



Office for Democratic Institutions and Human Rights

UNITED STATES OF AMERICA
MID-TERM CONGRESSIONAL ELECTIONS
7 November 2006

OSCE/ODIHR Election Assessment Mission Report



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TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	1
II.	INTRODUCTION	3
III.	ELECTORAL SYSTEM.....	4
IV.	ELECTORAL REFORM.....	4
A.	LEGAL FRAMEWORK.....	4
B.	OVERVIEW	5
C.	STATES' COMPLIANCE	6
V.	ELECTION ADMINISTRATION	7
VI.	DELIMITATION OF CONGRESSIONAL DISTRICTS.....	7
VII.	CANDIDATE NOMINATION AND CAMPAIGN	8
VIII.	CAMPAIGN FUNDING	10
IX.	MEDIA.....	12
A.	REGULATORY PROVISIONS	12
B.	SUMMARY ASSESSMENT	13
C.	ACCESS FOR JOURNALISTS TO POLLING STATIONS TO CONDUCT EXIT POLLS	14
X.	VOTER REGISTRATION AND ELIGIBILITY	14
A.	OVERVIEW	14
B.	THIRD PARTY VOTER REGISTRATION.....	15
C.	STATEMENT OF POLITICAL AFFILIATION	15
D.	IMPLEMENTATION OF STATE-WIDE VOTER REGISTRATION DATABASES	16
E.	VOTER IDENTIFICATION	16
F.	ELIGIBILITY OF EX-FELONS	18
G.	NON-ELIGIBILITY OF U.S. CITIZENS WHO ARE NOT CITIZENS OF A STATE	19
XI.	ALTERNATIVE VOTING ARRANGEMENTS.....	20
A.	OVERVIEW	20
B.	PROVISIONAL BALLOTS	20
C.	ABSENTEE OUT OF COUNTRY VOTING	21
D.	BY-MAIL VOTING.....	21
E.	EARLY IN-PERSON VOTING	22
XII.	VOTING TECHNOLOGY	23
A.	OVERVIEW	23
B.	SELECTION OF EQUIPMENT.....	24
C.	DIRECT RECORDING ELECTRONIC (DRE) VOTING SYSTEMS.....	24
D.	SCAN BASED SYSTEMS.....	26
E.	IMPLEMENTATION	26
XIII.	COMPLAINTS AND APPEALS.....	27
XIV.	ELECTION OBSERVERS	28
XV.	NATIONAL MINORITIES' PARTICIPATION.....	28
XVI.	WOMEN'S PARTICIPATION	29
XVII.	ACKNOWLEDGEMENTS	29
	ABOUT THE OSCE/ODIHR	30

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I. EXECUTIVE SUMMARY

In response to an invitation¹ from the U.S. authorities to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), an Election Assessment Mission (EAM) was deployed for the 7 November 2006 mid-term congressional elections. One third of the Senate and all members in the House of Representatives were elected in the mid-term congressional elections. The OSCE/ODIHR EAM focused on specific issues, in the context of the 1990 OSCE Copenhagen Document, including implementation of the 2002 Help America Vote Act (HAVA). On the election day, a limited number of polling stations were visited, but no systematic observation of polling and counting procedures was conducted.

The United States of America has a long-standing democratic tradition, as reflected in the 2006 mid-term congressional elections, which were held in a competitive political environment, underscored by freedom of speech and broad access to media. The Republican Party and the Democratic Party, the two major political parties in the U.S., contested the vast majority of seats up for election. It is difficult for third parties to effectively contest congressional seats due to stringent ballot access laws and the high costs of an election campaign. However, two candidates, registered as independents, won seats in the Senate.

Campaign efforts focused on a limited number of congressional districts where both major parties assessed that they had a realistic chance for victory. Voters were provided with diverse campaign information from both the Republican and the Democratic Parties, allowing for informed voter choices. However, negative advertising was predominant throughout the campaign.

A diversity of media outlets covered the elections extensively. The law requires that radio and television stations provide equal opportunity to all candidates in broadcasts. However, this obligation does not extend to documentaries, interviews, or news coverage of candidates. There is no legal limit on the amount of paid political advertisements for candidates and political parties. Regulatory emphasis is on financial accountability through disclosure requirements. In addition to regular campaign coverage, a number of influential media outlets were critical of the implementation of new voting technologies.

Although campaign contributions are subject to legal limitations, campaign spending remains unlimited since restrictions on spending are equated with restricting freedom of speech and considered contrary to the First Amendment of the U.S. Constitution.² Anonymous contributions in excess of \$100 are prohibited. Alternative funding schemes have emerged for circumventing legal provisions. Complaints on campaign financing lodged to the Federal Election Commission (FEC) have generally required some time to process and are usually resolved only some time after an election.

The 7 November election was the first in which full HAVA implementation was due. Intense scrutiny by parties, civil society, and the media has revealed variations in HAVA compliance. The

¹ Letter from Ambassador Julie Finley, Chief of Mission, U.S. Delegation to the OSCE, to Ambassador Christian Strohal, OSCE/ODIHR Director, 19 June 2006.

² Cf. note 48 of this report.

OSCE/ODIHR EAM concluded that HAVA's electoral reform targets were largely met. However, HAVA implementation remains a challenge in a few states, particularly in regard to the requirement for each state to create a state-wide voter registration database.

Mandatory HAVA requirements and the availability of federal funds have resulted in a profound overhaul of the diverse voting systems in the 50 states and the District of Columbia. Many of these systems were used for the first time in the 2006 elections. The complexity of introducing such systems in a relatively short period of time resulted in a number of localities failing to fully comply with HAVA deadlines.

Further transparency measures, such as access to software codes, independent testing, provision of voter verified paper audit trail (VVPAT) or multiple audit mechanisms would enhance public confidence in the integrity of the new voting technologies.

Frequently, those responsible for election administration at a state or county level are in elected positions themselves, and may be running as candidates in a race that they are simultaneously administering. While this could raise questions pertaining to conflict of interests, there appears to be overall confidence in the U.S. tradition of election administration. In specific relation to the introduction of new voting technologies, however, the sharing of responsibilities between election officials, certification agencies and vendors could, at times, create difficulties in the effective management of the electoral process.

Delimitation of congressional district boundaries is accomplished, with few exceptions, by state legislatures on the basis of detailed knowledge of local political preferences stemming from voter registration information and historic voting patterns. There is a constitutional requirement for equality of population numbers in congressional districts. Some unusually shaped congressional districts have resulted due to the political nature by which boundaries are established. While there is a broad perception that the current process for delimiting congressional district boundaries diminishes competition, a few states' referenda for changing the current system have been defeated by voters.

There are a number of alternative voting arrangements, such as early voting and absentee voting, intended to maximise voting possibilities for citizens, and which appear to be welcomed by voters. The 7 November elections were pioneering in the service provided to voters with disabilities and alternative language needs.

However, procedures for voting by fax, which is offered in a limited number of specific circumstances, could compromise the secrecy of the vote, and should be reconsidered.

Only citizens of a state may elect members to Congress. This results in the denial of suffrage for full congressional representation to some citizens residing in U.S. territories and Washington, D.C. Furthermore, there is a broad range of practices with regard to enfranchisement of citizens who have been convicted of a felony. While in two states prisoners are allowed to vote, in most states incarcerated felons cannot vote and in some states ex-felons are barred from voting for life.

Restrictions of civil and political rights should be proportionate to the offence committed.

In keeping with its OSCE commitments, the United States has regularly invited the OSCE/ODIHR to observe elections for federal office. However, access of observers to U.S. elections continued to be regulated by state law, or state law lacked any reference to international observers. Legal

conditions for access varied widely from one jurisdiction to another, falling short of OSCE Commitments in a number of jurisdictions.

As the United States of America is a signatory to the OSCE 1990 Copenhagen Document, individual U.S. states should respect the commitments of the Copenhagen Document, including access for OSCE observers at the polling station level.

Nonetheless, an important resolution of the National Association of Secretaries of States (NASS) was adopted on 24 July 2005, whereby the NASS “welcomes international observers from OSCE member countries to the United States”. On the grounds of this resolution, and with the strong support of the U.S. Election Assistance Commission (EAC), members of the OSCE/ODIHR EAM were granted access to all levels of the election administration in most cases, including polling stations on election day.

While these were welcome developments, *the adoption of minimum federal standards for observer access to U.S. elections would ensure full compliance with Paragraph 8 of the 1990 OSCE Copenhagen Document.*

II. INTRODUCTION

The OSCE/ODIHR deployed an Election Assessment Mission (EAM) for the 7 November mid-term congressional elections at the invitation of the U.S. authorities. The OSCE/ODIHR EAM focused on relevant issues, in the context of the 1990 OSCE Copenhagen Document, including implementation of the 2002 Help America Vote Act (HAVA). The EAM followed an OSCE/ODIHR Needs Assessment Mission conducted from 15 to 18 May 2006.

The EAM was headed by Mr. Giovanni Kessler and included 18 international election analysts from 15 OSCE participating States who were in-country from 23 October to 11 November. OSCE/ODIHR experts met with federal agencies before deploying in two-member teams around the country. Once deployed, teams met with state and county officials, election officials, candidates, and representatives of the media and civil society. In total, teams assessed election preparations in 14 states³ around the country. On election day a limited number of polling stations were visited, but no systematic observation of polling and counting procedures was conducted. A press release was issued on 8 November.

Previously, the OSCE/ODIHR conducted election observation activities in the U.S. with regard to the 2002 mid-term congressional elections and the 2004 general elections. This report should be read in conjunction with previous OSCE/ODIHR reports on elections in the United States of America.⁴

³ Alabama, California, Connecticut, Illinois, Louisiana, Maryland, Nevada, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia and Washington.

⁴ Notably, the Final Report on the 2 November 2004 general elections and the Needs Assessment Report on the 7 November 2006 mid-term congressional elections, available at <http://www.osce.org/odihr>.

III. ELECTORAL SYSTEM

The U.S. federal legislature is a bicameral Congress, consisting of the Senate and the House of Representatives. The Senate has 100 seats, with two members elected from each state by popular vote, according to the first-past-the-post system⁵, with no state's two senators being elected in the same election year. Senators serve six-year terms. One third of the Senate is elected every two years.

The number of seats in the House of Representatives is determined by law and has been 435 since 1912. Each state is entitled to at least one seat in the House, with the total number of seats allocated to each state determined through the "Huntington-Hill" formula⁶ on the basis of population figures derived from the decennial census. The decennial census counts all residents, including non-citizens, and members of the armed forces and federal civilian employees who are stationed outside the United States. The average population of a House district is around 630,000 persons. House members are elected by popular vote in single-seat districts, according to the first-past-the-post system, to serve two-year terms. For the 7 November 2006 elections, all 435 House seats were up for election together with 33 Senate seats.⁷ Election results had to be certified by each respective state before 3 January 2007 in order for elected members to the new Congress to assume office.

