



Office for Democratic Institutions and Human Rights

# UNITED STATES OF AMERICA

GENERAL ELECTIONS

8 November 2016

OSCE/ODIHR NEEDS ASSESSMENT MISSION REPORT

16-20 May 2016



Warsaw  
13 June 2016

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**UNITED STATES OF AMERICA  
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**OSCE/ODIHR Needs Assessment Mission Report**

**I. INTRODUCTION**

Following an invitation from the United States Mission to the OSCE to observe the 8 November 2016 general elections and in accordance with its mandate, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) undertook a Needs Assessment Mission (NAM) from 16 to 20 May. The NAM included Alexander Shlyk, Deputy Head of the OSCE/ODIHR Election Department, Richard Lappin, OSCE/ODIHR Senior Election Adviser, and Radivoje Grujić, OSCE/ODIHR Election Adviser. The OSCE/ODIHR NAM was joined by Andreas Baker, Chief of the Executive Office of the OSCE Parliamentary Assembly.

The purpose of the mission was to assess the pre-election environment and the preparations for the elections. Based on this assessment, the NAM should recommend whether to deploy an OSCE/ODIHR election-related activity for the forthcoming elections, and if so, what type of activity best meets the identified needs. Meetings were held with officials from federal and state institutions, as well as representatives of political parties, media, and civil society. A list of meetings is annexed to this report.

The OSCE/ODIHR would like to thank the Department of State for its co-operation and assistance in organizing the visit. The OSCE/ODIHR would also like to thank all of its interlocutors for taking the time to meet with the NAM and for sharing their views.

**II. EXECUTIVE SUMMARY**

The US is a federal republic comprising 50 states, the District of Columbia, and a number of overseas territories. Executive power is vested in the president and legislative power is exercised by the bicameral Congress, consisting of the Senate and House of Representatives. The states exercise wide authority relative to the federal government and have their own governors, laws, legislatures, and courts. On 8 November, in line with the Constitution, US citizens will vote to elect the president and vice president, 34 of the 100 senators, and all 435 representatives.

The legal framework for elections is highly decentralized and complex. While the Constitution and federal legislation provide minimum standards, the implementation and details are regulated by state law. Several OSCE/ODIHR NAM interlocutors expressed concerns about a 2013 Supreme Court ruling that struck down provisions of the Voting Rights Act noting that this could limit the timely and effective protection of voter rights for racial and linguistic minorities, particularly in respect of voter identification rules.

Elections are administered at the state level with many duties delegated to the some 8,000 different electoral jurisdictions across the country. An expected 185,000 polling stations will be established for election day. OSCE/ODIHR NAM interlocutors welcomed the appointment of new commissioners to the Election Assistance Commission, a national advisory body, and the report of the Presidential Commission on Election Administration, both of which were seen to provide positive support to the work of the states and jurisdictions in administering elections.

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 and some 600,000 citizens that are residents of the District of Columbia can vote in presidential elections but do not have full representation in Congress. Some 5.8 million prisoners and ex-prisoners continue to be disenfranchised due to prohibitive and disproportionate legal regulations or burdensome procedures for reinstating voting rights in a number of states, particularly affecting minorities.

Voter registration is active and implemented at state level. In line with a prior OSCE/ODIHR recommendation, a number of states have taken steps to facilitate registration, including the introduction of online and automatic systems. Co-ordination between state-wide voter registration databases has also increased, with the aim of enhancing accuracy of voter lists. A total of 33 states require voter identification when voting, with 17 requiring a photo identification. Views on voter identification are polarized between the importance attributed to enfranchisement and integrity of the vote.

Federal law outlines candidate registration requirements. However, additional rules at state level vary, which may impede ballot access for smaller parties and independents. Women are generally underrepresented in public office, holding some 20 per cent of seats in the outgoing Congress.

A range of voting methods will be used in all states and more than one-third of voters are expected to cast their vote by post or in person before election day. The Department of Defense supports states in administering out-of-country voting by facilitating online voter registration and ballot requests. A majority of states allow for electronic submission of marked ballots from abroad, which requires voters to waive the secrecy of their vote.

The use of new voting technologies (NVT) is extensive and varies considerably across and within states. In 2015, the EAC updated its Voluntary Voting System Guidelines, in line with a prior OSCE/ODIHR recommendation. A number of OSCE/ODIHR NAM interlocutors raised concerns over the reliability of NVT systems and their possible malfunctioning on election day, mainly due to their age.

Election campaigning is largely unregulated, both at the federal and state level. The presidential campaign is expected to receive most of the national attention. Although no OSCE/ODIHR NAM interlocutors raised concerns about the ability to campaign freely, some noted concerns about negative stereotyping of women and an increase in inflammatory speech targeting minorities.

There are no limits on campaign spending and, following a 2014 Supreme Court ruling, there is no aggregate limit on how much an individual may contribute although base limits on contributions to individual campaigns remain. While the financing of candidates and parties is largely transparent, spending by independent groups can be exempt from disclosure requirements. A prior OSCE/ODIHR recommendation to clarify rules on the co-ordination of spending between outside groups and candidates remains unaddressed.

