



Office for Democratic Institutions and Human Rights

UNITED STATES OF AMERICA

MID-TERM CONGRESSIONAL ELECTIONS
6 November 2018

ODIHR NEEDS ASSESSMENT MISSION REPORT
21-25 May 2018



Warsaw
29 June 2018

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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 6 November 2018 mid-term congressional elections and in accordance with its mandate, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) undertook a Needs Assessment Mission (NAM) from 21 to 25 May. The NAM included Richard Lappin, Deputy Head of the ODIHR Election Department, Ana Rusu, ODIHR Senior Election Adviser, and Radivoje Grujić, ODIHR Election Adviser. The ODIHR NAM was joined by Loïc Poulain, OSCE Parliamentary Assembly Presidential Advisor.

The purpose of the mission was to assess the pre-election environment and the preparations for the elections. Based on this assessment, the NAM recommends whether to deploy an 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.

ODIHR would like to thank the Department of State, including the United States Mission to the OSCE, for their co-operation and assistance in organizing the visit. 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

On 6 November, US citizens will vote to elect 35 of 100 Senators and all 435 Representatives. The legal framework for elections is multi-layered and complex. The Constitution and federal legislation provide minimum standards, with detailed implementation regulated by state law. No changes have been made to federal election law, but some legal amendments have been introduced at state level, primarily concerning procedures for voter registration, prisoner voting rights, and early voting. Several ODIHR NAM interlocutors expressed concern about a continued lack of provisions to fully implement the Voting Rights Act and also shared their view that the Department of Justice could be more assertive and consistent in enforcing federal legislation related to elections.

Elections are administered at state level with duties often delegated to some 10,500 jurisdictions across the country. Many ODIHR NAM interlocutors noted the important role played by the Election Assistance Commission in providing guidance to local administrators, but expressed concerns over the Commission's ability to be proactive following the departure of a commissioner and the loss of its decision-making quorum. In 2017, a Presidential Commission on Election Integrity was established to identify vulnerabilities in electoral processes, but was since terminated with no report published. Overall, ODIHR NAM interlocutors expressed confidence in the professionalism and impartiality of election administrators, including on election day.

In January 2017, election infrastructure was designated as part of the nation's critical infrastructure, resulting in many efforts at federal and state level to improve co-ordination and exchange information to mitigate cyber-security risks. In addition, Congress allocated USD 380 million to support states in enhancing the security of election administration technology. While most ODIHR NAM interlocutors

expressed confidence in the integrity of election infrastructure and praised recent mitigation measures, some shared concerns about isolated cyber-attacks and the impact this may have on public trust.

Citizens who are at least 18 years old on election day and are residents of a state are eligible to vote. Some 4.7 million citizens that are resident in US territories and the District of Columbia do not have full representation in Congress. An estimated 6.1 million citizens are disenfranchised due to a criminal conviction, with African-Americans disproportionately affected. Most states impose burdensome procedures for reinstating voting rights for ex-prisoners, although some have eased restrictions.

Voter registration is active and implemented at state level. A number of states have taken steps to facilitate voter registration, including through online and automatic systems. Co-ordination of voter registration data between states has increased. Voter identification is a politically divisive issue and rules vary by state. A total of 33 states require identification, with 17 requiring a photo identification.

Federal law outlines candidate registration requirements, with additional rules provided at state level. Women and minorities are generally underrepresented in public office, but many ODIHR NAM interlocutors expect a higher number of women and minority candidates for these elections.

Strong legal guarantees ensure the right to vote for persons with physical disabilities. All polling stations provide specialized equipment to assist such voters. Restrictions on voting rights based on mental disability or guardianship are widespread and it is unclear how many individuals are impacted.

More than one-third of voters are expected to cast their vote by post or in person before election day, including from abroad. Early voting enjoys broad public trust. 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 across and within states. Most states rely on scanning of paper ballots but Direct Recording Electronic machines are partly used in some 30 states, 12 of which do not provide a paper audit. Many ODIHR NAM interlocutors shared concerns over the reliability and security of NVT systems.

Election campaigning is largely unregulated. No ODIHR NAM interlocutors raised issues about the ability to campaign freely, but some noted concerns about intolerant rhetoric during the campaign, including negative stereotyping of women and minorities. The use of online and social media is expected to be prominent, with many interlocutors expressing concern about the transparency of online advertising and potential disinformation, including from foreign sources.

The Federal Election Commission (FEC) oversees a campaign finance system that imposes few actual limits on donations and does not limit expenditure. While all financial reports are timely published, spending by independent groups can be exempt from disclosure requirements. The FEC has initiated public discussions to amend its regulations related to disclosure of online advertisements. Most ODIHR NAM interlocutors shared concerns about the lack of transparency in campaign financing.