IV. ELECTORAL REFORM

A. LEGAL FRAMEWORK

Legal regulation of elections is highly decentralised in the U.S., as the U.S. Constitution allows each state broad authority when conducting elections.⁸ Federal oversight of election administration is primarily limited to specifying minimum standards with implementation left to the discretion of each state. The new requirements imposed by HAVA prompted some accusations of unwarranted federal interference in state matters. However, supporters of HAVA have argued that such reforms are necessary to ensure that federal bodies are representative and fully enjoy citizens' confidence. Further, some have expressed the view that the HAVA reform process did not reach far enough.

In addition to HAVA, there are various other federal legislative acts that regulate election processes. The 1965 Voting Rights Act sought to protect the rights of racial and linguistic minorities, outlawing discriminatory practices such as literacy test requirements. The 1986 Uniformed and Overseas Citizens Absentee Voting Act requires the Department of Defense to facilitate absentee voting by U.S. citizens living abroad, including those in the armed forces. The 1993 National Voter Registration Act introduced reforms intended to ease the registration process and therefore achieve maximum enfranchisement. The 2002 Bipartisan Campaign Reform Act

⁵ Georgia and Louisiana use a second round run-off system should no candidate receive 50 per cent plus one of the votes in the election.

⁶ This formula is also known as the equal proportions method.

⁷ These were the so-called Class I Senators; see also the OSCE/ODIHR Needs Assessment Report of 19 July 2007, <http://www.osce.org/odihr>. A multitude of state and sub-state level offices were also up for election. However, the OSCE/ODIHR EAM was involved only with the assessment of the congressional elections.

⁸ Article 1, Section 4 of the United States Constitution provides: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

provides regulation of campaign income and expenditures. Also constituting part of the legal framework for elections are decisions of the judiciary interpreting various legal provisions.⁹

B. OVERVIEW

The problems identified during the 2000 elections prompted an extensive consideration of electoral reform. There was intense political debate, which resulted in some compromise in order to pass legislation stipulating a number of minimum standards for federal elections. The HAVA of 2002, therefore, emerged as a political agreement on measures to address the above mentioned problems. It would appear that many share the view that HAVA be more comprehensive and more inclusive of the views and experiences of election administrators.

HAVA's requirements primarily relate to voting system standards, access of voters with disabilities, state-wide voter registration databases, provision of identification by voters who register by-mail for the first time, and provisional voting. The bi-partisan Election Assistance Commission (EAC)¹⁰ was established by HAVA, and had a significant role in HAVA implementation. It serves as a national clearinghouse on issues pertaining to best practice and the introduction of new voting technologies, and a resource for information and for review of procedures. The EAC also administered payments to states for meeting their HAVA commitments, with some \$3 billion of federal money made available for this purpose, all of which had been appropriated. Generally, the deadline¹¹ set for states to comply with all HAVA requirements was 1 January 2006; however compliance with regard to establishment of new voting systems was waived, if there was a "good cause", until the first election for federal office held after 1 January 2006.¹²

Instances of states' non-compliance with HAVA are generally not attributed to neglect, but to the complexity and political controversy of the challenge, which typically required legal reform by states and multiple decisions over equipment and systems. Furthermore, there was some delay in the establishment of the EAC, and therefore the disbursal of funds.

The debate on election reform continues, and is defined largely along party lines. Civil society has been particularly active in tracking election reform activities and contributing to the debate. An

⁹ The role of the judiciary in elections may have been significantly expanded by the 2000 landmark case of *Bush v. Gore*, 531 US 109 (2000). In *Bush v. Gore*, the U.S. Supreme Court prevented the recount ordered by the Florida Supreme Court, relying primarily on the Equal Protection Clause of the U.S. Constitution. Although this ruling was intended to be case-specific, the legal principles involved appear to have a wider application. For example, a 2002 class action lawsuit lodged in Ohio, *Effie Stewart, et al., Plaintiffs v. J. Kenneth Blackwell, Secretary of State, et al., Defendants* (Case No. 5:02-CV-2028, in the U.S. District Court for the Northern District of Ohio, Eastern Division), challenged the use of "non-notice voting equipment" (punch cards and "central-count" optical scanning technology) in four Ohio counties. In 2006, the U.S. Court of Appeals for the Sixth Circuit made an initial ruling that the use of deficient non-notice voting equipment in some counties in Ohio, but not in others, was a violation of the Equal Protection Clause. This ruling was vacated and the lawsuit has since been dismissed. However, the court's application of *Bush v. Gore* in its initial ruling suggests that the *Bush v. Gore* decision may have wider application.

¹⁰ The EAC consists of four commissioners, appointed by the President and approved by the Senate, but based upon recommendations from the party leaders of the majority and minority party in the House and Senate. A decision of the EAC is effective only upon receiving at least three votes of the membership.

¹¹ The OSCE/ODIHR Final Report on the 2004 U.S. general elections noted that "... some deadlines for the implementation of HAVA's key provisions might have been too ambitious...".

¹² HAVA, Section 102(a)(3)(B).

expression of this debate was the September 2005 Carter-Baker Report.¹³ A number of groups provided comments and views to the Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker III. The report reflects some of these views and makes 87 recommendations¹⁴, including in particular: (a) country-wide uniform voter registration and voter identification, (b) measures to increase voter participation, particularly by out-of-country voters, (c) auditable paper records of electronic votes cast, and (d) non-partisan election administration bodies¹⁵. Notably, the report also calls for "...all of the states to provide unrestricted access to all legitimate domestic and international election observers..."

Following bi-partisan agreement¹⁶, the U.S. Congress extended for 25 years the effectiveness of Sections 5 and 203 of the federal Voting Rights Act (VRA) of 1965, which were to expire in August 2007. The extension was signed into law by the President on 21 July 2006. Thus, the VRA continues to apply in full.

The public discourse on election reform resulted in intense scrutiny of the 2006 mid-term election process by political actors, civil society, and the media. The OSCE/ODIHR EAM heard opinions to the effect that, in some instances, this could have been counter-productive, with certain groups and media outlets potentially undermining confidence in the reform process and available electoral services, thereby possibly reducing voter turnout.

C. STATES' COMPLIANCE

The U.S. Department of Justice (DoJ) is charged with enforcing the provisions of HAVA and other federal voting legislation. HAVA required all states that conduct registration to have a single state-wide voter registration database by 1 January 2006. Twelve states missed this deadline, resulting in some level of legal response by the DoJ. In five states, the DOJ's legal response was to file lawsuits against these states in federal courts.¹⁷

The DoJ reached agreements with California in 2005 and Maine, New Jersey and New York in 2006. These agreements permitted use of other databases for the 2006 elections and required the development of the required state-wide database and full HAVA compliance in 2007. The lawsuit against Alabama, which was filed in May 2006, has not been resolved. The Alabama lawsuit has been contentious as the court removed the legal authority of the state's chief election official, the Secretary of State, on 8 August 2006 and appointed Governor Bob Riley as a "special master" for

¹³ "Building Confidence in U.S. Elections", Report of the Commission on Federal Election Reform, Center for Democracy and Election Management, American University, 4400 Massachusetts Avenue, NW, Washington D.C. 20016-8026, September 2005, also http://www.american.edu/ia/cfer/report/full_report.pdf.

¹⁴ The OSCE/ODIHR NAM of 15-18 May 2006 enquired of possible legislative response to the Carter-Baker report. The U.S. Congress seems to prefer to see the 2002 HAVA fully implemented and tested prior to any new legislative effort. Further to that, a number of civil society groups expressed their disagreement with the report, particularly regarding the suggestion to introduce new identification requirements for voters, as they felt that such regulations could disenfranchise voters, in particular those in lower-income brackets, those that are highly mobile, and minority communities.

¹⁵ The Carter-Baker report recommends that the EAC should comprise five commissioners and that their appointment should be based on non-partisanship and integrity. It is argued that non-partisanship would strengthen the EAC and would promote decision-making efficiency.

¹⁶ An extensive report by the National Commission on the VRA was published in February 2006, <http://www.votingrightsact.org/report/finalreport.pdf>. The House of Representatives voted in favour of extension of the VRA by a vote of 390 to 33. Subsequently, in July 2006, the Senate unanimously approved, by a vote of 98 to 0, to extend reauthorisation of the VRA. In its Needs Assessment Report of 19 July 2006, the OSCE/ODIHR also drew attention to the importance of the 1965 VRA.

¹⁷ The lawsuit against the State of New York was also based on the state's failure to establish HAVA compliant voting equipment by 1 January 2006.

the purposes of the lawsuit and to work toward HAVA compliance. The deadline set by the court for Alabama to achieve HAVA compliance is 31 August 2007.

Although HAVA compliance has received the most media attention, the DoJ has also taken legal action to enforce other provisions of federal voting legislation. Since 2004, the DoJ has filed 17 lawsuits under the VRA, four under the Uniformed and Overseas Citizens Absentee Voting Act and three under the National Voter Registration Act.

V. ELECTION ADMINISTRATION

Each state has its own election administration arrangements with ultimate authority often resting with the Secretary of State. Similarly, within each state, lower levels of administrative units may have varied structures of election management. Different structures include varying levels of bi-partisan representation and oversight by the state executive, judicial and legislative branches. While there would appear to be overall public confidence in the election administration bodies across the U.S., the Carter-Baker report has placed an emphasis on the introduction of non-partisan election administration bodies.

It is common for the head of the authority directly responsible for administering elections to be an elected position, usually on a partisan ticket. It has been argued that this makes the election administration more accountable to the people, and to have a greater sense of public mandate. However, there may be also a concern that an elected administrator's attention could be diverted to campaign activities and that the role could become politicised. Thus, there is a potential concern that public confidence in such election administration could be undermined. Moreover, these concerns are aggravated in situations where high-level election officials are administering elections in which they are running as candidates or actively campaigning.

In the absence of a bi-partisan or multi-party election administration, consideration could be given to creating legal incompatibility between the status of a running candidate or a campaign manager and an incumbent election official. If such an official wishes to be a candidate, or to campaign or actively support a candidate or party, then he or she would be required to resign, or at least delegate, his/her election administration responsibilities to a non-partisan official or a bi-partisan body.

There is a recognised wide-spread shortage of poll workers across the US. This situation is compounded by a changing set of skills required to administer elections conducted with new voting technologies. Many jurisdictions reported a strong reliance on poll-workers of senior years, who are particularly appreciated for their commitment and reliability during the long hours of polling day.

