

**INTERIM REPORT  
29 September – 19 October 2020**

**22 October 2020**

**I. EXECUTIVE SUMMARY**

- General elections will take place on 3 November 2020 for the president and vice-president, 35 senators, and 435 representatives.
- The legal framework for elections is highly complex, with significant variations between states, and differences in practice within states. Amendments to electoral processes of multiple states have been made in response to the COVID-19 pandemic with the purpose of safeguarding the health of voters and election officials during the electoral process. Active litigation is still taking place on voting rights and procedures in numerous states, with over 365 lawsuits filed in 44 states and District of Columbia. ODIHR Limited Election Observation Mission (LEOM) interlocutors stated that the continuing litigation can result in uncertainty and some voters not being able to cast their ballots.
- States are responsible for administering elections, with duties delegated to some 10,500 jurisdictions across the country. In March 2020, the Election Assistance Commission (EAC) was tasked by Congress to distribute emergency funds to states to address issues related to the COVID-19 pandemic, however funds are largely considered to be insufficient. In some jurisdictions funding was supplemented through donations from individuals channelled through not-for-profit organizations. Recruitment of sufficient numbers of poll workers is a significant challenge in many jurisdictions.
- The use of new voting technologies is broad and varies considerably across the country. Many ODIHR LEOM interlocutors welcome the increased use of paper-based voting as these systems are more easily audited. However, some jurisdictions in eight states use devices which do not have a voter-verified paper trail. Some ODIHR LEOM interlocutors note the potential for device malfunction, unauthorised tampering or unreliable vote count for certain devices. Notwithstanding these concerns, interlocutors of the mission express confidence in the integrity of election infrastructure and efforts to mitigate cybersecurity risks.
- The right to vote is subject to many limitations. Some 4.6 million citizens resident in the District of Columbia and in US territories are not fully represented in the Congress. Some 5.2 million citizens, about half of whom have served their sentences, are disenfranchised due to criminal convictions. These restrictions disproportionately affect racial minorities.
- Voter registration is active and implemented at the state level with online registration available in 40 states. Voter registration websites in some states were temporarily inaccessible during the registration period, thereby bringing robustness of the underlying systems into question. In 34 states, voters are required to provide some form of ID document to vote. Some ODIHR LEOM interlocutors stated concerns that vulnerable and minorities groups are more likely to experience difficulties in obtaining appropriate identification.

- Early voting, either by post or in person, is ongoing in most states, with high voter turnout reported. A significant increase in absentee and postal ballots is expected due to the COVID-19 pandemic. While voter access to early and absentee voting has been expanded to varying degrees, election stakeholders have raised concerns about the capacity of the election administrations in some jurisdictions to deal with unprecedented volumes of absentee ballots.
- The campaign is taking place within an atmosphere of high degree of polarization and political division, which have been significantly impacted by COVID-19 pandemic. The capacity to hold in-person campaign events has been significantly limited due to the pandemic. However, President Trump and the former Vice President Biden have both been able to hold some campaign rallies. Many ODIHR LEOM interlocutors have expressed grave concerns about the risk of legitimacy of the elections being questioned due to the incumbent President's repeated allegations of a fraudulent election process, and postal vote in particular.
- Campaign finance is regulated and enforced at the federal level. However, the Federal Election Commission (FEC) tasked with enforcing reporting and disclosure requirements for campaigns has been without a quorum since August 2019 and is therefore unable to make decisions or issue advisory opinions. While individual donations to parties and candidates are limited and disclosed, expenditure is unrestrained. Individuals, corporations and trade unions, defined by law as independent spenders, can donate and spend without restrictions; charity organizations can avoid disclosure, which raises concerns about transparency.
- The media landscape is pluralistic and diverse, but highly polarized. Major cable and TV stations and networks remain important sources of political news, but there is a steady shift towards online media and social networks. The media coverage of the presidential campaign is extensive on nationwide media, with more reporting on congressional races in local media. In response to growing public and legal pressure, major social networks have started to adjust their policies to tackle disinformation, but numerous ODIHR LEOM interlocutors opined that it remains a concern.
- Election observation is regulated by state law. Due to the COVID-19 pandemic, several election officials reported their intention to limit the number of observers allowed in polling stations on election day. Legal restrictions on observation of voting by international observers are in place in 18 states.

## **II. INTRODUCTION**

Following an invitation from the US Government to observe the 3 November 2020 general elections, and based on the recommendation of the Needs Assessment Mission conducted from 29 May to 5 June, ODIHR deployed a Limited Election Observation Mission (LEOM) on 29 September. The LEOM, headed by Ambassador Urszula Gacek, consists of 15 experts based in Washington, DC, and 30 long-term observers who have deployed to 28 states since 6 October. Mission members are drawn from 20 participating States of the OSCE. ODIHR has observed eight previous elections in the United States since 2002.

## **III. BACKGROUND AND POLITICAL CONTEXT**

On 3 November, federal elections will be held for the president and vice-president, 35 of 100 senators, and all 435 representatives.<sup>1</sup> Elections for state and local executive offices and legislatures, various

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<sup>1</sup> Thirty-three senate seat are contested in regular elections, and two in special elections, following the death of Senator John McCain of Arizona and resignation of Senator Johnny Isakson of Georgia.

referenda and initiatives, as well as 66 state judges in 31 states, will be observed to the extent that they impact the conduct of the federal-level elections.

The last presidential election was held in 2016, when the Republican candidate Donald Trump was elected against former Secretary of State Hillary Clinton nominated by the Democratic Party. The most recent congressional elections were held in 2018, resulting in a Senate composed of 53 Republicans, 45 Democrats and two Independents, as well as a House of Representatives composed of 235 Democrats, 199 Republicans and 1 vacancy.<sup>2</sup> Women are under-represented in legislative branch, holding 24 per cent of all congressional seats and approximately 25 per cent of seats in state legislatures. Minorities and Native Americans also remain under-represented, despite increases in the previous election.<sup>3</sup>

The official selection of presidential candidates began in February 2020 with a series of nationwide state-level caucuses and primaries. The incumbent President Trump's nomination was confirmed on 27 August in a ceremony in front of the White House where he holds the executive office. His major challenger is former vice president Joe Biden, who was nominated by the Democratic Party on 18 August.

