

INTERIM REPORT No.1
4 – 17 October 2012
19 October 2012

I. EXECUTIVE SUMMARY

- General elections will take place on 6 November 2012 with elections for the President and Vice-President, 33 seats in the Senate, and 435 seats in the House of Representatives.
- Elections in the United States (US) are highly decentralized and federal legislation sets only minimum standards. The implementation and details of the electoral process are regulated by state laws with some decisions taken at county level. Late changes to the electoral legal framework in some states have raised concerns among some OSCE/ODIHR LEOM interlocutors about voter information and the training of poll workers.
- Recent state-level legislative initiatives to limit early voting and introduce stricter voter identification have become highly polarized. Democrats are concerned that these would disenfranchise eligible voters, while Republicans believe they are necessary to protect the integrity of the vote.
- Only US citizens who are a resident of one of the 50 states are eligible to vote. Some 4.1 million citizens that are residents of US territories are not eligible to vote, while some 600,000 citizens of the District of Columbia are only eligible to vote in the presidential election. A further 5.9 million citizens are estimated to be disenfranchised due to a criminal conviction.
- Voter registration is implemented at state-level through an active system. A number of states have launched initiatives to improve the accuracy of voter lists. Despite official and civil society voter education efforts an estimated 51 million eligible voters have not registered to vote.
- Candidacy requirements are provided by the Constitution and candidate registration is regulated by a number of state laws that vary across the states. While 32 presidential candidates will appear on ballots across the country, only 4 candidates are running in enough states to potentially be elected. Some 1,200 candidates will contest the House of Representatives seats and 120 will run for the Senate.
- There is no federal-level election management body in charge of administering and organizing election procedures. Administrative authority is generally vested in the state secretary or a state-level election commission or board. The Election Assistance Commission (EAC), which provides guidance on the implementation of the 2002 Help America Vote Act (HAVA), is without any commissioners and functions at an administrative level only.
- Political Action Committees (PACs) and “501(c)” organizations are playing a prominent role in funding campaigns following the Supreme Court’s *Citizens United* ruling that limitations on independent spending are unconstitutional. Several OSCE/ODIHR LEOM interlocutors expressed concerns that this decision limits transparency. The Federal Election Commission

(FEC) administers campaign finance regulations but is currently in deadlock as members vote along partisan lines.

- Access of election observers is regulated by state law. This frequently does not provide for international observers as required by paragraph 8 of the 1990 OSCE Copenhagen Document. Domestic observation is expected to be widespread.
- The OSCE/ODIHR Limited Election Observation Mission (LEOM) commenced its work on 3 October with a core team of 13 experts in Washington D.C. On 11 October, 44 long-term observers were deployed throughout the US and will cover a total of 40 states. The OSCE/ODIHR LEOM has been monitoring campaign coverage by the media since 12 October.

II. INTRODUCTION AND BACKGROUND

Following an invitation from the United States Mission to the OSCE, and based on the findings and conclusions of a Needs Assessment Mission (NAM) conducted from 23 to 27 April 2012, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) established a Limited Election Observation Mission (LEOM) to observe the 6 November general elections.¹ The LEOM opened in Washington D.C. on 3 October. It is led by Ambassador Daan Everts and consists of a core team of 13 experts based in Washington D.C. and 44 long-term observers (LTOs) who were deployed on 11 October and will cover a total of 40 states. Members of the LEOM are drawn from 23 OSCE participating States. In line with the OSCE/ODIHR methodology for LEOMs, the mission will not undertake a comprehensive observation of election day proceedings, but will visit a number of polling stations across the country.

The 6 November general elections comprise elections for the President and the Vice-President, 33 of the 100 seats in the Senate, and all 435 seats in the House of Representatives. The current Senate comprises 51 members from the Democratic Party, 47 from the Republican Party, and 2 independents. In the outgoing House of Representatives there are 240 Republicans, 190 Democrats, and 5 vacant seats.