The media landscape is largely partisan but diverse, providing voters with a range of political views. The obligations placed on media to provide balanced election coverage are limited, with a preference given to self-regulation. To promote transparency, all advertisements must include sponsorship identification and broadcasters must maintain a public record of all airtime purchased.

Election observation is regulated by state law. Often this does not explicitly provide for international observers, at odds with the 1990 OSCE Copenhagen Document. Election observation by political

parties and civil society is expected to be widespread, adding an important layer of transparency and confidence to the process.

The majority of OSCE/ODIHR NAM interlocutors expressed overall confidence in the election administration and their ability to conduct elections professionally and impartially. While some previous OSCE/ODIHR recommendations have been addressed, most interlocutors stated that they would welcome a potential OSCE/ODIHR observation activity for these elections, recognising that an external assessment may contribute to further improvements to the electoral process. In particular, this concerns the implementation of new state laws regarding voter registration and identification, changes to alternative voting methods, the reliability of NVT, the effectiveness of campaign finance rules, and the conduct of the electoral campaign, particularly in the media. Most OSCE/ODIHR NAM interlocutors underscored the professionalism of election administrators and also that the widespread deployment of civil society and party observers would contribute to transparency and oversight on election day.

On this basis, the OSCE/ODIHR NAM recommends the deployment of an Election Observation Mission (EOM) to observe the general elections. In addition to a core team of analysts, the mission recommends the secondment of 100 long-term observers from OSCE participating States to follow the electoral process countrywide, and 400 short-term observers to follow election day proceedings. In line with the OSCE/ODIHR's standard methodology, the EOM would contain a media monitoring element.

### **III. FINDINGS**

#### **A. BACKGROUND**

The US is a federal presidential republic comprising 50 states, the District of Columbia, and a number of overseas territories.<sup>1</sup> Executive powers are vested in the president, who serves as head of state and head of government. The president is responsible for implementing and enforcing federal law and, to that end, appoints the cabinet and heads of federal agencies. Legislative power is exercised by the Congress, a bicameral body consisting of the Senate and the House of Representatives. The states exercise wide authority relative to the federal government and have their own governors, constitutions, laws, legislatures, and courts.

On 8 November, in line with the Constitution, elections will be held for the president and vice president, 34 of 100 senators, and all 435 representatives. Elections will also be held for state and local offices, as well as various referenda and initiatives. The last presidential election was held in 2012, when the Democratic incumbent Barack Obama was re-elected for a second and final term in office. The last congressional elections were held in 2014, resulting in a Senate comprised of 54 Republicans, 44 Democrats and 2 independents, and a House of Representatives comprised of 247 Republicans and 188 Democrats.

Women are generally underrepresented in public office, holding 4 of the 15 cabinet posts, some 20 per cent of seats in the outgoing Congress, and some 25 per cent of seats in the state legislatures. No woman has previously been elected president or vice president.

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<sup>1</sup> Including American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Puerto Rico, Virgin Islands, and Wake Island.

The OSCE/ODIHR has observed elections in the US since 2002. Most recently, a Limited Election Observation Mission was deployed for the 6 November 2012 general elections. The mission concluded in its final report that the “elections took place in a competitive environment and were administered in a professional manner. However, decisions on technical aspects of the electoral process were often unduly politicized”.<sup>2</sup> The report included recommendations for the authorities on how electoral processes may be improved and brought more closely in line with OSCE commitments.<sup>3</sup>

## B. LEGAL FRAMEWORK

The legal framework for elections is highly decentralized and complex. While the Constitution and federal legislation provide minimum standards for elections, the implementation and details are regulated by state law.<sup>4</sup> A diverse body of electoral law and regulations exists across the country, including variations among counties in some states. Federal and state court decisions also form an integral part of the legal framework. The US is a party to major international and regional instruments related to the holding of democratic elections.<sup>5</sup>

Federal legislation includes: the 1965 Voting Rights Act (VRA), which protects the rights of racial and linguistic minorities; the 1986 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the 2009 Military and Overseas Voting Empowerment Act (MOVE), which facilitate out-of-country voting; the 1984 Voting Accessibility for the Elderly and Handicapped Act and the 1990 Americans with Disabilities Act, which promote access to the polls for people with disabilities; the 1993 National Voter Registration Act (NVRA), which facilitates voter registration; the 1971 Federal Electoral Campaign Act and the 2002 Bipartisan Campaign Reform Act, which regulate campaign finance for general elections; and the 2002 Help America Vote Act (HAVA), which provides minimum standards for new voting technologies (NVT), state-wide voter registration, provisional ballots, and access for voters with disabilities.

There have been no major legislative changes at the federal level since the last general elections, nor are any expected prior to the upcoming elections. At the state level, a number of amendments have been introduced, primarily concerning voter registration, voter identification and alternative voting methods (*see respective sections*).

