹⁷
- **Statewide voter registration databases.** Each state is required to compile a statewide voter registration database by 1 January 2006, in order to ensure efficient maintenance of accurate voter lists and as a safeguard against possible multiple registration of voters.
- **Voter identification requirements.** First time voters who did not provide a copy of their ID with photo, if they applied by mail to be included on the voter register, now have to show a photo ID on election day.
- **Introduction of provisional ballots.** All states were required to introduce provisional balloting by 1 January 2004. A provisional ballot must be provided to a person who claims to be registered to vote "in the jurisdiction in which the individual desires to vote"¹⁸ and finds that his/her name does not appear on the voter list. He or she must be allowed to vote using a provisional ballot. However, HAVA fails to provide any further indication of legislative intent in regard to the meaning of the term "jurisdiction", in particular whether "jurisdiction" means the county of residence or the address of residence of the voter.

¹⁶ The Voting Rights Act of 1965 was amended in 1975 to add protections from voting discrimination for language minority citizens. Section 301 of HAVA requires a voting system to provide for alternative language accessibility.

¹⁷ HAVA, Section 202.

¹⁸ HAVA, Section 302.a.

The provisional ballot is a paper ballot, which is placed in a special envelope to ensure the secrecy of the vote. The voter's eligibility to vote "in the jurisdiction in which the individual desires to vote" must be verified after the vote is cast, but prior to the vote being counted. Voters must be able to find out, using the Internet or a toll-free number, whether their vote was counted and, if not, why. While certain states have been using provisional ballots for a number of years, these were the first elections with provisional ballots widely available throughout the country according to federal legislation.¹⁹

HAVA does not indicate how, and in what timeframe, provisional ballots are to be verified. There are widely varying deadlines for verification, ranging from three to 32 days, depending on state law. Additionally, HAVA fails to specify that the number of provisional ballots cast should be announced together with all other results released on election night, in order to provide a timely indication if the verification and the counting of verified provisional ballots has a potential to change the outcome of the vote. This creates conditions for delayed announcement of the election winner when the margin between the front running candidates is narrow.

- **Voting by disabled persons.** HAVA provides that states and units of local government will be eligible to receive funds for "... making polling places, including the path of travel, entrances, and voting areas of each polling facility, accessible to individuals with disabilities, including the blind and visually impaired, in a manner that provides the same opportunity for access and participation (...) as for other voters..."²⁰ The act also instructs that such individuals will be provided with all relevant information in a timely manner.

C. VOTER REGISTRATION

Voter registration for U.S. elections is based on the active and honest participation of citizens, and requires in practice a minimal level of literacy. Citizens are expected to register with the authorities their desire to cast a ballot in the jurisdiction, most often the county where they live, and indicate in their application their respective addresses. Once this has been done, the authorities include the applicant in the voter register and allocate the applicant to the precinct area encompassing the declared address.

In order to register, citizens are asked to file with the respective officials a registration form within a prescribed deadline, which varies from state to state. Citizens are asked to state in writing their personal data, including that they are US citizens, are at least 18 years old on election day, and reside in the respective county and state. They are also asked to sign a declaration or oath, which in most states reconfirms the above information and in a number of states includes a confirmation that their civil rights are not restricted. Once the form is completed correctly and in a timely manner, the relevant officials must register the applicant or provide reasons in case of refusal.

Registration forms vary from one state to another. In at least six states the registration forms include an option for the voter to declare his or her race. In approximately half of the states voters have the option to declare party affiliation to be used in party primaries. A majority of states require voters to

¹⁹ Provisional ballots are not in use in six states, where state law permits for election day registration, including Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming.

²⁰ HAVA, Section 261.b.1.

enter in the registration forms an identification document number, such as a social security or driver's license number.

In most states voter registration is based on the principle of "closing" the voter registers: after the expiry of the period for registration, election administrators stop accepting new applications for registration in advance of specific elections. However, those voters who have failed to register within the deadlines prescribed by state law may still cast a ballot. In most states this would be a provisional ballot. In the six states where state law provides for election day registration, voters whose names are not included in the precinct voter list are allowed to vote if they submit to the polling board of their "home" precinct an affidavit stating their personal data, including the address.

Civil society groups play an important role in the voter registration process. They serve a number of functions, including, *inter alia*, being "mediators" between the voter and the authorities responsible for updating the voter registers at a county or state level. In this regard, civil society activists provide information and registration forms to voters, assist voters in filling out the forms, and, where permitted, collect the forms and transmit them back to the authorities. They also serve a voter education function, and can be credited with the increases in the numbers of registered voters noted in a number of states.

While the efforts of civil society groups as "mediators" provide a valuable service to certain categories of voters, including historically disadvantaged minorities, it also has drawbacks. Notable amongst these is a number of incidents reported to the EOM where partisan groups mishandled or lost registration forms, or allegedly facilitated the fraudulent registration of voters. An active voter registration process is best served when citizens take full responsibility for ensuring that they are accurately registered, and where the authorities are held equally accountable for fulfilling their responsibilities to process the registration forms in an accurate and timely manner.

D. ABSENTEE (OUT-OF-COUNTRY) AND EARLY VOTING

U.S. federal and state law includes instruments, such as absentee and early voting, in order to encourage participation in a process characterized by an overall significant degree of confidence. Out-of-country voting, a particular aspect of absentee voting, is facilitated by the Department of Defense through its Federal Voting Assistance Program. The Program helps in providing applications to out-of-country voters, both civilian and military, to obtain ballot papers directly from their home county in their respective state of residence. These are completed and returned directly to the county authorities by post. In a number of states, voters residing outside the U.S. are also permitted to return their completed ballots by facsimile transmission (fax). While in particular circumstances, this may be a unique option to enhance enfranchisement, those who choose this option willfully forego the secrecy of their votes. OSCE commitments determine that a secret vote is fundamental to a democratic process.

