



## **PRELIMINARY STATEMENT OF THE OAS ELECTORAL OBSERVATION MISSION FOR THE NOVEMBER 3, 2020 GENERAL ELECTIONS IN THE UNITED STATES OF AMERICA**

November 6, 2020

Following an invitation from the United States Department of State, the Organization of American States deployed a limited scope Electoral Observation Mission for the General Elections of November 3, 2020. Led by the Secretary General of the Organization of American States, Luis Almagro, the OAS Mission comprised 28 experts and observers from 13 countries.

Due to the decentralized nature of electoral administration in the United States, the Mission required the authorization of individual states in order to observe their voting processes. The Mission therefore contacted the authorities in fourteen states and the District of Columbia to request access during the pre-electoral period and on Election Day. The size of the country and challenges deriving from the COVID-19 pandemic did not allow the OAS to deploy a larger or more widely-dispersed Mission. In determining the states in which it hoped to observe, the Mission applied the following criteria: 1) states that allow international observers; 2) plurality of electoral systems and organization; 3) geographic representation; and 4) political trends. Ultimately, restrictions resulting from COVID-19 as well as other factors outside of the control of the Mission, limited the states to which it was able to deploy.

As noted in the report of the OAS Mission to the 2016 general elections in the United States, some states do not allow or lack specific provisions for international observation of their electoral processes. The OAS would welcome consideration by these states of the benefits of receiving international observers and steps to reflect this in their local legislation.

Prior to Election Day the Mission visited and engaged with state and electoral officials, political party representatives and other stakeholders in Georgia, Iowa, Maryland, Michigan and the District of Columbia. The Mission also observed the early voting process and political campaign activities in these jurisdictions. On Election Day the Mission was present and observed the final voting process in the same four states and the District of Columbia.



The Mission also met with federal authorities, other electoral observation missions, organizations working in the field of democracy and elections, representatives of the private sector and civil society actors, among others. Experts attached to the Mission analysed key aspects of the electoral process, including electoral organization and technology, electoral justice, political financing, the political participation of women, postal voting, electoral boundaries and freedom of expression/media.

Mindful of the COVID-19 pandemic, the Mission implemented a series of precautionary measures in order to safeguard its members and the stakeholders with which it met. As far as possible, meetings with stakeholders were held virtually, using different online platforms. For all in-person engagements, including the observation of Early Voting and on Election Day, members of the Mission utilized Personal Protective Equipment, respected social distancing recommendations and complied with the safety guidelines of electoral authorities when visiting polling places. The Mission's specialists conducted the majority of their work remotely.

## **PRE-ELECTORAL CONTEXT**

Electoral administration in the United States is highly differentiated. While the nation relies on a complex federal system of government, each state is mandated by the U.S. Constitution to individually regulate electoral matters and election laws at the state level. The responsibility for the conduct of elections, including the enforcement of qualifying rules, oversight of finance regulation, and establishment of Election Day procedures falls either on the Office of the Secretary of State or a Board of Elections, with officials at the county level managing and delivering electoral processes within each state. As a result, thousands of administrators nationwide are responsible for organizing and conducting U.S. elections, as well as tabulating and certifying the results, according to multiple and significantly varied regulations.

For the 2020 elections, as a result of the COVID-19 pandemic, multiple states also modified their processes to provide greater access to alternative voting methods for voters, which ensured their safety while avoiding their concentration in physical places. One major development in this regard, and one which drew a high level of attention, was the significant expansion of postal voting. Multiple states provided voters with greater access to absentee or mail ballots, proactively mailed applications for absentee and/or mail ballots to voters or mailed ballots to all eligible voters with no request needed. Members of the armed services and their families, as well



as citizens who reside overseas, also voted by mail, as normally provided for by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA 1986).

As of Election Day, November 3, electoral authorities had received over 65 million mail ballots, with over 27 million votes outstanding – figures that more than double the 33,378,450 postal votes received in the 2016 election. Regulations in most states require the United States Postal Service (USPS) deliver ballots to electoral bodies. Some stakeholders expressed concern that the volume of mail generated by postal voting could not be adequately managed by the USPS in a timely manner and could lead to ballot tampering and other forms of voter fraud. As a result, the pre-electoral period saw increased litigation on aspects of postal voting mechanisms.

The 2020 elections also saw a significant increase in in-person Early Voting across the country and by Election Day, approximately 36 million voters had already cast their ballots in-person. Taken together, postal and early voting accounted for over 100 million ballots cast prior to Election Day.

