Office for Democratic Institutions and Human Rights

UNITED STATES OF AMERICA

2 NOVEMBER 2004 ELECTIONS

OSCE/ODIHR Election Observation Mission Final Report

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I. EXECUTIVE SUMMARY

In response to an invitation from the Government of the United States of America\(^1\) to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the OSCE conducted an Election Observation Mission (EOM) of a targeted nature to the 2 November 2004 elections. The OSCE EOM assessed the elections in terms of their compliance with the 1990 OSCE Copenhagen Document and other international standards for democratic elections. Implementation of the 2002 Help America Vote Act (HAVA) with regard to elections for federal office, notably the presidential election, was of particular interest.

The 2 November 2004 elections in the United States mostly met the OSCE commitments included in the 1990 Copenhagen Document. They were conducted in an environment that reflects a long-standing democratic tradition, including institutions governed by the rule of law, free and generally professional media, and a civil society intensively engaged in the election process. There was exceptional public interest in the two leading presidential candidates and the issues raised by their respective campaigns, as well as in the election process itself. However, a number of issues were identified, particularly in the context of the ongoing electoral reform process, which merit further consideration.

The presidential elections took place in a highly competitive environment that resulted in a close race. The two leading candidates enjoyed the full benefits of extensive media coverage, which enabled voters to make informed choices. However, in order to safeguard the genuine competitiveness of congressional election contests, there may be a need to review procedures for drawing borders of congressional districts.

The elections were held in the context of an ongoing electoral reform process, and in the framework of a highly decentralized system of government. While HAVA represents a bi-partisan response to problems identified during the 2000 elections, establishing minimum federal standards for the conduct of elections, it also reflected a political compromise. A number of procedural issues, including the regulation of provisional balloting, remained to be addressed during implementation, which varied from state to state. HAVA’s impact to date has been positive but limited, due in part to delays in funding and the late establishment of the Election Assistance Commission (EAC), a key institution for facilitating HAVA implementation.

The principal state and county election officials, most of whom are either elected to their office or nominated by political parties, generally performed their duties in a professional and dedicated manner. Although the method of appointment of election administrators enjoys overall confidence, there is the potential for a conflict of interest when a state or county election official simultaneously runs for public office or is actively involved in the campaign of a candidate. The overall transparency of the election administration was enhanced by broad media coverage of the process.

During the pre-election period, campaign expenditures by the candidates were subject to limits imposed by federal law. However, these limits were circumvented by the so-called “527” groups, tax exempt groups which are not subject to statutory limits on financial contributions. Towards the end of the campaign, “527” groups were effectively deployed in support of both leading presidential candidates.

Federal law establishes minimum standards for states to ensure absentee voting for federal offices by out-of-country voters. Some states further facilitate out-of-country-voting by allowing marked ballots to be returned by facsimile transmission. While in particular circumstances, such a method of voting may represent a unique option to enfranchisement, those who choose this option willfully forego the secrecy of their votes. OSCE commitments determine that a secret vote is fundamental to a democratic process.

The U.S. constitutional framework grants full representation and voting rights in elections for federal office to US citizens, who are also citizens of individual states. However, to varying degrees, these rights are limited for citizens of other U.S. jurisdictions, such as Washington D.C. Additionally, in some states, there is a disproportionate restriction on voting rights of persons who have previously been convicted on a felony charge, but who have since completed their prison sentence. Ensuring equal voter rights is a fundamental OSCE commitment.

In a system of pro-active voter registration, voter rights are best protected when voters themselves undertake the responsibility to ensure their registration status. At the same time, the authorities should be equally accountable for fulfilling their responsibilities to process voter registration forms in an accurate and timely manner. The OSCE EOM received reports to the effect that partisan groups mishandled or lost registration forms, or allegedly facilitated fraudulent registration of voters.

Concerns regarding the integrity of the ballot and alleged vote suppression, primarily among minorities, were shared with the OSCE EOM in the pre-election period. Although the OSCE EOM could not verify them, it noted that the scale of expressed concern could have undermined confidence in the electoral process.

This election witnessed the broad introduction of Direct-Recording Electronic (DRE) voting machines. While voter education efforts familiarized many voters with these new technologies, a general lack of voter verified audit capabilities\(^2\), combined with certification procedures that at times lacked transparency and inclusiveness, lessened the potential for building confidence in DREs.

Election day was characterized by broad participation indicating high voter interest in the contest. Long lines of voters were reported in a number of areas, with polling boards appearing to do their best to ensure the efficient processing of voters. The OSCE EOM heard concerns that due to variances in the numbers, quality and type of voting equipment units in usage in polling stations, disparities in exercising the right to vote could have occurred. The OSCE EOM was made aware of limited reports of concern with regard to the performance of DREs and the regulation of provisional balloting. The announcement of preliminary results was prompt and transparent.