The media landscape is pluralistic and diverse, albeit increasingly polarized. The obligations placed on media to provide balanced election coverage are limited, with a preference given to self-regulation. All broadcast advertisements must include sponsorship identification and broadcasters must maintain a public record of airtime purchased. Many ODIHR NAM interlocutors shared their view that trust in news media is declining, with more hostility against journalists, including from some officials.

Election observation is regulated by states, which often does not explicitly provide for international observers. Election observation by civil society and political parties is expected to be widespread, adding an important layer of transparency and confidence to the election process.

The majority of ODIHR NAM interlocutors expressed confidence in the election administration and their ability to conduct elections professionally and impartially, including on election day. While some previous ODIHR recommendations have been addressed, most interlocutors noted the value of a potential ODIHR observation activity for these elections, recognising its possible contribution to improvements of the electoral process. In particular, this concerns voter rights, registration and identification, security of election technologies, alternative voting methods, campaign finance, and the conduct of the electoral campaign, particularly online and in the media.

On this basis, the ODIHR NAM recommends the deployment of a Limited Election Observation Mission (LEOM) to observe the mid-term congressional 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. In line with ODIHR's standard methodology, the LEOM 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.¹ The president holds executive power, serving as head of state and head of government, while legislative power is vested in Congress, a bicameral body consisting of the Senate and the House of Representatives (House). The states exercise wide authority relative to the federal government and have their own governors, constitutions, laws, legislatures, and courts.

On 6 November, in line with the Constitution, elections will be held for 35 of 100 Senators and all 435 Representatives.² In addition, elections will also take place for state and local offices, as well as various referenda. The last congressional elections were held in 2016, resulting in a Senate comprised of 51 Republicans, 47 Democrats and 2 independents, and a House currently comprised of 236 Republicans and 193 Democrats, with 6 seats vacant. Women are generally underrepresented in public office, holding 3 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. Minorities and Native Americans are also reported to be underrepresented in political structures.

During the 2016 general election cycle, a number of vulnerabilities related to the security of electoral infrastructure were revealed. As a result, various federal and state investigations were initiated regarding cyber security threats and foreign interference in US elections.³ In January 2017, the Department of Homeland Security (DHS) designated US election infrastructure as part of the nation's critical infrastructure (see *Cyber Security* section).

¹ 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.

² For the Senate, 33 seats are contested in regular elections and 2 in special elections (Minnesota and Mississippi).

³ See the 8 May 2018 Senate Select Committee on Intelligence Summary of Initial Findings and Recommendations on "[Russian Targeting of Election Infrastructure During the 2016 Election](#)", and the 22 March 2018 House Select Committee on Intelligence Report on "[Russian Active Measures](#)" (redacted). There is an ongoing investigation by a [Special Counsel](#) appointed by the Attorney General in May 2017 to investigate "Russian interference with the 2016 presidential election and related matters".

ODIHR has observed elections in the US since 2002. Most recently, an Election Observation Mission was deployed for the 2016 general elections. The mission concluded in its final report that the “elections were highly competitive and demonstrated commitment to fundamental freedoms of expression, assembly and association. The presidential campaign was characterized by harsh personal attacks, as well as intolerant rhetoric by one candidate. Diverse media coverage allowed voters to make an informed choice. Recent legal changes and decisions on technical aspects of the electoral process were often motivated by partisan interests, adding undue obstacles for voters. Suffrage rights are not guaranteed for all citizens, leaving sections of the population without the right to vote. These elections were administered by competent and professional staff, including on election day, which was assessed positively by IEOM observers, despite some instances of long queues and malfunctioning voting equipment”.⁴ The report included recommendations for the authorities on how electoral processes may be improved and brought more closely in line with OSCE commitments.⁵

B. LEGAL FRAMEWORK

The legal framework for elections is multi-layered and complex. The Constitution and federal law provide minimum standards, with detailed implementation regulated by state law.⁶ As such, a diverse body of law and regulations exist 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 democratic elections.⁷ However, although signed, the US has not ratified the 1979 Convention for Elimination of All Forms of Discrimination against Women and the 2006 Convention on the Rights of Persons with Disabilities. The US ratified the ICCPR in 1992, with a number of reservations, understandings, and declarations.⁸

Federal legislation focuses on specific categories of voters and 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 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 (ADA), 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; and the 2002 Help America Vote Act (HAVA), which provides standards for new voting technologies (NVT), state-wide voter registration, provisional ballots, and access for voters with disabilities.

At the federal level, there have been no legislative changes since the last general elections. Several bills were submitted to Congress, including in respect of electoral security, voter registration and online advertisements, but it is uncertain if and when these will be adopted. At the state level, a variety of amendments have been introduced, primarily concerning procedures for voter registration,

⁴ See previous [ODIHR election-related reports](#) on the US.

⁵ 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”.

⁶ This was reaffirmed by the Supreme Court in 2013 in [Arizona v. Inter Tribal Council of Arizona](#).