These elections are held within an atmosphere of high polarization and political division. The pre-electoral period was marked by protests which erupted across the United States after George Floyd, an African American man, died while being arrested in the city of Minneapolis in May. The outbreak of the COVID-19 pandemic presented numerous challenges to the organization of elections and had a significant impact on the political environment.

Numerous election stakeholders perceive a rising level of politicization of the judiciary. During his first term, the incumbent president filled-in vacancies for 24 per cent of all federal court judges, more than any recent president at the same point in their presidency. In the final weeks in the run-up to the election, the US Senate is conducting a confirmation hearing for a US Supreme Court justice, which further accentuated the political division.<sup>4</sup> While the republicans argued that the sitting Senate has the constitutional right to confirm the nomination at any time, democrats have argued that a nomination should not be rushed so close to a national election, particularly as issues such as the validity of early and postal voting in certain jurisdictions may ultimately be determined by the courts.<sup>5</sup>

#### IV. LEGAL FRAMEWORK AND ELECTORAL SYSTEM

The US Constitution and its amendments establish a broad framework for federal elections, with additional federal laws focusing on the protection of voting rights of racial and linguistic minorities, military and overseas voters, and persons with disabilities, as well as providing minimum standards for using new voting technologies (NVT) and the regulation of campaign finance.<sup>6</sup> The US is a party to

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<sup>2</sup> Filled by a Republican in 2019 by-election in North Carolina.

<sup>3</sup> See the [report](#) from February 2019 by Pew Research Center.

<sup>4</sup> Following the death of Justice Ruth Bader Ginsburg on 18 September, President Trump nominated Judge Amy Coney Barrett to fill the vacant seat on the Supreme Court. In an open [letter](#) to the US Senate of 11 October, more than 6,500 legal professionals opposed this nomination.

<sup>5</sup> The Senate refused to vote on a Supreme Court justice nominated by President Barack Obama in March 2016 on the grounds that this nomination was too close to the upcoming November 2016 election.

<sup>6</sup> Federal legislation includes: the 1965 Voting Rights Act ([VRA](#)), [the 1986 Uniformed and Overseas Citizens Absentee Voting Act](#) and the 2009 Military and Overseas Voting Empowerment Act ([MOVE](#)), [the 1984 Voting Accessibility for the Elderly and Handicapped Act](#) and the 1990 Americans with Disabilities Act ([ADA](#)), the 1993 National Voter Registration Act ([NVRA](#)), [the 1971 Federal Electoral Campaign Act](#) and [the 2002 Bipartisan Campaign Reform Act](#), the 1939 [Hatch Act](#) and its amendments, and the 2002 Help America Vote Act ([HAVA](#)).

major international and regional conventions related to democratic elections.<sup>7</sup> A diverse body of state laws and regulations exist across the states, with further variations between counties in some states. Federal and state court decisions also form an integral part of the legal framework.

At the federal level, there have been no election-related legislative changes since the last elections.<sup>8</sup> Several bills relating to electoral security, voter registration and online advertisements were submitted to Congress. However, none of these bills have been adopted.<sup>9</sup> The COVID-19 pandemic led to a plethora of amendments at the state level in order to protect the health of voters and election administration officials. However, a great deal of these amendments have resulted in challenges in the courts and numerous lawsuits are still pending (see *Complaints and Appeals*).

The Department of Justice monitors the implementation of federal election law and can initiate or join enforcement lawsuits in cases of non-compliance. In 2013, following the removal by the US Supreme Court of the pre-clearance requirement of Section 5 of the 1993 Voting Rights Act (VRA), which obliged specific jurisdictions with a history of discrimination to get an approval from the Department of Justice before amendments to any election procedures, the Congress is yet to establish criteria for determining jurisdictions which should be under the pre-clearance regime.<sup>10</sup>

The president and vice president are elected jointly for a four-year term through an indirect election conducted by an Electoral College of 538 electors.<sup>11</sup> While there is no federal law requiring electors to vote in line with their nominating party, some states may replace or sanction these “faithless electors”.<sup>12</sup> While any formal change to the Electoral College would require a constitutional amendment, several states have passed a National Popular Vote (NPV) Act, whereby states would award their electoral votes to the winner of the national popular vote.<sup>13</sup>

Senators and representatives are elected directly, primarily in first-past-the-post contests. Each state is represented in the Senate by two senators while in the House by at least one representative and the remaining seats are allocated to states in proportion to their population. While the Senate electoral districts correspond to the entire state, representatives are elected from single-member districts.

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<sup>7</sup> Including the 1966 International Covenant on Civil and Political Rights (ratified in 1992 with a number of reservations), the 1965 Convention on the Elimination of all forms of Racial Discrimination the 2003 UN Convention against Corruption, the 2004 Council of Europe Convention on Cybercrime. The US is also a member of the Council of Europe’s Group of States against Corruption and European Commission for Democracy through Law (Venice Commission). The US has signed but not ratified the 1979 Convention for Elimination of All Forms of Discrimination against Women, the 2006 Convention on the Rights of Persons with Disabilities and the 1969 American Convention on Human Rights.

<sup>8</sup> The March 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act provides states with additional resources to protect the 2020 elections from the effects of the COVID-19 pandemic.

<sup>9</sup> A comprehensive draft law on federal level, [For the People Act](#), was adopted in House in December 2019 but is still pending in the Senate. Likewise, the House adopted in May 2020 the [Heroes Act](#), aiming to detail postal voting procedures, absentee vote requirements, enhance online voter registration, and appropriate USD 3.6 billion for election officials to address all COVID-19 related measures that is also pending in the Senate.

