



# OAS

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More rights for more people

**ORGANIZATION OF AMERICAN STATES**

**ELECTORAL OBSERVATION MISSION**

**GENERAL ELECTIONS**

**UNITED STATES OF AMERICA**

**NOVEMBER 3, 2020**

**FINAL REPORT**

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## **I. FINAL REPORT TO THE PERMANENT COUNCIL<sup>1</sup>**

### **A. INTRODUCTION**

On November 3, 2020, the United States of America held General Elections to elect the President and Vice President and to fill 435 seats in the House of Representatives, 35 seats in the Senate, 13 state and territorial governorships, and other state and local offices.

In a letter to the Secretary General of the Organization of American States (OAS), dated October 5, 2020, the Permanent Representative of the United States to the OAS, Ambassador Carlos Trujillo, invited the OAS to observe these elections. The Secretary General accepted the invitation on October 20, 2020 and confirmed that the Organization would deploy an Electoral Observation Mission (EOM) to the elections, with its size and scope contingent on the resources available to do so.

The legal framework within which the Mission carried out its work, including the privileges and immunities accorded to the Mission and its members, was provided by the International Organizations Immunities Act (22 U.S.C. §§ 288 et seq.) and the 1992 Headquarters Agreement Between the OAS and the Government of the United States of America.

This was the second occasion on which the OAS observed an electoral process in the United States, having previously deployed for the General Elections held in 2016.

#### **– Composition and Methodology of the Electoral Observation Mission**

The organization deployed a limited scope Electoral Observation Mission for the November 2020 general elections. The Mission was led by the OAS Secretary General, Luis Almagro and comprised 28 experts and observers from 13 countries, including specialists in electoral organization, electoral technology, postal voting, electoral justice, electoral boundaries, political finance, media and the political participation of women. Two experts provided their services remotely from their home 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.

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<sup>1</sup> Presented to the Permanent Council of the Organization of American States on June 7, 2023, on behalf of the Chief of Mission, Luis Almagro, by the Deputy Chief of Mission, Melene Glynn.

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.

With its headquarters based in Washington DC, the OAS was able to follow the overall electoral process from its early stages, including campaign activities by the different political parties and candidates. With the approval/agreement of the respective state authorities, the Mission also observed early and Election Day voting in Georgia, Iowa, Maryland, Michigan and Washington DC.

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 (PPE), 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.

On November 6, 2020 the OAS Mission released a Preliminary Statement with its principal findings and recommendations. The Mission continued to observe and monitor the electoral process, through the certification of results by individual States and the tally of the Electoral College votes on January 6, 2021. This document is the Mission's Final Report. It complements the Preliminary Report, provides greater detail on the Mission's initial findings and recommendations and includes additional analyses and recommendations based on post-electoral developments.

## **B. PRE-ELECTORAL PHASE**

Prior to the elections the Mission reviewed existing legislation, regulations and procedures related to the electoral process, to ensure a full understanding of the regulatory framework within which the poll would take place. The Mission's leadership and experts also engaged with a range of actors, including federal and state authorities, electoral officials, political party representatives, other electoral observation missions, organizations working in the fields 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.

The discussions held by the OAS Mission allowed its members to analyse the arrangements for the process, hear different perspectives on the elections, and examine the principal issues that had come to the fore during the electoral process. Among the more prominent issues were the following:

## – *Voting Processes*

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, pro-actively 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 doubled 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 were of the view 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.

## – *Tone of the Campaign*

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 some stakeholders questioning the integrity of the

country's electoral system. The highly negative nature of the campaign served to further divide an already highly polarized electorate and electoral process.

In the days just prior to the elections, the Mission 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 social and economic impact of COVID-19 on the lives and livelihoods of millions of people. The feared unrest did not materialize in the immediate post-electoral period, however the events surrounding the certification of the vote at the Capitol on January 6, 2021 were marked by violence that was both reprehensible and unusual in the U.S. democratic tradition. The Mission welcomed the efforts by some stakeholders to encourage calm, patience and respect for the natural unfolding of the electoral process at the different stages where it proved necessary.

#### – *Cybersecurity and Foreign Interference*

An 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 U.S. state websites, including election websites.<sup>2</sup> CISA and the FBI also determined that the foreign state actor had engaged in election disinformation and voter intimidation, and had successfully obtained voter registration data in at least one state.

In a joint report prepared in February 2021, the Department of Justice (including the FBI) and the Department of Homeland Security (including CISA), confirmed there was no evidence that any foreign government or other actor was able to affect any technical aspect of the electoral process or election infrastructure, or otherwise compromise the results or integrity of the 2020 elections.<sup>3</sup>

The OAS Mission also 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 U.S. elections has improved significantly since 2016 and states have additional resources and understanding of the potential threats and actors.