The pre-electoral environment in the United States was quite complex. While the Republican Party consolidated around its incumbent president, the Democratic Party engaged in an extended and highly competitive primary election process, which saw multiple contenders jockeying for primacy in a crowded field. The presidential campaign itself was similarly competitive and quite aggressive, with one campaign in particular launching repeated attacks on its major rival as well as the integrity of the country's electoral system. These attacks served to further divide an already highly polarized electorate and electoral process.

In the days just prior to the elections, the Mission also took note of elevated concerns about the potential for post-electoral civil unrest. While some of this tension derived from the highly competitive nature of the 2020 elections themselves, the social and political landscape was already fraught with lingering frictions stemming from widespread protests throughout the United States earlier in 2020, along with the economic impact of COVID-19 on the lives and livelihoods of millions of people. The feared unrest did not eventually materialise, however the Mission welcomed the efforts by some stakeholders to encourage calm, patience and respect for the natural unfolding of the electoral process.

Another area of considerable concern was the possibility of foreign interference in the election. Since the last presidential elections in 2016, foreign actors have directed extensive activity



towards influencing the electoral process in the United States, leading the Department of Homeland Security (DHS), in January 2017, to designate the infrastructure used to administer the nation's elections as critical infrastructure. In late October 2020 the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI) revealed they had identified credible evidence of efforts by a foreign country to target US state websites, including election websites.<sup>1</sup> CISA and the FBI determined that the efforts of the state actor was responsible for the mass mailing of voter intimidation emails to US citizens and the dissemination of election disinformation in October 2020. They also confirmed that the actor successfully obtained voter registration data in at least one state. The OAS Mission notes that the federal government and states have made significant efforts to improve their cyber security posture. The level of awareness and the implications of a cyber-attack in US elections has improved significantly since 2016 and states have additional resources and understanding of the potential threats and actors.

Campaign finance was a point of interest in the 2020 process. While there are some limits to contributions, there are no spending limits following the U.S. Supreme Court's 2010 decision that campaign expenditures can be considered political speech. According to data published by the Federal Elections Commission (FEC), the 2020 elections have been the costliest in the history of the United States, when the total money raised and spent in the Presidential, Senate, and House races is combined. At November 3, 2020, all candidates in all races had spent US\$6,303,596,311, an almost 100% increase on the 2016 general election.<sup>2</sup> This figure is expected to total some US\$14 billion once reporting is completed. On November 5, FEC data showed that the Democratic candidate had raised over US\$350 million more than the Republican candidate.<sup>3</sup>

In addition to being the most expensive U.S. election, the 2020 electoral process has also been the most litigated. Due to the decentralized nature of election administration in the country, there is no single centralized administrative or judicial process for submitting election complaints. Just as individual states administer the national, state, and local elections within their jurisdiction, so too are the procedures, rules and deadlines for the adjudication of election complaints found

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<sup>1</sup> Cybersecurity & Infrastructure Security Agency, Alert (AA20-304A), <https://us-cert.cisa.gov/ncas/alerts/aa20-304a>

<sup>2</sup> Figures were calculated by the Federal Elections Commission (FEC) based on records submitted by the candidates in all competing races. The data is available for public view on the FEC website [www.fec.gov](http://www.fec.gov)

<sup>3</sup> *Ibid*



in state law. These rules vary substantially across jurisdictions.<sup>4</sup> Disputes regarding the presidential election are heard in the state courts and can be appealed to the U.S. Supreme Court, while the House of Representatives and the Senate have the authority to arbitrate electoral disputes for the election of their members.

Much of the litigation for the 2020 elections concerned modifications to the electoral process as a result of the pandemic, and whether these modifications preserve or expand voting rights, or restrict them. Many complaints were filed in state courts regarding absentee ballot deadlines, including in Montana,<sup>5</sup> Massachusetts,<sup>6</sup> Michigan,<sup>7</sup> Minnesota,<sup>8</sup> Ohio,<sup>9</sup> Pennsylvania,<sup>10</sup> and Wisconsin,<sup>11</sup> with different outcomes, including on appeal with the Federal Supreme Court. There were also cases relating to signature matching requirements for absentee ballots in Ohio,<sup>12</sup> Texas,<sup>13</sup> and North Dakota.<sup>14</sup> One prominent case, *Washington v. Trump*, was brought by 14 states against the Trump Administration challenging some of the controversial changes to the operation of the Postal Service implemented by U.S. Postmaster General Louis DeJoy in July 2020, that were seen as targeting postal voting. There have also been cases related to ongoing debates such as voter identification and felony voting, which have not been strictly related to the COVID-19 pandemic.