The presidential election formally began with the selection of party candidates in nationwide state-level primaries and caucuses that started in January 2012. Incumbent President Barack Obama, nominated by the Democratic Party, is running for a second and final term. His major challenger is former Massachusetts Governor, Mitt Romney, nominated by the Republican Party. While the presidential election receives most of the national focus, several close contests are anticipated for seats in the Senate and House of Representatives.

II. LEGAL FRAMEWORK

Consistent with the federal political system established by the Constitution, the legal framework for general elections is decentralized and complex. Federal legislation sets only minimum standards for elections, while the implementation and details of the electoral process are regulated by state laws with some decisions taken at the county level. There is a diverse body of state laws that impact differently on voting rights and procedures.

¹ See previous OSCE/ODIHR reports on the US at <http://www.osce.org/odihr/elections/usa>.

Federal legislation includes the 1965 Voting Rights Act (VRA) that aims to protect the rights of racial and linguistic minorities by prohibiting discriminatory voting practices and procedures;² the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the 2009 Military and Overseas Voting Empowerment Act (MOVE) that allow citizens living abroad to register and vote absentee in federal elections; the 1993 National Voter Registration Act (NVRA) that facilitates voter registration; the 1971 Federal Electoral Campaign Act (FECA) and the 2002 Bipartisan Campaign Reform Act (BCRA) that regulate campaign finance; and the 2002 HAVA that establishes minimum standards in key areas of election administration.

The Department of Justice (DoJ) monitors state implementation of federal election legislation and has challenged state legislation concerning early voting and voter identification. These legal issues are increasingly divided along partisan lines. Democrats are concerned that stricter requirements will disenfranchise otherwise eligible voters while Republicans believe they are necessary to protect the integrity of the vote and prevent voter fraud.

III. ELECTORAL SYSTEM

The President and Vice-President are elected for a four-year-term with an absolute majority by an Electoral College consisting of 538 Electors. Each state has as many electoral votes as congressional representatives and the District of Columbia is allocated three Electors as if it were a state. Electors are elected by popular vote, mostly through “winner-takes-all” contests.³ Under the current system, it is possible that a presidential candidate might win the popular vote nationwide but not be elected. There is no federal law or constitutional provision that requires Electors to vote for the candidate of the party that nominates them.⁴

Senators and Representatives are elected directly, mostly through the “first-past-the-post” system. Each state is represented in the Senate by two Senators who serve staggered six-year-terms; no state’s two Senators can be elected in the same election year. Each state is represented in the House by at least one Representative; the remaining House seats are allocated to states proportional to their population. Representatives serve two-year-terms. While electoral districts for the Senate race are the entire state, Representatives are elected in congressional districts updated every ten years after a nationwide census. Following the 2010 census, the House seats were reapportioned among the 50 states to reflect population changes with some states gaining additional seats (for example, Texas and Florida) and other states losing seats (for example, New York and Ohio).

US citizens who are at least 18 years old on election day and are residents of a state are eligible to vote in general elections. Some 4.1 million citizens that are residents of US territories are not eligible to vote in general elections, while some 600,000 citizens that are residents of the District of Columbia are only eligible to vote in the presidential election. A further 5.9 million citizens are estimated to be disenfranchised due to a criminal conviction.⁵ This includes many ex-prisoners who have completed their sentences.

² Section 5 of the VRA freezes election laws and regulations at certain jurisdictions until they have been determined by the Department of Justice or a federal court to have neither discriminatory purpose nor effect.

³ With the exception of Maine and Nebraska, where some Electors are elected from the respective congressional districts via “first-past-the-post” contests and the remainder via a state-wide “winner-takes-all” system.

⁴ Some states have passed such laws and penalties may include fines, replacement of the Elector, or criminal prosecution. Even though there have been occurrences of Electors voting contrary to their pledge, no Elector has ever been penalized.

