



INTERNATIONAL ELECTION OBSERVATION MISSION United States of America – Mid-term Congressional Elections, 6 November 2018

STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS

PRELIMINARY CONCLUSIONS

The 6 November mid-term elections were highly competitive and contestants could campaign freely, with media presenting a wide array of information and views, enabling voters to make an informed choice. However, campaign rhetoric was often intensely negative and, at times, intolerant, including on social networks. The fundamental right to suffrage was undercut in places by disenfranchisement of some groups of citizens and lack of full representation in Congress. Campaign finance rules do not guarantee full transparency. While the elections were largely administered in a professional manner and voters turned out in high numbers, decisions on important aspects of the electoral process were often politicized.

The electoral legal framework is complex and diverse. There are few nationwide requirements for procedural uniformity and detailed rules are found only at the state and sub-state level. Some states have amended laws to facilitate voter registration, early voting, and voting rights of ex-prisoners, partially addressing prior ODIHR recommendations. However, fundamental deficiencies remain in law, particularly in respect of disenfranchisement of citizens on various grounds. Lack of agreement in Congress to adopt a new formula to enforce a key aspect of the 1965 Voting Rights Act diminishes its effectiveness in safeguarding against discrimination on racial or linguistic grounds. A wide range of electoral litigation is ongoing, potentially causing uncertainty for voters and electoral stakeholders.

Elections are administered at state level with duties often delegated to some 10,500 jurisdictions across the country. Election officials were competent, operating transparently and in accordance with rules and established deadlines. While stakeholders overall had confidence in the administration of elections, chief election officials of some states were candidates in the elections they supervised, potentially leading to conflicts of interest and raising questions about the independence of the administration. The bipartisan Election Assistance Commission (EAC) provided valuable support to election officials, but further support from Congress is necessary to maintain its long-term role. States and jurisdictions continued to provide a range of voter information materials, including in minority languages and accessible formats.

Federal and state authorities launched a number of robust initiatives to help secure election technologies, including from cyber-threats. Following the designation of elections as critical infrastructure, a sector-specific agency was established to share information and good practice to prevent and respond to attacks. The EAC expeditiously disbursed USD 380 million that Congress allocated to replace outdated voting machines, strengthen existing computer and network infrastructure, and build cybersecurity capacity. However, more investment is needed to replace aging voting equipment and to maintain security. There were no public reports of verified cyber attacks on election infrastructure prior to election day. Despite advancements, challenges remain in respect of co-ordination among federal and state bodies, security of voter registration webpages, and requirements for vendors to upgrade systems.

Legislation and practice effectively disenfranchised around 11 million otherwise eligible voters. Some 4.7 million citizens residing in the District of Columbia and in US territories lack full representation in Congress. An estimated 6.1 million persons with criminal convictions are disenfranchised, with a

disproportionate impact on racial minorities. Voting rights of persons with intellectual disabilities vary across the country, and, in many states, such persons are deprived of the vote without individual assessment. These restrictions breach OSCE commitments and international standards with regard to universal and equal suffrage.

Voter registration is active and implemented at state level, with minimum conditions set by federal law. A number of states enhanced their efforts to facilitate voter registration, including online and automatic registration, and increased the sharing of state registration databases to ensure the integrity of voter registers. It is estimated that some 50 million eligible citizens were not registered for these elections, for various reasons. At the same time, some decisions and initiatives related to voter list maintenance and integrity effectively limited access to vote for some citizens.

Voter identification is a politically divisive issue. In these elections, 34 states required voters to show identification, 17 of which required photo identification. Voter identification rules in some states can present obstacles, particularly for low-income voters, racial and linguistic minorities, and Native Americans. While measures to ensure electoral integrity are important, they should be designed in a manner that does not disenfranchise eligible voters.

A total of 1,262 candidates stood in the mid-term elections, providing voters with a variety of choice. In some states, requirements for registration, including the number of supporting signatures, proved challenging for smaller parties and independent candidates. Concerns also persist about the drawing of electoral districts. While districts are generally equal in size, there are widespread concerns that redistricting is often a partisan process, resulting in a number of uncompetitive contests. In 42 House races, a Democrat or Republican ran unopposed.

Fundamental freedoms were overall respected in a campaign that engaged a high number of voters across the country. The campaign was dominated by the two main parties and marked by frequently divisive and intolerant rhetoric, including several incidents with xenophobic and anti-Semitic connotations. Concerns were raised regarding online disinformation, from domestic and foreign sources, as well as the transparency of online advertising. There were several serious security-related incidents in the final weeks of the campaign.

There were both a record number of women who ran as candidates and who were ultimately elected, although women remain underrepresented in the Congress. A number of grassroots movements raised the profile of issues related to women's rights, promoting a diverse range of views. There was an increased number of candidates from historically underrepresented groups, including persons with disabilities, Native Americans, and openly LGBT persons.

Campaign finance rules are enforced at federal level, with few limits on donations and no limits on expenditure, including by so-called Super PACs. While financial reports were submitted and published expeditiously, some non-profit organizations are not required to disclose their reports, undermining an otherwise transparent system. These were the most expensive mid-term elections in the US, projected at USD 5.2 billion, with most spending on behalf of the two main parties.

The media is pluralistic and vibrant, offering voters a wide range of opportunities to inform themselves, but is increasingly polarized. The legal framework provides for limited regulation and few rules for broadcast media during elections. Continuous verbal attacks on journalists and news media by senior officials raised concerns over the safety of journalists and undermined the essential role of media in a democratic society. Cable TV news coverage reflected the existing polarization of political and electoral discussion. The public broadcasters offered balanced coverage of the two main parties. The repeal of "net neutrality" rules raised concerns over potentially reduced access to information.

Election observation is regulated by states. Restrictions on election day observation by international observers were in place in 12 states. While federal government departments and agencies supported and facilitated the work of the IEOM, political and electoral authorities in several states declined to meet with ODIHR LEOM observers, and in one state prevented observation altogether. Such restrictions on international election observers are not in line with OSCE commitments undertaken by the US Government. Voting was observed extensively by parties and civil society, providing oversight and transparency.