<sup>10</sup> See [Shelby County v. Holder](#). In December 2019, the US House of Representatives adopted the [Voting Rights Advancement Act](#), envisioning new formula. The bill is currently pending in the Senate.

<sup>11</sup> All states have a number of electors equivalent to their total representation in Congress, while the District of Columbia has three.

<sup>12</sup> These laws, present in various forms in 32 states and District of Columbia, either impose a fine to an elector who fails to vote according to the statewide or district popular vote or replace them. In July 2020, the U.S. Supreme Court confirmed as constitutional state laws punishing or replacing faithless electors.

<sup>13</sup> The Act (NPV) has been enacted in 16 states and the District of Columbia, totaling in 196 electoral votes. For the NPV to take effect, states with a combined total of at least 270 electoral votes must join the initiative.

## V. ELECTION ADMINISTRATION

Election administration is highly decentralized, with no federal body mandated to oversee the entire electoral process. States are responsible for administering elections with duties often delegated to some 10,500 jurisdictions across the country. Most election bodies are partisan and composed of appointees by the governing party in the state. Twenty states and the District of Columbia have election management bodies, which are either bipartisan or independent.

The Election Assistance Commission (EAC) is a national bipartisan advisory body that provides guidance on meeting the Help America Vote Act (HAVA) requirements, develops NVT guidelines and serves as an information center for information about election administration. For these elections, the EAC was tasked by Congress with distributing USD 400 million emergency funds to the states in order to address issues stemming from the COVID-19 pandemic. In general, ODIHR LEOM interlocutors were of the opinion that the allocated federal funds alone are not sufficient to guarantee safe and well-organized elections, due to increased workload related to a substantial rise in online voter registration and postal voting. Some 2,500 local election administrations sought to fill the financial shortfall by applying for private funding provided by the Center for Tech and Civic Life (CTCL).<sup>14</sup> While this initiative was welcomed by local election administrations, the legality of this form of financial support to the election process was questioned by conservative groups in a few states.<sup>15</sup>

For these elections, the number of polling stations was reduced in some states.<sup>16</sup> The majority of election administrations spoken to by the ODIHR LEOM observers noted that the recruitment of sufficient number of poll workers is a significant challenge due to the COVID-19 pandemic. Comprehensive initiatives such as the National Poll Workers Recruitment Day launched by the EAC encouraging students to engage as poll workers had positive results in some, but limited in other jurisdictions.<sup>17</sup>

According to many election stakeholders, several local election administrations have had to take substantial steps to counteract disinformation intended to confuse voters or discourage turnout. State and county administrations mainly used their websites and social networks to disseminate voter information. Various civil society associations and social media companies provided free advertisements to election administrations for the purposes of voter information, the recruitment of poll workers and training of election officials on effective outreach.

## VI. NEW VOTING TECHNOLOGIES AND CYBERSECURITY

The use of new voting technologies is broad and varies considerably across the country. Most states use at least one type of voting machine, mostly for the purpose of making voting more accessible to people with special needs and language demands. Some jurisdictions across 48 states and the District of Columbia use optical or digital scanner technology combined with paper-based ballots. Ballot Marking Devices (BMDs), initially developed for use by persons with disabilities, are increasingly utilized for all voters.<sup>18</sup> While there is a general trend towards paper-based voting, some jurisdictions in eight states continue to use machines which do not provide for a voter-verified paper trail.<sup>19</sup> Although many ODIHR

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<sup>14</sup> See the [CTCL COVID-19 Response Grants Program](#).

<sup>15</sup> Lawsuits were filed on 5 October in Texas, Georgia, Iowa and South Carolina by voters' alliances and individual voters, while in the week of 28 September similar complaints were filed in Louisiana, Michigan, Minnesota, Pennsylvania and Wisconsin.

<sup>16</sup> For example, as noted by ODIHR LEOM observers in District of Columbia, Kentucky, Maryland and North Dakota.

<sup>17</sup> For example, as reported to the ODIHR LEOM in Utah, Colorado and Indiana.

<sup>18</sup> Arkansas, Georgia and South Carolina use this solution in all their jurisdictions.

<sup>19</sup> Indiana, Kansas, Kentucky, Mississippi, New Jersey, Tennessee, and Texas. Louisiana is using exclusively direct recording voting machines without a paper trail.

LEOM interlocutors welcome the increased use of paper ballots and BMDs, some are concerned that certain devices hold potential risks of interruptions or long delays at polls due to device malfunction, unauthorized tampering and unreliable vote counts.<sup>20</sup>

Federal and state authorities have introduced a number of initiatives to help secure election technologies. The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA), the EAC and other institutions offer cyber-risk mitigation services such as risk assessment, vulnerability scanning and cyber resilience reviews to election administrations and provide further information and training.<sup>21</sup> In December 2019, Congress allocated USD 425 million to enhance technology and security of elections across the country and the funds were distributed by the EAC.<sup>22</sup> Funds were initially allocated with the purpose of replacing outdated voting machines, and upgrading the existing computer and network infrastructures. Further efforts to increase cyber-security capacity included providing access for election administrators to information on potential cyber-risks, cybersecurity training, and installation of intrusion detection systems in most states. In general, ODIHR LEOM interlocutors have expressed confidence in the integrity of election infrastructure and efforts to mitigate cyber-security risks, although some remain concerned about the potential of cyber-attacks and their possible impact on public confidence, even if not successful.