⁵ See, “Felony Disenfranchisement Laws in the United States,” The Sentencing Project, September 2012, http://www.sentencingproject.org/doc/publications/publications/fd_bs_fdlawsinus_Sep2012.pdf.

IV. ELECTION ADMINISTRATION

There is no federal-level election management body in charge of administering election procedures; a practice that follows the decentralized nature of the US political system. The bipartisan EAC, which provides guidance on the implementation of HAVA requirements, functions without a policy decision-making capacity, as all four Commissioner positions are currently vacant.⁶ However, the EAC does maintain a certain level of activity in gathering and disseminating electoral information.

On the state level, the overall administrative authority is generally vested in the state secretary or a state-level election commission or board. Election officials at the county or lower levels are actively preparing for the administration of the general elections, including hiring and training poll workers. In addition, they are using various channels – including social media – to inform voters about key electoral provisions, such as voter registration and early voting deadlines and identification requirements for voting. In some states, interlocutors informed the OSCE/ODIHR LEOM that the process of informing voters and training election officials has been complicated by late changes to the legal framework, particularly regarding early voting periods and voter identification requirements, as well as budgetary constraints.

V. VOTER REGISTRATION

Voter registration is implemented at state-level through an active system where voters must submit signed applications to register or change their information.⁷ The NVRA provides that voter registration must remain open until at least 30 days before elections in all states. Eight states and the District of Columbia allow voter registration on election day. There are some 237 million citizens eligible to vote in the general elections. While the total number of registered voters is not known, it has been estimated that approximately 51 million eligible voters have not registered to vote.⁸

Several OSCE/ODIHR LEOM interlocutors stated that the absence of a national-level voter register can affect the accuracy of the state-wide voter lists, including multiple and outdated entries. A number of states have taken recent steps to improve the accuracy of their voter lists. Seven states are currently engaged in a state-legislated and HAVA-compliant collaborative effort to share their databases in order to avoid erroneous entries as well as to reach out to eligible citizens who have not registered.⁹ In addition, 13 states now allow online registration of voters.¹⁰

VI. CANDIDATE REGISTRATION

Presidential candidates must be natural-born US citizens, at least 35 years old, and resident in the US for at least 14 years. Candidates for Senate must be 30 years old and a US citizen for at least nine years and candidates for the House of Representatives must be at least 25 years old and a US citizen for at least seven years. No person can be elected for the office of the president for more than two terms.

Additional candidate registration requirements are established by state laws and vary considerably between states. In general, a political party can nominate candidates for presidency or congress if it

⁶ The positions of the Executive Director and the General Counsel in the EAC are also vacant.

⁷ With the exception of North Dakota, which does not have voter registration.

⁸ See: “Inaccurate, Costly and Inefficient”, Pew Center on the States, February 2012, www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Pew_Upgrading_Voter_Registration.pdf.

⁹ Colorado, Delaware, Maryland, Nevada, Virginia, Utah, and Washington.

¹⁰ California, Maryland, New York, and South Carolina introduced online registration in July 2012.

obtained a certain percentage of total votes in previous elections, although this threshold differs considerably among the states.¹¹ Smaller political parties and independent candidates can run if they collect a certain number of supporting signatures, typically several months before the elections. The number of signatures required and the signature submission deadlines vary among the states. The majority of states also allow for voters to “write-in” candidates who are not included on the ballot.¹²

Although a total of 32 presidential candidates will be on the ballots across the country, only four have attained ballot access in a sufficient number of states to be potentially elected.¹³ In addition, there are a total of 120 candidates competing for the 33 Senate seats and some 1,200 candidates competing for the 435 seats of the House of Representatives. There are ten congressional seats where either a Democratic or a Republican Party candidate is running unopposed.

VII. CAMPAIGN FINANCE

Campaign finance for general elections is regulated by federal law. Legislation regulates in detail the limits on campaign finance contributions, as well as disclosure and reporting requirements, for candidates, political parties, and PACs. There are, however, no limits on campaign spending as the Supreme Court has ruled that any limitation would be an infringement of the right to free speech as protected by the First Amendment to the Constitution.¹⁴ General elections have therefore typically been characterized by a high level of campaign spending and many OSCE/ODIHR LEOM interlocutors expect these elections to be the most expensive yet.