Some 35 per cent of voters are estimated to have voted early, either in person or by mail. Overseas voters could request an absentee ballot that, in some instances, could only be returned electronically, which required voters to waive the secrecy of their vote.

The use of new voting technologies (NVT) is extensive and varies considerably across the country. While there is a general trend to return to paper-based voting, voting machines without a voter-verified paper trail were used in 15 states, with 5 states relying on them exclusively. Outdated voting machines known to have serious usability issues were used in some states. Positively, in line with prior ODIHR recommendations, efforts to strengthen public confidence in the accuracy of election results were introduced, including through certification of NVT and post-election audits.

Election day was orderly and calm overall. Poll workers in polling stations observed by IEOM observers were knowledgeable, helpful and well-prepared, and polling stations visited were as a rule accessible for voters with disabilities. Prescribed procedures were generally followed, although conditions did not always ensure the secrecy of the vote. Where observed, the closing of polling stations and the transmission and tabulation of results was transparent, orderly and efficient.

PRELIMINARY FINDINGS

Background

The US is a federal presidential republic comprising 50 states, the District of Columbia, and a number of overseas territories. The President holds executive power, serving as head of state and government, with legislative power vested in Congress, consisting of the Senate and the House of Representatives. On 6 November, elections were held for 35 of the 100 Senators and all 435 Representatives.¹ The last congressional elections, held in 2016, resulted in a Republican majority in both the Senate and House. A number of social groups are underrepresented in the outgoing Congress. Women hold some 20 per cent of seats and 25 per cent of leadership positions, racial minorities and Native Americans hold 19 per cent of seats, and persons with disabilities are also reported to be underrepresented.²

The elections took place in a highly polarized political environment with entrenched partisan gridlock in Congress and federal bodies. The pre-election period was marked by a series of legal and congressional investigations regarding cyber security threats and foreign interference in US elections.³ In January 2017, the Department of Homeland Security (DHS) designated elections as part of the nation's critical infrastructure (see *Cyber Security* section).

¹ Thirty-three Senate seats were contested in regular elections and 2 (Minnesota and Mississippi) in special elections.

² Women hold 5 of 19 leadership positions in the Senate, and 2 of 9 in the House, see data from the [Center for American Women and Politics](#). On minority and Native American representation, see data from the [Pew Research Center](#). On persons with disabilities, see data from the [National Council on Independent Living](#).

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".

Legal Framework and Electoral System

The Constitution establishes the broad framework for federal elections. A discrete body of federal law focuses on protecting the voting rights of racial and linguistic minorities, military and overseas citizens, and persons with disabilities, as well as providing minimum standards for new voting technologies (NVT) and comprehensive regulation of campaign finance. Otherwise, detailed rules are to be found only at the state and sub-state level, resulting in an electoral framework that is complex and diverse, with few requirements of uniformity of practice.

While several bills were submitted in the outgoing Congress, which included proposals that would have addressed a number of prior ODIHR recommendations, a lack of bipartisanship meant that federal election law remained unchanged for these elections.⁴ Many states, however, introduced amendments, principally to facilitate voter registration, early voting, and restoration of voting rights for ex-prisoners. The US is a party to some major international and regional instruments related to democratic elections.⁵ It has, however, not ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (CRPD).⁶

Responsibility for enforcing federal electoral law is vested in the Department of Justice (DoJ). Under the 1965 Voting Rights Act (VRA), the DoJ may initiate proceedings against jurisdictions that discriminate on the grounds of race or color, or language status. 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. In 2013, the Supreme Court struck down the formula for determining which jurisdictions should be subject to preclearance, holding that the formula was outdated.⁷ At odds with a prior ODIHR recommendation, and despite several legislative initiatives, Congress has yet to adopt an alternative formula. As a result, no jurisdiction is presently required to pre-clear electoral changes, with four exceptions that are covered by court orders.⁸ The absence of preclearance requirements removes a longstanding, timely and effective safeguard against discrimination on racial or linguistic grounds, challenging constitutional guarantees, OSCE commitments and international obligations.⁹ Concerns have also been expressed by many ODIHR LEOM interlocutors that the DoJ is failing to use its enforcement powers in an effective manner.¹⁰

Individuals, political parties and civic groups may file cases of violations of electoral law before the courts. Access to courts is open but legal costs may be prohibitive. Temporary orders are available, but final adjudication may take years, undermining access to timely and effective remedies, contrary to

⁴ Election-related legislation tabled in the outgoing Congress includes [Voting Rights Advancement Act](#), [Voter Empowerment Act](#), [Honest Ads Act](#), [Secure Elections Act](#), and [Native American Voting Rights Act](#).

⁵ Including the 1966 International Covenant on Civil and Political Rights (ICCPR) (subject to reservation); the 1965 Convention on the Elimination of all forms of Racial Discrimination (CERD); 2003 UN Convention against Corruption (UNCAC); and 2004 Council of Europe Convention on Cybercrime.

⁶ Paragraph 13.2 of the 1989 OSCE Vienna Document commits participating States to consider acceding to international human rights treaties, with paragraph 15 referencing CEDAW. See also, paragraph 40.2 of the 1991 OSCE Moscow Document and paragraphs 5.20 and 5.21 of the 1990 OSCE Copenhagen Document. The US is also not a party to the American Convention on Human Rights and the Indigenous and Tribal People's Convention.

⁷ See [Shelby County v Holder](#).

⁸ Charles Mix County (South Dakota), Port Chester Village (New York), Evergreen City (Alabama), and from 2017, as the first 'bail-in' since 2013, [Pasadena City](#) (Texas).

⁹ In particular, Article 2 of the CERD requires that all public authorities, national and local, shall pursue policies of eliminating racial discrimination, while Article 5(c) guarantees the right to participate in elections on the basis of universal suffrage. See also paragraph 5.9 of the 1990 OSCE Copenhagen Document.

¹⁰ See, for example, Congressional Black Caucus [Letter to Attorney General Jeff Sessions](#). Also, see US Commission on Civil Rights, [An Assessment of Minority Voting Rights Access](#) in the US, 2018 Statutory Enforcement Report.