⁷ Including the 1966 International Covenant on Civil and Political Rights (ICCPR), 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 2003 Convention against Corruption, and 2004 Council of Europe (CoE) Convention on Cybercrime. The US is a member of the CoE Group of States against Corruption (GRECO) and the European Commission for Democracy through Law (Venice Commission).

⁸ In particular, the Senate declared that “the provisions of Article 1 through 27 of the Covenant are not self-executing”. Under international law, the responsibility to ensure compliance with obligations under ratified international instruments lies with the federal government, see Paragraph 4 of the 2004 [UN Human Rights Committee \(CCPR\) General Comment No 31](#) on the ICCPR. On 19 June, the US announced its intention to withdraw from the UN Human Rights Council

prisoner voting rights, and early voting. In addition, many cases have been filed with courts regarding districting and voter registration, including three cases at the Supreme Court.⁹ However, due to their timing, no decisions are expected to be take effect for the upcoming elections.

The Department of Justice (DoJ) monitors implementation of federal election law and can initiate or join 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.¹⁰ In 2013, the Supreme Court ruled that the formula for determining jurisdictions subject to pre-clearance was outdated and that Congress should establish a new formula.¹¹ At odds with a prior ODIHR recommendation, and despite several legislative initiatives, Congress is yet to determine a new formula. As a result, no jurisdiction is presently required to pre-clear election-related changes, with three exceptions that are covered by separate court orders.¹² Several ODIHR NAM interlocutors expressed concern about the impact of the continued absence of a formula for VRA pre-clearance and also shared their view that the DoJ could be more assertive and consistent in enforcing federal legislation related to elections.¹³

C. ELECTORAL SYSTEM

Senators and Representatives are elected directly, primarily in first-past-the-post contests.¹⁴ Each state is represented in the Senate by two Senators who serve staggered six-year terms, with no state's two Senators scheduled to be elected in the same year. Each state is represented in the House 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 districts. The last district boundaries were drawn by states after the 2010 census. A number of ODIHR NAM interlocutors stated that some districts were drawn on partisan or racial grounds, which may result in uncompetitive races. Several legal challenges remain in the courts, but these rulings are not expected to affect boundaries for the upcoming elections.¹⁵ ODIHR has previously recommended the establishment of independent commissions to draw boundaries free from political interference.¹⁶

D. ELECTION ADMINISTRATION

There is no federal body mandated to oversee the entire electoral process and individual states are responsible for administering elections with duties often delegated to some 10,500 jurisdictions across the country. An expected 185,000 polling stations will be established. The composition of election

⁹ [Husted v. A. Philip Randolph Institute](#) (voter lists), [Gill v. Whitford](#) and [Benisek v. Lamone](#) (both partisan districting). In *Husted*, the Court ruled that the removal of voters was in line with the NVRA. In *Gill*, the Court remanded the case back to the district court, providing an opportunity to the plaintiffs to demonstrate standing. In *Benisek*, the Court declined to disturb the district court decision, but the challenge may continue at a lower court..

¹⁰ Section 5 has an expiration date, which, in 2006, was reauthorized by Congress until 2031.

¹¹ See [Shelby County v. Holder](#). The Supreme Court did not rule on the constitutionality of Section 5 itself.

¹² Charles Mix County (South Dakota), Port Chester Village (New York), and of Evergreen City (Alabama).

¹³ See, also, [Statement](#) by the US Commission on Civil Rights from 18 August 2017.

¹⁴ Except in Georgia, where a second round is held if no candidate receives an absolute majority, both for House and Senate elections. In the House, vacancies arising between elections are filled through by-elections. In the Senate, vacancies may be filled temporarily by Governors, except Oregon where a special election is required.

¹⁵ In addition to the aforementioned Supreme Court cases, see also, for example, [League of Women Voters of Michigan v. Johnson](#) (partisan), [Bethune-Hill v. Virginia State Board of Elections](#) (racial), and [Georgia State Conference of the NAACP v. Georgia](#) (partisan and racial). In January 2018, the Pennsylvania Supreme Court struck down the 2011 congressional map as unconstitutional and, after the state legislature failed to revise the map, adopted a new map which is in effect for the 2018 mid-term elections.

¹⁶ Independent commissions are in Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington.

bodies varies across the states. Most are partisan, although 20 states and the District of Columbia have bipartisan or independent bodies. Overall, ODIHR NAM interlocutors expressed confidence in the professionalism and impartiality of election administrators, including on election day.

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.¹⁷ Many ODIHR NAM interlocutors noted the important role of the EAC in supporting efficient elections, particularly at the local level. After four years of functioning with three of four commissioners, in March 2018 one commissioner left, which led to the EAC losing its quorum for decision making. There is no indication when new commissioners will be proposed and confirmed by the Senate.¹⁸ While it is not expected to impact EAC ongoing activities ahead of these elections, several ODIHR NAM interlocutors expressed concern over the EAC's inability to take new policy decisions and be proactive in its support role.

