



Office for Democratic Institutions and Human Rights

UNITED STATES OF AMERICA
MID-TERM CONGRESSIONAL ELECTIONS
7 November 2006

OSCE/ODIHR NEEDS ASSESSMENT MISSION REPORT

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OSCE/ODIHR Needs Assessment Mission Report 19 July 2006

I. INTRODUCTION

Following a 2 May 2006 welcome letter from the Secretary of State of the United States of America, the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) conducted a Needs Assessment Mission (NAM) to Washington D.C. in relation to the 7 November 2006 mid-term congressional elections.¹ The NAM took place between 15 and 18 May 2006, and was led by Ambassador Christian Strohal.

The purpose of the OSCE/ODIHR NAM was to assess preparations for the upcoming elections, including the degree of implementation of the 2002 Help America Vote Act (HAVA). This report should be read in conjunction with the OSCE/ODIHR Final Report on the 2004 general elections in the United States of America.

The OSCE/ODIHR NAM held meetings in Washington D.C. with representatives of the Department of State, Congress, White House, National Association of Secretaries of State (NASS), Federal Election Commission (FEC), Election Assistance Commission (EAC) and civil society groups, and the OSCE/ODIHR looks forward to meeting with representatives of the Republican National Committee and the Democratic National Committee at the next convenient opportunity.

The OSCE/ODIHR is grateful to the authorities of the United States of America for their co-operation and support provided prior to and during the NAM.

II. EXECUTIVE SUMMARY

The United States of America has extended regular invitations to the OSCE/ODIHR for federal elections in the U.S. Furthermore, upon the release of the OSCE/ODIHR Final Report on the 2004 general election, the U.S. has initiated a follow-up dialogue with the OSCE/ODIHR.

¹ In a letter of 19 June, 2006 to the OSCE/ODIHR Director, Ambassador Christian Strohal, from the Head of the United States Mission to the OSCE, Ambassador Julie Finley, an invitation was extended to the OSCE to observe this election.

All seats in the lower chamber of the U.S. Congress, the House of Representatives, are put to the vote every two years, together with one third of the seats of the upper chamber, the Senate, whose members are elected to a term of office of six years. Most states have chosen a first-past-the-post system for electing the members of both chambers. The Senators to be elected in the 7 November elections are 33 “Class I” Senators².

Districts for Senate seats are the states themselves. With a view to ensure equal representation of the population and at least one seat in the House of Representatives per state, redistricting of existing districts for the House of Representatives must be conducted every ten years, following a decennial census.

Generally, the drawing of district boundaries is conducted by state legislatures. This impacts upon the competitiveness of the races since state legislatures are political bodies. Once the numbers of districts for each state are determined after the decennial census, congressional districts are to be drawn so that the population of congressional districts in the same state must be as nearly equal in population as practicable. Generally, guidance as to when this standard has been violated is provided on a case by case basis when a particular redistricting plan is challenged in court. A few recent attempts to reform the practice of districting have been defeated by voters in referenda. In six states, the drawing of district boundaries is tasked to special commissions.

After the expiry of all HAVA deadlines on 1 January 2006, a number of states continue their efforts to achieve full implementation of HAVA, in particular in regard to compilation of statewide voter registration databases and the introduction of direct recording electronic (DRE) machines for voting. Federal authorities have undertaken legal action against two states that lag considerably behind in this respect.

An important issue has been addressed by the Federal Election Commission (FEC) concerning use of the Internet for campaign purposes. In March 2006, the FEC approved a regulation elaborating on the existing legal framework regulating campaign efforts on the Internet.

One issue that remains unresolved, however, is whether certain provisions of the 1965 Voting Rights Act (VRA), which expire in August 2007, will be extended. It has been proposed that these provisions, Sections 5 and 203 of the VRA, be extended for a term of 25 years, and discussion continues in the US Congress.

Repeated concerns expressed by civil society and advocacy groups regarding the so-called suppression of the vote³ were noted by the NAM. The continued public discourse, including in the U.S. media, could facilitate identification of workable solutions.

² The Senate is composed of three “classes”, as explained later in this report.

³ Alleged activities aiming to decrease voter participation either through administrative shortcomings or through disinformation and intimidation.