OSCE commitments and international obligations.¹¹ In several states, numerous cases remain before courts concerning voter registration, voter identification, documentary proof of citizenship, early voting, criminal disenfranchisement, absentee ballots, and redistricting. This potentially causes uncertainty for voters and electoral stakeholders.

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 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. Representatives serve two-year terms. House district boundaries are drawn by states. Instances of partisan and racial redistricting, violating guarantees of equal suffrage, are alleged, with litigation initiated in a number of states. The Supreme Court dealt with four cases on redistricting in 2018, but in none has there been a substantive ruling on the matter.¹² While districts generally are of equal size, there are widespread concerns that redistricting is often a partisan process, resulting in a number of uncompetitive contests. In these elections, 42 candidates for the House ran unopposed.

Election Administration

The election administration is highly decentralized, with no federal body mandated to oversee the entire electoral process. States are responsible for administering elections, with duties often delegated to some 10,500 jurisdictions across the country. Around 185,000 polling stations were established for these elections, but their number and size varied from state to state. At least 13 states established vote centres, where voters could vote regardless of their residential address within a jurisdiction.

The overall authority to administer elections at the state level varies considerably. In 26 states, the chief election official (CEO) is the elected secretary of state or lieutenant governor, while others use a combination of politically appointed CEOs and commissions. A similar variety of electoral authorities exist at the sub-state level. While stakeholders overall had confidence in administration of elections, in some states, CEOs were contestants in the elections they supervised, potentially leading to conflict of interest and raising questions about the independence of the administration.¹³

The bipartisan Election Assistance Commission (EAC) proactively supported states and local jurisdictions to prepare for the elections, including guidance on voter registration, cyber-security training, and NVT certification. All ODIHR LEOM interlocutors positively assessed the work of the EAC. However, concerns were expressed that its current lack of a decision-making quorum means it cannot adopt new guidelines, including on the testing and certification of NVT, reducing its effectiveness to respond to current and emerging challenges.¹⁴

Election officials met with by the ODIHR LEOM were competent, operating transparently and in accordance with rules and established deadlines. Some officials indicated difficulties in recruiting and training poll workers, as well as a reduced capacity of some poll workers related to NVT. The DHS, state officials and non-profit organizations provided trainings in electoral security as a priority for election administrators tasked to be managers of information systems.

¹¹ Paragraph 5.10 of the 1990 OSCE Copenhagen Document provides that “everyone will have an effective means of redress against administrative decisions”. See also Article 2.3(a) of the 1966 ICCPR.

¹² See [Abbott v Perez](#), [Benisek v Lamone](#), [Gill v Whitford](#) and [Rucho v Common Cause](#).

¹³ CEOs ran for office in 20 states, including the Secretaries of State of Georgia and Kansas, who ran for governor. See a [letter](#) by former president Jimmy Carter to the Georgia Secretary of State. Paragraph 20 of the UN Human Rights Committee (CCPR) General Comment 25 states that “an independent electoral authority should be established to supervise the electoral process”.

¹⁴ After four years of functioning with three of four commissioners, in March 2018 one commissioner left. New commissioners have been nominated by the Senate and are awaiting confirmation, while a proposed “[Election Assistance Commission Termination Act](#)” is currently in Congress.

State and sub-state election officials widely used their websites to provide information to voters on a variety of topics, as well as guidance and training materials. However, some ODIHR LEOM interlocutors mentioned that sufficient information was not always provided to voters in case of legal changes or new procedures, as well as for prisoners and ex-prisoners. Various initiatives to increase voter turnout were undertaken by civil society groups and political parties. However, at times, this information was inaccurate or purposefully misleading.¹⁵

As required by the VRA and the 2002 Help America Vote Act (HAVA), authorities undertook numerous efforts to provide information materials in minority languages, as well as in formats accessible for persons with disabilities. In line with prior ODIHR recommendations, some jurisdictions introduced new tools to facilitate voting by persons with disabilities.¹⁶ Notwithstanding, disability rights organizations shared concerns that the number of inaccessible polling stations and the format of election materials in many jurisdictions across the country may affect the level of participation of persons with disabilities.

Cyber Security

Federal and state authorities launched a number of initiatives to help secure election technologies, including from cyber-threats. Following the DHS designation of elections as critical infrastructure, a sector-specific agency was established to share information and good practice to prevent and respond to attacks, particularly in respect of cyber security. In January 2018, Congress allocated USD 380 million to enhance technology and security in the election administration. The funds were distributed in their entirety by the EAC to all 50 states, the District of Columbia, and the US territories, and were used to replace outdated voting machines, strengthen the existing computer and network infrastructure, and build cybersecurity capacity.¹⁷ However, more investment is needed to replace aging voting equipment and to maintain security.

After the DHS designation, Information Sharing and Analysis Centers (ISACs) were established to assist states and jurisdictions to defend against cyber-attacks.¹⁸ ISACs organized cyber security training and simulation exercises, which helped several states to improve overall cyber awareness and cyber hygiene among election staff. DHS granted the necessary security clearances to around 100 election staff including CEOs of all states to be briefed on classified information pertaining to a potential cyber-attack. ISACs also supported the broad deployment of so-called ‘Albert sensors’, which allowed DHS and ISACs to collect, consolidate, and analyze suspicious network traffic and determine the best course of action to mitigate cyber-attacks.¹⁹

The robust technical support and co-ordination mechanisms introduced by DHS greatly enhanced the authorities’ preparedness for cyber-attacks. Most ODIHR LEOM interlocutors expressed confidence in the overall integrity of the election infrastructure and positively assessed efforts at all levels to mitigate cyber risks. There were no public reports of verified cyber attacks on elections infrastructure prior to election day. However, challenges continue to threaten the effectiveness of a co-ordinated response to cyber-attacks. An ODIHR LEOM analysis showed that more than 30 per cent of jurisdictions used insecure voter registration webpages and only 1,300 of around 10,500 jurisdictions are ISAC members that receive cyber security updates. In addition, some NVT vendors are not contractually obliged to react

¹⁵ For example, incorrect information about the deadline for submitting absentee ballots was sent on behalf of candidates to thousands of voters in New York and Missouri.