Administrative bodies, political parties, media and civil society groups could raise public awareness of younger generations, particularly college students, in order to involve them in administering polling stations.

VI. DELIMITATION OF CONGRESSIONAL DISTRICTS

As all members of the House of Representatives are elected through the first-past-the-post (FPTP) system, delimitation of congressional districts is an important element of the election process.

According to media reports, it would appear that the U.S. public has developed a degree of sensitivity towards this issue.

Historically, districting has been based on a number principles including that districts should have equal size of the population, be compact and contiguous, respect administrative territorial divisions and preserve communities of interest. In the case of redistricting, it is assumed that traditional districting principles also include preserving cores of prior districts and avoiding contests between incumbent representatives.¹⁸

Districting plans are components of the electoral process and, as such, can be challenged under the Voting Rights Act if the plan has discriminatory consequences for minority voters. Following a series of court cases, three factors have been identified as conditions for successfully challenging a districting plan as discriminatory against minority voters.¹⁹ Thus, after each decennial census, all states attempt to develop redistricting plans that will survive a court challenge.²⁰ However, portions of the Texas plan were struck down as late as the summer of 2006.²¹

Partly as a result of the complexity of districting criteria, which could at times target contradictory objectives, and in view of the fact that protection of some minority interests is part of federal legislation unlike the other criteria that could or could not be part even of state law, a number of unusually shaped congressional districts have repeatedly made headlines.²²

It appears to be widely recognised that as districting plans are drafted mostly by state legislatures, they may often reflect political realities in a mutually convenient manner, likely to impact negatively on the competitiveness of races. However, on two recent occasions, proposals to reform existing practices in drafting (re)districting plans were defeated by voters in state referenda in California and Ohio.

With a view to ensuring genuine electoral competition in congressional districts, consideration could be given to introduce procedures for drawing district boundaries that will be based on information other than voters' voting histories and perceived future voting intentions.

VII. CANDIDATE NOMINATION AND CAMPAIGN

In the framework of decentralized governance and legislation, the OSCE/ODIHR EAM looked into some specific practices with regard to candidate nomination. There is considerable variation among states in the candidacy requirements for federal office (*i.e.*, the conditions for getting one's name on the ballot). In some states, candidates from a party that did not participate in the last elections for the office in question have to gather signatures equivalent to two per cent of the largest majority of votes gained in the last elections.²³ Some states have percentage requirements

¹⁸ "Reapportionment and Redistricting in the United States of America", Senate, State of Minnesota; also www.senate.leg.state.mn.us/departments/scr/REDIST/red-us/redist-US.htm.

¹⁹ (1) The minority group is sufficiently large and geographically and culturally compact to constitute a majority in a single member district; (2) The minority group has established that it is politically cohesive by its voting patterns in past elections; and (3) In the absence of special circumstances, block voting of the white majority usually defeats the minority candidate. "Reapportionment and Redistricting in the United States of America", Senate, State of Minnesota; also www.senate.leg.state.mn.us/departments/scr/REDIST/red-us/redist-US.htm.

²⁰ Peter S. Watson, "How to Draft Redistricting Plans That Will Stand Up in Court", Senate, State of Minnesota; also, www.senate.leg.state.mn.us/departments/scr/REDIST.

²¹ *League of United Latin American Citizens, et al. v. Perry, et al.*, 548 U.S. (No. 05-204, 28 June 2006).

²² E.g. *The Economist*, 25 April 2002; *The Wall Street Journal*, 10 November 2006.

²³ For example, in Pennsylvania for the 7 November election this meant 57,000 signatures.

lower than two per cent and a few states have percentage requirements greater than two per cent. Some states require a fixed number of signatures instead of a percentage of registered voters or votes in the last election.

*Consideration should be given by the states to decrease the number of required signatures for nomination of candidates to up to one per cent of the number of registered voters in a given electoral district, in line with existing best practices.*²⁴

For new parties, a challenging aspect may be the deadline by which the signatures must be submitted to electoral authorities for verification. Although this deadline varies among the states, a decision of the U.S. Supreme Court suggests that any deadline more than 75 days before the election may be excessive and contrary to the U.S. Constitution.²⁵

Another nomination procedure available in some states is a form of “election day nomination”, where voters are able to manually “write-in” a candidate as they cast their ballot. Such a “write-in” option appears to be infrequently used, but it allows maximum opportunity for nomination and adapting to last minute situations, such as in the case of a candidate’s sudden death.

A modality for candidate nomination, and even election, that may be unique for the U.S., and is likely to reflect a degree of past pragmatism, is represented by the so-called “unopposed” candidacies. This is relevant in the context of general rather than special elections.²⁶ Such a situation occurs when there is only one candidate in either the primary²⁷ or general election for the congressional office. Under the presumption that there is only one candidate, and that he or she will vote for himself or herself, such a candidate is deemed elected by default. The scope of implementation of unopposed candidacies varies significantly with the level of the elected office.²⁸

The election laws of several states allow for an unopposed candidate to be elected as a member of Congress without having the candidate’s name placed on the ballot.²⁹ With regard to the 7 November mid-term elections, it was reported that 34 unopposed candidates in 15 states became members of the US House of Representatives by default.³⁰ Six of these were in Florida which is approximately a quarter of Florida’s representation in the House.

There was an active and extended campaign, with ample information disseminated from a variety of sources, including through the media, the internet, phone calls to voters and meetings by candidates and parties. Regular opinion polls took place, receiving local and national media coverage. Some jurisdictions were targeted as “swing” districts, which typically prompted intensified support from the upper party levels, increased levels of media activity and increased scrutiny of the election administration. For federal races, such strategising is a logical consequence

²⁴ Opinion no. 190/2002, Code of Good Practice on Electoral Matters, European Commission for Democracy Through Law (Venice Commission), page 16, point 1.3.

²⁵ *Anderson v. Celebrezze*, 460 US 780 (1983).

²⁶ Special elections are mostly used to fill unexpected vacancies occurring between general elections.

²⁷ Primaries are part of the general electoral system and are paid by the tax-payers. Rules for the conduct of primaries are varying between different states and parties.

²⁸ Associated Press: Legislative Candidates Run Unopposed, Garry D. Robertson, 27 October 2006, 12:28.

²⁹ Examples of statutory text that allows for victory by default can be found in the following laws: Title 17 of The Code of Alabama of 1975, §17-13-5; 2006 Florida Statutes, §101.151; Official Code of Georgia Annotated, §§21-2-158 and 21-2-291; Title 26 of Oklahoma Statutes Annotated, §6-101.

³⁰ The New York Times, 6 November 2006.

of the strong history of incumbent success.³¹ In other jurisdictions, the outcome of the contests was considered known *a priori*, either based on opinion poll projections or due to unopposed candidacies. In such cases campaign activities were low-key or even largely absent.

There was a striking prevalence of negative campaigning, with aggressive advertising typically including intensely personalised criticism of opponents. While there were some analyses that this would be repellent to voters, according to other opinions this negativity might have engaged voters who became attracted to such personal disputes.

VIII. CAMPAIGN FUNDING

The high level of campaign expenditure is a striking feature of U.S. elections, with spending essentially unlimited by law, as freedom to spend on campaigning is equated with freedom of speech. There is criticism of insufficient regulation resulting in massive campaign budgets that effectively marginalise any candidate who does not have strong financial backing or extensive personal resources, thereby in effect narrowing the political arena. It is argued that the need for large amounts of campaign funding also compromises candidates' campaign issue agendas and performance once in office. For these reasons, there appears to be interest in alternative models of campaign financing.

The Bipartisan Campaign Reform Act (BCRA) of 2002 strengthened the existing regulatory framework administered and enforced by the Federal Election Commission (FEC).³² Such regulation has resulted in extremely high levels of transparency of regulated financial activity. However, campaign finance regulations and respective limits have, to an extent, been undermined by the activities of "501c" and "527" organizations.³³

The BCRA distinguishes between "hard money", used for candidates' campaigns, and "soft money" spent for party promotional work. "Hard money" refers to donations made directly to candidates, in which the name of the donor must be declared and contribution limits are specified. For this election, individuals could donate up to \$2,100 to a candidate or candidate committee. Candidates must identify in disclosure reports all political action committees and party committees that give them contributions. Campaign donations from specific sources, primarily corporations and labor unions, are prohibited.

"Soft money" refers to contributions which are not made directly to a candidate's campaign, but are given to a political party for "party building". Although there are fewer restrictions on raising and spending soft money, the BCRA did introduce restrictions on national party committees' soft money fund raising and state and local parties' spending soft money in federal elections.

The BCRA specifies that a person who spends money for an election "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or political party (or their agent) is deemed to have made a contribution to that candidate or party. There is an ongoing debate on what distinguishes "coordinated" campaign expenditures for a candidate from "independent" or

³¹ Between 1962 and 2000 in 7,921 election contests for the House of Representatives, incumbent parties won 93.3 per cent of the seats, losing only 6.7 per cent. Vital Statistics on American Politics, CQ Research, Congressional Quarterly Weekly, 18 May 2002.

³² The BCRA makes major amendments to the 1971 Federal Election Campaign Act. Amendments to the 1971 act created the Federal Election Commission in 1974.

³³ The "527" and "501c" groups are named after the Internal Revenue Code sections which defines their federal tax status. See *infra*, notes 37-39.

“uncoordinated” party promotion activities. “Coordinated” campaign expenditures for a candidate are subject to contribution limitation, while “uncoordinated” party promotion activities would not be classified as contributing to a candidate’s campaign and therefore not subject to the same contribution limit. In June 2006, the FEC published rules and explanation governing coordinated campaigning.³⁴

Alternative organizational structures have, however, been used to avoid restrictions on the use of “soft” (party) money and donation limits for hard (candidate campaign) money. Tax exempt issue oriented organizations, broadly referred to in this context as “527” and “501c” groups, have engaged in activities similar to those of political committees, but without registering with the FEC and thereby avoiding campaign finance regulation.³⁵ The extent of the involvement of such organizations is not easily measured, as their contributions and expenditures are not subject to disclosure requirements of the FEC.

The qualifying criteria for “527” status is criticized for being sufficiently indefinite as to enable some “527” organizations to raise and spend money promoting or attacking federal candidates.³⁶ “501c” organizations may promote electoral participation in a neutral and non-partisan manner. However, complaints have been lodged about “501s” undertaking political activities.³⁷

In February 2006, the Internal Revenue Service (IRS) published a report on political activity by tax-exempt organizations during the 2004 election campaign. In nearly three-quarters of the 82 cases examined, the tax-exempt organizations engaged in some level of prohibited political activity. These were concluded to be generally isolated occurrences which the IRS addressed through written advisories. In three cases, the IRS proposed the revocation of the organization’s tax-exempt status. The cases were found to cover the full spectrum of political viewpoints.