As a response to experiences from the 2 November 2004 general elections, a number of civil society groups published the 2005 Carter-Baker Report providing recommendations on important electoral issues⁴. It would appear that the U.S. Congress will not undertake any new electoral reform legislation until after the implementation of current legislation is thoroughly assessed.

In a positive development since the November 2004 election, the National Association of Secretaries of State (NASS) passed a resolution welcoming OSCE election observers and supporting their access to the electoral process, “as U.S. and state law allows”. The NASS has also called on Secretaries of State, State Election Directors and all county and municipal officials to lend their full support to facilitating international election observation.

The OSCE/ODIHR NAM recommends that an Election Assessment Mission (EAM) to the United States of America be deployed in relation to the forthcoming mid-term congressional elections to take place on 7 November 2006. The EAM will focus on relevant issues in the context of the 1990 OSCE Copenhagen Document, including implementation of the 2002 Help America Vote Act. The OSCE/ODIHR Election Assessment Mission would intend to deploy some two weeks prior to election day.

III. BACKGROUND

A. SYSTEM OF U.S. GOVERNMENT

The electoral system in the United States of America reflects the decentralized nature of the US system of government. While elections are conducted according to different legislation in all 50 states and other territories⁵, important differences in polling procedures can also occur between different counties within the same state.

The OSCE/ODIHR reports related to observation of elections in the U.S. contain further details, including in regard to the system of governance and voting rights of U.S. citizens in federal elections, and can be found at <http://www.osce.org/odihr-elections/14676.html>.

As the United States of America is a signatory to the OSCE 1990 Copenhagen Document, individual states have an obligation to abide by the aforementioned document in a uniform and consistent manner, including access for OSCE observers at the polling station level.

⁴ “Building Confidence in U.S. Elections”, Report of the Commission on Federal Election Reform, Center for democracy and Election Management, American University, 4400 Massachusetts Avenue, NW, Washington D.C. 20016-8026, September 2005, also http://www.american.edu/ia/cfer/report/full_report.pdf

⁵ Following the publication of the Final Report on the observation of the 2004 general elections in the U.S., it was established that the Harcon Tract had ceased to be a part of the U.S. as the result of a treaty with Mexico which was finalized in the late 1970s.

B. PREVIOUS OSCE/ODIHR ELECTION OBSERVATION ACTIVITIES

In line with the commitments outlined in the 1990 Copenhagen Document, the OSCE/ODIHR was invited to observe U.S. elections in 1996, 1998, 2000, 2002 and 2004. In 2002, the OSCE/ODIHR undertook an Election Assessment Mission to follow the congressional mid-term elections of that year, focusing mainly on the State of Florida.

In 2004, 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, and concluded that they mostly met the OSCE commitments. Implementation of HAVA was of particular interest.

Following the release of the OSCE/ODIHR Final Report on the 2 November 2004 elections, the U.S. authorities invited the OSCE/ODIHR to conduct a follow-up visit to Washington D.C., respecting their commitments under the 1999 Istanbul Summit Document to address OSCE/ODIHR recommendations, and also invited the OSCE Parliamentary Assembly. Ambassador Christian Strohal, the OSCE/ODIHR Director, led the follow-up visit that took place between 10 and 13 October 2005, and included consultations with representatives of the U.S. authorities and civil society on the recommendations contained in the Final Report.

As a result of these assessments, the OSCE/ODIHR identified a number of issues that required attention by the relevant authorities, such as access for observers to the election process and implementation of some provisions of HAVA.

IV. MID-TERM CONGRESSIONAL ELECTIONS

A. U.S. CONGRESS

The U.S. federal 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.

B. ELECTIONS TO THE SENATE

Each U.S. state elects two Senators for a term of six years. However, Senators are divided into three classes so that one-third of the Senate is elected every two years.⁶ Further, both

⁶ Article 1, Section 3, Clause 2 of the US Constitution establishes that “they shall be divided as equally as may be into three classes”.

Senate seats in a state are not in the same class to ensure that they are elected in different elections. Thus, each state represents one Senate constituency each time it is put to the popular vote⁷. Since there are three classes of Senators and the term of office is six years, each state has a Senate election in only two of the three mid-term elections that occur during a six-year cycle.