¹⁶ For example, in 43 states remote ballot marking systems or optical scanners with ballot marking function are in use.

¹⁷ California received the largest amount (USD 35.5 million), but no state received less than USD 3 million. See the [HAVA funds chart view](#).

¹⁸ The Multi-State ISAC and the Election-Infrastructure ISAC provide central resources for gathering information on cyber threats to critical infrastructure and enable communication between the public and private sector.

¹⁹ The Albert sensor is an intrusion-detection system designed to identify malicious network traffic.

to advisories that are being issued by the authorities, or to inform them about new vulnerabilities or security breaches.

Voter Rights

Citizens who are at least 18 years old on election day and are residents of a state are eligible to vote. However, contrary to longstanding ODIHR recommendations, legislation and practice effectively disenfranchised around 11 million otherwise eligible voters. Some 4.7 million citizens resident in the District of Columbia and US territories have no representation in the Senate and only non-voting representation in the House. Despite several states introducing amendments to restore the voting rights of ex-prisoners, an estimated 6.1 million persons with criminal convictions remain disenfranchised, half of whom have served their sentences.²⁰ This disproportionately impacts racial minorities, who are overrepresented in the penitential system.²¹ These restrictions on voting rights contravene principles of universal and equal suffrage, and the commitment to ensure proportionality in the restriction of rights, as provided in the 1990 OSCE Copenhagen Document.²²

Restrictions on voting rights of persons with intellectual disabilities or in guardianship vary across the country. Forty states impose disqualifications based on competency requirements, five of which have adopted a best practice model in the assessment of capacity, while ten states have no legal restrictions on the grounds of intellectual capacity.²³ State practices do not always accord with US legislation and international standards.²⁴

Voter Registration

Voter registration is active and implemented at state level, with minimum conditions set by HAVA and the 1993 National Voter Registration Act. In line with the law, registration of voters was open until at least 7 October. In many states, the process continued after that date, allowing later registration for absentee and early voting. Voters could register in person, by post, or through an authorized third party. Seventeen states and the District of Columbia allowed same-day voter registration before and on election day, while North Dakota did not require any registration.²⁵ Two states required documentary proof of citizenship to register.²⁶ States are required to co-ordinate and match their voter registration databases with state and federal databases, but laws and procedures for maintaining voter lists vary.²⁷

Several initiatives were undertaken to facilitate registration, in line with prior ODIHR recommendations. Online voter registration was used in 37 states and the District of Columbia, while automatic registration

²⁰ See The Sentencing Project, [6.1 million lost voters](#). Since the last elections, Alabama, California, Delaware, Iowa, Louisiana, Maryland, Nevada, New York, Virginia and Wyoming have amended their laws to liberalize voting access. Proposals for similar amendments were on the ballot in several states in these elections.

²¹ Even for those who are not legally deprived of the right to vote, voting facilities are rare in jails and prisons.

²² Paragraphs 7.3 and 24 of the 1990 OSCE Copenhagen Document state that participating States will “guarantee universal and equal suffrage to adult citizens,” and that “...any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.” See also, the 2003 Inter-American Commission on Human Rights (IACHR) decision in [Statehood Solidarity Committee v US and the 5 October 2018 Case before IACHR](#).

²³ See Bazelon Center for Mental Health Law, [State Laws Affecting the Voting Rights of People with Mental Disabilities, 2018 revision](#).

²⁴ The 1990 American with Disabilities Act provides that the right to vote cannot be taken away without an individual assessment. Articles 12 and 29 of the 2006 CRPD, and subsequent CRPD [treaty interpretation](#), does not permit blanket restrictions based on mental disability.

²⁵ In Florida, a proposal to extend the voter registration deadline because of hurricane Michael was rejected.

²⁶ Laws in Arizona and Kansas requiring proof of citizenship for voter registration were partially overturned by courts for violating NVRA requirements.

²⁷ Databases include the state databases of the motor vehicle authority and the federal database of the Social Security Agency, as well as state records of deceased people and prisoners.

was provided in ten states and the District of Columbia. At the same time, an increased number of states also participated in inter-state projects to identify duplicate records and inaccuracies, and to ensure the integrity of voter registers.²⁸ However, some decisions and initiatives related to voter list maintenance and integrity effectively limited access to the vote for some citizens. In June 2018, the Supreme Court ruled that removals from voter lists due to inactivity, as practiced in Ohio, do not violate federal election law.²⁹ The application of Georgia's legislation on voter registration resulted in the suspension of the registration of some 50,000 people, the majority of whom are African American, because of mismatches in their documents.³⁰ A number of IEOM interlocutors noted that low-income voters, racial and linguistic minorities, Native Americans, and citizens with disabilities face greater obstacles in registering as voters and have lower than average registration rates.

According to the Census Bureau, the total number of citizens eligible to vote is estimated to be above 250 million, while the total number of registered voters, according to state registers, is estimated at some 192 million. Despite some improvements to facilitate voter registration, the high number of unregistered citizens coupled with concerns that marginalized groups faces undue obstacles in registering, underline a need for greater efforts by authorities to enhance voter registration and accuracy across the country.³¹

Voter Identification

Requirements for voter identification vary widely. Thirty-four states required voters to show some form of identification before voting, 17 of which required photo identification.³² Provisional ballots can be provided to voters who believe they are registered at a locality but cannot be found on the voter list or cannot present the required identification document, but state regulations and deadlines for verifying and counting provisional ballots vary widely. On 9 October, the Supreme Court upheld a North Dakota voter identification law that requires a residential address on an ID to vote and does not accept a post office box address, except with supplementary proof of a residential address.³³ Several organizations claimed that this law disproportionately restricts the rights of Native Americans who do not have a residential address.

While there have been only a few legal changes to identification requirements since 2016, it remains a highly charged issue, divided along partisan lines. Republicans emphasize strict voter identification as key to protecting electoral integrity, while Democrats underscore that the risk of fraud is minimal and that such requirements can disenfranchise marginalized groups. Measures to ensure electoral integrity are important but they should be designed in a manner that does not disenfranchise eligible voters.