In a pending case, *Shays and Meehan v. FEC*³⁸, the complainants have challenged the FEC’s alleged “failure...to promulgate legally sufficient regulations to define the term ‘political committee’” particularly in reference to “527” organizations. In March 2006, the district court determined that the FEC had failed to explain its decision not to issue rules about “527” organizations and ordered the FEC to either adequately explain its decision of only regulating “527” organizations on a case-by-case basis, or to now adopt appropriate rules. The FEC stated at a hearing before the court on 2 November that it will “provide an explanation of its handling of so-

³⁴ The rules are in response to a court decision in *Shays v. FEC*, where it was ruled that the FEC had not adequately explained one aspect of the previous “coordinated communications” regulations.

³⁵ National party committees may not solicit funds for, or make direct donations to, tax-exempt “501c(c) organizations”, or an organization that has applied for this tax status. However, national party committees may solicit funds for, or make or direct donations to, so-called “527 organizations” only if these organizations are: political committees under FEC regulations or state, district or local party committees or authorized campaign committees of state or local candidates.

³⁶ “527” organizations are, according to the Internal Revenue Code, political parties, committees, and associations that receive and disburse funds to influence or attempt to influence the nomination, election, appointment or defeat of candidates for public office. However, not all “527” organizations are political committees subject to federal campaign finance laws. Organizations that engage only in activities to influence appointments, such as judicial nominations, or that influence only state and local elections are not considered federal political committees and thus not subject to federal campaign finance regulations and limitations.

³⁷ “501c(3)” organizations are corporations, community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster amateur sports competition. They must not have substantial part of their activities as carrying on propaganda or attempting to influence legislation, participation in any political campaign on behalf of (or in opposition to) any candidate for public office.

³⁸ *Shays II*, case No. CIV-04-1597 in the United States District Court for the District of Columbia.

called “Section 527” political organizations by sometime early next year.”³⁹

There were complaints that “527” organizations continued to be active in the 2006 campaign. FEC officials have indicated that “527” organizations accused of being active in the 2004 election were subject to scrutiny during the 2006 election. However, complaints to the FEC were not resolved prior to these mid-term elections. It is argued that this renders the grievance process of limited value.

The FEC’s complaint process could be strengthened so that cases are completed more expeditiously and prior to the next elections for federal office. Further, consideration could be given to enhancing federal legislation, by empowering the FEC to regulate such organizations, should existing legislation be perceived as needing more clarity, and by applying federal campaign limits regardless of tax status.

IX. MEDIA

A. REGULATORY PROVISIONS

The regulatory framework establishing the parameters for the media in its coverage of election campaigns and rules for candidates and other interested parties to gain access to the media is essentially divided into two branches. The first branch consists of obligations placed on broadcasters by the 1934 Communications Act⁴⁰ and subsequent regulations issued by the Federal Communications Commission (FCC). The second branch relates to the financing of campaigns and transparency measures, and is regulated by the Federal Election Commission (FEC) pursuant to the 1971 Federal Election Campaign Act (FECA). Both the Communications Act and the FECA incorporated amendments introduced by the Bipartisan Campaign Reform Act (BCRA) of 2002. Newspapers are free from any federal statutory campaign coverage or access obligations and the majority of regulatory measures apply solely to the audiovisual media, including the regulation of paid political advertising on the internet.

The 1934 Communications Act places some obligations on television and radio broadcasters. First, Section 312(a)(7) of the Act provides administrative sanctions against a broadcaster for failure to allow reasonable access to or to permit purchase of reasonable amounts of time by “a legally qualified candidate for Federal elective office on behalf of his candidacy.” Secondly, Section 315(a) of the Act states that if a broadcaster permits a candidate to use broadcast time, the broadcaster “shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station”, except where the initial broadcast was a documentary, interview, or news coverage of the candidate.⁴¹ Thirdly, Section 315(b) of the Act requires that, during the 45 days preceding a primary election and the 60 days preceding a general election, a candidate is

³⁹ *Shays and Meehan v. FEC and Bush-Cheney v. FEC*, Case Nos. CIV-04-1597 CIV-04-1612 in the United States District Court for the District of Columbia, hearing held on 11/2/06.

⁴⁰ Codified at 47 U.S.C. §§151, *et seq.* (last amended on 6 November 2002).

⁴¹ The text of the exemptions states: “(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection (315(a)). Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”

entitled to broadcast time charged at the “lowest unit charge of the station for the same class and amount of time for the same period”. During other periods, a candidate is entitled to broadcast time charged “for comparable use of such station by other users”.

It should be noted that the requirements of Section 312(a)(7) of the Act apply even before the requirements of Section 315(b) have become applicable during elections. This means that “reasonable access” must be provided to legally qualified candidates, even though the lowest advertising rate is not yet obligatory, since the campaign begins several months before election day.

Television and radio broadcasters are required to maintain records of all requests to purchase airtime.⁴² There is no legal limit on the amount a candidate can spend in the media for the election campaign. However, there are extensive reporting requirements, which provide some degree of financial accountability.

B. SUMMARY ASSESSMENT

There are approximately 1,752 commercial and public television channels and 13,748 radio stations operating across the U.S. in what has developed into an increasingly regionalised industry as the traditional national television networks’ audiences have declined.⁴³ Newspapers also have a strong regional base, with the exception of three recognised national dailies.

There was extensive media coverage of the elections and candidates gained wide access to the media. A variety of programmes, including paid advertisements, debates and news bulletins, provided a wealth of coverage, particularly on television channels. Political advertising was a major source of coverage for candidates.

A number of areas related to interpretation and application of media related laws and regulations could merit a review, including the so-called equality of opportunity doctrine.⁴⁴ Definitions as to which kinds of programmes actually qualify according to the criteria for the media exemption could gain from clearer parameters. A further opportunity to enhance clarity of definition is also evident in the BCRA⁴⁵ where broadcasters are required to maintain a record of requests for airtime of “a national legislative issue of public importance.”

These areas could benefit from clearer interpretations included in a regulation issued by the FCC and, in the case of the media exemption, a narrower set of definitions.

A fundamental feature of the regulatory parameters established for the media are decisions of the U.S. Supreme Court that have applied the First Amendment of the U.S. Constitution when considering the primacy granted to the principle of freedom of speech over any restrictive measures that a regulatory agency would seek to impose.⁴⁶ Any limits on freedom of speech are strictly construed. First Amendment principles permeate the regulatory framework, resulting in

⁴² These records provide detailed information about prices and timeslots of paid political advertisements.

⁴³ Federal Communications Commission, News Release: Broadcast Stations, accessed 10 November 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-265530A1.pdf.

⁴⁴ See Federal Communications Commission decisions in *In re Request of Infinity Broadcasting Operations Inc.* (DA-03-2865, 9 September 2003), and *In the Matter of Equal Opportunities Complaint Filed by Angelides For Governor Campaign Against 11 California Television Stations* (DA 06-2098, 26 October 2006).

⁴⁵ Section 504(e)(1)(B)(iii).

⁴⁶ See, e.g., *Buckley v. Valeo*, 424 US 1 (1976).

limited rules of regulatory agencies and an increasingly soft approach to enforcing relevant statutory provisions.

C. ACCESS FOR JOURNALISTS TO POLLING STATIONS TO CONDUCT EXIT POLLS

In the weeks immediately prior to election day, lawsuits were filed in Florida and Nevada by television networks and the Associated Press challenging restrictions on media access to polling stations to conduct exit polls.⁴⁷ Primarily, these restrictions prevented the media from conducting an exit poll within an established distance of the polling station. In both cases, the complainants argued that the restrictions infringed their First Amendment rights and were unconstitutional. The respective district courts ruled that First Amendment rights were infringed and an injunction was issued against enforcement of the provisions. A complaint was also filed against the Ohio Secretary of State, which resulted in a court order preventing enforcement of a similar prohibition in Ohio.⁴⁸

X. VOTER REGISTRATION AND ELIGIBILITY

A. OVERVIEW

Eligibility criteria for voting in elections for federal office include being a U.S. citizen and citizen of a state, 18 years or older on election day, and resident of the respective locality. Seven states allow for election-day registration⁴⁹ and North Dakota doesn't require registration at all.

The 1993 National Voter Registration Act required state governments to make registration easier for voters by providing uniform registration services through drivers' license registration centers, disability centers, schools, libraries and mail-in registration.

Issues of criticism in different localities include inefficient removal of the names of deceased voters, duplications, exclusions and also delays in data exchange with other state institutions. Another area of concern is the protection and security of personal data. The Carter-Baker report commented that "incomplete or inaccurate registration lists lie at the root of most problems encountered in U.S. elections."⁵⁰

In order to receive a ballot and vote, U.S. voters generally need to be registered. Voter registration is a pro-active "opt-in" system. An oath or declaration is required to be signed confirming voter-submitted information. It is estimated that approximately three out of four eligible citizens are registered voters. Notably, voter registration can be successful only if both relevant administrative authorities and voters take up their respective responsibilities in good faith.

⁴⁷ *CBS & Others v. Sue M. Cobb in her official capacity as Secretary of State for the State of Florida*, Case Number 06-22463-CIV, United States District Court for the Southern District of Florida, Miami Division; *ABC & Others v. Dean Heller in his official capacity as Secretary of State for the State of Nevada*, Case Number 2:06-CV-01268-PMP-RJJ, United State District Court of Nevada.

⁴⁸ *ABC & Others v. J. Kenneth Blackwell*, Case Number 1:04-CV-00750, United States District Court for the Southern District of Ohio, Western Division.

⁴⁹ Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming.

⁵⁰ "Building Confidence in U.S. Elections", Report of the Commission on Federal Election Reform, Center for Democracy and Election Management, American University, 4400 Massachusetts Avenue, NW, Washington D.C. 20016-8026, September 2005, also www.american.edu/ia/cfer/report/full_report.pdf, p.10.

B. THIRD PARTY VOTER REGISTRATION

Voter registration by third parties has traditionally been practiced by civil society groups to assist voters, in particular historically disadvantaged ones. However, there have been allegations of misconduct by third parties.⁵¹ This has resulted in some states enacting laws regulating voter registration by third parties.

New legislation in Florida created financial penalties for third parties for any completed applications that were not submitted to registration authorities within ten days. This provision was ruled to be invalid by a federal judge as an infringement of free speech and association rights.⁵² Similarly, a Georgia federal court ruled that regulations restricting third party involvement in voter registration limited First Amendment rights.⁵³ Provisions in Ohio, which had required all third party groups to first register and be trained, and for all completed forms to be submitted by the collector in-person (rather than by the organisation), were also struck down by a federal court on the grounds that it was against the national interest of registering voters.⁵⁴

The efforts of civil society groups to enhance voter registration are commendable, in particular with respect to supporting historically disadvantaged populations' participation in elections. However, such support involves a degree of understanding of the administrative framework, including the importance of applicable deadlines and the level of accuracy of the information provided to the election administration in order to be effective.