While the majority of state laws permit early voting, 15 states do not permit early voting. The period and the procedures for early voting vary from state to state. In some states, voters can use this option to cast a ballot in person in designated polling places only by paper ballot, while in others they can use DRE machines. Although Oregon voters vote primarily by mail, a voter does have the option to personally obtain and return the ballot to the appropriate county elections office.

E. CAMPAIGN FINANCE

The Federal Election Campaign Act (FECA), passed in 1971, imposed stringent disclosure requirements for federal candidates, political parties and political action committees. The Federal Election Commission (FEC) was created in 1975 to ensure compliance with the FECA and to facilitate disclosure. Further changes were introduced with the passing of the Bipartisan Campaign Reform Act in 2002, which banned national parties from raising or spending non-federal funds (so-called “soft money”), restricting so-called “issue ads” and increasing contribution limits.

F. VOTING BY EX-FELONS²¹

With the exception of two states, state laws deprive citizens convicted of a felony of their voting rights during incarceration. In seven states ex-felons are denied the right to vote for life, irrespective of the seriousness of the crime committed. In another seven states, specific felonies are sanctioned for life as well. Such an approach is difficult to reconcile with the generally accepted principle that any restriction of franchise should be reasonable and proportionate.²² Between the above mentioned extremes, the rules for restricting and restoring political rights of ex-felons across the remaining 43 states and the District of Columbia vary widely. Thus, suffrage rights are not enjoyed on equal terms.

G. VOTER CHALLENGES

State law in a number of states permits party and/or candidate representatives, voters and poll workers to confront voters in the polling station and challenge their eligibility to vote there. A challenge must be based on a claim that the voter concerned is not qualified to cast a vote, for instance because s/he is no longer resident in the precinct area. Challenges may also be lodged in advance with the election authorities, with a view to having the challenged voter’s name removed from the list before election day.

H. ELECTION OBSERVERS

International observers are an unknown concept in U.S. federal and state law. In a number of states, polling places are effectively open to any observation, so the issue of access for international observers does not arise. In others, election administrators enjoy the discretion to admit observers as they see fit. In yet others, state law identifies an exhaustive list of persons permitted to be in a polling station on election day. Only the State of Missouri includes international observers on such lists. In a number of states, there are no provisions regarding domestic non-partisan observers. At times, contrary to the concept of non-partisan civic participation, they must adopt party affiliation in order to gain access. Lack of observer access to the election process, both international and domestic, including at polling station level, is contrary to OSCE commitments.

²¹ A felony is a criminal offence more serious than a misdemeanor; a felon is a person sentenced for committing a felony.

²² According to General Comment 25 of the Human Rights Committee on Article 25 of the International Covenant on Civil and Political Rights, which was ratified by the U.S. in 1992, “If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and sentence”.

V. ELECTION ADMINISTRATION

The structure of the election administration reflects the decentralized nature of the U.S. political system. There is no central election administration body responsible for the conduct of elections across the U.S. Rather, there are two federal electoral bodies with limited mandates. Both bodies are appointed by the President and confirmed by the Senate.

The Federal Election Commission (FEC) maintains an overview of campaign finance regulations and protection of the right to vote in federal elections. It comprises six members including the Chairman – three Democrats and three Republicans. FEC members are nominated by the President, upon consultations with congressional leaders.

The Election Assistance Commission (EAC), established following the adoption of HAVA, is overall an advisory body, issuing guidelines and recommendations, and reviewing the implementation of HAVA. It comprises four members including the Chairman - two Republicans and two Democrats - nominated by the President based on consultations with congressional leaders.

Both bodies take decisions with super-majority, a mechanism presuming that decisions are largely consensual, however at times difficult to make. In practice, however, the longer- established FEC has sometimes been criticized for not being able to move beyond stalemate on some issues.

In most states, the election process is administered either directly by the Secretary of State²³ or his/her authorized representative. However, the administration of elections is further decentralized, and respective counties and other jurisdictions have a high degree of autonomy in conducting elections in their areas, including different voting methods.

The performance of state and county election officials, mostly nominated by political parties, was generally marked by professionalism, dedication and transparency enhanced by broad media coverage of the election process. Although the method of appointment of election administrators enjoys overall confidence and reflects broadly used best practices, it has the potential to raise questions of possible conflicts of interest if a state or county election official simultaneously chooses to run for office or is actively involved in the campaign of a candidate.²⁴

The election administrators, at all levels, faced a number of new challenges in the 2 November 2004 elections. First, there was a remarkable increase in voter registration, spurred in part by a widely perceived sense of the importance of these presidential elections – the first since the difficulties experienced in Florida in 2000 - placing additional strains on the system.

Secondly, election authorities faced a widespread shortage of poll workers. This shortfall was estimated ahead of the elections by the EAC Chairperson at nearly 500,000 persons of the approximate 2,000,000 needed. Current poll workers, with a reported average age of over 70 years, have long contributed to stability and continuity in U.S. electoral practice. Poll workers are often volunteers, and training was reported to the EOM as being at times inconsistent. Given the crucial contribution of these citizens to the electoral process, and likely changes to voting technology, there is a need both for an influx of new poll workers and for efforts to broaden the appeal of this key task.

²³ In some states, the office responsible for election administration is not the Secretary of State's Office but a state department that is not under the authority of the Secretary of State.