Candidate Registration

Under the Constitution, candidates for the Senate must be at least 30 years old and a citizen for at least 9 years, while candidates for the House must be at least 25 years old and a citizen for at least 7 years. Members of Congress are required to be residents of the states they represent. Detailed registration requirements are established by state law, with considerable variations. All states offered the possibility for recognized political parties to nominate candidates, although the definition of 'recognized' party

²⁸ Currently, 24 states and the District of Columbia participate in [ERIC](#), and 30 states participate in [IVCP](#).

²⁹ See [Husted v. Randolph](#). However, on 31 October, a federal appeals court ordered Ohio to allow voters who had been removed from voter lists in the last six years to cast provisional ballots in the mid-term elections.

³⁰ The Congressional Black Caucus cited the racially disparate impact of the system in its [letter to Attorney General Jeff Sessions](#).

³¹ Paragraph 11 of the UN CCPR General Comment 25 provides that "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. When registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed".

³² Alabama, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Rhode Island, South Dakota, Tennessee, Texas, Virginia, and Wisconsin.

³³ See [Brakebill v Jaeger](#). The law, introduced in 2013, was not in effect until these elections due to a court stay.

varied depending on the number of registered voters declaring their association with the party or the number of votes that the party received in previous elections. Smaller political parties and independent candidates may run for election if they collect a certain number of supporting signatures. Several IEOM interlocutors noted that in some states, meeting these requirements proved challenging for smaller parties and independent candidates who, as a rule, have limited resources. A majority of states allowed for voters to ‘write-in’ unregistered candidates on election day. The variations in registration rules resulted in significant differences in the conditions for citizens from different states to be elected to the same national offices.

Following primary elections held between March and September, a total of 1,262 candidates stood in the mid-term elections, providing voters with a variety of choices. These elections witnessed record numbers of candidates from historically underrepresented groups. There were 23 women running for the Senate and 239 for the House.³⁴ While a record number of women were elected, they still remain underrepresented in the Congress. The number of openly LGBT candidates running for Congress increased to a record 31. At least 14 persons with disabilities appeared on congressional ballots.³⁵

Election Campaign

The campaign unfolded in an open atmosphere with overall respect for the fundamental freedoms of expression and assembly. However, a number of security-related and terrorist incidents cast a shadow over the campaign. Over several days in late October, some 15 improvised explosive devices were found, addressed to prominent Democratic politicians and other public figures critical of the White House and the Republican party, as well as to a major cable TV network.³⁶ On 27 October, a mass shooting in a Pittsburgh synagogue left 11 people dead and six injured.³⁷

The type of rhetoric used during the campaign was often divisive, confrontational, and, at times, intolerant, with much of it emanating from the national level.³⁸ In particular, language of a sexist, xenophobic and racist nature was often observed during this period, including instances of an anti-Semitic nature.³⁹ The recent confirmation process of a Supreme Court nominee amplified existing political divisions. The campaign also witnessed a range of negative TV adverts to attack political

³⁴ However, women still only accounted for 28.7 per cent of major-party nominees for the House, and 32.4 per cent for the Senate. See [Center for American Women and Politics](#).

³⁵ See data from the [Victory Fund](#) and the [National Council on Independent Living](#).

³⁶ Addressees included, among others, former President Obama, former Vice President Biden, former Secretary of State Ms. Clinton, philanthropist George Soros, and CNN offices in Atlanta and New York City. One person was arrested in connection with these incidents. The FBI referred to these cases as ‘domestic terrorism’.

³⁷ The [ODIHR Director](#) and the [OSCE Parliamentary Assembly](#) President condemned the attack and called on political leaders to speak out against anti-Semitism and all forms of intolerance and discrimination.

³⁸ For example, on 2 October, in a rally in Mississippi, President Trump mocked the testimony of one woman who had claimed that the Supreme Court nominee had sexually assaulted her. On 6 October, in a rally in Kansas, President Trump referred to Democratic Senator Elizabeth Warren as ‘Pocahontas,’ mocking her claim of Native American heritage. On 20 October, President Trump declared in a rally in Nevada that the Democrats had become “an angry, ruthless, unhinged mob determined to get power by any means necessary”. On 23 October, the White House published a report comparing the policies of Democratic Senators with those of Mao Tse-tung. On 9 October, Ms. Clinton stated in a TV interview that “you cannot be civil with a political party that wants to destroy what you stand for, what you care about”. On 12 October, in Kentucky, former Vice President Biden criticized President Trump for “trashing American values”.

³⁹ For example, on 16 October, the Republican Senate candidate in Michigan was forced to publicly apologize after a swastika was seen in one of his campaign TV ads. On 23 October, a Republican House candidate in Illinois in a TV interview described himself as “a National Socialist”. On 23 October, House Majority Leader Kevin McCarthy posted on Twitter that three Democratic donors – all of whom are Jewish - were trying to ‘buy’ the elections. On 24 October, graffiti of a swastika was found on a campaign sign of a Republican Senate candidate in Missouri. The National Republican Congressional Committee produced a TV ad in Minnesota where the philanthropist George Soros was characterized as a ‘puppet master’ behind large sums of funds controlling the Democratic House candidate.

opponents.⁴⁰ Such rhetoric, coupled with the inability of both main political parties to maintain a reasoned dialogue, restricted the space for substantive debate on public policy.

The campaign was dominated by the two main parties, including active roles for senior party figures. President Trump campaigned actively for the Republicans, speaking at numerous rallies in so-called battleground states, as did former President George W. Bush and outgoing House Speaker Paul Ryan. For the Democrats, former President Barack Obama, former Vice President Joe Biden, former Secretary of State Hillary Clinton, former First Lady Michelle Obama, and House Minority Leader Nancy Pelosi all actively campaigned across the states. The issues discussed in the campaign were largely driven by the national political environment, including the performance of the president, the economy, immigration, healthcare, education, and social security, as well as a range of prominent local issues.

A large number of grassroots movements assumed a strong public profile, campaigning on social issues related to women's rights, racial equality, gun control, and the role of federal government.⁴¹ These movements played a key role in ensuring a diverse range of views were presented during the campaign. Groups dealing with women's rights were particularly active in energizing women to stand as candidates and to register to vote.