The first Class I Senators of 1789, when the first elections for the U.S. Senate took place, had a term of two years; the Class II Senators of 1789 had a term of four years; and the Class III Senators of 1789 had a term of six years. When a new state was admitted to the U.S., its two senators were assigned to two different classes in order to meet the Constitutional requirement that the Senate be “divided as equally as may be into three classes”. This means that one of the two Senators of a newly admitted state would initially have a term for less than six years and one will initially have a term that is two or four years shorter than the other Senator’s term. Class I consists of 33 Senators, as listed in Annex 2, whose terms expire in January 2007. These Senate seats will be filled by the 7 November elections. Class II consists of 33 Senators, whose terms expire in January 2009. Class III consists of 34 Senators, whose terms expire in January 2011.

With the exception of Georgia and Louisiana, states elect their Senators in first-past-the-post elections. Georgia and Louisiana use a second round run-off system should no candidate receive 50% plus one of the votes in the election. Senate vacancies are filled by special elections. However, the 17th Amendment of the U.S. Constitution does authorize state legislatures to empower the state’s governor to make temporary appointments to fill a vacancy. All states, with the exception of Arizona, have authorized the state’s governor to make temporary appointments to fill a vacancy. Whether by special election or appointment, the successor completes the remainder of the six-year term.

C. ELECTIONS TO THE HOUSE OF REPRESENTATIVES

The number of seats that each state has varies according to the states’ respective populations and is updated every ten years, following a decennial census, to ensure equal representation of the population and at least one seat in the House of Representatives per state. The last U.S. census was conducted in 2000. The next census, anticipated in 2010, is to be followed in 2011 by a countrywide regular re-districting to become effective for the 2012 general elections.

The distribution formula⁸ for the number of seats in the House of Representatives per state reflects the constitutional requirement that seats are allocated proportionally to population,

⁷ The numbers of voters for each senate district varies substantially and without restrictions. This is consistent with the principle that each state must have equal representation in the Senate regardless of population.

⁸ U.S. Census Bureau, Internet release date 17 October 2000; see also <http://www.census.gov/population/www/censusdata/apportionment.html>.

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.⁹

D. DISTRICTING RELATED TO ELECTIONS FOR THE HOUSE OF REPRESENTATIVES

Guidance on the federal level for drawing congressional districts is driven by court decisions rather than federal statutory criteria. This occurs on a case by case basis when a particular redistricting plan is challenged in court. Thus, the drawing of boundaries for congressional districts and relevant responsibilities are mostly vested in state legislatures. As state legislatures are political bodies, it appears that mutually convenient solutions are often reached, thereby impacting on the competitiveness of the election races¹⁰.

In six states¹¹, the authority for establishing boundaries of congressional districts is vested in specially appointed commissions instead of the state legislature. Overall, such commissions include members appointed either from the two largest political parties represented in the respective state legislature or by the legislative leaders of the two largest political parties. Such commissions could be considered “independent” in the sense that the appointment process for each commission is designed to prevent control over the commission by one political party.

Lawsuits were filed in 28 states, subsequent to the 2000 U.S. decennial census, challenging various aspects of the respective state’s plan for congressional districts.¹² The US Supreme Court, in an opinion exceeding 100 pages, decided redistricting cases concerning Texas on 28 June. Lawsuits over congressional districting remain pending in Colorado.

The Texas lawsuits are considered important as the United States Supreme Court agreed to consider four of these cases. The Texas cases raised several issues concerning the time and manner in which states establish congressional districts, including issues related to possible partisan gerrymandering and racial discrimination. The Texas cases also raised the constitutional question of whether a state may engage in congressional redistricting between decennial censuses when a legally acceptable congressional plan already exists.

Controversy over congressional redistricting has generated proposals for reform in some states. Proposals in California and Ohio were followed closely as both states presented the issue to voters in statewide referenda in 2005.

⁹ The Huntington-Hill formula is also known as the equal proportions method.

¹⁰ According to interlocutors, approximately 10 percent of the districts provide for fully competitive congressional races.

¹¹ Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington.

¹² Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

The California proposal would have required the California legislature to appoint a panel of "Special Masters" to develop the plan for congressional districts. These "Special Masters" would be selected from a pool of twenty-four retired judges, none of whom could have held elected office or pursued partisan office within the previous five years. This pool would be reduced to twelve members, with three members each being selected by the leaders of the two largest political parties of both houses of the legislature. The leaders of the two largest political parties of both houses of the legislature would then exclude one member each from the pool, reducing the number to eight. Lots would then be chosen for the final three "Special Masters", one of whom would have to be a selection of a different political party than the other two "Special Masters". On 8 November 2005, California voters defeated this proposal, with 59.8% voting against it.