²⁴ Isolated cases of such nature were brought to the attention of the EOM.

The EAC and certain influential non-governmental organizations such as the League of Women Voters have made welcome efforts in this area.

VI. IMPLEMENTATION DURING THE PRE-ELECTION PERIOD²⁵

A. HAVA

While the ultimate deadline for the implementation of HAVA is 1 January 2006, despite funding delays and the late establishment of the Electoral Assistance Commission, there were creditable attempts to do as much as possible before the 2 November 2004 elections. It would appear that, for practical reasons, some deadlines for the implementation of HAVA's key provisions might have been too ambitious. Overall, to date HAVA has had a visible and positive, albeit limited, impact on the U.S. election process.

- **Replacement of voting equipment and minimum standards.**²⁶ Lever and punch card technologies have been replaced only in a number of areas, including the whole of Florida, by DRE machines and optical scan technologies. This was in part because many states had obtained a waiver extending the deadline for replacement of lever and punch card machines until 1 January 2006, and in part because of delays in the release of federal funds provided for their replacement. Moreover, given that the current federal standards for election technology are not mandatory, there are no uniform certification procedures. This may have accounted in part for the reported distrust of DRE machines, especially touch screen machines. The Secretary of State of California withdrew the approval for one of the DRE machines for failure to receive federal qualification and for reported disenfranchisement of voters at the 2 March 2004 primaries.
- **Election Assistance Commission.** The Election Assistance Commission was appointed only in December 2003, nine months after the deadline established under the Act. This, in turn, limited its impact on these elections. Nevertheless, since taking up its duties, the EAC has acted swiftly to meet its responsibilities.
- **Statewide voter registration databases.** For the 2 November 2004 elections, 15 states had completed this task. It would seem that at least some of these states were well on the way to compiling such lists before HAVA was adopted. Until recently, voter lists were mostly compiled only at county level, giving rise to the potential for multiple registrations.
- **Voter identification requirements.** While in the majority of states voters are not required to produce any identification document (ID) when they present themselves at precincts to vote, in 17 states all voters must produce ID. The EOM was not aware of problems connected with the introduction of new ID requirements under HAVA.
- **Introduction of provisional ballots.** There were varying interpretations of the rules on whether a voter has to cast a provisional ballot in his or her assigned precinct. The words "in

²⁵ In a number of states, aspects of the implementation of Voter Registration, Voter Challenges, Provisional Balloting, Early Voting and Voting of Ex-Felons were subjects of litigation, and are discussed in Section XII.

²⁶ Implementation of DRE equipment for voting attracted substantial interest during the pre-election period and is described in more detail in Section VII.

the jurisdiction in which the individual desires to vote” have been interpreted differently in different states. In 28 states and Washington DC, the vote was only to be counted if the ballot was cast in the voter’s “home” precinct, the area which included the address declared by the voter during voter registration. In 17 other states the term “jurisdiction” was assumed generally as the county declared in the course of voter registration. Proponents of this view suggested to the EOM that this was the original intent of what could otherwise be seen as rather vague wording. However, the degree of variation in interpretation of the law confirms the need for definitive interpretation. The interpretation of the term “jurisdiction”, in this context, was the subject of intensive litigation shortly before the election in a number of states, as discussed later in the report.

- **Voting by disabled persons.** It would appear that most polling stations provided good access for visually impaired and other disabled voters.

B. VOTER REGISTRATION

While HAVA required that all states introduce statewide voter registration databases by 1 January 2004, this was an ambitious timeframe, and consequently most states took advantage of the possibility to apply for a waiver until 1 January 2006, due to the complexity of the task. As a result, the advantages which statewide registration would provide, including the prevention of any potential multiple registration, were not available in the majority of states for these elections.

C. ABSENTEE (OUT-OF-COUNTRY) AND EARLY VOTING

In general, absentee and early voting was strongly encouraged by the major political parties, with considerable effect, in a process characterized by an overall significant degree of confidence. Some estimates put the likely level of absentee and early voting as high as 20 per cent of all voters. Other reasons for the high levels of absentee and early voting included the fact that U.S. general elections take place on a working day, that in some counties polling stations closed as early as 6 p.m., and the large number of U.S. citizens, both civilian and military, who were permitted to use absentee voting procedures from abroad.

The EOM was informed that insufficient or unequal distribution of early voting sites may have impeded the ability of voters to equally exercise this option. The EOM was not in a position to identify to what extent absentee voting by facsimile transmission was used.

D. CAMPAIGN FINANCE

To a significant extent, the campaign finance limits imposed under federal law were undermined by so-called “527s”, named after the section of the Internal Revenue Code which defines their tax status. These are groups which may receive and disburse funds to influence or attempt to influence the nomination, election, appointment or defeat of candidates for public office. They are permitted to accept contributions in any amount from any source. By the end of the campaign, a number of “527s” had been deployed in support of both leading presidential candidates. This innovation effectively circumvented the statutory regime for campaign finance in relation to the presidential elections.

E. DISTRICT BOUNDARIES

The boundaries of the 435 congressional districts are reviewed for possible redistricting every ten years in the year following the national census. The redistricting last occurred in 2001. Neither federal nor state law prohibits state legislatures from taking into consideration the preference of a particular geographical group of voters²⁷ when drawing district boundaries. The absence of such prohibition and the availability of increasingly sophisticated geographic databases, demonstrating voting history patterns and indicating likely voter intent, are widely seen as having an impact on the redistricting process.