Access to the vote is an important right for all persons. The Mission noted that citizens continue to be deprived of their franchise for a range of reasons, including the loss of voting rights following a felony conviction (even when convicted persons have served their sentences) and the revocation of rights of persons with intellectual disabilities. Measures adopted by states, such as strict voter ID laws, restrictions on registration, the biased design of electoral maps, and a reduction in polling places in selected areas, may also affect the ability of citizens to vote. The

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<sup>4</sup> IFES, Elections in the United States: 2020 General Elections, *Frequently Asked Questions*, [https://www.ifes.org/sites/default/files/ifes\\_faqs\\_elections\\_in\\_the\\_united\\_states\\_2020\\_general\\_elections\\_october\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_faqs_elections_in_the_united_states_2020_general_elections_october_2020.pdf)

<sup>5</sup> Driscoll v. Stapleton, No. OP20-0293, DA20-0295 (Mont. S. Ct.)

<sup>6</sup> Grossman v. Galvin, No. SJC-2020-XX (Mass. S. Ct.)

<sup>7</sup> League of Women Voters of Michigan v. Benson, No. 161671 (Mich. S. Ct.)

<sup>8</sup> LaRose v. Simon, No. A20-1040 (Minn. S. Ct.) and NAACP of Minnesota v. Simon, No. A20-1041 (Minn. S. Ct.)

<sup>9</sup> Ohio Dep't of Health v. LaRose, No. 2020-0388 (Ohio S. Ct.)

<sup>10</sup> Republican Party of Pennsylvania v. Boockvar, Nos. 20A53, 20A54, 20-542 (S. Ct.)

<sup>11</sup> Republican National Committee v. Democratic National Committee, No. 19A1016 (S. Ct.); Nos. 20-1538, 20-1539, 20-1545, 20-1546, 20-2835 (7th Cir.)

<sup>12</sup> League of Women Voters of Ohio v. LaRose, No. 2:20-cv-03843 (S.D. Ohio)

<sup>13</sup> Lewis v. Hughs, No. 20-50654 (5th Cir.)

<sup>14</sup> Self Advocacy Solutions North Dakota v. Jaeger, No. 3:20-cv-00071 (D.N.D.)





Mission notes that in many cases, voter disenfranchisement and voter suppression, disproportionately affect racial minorities, the poor and both young and older voters.

The intimidation of voters and other actors in the electoral process was also a matter of significant concern. In the weeks before Election Day, while early voting was already in progress, citizens in several states, both Democrats and Republicans, received threatening emails from an unknown actor, demanding they vote for one or the other of the major candidates.

## **ELECTION DAY**

On Election Day, the members of the Mission were present at polling places in Georgia, Iowa, Maryland, Michigan and the District of Columbia, and observed the process from the opening of the polling centers through to the close of polls and the deposit of voting materials with the appropriate local authorities. Members of the Mission also visited tabulations centers to observe the tallying of result.

In the jurisdictions that it observed, the Mission found that the day progressed in a peaceful manner. All observers reported well-organized polling places with clear signage and adequate space to guarantee the secrecy of the vote. Those centers observed opened on time and had all of the essential electoral materials. The Mission noted that in the locations it visited, a significant number of poll workers were young persons and the majority were women.

In order to address challenges occasioned by the COVID-19 pandemic, polling places installed clear shields/dividers to protect poll workers and placed marks on the floor to ensure appropriate social distancing among voters in line. Hand sanitizers were provided. In some places, observers noted that voting booths and machines were disinfected after each voter. However, this was not a standardized practice. Masks were mandatory for poll workers and voters in the District of Columbia and Maryland, but not in Iowa, Michigan and Georgia. In Georgia, the Mission noted the Governor's advice that poll workers could not require voters to wear a mask in order to access the polling place.

Observers in Iowa, Michigan, and Georgia reported long lines early in the morning, which nevertheless moved quickly. In the District of Columbia and Maryland observers reported low numbers of voters at polling places. The Mission took note of the curbside voting system implemented in the District of Columbia, which sought to facilitate older voters and persons with



disabilities. In those places visited by the observers, people with disabilities, pregnant women and seniors were given priority in line.

Polling stations closed on time and observers reported that the closing procedures they witnessed complied with expectations. The Mission commends the electoral authorities across all states, as well as the thousands of poll workers and supervisory personnel, for their efficient and professional conduct of the voting process prior to and on Election Day.