The Ohio proposal would have created the Ohio Independent Redistricting Commission, which would have been responsible for drawing state and federal legislative districts. This commission would consist of five members. Two members would be appointed by the longest and second longest serving judges on the State Court of Appeals, each of whom is a nominee of a different political party. These two members would then select three other members, using an application process designed to identify persons who could serve in a non-partisan manner. On 8 November 2005, Ohio voters defeated this proposal, with 69.7% voting against it. A similar proposal to place the issue before voters again was defeated in the Ohio legislature in May 2006. It would therefore appear that the current system in these two states enjoy popular support.

V. ELECTORAL REFORM

A. POSSIBLE AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965

Sections 5 and 203 of the federal VRA expire in August 2007. However, the application of Sections 6 through 9, which do not expire, could be affected since these sections currently can be utilized by the US Attorney General in Section 5 "pre-clearance" jurisdictions.¹³ The NAM was informed of a bi-partisan agreement to extend the validity of these provisions for a period of 25 years.¹⁴

Section 5 of the VRA requires certain states and political subdivisions to obtain federal or judicial approval ("pre-clearance") of any proposed change in voting legislation or practices

¹³ Sections 6 through 9 contain provisions for the appointment of federal examiners and observers to assist with the registration of voters, receive complaints, and observe and document voting and counting activities in elections. The authority of the US Attorney General to make an appointment is limited to Section 5 pre-clearance jurisdictions. Thus, the expiration of Section 5 could impact the exercise of Sections 6 through 9. A court could still authorize the appointment of examiners and observers.

¹⁴ However, according to recent information from the media, the discussion on this issue continues in the U.S. Congress and agreement is still outstanding.

before such changes could take effect. Section 4(a) provides a formula for determining whether a state or political subdivision is covered by Section 5. Section 5 is triggered if the state or political subdivision (1) relied on a “test or device”, *e.g.* a literacy requirement, as a precondition to voting or registration as of 1 November 1964 or (2) relied on such a test or device as of 1972 *and* less than 50% of the voting-age residents were registered to vote or actually voted in the presidential elections of 1964, 1968, or 1972. Section 4(a) also has a “bail-out” mechanism whereby states and political subdivisions can be removed from Section 5 status by meeting certain requirements. Currently, Section 5 covers nine entire states¹⁵, as well as sixty-six counties, townships, and towns in seven other states¹⁶.

Section 203 of the VRA requires certain jurisdictions to provide language assistance at polling locations for citizens with limited English proficiency (“LEP”).¹⁷ These provisions apply to four language minorities: Spanish, Asian, Native American and Alaskan Native. Section 203 is triggered when (1) more than 5% of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited LEP *or* more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are LEP *and* (2) the illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.¹⁸ Section 203 currently applies to 466 political subdivisions in 30 states¹⁹.

B. THE CARTER–BAKER REPORT

Following the 2004 general elections, a number of civil society groups joined efforts to address perceived avenues “... to raise confidence in the electoral system ...” The effort was led by former U.S. President Jimmy Carter and former U.S. Secretary of State James A. Baker, III. The effort resulted in the publication of a report. The report listed 87 recommendations and focused on furthering the electoral reform initiated by HAVA, including countrywide uniform voter registration and voter identification, measures to increase voter participation, particularly for out-of-country voters, introduction of auditable backup on paper for electronic voting machines and nonpartisan state election management. Notably, the Carter-Baker report called on “... all of the states to provide unrestricted access to all legitimate domestic and international election observers ...”

¹⁵ Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.

¹⁶ California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

¹⁷ Registration and voting materials for all elections must also be provided in the minority language. Oral translation during all phases of the voting process is also required.

¹⁸ LEP means that one is unable to speak or understand English adequately enough to participate in the electoral process. Illiteracy means the failure to complete the fifth primary grade of school. The Director of Census determines whether a jurisdiction satisfies the requirements of Section 203.

¹⁹ Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington.