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<sup>2</sup> Cybersecurity & Infrastructure Security Agency, "Alert (AA20-304A)," <https://us-cert.cisa.gov/ncas/alerts/aa20-304a>.

<sup>3</sup> U.S. Department of Justice, "Key Findings and Recommendations from the Joint Report of the Department of Justice and the Department of Homeland Security on Foreign Interference Targeting Election Infrastructure or Political Organization, Campaign, or Candidate Infrastructure Related to the 2020 US Federal Elections," March 2021, <https://www.justice.gov/opa/press-release/file/1376761/download>.

## – *Pre-Electoral Litigation*

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 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.

The 2020 electoral process was considered the most litigated election held in the United States. Many of the cases concerned modifications to the electoral process as a result of the pandemic, and whether these modifications preserved or expanded voting rights, or restricted 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 changes to the operations of the Postal Service implemented by U.S. Postmaster General Louis DeJoy in July 2020, that were seen as targeting postal voting. There were also cases related to ongoing debates such as voter identification and felony voting, which were not strictly related to the COVID-19 pandemic.

## – *Media*

Media coverage plays a significant role in any modern electoral process, both the traditional media (print, broadcast radio/TV, cable TV and online media), and social media (Facebook, Twitter and Google-YouTube). For the 2020 General Election in the United States, coverage by the media was even more critical, given the impact of the COVID-19 pandemic on the organization of in-person events such as campaign activities and public debates. The Mission noted that, overall, the two major presidential candidates received a similar level of

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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.).

coverage. As with past elections, expenditure on the media was significant, exceeding US\$1.5 billion on TV, radio and digital media. In the United States, media spending during electoral campaigns is not regulated as long as the amounts are properly disclosed.

Both major presidential campaigns used negative TV ads in their campaigns with close to 70% of ads being critical of opposing campaigns. Few ads contained proposals for voters. In the United States, negative ads are also unregulated and are protected by the right to freedom of speech.

The Mission noted that, as a result of the use of social media platforms to disseminate disinformation regarding the 2016 elections in the United States and in other political processes around the world, social media companies enacted new rules and guidelines for the 2020 election, in an effort to discourage false information and reduce manipulation campaigns. These were important steps towards corporate social responsibility by these platforms. Companies also sought to regulate 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, the absence of formal rules has required these companies to self-regulate in terms of the content they publish. This is far from ideal.

#### – *Access to the Vote*

Access to the vote is an important right for all persons. The Mission noted that citizens continued 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 Mission noted that in many cases, voter disenfranchisement and voter suppression, disproportionately affected racial minorities, the poor and both young and older voters.

### **C. EARLY VOTING**

In the United States early voting in elections takes place in two ways – in person and absentee voting. In-person early voting may be available from as early as 45 days before the election up to the Friday before the election. For the 2020 poll early voting was available in 43 states and in the District of Columbia.<sup>15</sup> OAS observers visited early voting sites in Georgia, Iowa, Maryland, Michigan and the District of Columbia, to observe the processes in those jurisdictions. With regard to absentee voting, some states allow "no excuse absentee" voting, where no reason is required to request an absentee ballot, while others require a valid reason, such as infirmity or travel, before a voter can participate using an absentee ballot.

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<sup>15</sup> NCSL, "State Laws Governing Early Voting," October 2020, <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

Most states stipulate that absentee ballots must be sent and received through the United States Postal Service.

There was a significant increase in absentee and in-person early voting for the 2020 elections. Approximately 36 million voters cast their ballots early in-person and by Election Day, November 3, electoral authorities had received over 65 million mail ballots, with over 27 million votes outstanding – figures that more than doubled the 33,378,450 postal votes received in the 2016 election. Taken together, in-person and absentee voting accounted for over 100 million ballots cast prior to Election Day.<sup>16</sup>

The Mission took note of other early voting alternatives implemented during this electoral process. Multiple states provided members of the armed services and their families, as well as citizens who reside overseas, with greater access to absentee or mail ballots, as normally provided for by the 1986 Uniformed and Overseas Citizens Absentee Voting Act. Under UOCAVA provisions, Internet voting was utilized in 31 states and the District of Columbia,<sup>17</sup> allowing citizens overseas to transmit their votes via email, fax, or the Internet.

#### **D. 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.

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<sup>16</sup> United States Elections Project, “2020 General Election Early Vote Statistics,” November 23, 2020, <https://electproject.github.io/Early-Vote-2020G/index.html>.

<sup>17</sup> NCSL, “VOPP Table 16”.