While official U.S. election results have never been certified and available on election night, preliminary data from states typically permit media organizations to provide a strong projection of the unofficial winners, particularly the president-elect, based on emerging trends in the allocation of Electoral College votes. For these elections, the Mission observed a significant disparity across states in the tabulation and reporting of results, which did not allow this to occur. The Mission notes this may result in part from the difference in funding available to each state and the consequent inability of some to invest in the needed modernization of their electoral systems. Another factor in the differences in tabulation and reporting, when compared to other years, was however the large volume of postal ballots received in the 2020 process and the variations in procedures across states regarding the receipt, processing and tabulation of these ballots.

Despite the lack of sufficient information regarding the results of the elections, the Mission noted the decision of both major presidential candidates to make statements on election night. The Democratic candidate called on his supporters to be patient “...until the hard work of counting votes is finished”, stressing the importance of ensuring “... every vote is counted, every ballot is counted.” He also signalled his belief that “...we’re on track to win this election.” In later remarks the Republican candidate called the integrity of the electoral process into question, expressing the opinion that the process was “... a fraud on the American public” and “...an embarrassment to our country”. He also stated that he had already won the election and wanted “all voting to stop”. He noted that he would be approaching the U.S. Supreme Court in this regard.

As occurred in the 2016 elections, the polling industry, at the national level, failed to accurately estimate the support for several candidates, including the Republican presidential candidate, while overestimating the support for the Democratic candidate. This can be attributed to the significant decentralization of the electoral system. Polls at the local level proved to be more accurate. The Mission noted that candidates and the media used polling more as a tool for



campaign propaganda than as a mechanism to accurately predict voter intentions. This was made most evident as results showed the predictions were drastically different from reality.

## POST-ELECTORAL CONTEXT

In the days after the elections the Mission continued to engage with and monitor the electoral process and the progress of the count. Observers in Michigan and Georgia visited the tabulation centers in those states as the results were tallied. In Georgia, the OAS Observer was present for the identification and resolution of minor issues in the count, which did not affect the integrity of the process. He reported that representatives of both the Republican and Democratic parties were also present on these occasions. In Michigan, the OAS Observer was informed by the Director of Elections, on November 4, that they were still awaiting information from eight counties at that time, including Wayne County, the most populated. The delay in receiving the results was largely attributed to ballots that required further verification.

While not physically present in Pennsylvania, the Mission noted the decision of Allegheny County to suspend the tabulation of the remaining uncounted, mail-in ballots on November 5, in order to resolve administrative issues with the majority of the pending ballots. The Mission notes that the processing of the valid votes could have continued during this period, instead of halting the count entirely.

The OAS Observer in Michigan also witnessed some disruption outside the tabulation center in Detroit, as members of the public gathered to protest the ongoing tabulation of ballots. The Mission notes that the aggressive attempts by members of the public to “*stop the count*”, which were replicated in Pennsylvania and Arizona, were clear examples of intimidation of electoral officials. On November 5, the Mission noted similar intimidation from the National Rifle Association which issued a challenge on Twitter to “*Come and take it*”<sup>15</sup>.

The Mission noted statements in the days after the poll, by one candidate in particular, regarding the progress and credibility of the vote, and the subsequent initiation of efforts by that campaign to challenge the ongoing process and the results before the courts. On November 5 both candidates addressed the nation through the media once more. The Democratic candidate urged citizens to be calm and assured them that “*...the process is working*” and would reflect “*...the will*

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<sup>15</sup> "Twitter". 2020. Twitter.Com. <https://twitter.com/NRA/status/132449250035>





*of the voters.”* In his statement the Republican candidate cast further aspersions on the US electoral process, stating that *“This is a case where they’re trying to steal an election. They’re trying to rig an election and we can’t let that happen.”* He accused electoral workers of electoral fraud, and reiterated that his campaign would pursue its complaints through the courts.

The OAS observers deployed in the battleground states of Michigan and Georgia did not witness any of the aforementioned irregularities.

While the OAS Mission has not directly observed any serious irregularities that call into question the results so far, it supports the right of all contesting parties in an election, to seek redress before the competent legal authorities when they believe they have been wronged. It is critical however, that candidates act responsibly by presenting and arguing legitimate claims before the courts, not unsubstantiated or harmful speculation in the public media. In the circumstances, the Mission welcomed the efforts by electoral authorities in the days after the poll to provide clear, fact-based information on their progress in the counting process, and to explain the applicable state law and certification processes in the different jurisdictions. The Mission also welcomed the acknowledgement by other stakeholders that electoral administrators were the only ones authorized to determine the official results of the elections, and to encourage citizens to be patient while this occurred.