## VII. VOTER RIGHTS, REGISTRATION AND IDENTIFICATION

US citizens at least 18 years of age on election day are eligible to vote. Some 4.7 million citizens that are resident in US territories and the District of Columbia do not have full representation in Congress, and residents of US territories cannot vote in presidential election.<sup>23</sup>

An estimated 5.2 million citizens are disenfranchised due to a criminal conviction, with many of them having already served their sentences.<sup>24</sup> Felony disenfranchisement disproportionately affects racial minorities and it is estimated that 1.3 million African Americans are disenfranchised as a result of these policies. Convicted felons and those on parole are deprived of their voting rights in 48 States, while those convicted of a crime in Maine, Vermont and the District of Columbia do not have their voting rights revoked.<sup>25</sup> Since 2019, the Governors of Iowa and Kentucky signed executive orders to automatically restore the voter rights of past convicts except those convicted for violent crimes.<sup>26</sup> In Florida, following a referendum in 2018, an amendment was passed to the state's constitution automatically restoring voting rights for an estimated 1.4 million former criminal offenders who had

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<sup>20</sup> In Georgia and Texas, voting was interrupted during early voting on 12th and 13th October, respectively, due to electronic pollbook and voting equipment malfunctions. In all counties in Georgia and Los Angeles, California, concerns were raised by various election stakeholders, that the last-minute updates of voting machines carry potential risks of malfunction. In addition, in New Mexico, Delaware and several jurisdictions in other states, technical features of some hybrid scanner/BMDs used for voting could theoretically allow for ballot tampering without the knowledge of the voter.

<sup>21</sup> Notably, through developing comprehensive tools such as the [Election Risk Profile Tool](#), the [Election Infrastructure Assessment Tool](#) or the [Cybersecurity Toolkit for Elections](#).

<sup>22</sup> See [the funding chart](#). These resources are in addition to USD 380 million that the Congress allocated in 2018.

<sup>23</sup> American Samoa, Guam, US Virgin Islands, Commonwealth of the Northern Mariana Islands and Puerto Rico.

<sup>24</sup> See 14 October 2020 [report](#) from the Sentencing Project.

<sup>25</sup> Voting rights are automatically restored in 36 states with a variations in timeframes. In 11 states people with criminal convictions are permanently disenfranchise unless pardoned by the state governor.

<sup>26</sup> In Kentucky, these include those with past felony convictions who have completed their full sentence, probation and parole or who are on probation or parole only because of unpaid fines or restitution. In Iowa, individuals who were convicted of felony homicide offenses are excluded from the automatic restoration and must continue to individually apply for restoration.

completed their sentence. However, the Florida state legislature enacted a law requiring citizens with past convictions to pay all court costs, fees and fines in full, as a condition to register to vote.<sup>27</sup>

Voter registration in the United States is active, i.e. citizens must register in order to cast a ballot.<sup>28</sup> The registration is conducted in the jurisdiction of their residence, most often on the county level.<sup>29</sup> Voters can register in person, online or through a third party. Online voter registration is available in 40 states. Some states experienced website inaccessibility during important voter registration periods thereby raising doubts about the robustness of the servers and the adequacy of risk mitigation solutions.<sup>30</sup> Voter registration deadlines were extended in some states to overcome challenges arising from the COVID-19 pandemic, such as the inability by some categories of voters to register in person.<sup>31</sup>

Voter identification requirements vary across the states, and in 34 states voters are required to show identification before voting. In the remaining 16 states and District of Columbia, other identifying information, such as verification of signatures or asking personal information, may be used at the polling station. HAVA requires that a provisional ballot be issued to any voter who believes that they are registered but cannot be found in the voter register. Opponents of stricter identification rules express concerns that voter identification laws do not respond to credible threats to the electoral process and are rather intended to suppress certain categories of voters that often face challenges in obtaining identification documents. These groups include Native Americans, people with disabilities, the homeless, economically disadvantaged groups with racial and ethnic minorities disproportionately affected, and transgender people. Proponents of stricter voter identification requirements argue that such measures strengthen the integrity of electoral processes by deterring and detecting electoral fraud with no overall impact on turnout.<sup>32</sup>

## **VIII. CANDIDATE REGISTRATION**

Candidacy requirements are provided in the Constitution and state laws. In accordance with the constitution, presidential and vice-presidential candidates must be natural born US citizens, at least 35 years old, and resident in the US for at least 14 years.<sup>33</sup> Senate candidates must be at least 30 years old and citizens for at least 9 years. Candidates for the House of Representatives must be at least 25 years old and citizens for at least 7 years. Both senators and representatives, when elected, must be residents of the state in which they are elected.

All states offer the possibility for recognized political parties to nominate candidates. The definition of a 'recognized' party varies from state to state and is determined in consideration of the number of registered voters declaring their association with the party or the number of votes received by the party in previous elections.<sup>34</sup> Smaller political parties and independent candidates may run if they collect a certain number of supporting signatures, typically several months before election day. The number of signatures required and the deadline for submitting signatures vary by state. The majority of states also allow for voters to 'write-in' candidates. Some states eased candidate signature requirements in the

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<sup>27</sup> Following a complex litigation process that culminated with a decision of the US Court of Appeals for the 11<sup>th</sup> Circuit to strike down the May 2020 decision of a Florida district court, the law remains in force for these elections.

<sup>28</sup> Voter registration is required in 49 states but not in North Dakota where there is no registration process.

<sup>29</sup> Other units of jurisdiction, in some states, may be cities, towns or villages.

<sup>30</sup> In Louisiana during Voter Registration Day, and in Florida and Virginia on the last day of voter registration (registration was extended).

<sup>31</sup> Voter registration deadlines were extended with three weeks in Arizona considering the difficulties and lack of necessary internet connection for some groups of voters to register online. After the extension, a Court ruling reversed the decision and reduced the deadline making another last-minute change.

<sup>32</sup> See [report](#) by the Heritage Foundation.

<sup>33</sup> No person can be elected to the office of President for more than two terms.