In May 2017, a Presidential Commission on Election Integrity (PCEI) was established to identify vulnerabilities in voter registration and voting processes used in federal elections. After most states refused to share voter registration data with the PCEI, and after several court cases initiated against the commission, the president terminated the PCEI in March 2018.¹⁹ There is no public record of the PCEI's work and many ODIHR NAM interlocutors assessed the commission as politicised and having minimal impact compared to the 2013 Presidential Commission on Election Administration.²⁰

Federal legislation prohibits discrimination and ensures equal opportunity for persons with disabilities in political life.²¹ It is estimated that one sixth of the voting age population has some type of disability. While practice varies between rural and urban areas, several ODIHR NAM interlocutors noted progress in registering voters with physical and sensory disabilities and providing access to voting.²²

E. CYBER SECURITY

A number of efforts have been undertaken to enhance the security of election technologies, at federal and state level, in line with prior ODIHR recommendations. This has included an emphasis on cyber security for election administration bodies (see also *Voter Registration* and *New Voting Technologies* sections). Following the DHS designation of election infrastructure as critical infrastructure, in October 2017, a Sector Specific Agency (SSA) was created to manage the structure.²³ The SSA comprises the Government Coordinating Council (GCC) and the Sector Coordinating Council (SCC), which serve as collaborative forums where federal, state and local government officials, as well as the private sector, can share information and good practice to prevent and respond to attacks on election infrastructure, particularly in respect of cyber security.²⁴ The DHS has offered a number of free

¹⁷ See the 2015 [Voluntary Voting System Guidelines 1.1](#). An updated [draft](#) is pending adoption. Currently, 47 states use the VVSG 1.1 in some form. There are 22 certificated NVT systems and 14 registered manufacturers operating across the country, with two accredited laboratories to certify NVT systems.

¹⁸ A proposed "[Election Assistance Commission Termination Act](#)" is currently in Congress.

¹⁹ See Presidential [Executive Order](#) on the PCEI establishment and Presidential [Executive Order](#) on its termination.

²⁰ See the 2014 "[Report and Recommendations of the Presidential Commission on Election Administration](#)".

²¹ See [guidance](#) provided by the DoJ.

²² See [letter](#) from National Council on Disabilities and [the EAC factsheet](#) on voters with disabilities.

²³ [Election infrastructure](#) is defined as: "storage facilities, polling places, and centralized vote tabulations locations used to support the election process, and information and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and report and display results on behalf of state and local governments". It is a subsector of one of 17 national critical infrastructures sectors.

²⁴ The GCC's executive committee has representatives of 25 states, plus DHS, EAC, National Association of State Election Directors (NASED), and National Association of State Secretaries (NASS).

services to support states in identifying and mitigating cyber security risks.²⁵ There is a bipartisan legislative initiative in the Senate aimed to enhance electoral cyber security.²⁶

In addition, in January 2018, Congress allocated USD 380 million to be made available to states through grants to improve election administration, including through enhanced technology and security.²⁷ The EAC is responsible for authorizing the grants, on the basis of applications that include a short justification of how funds will be spent and a commitment to match five per cent of the costs within a two-year period.²⁸ While all ODIHR NAM interlocutors welcomed the new funds and praised the EAC's role in managing the grants, many considered that the funds would not significantly impact the upcoming elections due to the late allocation and the need to undertake feasibility studies and follow extensive procurement procedures in case of major investments.

Most ODIHR NAM interlocutors expressed their confidence in the integrity of election infrastructure and appraised efforts from all levels of administration to mitigate cyber security risks. At the same time, some shared concerns about isolated cyber-attacks and the impact that may have on public confidence, particularly in the context of what many interlocutors characterised as sensationalised media coverage of the issue.

F. 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. Contrary to longstanding ODIHR recommendations, some 4.7 million citizens that are resident in US territories and in the District of Columbia do not have full representation in Congress.

In addition, an estimated 6.1 million citizens are disenfranchised due to a criminal conviction, including some 3.1 million who have served their sentences.²⁹ 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.³⁰ In a few states, prisoners and ex-prisoners permanently lose their right to vote unless pardoned by the state governor, while in most 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. There is an emerging trend among states to ease restrictions on the restoration of voting rights for ex-prisoners, in line with prior ODIHR recommendations.³¹

Restrictions on voting rights based on mental disability or guardianship vary among states.³² Thirty-nine states have laws that restrict voting rights for persons with mental disabilities and it is unclear

²⁵ See DHS's [Election Infrastructure Security Resource Guide](#), from 1 April 2018.

²⁶ See the [Secure Elections Act](#).

²⁷ See the 2018 [Consolidated Appropriations Act](#). This is the first appropriation to support HAVA since 2010.

²⁸ States can opt for these [funds](#) until 2023. To date, more than 20 states applied for funds.