C. STATEMENT OF POLITICAL AFFILIATION

In a number of states voters are required to declare their political party preference⁵⁵ upon registration. This information is used in primaries, where often voters may only vote for the party they have declared upon registration.⁵⁶ Declared political party information is also typically used by parties for targeting their voters and other campaign activities. Party declaration may be stated on a voter's registration card and the voter register which is publicly available, and may be displayed at polling precincts on election day. Required public disclosure of political opinion upon registration could be regarded as potentially compromising the secrecy of the vote.

A review of the requirement of political party declaration for voter registration could be undertaken with a view to identifying other possibilities to facilitate voting in primaries and avoid registrants being asked to disclose their political affiliation.

⁵¹ In 2004, there were media reports of collected voter registration records being selectively passed to registration officials, multiple applications for a single voter partly attributed to workers being paid according to the number of returns, and third parties discarding or losing completed applications.

⁵² *League of Women Voters, et al., Plaintiffs v. Sue Cobb, individually and in her official capacity as Secretary of State for the State of Florida, and Dawn Roberts, individually and in her official capacity as Director of the Division of Elections within the Department of State for the State of Florida, Defendants*, Case No. 06-21265-CIV, in the United States District Court, Southern District of Florida, Miami Division.

⁵³ *Association of Community Organizations for Reform Now, et al., Plaintiffs v. Cathy Cox, et al., Defendants*, Civil Action No. 1:06-CV-1891, in the United States District Court for the Northern District of Georgia, Atlanta Division.

⁵⁴ *Project Vote, et al., Plaintiffs v. J. Kenneth Blackwell, et al., Defendants*, Civil Action No. 1:06-CV-01628, in the United States District Court for the Northern District of Ohio, Eastern Division.

⁵⁵ Typically, Republican, Democrat or Independent.

⁵⁶ Other methods of primary elections are wide and varied throughout the states and some primary methods have been ruled to be unconstitutional by state and federal courts.

D. IMPLEMENTATION OF STATE-WIDE VOTER REGISTRATION DATABASES

Discretion over how to implement a state-wide database was left to each state. The majority of states have a top-down system, in which local election authorities provide information to a unified database maintained by the state. Others have a bottom-up system, in which counties and municipalities maintain their own registration systems and submit information to a state compilation of local databases. Some states have internally developed their own databases, while 28 states have contracted private vendors to supply a registration system. However, problems in contractual relations resulted in several contracts being terminated.

Future implementation would benefit from developing common standards with regard to testing, certification, data usage and protection, and proprietary ownership of voter registration data and equipment.

Matching voter registration data, for verification purposes, with data from other state or federal databases, such as the state's database of licensed drivers or the federal database of the U.S. Social Security Administration, has opened venues for further discussions. Some states have made registration decisions based solely on differences between any two database records without inquiring further with the voter to determine which record contains the correct information. This has been extensively criticised for potentially disenfranchising people on the grounds of "simple matching" problems, such as different ways to spell a name. In one state, a court has issued an injunction preventing enforcement of a state matching requirement, ruling that the matching provision violated HAVA and the VRA.⁵⁷ This only reinforces the recommendation already offered above.

*The issue of compilation of a U.S. wide voter database, that would prevent possible multiple registration of a voter in more than one jurisdiction, should receive due consideration.*⁵⁸

E. VOTER IDENTIFICATION

Although there are no indications of impersonation or voter fraud occurring in anything other than isolated cases over recent years, it is a concern of some stakeholders. There is much political discussion over the merits of requiring voters to show identification documents in order to receive a ballot, particularly an identification document (ID) with a photograph of the voter. This debate, which has been defined largely along party lines, rotates around the relative importance of enfranchisement versus electoral safeguards and ballot integrity. Republicans generally argue that voter ID requirements are necessary to prevent impersonation and multiple voting. Most Democrats insist that such requirements are an obstacle that may deter citizens from voting. It is further argued that those least likely to have ID, or able to comfortably afford ID, are more likely to be supporters of the Democratic Party. If such an assumption is correct, Democrats would be disproportionately affected by such requirements.

This debate, and related HAVA ID requirements, has caused some states to legislate for more demanding identification requirements, beyond the federal requirements. At the time of this report, approximately one half of the states, and the District of Columbia, had just the minimum HAVA

⁵⁷ *Washington Association of Churches, et al., Plaintiffs v. Sam Reed, in his official capacity as Secretary of State for the State of Washington, Defendant*, Civil Case No. CV06-0726, in the United States District Court, Western District of Washington.

⁵⁸ The Carter - Baker report recommended an inter-operable system among states.

ID requirements⁵⁹. Fewer than half of the states required all voters to show ID, with failure to provide ID resulting in provisional balloting. Florida and Indiana require all voters to show photographic ID, or else cast a provisional ballot. Hawaii, Louisiana and South Dakota also require all voters to show photographic ID, or else sign an affidavit and cast a regular ballot. Within those jurisdictions requiring identification, there is variation not only over whether photographic ID is required, but also over whether the ID needs to be government-issued.

Various court challenges have been made in state and federal courts, and the U.S. Supreme Court became involved in a federal case in Arizona when it issued a procedural ruling that allowed Arizona's ID law to be enforced for the 2006 elections. These court challenges, however, have resulted in a changing legal framework in various jurisdictions, with judgements affecting the mid-term elections being made as late as the beginning of November. Currently, some states require photographic identification, while courts in other states have declared such requirements to violate constitutionally protected suffrage rights.

For example, in Georgia, complainants alleged in a federal court lawsuit that the photo ID requirement is unconstitutional and violates federal civil rights legislation and the VRA.⁶⁰ This resulted in a preliminary injunction prohibiting enforcement of the new legal provision on ID requirements. Similarly, a Georgia state court also granted a preliminary injunction preventing enforcement, stating that the photo ID requirement "violates the Constitution by placing restrictive condition on the right to vote."⁶¹

In Missouri, complainants argued that an identification requirement is equivalent to a poll tax, resulting in the state supreme court upholding a lower court's opinion that the state's photo ID requirement is invalid.⁶² However, an Indiana case, which alleged that Indiana's law unfairly impacts upon minorities, the poor, the disabled and the elderly who may have difficulty obtaining photo ID, was unsuccessful.⁶³ Similarly, in Arizona, plaintiffs asserted unsuccessfully that ID provisions disparately affected minority voters.⁶⁴ Complainants in Ohio, though, successfully argued that there was discrimination against naturalized citizens who were required by a new law to produce a certificate of naturalization in order to vote.⁶⁵

A survey conducted after the elections by ELECTIONLINE.ORG "found instances where new or recently-altered voter identification rules caused problems where voters were asked to present photo ID when its use was not mandatory (Missouri and Wisconsin), were confused about whether

⁵⁹ HAVA, Section 303(b), addresses first-time voters who registered by mail without providing ID verification.
⁶⁰ *Common Cause/Georgia, League of Women Voters of Georgia, et al., Plaintiffs v. Ms. Evon Billups, Superintendent of Elections for the Board of Elections and Voter Registration for Floyd County and the City of Rome, Georgia, et al., Defendants*, Civil Action No. 4:05-CV-201, in the United States District Court for the Northern District of Georgia, Rome Division.

⁶¹ *Ms. Rosalind Lake and Mr. Matthew L. Hess, qualified and registered voters under Georgia Law, Plaintiffs v. Hon. Sonny Perdue, in his official capacity as Governor, et al.*, Civil Action No. 2006-CV-119207, in the Superior Court of Fulton County, State of Georgia.

⁶² *The National Association for the Advancement of Colored People (NAACP), et al., Plaintiffs v. Robin Carnahan, et al., Defendants*, Case No. 06-4200-CV-C-SOW, in the United States District Court for the Western District of Missouri, Central Division. Also, *Jackson County v. State of Missouri; Weinschenk v. State of Missouri*; Case Nos. 06AC-CC000587, 06AC-CC00656; Cole County District Court, State of Missouri.

⁶³ *Indiana Democratic Party, et al., Plaintiffs v. Todd Rokita, et al., Defendants*, Civil Action No. 1:05-CV-0634, in the United States District Court for the Southern District of Indiana, Indianapolis Division.

⁶⁴ *Gonzales v. Arizona and Navajo Nation v. Brewer*, Case Nos. CV-06-1268, CV-06-1362, and CV-06-1575 in the United States District Court of Arizona.

⁶⁵ *Laura Boustani, et al., Plaintiffs v. J. Kenneth Blackwell, Defendant*, Civil Action No. 1:06-CV-02065, in the United States District Court for the Northern District of Ohio, Eastern Division.

they needed ID at all after a number of court decisions (Georgia) and poll workers had difficulty interpreting verification rules at the polling place (Ohio).”

Voter identification requirements should be established well in advance of election day so that voters are correctly informed and polling staff fully trained.

Also relevant to the issue of voter identification is federal legislation regulating the issuance of some state identification documents. The “REAL ID Act of 2005”, signed into law in May 2005, requires states to verify an individual’s name and personal details (including social security number and citizenship confirmation) before issuing a driver’s license or personal ID card to the person. The Carter-Baker report recommends that such identification documentation be elaborated, so that these ID cards can be an effective mandatory requirement for voting. The report also recommended that such cards should be available without inhibiting costs or inconvenience.

Establishment of uniform voter identification requirements could be considered. If voters are required to produce identification documents, such documents should be readily available without any administrative or considerable financial burden to the voter.

Absentee ballots require alternative voter verification methods. Generally, signature verification is used, which is also used in the polling station in jurisdictions that do not require voters to present identification documents for in-person voting. There is some criticism that this is a questionable practice, as a person typically has multiple ways of signing his or her name and verification of the signature is subjective.

F. ELIGIBILITY OF EX-FELONS⁶⁶

It is estimated by the American Civil Liberties Union (ACLU) that five million U.S. citizens are disenfranchised for reason of a felony conviction, including people who have completed their sentence.⁶⁷ Each state regulates restriction of voting rights in its own legislation. At the time of the 7 November 2006 election, in two states persons retain their right to vote while incarcerated. In the remaining states and the District of Columbia, persons convicted of a felony may be disqualified from voting during their detention and/or after its expiry, including for life. Thirty-six of these states bar convicted felons from voting while on parole, and thirty one states also exclude felony probationers from voting. Three states prohibit all ex-felons from voting even after they have fully completed their sentences. Nine other states permanently restrict from voting those convicted of specific offences, or require a post-sentence waiting period for some offenders.⁶⁸

One disenfranchising complication is a practice of only regarding a sentence as complete once all court imposed financial penalties have been paid in full, including all accrued interest and associated costs. Furthermore, obtaining certification of debt completion can be prolonged and require extensive commitment. In addition, administrative procedures to be completed by the voter registration authority could also result in delays, to the detriment of applicants. Other

⁶⁶ A felony is a criminal offence more serious than a misdemeanour. A “felon” is a person convicted of committing a felony.