According to interlocutors and media reports, such a practice may have rendered a sizable proportion of the congressional races in these elections to be insufficiently competitive. This point may be underscored by the high number of incumbent candidates who were returned to office in these elections. Consequently, there may be a need to review procedures for drawing boundaries of congressional districts in order to safeguard the genuine competitiveness of Congressional election contests.

The State of Iowa has moved away from such practices by introducing an independent Legislative Services Agency. The Agency is not permitted to take voter preferences into account when redrawing boundaries. Although the legislature has the right not to adopt the Agency's recommendations, it has tended to accept the recommendations of the Agency. However, there appears to be little interest in the rest of the country in following Iowa's example.

VII. VOTING BY DIRECT-RECORDING ELECTRONIC (DRE) VOTING MACHINES

A. BACKGROUND

The voters in the United States cast their votes using a range of equipment, which may vary from county to county. Five different voting technologies are typically in use:

- lever machines;
- punch-card machines;
- paper ballots;
- optical scan; and
- DRE machines, such as touch-screens.

The problems that emerged with punch-card machines during the 2000 elections, particularly in the State of Florida, inspired a nationwide interest in reform of voting technology, as reflected in HAVA. As the older voting technology was usually replaced by DRE machines, which were already the subject of litigation, the new equipment had the potential to become a serious controversy during the 2 November 2004 elections. Generally, the software used in the new voting machines was not made available for domestic independent public scrutiny, and several states had invested in new electronic equipment that did not provide for a voter verified manual audit and recount capacity.

²⁷ For example, in a number of states, voter registration forms include the possibility for a voter to provide his or her political party affiliation.

In response to these developments, the EOM paid particular attention to the use of DRE equipment. More than 48 million registered voters were able to vote using a DRE machine (see the table below).

Types of Voting Equipment ²⁸

	Counties		Precincts		Registered voters	
	Number	%	Number	%	Number	%
Punch card²⁹	306	9.83%	25,043	13.59%	21,643,432	13.75%
Lever	269	8.64%	26,431	14.34%	21,893,531	13.91%
Paper ballot	299	9.60%	3,465	1.88%	1,038,800	0.66%
Optical scan	1,415	45.44%	65,624	35.62%	53,085,381	33.72%
DRE	675	21.68%	51,933	28.18%	48,412,015	30.75%
Mixed	150	4.82%	11,763	6.38%	11,360,189	7.22%
Total	3,114		184,259		157,433,348	

DREs can be divided into three main categories:

- Touch-screen voting systems with a paper trail, that must be verified by the voter before the vote is actually cast (voter-verified auditable paper trail or VVAPT);
- Touch-screen voting systems without a voter verified paper trail; and,
- Push-button devices, where the voter presses one or more buttons next to the candidates of his or her choice, and then presses a “vote” button.

Only the first type of DRE equipment offers a recount facility based on a manual recount of VVAPT. All others, when a recount is undertaken, rely on the built-in memory. They will thus produce an exact copy of the original reported outcome. These systems store their record of votes cast in separate places (e.g. on a hard disk or a memory card) and most systems keep a log of all operations (audit log). Inspection of this data may clarify matters if a recount is needed, but it requires the intervention of an expert, usually from the vendor’s staff, and requires that there be no hardware failure (e.g. on the hard disk or memory card).

Other electronic voting equipment like optical scan technology uses a special ballot that is entered into the machine and then counted. However, the ability of such devices to scan the voter’s vote depends on the voter marking the ballot properly.

²⁸ Election Data Services, “Overview of Voting Equipment Usage in the United States, Direct-Recording Electronic (DRE) Voting – statement of Kimball W. Brace, President Election Data Services Inc. to the United States Election Assistance Commission”, May 5, 2004.

²⁹ This includes related technologies like InkaVote that are, from a technological point of view, not punch cards, but use ink dots instead.

B. CERTIFICATION

The process of certification of equipment reflects the decentralization of the U.S. election administration. Currently, these different levels of certification reinforce distinctions in the type of voting equipment used and the manner in which states attest to its ability to provide an equal voting process. This situation should change shortly as the National Institute of Standards and Technology (NIST) will be involved in the definition of voting systems standards.

To enhance the creation of uniform standards of electronic voting technology, the National Association of State Election Directors (NASED) created the Federal Voting Systems Standards (FVSS). These standards, which are maintained by both the NASED and Election Assistance Commission, are not legally binding. However, most states require that equipment should meet the standards prior to purchase. Nine states do not require this and have either their own guidelines or no guidelines at all, e.g. accepting a written guarantee from the vendor.

An Independent Test Authority (ITA) examines the hardware and/or software of the vendor and checks whether it meets the criteria of the FVSS. ITAs are independent companies accredited by NASED. Vendors bear the cost of such examinations. If a system meets the criteria, it is put on the NASED list of qualified systems. If the vendor makes any changes to the system, it must be re-examined since any change may introduce a potential malfunction. It has to be absolutely clear that the system used is indeed the system that was examined.

A number of states have made NASED certification mandatory for voting systems. Further, state law may introduce new requirements for voting systems. A number of states also contract independent consulting firms to conduct the examinations.

Finally, there is an official acceptance of voting equipment, which is undertaken at the county level. The county is the party that actually purchases the equipment in most states. The counties may well impose their own rules when deciding which voting technology to use.