## **FINDINGS AND RECOMMENDATIONS**

Based on its analysis of the electoral system, as well as the information it has gathered through discussions with federal, state and electoral authorities, representatives of political parties, civil society and other stakeholders prior to the elections, and its observations on Election Day, the OAS Mission wishes to offer the following preliminary findings and recommendations.

### **I. Postal Voting**

The role of the United States Postal Service has been discussed at length in both the political and legal arenas and voting by mail has been severely questioned by the Republican candidate and his campaign. The non-partisan Commission on Federal Electoral Reform (Carter-Baker



Commission)<sup>16</sup> found that the safeguards for ballot integrity are in place and meet democratic standards. Verification mechanisms exist to confirm or dispel doubts regarding the postal vote.

The Mission notes that the role of the USPS regarding a wider use of postal votes does not compromise its effectiveness<sup>17</sup> as every day the USPS delivers more than 181 million pieces of mail.<sup>18</sup> There are however concerns regarding the deadlines allowed for registration and mailing of ballots which can become challenging in the last days of an electoral process.

Most states do not require a specific postmark date for received envelopes. For the 2020 elections, five states required a postmark of November 2 at the latest, and 16 States, established a deadline of November 3. Generally, the deadline to receive mail ballots varied from November 2 to 23. The dates set by the local legislatures and electoral bodies have been challenged in state and federal jurisdiction, including the Supreme Court of Justice. While the rulings of the Court have been consistent, generally allowing local authorities to change electoral rules and preventing federal courts from modifying local rules close to Election Day, the Mission noted that the effects of such rulings have produced contradicting norms in various states,<sup>19</sup> with the potential for confusion among the electorate on the rules that apply.

The Mission also noted that states that send application forms or admit absentee voting vary significantly on the deadline to apply for postal voting. There are 11 different dates that range from 20 October to 2 November. The median is October 27, which, while maximizing elector's rights, puts a heavy burden on EMB's and on the postal service in order to send ballots, allow citizens to fill them out and send them back in time.

The Mission therefore recommends:

- Establishing deadlines for registration to vote via mail, which allow ample time for EMB's to send ballots, and for citizens to cast their vote and either send or deliver it. Uniformity

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<sup>16</sup> Carter Center, "Carter Center Statement on Voting by Mail for 2020 U.S. Elections", May 6, 2020.

<https://www.cartercenter.org/news/pr/2020/united-states-050620.html>

<sup>17</sup> The media has reported several issues regarding leakage or delay in postal processing, but there is no wider tendency that suggest a substantive failure to process postal vote.

<sup>18</sup> <https://facts.usps.com/one-day/>

<sup>19</sup> Cfr, Supreme Court of Justice. Republican Party of Pennsylvania v. Kathy Boockvar, Secretary of Pennsylvania, et al, Timothy K. Moore, et al. v. Damon Circosta, Chair, State Board of Elections, et al, Democratic National Committee, et al. v. Wisconsin State Legislature, et al.



in this deadline would allow the public to have a clearer understanding of their rights and responsibilities.

- Encouraging states that have turned to universal postal voting to strengthen their voters registries and to determine effective ways to update electors addresses (via EMB and USPS) in order to ensure voters rights.
- Facilitating efforts to provide timely and accurate information to citizens on changes to voting rules, dates and deadlines, to ensure public awareness and trust in the results of the election.

## II. Electoral Technology

Since the last presidential elections in 2016, foreign actors have directed extensive activity towards influencing the election process, launching cyber-attacks against U.S election infrastructure at the state and local level. U.S. Intelligence Agencies have concluded that an elevated risk of cyber-attacks on election infrastructure is present, leading the Department of Homeland Security (DHS), in January 2017, to designate the infrastructure used to administer the Nation's elections as critical infrastructure.

Several steps have been taken for the 2020 Presidential Election to strengthen the security of election infrastructure, including steps by state and local governments to switch to machines that produce a verifiable and auditable paper trail for every vote, improved information-sharing between states and localities, and steps to identify threats. DHS has also prioritized increasing the efficiency of sharing classified information by providing more briefings and facilitating the security clearance process for state local officials, who often need access to classified information regarding election threats. However, vulnerabilities remain. Some states continue to rely on outdated Direct Recording Electronic (DRE) machines which are susceptible to vulnerabilities and which do not facilitate a paper-based audit of results.

Voting machines and Election Management Systems (EMS) used by most states are certified by the Election Assistance Commission (EAC) using the Voluntary Voting System Guidelines Version 1.0 from 2005. These voluntary guidelines are significantly outdated and do not include a penetration testing process, which checks a computer system for exploitable security vulnerabilities. The EAC is currently working on VVSG 2.0.