Corporations or unions cannot make direct contributions to parties and federal candidates, but they can make contributions through a PAC, subject to limitations.¹⁵ In addition, the 2010 US Supreme Court ruling on *Citizens United v. FEC* facilitated the formation of so-called “super PACs,” by allowing corporations and unions to make “independent expenditures” that explicitly advocate for the election or defeat of a candidate, which was until then prohibited by federal law. In order to be considered independent, expenditures must not be co-ordinated with a candidate. Contributions for this type of expenditure are not subject to limits but they do need to be disclosed. Both types of PACs, organized under section 527 of the Internal Revenue Code, must register with the FEC.

In addition, organizations under Section 501(c) of the Internal Revenue Code, such as social welfare organizations and chambers of commerce, can make unlimited independent campaign expenditures, provided that campaigning is not their official primary activity. 501(c) organizations do not fall within FEC jurisdiction and are not subject to disclosure of their source of funding. This has raised transparency concerns among several OSCE/ODIHR LEOM interlocutors.

The FEC is mandated to supervise and implement relevant provisions and consists of six commissioners with no more than three representing the same party. Decisions require at least four votes. The FEC Vice-Chairperson informed the OSCE/ODIHR LEOM that due to ideological voting within the Commission, the decision-making process is in deadlock.

¹¹ For example, for presidential elections, this figure varies from 1 to 20 per cent.

¹² For example, this is possible in 44 states for the presidential and vice-presidential elections.

¹³ Apart from President Obama and former Governor Romney, this includes: former New Mexico Governor Gary Johnson, the nominee of the Libertarian Party and Jill Stein, the Green Party nominee.

¹⁴ See *Buckley v. Valeo* (424 US 1, 23 (1976)).

¹⁵ PACs are not legally tied to a candidate or party but they may make direct contributions to their campaign funds. A PAC may act independently or may be connected to a specific corporation or union.

VIII. ALTERNATIVE VOTING METHODS

Several OSCE/ODIHR interlocutors estimated that up to 40 per cent of voters will vote before election day, either through a postal ballot or through in-person early voting. A total of 29 states and the District of Columbia do not require voters to provide a reason for postal voting.¹⁶ Washington and Oregon will conduct general elections entirely by post. Early in-person voting is available in 32 states and the District of Columbia. The dates and working hours for early voting vary significantly depending on the state and have been recently shortened in four states.¹⁷ On 5 October, a federal court ordered a temporary ban on the proposed removal of the last three days of early voting in Ohio.

The MOVE Act requires states to distribute ballots to voters abroad at least 45 days before election day. In order to ensure that voters will receive their ballots in time to send them back, a number of states allow for electronic transmission of ballots to voters, which requires voters to waive the secrecy of their vote. The Federal Voting Assistance Program of the Department of Defense provides considerable assistance to the states to facilitate voter registration, information campaigns, and ballot requests for military voters.

In addition, many states make use of New Voting Technologies (NVT) for voters to cast their ballot on election day. This includes Direct Recording Electronic (DRE) voting machines, which may or may not incorporate a Voter Verified Paper Audit Trail (VVPAT). The use of NVT varies considerably across and within states. While 40 states have enacted legislation to require a VVPAT, 6 of these will not fulfil their own requirements for these elections. Overall, it is estimated that the majority of election day votes will be cast on machines without a paper trail in 11 states.¹⁸

IX. MEDIA

The basic rules that establish how candidates, parties, and groups may access television and radio are established by the 1934 Communications Act (as amended) and by regulations issued by the Federal Communications Commission. The print media are not bound by any statutory requirements. Commercial broadcast media – as public trustees – are required to operate in the public interest, but there are no statutory requirements of equal and balanced news coverage. Paid airtime is subject to an equal opportunity rule whereby candidates are entitled to purchase airtime commensurate with that provided to other legally qualified candidates on a channel by channel basis.