C. CHALLENGES

Civil society groups engaged with the issue of voting with DRE machines made numerous statements, and provided extensive information on their websites, demonstrating distrust of DRE machines that fail to provide a voter-verified auditable paper trail (VVAPT). Neither the vendors nor the county and state election officials with whom the EOM met shared this distrust. The fundamental arguments regarding the introduction of new technology in a short period, the reported shortage of trained poll workers and the questions about the integrity of votes cast through DRE machines made headlines during the pre-election period, and included:

- reports by academics, institutions and companies, exposing security flaws;³⁰
- close press attention to any incident involving DRE voting systems;

³⁰ See, e.g., "Analysis of an Electronic Voting Systems", Aviel D. Rubin *et al*, IEEE Computer Society Press, May 2004, dated 27 February 2004. (Also known as the 'Hopkins report'); "Immediate steps to Avoid Lost Votes in the 2004 Presidential Election: Recommendations for the Election Assistance Commission", CALTECH/MIT Voting Technology Project, July 2004; "Trusted Agent Report Diebold AccuVote-TS Voting System", RABA Innovative Solution Cell (RiSC), Dr. Michael A. Wertheimer, Director, 20 January 2004. (Also known as the "RABA report"); "Direct-Recording Electronic (DRE) Technical Security Assessment Report", prepared by Compuware Corporation for the Ohio Secretary of State, 21 November 2003.

- civic groups concerned about lost votes and potential fraud;³¹
- articles reporting on potential conflicts of interest by one of the major vendors.³²

A strong demand arose for an extra verification method that was independent of the electronic equipment: a voter-verified auditable paper trail (VVAPT). This trail can be inspected and accepted by the voter. After the vote is cast, it can be inspected by the voter and stored separately by the voting authorities. These paper trails can be used whenever a manual recount is demanded, increasing confidence and transparency.

Although the VVAPT provides the means for a truly manual recount based on a voter-verified trail, it also introduces some challenges:

- adding extra devices (e.g. printers) to already purchased equipment will increase costs;
- printers tend to be more error prone (e.g. paper jams and misprints); and
- legislation is required to decide which tally is legal in case of mismatches of the electronic result against the paper result.

The adoption of a VVAPT will enhance confidence of DRE voting technologies.³³ Some states have already adapted their legislation to require a VVAPT and more states are reported to be considering such an amendment. However, for the November 2004 elections, only the State of Nevada required a VVAPT.

Another suggestion for boosting public trust in voting systems is to require vendors to publish their program source code so as to facilitate widespread public “testing” and inspection of the code by interested parties. Vendors, however, strongly argue against this approach, claiming it would reveal their trade/commercial secrets and allow competitors to enter the market rapidly without them having to make a similar investment in research.

VIII. ELECTION CAMPAIGN

The system for election of the U.S. President and Vice President has a strong impact on the geographical distribution of candidates’ campaign efforts. Candidates concentrated on those “swing” states, where voters’ political attitudes in the run-up to the popular vote did not favor decisively any of the leading candidates and which had, therefore, the potential to “swing”, through the votes of their Electors, the outcome of the vote in the Electoral College.

The list of “swing” states for the 2 November 2004 election evolved over the course of the campaign, although it was generally agreed to include several states which carried significant numbers of Electoral College votes, especially Florida (27), Ohio (20), and Pennsylvania (21). Towards the end of the campaign, smaller states such as Iowa and New Mexico also received significant attention.

³¹ See, e.g. <http://www.verifiedvoting.org>, <http://www.blackboxvoting.org> and <http://www.eff.org>.

³² See, e.g., New York Times – article “Machine Politics in the Digital Age”, 9 November 2003 by Melany Warner.

³³ See “Election reform briefing – Securing the vote”, <http://www.electionline.org>, April 2004.

Citizens in the “swing” states were flooded with campaign material, especially television advertisements, with messages becoming increasingly negative as the campaign drew to a close. By contrast, states where popular attitudes showed clear political preferences received less focused campaign attention. Personal appearances of the leading candidates followed a similar pattern.

The political campaign was notable for the enormous quantity of information available to voters. For those who wished to inform themselves, numerous printed and broadcasting media, and Internet sources, provided a wide diversity of views offering analyses of leading candidates’ campaign positions, as well as much needed voter information about recent reforms to the electoral process. In addition to issues typically outlining differences between center-right and center-left platforms, campaigns also focused on the personal records of the leading presidential candidates and attitudes related to the war on terrorism. Three debates between the two leading candidates, broadcast live, attracted attention across the U.S. and internationally.

Opinion polls were published frequently and these were the subject of regular and extensive media comment. Although there were variations, the margin between the candidates was fairly consistent within the polling sample margin of error.

Considerable efforts were undertaken by both major parties, and by affiliated non-governmental organizations, to encourage voter turnout. Sophisticated methods were employed to contact voters and to ensure they actually voted. The two parties’ efforts to encourage voter turnout, while obeying the same basic principles, used different techniques. The Democratic Party program to Get-Out-the-Vote (GOTV) was supplemented by the efforts of a wide variety of domestic non-governmental organizations, including those of the “527” category. The Republican Party kept their GOTV effort largely in-house and within the party structures.

IX. DOMESTIC OBSERVATION

The role of civil society in the U.S. electoral process is perhaps unique. Included are several elements in the broad spectrum of domestic election monitoring, such as media monitoring, election law analysis, observation of election day procedures and minority group advocacy.

The scope of domestic monitoring conducted by civil society groups, some having their roots back in earlier struggles to ensure full suffrage for women and national minorities, is a positive element of the U.S. electoral landscape. Civil society organizations generally define themselves by reference to elements of the U.S. tax code, and this is also an important factor in their fundraising appeals to donors.

There is a clear need for continued civil society work of a distinctly non-partisan nature in the on-going reform of the U.S. electoral system. However, some confusion has arisen over which civil society organizations are non-partisan in their orientation. Pronounced elements of partisanship in the NGO sector may detract from, rather than promote, initiatives for perceived positive change.