In addition to traditional media and in-person campaigning, social networks were used extensively, both to communicate directly with voters and to place targeted adverts. While a legislative initiative at federal level to enhance disclosure of online political advertisements is pending, a number of initiatives were introduced at state level and some of the main social networks made policy revisions.⁴² There were instances of online disinformation campaigns, including from domestic and foreign sources, as well as about the transparency of online advertising.⁴³

Campaign Finance

Federal law regulates campaign finance for congressional elections, including clearly defined limits on donations by individuals, political parties, and Political Action Committees (PACs). There is no public funding for candidates. Foreign or anonymous donations are prohibited, as are direct donations from corporations and trade unions. There are no campaign spending limits, as the Supreme Court has consistently held that any limitation would constrain free speech. The Court has also extended the right to "independent speech" to legal entities, including so-called Super PACs, allowing them too to spend without limit.⁴⁴ To be considered "independent", legal entities cannot co-ordinate their campaigning with parties and candidates, but many IEOM interlocutors noted gaps in enforcing this law. It has been estimated that these were the most expensive mid-term elections in US history, with total spending projected at USD 5.2 billion.⁴⁵ Many ODIHR LEOM interlocutors raised concerns that disproportionate

⁴⁰ On 1 November, a controversial video produced by the Trump 2020 campaign and broadcasted by several cable channels linking Democrats to a convicted Mexican murderer of two US police officers, by saying "Democrats let him into our country. Democrats let him stay". Ultimately, the cable networks decided to stop airing the commercial. Another advert attempted to link a Democratic candidate of Mexican-Palestinian descent to terrorism by describing him as a "security risk," who was "trying to infiltrate Congress." The Congressional Leadership Fund produced an advert that portrayed a Democratic House candidate in New Jersey as a terrorist sympathizer.

⁴¹ Examples include [#MeToo](#), [Emily's List](#), [Maggie's List](#), [Winning for Women](#), [Black Lives Matter](#), [March for Our Lives](#), [Americans for Prosperity](#), [American Action Network](#), [Susan B. Anthony List](#) and [Freedom Works](#).

⁴² See [Honest Ads Act](#) introduced in Congress. In Maryland, the [Online Electioneering Transparency and Accountability Act](#) came into effect on 1 July, while on 26 September California passed a "[Social Media Disclose Act](#)", and other states, such as Connecticut and Washington, are considering similar policy initiatives.

⁴³ Facebook and Twitter undertook some self-regulation actions to remove disinformation and enhance transparency of political advertising but the media reported several instances of how these rules could be circumvented.

⁴⁴ See, respectively, [Buckley v Valeo](#) and [Citizens United v. FEC](#).

⁴⁵ See [projections](#) by the Center for Responsive Politics, based on FEC data.

spending on behalf of select candidates of two parties distorted the campaign environment, challenging international standards.⁴⁶

Campaign finance law is enforced by the Federal Election Commission (FEC), which should have six commissioners, of whom no more than three can represent the same party. Due to the inability of Congress to make appointment for two FEC vacancies, decision-making by the sitting members requires full consensus, resulting in effective paralysis with regard to policy making and the initiation of investigations. The FEC's administrative reporting and disclosure functions continue to operate efficiently. New reporting rules applied to Senate candidates in these elections, requiring electronic filing of returns, facilitated expeditious disclosure.

Candidates, parties and PACs submitted financial reports to the FEC which published them expeditiously, ensuring a high degree of transparency. However, some non-profit organizations were not required to disclose their spending, provided political activity is not their stated primary purpose. This diminishes an otherwise transparent system by allowing donors to circumvent disclosure rules, which is at odds with international obligations and prior ODIHR recommendations.⁴⁷

Media

The media landscape is pluralistic and diverse, offering voters a wide range of opportunities to inform themselves, but at the same time is increasingly polarized. Despite the large volume of media outlets, there is a considerable concentration in media ownership. Major cable and local TV channels belonging to the main television networks dominate the consumption of political news, but online media and social networks are increasingly used to access news information. The two main public broadcast networks, Public Broadcasting Service (PBS) and National Public Radio (NPR), have a limited but growing audience, in particular NPR. There is a high number of print publications, but very few have nationwide reach, and both national and local print media are facing challenges as the media market shifts to online media and digital platforms.

The First Amendment to the Constitution guarantees freedom of the press and expression and provides for a robust system of protection for media independence. However, in the period ahead of these elections, journalists and news media have been the subject of several verbal attacks by high-level officials.⁴⁸ Further concerns were raised by the packages containing explosive material addressed to a prominent news TV.⁴⁹ Such attacks raised concerns about the safety of journalists and undermined public trust in the media and its essential role in a democratic society.⁵⁰

The overall legal framework for media provides for limited regulation, favouring self-regulation. The Federal Communications Commission (FCC) oversees broadcast media regulations but does not conduct systematic media monitoring. In line with a general tendency toward media deregulation, the FCC repealed the 2015 Open Internet Order, which barred providers from blocking, throttling or introducing paid prioritization of Internet content. The December 2017 repeal of the so-called "net neutrality" rules,

⁴⁶ Paragraph 19 of UN CCPR General Comment 25 states that "reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that... the democratic process [is not] distorted by the disproportionate expenditure on behalf of any candidate or party".

⁴⁷ Article 7.3 of UNCAC requires "each State Party...to consider taking appropriate legislative and administrative measures... to enhance transparency in the funding of candidatures for elected public office...".

⁴⁸ At a Republican rally in Montana on 18 October, the president praised the unprovoked assault on a journalist by state Congressman Greg Gianforte. The president also verbally attacked journalists and news media while participating at Republican rallies and via Twitter.

⁴⁹ See also, OSCE Representative on Freedom of the Media (RFoM) [statement](#) from 25 October 2018.