⁶⁷ ACLU report “Out of Step with the World” of May 2006, which noted that almost half of Europe’s states allow all incarcerated people to vote, and those who do not, disqualify only a small number of prisoners from the polls, www.aclu.org/votingrights/exoffenders/25663pub20060525.html.

⁶⁸ Ibid.

complications include policies over ex-felons convicted in another state or by a federal court, or under laws that have been later amended or repealed.⁶⁹

Many argue that the financial obstacles are equivalent to poll taxes, leaving economically disadvantaged persons disenfranchised. In March 2006, a state court ruled in a challenge to Washington's law that ex-felons should not be denied the right to vote because of outstanding court-imposed fines and debts.⁷⁰ However, this decision is from a lower court and is not a binding precedent for other courts in Washington. Furthermore, the decision did not require an automatic reinstatement of voting rights. The State of Washington has appealed the decision to the Washington Supreme Court.

However, there appears to be some momentum for liberalising voting policies for ex-felons. In 2006, the Tennessee Legislature simplified the voting restoration process for ex-felons and, in 2005, the Governor of Iowa issued an executive order restoring the political rights of some citizens convicted of specific felony charges upon complete sentence discharge.

Restriction of voting rights for felons and ex-felons should be reviewed to ensure that any restriction is proportionate to the crime committed. Restriction should be for a limited period and voting rights should be restored automatically after the expiration of an established period of time. Financial debt or administrative barriers should not be obstacles to voter registration.

G. NON-ELIGIBILITY OF U.S. CITIZENS WHO ARE NOT CITIZENS OF A STATE

Article 1 of the U.S. Constitution provides that members of the House of Representatives are chosen "by the people of the several states". Article 1 further provides that the U.S. Senate consists of "two Senators from each state". Consequently, U.S. citizens who are not citizens of one of the fifty states are not able to vote for members of Congress who have the right to vote on the floor.⁷¹ However, a citizen of a state who is also a resident of a U.S. territory or of the District of Columbia, depending on the law and election administration practice of the particular state, may be able to exercise voting rights in his or her state of citizenship by absentee ballot. It is, however, estimated⁷² that in Washington D.C. alone, without including U.S. citizens of U.S. territories, up to half a million U.S. citizens are not permitted to vote in federal elections for full congressional representation. As these citizens are subject to US laws, including taxation, the denial of full representation, as underscored by the Constitution and Supreme Court decisions, would appear to be a limitation of voting rights.⁷³

Court cases challenging this situation have been unsuccessful, as court decisions have relied on the explicit word "state" in the text of Article 1 of the U.S. Constitution.⁷⁴ Draft legislation, the District of Columbia Fair and Equal House Voting Rights Act, was introduced in Congress in

⁶⁹ For example, in Nevada, the contradictory situation has arisen whereby one-time offenders may be barred from voting, but repeat offenders who now fall under the new legislation are enfranchised.

⁷⁰ *Madison, et al., v. The State of Washington, et al*, Case No. 042-33414-4-SEA, in the Superior Court of the State of Washington, County of King.

⁷¹ These restrictions exist even though such U.S. citizens are subject to U.S. federal law and pay federal taxes.

⁷² www.commoncause.org/siteapps/advocacy/ActionItem.aspx?c=dkLNK1MQIwG&b=1503879.

⁷³ Such jurisdictions are 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 the final passage of legislation, they can vote in committee hearings and on amendments.

⁷⁴ See *Albaugh v. Tawes*, 379 US 27 (1964) and *Adams v. Clinton*, 531 US 941 (2000).

2005, 2006, and 2007 granting citizens of the District of Columbia voting representation in Congress. This legislation has not yet been put to a vote in Congress.

U.S. authorities should consider all possibilities to provide full representation rights for all U.S. citizens.

XI. ALTERNATIVE VOTING ARRANGEMENTS

A. OVERVIEW

In addition to in-person voting on election day, several other arrangements were in place for casting ballots, maximizing enfranchisement opportunities. Each jurisdiction generally offered a choice of alternative voting opportunities, such as by-mail voting, absentee voting and early voting. This has reached a level whereby election authorities are reporting that 30-40 per cent of voters have cast their ballot absentee, by-mail or through early voting.

In addition, HAVA imposed obligations for states to introduce provisional voting, exempting only those states where voter registration is allowed on election day.⁷⁵ HAVA also introduced requirements for states to ensure that voters with disabilities are able to vote in-person unaided, thereby enabling such voters' right to cast their ballots in secrecy.

B. PROVISIONAL BALLOTS

HAVA required that provisional ballots must be provided to voters who, upon arrival at polling places, believed that they were registered but their names were not on the voter list. In addition, provisional ballots are offered in the case that an election official declares that the person concerned is not eligible to vote.⁷⁶ In Wyoming and Wisconsin, provisional ballots are also used when a voter is not able to provide required identification at a polling place for election-day registration.

HAVA states that "If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote ... such individual shall be permitted to cast a provisional ballot..."⁷⁷ However, provisional ballots may be counted only upon verification, after election day, of the voter's eligibility in the correct "jurisdiction". As in the 2004 general election, states interpreted "jurisdiction" differently. Some required voters to be registered in the correct polling place, while others only required voters to be registered within the correct county or state.⁷⁸ The word "jurisdiction" in the above context illustrates a specific aspect of the political compromise that facilitated passage of HAVA in 2002.

Due to the variation in application of the term "jurisdiction", consideration could be given to amend HAVA to ensure a uniform meaning for all states.

⁷⁵ Idaho, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming; there is no voter registration in North Dakota.

⁷⁶ HAVA, Section 302(a).

⁷⁷ HAVA, Section 302(a).

⁷⁸ Twenty-eight states and the District of Columbia require provisional ballots to be cast in the correct polling place in order to be counted. Fifteen states require provisional ballots to be cast in the correct county or state in order to be counted.

HAVA requires that voters have an opportunity, through a free access system, to know whether their provisional vote was counted and, if it was not deemed eligible, to be given the reason. However, there is no specification as to when such information must be made available. In some jurisdictions, voters were only informed of the acceptance or rejection of their provisional ballot after the certification of results, thereby limiting opportunity for voter challenge.

Consideration could be given to introduce arrangements, whereby voters who have cast provisional ballots are informed whether their ballots were counted prior to certification of results.

The processing of provisional ballots by relevant officials is a lengthy procedure, with deadlines varying widely across individual states.⁷⁹ Furthermore, provisional ballots have the potential to affect the outcome of a race when the margin between frontrunners is narrow.

In order that the public is accurately informed about electoral developments in a timely manner, relevant state authorities could usefully consider the introduction of requirements that the numbers of provisional ballots cast are recorded and announced simultaneously with the remaining results of the counting of the votes at all levels of the election administration.

C. ABSENTEE OUT OF COUNTRY VOTING

Voting provisions for citizens overseas is a particularly challenging operation. In 1986 Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which required each state to have a single office for assisting overseas voters. The Department of Defense is mandated with facilitating out-of-country voting through its Federal Voting Assistance Program for military and civilians located out of country. Such enfranchisement has produced a concern over safeguards for secrecy and security of the marked ballot. In particular, the secrecy of the ballot has not been maintained with some overseas voters submitting their completed ballot by fax rather than using a postal service option.⁸⁰

While every effort should be made to maximize opportunities for voter participation, protecting the secrecy of the vote remains a priority as required by Paragraph 7.4 of the 1990 OSCE Copenhagen Document.

Another administrative complication is the variation in mechanisms and deadlines among states for returning ballots from outside of the U.S. An added complexity is that late legal challenges to candidacy can cause last minute changes to the ballot and result in inaccurate ballots having already been sent out to voters. These are important issues that have the potential to affect the vote of a considerable number of voters.

D. BY-MAIL VOTING

Voting by mail, without requiring an excuse, is provided for in 29 states. In 21 other states and the District of Columbia, by mail voting is provided, but the voter must give a reason for not being able to vote in a polling station on election day. Voting in Oregon is entirely by mail. In Washington, 34 of the 39 counties vote by mail and the remaining five appear to be preparing to

⁷⁹ For example, in Iowa, Tennessee, and Vermont provisional ballots have to be fully processed within two days, while in California and New Jersey the respective deadline is 28 days.

⁸⁰ While irrelevant to out of country voting, the consequences of the displacement of a large number of persons following Hurricane Katrina present a noteworthy example. The Louisiana State Registrars Office received 6,000 requests for voting by fax by people who continue to be displaced as a result of this natural disaster.

follow suite. In jurisdictions where voting is entirely by mail, precincts for in-person voting are still required for people with disabilities, as stipulated by HAVA.

Implementation of HAVA requirements for in-person voting facilities could be strengthened to increase the number of locations for in-person voting and ensure that people with disabilities are able to cast their ballot without having to travel over long distances.

As voters can vote by mail without having to be in a particular place at a specified time, there is a potential for increased voter turnout.⁸¹ This is deemed particularly important given that election day is not a holiday in the U.S. It is argued to be a more robust mechanism with reduced vulnerability to election day circumstances, such as bad weather. Political parties reported positively, stating that it allowed them to target those who had not yet voted. The safeguard of a paper ballot was also positively regarded.

However, there are outstanding concerns. First, there is no assurance that voters are marking their ballot in secret and the possibility for ballot exposure renders voters more vulnerable to coercion. Secondly, there is a weakened mechanism for voter identification, as the voter is not present directly signing a voter register or producing an identification document. Thirdly, the announcement of results is delayed, as there is a time lapse before ballots arrive from voters who mail their ballots on or just before election day. Fourthly, there is a risk of some completed ballots failing to arrive because of postal service error. Furthermore, ballots that are scanned may arrive in a damaged condition, thereby requiring manual duplication on a blank ballot by an election worker in order for the ballot to be scannable. The process also requires an extended period of scrutiny, as mailed ballots are received and processed over several weeks.

Provisions for by-mail voting could be reviewed to ensure that safeguards used for in-person voting are applicable to by-mail voting to the fullest extent possible. Tracking requirements could be instituted so voters may verify that their mailed ballots have been received and processed.