The *Election Protection Coalition* brought together some 60 different civil society groups. It operated as a loose structure, with different partner organizations being responsible for different geographic areas, different issues within the spectrum of voter rights, and even different election monitoring exercises. The main focus of the coalition was minority voter rights. It targeted states

where this has historically been an issue, as well as “swing” states where so-called voter suppression was alleged.

Two notable projects conducted by the *Election Protection Coalition* included:

- A nationwide voter information and assistance hotline – 1-866-OUR-VOTE. The hotline was intended to assist voters in exercising their right to vote. It was also intended to create a database of “complaints”³⁴ and queries categorized by type and state, and, within the state, by county. This database was made available on election day via the Internet. In total, some 15,500 election day reports of alleged irregularities were registered in the database, approximately half of which were related to voter registration issues.
- An exit polling exercise which covered two key “swing” states, Ohio and New Mexico. The exit poll did not ask for whom citizens had voted, but rather covered a number of aspects of the polling process.

In addition, a civic effort known as *Count Every Vote* was organized in seven southeastern states. The main focus of this effort was also minority voter rights, and it targeted states where this has historically been an issue. Its subsequent reporting is focused on findings related to so-called suppression of the vote in the respective states observed.

X. PARTICIPATION OF WOMEN

A record number of women were nominated to compete for seats in the House of Representatives (139 as compared to 124 in 2002). There was also a high proportion of women working in election administration and as poll workers.

XI. NATIONAL MINORITIES

The United States of America is ethnically diverse. There are numerous minority groups, which are politically important in specific regions of the country. Traditionally, high profile groups are African-Americans, Hispanic-Americans and Native Americans, and the Asian-American community is rapidly becoming more influential.

The voting rights of minorities are well represented, both through federal and state law. The activities of a wealth of civil society organizations focus attention on minority voting rights issues. In this regard, there is a breadth of information, advice and opportunities available to minority voters.

The EOM noted concerns, mainly by several African-American voters’ advocacy groups but also reported in the national media, regarding the so-called suppression of the vote. This term was used to describe the allegedly intentional effort to decrease minority voter participation through administrative shortcomings, such as inaccurate voter registers, purges of the voter register intended to remove ex-felons but which removed non felons, inaccurate voter information, and cases of voter

³⁴ In the sense of signals for irregularities communicated to the project by citizens who felt their rights were infringed, rather than formal complaints referred to the judiciary.

intimidation.³⁵ Other than press reports, the EOM was not aware of such instances and was not able to identify any first-hand evidence for alleged vote suppression.

The EOM was presented with a few examples of anonymous leaflets, allegedly distributed in the immediate pre-election period with the supposed intention to “suppress” the vote of historically disadvantaged minorities. While recognizing the seriousness of such allegations, the EOM was not provided with substantial evidence that such practices existed.

XII. IMPLEMENTATION OF HAVA DURING ELECTION DAY PROCEDURES

A. GENERAL ASSESSMENT

Voting took place in some 186,720 polling places across the U.S. Election day and was characterized by a high turnout, in total 122, 280, 899 voters cast their ballots. In a number of areas, this resulted in long lines and pressure on poll workers. The EOM commends the patience of voters who waited to cast their vote, in some cases for several hours, and the commitment of poll workers, performing at times under difficult conditions.

EOM observation reports indicated that the polling process was mostly uneventful. While the polls were generally well administered, observers also noted that poll workers displayed varying levels of knowledge on correct procedures e.g. on use of the provisional ballot. It was not clear that poll workers had generally received sufficient training to perform their functions.

The EOM heard concerns that, due to variances in the numbers, quality and type of voting equipment units in usage in polling stations throughout the country, disparities in exercising the right to vote could have occurred. It seems that in those areas where voters had to wait in long lines, waiting periods may have deterred voters from voting, particularly those who were working on 2 November and were not given time off by their employers.

Announcement of preliminary results was prompt and transparent. Initially, preliminary state-by-state results were announced by the media on the basis of exit polls, and later announced by state election administrators. While exit poll predictions often corresponded to official preliminary results, there were also some divergences that appeared to be mostly within the exit polls’ margins of errors.

OSCE observers were granted access to polling stations in California, Florida, Illinois, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Virginia and Washington DC. Access was sometimes limited to specific counties or to specific polling stations within a particular county, contrary to OSCE commitments. In those places where access was granted, OSCE observers noted that the key elements of HAVA were being implemented.

B. PROVISIONAL BALLOTS

There were varying approaches, from one state to another, regarding the use of provisional ballots. In a number of states where the issue was not litigated, provisional ballots were counted, provided

³⁵ In the U.S. context, “voter intimidation” was explained to the EOM as a police or private security guard presence around precincts, usually in minority communities, who act in ways that may cause some potential voters to turn away from the polls.

the voter was eligible to vote and had cast his or her vote in the correct county. Otherwise, provisional ballots were counted when cast in a voter's "home" precinct.

There was no clear procedure for collating and disseminating data on the number of provisional ballots cast in a particular state. This led to a degree of uncertainty about whether the number of such ballots cast, for example in the State of Ohio, had the potential to affect the overall result in the presidential race. Apart from this, there were few reported problems connected with provisional balloting on or after election day.

C. VOTER CHALLENGES

It would appear that relatively few voters were challenged in polling stations to confirm their eligibility to vote, despite indications that such challenges would be launched on a large scale. Similarly, the high number of lawyers deployed by both major parties does not appear to have led to a significant level of litigation on election day.