<sup>34</sup> For presidential elections this varies from 1 to 20 per cent, depending on the state.

context of the COVID-19 pandemic, by extending deadlines for collecting supporting signatures, waiving the requirement to collect signatures or decreasing the number of signatures required.<sup>35</sup>

Four presidential candidates have been registered in a sufficient number of states to be elected.<sup>36</sup> Eighty-eight presidential candidates, including 27 women, will appear on various state ballots. There are 151 candidates, including 42 women, competing for the 35 Senate seats and 1,113 candidates, of whom 340 are women, competing for all 435 House seats. At least 27 openly LGBTI candidates will appear on the ballot for federal elections across 21 states. Eleven House of Representatives candidates are running unopposed.<sup>37</sup>

## IX. ALTERNATIVE VOTING METHODS

Early voting began on 9 September and is ongoing in most states by post or in-person, with high voter turnout reported across the board and long queues in some locations.<sup>38</sup> While casting a vote before election day is common practice, a significant increase in the volume of absentee voting is evident in the context of the COVID-19 pandemic.<sup>39</sup> Significant changes to voting procedures have been made in most jurisdictions under short timeframes. Interlocutors raised concerns that last minute changes to election procedures due to continuing litigation could confuse voters and that errors arising from these changes may fuel narratives of a widespread fraud. Concerns by election stakeholders were also raised over the level of preparedness of election officials with little previous experience of handling postal votes.

Voting modalities and deadlines vary significantly between states and counties. Three states conduct elections entirely by postal ballot. Early voting is available in 43 states and the District of Columbia, with voting periods ranging from 3 to 51 days. In 38 states and the District of Columbia all voters can cast an absentee ballot without an excuse.<sup>40</sup> In six states, voters can use the COVID-19 pandemic as an excuse to request absentee ballot.<sup>41</sup> Some commentators, as well as President Trump, have inveighed against the expanded postal votes in response to the pandemic arguing that automatically sending postal ballots to all registered voters leaves the process vulnerable to fraud.<sup>42</sup> Forty states provide absentee ballots upon voter request.<sup>43</sup> Eight states apply some form of witness or notary requirement. Voters may submit their absentee ballot at various locations and, in certain cases, designate a third party to collect and submit their ballot. While all states allow voters abroad to submit their ballot by post, 32 states also permit electronic submission of marked ballots. Electronic submission of ballots requires voters to waive the secrecy of the vote. According to the Federal Voting Assistance Program (FVAP), international postal disruptions may present challenges for overseas voters to get and return their postal ballots. ODIHR LEOM interlocutors expressed concerns over the accessibility of absentee and postal voting for vulnerable groups, including Native Americans and persons with disabilities.

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<sup>35</sup> Candidate signature requirements were cancelled in Vermont and decreased in some states, including Maryland, Michigan, New Hampshire and Virginia. In total, 24 lawsuits were filed in 16 states and the District of Columbia leading to various results.

<sup>36</sup> The incumbent president and Republican nominee Donald Trump, the Democratic Party nominee Joseph Biden, Jo Jorgensen of the Libertarian Party and Howie Hawkins of the Green Party.

<sup>37</sup> Five Democrats and six Republicans are running unopposed across 10 states, namely Alabama (two seats), Arkansas, Florida, Georgia, Massachusetts, Mississippi, New York, North Carolina, Tennessee, and Virginia.

<sup>38</sup> For example, on the first day of early voting, voters waited in long queues of up to 11 hours in Georgia (12 October) and up to 5-6 hours in Texas (13 October).

<sup>39</sup> As of 19 October, over 11 million voters have cast an absentee ballot.

<sup>40</sup> In Alabama, Connecticut and Delaware, this measure is temporary, introduced for these elections.

<sup>41</sup> Arkansas, Kentucky, New Hampshire, New York, South Carolina and West Virginia.

<sup>42</sup> See 2019 [report](#) by the Heritage Foundation.

<sup>43</sup> Automatic mailing of ballots to voters is permanently used in 6 states and temporarily used, due to COVID-19, in 4 states and the District of Columbia.

In order to mitigate delays in absentee ballot processing, many states allow processing them before election day, as well as allowing postmarked ballots to be counted if received after election day and permitting voters to correct mistakes that may otherwise lead to ballot rejection.<sup>44</sup> While local election officials conveyed positive assessments of the capacity and their co-operation with United States Postal Service (USPS) local offices, there is a controversy about USPS practices at the federal level.<sup>45</sup> Following several lawsuits against the USPS involving 23 attorneys general, a nationwide preliminary injunction ordered USPS to reverse policies including to replace, reassemble or reconnect any removed mail-sorting machines needed to ensure timely processing and delivery of election mail.<sup>46</sup> Despite particularly low occurrences of fraud associated with postal ballots in previous elections, high ranking officials, including the President and the Attorney General, have publicly cast doubt on the integrity of postal voting.

## X. CAMPAIGN ENVIRONMENT

Due to the COVID-19 pandemic, the campaigns from both Democratic and Republican parties took a relatively low-key approach by avoiding gatherings and preferring small, physically distanced or virtual events. The president took a more traditional posture, holding in-person rallies and events without mandating physical distancing (even after he tested positive for COVID-19 on 2 October and was hospitalized for three days), which became a point of contention during the campaign. On several occasions, the President held in-person gatherings, including giving his acceptance speech in August in front of a thousand guests. Former Vice President Biden's in-person campaign in the run-up to the election day was limited to short visits, mostly to battleground states and typically holding one rally per day.

Economic recovery, healthcare, the appointment of a Supreme Court justice, and management of the COVID-19 pandemic by the current administration dominate an acutely polarized campaign that is also marred by personal attacks. Campaigning has also taken place within the context of nationwide protests in the wake of deaths of African American citizens during arrests that attracted significant public attention. The protests have been predominantly peaceful, with some exceptions of escalated violence.<sup>47</sup> The campaigns of President Trump and other republican candidates have framed the violence in some of the protests as an indication of increasing lawlessness and disorder.