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 (of the Republican and the Democratic parties) to make statements on election night, signalling their belief that they had won. The Mission observed in this regard, that while the Democratic candidate nevertheless stressed the importance of ensuring that every vote was counted<sup>18</sup> the Republican candidate called for the process to stop and advised that he would be approaching the U.S. Supreme Court to this end.<sup>19</sup>

As occurred in the 2016 election, the polling industry, at the national level, failed to accurately estimate the support for several candidates, including the presidential candidates. This can be attributed to the significant decentralization of the electoral system. Polls at the local level proved to be more accurate. The Mission also noted that candidates and the media used polling more as a tool for campaign propaganda than as a mechanism to accurately predict voter intentions.

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<sup>18</sup> Politico, “Biden: The election ‘ain’t over until every vote is counted””, November 4, 2020, <https://www.politico.com/news/2020/11/04/biden-the-election-aint-over-until-every-vote-is-counted-433996>.

<sup>19</sup> The Hill, “Trump prematurely declares victory, says he’ll go to Supreme Court”, <https://thehill.com/homenews/campaign/524404-trump-says-hell-go-to-supreme-court-to-stop-votes-from-being-counted>.

## E. POST-ELECTORAL PHASE

In the days after the election 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.

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*” at that center, which were replicated in other U.S. cities, were clear examples of the intimidation of electoral officials.

The Mission noted statements by the Republican presidential campaign in the days after the poll, regarding the progress of the vote counting and the credibility of the process, and the subsequent initiation of efforts by that campaign to challenge both the ongoing tabulation and the results before the courts. On November 5 both major presidential candidates addressed the nation through the media once more. While the Democratic candidate urged citizens to be calm and assured them that the system was working, the Republican candidate cast further aspersions on the U.S. electoral process, claiming that there had been widespread fraud.<sup>20</sup> The OAS observers deployed in the battleground states of Michigan and Georgia did not witness any irregularities.

While the OAS Mission did not directly observe any serious electoral issues that could call the results into question, 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. In doing so, 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 this regard, 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.

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<sup>20</sup> Washington Post, “Biden renews call for patience as Trump assails vote-counting process,” November 5, 2020, [https://www.washingtonpost.com/politics/biden-trump-election/2020/11/05/1dd15c6c-1f82-11eb-ba21-f2f001f0554b\\_story.html](https://www.washingtonpost.com/politics/biden-trump-election/2020/11/05/1dd15c6c-1f82-11eb-ba21-f2f001f0554b_story.html).

### **i. Recount Processes**

A recount is automatically triggered in some states if the results fall within a specified margin. In 41 states and the District of Columbia, a recount can be requested or petitioned by a losing candidate, a voter, a group of voters or other concerned parties.<sup>21</sup> Recounts may also be conducted by order of the courts.

In Georgia, the Secretary of State announced a risk-limiting hand-count audit, after the margin of votes between the top two presidential tickets was deemed too narrow at 0.3%. The audit, which was completed on November 19, prior to the state's certification deadline, confirmed that the Democratic ticket had won the state's presidential election. A recount was subsequently requested by the Republican ticket on November 21. The results of that recount, which was completed on December 4, confirmed the results of the hand-count audit.<sup>22</sup>

The Mission also noted that a partial recount was requested by the Republican ticket in Wisconsin, where the difference between the two top tickets for federal office was approximately 20,000 votes. The recount, which took place in Milwaukee and Dane Counties, resulted in a net gain of 87 votes for the Democratic ticket.<sup>23</sup>

### **ii. Post-Electoral Litigation**

As of April 16, 2021, 100 post-election lawsuits had been filed in 15 states and the District of Columbia. Of these, 34 lawsuits dealt directly with the presidential election, and were filed in 8 states (Arizona, Georgia, Nevada, Michigan, New Mexico, Pennsylvania, Texas, Wisconsin) and the District of Columbia.<sup>24</sup> The Mission noted that in the majority of cases, the lawsuits were either dismissed or withdrawn. In one successful case in Pennsylvania however, *Donald J. Trump for President, Inc. v. Boockvar*, the judge ruled that the Secretary of the Commonwealth had incorrectly extended the deadline for mail-in voters to provide missing proof of identification after submitting their ballots, and barred election officials from counting ballots for which proof of identification was provided after the statutory deadline of November 9, 2020.<sup>25</sup>

Again, as noted earlier, the Mission supports the right of all parties to an electoral process to address their legitimate concerns before the courts. However, once those claims have been resolved, political actors have the responsibility to respect those results and the institutions

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<sup>21</sup> NCSL, "Election Recounts," October 2020, <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx>.

<sup>22</sup> Ballotpedia, "Noteworthy recounts in the United States," [https://ballotpedia.org/Noteworthy\\_recounts\\_in\\_the\\_United\\_States#2020](https://ballotpedia.org/Noteworthy_recounts_in_the_United_States#2020).