D. VOTING BY DIRECT-RECORDING ELECTRONIC (DRE) VOTING MACHINES

On election day, there were limited reports of voting machine malfunctions, but this did not disturb the overall election process. During voting hours, some interlocutors were of the opinion that the DRE systems caused delays in the voting process because voters were not familiar with their operation. Observers also noted that some voters, mostly but not exclusively the elderly, had difficulties with new voting technologies, necessitating assistance from poll workers. Many counties provided instructional brochures and videos to introduce this technology to voters. Some counties allowed senior citizens to use paper ballots if they were not comfortable with the new equipment.

Some concerns were expressed by observers regarding the secrecy of the vote due to the positioning of the voting machines in polling stations. While political party observers were present in many polling stations, non-partisan observers often had no legal right to such access, contrary to OSCE commitments.

XIII. COMPLAINTS AND APPEALS

Complaints and litigation figured prominently in the pre-election period on a range of issues, with a number of challenges brought or supported by one of the major political parties. However, despite the deployment of a high number of lawyers to pursue judicial remedies before, on and after election day, the volume of litigation was less than some anticipated. The Election Reform Information Project attempted to follow litigation related to the 2 November 2004 elections and a comprehensive table of election related litigation can be seen at the project's website.³⁶

In the pre-election period, legal challenges were brought on such matters as validation and invalidation of voter registrations, rules for use of provisional ballots, voting rights of minority population and ex-felons, and the establishment of early voting polling locations in states where early voting was permitted.

³⁶ <http://www.electionline.org>

In early October 2004, three citizens of Florida and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a lawsuit³⁷ against the election supervisors of five Florida counties and the Secretary of State of Florida based on refusal to register voters who submitted incomplete registration application forms. The AFL-CIO sought relief in order to ensure that its members in Florida would not be denied the right to vote based on the submission of incomplete voter registration information. On 26 October 2004, the court dismissed the case and ruled that the AFL-CIO did not have legal standing to maintain the lawsuit. As for the three individual voters, the court ruled that they had the right to supply the incomplete information after registration had been denied and to register in time for the elections. In fact, one of the individuals did supply the missing information and was registered to vote at the time, when the court dismissed the lawsuit.

Also in Florida, where ex-felons are denied the right to vote, litigation was brought to compel disclosure of a list of 48,000 ex-felons. The list had been compiled with a view to deleting those included in it from voter registers. Following disclosure and publication of the list it was found to contain a significant number of erroneous entries, and subsequently this list was not used.

The rules on provisional balloting were the subject of intensive litigation in different parts of the U.S., including Colorado, Florida, Iowa, Michigan, Missouri, North Carolina, Ohio and Washington. Initially, courts at different levels seemed to be taking different views, although by election day a consensus emerged in those states where the point was litigated, that voters using provisional ballots had to cast the ballot in their “home” precinct.

Another subject of significant litigation was the use of voter challenges. About 10 days before election day, the Republican Party in Ohio lodged challenges in respect of 35,000 newly registered voters in the state. These were based on the fact that election-related mailings to these voters had been returned undeliverable. This was regarded as evidence that the addresses given by these voters were inaccurate and that the voters did not reside at the addresses indicated, and were therefore ineligible to vote in their assigned precinct. However, the party was prevented from pursuing these challenges before election day by court order. A further order was sought to prevent the challenges being made on election day itself. However, this time the courts refused to make the order and the Supreme Court declined to intervene. Despite the court’s ruling, it would appear that few challenges were in fact mounted on polling day. Similar attempts in Nevada to challenge 17,000 voters in the Las Vegas area were stopped by court order, and in Wisconsin the Milwaukee city election board prevented proposed challenges of 5,600 voters.

There were relatively few legal challenges on election day, with sporadic claims relating to late poll openings, shortage of voting machines and the counting of absentee ballots. All these appeared to be resolved without any significant effect on the overall electoral process.

Following election day, a legal challenge was filed in the State of Ohio seeking a recount of votes and to set aside the election results.³⁸ Several voters and the candidates from the Green Party and Libertarian Party sought a court order requiring the Secretary of State to conduct a recount of the votes based on allegations of voting irregularities throughout the state. The court denied the request for the recount order, ruling that Ohio state law did not grant a voter the right to request a recount. The court also ruled that, although Ohio state law did provide a candidate the right to request a

³⁷ *AFL-CIO et al. v. Hood*, U.S. District Court, the Southern District of Florida.

³⁸ *Rios, et al., vs. Blackwell*, 22 November 2004, U.S. District Court, the Northern District of Ohio.

recount, neither the Green Party nor Libertarian Party candidate could “credibly maintain that he possesses even a remote chance of victory through a recount”. The court concluded that it would be improper for it to “interfere with the final stages of Ohio’s 2004 electoral process”.

In another case³⁹, the plaintiffs claimed that voting irregularities throughout the state had resulted in errors exceeding several hundreds of thousands of votes. They also included a claim against an Ohio Supreme Court Justice, who was a candidate for re-election to the Ohio Supreme Court. On 16 December, the lawsuit was ordered dismissed on the grounds that the plaintiffs “improperly combined two election contests in the same petition”. On 17 December, these voters filed a new election contest omitting the claim challenging the Justice’s election. However, the Electoral College results were certified while the case was pending. As the outcome of the case could not affect the Electoral College’s choice of President and Vice President, the complaining voters dismissed the case on 12 January 2005.