Throughout the campaign, President Trump has repeatedly claimed that the elections would be marred by fraud, especially in relation to absentee and particularly postal voting. Several ODIHR LEOM interlocutors expressed grave concerns about allegations from a sitting president casting doubt on the democratic process without presenting any evidence that the integrity of the election process could be systematically jeopardized. On a number of occasions, President Trump refused to commit to a peaceful transition of power if he lost the elections, using this stance to reaffirm his lack of trust in the

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<sup>44</sup> Based on the audit [report](#) of USPS processing readiness for the 2020 general elections, USPS [warned](#) 46 states and the District of Columbia that, given the USPS mail processing timeframes, some deadlines could result in voters not receiving their ballot on time or for submitted ballots not be received on time to be counted.

<sup>45</sup> A House Oversight Committee [hearing](#) was held with Postmaster General Louis DeJoy questioning if recent operational changes were made intentionally to reduce capacity of the USPS ahead of general elections. A [court decision](#) prevented USPS sending voter information postcards to voters in Colorado, on the basis they gave false and misleading information that could disenfranchise voters. These postcards were criticized in other states as well.

<sup>46</sup> See [State of Washington v. Donald J. Trump, Louis DeJoy, USPS](#).

<sup>47</sup> Such as in Portland, Oregon and Kenosha, Wisconsin. See also the Armed Conflict Location and Event Data (ACLED) [report](#).

process<sup>48</sup>. This, coupled with the highly polarized political environment, led ODIHR LEOM interlocutors to express concern over the potential for political violence in the aftermath of the elections.

Some ODIHR LEOM interlocutors expressed concern over the use of administrative resources for campaigning, citing the fact that the COVID-19 economic relief checks sent to voters in April contained a letter signed by the president, the first time a president's name appeared on an Internal Revenue Service (IRS) disbursement. The US Department of Agriculture initiative to buy fresh food and ship it to families in need also included a signed letter on White House letterhead.<sup>49</sup>

President Trump has repeatedly made reference to voter fraud and has called on his supporters to watch the polls, including during the first presidential debate. The imprecise nature of these calls and the extent to which they relate to official poll watching by party-authorized and trained observers has led a number of ODIHR LEOM interlocutors to express fears of intimidation on election day. In a message addressing voter concerns related to public safety and integrity of election day processes, the directors of several national security agencies issued a joint statement on 6 October reaffirming their commitment to election security and expressing confidence in the system.<sup>50</sup>

## XI. CAMPAIGN FINANCE

Campaign finance is governed by federal law and at least two landmark US Supreme Court decisions.<sup>51</sup> Individual donations to candidates and political organizations are limited and must be fully disclosed.<sup>52</sup> Foreign and anonymous donations or using other person's identity for donating are prohibited, as are direct donations from corporations and trade unions. By contrast, campaign expenditure is unrestrained, allowing for 'independent' spenders such as individuals, corporations and trade unions. 'Independent' expenditure, as defined by law, is campaigning either by referring to federal candidates or advocating for their victory or defeat, under a condition that it is not made in co-operation with or at the request or suggestion of the official candidate's campaign. A bulk of this spending is disclosed to the public, including the sources of financing, but some are not, which raises transparency concerns.

Tax-exempt social welfare organizations may engage in political campaigns for or against candidates, provided that this is not the organization's primary activity. Their income is subject to disclosure only if donations are specifically earmarked for political communication. Donating for general purposes and not earmarking the donations is often used to avoid disclosure. These organizations can themselves donate to other independent spenders.

By law, all advertising has to include a disclaimer on who finances and takes responsibility for the campaign message. This regulation was first extended to online media in 2006. In 2018, a hearing was launched proposing to bring regulation in line with expanded use of online means of communication, but no action followed.<sup>53</sup>

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<sup>48</sup> During a 23 September news conference, when asked whether he would commit to a peaceful transfer of power President Trump stated that he would "see what happens", claiming that mail in voting would lead to fraud. On the same day he called the election a "scam" and said that the result would have to be decided by the Supreme Court. At a rally on 13 September, the President said that his opponent could only win through a rigged election. On 20 August, at a rally, he said "the only way they're going to win is by a rigged election.," On 19 July during a "Fox News Sunday" interview the president refused to answer the question if he will accept a defeat in elections

<sup>49</sup> See the letter [here](#).

<sup>50</sup> See the [video](#) link and transcript.

<sup>51</sup> In 1976, [Buckley v. Valeo](#) and in 2010, [Citizens United v. FEC](#), the US Supreme Court upheld freedom of speech principle in effect equating spending with speech.

<sup>52</sup> In each election, individuals can donate up to USD 2,800 per candidate and up to USD 5,000 USD per Political Action Committee (PAC). Disclosure is required for donations above 200 USD.

<sup>53</sup> See FEC [Public hearing](#) on internet disclaimers.

The oversight of campaign finance is vested with a bipartisan six-member Federal Election Commission (FEC), with the law requiring four commissioner votes to make decisions.<sup>54</sup> Since August 2019 (with the exception of May and June 2020), only three commissioner seats have been filled and the FEC is therefore unable to make decisions or issue advisory opinions relating to requests for clarification of the law and regulations. According to ODIHR LEOM interlocutors, this raised concerns about enforcement of non-coordination principles, bans on foreign financing and online advertising regulations. The FEC continues to conduct educational and outreach activities.

The total of the 2020 General Election campaign expenditure is projected to reach USD 11 billion. This increase in spending compared to previous elections has been attributed by ODIHR LEOM interlocutors to a high degree of politicization and political polarization in society. By 21 September, the estimated campaign expenditure for presidential candidates in aggregate was some 650 million, senatorial - approximately 600 million, congressional – 958 million. “Independent” expenditures were estimated to have reached over 1 billion.<sup>55</sup>

## XII. MEDIA

The media landscape, while extremely polarized, is pluralistic and diverse. According to the Federal Communications Commission (FCC), there are 1,758 commercial and public television stations and 15,460 radio stations. Major cable and local TV channels, and major television networks are similarly important sources of political news.<sup>56</sup> There is a steady shift towards online media and social networks, despite existence of some 1,300 print publications. There are two public networks, Public Broadcasting Service (PBS), and National Public Radio (NPR).<sup>57</sup>