Further, the EAC certification does not require EMS vendors to provide patches and updates for commercial, off-the-shelf software (COTS) used in voting machines and Election Management Systems. As a result, many election management systems are using outdated and out of support software. For example, Maryland and the District of Columbia currently use EVS voting systems that run part of their systems on Windows 7 and Windows 2008 – both of which are out of support from Microsoft and will no longer benefit from software updates or security fixes.

The Mission therefore recommends:

- Ensuring that the new Version 2.0 of the Voluntary Voting System Guidelines establish more opportunity for independent security experts by state and local governments to do open ended testing of the equipment. The VVSG 2.0 should also require EMS vendors to provide continuous updates and patches for voting machines and Election Management Systems.
- Suggesting that all states and counties replace outdated DRE machines with voting systems that produce a voter-verifiable paper record, thus creating a “paper trail” of each voter’s selections.

### III. Electoral Organization

#### Electoral Bodies

The electoral system in the United States is highly differentiated. At the level of the states, the responsibility for the conduct of elections, including the enforcement of qualifying rules, oversight of finance regulation, and establishment of Election Day procedures, falls either on the Office of the Secretary of State or a Board of Elections. In some cases, the officials responsible for managing the electoral process are themselves elected officials who belong to one or the other of the two major parties. The Mission has no reason to doubt the integrity of any the elected officials responsible for elections, but notes the potential for conflicts of interest when an election is organized by an individual who is competing directly in the process or invested in the success of one of the major contenders in the same process.

The Mission therefore recommends:



- Promoting the establishment of independent electoral bodies across all states, that are responsible for the organization of electoral processes and the certification of results.

## Training for Poll Workers

Training programs for poll workers in the United States are developed and implemented by local jurisdictions. In 47 states, laws explicitly require training for poll workers. Of this number 35 states stipulate mandate training regardless of the poll worker's experience, while five only require training at the level of the supervisor or chief poll worker. Three states – Maine, New Hampshire and Texas – do not require mandatory training for poll workers. Training materials and content utilized by the states depend on the electoral system of each jurisdiction, with the result that uniform standards do not exist across states. The Mission notes that mandatory, standardized training for all poll workers, supports the execution of uniform and accurate procedures during the voting process.

The Mission therefore recommends:

- Considering legislation that explicitly mandates training as a pre-requisite for the participation of all poll workers in the electoral process.
- Promoting measures to establish minimum uniform standards for training programs across the states to ensure a quality electoral product throughout the United States.

## **IV. Electoral Boundaries**

Boundary delimitation is mandated by federal law every ten years, following a census. With exceptions, congressional redistricting is conducted in the regular legislative process. That is, the state assembly draws a map of the state's congressional districts, which it passes as any other statute of law. This bill is then sent to the governor for a signature. If the governor objects to the map, the assembly can override the veto with supermajority support of the district boundaries.

Within this structure, the partisan makeup of state governments can influence the neutrality and representative nature of the electoral map, and thus the competitiveness of elections. The manipulation of boundaries for electoral gain, known as gerrymandering, has tended to be an





issue in past US elections. There have been efforts in some US states to reform the redistricting process in order to de-politicize this area of the electoral process. While the majority of states (36) continue to follow the legislative model mentioned earlier, seven states, including Michigan, where the Mission was present, rely on independent or bi-partisan commissions to draw the electoral maps. As noted by the OAS Mission to the United States elections in 2016, this practice guarantees clearer standards in the definition of district lines, thus increasing the possibilities for political alternation.

The Mission therefore recommends:

- Promoting reform that delegates redistricting to bipartisan or non-partisan commissions instead of state legislators. Successful reform cases, such as California and Michigan, offer insights on possible approaches that can be considered.
- Considering the establishment of a set of minimum re-districting requirements with which congressional districts must comply in every state.
- Encouraging greater transparency and accountability in all 50 states in the design of electoral maps.

## V. Electoral Justice

As indicated earlier, the nature of election administration in the United States means there is no central administrative or judicial process for addressing election complaints. Individual states administer elections within their jurisdiction, with the result that the procedures, rules and deadlines for the adjudication of election complaints are included in state law. Litigation in elections, both prior to and after an electoral process, has been steadily increasing. For the 2020 elections, the number of lawsuits filed by both major parties and other stakeholders suggest that it may be the most litigated election held in the country. A significant portion of the election-related litigation has been related to modifications to the electoral process as a result of the pandemic, and whether these modifications preserve or expand voting rights, or restrict them.