The Department of Justice (DoJ) monitors state implementation of federal election law and can bring enforcement suits in cases of non-compliance. Section 5 of the VRA requires jurisdictions where there is a history of discrimination to obtain federal pre-clearance of changes to electoral law from the DoJ or the federal district court in the District of Columbia.<sup>6</sup> In 2013, the Supreme Court ruled in *Shelby County v. Holder* that the formula to determine which jurisdictions are subject to pre-clearance is unconstitutional as it is based on outdated information that does not necessarily reflect current

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<sup>2</sup> See previous [OSCE/ODIHR election-related reports on the US](#).

<sup>3</sup> In paragraph 25 of the 1999 OSCE Istanbul Document, OSCE participating States committed themselves “to follow up promptly the ODIHR’s election assessment and recommendations”.

<sup>4</sup> This was reaffirmed by the Supreme Court in 2013 in [Arizona v. Inter Tribal Council of Arizona](#).

<sup>5</sup> Including the 1966 International Covenant on Civil and Political Rights (ICCPR), 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and 2003 Convention against Corruption. The US is also a member of the Council of Europe’s Group of States against Corruption (GRECO). Although signed, the US to date has not ratified the 1979 Convention for Elimination of All Forms of Discrimination against Women and 2006 Convention on the Rights of Persons with Disabilities. The US ratified the ICCPR in 1992, with a number of reservations, understandings, and declarations. In particular, the Senate declared that “the provisions of Article 1 through 27 of the Covenant are not self-executing.” Thus while the ICCPR is binding upon the US as a matter of international law, it does not necessarily form part of domestic law.

<sup>6</sup> Unlike other sections of the VRA, Section 5 has an expiration date. In 2006, it was reauthorized by Congress for 25 more years.

circumstances.<sup>7</sup> As a result, no jurisdiction is presently required to pre-clear election-related changes, with three exceptions that are covered by separate court orders.<sup>8</sup>

Several OSCE/ODIHR NAM interlocutors expressed concern that the *Shelby County* ruling diminishes the timely and effective protection of voter rights from legal changes that have a discriminatory intent or impact.<sup>9</sup> Several cases remain pending ahead of the upcoming elections, including with respect to districting and voter identification.<sup>10</sup>

### C. ELECTORAL SYSTEM

The president and vice president are elected jointly by absolute majority by a special body, the Electoral College, consisting of 538 electors. Each state is assigned as many electors as congressional representatives and the District of Columbia is assigned three electors as if it were a state. Electors are elected by popular vote, mostly through “winner-takes-all” contests.<sup>11</sup> There is no federal law or constitutional provision that requires electors to vote for the candidate of the party that nominates them.<sup>12</sup> It is possible that the president can be elected by a majority of Electoral College votes without winning the popular vote nationwide.

Senators and Representatives are elected directly, primarily in first-past-the-post contests. Each state is represented in the Senate by two Senators who serve staggered six-year terms, with no state’s two Senators scheduled to be elected in the same election year. Each state is represented in the House by at least one Representative and the remaining seats are allocated to states proportional to their population. All Representatives serve two-year terms.

While electoral districts for the Senate are the entire state, Representatives are elected from single-member congressional districts. Following the 2010 decennial census and in line with the Constitution, district boundaries were redrawn by the states so as to ensure that each district represented approximately the same number of people. A number of OSCE/ODIHR NAM interlocutors stated that the redistricting process was largely driven by partisan interests, which may result in a number of uncompetitive races. Several legal challenges concerning the revised district plans remain in the courts.<sup>13</sup>

### D. ELECTION ADMINISTRATION

In line with the Constitution and the decentralized nature of the political system, there is no federal body mandated to oversee the entire electoral process. Individual states are responsible for administering elections with duties often delegated to some 8,000 different jurisdictions across the country. An expected 185,000 polling stations will be established for election day.

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<sup>7</sup> See, *Shelby County v. Holder*. The Supreme Court did not rule on the constitutionality of Section 5 itself.

<sup>8</sup> These three jurisdictions are: Charles Mix County in South Dakota; the Village of Port Chester in state of New York; and the city of Evergreen in Alabama.

<sup>9</sup> See also UN Committee on the Elimination of Racial Discrimination “[Concluding observations on the combined seventh to ninth periodic reports of the United States of America](#)” (25 September 2014), CERD/C/USA/CO/7-9, para. 11.

<sup>10</sup> See, for example, *Harris v. McCrory* and *Dickson v. Rucho*. On the timing of legislative changes ahead of elections see *Purcell v. Gonzalez*.

<sup>11</sup> Electors in Maine and Nebraska are partly elected from respective congressional districts via “first-past-the-post” contests and partly via a “winner-takes-all” system.

<sup>12</sup> Some states have passed such laws, including penalties for non-compliance.

<sup>13</sup> See, for example, *Wittman v. Personhuballah* and *Harris v. Arizona Independent Redistricting Commission*.

The composition of election administration bodies varies across the states. Most election bodies are partisan, although some 20 states and the District of Columbia have bipartisan or independent bodies. OSCE/ODIHR NAM interlocutors expressed overall confidence in the professionalism and impartiality of election administrators. Some concerns were voiced about identifying qualified polling staff, overcrowding, and malfunctioning NVT, however, these were largely considered to be a consequence of under-resourcing or poor planning rather than deliberate manipulation.