²⁹ See "[6 Million Lost Voters](#)", The Sentencing Project 6 October 2016. See also UN CCPR "[Concluding observations on the fourth periodic report of the United States of America](#)" (2014), CCPR/C/USA/CO/4, para. 24.

³⁰ Primarily, this concerns 'ex-felons'. In the US, a felony is typically defined as a serious crime punishable by a term of imprisonment of at least one year.

³¹ For example, in Florida, voters will vote on 6 November to allow automatic restoration of voting rights to former prisoner, impacting almost 1.5 million citizens. In Virginia, the Governor restored voting rights to an estimated 173,000 ex-prisoners in 2018. In Louisiana, the law was changed and voting rights are estimated to be restored to some 70,000 people on probation and parole after a five year waiting period, starting from March 2019.

³² See the National Council on Disability's report from 22 March 2018, "[Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination](#)", p.105.

how many individuals will be impacted in these elections. Several ODIHR NAM interlocutors noted 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 form also serve as a voter registration application, while the EAC is mandated to provide a federal postal registration form that states must accept.³³ HAVA requires first-time voters that register by post to provide proof of identity. Four states require documentary proof of citizenship.³⁴

Voter registration must remain open until at least 30 days before election day, but deadlines vary. Fifteen states and the District of Columbia allow registration on election day, while North Dakota does not require any registration. In line with prior ODIHR recommendations, a majority of states have taken steps to facilitate voter registration, often with bipartisan support. There is an emerging trend of states offering online registration, which now includes 37 states and the District of Columbia. In addition, 12 states and the District of Columbia have introduced types of automatic voter registration.³⁵ In contrast, there are some initiatives to remove voters from voters lists due to voter inactivity, including an ongoing case from Ohio that has reached the Supreme Court.³⁶

HAVA mandates states to co-ordinate and match their voter registration databases with state and federal databases.³⁷ 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. While IVCP is limited to providing lists of suspected duplicates, ERIC provides comprehensive assistance to identify various types of inaccurate voter list entries.³⁸ If a potential duplicate record is identified, states must attempt to contact the individuals concerned before they are removed from voter lists. A number of states are upgrading their voter registration systems as part of broader efforts to enhance protection against possible cyber-attacks.³⁹

Several ODIHR NAM interlocutors noted that low-income voters, racial and linguistic minorities, Native Americans, and citizens with disabilities face greater obstacles in voter registration processes and continue to have lower than average registration rates.⁴⁰

3. Voter Identification

For the upcoming elections, 34 states will require voters to show identification before voting, of which 17 require photo identification.⁴¹ While there have been no major legal changes since the last

³³ In June 2017, the DoJ signed a [Memorandum of Understanding](#) with New York, to provide voter registration opportunities for federal elections when eligible citizens apply for or seek to renew their driver's license.

³⁴ Alabama, Arizona, Georgia and Kansas. There is an ongoing legal dispute about whether the EAC can allow states to add citizenship documentation requirements to the federal postal registration forms. See, [Fish v. Kobach](#).

³⁵ Not all will be operational in the upcoming elections. There is also an initiative in Congress to make this federal law, see [Automatic Voter Registration Act](#).

³⁶ See [Husted v. A. Philip Randolph Institute](#). The Supreme Court is expected to rule on the case by the end of June.

³⁷ 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.

³⁸ Currently 22 states and the District of Columbia participate in [ERIC](#) and 30 states participate in [IVCP](#).

³⁹ See 2016 [Joint Statement](#) from the DHS and Office of the Director of National Intelligence on Election Security.

⁴⁰ See, for example, the [Native American Voting Rights Coalition](#) field hearings across the country.

⁴¹ Alabama, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Rhode Island, South Dakota, Tennessee, Texas, Virginia and Wisconsin.

elections, voter identification remains a highly-charged issue divided largely along partisan lines on the balance between electoral integrity and inclusion. HAVA requires that provisional ballots be provided to voters who believe they are registered at a locality but could not be found on the voter list. State regulations and deadlines for verification and counting of provisional ballots vary widely.

G. CANDIDATE REGISTRATION

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 or if they submit a number of signatures, although thresholds vary by state. Several ODIHR NAM interlocutors noted that, in some states, these requirements may be challenging for smaller parties or independent candidates. Most states allow for voters to “write-in” candidates who are not included on the ballot.

Congressional candidates representing the Democratic and Republican parties are selected in primary elections which take place on different dates in different states.⁴² For these elections, a record number of women and minority candidates are widely expected, with many winning or predicted to win primary elections.