A concerning procedural element in the United States electoral justice system is the increased use of emergency applications (called the “shadow docket”) in the Federal Supreme Court. For rulings on these applications, the Supreme Court is not required to provide a written judgment



with reasons for its decisions. Several judgments on election cases have been made recently with no written reasoning provided.

Recounts and audits are governed by state law and there is therefore significant variation between states on their use. Depending on the state, a recount of all votes may be conducted automatically when the margin between contesting candidates is narrow, or can be requested by election officials, candidates or voters. In some states, the provisions for audits and recounts lack clarity. Timelines for recounts and audits can also be a problem, especially if they conflict with the safe harbor clause (as was the case in *Bush v. Gore*).

Electoral dispute resolution timelines generally vary widely between states and in some cases do not exist. This may leave cases languishing for many months, although cases leading up to the 2020 election have generally been expedited by courts. There has been a focus on the timing of election litigation in the 2020 elections, particularly with reference to the principle that court decisions should not alter election rules close to an election. This is challenging in the U.S. context given the multiplicity of jurisdictions and the variation in their rules.

The Mission recommends:

- The courts should provide written, reasoned decisions on election cases available to the public, including on all emergency applications heard and decided. If necessary given tight deadlines, written reasons can be provided after the ruling has been made.
- States should provide clear and consistent access to recounts and audits, and timelines that facilitate the ability for these recounts and audits to be carried out.
- The next Congress should use the Constitution’s Elections Clause to pursue reforms that reduce the vulnerabilities of the current election dispute resolution system.

## **VI. Political Finance**

In the United States the campaign finance regime comprises almost entirely private financing. Public funding at a federal level is obsolete, although it remains available under the Federal Election Campaign Act (FECA) of 1974. No major party Presidential candidate has used public



funding since 2008 given that it requires candidates to respect spending limits. For the 2020 general elections the FEC set the spending limit at \$103,701,600.

The total money raised and spent in the 2020 Presidential, Senate, and House races combined, have made the 2020 US General Elections the costliest election in the history of the country. As of November 3, 2020, all candidates in all races had spent US\$6,303,596,311, an almost 100% increase when compared to the total spending reported for the 2016 general election.<sup>20</sup> The Center for Responsive Politics estimates that the spending total could reach US\$14 billion once reporting is completed.

The absence of spending limits on private funding, along with the magnitude and influence of Big Money in electoral giving and spending, works against the principle of equity and fairness in the electoral competition, as a small number of wealthy individuals and powerful outside groups are able to dominate the campaign finance landscape.

In this context, the Mission took note of the continuing vacancies, and consequent loss of quorum, at the Federal Elections Commission (FEC). While the FEC advised the Mission that it remained able to carry out many of its duties, the absence of three Commissioners and the ability to form a quorum harm the effectiveness of government oversight and the capacity to impose fines and sanctions if and when campaign finance laws are violated. Considering the record-breaking expenditure of the 2020 elections, the Mission was concerned at the limitations at the agency charged with enforcing campaign finance rules.

The Mission therefore recommends:

- Employing all means, including an appeal to bipartisanship, to ensure the full complement of the FEC is installed and thus able to enforce the rules governing federal campaign finance.
- Enacting stronger disclosure laws to ensure equity and transparency in elections.

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<sup>20</sup> Data compiled by the Federal Election Commission - [www.fec.gov](http://www.fec.gov)



## VII. Media Coverage

Due to the paramount importance of media in any modern electoral process, media coverage was of particular interest to the Mission, both the traditional media (print, broadcast radio/TV, cable TV and online media), and social media (Facebook, Twitter and Google-YouTube). In analyzing media coverage for the U.S. presidential election, the Mission reviewed data on LexisNexis Newsdesk (a news aggregator and media monitoring tool), Sysomos (a social media analytic platform), Socialbakers (a social media marketing platform), and data from trusted media outlets, NGOs, industry think tanks and research firms.

The Mission noted that overall coverage for both presidential candidates was similar in both numbers and sentiment. As has occurred before, media expenditure was significant, surpassing US\$1.5 billion dollars spent on TV, digital and radio. The Mission noted that both presidential campaigns relied on negative TV ads. Close to 70% of ads were critical of their opponents and few of them had proposals for voters. However, negative ads are not regulated in the U.S. and are part of a very complex system that highly values the right to freedom of speech. The level of coverage reflected a very important media interest in the U.S. election and voters had ample sources of information on the process to assist in determining how to cast their votes.