In the course of its meetings, both the OSCE/ODIHR follow-up mission and the NAM enquired of possible legislative response to the Carter-Baker report. It would appear that the US Congress would currently prefer to see the 2002 HAVA fully implemented and tested in the field prior to any new legislative effort. Further to that, a number of civil society groups expressed their disagreement with the report, particularly regarding the suggestion to introduce new identification requirements for voters.²⁰

C. HAVA: THE DEADLINES EXPIRED

All deadlines for implementation of HAVA expired on 1 January 2006.²¹ All federal funds released under HAVA have been appropriated.

Within the framework of its limited mandate, the U.S. Election Assistance Commission (EAC) continues to provide support to states in meeting HAVA's requirements, including by issuing voluntary guidelines in regard to particular issues, such as the Voluntary Voting System Guidelines adopted already by 39 states. In the near future, the EAC intends to develop guidelines on certification of Direct Recording Electronic (DRE) machines, provisional voting, and recruitment of college students for polling board members and improvement of voter registration forms.

A number of states continue their efforts to achieve full implementation of the HAVA, in particular in regard to compilation of statewide voter registration databases and the introduction of DRE machines for voting. However, a dozen states²², notably California, Alabama and New York, missed the 1 January 2006 deadline for compiling statewide voter registration databases²³.

The use of optical scanning and DRE machines has nearly doubled across the U.S., replacing punchcard equipment that was unable to warn voters of an overvote (choosing more candidates than allowed, thus invalidating the ballot). As of early 2006, state law or other regulations in 25 states have introduced DREs with a voter verified audit paper trail²⁴; additionally Mississippi has introduced it in all counties where DREs will be in use. After the expiry of the deadline for upgrading voting equipment, some one third of the states have not been able to ensure that in each polling station there is one voting machine that satisfies the needs of people with disabilities. Responsibility for failure of voting equipment is vested with the election officials, which only contributes to the sensitivity of their jobs. Civil society

²⁰ Some civil rights groups state that such regulations could disenfranchise voters, in particular those in lower-income brackets, those that are highly mobile, and minority communities.

²¹ In its Final Report on the 2004 general elections, the OSCE/ODIHR noted that "... some deadlines for the implementation of HAVA's key provisions might have been too ambitious ...".

²² "Election Reform: What Has Changed, What Hasn't and Why, 2000-2006", www.electionline.org.

²³ North Dakota is exempt from HAVA database requirements as it does not conduct voter registration.

²⁴ "Election Reform: What Has Changed, What Hasn't and Why, 2000-2006", www.electionline.org.

groups alleged that there is a need for more transparency in regard to maintenance of DREs, which on occasions have reportedly been delivered before being certified. The NAM was also informed of isolated cases of malfunction of DREs.

There is a notable initiative, at the state level, to introduce more stringent requirements for identification when voters receive ballots in polling stations on election day. The US Department of Justice (DoJ) has cleared, in accordance with Section 5 of the VRA, that the requirement for photo IDs does not represent a means to disenfranchise voters. In Missouri, Georgia and Indiana, state legislatures have approved legislation requiring voters to present identification documents with a photo when they go to polling stations to vote. A number of other states have enhanced their regulations in this regard. There are 22 states that now require all voters to show an ID in order to receive a ballot²⁵. Some civil rights groups continue to insist that such regulations could disenfranchise voters, in particular those in lower-income brackets, those that are highly mobile, and minority communities.

While controversies over provisional voting remain, it would appear that many states are considering introducing rules to count the number of provisional ballots cast within 24 hours of the closure of polls, as adequate to address whether provisional ballots could impact upon the outcome of a contest decided by a narrow margin.

Early voting would appear to be gaining greater acceptance among voters. As a result, the importance to set up more early voting polling stations, particularly in urban locations, is taking prominence. Some states now allow for ballots to be printed from the Internet in order to shorten by half the timeframe for absentee voting, in particular for voting out-of-country.

D. FEDERAL ACTION FOR NON-COMPLIANCE WITH HAVA

Since 2004, four lawsuits have been filed by the U.S. Department of Justice²⁶ (DoJ) for HAVA non-compliance. In comparison, during the same period, the DoJ filed 17 lawsuits under the federal Voting Rights Act, four under the Overseas Citizens Absentee Voting Act, and three under the National Voter Registration Act. Two of the HAVA lawsuits were also based on violations of the Voting Rights Act.²⁷ Thus, only two “pure” HAVA lawsuits, against the States of New York and Alabama, have been filed by the DoJ since the law was enacted. Additionally, the State of California entered into an agreement with the DoJ allowing California to create an interim database of voters.