The 1<sup>st</sup> Amendment to the Constitution guarantees freedom of the press and expression, with Supreme Court decisions and self-regulation providing for a robust system of protection for media independence. However, recent years have been characterized by increased derogatory attacks against news media and individual journalists, often by top officials, undermining role of media in democratic society. This tendency has raised significant concerns by international organizations dealing with matters of freedom of expression.<sup>58</sup>

The 1934 Communications Act, the 1996 Telecommunications Act, and the FCC regulations outline the basic regulatory framework for broadcasters, including during elections. While the FCC oversees the implementation of the regulatory framework, it does not conduct systematic media monitoring. Print and online media are not bound by statutory requirements. During the 60 days prior to federal elections, commercial broadcasters must provide ‘reasonable access’ to all legally qualified federal candidates who request to purchase airtime. The FCC maintains a publicly accessible ‘political file’ of all such requests.<sup>59</sup> In addition, an ‘equal opportunity’ rule grants a candidate the right to use airtime on equal conditions with other candidates running for the same office, but with exceptions aimed at protecting editorial freedom, including regarding appearance on newscasts, scheduled interviews, and debates.

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<sup>54</sup> Commissioners are appointed by the President and confirmed by the Senate.

<sup>55</sup> See the [analysis](#) of the Center for Responsive Politics (opensecrets.org).

<sup>56</sup> See the July 2020 Pew Research Center (PRC) [analysis](#).

<sup>57</sup> As non-commercial broadcasters, PBS and NPR are prohibited from airing paid advertisements.

<sup>58</sup> Reporters Without Borders, [World Press Freedom Index 2020](#); Committee to Protect Journalists, April 2020, [The Trump Administration and the Media](#). See also a [statement](#) of OSCE Representative on Freedom of Media (RFoM), 28 August 2017.

<sup>59</sup> See the FCC [Public Inspection Files](#).

The media coverage of the presidential campaign in the major nationwide media is extensive, with reporting on congressional races more visible in local media. The non-partisan Commission on Presidential Debates (CPD) initially scheduled three debates for the two qualified presidential and one for the two vice-presidential candidates.<sup>60</sup> The initial presidential debate and the vice-presidential debate were organized as planned attracting large audience, with the presidential debate prompting controversies concerning its conduct.<sup>61</sup> CPD announced an intention to hold the second presidential debate virtually, in order to protect health and safety of all persons involved. However, it was cancelled following a refusal by President Trump's campaign to participate in a virtual debate; the campaign accused the CPD of a bias against the President.<sup>62</sup>

Amidst growing public and legal scrutiny, major social media companies have amplified policies and practices aimed to tackle disinformation, in particular as it relates to elections.<sup>63</sup> Many ODIHR LEOM interlocutors acknowledged numerous civic activities aimed at fostering civil online discourse.<sup>64</sup> However, interlocutors have also expressed concerns about the level of disinformation spread via social networks, in particular Facebook and YouTube, stating that the disinformation has become particularly worrisome in connection with narratives that question voting procedures or election integrity, especially where the enforcement of the social networks' policies is belated or inconsistent.

On 5 October, the ODIHR LEOM commenced its quantitative and qualitative assessment of political and election-related coverage by several major media outlets.<sup>65</sup> The ODIHR LEOM is also following election-related content on social networks.

### XIII. COMPLAINTS AND APPEALS

Following the declaration of the COVID-19 pandemic, state legislatures or governors began amending provisions of election legislation in order to reduce health risks. These amendments have been challenged, largely along party lines, resulting in over 365 lawsuits filed in 44 states, surpassing all previous election litigation records at such a late stage in the electoral process. According to some ODIHR LEOM interlocutors, the vigorous litigation accentuates the significant role of state courts in interpreting and amending the rules of federal elections. Some expressed concerns that the outcome of several of the rulings may result in a significant number of voters not being able to cast their votes.

The majority of lawsuits are related to the expansion of early in-person voting, early absentee voting, the extension of statutory deadlines for the receipt and tallying of postal ballots, placement of several drop-off boxes for absentee ballots in the counties, or the need for a witness signature on the envelope of postal ballots. Some state legislatures, governors and candidates, most of whom are Republican, have

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<sup>60</sup> To be eligible, candidates must appear on a sufficient number of state ballots, to have a mathematical chance of winning a majority vote in the Electoral College, and have a support of at least 15 per cent of voters as determined by the average of five national public opinion polls.

<sup>61</sup> The first debate, conducted on 29 September, was watched by 73 million people, making it the third most watched presidential debate in US history, while the vice presidential Harris – Pence debate on 7 October became the second most watched vice-presidential debate with almost 58 million viewers.

<sup>62</sup> Instead, two separate town hall debates featuring each of two candidates were aired at the same time on different channels.

<sup>63</sup> On 14 October, Facebook and Twitter limited the spread of the New York Post story about Hunter Biden, Joe Biden's son: Facebook questioned the story's validity and Twitter referred to its policies on hacked materials as well as on 'private and personal' information. In this context Twitter temporarily locked the Trump campaign account, while the newspaper's account remains locked as of 19 October.

<sup>64</sup> See also the 30 September 2020 report [Protecting the Vote](#), by the Open Technology Institute.

<sup>65</sup> Public television PBS and radio NPR networks; three television networks ABC, CBS and NBC; three cable television channels CNN, Fox News and MSNBC; three newspapers New York Times, USA Today and Wall Street Journal and three online news websites Breitbart.com, BuzzFeed.com and HuffingtonPost.com.

succeeded in preventing such changes and have limited the days for tallying of ballots arriving after election day in several battleground states.<sup>66</sup> In contrast, the court in Nevada has allowed for the counting of ballots arriving after election day, while a court in North Carolina declined on 14 October to block the State Board of Election's decision extending the deadline for ballots to 12 November.