The bipartisan Election Assistance Commission (EAC) is a national advisory body that provides guidance on meeting HAVA requirements and serves as a clearinghouse for information about election administration. It is also tasked to develop guidelines to test and certify NVT. After functioning without commissioners since 2011, the EAC's decision-making capacity was restored when the Senate unanimously confirmed the appointment of three commissioners in January 2015, thereby addressing a prior OSCE/ODIHR recommendation. Many OSCE/ODIHR NAM interlocutors expressed satisfaction that the EAC is fully operational again, expecting it to contribute to a more efficient conduct of the upcoming elections.

In 2013, a temporary Presidential Commission on Election Administration (PCEA) was established to identify best practices and make recommendations to promote efficient election administration. The PCEA report, published in January 2014, focused on facilitating online voter registration and the exchange of state-wide voter lists, expanding alternative voting methods before election day, strengthening the quality of NVT and ensuring the effective management of polling stations.<sup>14</sup> The report's focus on sharing information and best practice among stakeholders was widely welcomed by OSCE/ODIHR NAM interlocutors, with many agreeing that it established a realistic roadmap for improved electoral practice ahead of the upcoming elections.

Federal legislation prohibits discrimination and ensures equal opportunity for persons with disabilities in political life. Several OSCE/ODIHR NAM interlocutors noted progress in registering voters with disabilities and providing physical or technological access to voting. However, practice is considered to vary across jurisdictions and between urban and rural areas.<sup>15</sup>

## **E. VOTER RIGHTS, REGISTRATION, AND IDENTIFICATION**

### **1. Voter Rights**

Citizens who are at least 18 years old on election day and are residents of a state are eligible to vote in general elections. Despite longstanding OSCE/ODIHR recommendations that full representation rights be provided in Congress for all citizens, some 4.1 million citizens that are resident in US territories are ineligible to vote in general elections, while some 600,000 citizens that are resident in the District of Columbia can vote in presidential elections but do not have full representation in Congress.

An estimated 5.8 million citizens continue to be disenfranchised due to a criminal conviction, including some 2.6 million who have served their sentences.<sup>16</sup> Minorities are disproportionately affected and it is estimated that 2.2 million African-Americans are disenfranchised. Prisoner and ex-prisoner voting rights are determined by state law and vary considerably. In four states, prisoners and

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<sup>14</sup> See "[Report and Recommendations of the Presidential Commission on Election Administration](#)".

<sup>15</sup> See the National Council on Disability's report, "[Experience of Voters with Disabilities in the 2012 Election Cycle](#)", as well as [guidance](#) provided by the DoJ.

<sup>16</sup> See "[Felony Disenfranchisement: A Primer](#)" by The Sentencing Project. See also UN Human Rights Committee "[Concluding observations on the fourth periodic report of the United States of America](#)" (23 April 2014), CCPR/C/USA/CO/4, para. 24.



ex-prisoners permanently lose their right to vote unless pardoned by the state governor. In 34 states, persons on parole are prohibited from voting. Most states impose burdensome procedures for reinstating voting rights. In Maine and Vermont, those convicted are not disenfranchised at any stage. Some states have eased restrictions on the restoration of voting rights for ex-prisoners in recent years, in line with prior ODIHR recommendations.<sup>17</sup>

Restrictions on voting rights based on mental disability or guardianship vary by state. Several OSCE/ODIHR NAM interlocutors indicated that this was an issue that merited further review.

## 2. Voter Registration

Voter registration is active and implemented at state level, with minimum conditions provided by the NVRA. Voters may register in person, by post or through an authorized third party. States are required to make their driver license application also serve as a voter registration application, while the EAC is mandated to provide a federal postal registration form that states must accept and use.<sup>18</sup> HAVA requires first-time voters that register by post to provide proof of identity: either a match to a government database or a piece of identification. Four states require documentary proof of citizenship.<sup>19</sup>

Voter registration must remain open until at least 30 days before election day, but deadlines vary. Twelve states and the District of Columbia allow registration on election day, while North Dakota does not require any registration. In line with prior OSCE/ODIHR recommendations, a majority of states have taken steps to facilitate voter registration, often with bipartisan support. Thirty-one states and the District of Columbia now offer online registration and four states have introduced varying types of automatic voter registration systems.<sup>20</sup> It is widely estimated that some 180 million will be registered to vote.

HAVA mandates states to co-ordinate and match their state-wide voter registration databases with state and federal databases.<sup>21</sup> Since 2012, there has been increased participation in inter-state projects such as the Electronic Registration Information Center (ERIC) and the Interstate Voter Cross-Check Program (IVCP). States that participate in these schemes are able to directly compare their data to identify potential duplicate records or inaccuracies.<sup>22</sup> If a potential duplicate record is identified, most states require that an attempt is made to contact the individuals concerned before they are removed from voter lists.

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<sup>17</sup> For example, in February 2016, Maryland changed the [election legislation](#) and extended the right to vote to an estimated 40,000 people on probation or parole supervision. In April 2016, the Virginia Governor issued an [executive order](#) that restored voting rights to an estimated 206,000 ex-prisoners in the state.