XIV. RECOMMENDATIONS

The OSCE/ODIHR is pleased to offer a number of recommendations for consideration by the U.S. authorities. In view of the decentralized nature of U.S. election administration, it would appear appropriate to formulate such recommendations within the framework of the minimum federal standards approach as demonstrated by HAVA. While HAVA implementation is due for completion in January 2006, ongoing electoral reform efforts to address an array of issues as cited in this report should be considered.

In this process, structured consultations between election officials, voter advocacy and domestic non-partisan observer groups to discuss perceived administrative or other obstacles in relation to effective participation would enhance public confidence in the election process.

A. POSSIBLE AMENDMENTS TO EXISTING MINIMUM STANDARDS

- 1. Provisional ballots.** In the context of provisional balloting, the legislature should provide a precise definition of the term “jurisdiction”. Election officials should ensure that, at the time of announcing initial unofficial results, these include the totals of provisional ballots cast and ultimately the number counted. This would provide for a comparison of the margin between leading candidates and the number of provisional ballots cast in a concrete contest, with a possible estimate for the impact of provisional balloting on the outcome.
- 2. Absentee (out-of-country) voting by fax.** The practice of allowing voters to send completed ballots by fax, permitted in some states for voters residing abroad, discloses the secrecy of their ballot. Given that the secrecy of the vote is a broadly accepted principle⁴⁰, further consideration should be given to developing voting mechanisms for out-of-country voters, which preserve the secrecy of the vote, in line with OSCE commitments.
- 3. Voter identification and voter challenges.** Serious consideration should be given to address both voter identification and voter challenge rules simultaneously, with a view to amend both

³⁹ *Moss, et al. vs. Bush, et al.*, 13 December 2004, Supreme Court of Ohio.

⁴⁰ Article 25 of the International Covenant on Civil and Political Rights; Paragraph 7.4 of the 1990 Copenhagen Document.

of them and achieve guarantees for integrity while removing perceived intimidation. In the absence of broadly used voter identification rules requiring each voter to show an identification document with photo when he or she goes to the polling station to vote, voter challenges may be perceived as a possibility to enhance the integrity of the polling process. However, they can equally be perceived as intimidating, depending on personal attitudes and respective circumstances.

4. DRE voting equipment. While the ultimate deadline for implementation of DRE voting equipment, to satisfy the requirements of HAVA, expires on 1 January 2006, the following measures could prove essential with a view to enhance voters' confidence in such new voting technologies:

- (i) Inclusion of provisions that will permit competent individuals, academic institutions or civil society groups to comprehensively and independently test DRE voting equipment subject to reasonable limitations related only to patent or copyright law. However, such testing should not be perceived as a substitute for the establishment of inclusive and transparent certification procedures.
- (ii) Approval of provisions that will ensure against possible conflicts of interests of the vendors.
- (iii) As the requirements of HAVA include that DRE systems produce a permanent paper record with a manual audit capacity, serious consideration should also be given to ensuring a voter verified auditable paper trail (VVAPT).
- (iv) Establishment of a clear division of responsibilities between vendors, certification agencies and election administrators, to fully ensure accountability and an effective response in the case of failure of DRE equipment.

5. Poll worker training. During the implementation of HAVA, consideration should be given to enhance individual states' efforts in training poll workers to manage new voting equipment, by releasing additional federal funding for training activities. Such measures have also the potential to further accelerate processing of voters on election day.

6. Early voting sites. Based on experience from the 2 November 2004 election, consideration could be given to increase the numbers of early voting sites, and ensure their balanced distribution, with a view to reduce waiting times, further encourage voters' participation, and ensure equal access to this provision.

B. POSSIBLE NEW MINIMUM STANDARDS

7. Access of international observers to the polling process. Congress and individual states should consider how to ensure unimpeded access to all stages of the election process for international observers who have been invited to observe U.S. elections by the U.S. Government, in order to bring state laws fully in line with the United States' OSCE commitments.

8. Domestic non-partisan observation. Consideration should also be given to developing criteria to determine which civic groups are accredited as domestic non-partisan election observers. This would further enhance transparency and bring state laws fully in line with the United States' OSCE commitments. Additionally, regulation of involvement of civil society

groups in voter registration has the potential to streamline such activity, to the benefit of voters.

9. **Civil and political rights of ex-felons.** In regard to restriction of civil and political rights of ex-felons, federal and state laws should ensure that the principle of proportionality between offense and sanction is upheld. This will also enhance uniformity of voter qualifications for federal elections and avoid any discrimination in respecting the principle of universal suffrage.
10. **District boundaries.** With a view to ensuring genuine electoral competition in congressional districts, consideration should be given to introduce procedures for drawing district boundaries that will be based on information other than voters' voting histories and perceived future voting intentions.

ABOUT THE OSCE/ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 100 staff.

The ODIHR is the lead agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following thematic areas: rule of law, civil society, freedom of movement, and gender equality. The ODIHR implements a number of targeted assistance programmes annually, seeking both to facilitate and enhance State compliance with OSCE commitments and to develop democratic structures.

The ODIHR monitors participating States' compliance with OSCE human dimension commitments, and assists with improving the protection of **human rights**. It also organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States.

Within the field of **tolerance** and **non-discrimination**, the ODIHR provides support to the participating States in implementing their OSCE commitments and in strengthening their response to hate crimes and incidents of racism, xenophobia, anti-Semitism and other forms of intolerance. The ODIHR's activities related to tolerance and non-discrimination are focused on the following areas: legislation; law enforcement training; monitoring, reporting on, and following up on responses to hate-motivated crimes and incidents; as well as educational activities to promote tolerance, respect, and mutual understanding.

The ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing-house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE participating States, OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website (www.osce.org/odihhr).