²⁵ *ibid.*

²⁶ The US DoJ is charged with enforcing HAVA provisions.

²⁷ *United States of America, Plaintiff, v. San Benito County, California, et al., Defendants (USDC ND Cal.) and United States of America, Plaintiff, v. Westchester County Election Board, et al., Defendants (USDC SD NY).* The HAVA issues in these two lawsuits related to minority language requirements and providing and posting written voter information and assistance. Both of these lawsuits resulted in “consent decrees” whereby the defendants agree to remedy the violations.

On 1 March 2006, the DoJ filed a lawsuit against the State of New York for violations of Sections 301 and 303(a) of HAVA.²⁸ Section 301 of HAVA establishes voting system standards to be followed by states in an election for federal office and Section 303(a) requires each state to have a statewide voter registration list. Concerning the Section 301 claim, the lawsuit asserts that New York does not presently have voting systems in place for the conduct of elections for federal offices which comply with all of the voting system standards set forth in Section 301(a)(1) – (a)(6) of HAVA.²⁹ The complaint states that New York does not have a uniform and non-discriminatory definition of what constitutes a vote for each category of voting system used. The complaint also states that New York’s existing voting systems do not provide accessibility for persons with disabilities and fail to produce a permanent paper record with manual audit capacity. The DoJ claims that New York has received \$221 million in federal HAVA funds, including \$49 million for the purpose of replacing punchcard and lever voting machines and \$1.5 million for assuring access to the voting process for individuals with disabilities.

As to the Section 303(a) claim, the lawsuit asserts that New York does not have a statewide voter registration list and has not even issued public documents necessary for contracting with potential vendors for the development and implementation of a statewide voter registration list. The DoJ also asserts that the state has not established the technical requirements or built the necessary infrastructure for a statewide voter registration list and has failed to enter into an agreement with the federal Social Security Administration to match information from a statewide voter registration list against the federal social security number database.

On 23 March 2006, the court entered an order finding that the State of New York had not complied with HAVA and ordering the state to submit a comprehensive remedial plan detailing how the state intended to achieve HAVA compliance. The state’s remedial plan was filed on 10 April and supplemented on 20 April. Under the plan, the state will achieve HAVA compliance in 2007. The DoJ, stating it is “mindful at this late date of the potential for disruption of the federal election process in New York if plans for full HAVA compliance are implemented in too hasty a manner...”, has agreed to the remedial plan but requested that the

²⁸ United States of America, Plaintiff, v. New York State Board of Elections; Peter S. Kosinski and Stanley L. Zalen, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and State of New York, Defendants, Civil Action No. 06-CV-0263 in the United States District Court for the Northern District of New York.

²⁹ These provisions require that a state’s voting system: (1) provide a mechanism for a voter to verify and, where necessary, correct his or her ballot, including notification of, and the opportunity to correct, any overvote, (2) produce a permanent paper record with a manual audit capacity, (3) provide for accessibility for voters with disabilities in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters, (4) provide for accessibility, consistent with the requirements of the 1965 Voting Rights Act, for voters with alternative language needs, (5) meet a specific error rate standard in counting ballots established by the Federal Election Commission, and (6) have a uniform and nondiscriminatory definition of what constitutes a vote, and will be counted as a vote, for each type of voting system.

Court impose reporting requirements on the state in order to verify timely compliance with the remedial plan.

On 1 May 2006, the DoJ filed a lawsuit against the State of Alabama for violation of Section 303 of HAVA.³⁰ The lawsuit asserts that the State of Alabama does not have a statewide voter registration list. This lawsuit presents allegations against the State of Alabama similar to those presented against the State of New York over the failure to establish a statewide voter registration list. On 7 June 2006, the court entered an order finding that the State of Alabama had not complied with HAVA and ordering the state to promptly develop a HAVA compliance plan. The state had to file the plan with the court by 29 June 2006. Objections to the proposed plan were to be filed by 13 July 2006. A hearing on the proposed plan and objections was scheduled before the court on 20 July 2006.