<sup>18</sup> According to the [EAC](#), except North Dakota, Wyoming, and the U.S. territories of American Samoa, Guam, Puerto Rico and the U.S. Virgin Islands. New Hampshire accepts the form only for postal voting.

<sup>19</sup> Alabama, Arizona, Georgia and Kansas. There is currently an ongoing legal dispute about whether the EAC can allow states to add citizenship documentation requirements to the federal postal registration form when registering for federal elections. See, [Fish v. Kobach](#).

<sup>20</sup> Different models of automatic voter registration have been introduced in Oregon, California, Vermont and West Virginia.

<sup>21</sup> Databases include the state database of the Motor Vehicle Authority and the federal database of the Social Security Agency, as well as state records of deceased people and prisoners.

<sup>22</sup> Currently 17 states and the District of Columbia participate in [ERIC](#) and a similar number of other states participate in [IVCP](#).

### 3. Voter Identification

For the upcoming elections, 33 states will require voters to show identification before voting, of which 17 require photo identification.<sup>23</sup> Voter identification is a highly-charged issue divided largely along partisan lines. Generally, Republicans regard photo identification as a means to protect electoral integrity, while Democrats believe it could disenfranchise voters, particularly low-income and minority voters who are less likely to possess the required identification document. Many OSCE/ODIHR NAM interlocutors expressed concern that the *Shelby County* ruling may lead to changes in voter identification rules ahead of the upcoming elections, with limited time to inform voters of new requirements.

HAVA requires that provisional ballots be provided to voters who believe they are registered at a polling station but could not be found on the voter list. Regulations and deadlines for verification and counting of provisional ballots, as provided by states, vary widely.

#### F. CANDIDATE REGISTRATION

Presidential and congressional candidates representing the Democratic and Republican parties are selected in primary elections which take place on different dates in different states and are confirmed at national conventions.<sup>24</sup> In line with the Constitution, a presidential candidate must be a natural-born US citizen, at least 35 years old, and a resident of the US for at least 14 years. No person can be elected to the office of President for more than two terms. Candidates for the Senate must be at least 30 years old and a citizen for at least 9 years. Candidates for the House of Representatives must be at least 25 years old and a citizen for at least 7 years. Both Senators and Representatives, when elected, must be residents of the state in which they are elected.

Additional candidacy requirements at the state level vary considerably. In general, parties may nominate candidates if they obtained a certain percentage of votes in previous elections, although this threshold varies considerably.<sup>25</sup> Smaller parties and independent candidates can run if they collect a state-specific number of supporting signatures, which typically need to be submitted several months ahead of the elections. Several OSCE/ODIHR interlocutors acknowledged that this may impede access to the ballot, particularly for the presidential election. Most states allow for voters to “write-in” candidates who are not included on the ballot.

#### G. ALTERNATIVE VOTING METHODS

Alternative voting methods are an established practice in US elections and more than one-third of voters are expected to cast their vote by post or in person before election day. All states provide some voters with the possibility of postal voting, with 27 states and the District of Columbia not requiring voters to provide reasons for their request. In Colorado, Oregon and Washington general elections are entirely conducted by postal ballot. In-person early voting is possible in 34 states and the District of Columbia, with the early voting period ranging from 4 to 45 days. OSCE/ODIHR NAM interlocutors expressed trust in the election authorities to administer postal and early voting in an impartial and secure manner.

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<sup>23</sup> According to the [National Conference of State Legislators](#), the following states require photo ID: Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, North Dakota, Rhode Island, South Dakota, Tennessee, Texas, Virginia and Wisconsin.

<sup>24</sup> The first presidential primary was held in February 2016. The Republican National Convention will take place from 18 to 21 July, and the Democratic National Convention from 25 to 28 July.

<sup>25</sup> For presidential election, this varies from 1 to 20 per cent.

Federal legislation provides that citizens living abroad should have the possibility to vote in general elections.<sup>26</sup> The Department of Defense (DoD) supports states in administering out-of-country voting by facilitating online voter registration and ballot requests, as well as providing extensive voter information and guidance for election officials. The DoD informed the OSCE/ODIHR NAM that all states now comply with the requirement to distribute ballots to voters abroad at least 45 days prior to election day. Out-of-country voters, who have not received a ballot in time to return it before election day, can use a ‘back-up’ Federal Write-In Absentee Ballot, which is accepted by all states. Thirty-two states allow for electronic submission of marked ballots from out-of-country voters, which requires voters to waive the secrecy of their vote. In 2015, Congress repealed a directive for the DoD to develop an online voting system for military voters due to information security concerns.

## H. NEW VOTING TECHNOLOGIES

The use of NVT in US elections is extensive and varies considerably across and within states. Most states use more than one type of NVT, either because of county variations or to accommodate voters with disabilities or language needs. A general trend to return to paper-based voting has continued and 27 states use optical or digital scanners to count paper ballots. Direct Recording Electronic (DRE) machines are still used in some 30 states, 13 of which do not provide a voter-verified paper audit trail (VVPAT). The OSCE/ODIHR has previously recommended the mandatory use of a paper trail for NVT.