A few states have initiated efforts to more strictly control postal ballots. However, some of these efforts have been challenged, as any restriction can also make it more difficult to vote. In Texas, plaintiffs filed a lawsuit against the state for imposing limits and establishing criminal liability on some third parties for the possession and delivery of postal ballots.⁸² Some of the plaintiffs had been convicted or charged for such violations and others were home-bound voters who claimed that they required third party assistance. It was alleged that the limitations were intended to suppress the vote of minorities and are therefore discriminatory. Although the lower court issued a preliminary injunction preventing enforcement of some provisions of the law, this injunction was vacated by the U.S. Court of Appeals for the Fifth Circuit. Plaintiffs requested the U.S. Supreme Court to reverse the Fifth Circuit's decision, which it declined to do on 4 November 2006.

E. EARLY IN-PERSON VOTING

Early in-person polling enables voting by those who cannot vote in their polling place on election day. The majority of states that provide for early in-person voting do not require an excuse or reason from the voter.

⁸¹ For example, Stevens County, Nevada had a turnout of 9,500 in 2003, rising with by-mail voting to 16,000 in 2005. In 2006, the total voter turnout was over 17,000 (68 per cent).

⁸² *Willie Ray, et al., Plaintiffs v. State of Texas, et al., Defendants*, Civil Action No. 2-06-CV-385 in the United States District Court for the Eastern District of Texas, Marshall Division.

One example of early in-person voting is Clark County, Nevada, where just under half of all ballots were cast by in-person early voting. Early in-person voting was available for two weeks at convenient locations across the county, such as shopping centres and grocery stores. Networked voter registration databases enabled voters to attend any of the polling locations across the county, without having to use a provisional ballot. The election administration reports that this eases the pressures on election-day services. Costs are also reported to be lower as less equipment is used over a greater time period. It is also reported to be popular with voters, who have more choices and control over casting their ballot, and with parties, who can target those who have not yet voted.

However, early in-person voting requires an extended period of scrutiny and effective and accountable regulation. Arguably, early voters may be less informed since they cast their ballots before the campaign is over, and that the prolonged voting period may make campaigning more difficult. Moreover, voting early carries a risk that the candidate of choice may be dropped from the ballot as a result of a judicial decision after a possible appeal. Early voting is also criticised for diminishing the ceremony and community cohesion that is generated by election day.

XII. VOTING TECHNOLOGY

A. OVERVIEW

Following the enactment of HAVA, two types of voting systems are now mostly in use, the Direct Recording Electronic (DRE) voting systems and paper ballots that are marked by voters in the traditional manner and then read by optical scanners. Some localities also use hybrid systems in which a computer interface produces a marked paper ballot for manual depositing.⁸³ In some jurisdictions networked laptops contain the electronic voter list, thus allowing live checking of voter registration precinct and status. HAVA's requirements for persons with disabilities mandated the provision of appropriate equipment in each polling place, which resulted in DRE equipment being used on a large scale.

Research by Election Data Services found that for these elections, almost one-third of the registered voters used new voting equipment.⁸⁴ Some 56 per cent of counties or 48.9 per cent of the registered voters used optical scan equipment, and 36 per cent of counties or 38.4 per cent of voters used some kind of DRE. However, some 12 million, or 6.8 per cent, of registered voters still vote by lever machines, or punch card or paper ballots that are manually counted. New York was the largest state using lever machines for these elections, with "accessible voting machines" for voters with disabilities only available in a limited number of locations.⁸⁵ The majority of states have employed a diversity of systems in order to manage absentee ballots and voting by people with disabilities. At polling station level, in case only a few people are using one type of equipment, there is a risk that results totals will reveal individuals' voting preferences.

The new equipment drew extensive attention, including from the media, with regard to problems that had occurred or could arise. There was also considerable commentary from the academic community and civil society.

⁸³ However, there is some criticism that this system disadvantages voters with disabilities as the ballot paper needs to be transported to the ballot box.

⁸⁴ www.edssurvey.com/images/File/ve2006_nrpt.pdf.

⁸⁵ For example, there were 23 machines for 4 million disabled voters for New York City. The election authorities commented that absentee ballots could always be used.

B. SELECTION OF EQUIPMENT

States had different methods and criteria for selecting their voting equipment, and often this was devolved to the counties. Frequently, there were consultations with various stakeholders. Voluntary Voting Systems Guidelines (VVSG) were developed by the National Institute for Standards and Technology (NIST), based on the 2002 Voting System Standards, and subsequently approved by the EAC in December 2005. However, approval came after most jurisdictions had completed their voting system selection. A Voting System Testing and Certification Program (VSTCP) was developed in 2006, with two independent Voting System Testing Laboratories now accredited by the EAC.

Election officials informed the OSCE/ODIHR EAM of a measure of difficulties with equipment providers, primarily in not sharing information over potential problems. Vendors of voting systems are not subject to the same legal obligations applicable to government officials administering elections. Further, vendors have insisted on retaining proprietary control of computer software, which impacted negatively on transparency and fueled issues of public confidence. This left election officials in a vulnerable position, as they were responsible for election delivery but might be unable to thoroughly check their systems or open them to public scrutiny. Such considerations were particularly valid for smaller counties with limited in-house technical expertise.

As the responsibility for administering an election is vested with the states' and counties' authorities, this should be accounted for in the commercial relationship with vendors. Arrangements should be facilitated by a more clearly defined division of responsibilities, including access to software codes for public testing by professionally competent entities or individuals, under appropriate confidentiality conditions providing both for transparency and adequate protection against possible misuse of the codes.

C. DIRECT RECORDING ELECTRONIC (DRE) VOTING SYSTEMS

DRE voting systems are electronic systems that may involve voting by touch-screen, selector wheels or button facilities. They can be programmed to provide information in different languages and by audio speakers. Typically there is a hardware unit containing a cartridge locked within the unit. This cartridge may contain software, records of ballots cast and tabulation totals. Generally, machines are not networked, with each voter being given a card to activate the DRE machine to issue a ballot. The voter's identity is kept separate from the ballot cast.

DRE equipment has the advantage of multi-lingual use and accessibility for people with disabilities. It also prevents an overvote, where a voter votes more times than allowed for a particular election contest, and notifies the voter for a possible undervote, where a voter has not voted all voting opportunities provided by the ballot. It enables voters to check their choices marked on the ballot before casting the ballot. DRE provides for rapid tabulation and excludes possibilities for subjective interpretation of ballot markings or manual errors, limiting potential complaints with regard to the validity of the ballot.

However, extensive concerns have been voiced that such equipment is vulnerable to abuse. First, it is argued that possible software errors could distort results. For this reason, thorough security checks are needed with extensive scrutiny opportunities. This requires parties and candidates to have sophisticated technical expertise to test the logic of the software and be able to audit results after election day.

Secondly, it is argued that such equipment is vulnerable to tampering and that security lapses are less evident compared to traditional voting. In particular, in some localities DRE equipment containing locked-in programmed cartridges is temporarily stored in poll workers' homes if election day delivery is not possible. In such circumstances it is particularly critical that tight security is implemented, such as tamper-evident seals and zero-sum tests prior to the beginning of polling, to ensure that no votes are already registered. Additionally, randomly selected equipment can be exchanged and tested on voting days.⁸⁶ Further safeguards include exclusion of wireless components and networking, inclusion of thorough access protection such as limited, authorised, dual person code requirements and security camera coverage, and full records and checks of serial numbers.

Thirdly, it is argued that some DRE systems provide weaker opportunities for auditing and recounting. In particular, some interpret recounts merely as a repeat tabulation, without checking aggregated figures against individual ballots. However, recounts can involve a tabulation of electronically stored votes from different electronic memories that could be tabulated in different order and with different aggregation programs.

In order to enhance public confidence in DRE voting machines, and to provide for meaningful audits and recounts, legislation regulating use of such systems should include provisions for a Voter Verified Paper Audit Trails (VVPAT) or an equivalent verification procedure.⁸⁷

VVPATs provide a paper record of each ballot cast, after the voter has checked and accepted the marked ballot. If the voter, by checking his or her ballot before casting it, finds out that the ballot has been marked wrongfully, he or she can reject the ballot and repeat the procedure. The paper record is saved and can then be used for auditing and recounting, thus providing reassurance to voters and stakeholders.⁸⁸ However, VVPAT systems include printing devices, opening a potential for paper jams, which require some printer-management skills and a supply of replacement printer units. A paper record also reveals the order that ballots were cast, which might compromise the secrecy of the vote of the first and last voters who voted. Notably, legal provisions among states vary as to whether the paper record or the electronic record controls in a recount if there is a difference between the electronic and paper records.

Clear and advanced guidance of whether the electronic or the paper record controls in a case where they differ will further enhance public confidence in the implementation of DREs.

Currently, 22 states require VVPAT. Fifteen other states and the District of Columbia use DREs across at least one jurisdiction, but do not require a VVPAT.⁸⁹ A lawsuit that is due to be heard early in 2007 in Pennsylvania, calls for a legal requirement for paper trails.⁹⁰

⁸⁶ Equipment from particular polling locations could also be requested by parties, candidates and observers.

⁸⁷ Council of Europe's standards on e-voting require that (1) Art.107: The audit system shall provide the ability to cross-check and verify the correct operation of the e-voting system and the accuracy of the result, to detect voter fraud and to prove that all counted votes are authentic and that all votes have been counted; and (2) Art. 108: The audit system shall provide the ability to verify that an e-election or e-referendum has complied with the applicable legal provisions, the aim being to verify that the results are an accurate representation of the authentic votes. *See also* "Legal, Operational And Technical Standards For E-Voting" Recommendation Rec(2004)11 adopted by the Committee of Ministers of the Council of Europe on 30 September 2004 and explanatory memorandum, available at [www.coe.int/t/e/integrated_projects/democracy/02_activities/02_e-voting/01_recommendation/Rec\(2004](http://www.coe.int/t/e/integrated_projects/democracy/02_activities/02_e-voting/01_recommendation/Rec(2004).

⁸⁸ There have been some recommendations for each voter to be able to keep a paper record of their ballot choices. However, such a system could render voters vulnerable to coercion and intimidation since voters could be pressurised to show how they have voted.

⁸⁹ Other jurisdictions may only have limited numbers of DRE machines, essentially for people with disabilities.

D. SCAN BASED SYSTEMS

Scan based systems require the voter to manually mark a paper ballot which is then put through an optical scanner for recording and aggregating. Such optical scanners are often located at the polling place with equipment also securing the scanned ballot.⁹¹ Advantages include the availability of a paper record for verification and counting and tabulation speed.