E. ACCESS OF OBSERVERS

In a welcome development, in a protocol from 24 July 2005, adopted at the Summer Meeting of the National Association of Secretaries of States (NASS), the NASS stated that it "... welcomes OSCE international observers from OSCE member countries to the United States." A protocol was also adopted, which states that "... OSCE international election monitors will be given access to voter registration lists, poll worker training sessions, election procedures and materials, polling places and counting centers as U.S. and state law allows." Furthermore, "... NASS encourages the Secretaries of State, State Election Directors and all county and municipal election officials to lend their full support to facilitating international election observation." During the November 2004 election, while a number of states provided access to OSCE observers, in other states access was denied or was limited.

VI. OTHER FINDINGS

A. IOWA: POLITICAL RIGHTS OF SOME EX-FELONS RESTORED

In July 2005, the Governor of Iowa issued Executive Order N 42, which restored the political rights of citizens convicted of felony charges. The political rights restored were voting and qualification to hold public office to persons who have completely discharged their sentences, including any requirements imposed by conditions of probation, parole, or supervised release, as of 4 July 2005. The restoration of rights applies even if an ex-felon has not formally asked for their restoration. However, the executive order does not apply to persons convicted of crimes arising from state or federal statutes regulating weapons. For persons who meet the qualifying conditions after 4 July 2005, the Department of Corrections is required to submit a monthly report to the Governor's Office, along with any recommendations, for the Governor

³⁰ United States of America, Plaintiff, v. State of Alabama, and Nancy L. Worley, Secretary of State, in her official capacity, Defendants, Civil Action No. 2006-CV-392-SRW (USDC MD Ala.).

to consider on a case by case basis to determine whether the restoration of political rights is warranted.³¹

B. FLORIDA: NEW LEGISLATION RAISES CONTROVERSY

Often, civil society and advocacy groups implement projects intended to enhance voter participation by delivering to voters, such as historically disadvantaged minorities, voter registration forms, assisting them with completion of the forms and delivering them to officials responsible for voter registration. The OSCE EOM of 2004 received reports that partisan groups mishandled or lost such registration forms.

The legislature of the State of Florida recently enacted legislation that imposes fines for delayed submission or failure to submit completed voter registration forms by civil society groups to the authorities. The League of Women Voters of Florida, along with the Florida AFL-CIO, other unions and some individual voters, filed suit on 18 May 2006 to challenge this new legislation and prevent its enforcement. The lawsuit remains pending.

C. COLORADO: EFFORTS TO ENHANCE PARTICIPATION

The NAM was informed that the State of Colorado has initiated establishment of voting centers in the vicinity of malls and important roads where voters could cast their ballots without losing too much time, as election day is a working day. While a number of NAM interlocutors indicated their positive attitude towards such an initiative, others expressed caution until the efficiency of the initiative is tested in practice.

D. CAMPAIGN ON THE INTERNET

The Federal Election Commission³² (FEC) amended its rules in March 2006 to include paid advertisements on the Internet in the definition of “public communication”. The rules were amended in order to implement a federal district court decision, which held that the FEC’s previous definition of “public communication” impermissibly excluded all Internet communications.³³ The new rule, adopted with consensus by the FEC, is significant as federal election activity is subject to limitations, prohibitions, and reporting requirements.

The revised definition of “public communication” includes paid Internet advertising placed on another person’s website, but does not encompass any other form of Internet

³¹ In the OSCE/ODIHR Final Report on the November 2004 election, it was noted that some states deny the right to vote to ex-felons for life, irrespective of the seriousness of the crime committed, while in some others, there are examples where specific felonies are sanctioned for life.

³² This is the US independent regulatory agency created to administer and enforce the statute that governs the financing of federal elections. It is composed of six commissioners, three Republicans and three Democrats, nominated by the President upon consultations with congressional leaders.

³³ *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004), *aff’d*, No. 04-5352, 2005 WL 1653053 (D.C. Cir. July 15, 2005).

communication. The FEC also added new exceptions to the definitions of “contribution” and “expenditure” to exclude Internet activities and communications that qualify as individual activity or for the statutory “media exemption”.³⁴ The new rules ensure that political committees properly finance and disclose their Internet communications, while at the same time allowing individual citizens to use the Internet to speak freely regarding candidates and elections.