In 2015 the EAC updated the 2005 Voluntary Voting System Guidelines (VVSG), aiming to increase security requirements for NVT systems and expand access including for persons with disabilities.<sup>27</sup> As previously recommended by OSCE/ODIHR, the VVSG also include counting technologies. Forty-seven states use the revised VVSG in some form. The EAC has accredited three test laboratories to evaluate NVT systems against the VVSG. There are currently 22 certificated NVT systems and 14 registered manufacturers operating across the country. A number of OSCE/ODIHR NAM interlocutors raised concerns over the reliability and security of NVT systems and their possible malfunctioning in the upcoming elections, mainly due to their age. A lack of federal and state funds to purchase, maintain and renew equipment was widely cited as a key concern.<sup>28</sup>

## I. ELECTION CAMPAIGN

Election campaigning is largely unregulated, both at the federal and state level. The majority of OSCE/ODIHR NAM interlocutors anticipate a dynamic campaign focused on undecided voters in so-called “swing” states and competitive congressional races. Traditional campaign activities are expected, including media advertising, rallies, telephone banks and door-to-door canvassing, as well as increased use of social media. The presidential campaign is expected to receive most of the national attention. Three presidential and one vice presidential debate will be organized by the Commission on Presidential Debates, with the dates moved earlier so as to align with the start of early voting.<sup>29</sup>

No OSCE/ODIHR NAM interlocutors raised concerns about the ability to campaign freely. However, some noted concerns about negative stereotyping of women and an increase in inflammatory speech targeting minorities that may lead to isolated incidents of violence.

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<sup>26</sup> The Department of Defense estimates that some 4.5 million eligible voters reside abroad.

<sup>27</sup> See the updated [VVSG 1.1](#) from 31 March 2015.

<sup>28</sup> Recently, the [VOTE](#) Act was introduced to the Congress, with the aim to resolve this issue.

<sup>29</sup> See [the schedule](#) of debates for the 2016 presidential election.

## J. CAMPAIGN FINANCE

Unlike other areas of electoral law, campaign finance for general elections is comprehensively regulated by federal law. The Federal Election Commission (FEC) is tasked to administer and enforce the law. The FEC consists of six commissioners, of whom no more than three can represent the same party. Increased partisan voting has limited its ability to reach key decisions.

Election campaigns may be funded by individuals, political parties, and Political Action Committees (PACs). In 2014, the Supreme Court issued a ruling in *McCutcheon v. FEC* that struck down aggregate limits on the amount an individual may contribute during a two-year period to all federal candidates, parties and PACs combined, while maintaining individual limitations per category.<sup>30</sup> Foreign and anonymous donations are prohibited, while corporations and trade unions cannot make direct contributions to parties and candidates but can make contributions through a PAC, subject to limits. Public financing is available for presidential candidates but is subject to several restrictions, particularly regarding expenditures.<sup>31</sup> The OSCE/ODIHR previously recommended that the public financing system be revised.

There are no limits on campaign expenditures as the Supreme Court held in 1974 in *Buckley v. Valeo* that any limitation would constrain the right to free speech, as enshrined in the First Amendment to the Constitution. In 2010 in *Citizens United v. FEC*, the Supreme Court extended this right to “independent speech” by corporations and unions. Subsequent court rulings have affirmed the right of corporations and unions to also finance outside groups, including so-called Super PACs and 501(c) and 527 organizations.<sup>32</sup> In order to be considered “independent”, outside groups cannot co-ordinate spending with a candidate or party. A prior OSCE/ODIHR recommendation to review and clarify the FEC’s co-ordination rules remains unaddressed.

Candidates, political parties, PACs and Super PACs are required to file regular reports to the FEC on funds raised and spent. The reports list donors who contributed over USD 200, along with their address, employer and job title. The FEC publishes the reports on its website within 48 hours of receipt. However, 501(c) organizations are not obliged to disclose their donors to the FEC or IRS as long as election campaigning is not their primary activity. Several OSCE/ODIHR NAM interlocutors expressed concerns that this limits an otherwise transparent system by allowing donors to circumvent disclosure rules. The OSCE/ODIHR previously recommended that disclosure requirements be applied to all persons and groups engaged in electoral campaign activities regardless of their form or whether they are registered with the FEC.<sup>33</sup>

The FEC informed the OSCE/ODIHR NAM that it places a high priority on helping candidates and committees understand and voluntarily comply with the law. To achieve this goal, the FEC produces free publications and hosts events in major cities to educate campaign workers about the law.

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<sup>30</sup> Individuals may contribute up to USD 2,700 per election to a candidate, USD 10,000 per calendar year to a state party, USD 33,400 per calendar year to a national party and USD 5,000 per calendar year to a PAC. See, the [FEC’s full breakdown on contribution limits](#) for individuals, parties and PACs. See also, [McCutcheon v. FEC](#).