⁵⁰ In paragraph 6 of the 2010 OSCE Astana Document, participating States acknowledged that "the important role played by civil society and free media in helping us to ensure full respect for human rights, fundamental freedoms, democracy, including free and fair elections, and the rule of law".

which went into effect in June 2018, was met with criticism from national and international organizations who raised concerns that it could lead to unequal treatment of content and users, and possibly reduce access to information. Several states responded to the repeal of the Open Internet Order by initiating or enacting legislation to reinstate net neutrality at the state level.⁵¹

In the 60 days prior to elections, commercial broadcasters were required to offer “reasonable access” to all legally qualified federal candidates who request to purchase airtime, and provide an “equal opportunity” for candidates running for the same office to receive airtime under equal conditions. These rules, however, apply to candidates, but not to their supporters or to broadcasters’ editorial coverage. There are no limits on the amount of paid advertising, but commercial broadcasters have an obligation of sponsorship identification and are required to maintain a publicly accessible ‘political file’ of requests to purchase airtime. Public broadcasters PBS and NPR are prohibited from airing paid advertisements.

Media coverage of these elections was dominated by a focus on national politics and there was limited coverage of the different electoral races.⁵² Besides the most prominent policy issues and coverage of campaign events, the national media devoted considerable space to the debate over voting rights. Overall, the media devoted most of their coverage to the president, which contributed to framing these elections as a referendum on his policies and performance. The cable TV networks reflected and further exacerbated the overall polarization of political discourse, with generally highly partisan coverage. CNN news coverage focused on the president, who received 64 per cent of total coverage in a mostly negative tone. FOX news also focused its coverage on the president, who received 40 per cent of the total coverage, mostly in a neutral tone, while it devoted 37 per cent to the representatives and supporters of the Democratic Party, with a clearly negative tone.⁵³ While focusing 53 per cent of their coverage on the president, public broadcasters PBS and NPR offered balanced coverage of the Democratic and the Republican Party, who received 26 and 21 per cent, respectively of their news coverage. National television networks offered limited election coverage in their national newscasts, while local broadcast media extensively covering the most competitive races, including through candidate debates. All commercial broadcast media were widely used for airing paid advertisement.

Election Observation

In line with its OSCE commitments, the US Government invited ODIHR and the OSCE Parliamentary Assembly to observe the mid-term congressional elections. Federal government departments and agencies supported and facilitated the work of the IEOM. However, election observation is regulated by state law, which usually does not explicitly provide for international observers.⁵⁴ California, Missouri, New Mexico and the District of Columbia provide for international observers by law, and four additional states have statutory language that is inclusive of many types of observers, which may include international observers.⁵⁵ At least eight states allow the public to observe elections, while other state laws are silent on observation, leaving it to the discretion of election officials. Restrictions on

⁵¹ Legislators in 30 states have introduced over 72 bills requiring Internet service providers to ensure various net-neutrality principles. California, Oregon, Vermont and Washington have enacted net neutrality-related legislation. See [the OSCE RFoM statement](#) from 5 December 2017.

⁵² The ODIHR LEOM media monitoring started on 17 October and included public broadcasters *PBS* and *NPR*; three television networks – *ABC*, *CBS* and *NBC*; three cable television channels – *CNN*, *FOX News* and *MSNBC*; two newspapers – *New York Times* and *USA Today*. The ODIHR LEOM also followed five online media – *Politico.com*, *HuffingtonPost.com*, *Vox.com*, *Breitbart.com* and *TheDailyCaller.com*. In addition, the ODIHR LEOM followed state-level and local media.

⁵³ During a rally in Missouri on 5 November, President Trump invited on the stage a FOX News host, Sean Hannity, who gave a speech backing the president and labelling journalists attending the campaign event as “fake news”.

⁵⁴ A National Association of Secretaries of State 2015 resolution welcomes “OSCE international election observers from the OSCE member countries to observe elections in states where allowed by state law”.

⁵⁵ Hawaii, North Dakota, South Dakota and Virginia.

observation of voting by international observers are in place in 12 states.⁵⁶ Since the 2017 designation of elections as critical infrastructure, concerns regarding the presence of international observers have been raised, and political and electoral authorities of several states declined to meet with IEOM observers, and in one state prevented observation altogether.⁵⁷ Such restrictions on election observers are not in line with OSCE commitments undertaken by the US Government.⁵⁸

Election day was observed throughout the country by political parties and civil society, which was widely seen as adding an important layer of oversight and transparency. Many of these groups provided immediate legal support in case of disputes. The DoJ announced it would deploy monitors to 35 jurisdictions in 19 states and react to complaints submitted during election day.

Early Voting

It is estimated that more than 35 per cent of voters cast their ballot prior to election day. Most ODIHR LEOM interlocutors expressed confidence in the election authorities administering early and absentee voting. Election officials encouraged early voting as a measure against long queues on election day. Election officials took measures, including training and clear guidelines, to ensure secure overnight storage of cast ballots and prevent unauthorized access to election materials. All states provided voters with the option to cast a postal ballot, most of them upon request, with 27 states not requiring a reason for the request. State laws required that the secrecy of the ballot be ensured by the usage of secrecy envelopes. Colorado, Oregon and Washington conducted elections entirely by postal ballot. Early voting was conducted in person in 37 states and the District of Columbia, with the early voting period starting from 45 days before election day.

The Federal Voting Assistance Program (FVAP), under the Department of Defense, 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.⁵⁹ This included efforts to overcome restrictions on Internet traffic imposed by some states as part of their efforts to ensure the security of election technologies. In line with the law, states distributed ballots to voters abroad at least 45 days prior to election day. If a ballot was not received in time to return it before election day, voters could use a ‘back-up’ Federal Write-In Absentee Ballot. Thirty-one states allowed voters to return their absentee ballot through a web portal, email, fax, or mobile voting applications. In some instances, this required voters to waive the secrecy of their vote, contrary to OSCE commitments.⁶⁰

New Voting Technologies

The use of NVT is extensive and varies considerably across and within states and jurisdictions. Most states use more than one type of voting machine, because of county variations or to accommodate voters with disabilities or language needs. There is a broad return to paper-based voting, and 42 states and the District of Columbia used optical or digital scanners in conjunction with paper ballots. Direct Recording Electronic (DRE) voting machines without a voter-verified paper trail (VVPAT) were used in 15 states,

⁵⁶ According to the [National Conference of State Legislators](#), international observation is explicitly prohibited or restricted in Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Louisiana, Mississippi, Ohio, Oklahoma, Tennessee, Texas. Most of these states met with the ODIHR LEOM before election day.