There are some 1,721 commercial and public television stations and some 15,000 radio stations. Newspapers have a local base, as reflected in the relatively low circulation of national titles. The internet and social media have become a major news source about electoral campaigning.

The presidential election dominates the agenda of national media together with a very limited number of congressional races considered to be closely contested. Election coverage has been primarily focused on domestic issues, namely the economy, the role of the government, and the health care system. Foreign policy issues are gaining momentum. Following the first televised

¹⁶ Some states allow that the postal address for the delivery of the ballot paper may be different from the address of the voters' residence as recorded in the voter register.

¹⁷ Florida, Georgia, Tennessee, and West Virginia.

¹⁸ Delaware, Georgia, Louisiana, Maryland, New Jersey, and South Carolina will have DREs without VVPAT, while Indiana, Pennsylvania, Texas, Tennessee, and Virginia will have no VVPAT for a sizeable majority of voters. See: <http://countingvotes.org/sites/default/files/CountingVotes2012.pdf>

presidential debate there has been a major increase in the volume of political advertising purchased in the broadcast media by the presidential candidates and their supporters. Presidential election advertising spots are widely based on negative advertising against the opposing candidate, and they are mainly targeting the so-called battleground states.¹⁹

On 12 October, the OSCE/ODIHR LEOM commenced media monitoring of a cross-section of media outlets, with quantitative and qualitative analysis of their political and election-related coverage.²⁰

X. ELECTION OBSERVATION

The OSCE/ODIHR has regularly been invited to observe elections in the US, in line with OSCE commitments.²¹ In general, election observation is regulated by state legislation. While the access of international observers during voting is explicitly permitted in Missouri, South Dakota, North Dakota, New Mexico, and the District of Columbia, state law does not generally provide for international observers. The National Association of Secretaries of State (NASS) has been very helpful in facilitating access for OSCE/ODIHR at state-level, where allowed by state law. In 2010, the NASS extended its 2005 resolution encouraging federal, state, and local election officials to co-operate with and provide access to international observers.²²

Domestic observation will be widespread throughout the country, both from political party representatives and NGOs active in the protection of civil rights. These organizations are expected to mobilize and deploy several thousand lawyers and poll watchers. Political parties will concentrate their observation efforts in the closely contested constituencies. The DoJ will also deploy several hundred federal observers to observe whether racial and language minority voters will be able to vote without interference.²³

XI. OSCE/ODIHR LEOM ACTIVITIES

During the reporting period, the OSCE/ODIHR LEOM met with representatives of the Department of State, Department of Justice, the Federal Election Commission, the Election Assistance Commission, federal and state authorities, political party representatives, civil society, and media. Forty-four LTOs deployed in teams of two are meeting regional stakeholders and observing electoral campaign events. The LTOs have met state officials, electoral officers, political party representatives at state level, and observed early voting and voter registration activities in several states.

The OSCE Parliamentary Assembly will deploy a delegation to observe the general elections. The OSCE Chairperson-in-Office has appointed Mr. Joao Soares as Special Co-ordinator to lead the short-term OSCE observer mission.

¹⁹ These are widely considered to be Colorado, Florida, Iowa, Nevada, New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin.

²⁰ TV: ABC, CBS, CNN, Fox News, MSNBC, NBC, PBS. Radio: NPR. Newspapers: New York Times, USA Today, Wall Street Journal. News Websites: The Huffington Post, Politico.

²¹ Paragraph 8 of the 1990 OSCE Copenhagen Document.

²² NASS Resolution Supporting International Election Observers, 2010, see:
http://www.nass.org/index.php?option=com_docman&task=doc_download&gid=904&Itemid=.

²³ As provided by the 1965 Voting Rights Act, Sections 3(a) and 4.