<sup>31</sup> The public funding entitlement for the 2016 election is USD 96.14 million. A third party candidate may qualify for some public funds after the election if they receive at least five per cent of the popular vote.

<sup>32</sup> A Super PAC is a political committee registered with the FEC that can receive unlimited donations to influence elections provided that the money is spent independently of a candidate’s campaign. 527 organizations have to register with the FEC if they meet the test of a political committee (either contributing or spending at least USD 1,000 to influence an election) or register with the Internal Revenue Service (IRS) (if they are issue-focused and do not explicitly attempt to influence an election). 501(c) organizations are non-profit groups that can campaign but have to be primarily engaged in their tax-exempt activities to keep their status.

<sup>33</sup> See also, the [2011 GRECO Evaluation Report on the US on the Transparency of Party Funding](#) and the [2016 GRECO Second Compliance Report on the US](#).

Nonetheless, should an infringement be identified, the FEC may impose an administrative fine proportionate to the violation or submit the case to a District Court.

## **K. MEDIA**

The media landscape is partisan but diverse, providing voters with a range of political views. Commercial media dominate the broadcasting sector, with some 1,780 licensed television channels and 15,000 radio stations. Public service broadcasters are generally peripheral, although National Public Radio enjoys a significant audience. Newspapers generally have a local base, with all major metropolitan areas having their own publications. The Internet, and especially social media, is increasingly used by voters as a key source of political information.

The legal framework for media is characterized by a close application of the First Amendment to the Constitution, tending to prioritize freedom of speech and self-regulation over legislation. The 1934 Communications Act (since amended) and regulations of the Federal Communications Commission (FCC) provide the basic framework for broadcast media. The FCC is mandated to review complaints related to broadcast media coverage of candidates but does not conduct any systematic media monitoring. Print media are not bound by any statutory requirements.

There are no requirements for equal and balanced media coverage. However, in the 60 days prior to general elections, commercial broadcasters must provide “reasonable access” to all legally qualified federal candidates who request to purchase airtime. In addition, an “equal opportunity” rule means that if a broadcaster grants airtime to one candidate it must allow equal conditions for other candidates in that contest. There are, however, an increasing number of exceptions to this rule as a means to protect editorial freedom. Exemptions include appearance on newscasts, scheduled interviews, and debates. Since 2014, the FCC has interpreted that the equal opportunity rule only applies to candidates, not their supporters; where the candidate’s voice or image is not featured the rule does not apply.<sup>34</sup>

Legally qualified federal candidates are entitled to purchase paid political airtime at the lowest sum charged for a comparable advertisement on a channel by channel basis. To promote transparency, all advertisements must include sponsorship identification and broadcasters must maintain a publicly accessible ‘political file’ of all requests to purchase airtime. In line with a prior OSCE/ODIHR recommendation, the range of media required to post their political files on the FCC website has recently been expanded from only TV stations to include radio stations, cable systems and satellite operators.<sup>35</sup>

## **L. ELECTION OBSERVATION**

In line with OSCE commitments, the US has regularly invited the OSCE/ODIHR to observe general elections. However, election observation is regulated by state law, which usually does not provide for international observers as required by paragraph 8 of the OSCE 1990 Copenhagen Document. Eight states and the District of Columbia explicitly permit international election observation, while most other states interpret their law in a way that allows access or delegates the decision to county officials.<sup>36</sup> In 2015, the National Association of Secretaries of State renewed its 2005 resolution, welcoming “OSCE international election observers from the OSCE member countries to observe elections in states where allowed by state law”.

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<sup>34</sup> See the [FCC ruling from 8 May 2014](#).

<sup>35</sup> See the [FCC Report and Order from 28 January 2016](#).

<sup>36</sup> States explicitly permitting international election observation are: California, Colorado, Missouri, New Mexico, North Dakota, South Carolina, South Dakota and Washington.

Election observation by national stakeholders is expected to be widespread. The DoJ intends to deploy federal monitors to follow states' compliance with federal legislation, including VRA and HAVA requirements. Political parties and civil society groups are expected to mobilize several thousand lawyers and poll watchers, while a range of national and local media will also follow the polls closely. All OSCE/ODIHR NAM interlocutors positively appraised the high levels of domestic scrutiny, noting that it provides an important level of transparency and an effective means to promote compliance with federal and state law.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

The majority of OSCE/ODIHR NAM interlocutors expressed overall confidence in the election administration and their ability to conduct elections professionally and impartially. While some previous OSCE/ODIHR recommendations have been addressed, most interlocutors stated that they would welcome a potential OSCE/ODIHR observation activity for these elections, recognising that an external assessment may contribute to further improvements to the electoral process. In particular, this concerns the implementation of new state laws regarding voter registration and identification, changes to alternative voting methods, the reliability of NVT, the effectiveness of campaign finance rules, and the conduct of the electoral campaign, particularly in the media. Most OSCE/ODIHR NAM interlocutors underscored the professionalism of election administrators and also that the widespread deployment of civil society and party observers would contribute to transparency and oversight on election day.