In keeping with its OSCE commitments, the United States invited the OSCE/ODIHR to observe these elections. OSCE observers were granted access to polling stations in a number of states,\(^2\)

\(^2\) Only the State of Nevada required that all DRE’s have a voter verified manual audit capacity.
although sometimes only in specific counties. However, in other states, access was not possible or was limited. This was a result of state law, either because international observers were not included in the statutory categories of persons permitted to be in polling places, or because the lack of reference to international observers in state law was deemed to constitute an obstacle to their presence in polling places. Lack of observer access to the election process, both international and domestic, including at polling station level, is contrary to OSCE commitments, and limited the possibility of the OSCE EOM to comment more fully on the election process.

The OSCE/ODIHR issues this final report after expiration of deadlines for legal challenges to the election results and the installation in office of the elected candidates. The OSCE/ODIHR stands ready to support the authorities and civil society in the United States of America in furthering the electoral reform process.

II. INTRODUCTION AND ACKNOWLEDGEMENTS

The OSCE deployed an Election Observation Mission, of targeted nature, from 4 October 2004. The EOM was a joint effort of the OSCE/ODIHR and the OSCE Parliamentary Assembly (OSCE PA).

Professor Rita Suessmuth (Germany), former Speaker of the German Parliament, headed the OSCE/ODIHR Election Observation Mission and Ms. Barbara Haering MP (Switzerland), Vice President of the OSCE PA, was appointed by the OSCE Chairman-in-Office as Special Co-ordinator to lead the short-term observation.

On election day, 92 OSCE observers from 34 OSCE participating States were deployed throughout the country. In response to the OSCE/ODIHR request to OSCE participating States for 100 short-term observers, the OSCE EOM mission comprised 56 members of the OSCE Parliamentary Assembly and 36 observers including members of the OSCE/ODIHR long-term observation.

The OSCE EOM wishes to express appreciation to the U.S. Department of State, the Department of Defense, the Department of Justice, the Federal Election Commission, the Election Assistance Commission, representatives of state and county authorities, and polling station officials, as well as to representatives of civil society, for their co-operation and assistance during the course of the observation. The OSCE EOM is also grateful for the support from Embassies of OSCE participating States in Washington DC.

The Election Preview 2004, generously provided by ELECTIONLINE.ORG to the OSCE EOM, was highly appreciated.

III. BACKGROUND

A. U.S. SYSTEM OF GOVERNMENT

The United States of America comprises 50 states. It also exercises jurisdiction over the District of Columbia\(^3\) (the city of Washington DC), Puerto Rico, Guam, the Virgin Islands, American Samoa, and

\(^3\) In accordance with the U.S. Constitution, the U.S. Congress created a seat for the federal government. The geographical size of this seat of government could not exceed ten miles square and would have exclusive
Swain’s Island, the Harcon Tract and the Northern Mariana Islands. Each state and jurisdiction consists of a number of counties, in excess of 3,100\(^4\) throughout the U.S.

The U.S. Head of State and chief executive is the President, elected for a four-year term in indirect elections. The legislature, a bicameral Congress, consists of the Senate and the House of Representatives. The Senate has 100 seats. Two members are elected from each state by popular vote, according to the first-past-the-post system, to serve six-year terms; one third of the Senate is up for election every two years. The House of Representatives has 435 seats. Members of the House are elected by popular vote in single seat constituencies, according to the first-past-the-post system, to serve two-year terms.

The number of seats in the House of Representatives varies according to a state’s population and is updated every ten years, following the U.S. census, last conducted in 2000. The distribution formula\(^5\) for the seats in the House of Representatives reflects the constitutional requirement that seats are allocated proportionally to population, and each state is allocated at least one seat. The allocation of these seats is currently done according to what is known as the formula of Huntington-Hill.\(^6\)

### B. VOTING IN U.S. FEDERAL ELECTIONS

Voting in elections for federal office is regulated primarily by the Constitution. Federal elections include direct elections for the House of Representatives and the Senate, and indirect elections for the President and Vice President. Participation in these elections derives from the constitutional status of a State, which is a legal unit that comprises specific geographical territory.

The Constitution is explicit that only citizens of a state\(^7\) elect members of the Senate and House of Representatives. The result is that U.S. citizens, who are not citizens of a state\(^8\), are not able to vote in federal legislative elections. This includes not only the citizens of Washington D.C. (District of Columbia), but also citizens residing in other U.S. jurisdictions. Voting in presidential elections is regulated in a similar manner, with citizens of Washington DC, who do have the right to vote for the presidency, presenting an exception among U.S. jurisdictions that are not states.

The District of Columbia and some U.S. territories have been granted a “voice” in the U.S. Congress through non-voting Delegates to the House of Representatives. The District of Columbia, American Samoa, Guam, and the Virgin Islands each elect a Delegate for a two-year term in direct elections. Puerto Rico elects a Resident Commissioner, instead of a Delegate, for a four-year term in direct elections. Although none can vote on questions that come for decision to the full House, they can vote in committee hearings.