H. ALTERNATIVE VOTING METHODS

Alternative voting methods are an established practice 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.⁴³ 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. ODIHR NAM interlocutors expressed trust in the election authorities to administer postal and early voting in an impartial and secure manner. The DOJ guidance on protecting the rights of voters with disabilities does not clearly specify the extent to which federal accessibility requirements are applicable to early in-person voting.⁴⁴

The Federal Voting Assistance Program, under the Department of Defense (DoD), supports states in administering out-of-country voting by facilitating voter registration and ballot requests, as well as providing information to voters and election officials. States are required 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 (FWAB), which is accepted by all states. The DoD informed the ODIHR NAM that it simplified the Federal Post Card Application (FPCA) and FWAB, to make them easier for voters to complete. At odds with a prior ODIHR recommendation, 24 states allow for electronic submission of marked ballots from out-of-country voters, which requires voters to waive the secrecy of their vote.

I. NEW VOTING TECHNOLOGIES

The use of NVT 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

⁴² The primaries started in early May and will last until 12 September.

⁴³ In California (first time), Colorado, Oregon and Washington, all voters will receive a postal ballot.

⁴⁴ See 2017 Government Accountability Office report “[Observations on Polling Place Accessibility and Related Federal Guidance.](#)”

or language needs. A general trend to return to paper-based voting has continued and 41 states and the District of Columbia use optical or digital scanners to count paper ballots. Direct Recording Electronic machines are still used in some 30 states, 12 of which do not provide a voter-verified paper audit trail (VVPAT). ODIHR has previously recommended the mandatory use of a paper trail for NVT. States are able to use newly available HAVA funds to replace voting machines, but this is unlikely to happen before the upcoming elections. Many ODIHR NAM interlocutors shared concerns over the reliability and security of NVT systems.

In 32 states and the District of Columbia post-election audits of the equipment and procedures by checking paper ballots or records against the results produced by the voting system, are prescribed. These audits can lead to a full recount if errors are detected.⁴⁵

J. ELECTION CAMPAIGN

Election campaigning is generally unregulated and there are strong legal guarantees to protect fundamental freedoms. The possibility to organize rallies is subject to the permission of local authorities and application of a fixed fee in some states, but no ODIHR NAM interlocutors raised concerns about the ability to organize events or to campaign freely.⁴⁶ At the same time, some noted concerns about intolerant rhetoric during the upcoming campaign, including negative stereotyping of women and inflammatory speech targeting minorities.

Most of ODIHR NAM interlocutors expect the campaign to focus on undecided voters in competitive congressional races, with key topics including job creation, immigration, healthcare and prominent local issues. Recently, many active grassroots movements have emerged, involving a range of underrepresented groups, which, according to several ODIHR NAM interlocutors, may lead to increased participation in these elections.⁴⁷ Traditional campaign activities are expected, including media advertising, billboards, rallies, telephone banks and door-to-door canvassing. The use of social media, especially Twitter, YouTube and Facebook, continues to increase, both as a means to communicate directly to voters, as well as to place targeted advertisements. Many ODIHR NAM interlocutors expressed concern about the transparency of online advertising, as well as potential disinformation, including from foreign sources and bots. There are legislative initiatives to enhance disclosure of online advertisements in Congress and state legislatures, as well as policy revisions by social media networks.⁴⁸

K. CAMPAIGN FINANCE

Campaign finance is regulated by federal law under the oversight of the Federal Election Commission (FEC), which has six commissioners, of whom no more than three can represent the same party. Decisions require at least four votes. Following the resignation of a commissioner in February 2018, the FEC has four commissioners, meaning that all decisions must be unanimous. Many ODIHR NAM interlocutors saw this as challenging and potentially affecting the effectiveness of the FEC work.⁴⁹

⁴⁵ Twenty states and the District of Columbia provide for [automatic recounts](#), which are conducted if the margin between the top two candidates is within certain parameters. In other states, a losing candidate or a voter may request a recount, often at their own cost. See also NCSL webpage on [post-election audits](#).

⁴⁶ Some concerns about peaceful assembly were raised in the 2017 [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United States of America](#).

⁴⁷ Such as [Black Lives Matter](#), [#MeToo](#), [March for Our Lives](#).

⁴⁸ See [Honest Ads Act](#) introduced in Congress. In Maryland, the [Online Electioneering Transparency and Accountability Act](#) goes into effect on 1 July. Other states, such as Connecticut, Seattle and Washington are considering similar initiatives.

⁴⁹ As of [30 September 2017](#), there are 20 unresolved complaints more than two years old.

Election campaigns may be funded by individuals, political parties, and Political Action Committees (PACs).⁵⁰ Foreign and anonymous donations are prohibited. Corporations and trade unions cannot make direct contributions to parties and candidates but can make contributions to a PAC, subject to limits. Public financing is not available for Congressional elections.

There are no limits on campaign expenditures, including for legal entities.⁵¹ Court rulings have affirmed the right of corporations and unions to also finance outside groups as a form of “independent speech”, including to PACs and non-profit organizations. In order to be considered independent, outside groups cannot co-ordinate spending with a candidate or party. A prior ODIHR recommendation to review and clarify the FEC’s co-ordination rules remains unaddressed. Some ODIHR NAM interlocutors assessed the high costs of campaigning as disadvantageous for new candidates, particularly women and other underrepresented groups.