The Mission observed that social media companies flagged and/or deleted messages from certain candidates and their followers, based on their respective internal policies, such as Twitter's 'Civic Integrity Policy'. While social media companies have become a key source of information and communication, which is no doubt favorable to the expansion of freedom of speech, the Mission considers that lack of regulation has led social media companies to constitute themselves as regulators of the content that is published. This is far from ideal and legislation based on international human rights law should be discussed and passed.

Even though most media maintained a neutral tone (sentiment) throughout the electoral campaign in the coverage of both presidential candidates, media outlets overwhelmingly publicly endorsed the democratic candidate. This is compatible with the U.S. legal framework, and in particular with Free Speech constitutional guarantees however, TV audiences might not be aware of this editorial policy.

Considering the use of social media platforms in the U.S. 2016 election and other political processes in the world, to disseminate false or misleading information regarding elections, social

media companies enacted new rules and guidelines for the 2020 election. The Mission considers that the efforts and resources devoted to this cause were essential.

The Mission therefore recommends:

- Maintaining a close collaboration to ensure that these and other SMS-messaging, such as Telegram and Whatsapp, are better protected from future attempts at malicious use.

## **VIII. Political Participation of Women**

In the United States, the under-representation of women holding office persists, despite a long history of women's political involvement. The gender imbalance raises questions about the democratic legitimacy and the quality of political representation, and has important policy implications. Women vote at higher rates than men and have since 1980 but women do not occupy even a third of the seats in elected office in the US at the national level, state level, or as Mayors. Prior to the 2020 elections, women held 127 of 535 seats (23.7%) in the Congress, 26 of 100 seats in the Senate (26%) and 101 of 435 seats (23.2%) in the House. Nine of the 50 Governors (18%) were women.

Further, the Mission noted that there was no woman candidate on a major party ticket for the 2020 presidential elections, nor has there been except for 2016, when Hilary Clinton was the presidential nominee for the Democratic Party. Senator Kamala Harris is the first woman of colour (and the third woman overall) to be selected as a candidate for the Vice-Presidency on a major-party ticket.

Several factors in the US political system affect gender equality in electoral competitions. Electoral rules do not include gender quotas for party nomination and this is unlikely to change. Also, the United States electoral system has features that research suggests may favour men, including the possibility of re-election, which leaves fewer opportunities for women to run if there is a male incumbent. As reported by the 2016 OAS Mission in the USA 2016, the role of political parties and party leaders in recruiting and supporting women candidates seems to be one of the main challenges for women seeking and winning election in greater numbers.

The Mission therefore recommends:





- In keeping with the recommendation of the 2016 Mission, encouraging political parties to support women’s political participation through the recruitment of female candidates, facilitating the access of female candidates to financing and relevant training, and appointing more women to party leadership roles to make the party organization itself a source of female candidates.

## CONCLUSIONS

The OAS Electoral Observation Mission for the 2020 General Elections in the United States will continue to observe the current electoral process through to the certification of the results and the tally of the Electoral College votes in January 2021. The Mission stresses that as the process continues, every valid vote cast in these elections must be counted, once it was received within the framework of the existing rules and regulations in the respective states.

The Mission also reiterates that all candidates must be guaranteed their right of complaint and appeal, once these are made within the applicable legal frameworks.

The 2020 elections have been historic in many ways, including the extraordinary efforts by electoral authorities to expand voting options and facilitate safe and secure voting by a record number of voters, despite a debilitating global pandemic. While the environment of the elections was competitive and fraught, the ability of voters across the country to access the vote in less than ideal circumstances, exemplifies the democracy for which the United States is renowned and which it has championed across the globe.

The OAS Mission urges all political parties, candidates and citizens to allow this democracy to prevail and to allow the remainder of the electoral process to unfold within the framework of the law.

## ACKNOWLEDGEMENTS

A detailed report, which expands on the Mission’s preliminary observations and recommendations, and which includes a complete report on media in the elections, will be presented to the OAS Permanent Council in Washington, D.C. and publicised on the OAS website.



The Mission wishes to thank the Government of the United States, in particular the US Department of State, for its invitation to observe the elections. The Mission also thanks the authorities of the jurisdictions to which it deployed for their kind collaboration, including the Secretaries of State of Georgia, Iowa and Michigan, the State Board of Elections of Maryland and the Board of Elections and Ethics of the District of Columbia.

The Mission is grateful to the National Association of Secretaries of State, the National Association of State Election Directors and the other federal and state authorities with which it engaged, for their assistance in facilitating the work of the Mission. The Mission also thanks all other stakeholders with whom it met for their willingness to share their perspectives on the different aspects of the electoral process. These discussions were critical to the successful completion of the Mission's work.

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