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\(^4\) Including parishes, e.g. in Louisiana, and similar legal subdivisions.

\(^5\) U.S. Census Bureau, Internet release date 17 October 2000; see also http://www.census.gov/population/www/censusdata/apportionment.html.

\(^6\) The Huntington-Hill formula is also known as the equal proportions method.

\(^7\) Article 1 of the U.S. Constitution. Amendment XIV of the Constitution, Section 1 provides that U.S. citizens in the 50 states also have state citizenship. This is a legal term, not formalized by a particular identification document, which as a concept is similar to permanent residence and is based on a number of factors.

\(^8\) “Citizens” of the Swain’s Island and American Samoa are not U.S. citizens, but are “U.S. nationals”.
There is criticism that U.S. citizens of U.S. jurisdictions, other than states, are denied the right to send elected representatives to the U.S. Congress and the right to vote in federal elections. As these citizens are subject to U.S. laws, including laws regarding taxation, it is argued that this denial of representation and voting rights is particularly unfair. Court cases challenging this situation in Washington DC have been unsuccessful. The U.S. Constitution grants the right to vote in federal legislative elections and establishes the conditions for its exercise. The grant of this right is expressly conditioned upon a person being a citizen of a State. Thus, as this limiting condition is part of the granting language, courts have not considered this denial to be a violation of the voting rights of citizens who reside on territory that is not part of a State.

C. ELECTORAL SYSTEM

The U.S. President and Vice President are elected by an Electoral College consisting of 538 Electors. Each state elects a number of Electors that is equal to the sum of the number of senators and the number of representatives of that state to the House of Representatives. This means that each state will have at least three Electors. Additionally, Washington DC has Electors as if it were a state. All 50 states and Washington DC currently choose their electors by popular vote. U.S. voters cast a single ballot for the Electors for a particular team of candidates for President and Vice President. The Electors for the team of candidates must be U.S. citizens, and are “elected” with the sole task of electing the President and Vice President. Electors cast their votes in their own state capitals, on the Monday following the second Wednesday of December in the election year.

With the exception of the states of Nebraska and Maine, Electors are elected through the “winner take all” system: the list of Electors for a presidential candidate that wins the popular vote in each state wins all Electors for that state. Once the Electoral College is elected and certified, it elects the President and the Vice President by absolute majority vote, on separate ballots. Failure of the Electoral College to elect the President, the Vice President, or both, transfers the process to Congress. The House of Representatives would then determine the President, from the top three candidates, in a vote in which each state delegation casts one vote. The Senate would decide the Vice President between the top two candidates, each Senator having one vote.

D. PRESIDENTIAL CANDIDATES

Each party can register its candidates’ ticket in any state, provided it meets the registration requirements in accordance with state law. In order to register its ticket, each party usually has to present to state election officials lists containing specified numbers of voters’ signatures supporting the participation of the respective candidates in the election. Leading parties nominate their

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9 E.g. Albaugh v. Tawes in 1964, and Adams v Clinton in 2000, both heard by the U.S. Supreme Court. However, it is possible for a citizen of a particular state, while residing in Washington DC, to establish or retain his or her voting rights in his or her state of citizenship.

10 Three electors are attributable to the District of Columbia, which is a city and not a State, but has been granted by the 23rd amendment to the U.S. Constitution, effective in 1961, the number of electors to which it would be entitled if it were a State.

11 This underscores the fact that it is a state-by-state decision to adhere to the winner-take-all-system. It is not required in the U.S. Constitution. In 2004, the State of Colorado held a referendum on whether to change to a proportional system for electing Electors. The proposed change was defeated.
ABOUT THE OSCE/ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE’s principal institution to assist participating States “to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (…) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society” (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 100 staff.

The ODIHR is the lead agency in Europe in the field of election observation. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office’s democratization activities include the following thematic areas: rule of law, civil society, freedom of movement, and gender equality. The ODIHR implements a number of targeted assistance programmes annually, seeking both to facilitate and enhance State compliance with OSCE commitments and to develop democratic structures.

The ODIHR monitors participating States’ compliance with OSCE human dimension commitments, and assists with improving the protection of human rights. It also organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States.

Within the field of tolerance and non-discrimination, the ODIHR provides support to the participating States in implementing their OSCE commitments and in strengthening their respond to hate crimes and incidents of racism, xenophobia, anti-Semitism and other forms of intolerance. The ODIHR’s activities related to tolerance and non-discrimination are focused on the following areas: legislation; law enforcement training; monitoring, reporting on, and following up on responses to hate-motivated crimes and incidents; as well as educational activities to promote tolerance, respect, and mutual understanding.

The ODIHR provides advice to participating States on their policies on Roma and Sinti. It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing-house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE participating States, OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website (www.osce.org/odihr).