Candidates, political parties, and PACs are required to file regular reports to the FEC on funds raised and spent.⁵² 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, some non-profit organizations (501(c) organizations) are not obliged to disclose their donors to the FEC, or the Internal Revenue Service, as long as election campaigning is not their primary activity. ODIHR previously recommended that disclosure requirements be applied to all persons and groups engaged in campaigning regardless of their form or whether they are registered with the FEC.⁵³ The FEC has initiated discussions to amend its regulations related to disclosure of online advertisements and will hold a public hearing on 27 June.⁵⁴ Most ODIHR NAM interlocutors shared concerns about the lack of transparency in campaign financing, especially for online platforms.

Like in previous elections, the FEC is conducting various activities to assist candidates and committees to understand and comply with the law, including by providing publications and hosting events across the country. In cases of identified infringement, the FEC has authority to issue an administrative fine proportionate to the violation or to submit the case to a District Court.

L. MEDIA

The media landscape is pluralistic and diverse, albeit increasingly polarized. The broadcast media include 1,780 commercial and public television stations and more than 15,000 radio stations. The environment is traditionally dominated by major television networks and cable channels. There are some 1,300 print publications, but media consumption of political news, in particular among young and middle-aged groups, is shifting towards online media and social networks. The Public Broadcasters Service (PBS) is popular among more senior audiences and has seen its audience share for news programmes grow since 2016.⁵⁵ The National Public Radio enjoys a significant and growing audience across many social groups.

⁵⁰ Individuals may contribute up to USD 2,700 per election to a candidate, USD 10,000 per calendar year to a state party, USD 33,900 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](#). See also, [McCutcheon v. FEC](#) where aggregate limits on the amount an individual may contribute during a two-year period to federal candidates, parties and PACs were struck down.

⁵¹ In [Buckley v. Valeo](#), the Supreme Court held that any limitation would constrain the constitutional right to free speech. In [Citizens United v. FEC](#), this right was extended to “independent speech” by corporations and unions.

⁵² For PACs (527 organizations) that either contribute or spend at least USD 1,000 to influence an election.

⁵³ 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](#).

⁵⁴ See the FCC [Proposed Rules](#). Prominent Internet and social media networks have been invited to the hearing.

⁵⁵ See the 6 June [Public Broadcasting Fact Sheet](#) by Pew Research Center.

The legal framework for media is characterized by a robust protection for media independence, with various self-regulation mechanisms and Supreme Court decisions affirming that no limits should constrain freedom of speech. The 1996 Telecommunications Act and FCC regulations outline the basic framework for broadcasters to adhere to during elections. The FCC reviews 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.

In December 2017, the FCC repealed the Open Internet Order set in 2015, which barred providers from blocking or slowing down access to content or charging consumers more for certain content. Several states have responded by initiating legislation to reinstate net neutrality within their states. This developing issue has been a subject of concern of several international organizations.⁵⁶

In the 60 days prior to federal elections, commercial broadcasters must provide “reasonable access” to all legally qualified federal candidates who request to purchase airtime. Candidates can purchase paid political airtime at the lowest sum charged for a comparable advertisement on a channel by channel basis. All advertisements must include sponsorship identification and broadcasters must maintain a publicly accessible ‘political file’ of all requests to purchase airtime. In March 2018, in line with a prior ODIHR recommendation, this rule was enforced for all broadcasters, including radio.⁵⁷

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 is, however, an increasing number of exceptions to this rule, so to protect editorial freedom, including 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. As such, the rule does not apply where the candidate’s voice or image is not featured.⁵⁸ PBS are prohibited from endorsing or opposing candidates for public office and cannot air paid advertisements.

Many ODIHR NAM interlocutors expressed concerns about the media environment, citing increased verbal attacks on news media and journalists, politicians being selective in the media outlets they talk to, and a general decline in the trustworthiness of media. The OSCE Representative on Freedom of the Media (RFoM) has called on authorities to ensure that constitutional and international legal protections on freedom of the press are upheld and to refrain from attacking the media.⁵⁹

M. ELECTION OBSERVATION

In line with its OSCE commitments, the US Government has invited ODIHR to observe the upcoming elections. However, observation is regulated by state law, which usually does not explicitly provide for international observers.⁶⁰ Three states and the District of Columbia provide for international observers by law, while most state laws are silent on observation, leaving it at the discretion of election officials.⁶¹ In 2016, explicit restrictions on observation of voting were in place in 17 states.⁶²

⁵⁶ See OSCE RFoM statement from [5 December 2017](#).

⁵⁷ See the [FCC Report and Order from 28 January 2016](#). All [files](#) are accessible to the public.

⁵⁸ See the [FCC ruling from 8 May 2014](#).

⁵⁹ See OSCE RFoM statements from [24 January 2017](#) and [28 August 2017](#).