However, there are also disadvantages. First, software development is involved and, as with DRE equipment, full security and scrutiny mechanisms are required. Secondly, correct calibration is needed. Otherwise, if equipment is under-sensitive it may miss voter markings and, conversely, over-sensitivity can result in over-reading any marks on the ballot paper. Individual marked ballot papers that cannot be read by the scanner typically go through “duplication” by election administration workers, by manually copying the ballot’s marks to a second ballot paper. This places additional demands on poll workers and those undertaking scrutiny.

Implementation of optical scanning equipment will benefit from thorough poll worker training and development of detailed guidelines.

E. IMPLEMENTATION

For the 7 November mid-term elections, no major problems affecting the overall conduct of the polls were reported. However, there were a number of glitches. Common Cause, a non-partisan advocacy organization whose work includes the promotion of voter rights, operated a voter hotline to which the majority of calls received related to registration, although others referred to problems with voter equipment and poll access. Common Cause concluded that the problems “do not point to or uncover massive fraud or conspiracy to manipulate our elections, but they matter.”⁹² ELECTIONLINE.ORG concluded in its report on the mid-term elections that there were “widespread problems but no meltdowns at the nation's polling places.”⁹³

Technical problems included “frozen” DREs and start-up difficulties resulting in delays, which frequently ended with polling being extended at the end of election day and at times due to court order. Any delay in polling is significant given that election day is not a holiday and, therefore, voters may be less inclined to wait. In Denver, a reportedly reduced turnout⁹⁴ was attributed to extended queues that might have resulted from overload of the voter registration database. In Sarasota County, Florida, more than 18,000 undervotes were reported for just one congressional race, resulting in allegations that there had been a reading/aggregation error for that contest or possible flaw in the ballot design.⁹⁵ There were also reports in various polling stations that the positioning of the voting equipment might have compromised the secrecy of the vote.

⁹⁰ *Banfield, et al. v Cortes*, Case Number 442 MD 2006, Commonwealth Court of Pennsylvania.

⁹¹ Scanning machines must be arranged in such a way that the voter’s marked ballot is not exposed to others.

⁹² www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=186966.

⁹³ ELECTIONLINE.ORG found “widespread reports of voting system troubles, sporadic incidents of voter intimidation and/or poll worker confusion over voter identification requirements and some breakdowns at polling places because of problems with newly-mandated voter registration systems...” Voters in some states reported instances of “vote flipping”, whereby a machine indicated a choice other than the choice made by the voter. However, none of these reports indicate any intentional wrongdoing and are likely the result of a software or programming malfunction.

⁹⁴ Approximately 20,000 fewer voters than the projected turnout.

⁹⁵ At the time of writing this report, the case was still pending with the Florida state court.

XIII. COMPLAINTS AND APPEALS

There is variation among states in the legal and administrative structure for lodging complaints to election authorities. Frequently, there is a financial cost to prevent frivolous complaints obstructing the process. For example in California, costs⁹⁶ for a recount were reported to be approximately \$3,600 a day, which may present a barrier for less resourced candidates.

A possibility for free of charge automatic recount should be considered for cases when the margin of victory is small (such provisions have already been introduced in some jurisdictions).

Legal challenges to electoral malpractices and outcomes may be filed at a state or a federal court, depending on the legal issue presented by the challenge. Federal courts⁹⁷ have primary jurisdiction over issues raised under the U.S. Constitution or federal laws. Initial challenges to voting results usually involve application of a state's election law and are filed with the local county court, with the possibility to appeal to the state's highest court. However, a dispute that originates within the state judiciary may later end up in the federal judiciary. An example of this is the *Bush v. Gore* dispute of 2000. The case was initially decided by the Florida judiciary, which was applying state election law. It was finally decided by the court of last resort in the federal judiciary, the U.S. Supreme Court, which exercised jurisdiction based on federal issues.

The dual judicial structure risks inconsistency in judicial outcomes as the decisions reached depend in part on the judicial avenue taken. However, it is argued that there is sufficient distinction between the jurisdictional reach of the two judicial avenues to justify both, and that this dual federal and state legal architecture allows greater opportunity for achieving justice.

Although the process for certifying election results varies in each state, Article 1, Section 5 of the U.S. Constitution specifies that each House of Congress shall be the judge of the elections, returns, and qualifications of its own members. Thus, in some instances, the Senate or House of Representatives may be required to determine the winner, and neither is bound by the election result certified by the state electoral authority. In a state court challenge in California earlier in 2006, which challenged the results of a special election to fill a congressional vacancy, the court dismissed the election contest, holding that it did not have the power to oust the winning candidate or sit the losing candidate in Congress due to the Article 1, Section 5 authority of Congress.⁹⁸

The Senate and the House of Representatives have different operational regulations and procedures for election challenges, but in both challenges may be raised by citizens, candidates or chamber members.⁹⁹ Although the Senate and House of Representatives have the authority to be the judges of the elections, returns and qualifications of members, decisions of the U.S. Supreme Court indicate that either exercise of this constitutional power is subject to judicial review.¹⁰⁰

⁹⁶ Costs are refunded if the recount results change the winning candidate.

⁹⁷ The federal court structure consists of 94 U.S. judicial districts (with district courts), 12 circuit (regional) courts of appeal (for appeals from the U.S. district courts), the U.S. Supreme Court and specialized trial and appellate courts.

⁹⁸ *Jacobson, et al. v. Bilbray, et al.*, Case No. GIC-87004 in the Superior Court of California, County of San Diego. The complainants have appealed, arguing that, although the House of Representatives has the right to decide "who sits in the House", the state still has the right to determine "who won the election". See Court of Appeal No. D049407 in the Court of Appeal of State of California, Fourth Appellate District, Division 1.

⁹⁹ In the House the process is regulated by the Federal Contested Election Act. The Act does not apply to the Senate.

¹⁰⁰ See, cf., *Powell v. McCormack*, 395 US 486 (1969); *Roudebush v. Hartke*, 405 US 15 (1972).

XIV. ELECTION OBSERVERS

The U.S. is a signatory to the 1990 OSCE Copenhagen Document. Paragraph 8 of the Copenhagen Document includes a commitment to “invite observers from any other CSCE¹⁰¹ participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law”.

In keeping with its OSCE commitments, the United States of America has regularly invited the OSCE/ODIHR to observe elections for federal office. However, U.S. federal law does not provide minimum standards for access of observers to U.S. elections.

In accordance with the decentralized nature of U.S. government, the majority of states have yet to introduce specific legislation to regulate observation. In some jurisdictions election administrators have used their discretionary powers to grant full access for observers,¹⁰² while in others access is limited or restricted. As the U.S. is a signatory to the 1990 OSCE Copenhagen Document, individual states have an obligation to abide by the Copenhagen Document in a uniform and consistent manner, including access for OSCE observers at the polling station level.

In this context, an important resolution of the National Association of Secretaries of States (NASS) was adopted on 24 July 2005, whereby the NASS “welcomes international observers from OSCE member countries to the United States”. On the grounds of this resolution, and with the strong support of the U.S. Election Assistance Commission, members of the OSCE/ODIHR EAM were granted access to all levels of the election administration in most cases, including polling stations on election day.

The adoption of minimum standards for observer access to U.S. elections would ensure full compliance with Paragraph 8 of the 1990 OSCE Copenhagen Document.

XV. NATIONAL MINORITIES’ PARTICIPATION

Electoral under-participation by minority groups has been of concern for decades, resulting in the 1965 Voting Rights Act and ongoing legal challenges against practices that may be regarded as discriminatory. The recent renewal of specific provisions of the VRA indicates the continuing relevance of this concern, as well as the continuing commitment to addressing these issues. In the past, a number of civil society groups informed the OSCE/ODIHR of their concerns alleging intentional suppression of the vote, in particular in minority communities. While the OSCE/ODIHR did not receive substantial or specific information with regard to such issues during the course of this mission, ongoing attention to any such concerns can only further safeguard voter rights.

HAVA, in line with the VRA, requires specifically for new voting systems to provide for “alternative language accessibility”.¹⁰³

¹⁰¹ CSCE refers to the Conference for Security and Cooperation in Europe, which in 1994 transformed itself into the Organisation for Security and Co-operation in Europe (OSCE).

¹⁰² This may include domestic partisan and non-partisan observers, as well as international observers.

¹⁰³ HAVA, Section 301(a)(4).

Statistical data indicate that the disenfranchisement of felons and ex-felons disproportionately affects African Americans and other minority groups.¹⁰⁴ In Washington State, one quarter of African-American males are estimated to be disenfranchised on felony grounds. This resulted in a federal lawsuit, which argued that there was a violation of the VRA due to the disparate impact on minorities. The challenge was unsuccessful in the lower federal court, as the judge found that the racial discrimination that was present was due to problems with the state's criminal justice system overall and not specifically due to the state's electoral legislation. This decision has been appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁰⁵

XVI. WOMEN'S PARTICIPATION

The Department of State commented that "the election of at least 71 women to the U.S. House of Representatives -- a few more might be added when still-contested races are settled -- and 16 to the U.S. Senate in the 2006 midterm election sets a new record for women in the U.S. Congress. This display of women's growing political prominence also made history by elevating the first woman to the third most important post in the U.S. system of government. Ms. Nancy Pelosi became the first female speaker of the House of Representatives."¹⁰⁶ However, while the 2006 mid-term elections brought more women into Congress, women still only occupy some 16 per cent of congressional seats. Prior to these elections, there were 66 women in the House of Representatives (15.2 per cent) and 14 women in the Senate (14 per cent).

XVII. ACKNOWLEDGEMENTS

The OSCE/ODIHR wishes to express appreciation to the U.S. Department of State, the Department of Justice, the Federal Election Commission, the Election Assistance Commission, the National Association of Secretaries of States, 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 election assessment mission. The Election Preview 2006 provided to the OSCE/ODIHR EAM by ELECTIONLINE.ORG, a leading source for non-partisan and non-advocacy news and information on election reform, was also appreciated.

The OSCE/ODIHR stands ready to discuss any of the issues contained in this report in the context of a follow-up dialogue. The OSCE/ODIHR would also like to take this opportunity to express its appreciation for the previous invitation extended by the US authorities for a follow-up dialogue and subsequent OSCE/ODIHR visit, following the release of the OSCE/ODIHR final report on the November 2004 election.

¹⁰⁴ The Sentencing Project found that nationwide approximately 13 per cent of African-American males are disenfranchised due to felony convictions (www.sentencingproject.org/issues_03.cfm).

¹⁰⁵ *Muhammad Shabazz Farrakhan, et al., Plaintiffs-Appellants v. State of Washington, et al., Defendants-Appellees*, No. 01-35032 in the United States Court of Appeals for the Ninth Circuit.

¹⁰⁶ <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=November&x=20061117145152mlenuhret9.807986e-02>.

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, legislative support, democratic governance, migration and 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 response 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).