On this basis, the OSCE/ODIHR NAM recommends the deployment of an Election Observation Mission (EOM) to observe the general elections. In addition to a core team of analysts, the mission recommends the secondment of 100 long-term observers from OSCE participating States to follow the electoral process countrywide, and 400 short-term observers to follow election day proceedings. In line with the OSCE/ODIHR's standard methodology, the EOM would contain a media monitoring element.

## **ANNEX: LIST OF MEETINGS**

### **Department of State**

John A. Heffern, Principal Deputy Assistant Secretary, Bureau of European and Eurasian Affairs  
Lynne Davidson, Senior Advisor in the Bureau of Democracy, Human Rights, and Labor  
Judith E. Heumann, Special Advisor for International Disability Rights  
Katherine Guernsey, Senior Policy Advisor to the Special Advisor for International Disability Rights  
Luis A. Renta, Senior Advisor, Bureau of Public Affairs  
Ryan D. Stoner, Regional Economic Officer, Bureau of European and Eurasian Affairs  
Bridgette L. Walker, Deputy OSCE Coordinator  
David Swalley, OSCE Desk Officer

### **Department of Justice**

Justin Levitt, Deputy Assistant Attorney General, Civil Rights Division  
Karen Stevens, Senior Counsel, Civil Rights Division

### **Department of Defense**

Matt Boehmer, Director, Federal Voting Assistance Program  
J. Scott Wiedmann, Director, Communications and Outreach, Federal Voting Assistance Program  
Meaghan Kelly, State Legislative Affairs, Federal Voting Assistance Program  
Nate Bacchus, State Legislative Affairs Specialist, Federal Voting Assistance Program

### **Federal Election Commission**

Steven T. Walther, Vice Chairman

### **Federal Communications Commission**

Hope Cooper, Attorney Advisor, Media Bureau  
Gary Schoman, Special Counsel, Media Bureau

### **Election Assistance Commission**

Thomas Hicks, Chairman  
Matthew V. Masterson, Commissioner  
Christy A. McCormick, Commissioner  
Brian D. Newby, Executive Director  
Bryan Whitener, Director of Communications

### **Maryland State Board of Elections**

Jared DeMarinis, Director, Division on Candidacy and Campaign Finance  
Paul Aumayr, Voting Systems Director

### **Senate Committee on Rules and Administration**

Paul Vinovich, Chief Counsel  
Ben Hovland, Senior Counsel  
David C. Adkins, Counsel  
Stacy Ettinger, Democratic Chief Counsel

### **House of Representatives Committee on House Administration**

Khalil Abboud, Deputy Staff Director  
Bob Sensenbrenner, General Counsel

**National Association of Secretaries of State**

Leslie D. Reynolds, Executive Director

**National Conference of State Legislators**

Susan Parnas Frederick, Senior Federal Affairs Counsel

Katherine Boyce, International Programs Department

**National Council on Disability**

Clyde Terry, Chairman

Joan Durocher, General Counsel and Director of Policy

**US Commission on Civil Rights**

Karen K. Narasaki, Commissioner

Mauro Albert Morales, Staff Director

Gerson Gomez, Special Assistant to the Staff Director

Jason T. Lagria, Special Assistant and Counsel to Commissioner

**US Commission on Security and Cooperation in Europe**

Jonas Wechsler, Senior Advisor

Robert A. Hand, Policy Advisor

Allison Hollabaugh, Policy Advisor

Nathanial Hurd, Policy Advisor

Paul Massaro, Policy Advisor

Mischa Thompson, Policy Advisor

**Democratic National Committee**

Pratt Norton Wiley, National Director of Voter Expansion

Patrice Taylor, Director, Party Affairs and Delegate Selection

**Republican National Committee**

J. Justin Riemer, Deputy Chief Counsel

**Bipartisan Policy Center**

John C. Fortier, Director, Democracy Project

**Brennan Center for Justice**

Nicole Austin-Hillery, Director and Counsel, Washington Office

**League of Women Voters**

Jeanette Senecal, Senior Director, Elections and E-Democracy

**The Heritage Foundation**

Hans A. von Spakovsky, Manager, Election Law Reform Initiative

**The Pew Center on the States**

David Becker, Director, Election Initiatives

Sean Greene, Project Director, Election Initiatives

Samuel Derheimer, Manager, Election Initiatives

Amy Cohen, Officer, Election Initiatives

Heather Creek, Officer, Election Initiatives



**The Sentencing Project**

Marc Mauer, Executive Director

**International Foundation for Election Systems**

William R. Sweeney, Jr., President and Chief Executive Officer

Michael Svetlik, Vice President of Programs

Beata Martin-Rozumilowicz, Regional Director, Europe and Asia

Erica Shein, Deputy Director, Center for Applied Research and Learning

**International Republican Institute**

Stephen B. Nix, Director, Eurasia Division

**National Democratic Institute**

Michael McNulty, Senior Program Manager, Elections and Political Processes

**Organization of American States**

Yeruti Mendez, Specialist, Department for Electoral Cooperation and Observation

Brenda Santamaria, Specialist, Department for Electoral Cooperation and Observation

**The Carter Center**

David Carroll, Director, Democracy Program