In Texas, on 9 October, a district court prevented the governor from restricting the number of absentee ballot drop-off boxes and requiring election officials to close hundreds of established ballot return centers. However, on 12 October, the US Court of Appeals for the Fifth Circuit stayed the district court's order, ruling that the voters would still have numerous avenues to cast their ballots under the expanded voting opportunities that the governor's proclamation had afforded.<sup>67</sup> Furthermore, in another case, the same appeals court reversed the order of a district court to allow Texans below the age of 65 to vote absentee without providing an excuse.<sup>68</sup>

In Pennsylvania, on 17 September, the state Supreme Court issued a decision which held that the state law permits the collection of absentee ballots at several drop-off locations. The court also extended the last day of arrival of valid postal ballots to be counted.<sup>69</sup> On 19 October, the US Supreme Court rejected an appeal by the Republican Party to reverse the decision of the Pennsylvania Supreme Court. An appeal is pending before the US Supreme Court. Similar rulings were issued in Wisconsin<sup>70</sup> and Michigan.<sup>71</sup> In contrast, the US Supreme Court as well as some US Courts of Appeals generally made decisions based, *inter alia*, on a US Supreme Court principle counselling federal courts to exercise caution and restraint before upending state election laws close to elections.<sup>72</sup> These courts held that the difficulties attributable to the COVID-19 pandemic do not justify changes in electoral rules and stayed orders of lower courts.<sup>73</sup>

#### XIV. CITIZEN AND INTERNATIONAL OBSERVERS

In line with its OSCE commitments, the US Government invited ODIHR to observe these general elections.<sup>74</sup> However, most states do not comprehensively regulate observation, with access for international observers, as well as for partisan and non-partisan citizen observers, varying widely across the 50 states and often left to the discretion of state or county election officials.<sup>75</sup> Due to the COVID-19

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<sup>66</sup> In Wisconsin, Pennsylvania, New Hampshire, Georgia, Maine, South Carolina and Florida.

<sup>67</sup> See [Texas League of United Latin American Citizens, League of Women Voters of Texas et al. v. Greg Abbott, in his official capacity as Governor of Texas et al.](#)

<sup>68</sup> See [Texas Democratic Party v. Greg Abbot, Governor of the State of Texas](#). In June 2020, the US Supreme Court [rejected](#) the plaintiffs' request to hear the case expeditiously.

<sup>69</sup> See [Pennsylvania Democratic Party v. Secretary of the Commonwealth of Pennsylvania](#).

<sup>70</sup> See [Democratic National Committee v. Marge Bostelmann, Wisconsin Legislature, RNC et al.](#) The District Court ordered the extension of absentee ballots' counting if they arrive by November 9, provided they are postmarked by election day. However, on 8 October, the Court of Appeals for the Seventh Circuit restored Wisconsin's statutory ballot deadline.

<sup>71</sup> See [Michigan Alliance for Retired Americans et al. v Jocely Benson et al.](#)

<sup>72</sup> See [Purcell v. Gonzalez](#). On 16 October, several US legal scholars asked the US Supreme Court to clarify this principle in an *amicus curiae* [brief](#).

<sup>73</sup> See [Republican National Committee v. Democratic National Committee](#), [Andino v. Middleton](#) and [Barbara Tully, Indiana Vote By Mail, Inc. v. Paul Okeson, S. Anthony Long et al.](#)

<sup>74</sup> Paragraph 8 of the 1990 OSCE Copenhagen Document provides that "the participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place". The National Association of Secretaries of State (NASS) issued resolutions in 2005 and in 2010 and reauthorized in 2015, welcoming OSCE international election observers to observe elections in states as allowed by state law. The resolution expired in summer 2020 and has not yet been reauthorized or renewed. As of 22 October, the Organization of American States (OAS) had yet to receive an invitation to observe the 2020 general elections.

<sup>75</sup> Variations based on state election codes and county regulations include observers' proximity to polling sites, number and type of observers allowed inside a polling station, if or how they are accredited, or which parts of the electoral process they can observe.

pandemic physical distancing measures, several election officials reported their intention to rotate or limit the number of observers allowed in a polling station at a given time. Only five states and the District of Columbia explicitly permit observation by international observers by law, while eighteen states forbid it.<sup>76</sup> Other state laws are silent on this, leaving it to the discretion of election officials or their interpretation of the state law on who may witness the polls.

Partisan and non-partisan citizen observers have indicated a strong interest in domestic observation of the upcoming general elections. Some political party representatives expressed concerns that their poll watchers might be denied access to polling stations. In 2018, the District Court of New Jersey terminated the 1982 consent decree whereby the Republican National Committee (RNC) agreed to refrain from undertaking or permitting voter intimidation practices that targeted predominantly African-American and Latino neighborhoods.<sup>77</sup> Many ODIHR LEOM interlocutors expressed serious concerns over the possible presence of extremist and armed militias in the proximity of polling locations, which may contribute to disrupting the polling process.

## **XV. ODIHR LEOM ACTIVITIES**

The ODIHR LEOM commenced its work in Washington DC on 29 September. The Head of Mission met with the State Department, Election Assistance Commission, National Association of Secretaries of State, National Association of State Election Directors, and members of diplomatic community, among others. The ODIHR LEOM has also established contacts with the election administration at various levels, government institutions involved in the electoral process, as well as representatives of political parties, citizen observers, legal professionals, media and civil society. The OSCE Parliamentary Assembly (PA) has announced that they will deploy observer delegations for election day observation. The OSCE Chairperson-in-Office has appointed Mr. Michael Georg Link as Special Co-ordinator to lead the short-term OSCE observers for these elections.

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<sup>76</sup> California, Hawaii, Missouri, New Mexico, Utah and District of Columbia explicitly permit by international observers by law. Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Mississippi, Minnesota, New Jersey, Texas, North Carolina, Louisiana, Oklahoma, Ohio and Pennsylvania do not allow for presence of international observers in polling stations by law.

<sup>77</sup> See the 2018 court [decision](#) related to the 1982 consent [agreement](#).