⁶⁰ A National Association of Secretaries of State resolution welcomes “OSCE international election observers from the OSCE member countries to observe elections in states where allowed by state law”.

⁶¹ California, Missouri and New Mexico. In 2018 the draft [Bill on international election observers](#) was introduced but not passed in Maryland.

⁶² Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Louisiana, Mississippi, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, West Virginia and Wyoming.

The DoJ intends to deploy monitors to follow state compliance with federal election law. Election observation by political parties and civil society is expected to be widespread. Many of these groups plan to deploy lawyers to provide immediate support in case of disputes, as well as volunteers to facilitate voter access. All ODIHR NAM interlocutors appraised the high levels of national 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 ODIHR NAM interlocutors expressed confidence in the election administration and their ability to conduct elections professionally and impartially, including on election day. While some previous ODIHR recommendations have been addressed, most interlocutors noted the value of a potential ODIHR observation activity for these elections, recognising its possible contribution to improvements of the electoral process. In particular, this concerns voter rights, registration and identification, security of election technologies, alternative voting methods, campaign finance, and the conduct of the electoral campaign, particularly online and in the media.

On this basis, the ODIHR NAM recommends the deployment of a Limited Election Observation Mission (LEOM) to observe the mid-term congressional 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. In line with the ODIHR's standard methodology, the LEOM would contain a media monitoring element.

ANNEX: LIST OF MEETINGS

Department of State

Elizabeth I. Millard, Principal Deputy Assistant Secretary, Bureau of European and Eurasian Affairs
John Finkbeiner, OSCE Coordinator
Ann E. Cody, Special Advisor for International Disability Rights, Bureau of Democracy, Human Rights and Labor
Seth Patch, Deputy OSCE Coordinator
Kira Zaporski, OSCE Desk Officer

Department of Justice

Cristopher Herren, Voting Section Chief
Rebeca Wertz, Principal Deputy
Karen Stevens, Senior Counsel, Civil Rights Division

Department of Defense

Nate Bacchus, State Legislative Affairs Specialist, Federal Voting Assistance Program
Lisa Thomas, State Legislative Affairs Specialist, Federal Voting Assistance Program

Department of Homeland Security

Geoff Hale, Head, Election Task Force
Matthew V. Masterson, Senior Cybersecurity Advisor

Federal Election Commission

Steven T. Walther, Commissioner

Federal Communications Commission

Gary Schoman, Special Counsel, Media Bureau

Election Assistance Commission

Thomas Hicks, Chairman
Brian D. Newby, Executive Director
Mark Listes, Director of Policy
Clifford D. Tatum, General Counsel

Maryland State Board of Elections

Jared DeMarinis, Director, Division on Candidacy and Campaign Finance

Senate Committee on Rules and Administration

Ben Hovland, Acting Chief Counsel

House of Representatives Committee on House Administration

Nick Hawatmeh, Counsel
Tanya Sehgal, Counsel

National Association of Secretaries of State

Leslie D. Reynolds, Executive Director

National Conference of State Legislators

Susan Parnas Frederick, Senior Federal Affairs Counsel

National Association of State Election Directors

Amy Cohen, Executive Director

National Council on Disability

Joan Durocher, General Counsel and Director of Policy

US Commission on Civil Rights

Mauro Albert Morales, Staff Director
Jason T. Lagria, Special Assistant to Commissioner
Rukku Singla, Special Assistant to Chair
Irena Vidulović, Special Assistant to Commissioner

US Commission on Security and Co-operation in Europe

Erika B. Schlager, Counsel for International Law
Robert A. Hand, Policy Advisor
Mischa Thompson, Policy Advisor

Public Broadcasting Service

Sara Just, Executive Producer, News Hour

Democratic National Committee

Sam Cornale, Chief of Staff
Amanda Brown, Political Director
Kalen Pruss, Policy Director

Republican National Committee

Christina Schaengold, Senior Counsel
Nathan Groth, Associate Counsel

Bipartisan Policy Center

John C. Fortier, Director, Democracy Project

Brennan Center for Justice

Elizabeth Howard, Cybersecurity and Elections Counsel
Daniel I. Weiner, Senior Counsel, Democracy Program

Center for Democracy and Technology

Joseph Lorenzo Hall, Chief Technologist

Center for Election Innovation and Research

David J. Becker, Executive Director

The Heritage Foundation

Hans A. von Spakovsky, Manager, Election Law Reform Initiative
Nile Gardiner, Director, Margaret Thatcher Center for Freedom

The Sentencing Project

Marc Mauer, Executive Director

International Foundation for Election Systems

Beata Martin-Rozumilowicz, Regional Director, Europe and Asia

National Democratic Institute

Michael McNulty, Senior Program Manager, Elections and Political Processes
Julia Brothers, Senior Program Manager, Elections and Political Processes
Sarah Cooper, Program Manager, Elections and Political Processes