⁵⁷ CEOs in Kentucky, Louisiana, Montana, Nevada, Ohio, Pennsylvania, Tennessee, and West Virginia declined to meet with the ODIHR LEOM. Additionally, the Secretary of State of Indiana informed the ODIHR LEOM that international election observers were not welcome in the state at all.

⁵⁸ Paragraph 8 of the 1990 OSCE Copenhagen Document provides that “the participating State consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place”.

⁵⁹ The FVAP estimates the total number of out-of-country voters to be above 3 million.

⁶⁰ Paragraph 7.4 of the 1990 OSCE Copenhagen Document commits participating States to “ensure that votes are cast by secret ballot or by equivalent free voting procedure”.

with 5 states relying on them exclusively. Using equipment that does not allow the results to be audited is contrary to good practice.⁶¹ DREs with a VVPAT were used in 17 states. Despite concerns of cyber-attacks, new ballot return technologies for voters overseas were piloted and old voting machines known to have serious usability issues were used in some states.⁶²

Federal and state authorities made various efforts to strengthen public confidence in the accuracy of election results. There is an emerging trend away from traditional post-election audits and towards risk-limiting audits (RLA).⁶³ Thirty states and the District of Columbia required some form of traditional post-election audit, while Colorado, Rhode Island and Virginia required RLAs. In addition, several jurisdictions piloted RLAs in these elections.

Around 1,300 jurisdictions in 30 states certified their NVT using the EAC's Voluntary Voting System Guidelines (VVSG). The VVSG continues to be developed by the EAC in co-operation with the National Institute of Standards and Technology, as well as leading international computer security and election experts. While standards such as the VVSG establish a uniform minimum security baseline across all certified NVTs, they do not allow for security updates without breaking certification thereby reducing their value in responding to new and emerging security threats.⁶⁴

Election Day

The atmosphere in and around the limited number of polling stations visited on election day by IEOM observers was orderly, calm and peaceful overall. Voters turned out in high numbers, with queues noted especially in the morning. Polling stations visited by IEOM observers were generally accessible, including for voters with disabilities, and their setup was generally appropriate for voting.

IEOM observers reported that, in most polling stations observed, there were sufficient poll workers, who were knowledgeable, helpful and well-prepared to administer the voting process smoothly and efficiently. Prescribed procedures were generally followed, although conditions did not always ensure the secrecy of the vote, especially where ballot scanners were in use. All necessary election material was present at polling stations visited on election day, but IEOM observers reported isolated cases of voting machines or ballot scanners malfunctioning, which may be partly attributed to outdated equipment and inadequate testing procedures.

Some IEOM observers reported instances of voters' names not being found on the voter list. In most such cases, affected voters were issued provisional ballots. Where election day registration was possible, voters availed themselves of this opportunity, at times in significant numbers. IEOM observers did not observe and were not informed about challenges to voters' eligibility, nor did they observe instances of voters being turned away due to problems related to identification.

IEOM observers described the closing of polling station and the transmission and tabulation of results, in places observed, as transparent, orderly and efficient, although the process appeared complex in some jurisdictions.

⁶¹ DRE voting machines without VVPAT are exclusively in use in Delaware, Georgia, Louisiana, New Jersey, and South Carolina. The 2002 Venice Commission's [Code of Good Practice in Electoral Matters](#), section 3.2 iv, recommends that "voters should be able to obtain a confirmation of their votes".

⁶² West Virginia piloted a mobile phone-based Internet voting system with limited security features. Hart InterCivic's eSlate voting system without VVPAT is still in use in Indiana, Kentucky, Pennsylvania, Tennessee, and Texas.

⁶³ An RLA is a procedure for manually checking a sample of ballots or voter-verifiable paper records from an electronic voting device that will have a large, prespecified chance of correcting an erroneous election outcome.

⁶⁴ The latest adopted version of the VVSG, for example, is agnostic to newly discovered Common Vulnerabilities and Exposures (CVEs), but installing security patches to protect NVTs against such CVEs would break certification.

MISSION INFORMATION & ACKNOWLEDGEMENTS

Washington, DC, 7 November 2018 – This Statement of Preliminary Findings and Conclusions is the result of a common endeavour involving the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the OSCE Parliamentary Assembly (OSCE PA). The assessment was made to determine whether the elections complied with OSCE commitments, other international obligations and standards for democratic elections, and with national legislation.

The OSCE PA President, Mr. George Tsereteli, was appointed by the OSCE Chairperson-in-Office as Special Co-ordinator and leader of the OSCE short-term observer mission. Ms. Isabel Santos headed the OSCE PA delegation. Ms. Tana de Zulueta is the Head of the ODIHR LEOM, deployed from 3 October.

Each of the institutions involved in this International Election Observation Mission has endorsed the 2005 Declaration of Principles for International Election Observation. This Statement of Preliminary Findings and Conclusions is delivered prior to the completion of the electoral process. The final assessment of the election will depend, in part, on the conduct of the remaining stages of the electoral process, including the count, tabulation and announcement of results, and the handling of possible post-election day complaints or appeals. The ODIHR will issue a comprehensive final report, including recommendations for potential improvements, some eight weeks after the completion of the electoral process. The OSCE PA will present its report at its Winter Meeting in Vienna in February 2019.

The ODIHR LEOM includes 14 experts in the capital and 36 long-term observers deployed throughout the country.

On election day, 136 observers were deployed, including 53 observers deployed by the ODIHR, as well as a 83-member delegation from the OSCE PA. Observers were drawn from 33 OSCE participating States and one Partner for Co-operation.

The observers wish to thank the authorities of the United States for the invitation to observe the election, and the Department of State, the National Association of Secretaries of States, and the National Association of State Election Directors for their assistance. They also express their appreciation to other federal and state institutions, political parties, media and civil society organizations, and international community representatives for their co-operation.

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