The new rules provide that an individual, who places paid political advertising on the website of a third party, is subject to the FEC rules governing a “public communication”.³⁵ As a result, such an individual will be subject to financial and disclosure requirements regulating a “public communication”. An individual or group of individuals who develop web pages, send electronic messages, provide hyperlinks, forward material that has been cut and pasted from political websites, or otherwise use computer or Internet resources for political activity are exempt from regulation.

E. ALLEGATIONS OF IRREGULARITIES

A number of civil society groups informed the NAM once more of their election-related concerns alleging intentional suppression of the vote, in particular in minority communities, through:

- voter intimidation by partisan observers;
- local misinformation campaigns, such as organized dissemination of pamphlets from anonymous sources with incorrect data with regard to polling day procedures;
- insufficient number of DREs in lower income communities;
- lack of uniform application of voter verified audit paper trails;
- introduction of more stringent requirements for presentation of photo IDs;
- inaccurate maintenance of records of felons;
- special format for voter registration forms;

³⁴ The “media exemption” is a statutory exemption (2 U.S.C. 431(9)(B)(i)) created by Congress which exempts from the definition of “expenditure” costs associated with “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” This exemption recognizes the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns. In addition to traditional media, the media exemption applies to Internet-only media, as well as to the online components of traditional media.

³⁵ FEC rules already regulate a “public communication” by a state, district, and local party committees, FEC registered political committees (such as federal candidate committees, national party committees, and PACs), and state or local candidates that run advertisements promoting or attacking a federal candidate.

- insufficient training for polling boards, especially in regard to the new voting technologies; and
- lack of prosecution for alleged perpetrators.

As with previous elections, a lively debate on these issues is to be expected.

VII. CONCLUSIONS

The OSCE/ODIHR NAM recommends the deployment of an OSCE/ODIHR Election Assessment Mission (EAM) to the United States of America in relation to the forthcoming mid-term congressional elections to take place on 7 November 2006. The OSCE/ODIHR EAM will focus on relevant election issues in the context of the 1990 OSCE Copenhagen Document, including the implementation of the 2002 Help America Vote Act. The OSCE/ODIHR EAM would intend to deploy some two weeks prior to election day.

ANNEX 1

List of Meetings

U.S. Department of State

White House

U.S. Congress, Senate Committee on Rules & Administration

U.S. Congress, Commission on Security and Cooperation in Europe (CSCE)

U.S. Federal Election Commission

U.S. Election Assistance Commission

National Association of the Secretaries of State

Non-governmental Organisations

ANNEX 2

Class I Senators Whose Term of office Expire in 2007³⁶

Senators in Class I were elected to office in the November 2000 general election. Their terms run from the beginning of the 107th Congress on January 3, 2001 to the end of the 109th Congress in January 2007.

Class I Senators Whose Term of Service Expires in 2007

Democrats			
1	Daniel Akaka	HI	Hawaii
2	Jeff Bingaman	NM	New Mexico
3	Robert Byrd	WV	West Virginia
4	Maria Cantwell	WA	Washington
5	Thomas Carper	DE	Delaware
6	Hillary Clinton	NY	New York
7	Kent Conrad	ND	North Dakota
8	Mark Dayton	MN	Minnesota
9	Dianne Feinstein	CA	California
10	Edward Kennedy	MA	Massachusetts
11	Herb Kohl	WI	Wisconsin
12	Joseph Lieberman	CT	Connecticut
13	Robert Menendez	NJ	New Jersey
14	Ben Nelson	NE	Nebraska
15	Bill Nelson	FL	Florida
16	Paul Sarbanes	MD	Maryland
17	Debbie Stabenow	MI	Michigan

Republicans			
1	George Allen	VA	Virginia
2	Conrad Burns	MT	Montana
3	Lincoln Chafee	RI	Rhode Island
4	Mike DeWine	OH	Ohio
5	John Ensign	NV	Nevada
6	Bill Frist	TN	Tennessee
7	Orrin Hatch	UT	Utah
8	Kay Hutchison	TX	Texas
9	Jon Kyl	AZ	Arizona
10	Trent Lott	MS	Mississippi
11	Richard Lugar	IN	Indiana
12	Rick Santorum	PA	Pennsylvania
13	Olympia Snowe	ME	Maine
14	James Talent	MO	Missouri
15	Craig Thomas	WY	Wyoming

Independents			
1	James Jeffords	VT	Vermont

³⁶ http://www.senate.gov/reference/glossary_term/class.htm.

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).