<sup>23</sup> Ballotpedia, "Noteworthy recounts in the United States".

<sup>24</sup> Ballotpedia, "Ballotpedia's 2020 Election Help Desk: Tracking election disputes, lawsuits and recounts," [https://ballotpedia.org/Ballotpedia%27s\\_2020\\_Election\\_Help\\_Desk:\\_Tracking\\_election\\_disputes,\\_lawsuits,\\_and\\_recounts](https://ballotpedia.org/Ballotpedia%27s_2020_Election_Help_Desk:_Tracking_election_disputes,_lawsuits,_and_recounts).

<sup>25</sup> *Donald J. Trump for President, Inc. v. Boockvar*. Pennsylvania Commonwealth Court.

involved in the elections. Details of the post-electoral litigation filed in the 2020 elections may be found in the “Electoral Justice” Annex to this report.

### *iii. Certification of the Results of the Election*

Deadlines for the certification of results at the state level vary. Most states provide a specific date or time-frame for the certification of results, while a few are either vague on the deadline or do not specify a deadline at all. Once the results have been certified, each state governor is required by U.S. law to prepare a “Certificate of Ascertainment” of the vote, which includes the names of the electors who have been selected by voters, and the number of votes cast for the candidates.<sup>26</sup>

The Mission noted that all 50 states certified their results within their respective timelines. In Georgia, which undertook a second recount after the state’s November 20 certification deadline, the results were subsequently recertified. In Wayne County, Michigan, an initial refusal by the two Republican canvassers to certify the vote, was subsequently withdrawn.<sup>27</sup>

On December 14, 2020, the 538 members of the Electoral College cast their votes for President and Vice President of the United States in meetings held in the 50 state capitals and the District of Columbia and on January 6, in a joint meeting of the Congress, the results were counted and certified.

The OAS Mission followed with alarm, the events of January 6, both within and around the Capitol building (the seat of the Congress) which interrupted the certification of the vote and generated grave concern for the safety of the lawmakers responsible for this process. As OAS Missions have stated in other jurisdictions, violence has no place in an electoral process. As the events unfolded the OAS General Secretariat issued a statement repudiating the attack against institutions and urging a return to rationality and the constitutionally mandated process.<sup>28</sup> The Mission was happy to observe that lawmakers were not deterred by the occurrences of the day, and returned to their task late on January 6, finally completing the tally and certification of the electoral results early on the morning of January 7.

These results awarded 306 votes in the Electoral College to Joseph R. Biden and Kamala Harris of the Democratic Party, with 232 votes awarded to Donald J. Trump and Michael Pence of the Republican Party, as shown in Table 1.<sup>29</sup>

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<sup>26</sup> Congressional Research Service, “The Electoral College: A 2020 Presidential Election Timeline,” October 22, 2020, <https://crsreports.congress.gov/product/pdf/IF/IF11641>

<sup>27</sup> Both canvassers subsequently signed affidavits attesting that they wished to rescind their votes to certify the county's election results, but this was not facilitated.

<sup>28</sup> OAS Press Release E-001/21, “Statement from the OAS General Secretariat on Incidents in Washington, D.C.,” January 6, 2021, [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-001/21](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-001/21)

<sup>29</sup> National Archives, “2020 Electoral College Results,” <https://www.archives.gov/electoral-college/2020>.

**Table 1: Votes Cast in the Electoral College by State and by Candidate**

State	Votes	Winning Candidates	State	Votes	Winning Candidates
Alabama	9	Trump/Pence	Montana	3	Trump/Pence
Alaska	3	Trump/Pence	Nebraska	5	B/H: 1 T/P: 4
Arizona	11	Biden/Harris	Nevada	6	Biden/Harris
Arkansas	6	Trump/Pence	New Hampshire	4	Biden/Harris
California	55	Biden/Harris	New Jersey	14	Biden/Harris
Colorado	9	Biden/Harris	New Mexico	5	Biden/Harris
Connecticut	7	Biden/Harris	New York	29	Biden/Harris
Delaware	3	Biden/Harris	North Carolina	15	Trump/Pence
Dist. of Colombia	3	Biden/Harris	North Dakota	3	Trump/Pence
Florida	29	Trump/Pence	Ohio	18	Trump/Pence
Georgia	16	Biden/Harris	Oklahoma	7	Trump/Pence
Hawaii	4	Biden/Harris	Oregon	7	Biden/Harris
Idaho	4	Trump/Pence	Pennsylvania	20	Biden/Harris
Illinois	20	Biden/Harris	Rhode Island	4	Biden/Harris
Indiana	11	Trump/Pence	South Carolina	9	Trump/Pence
Iowa	6	Trump/Pence	South Dakota	3	Trump/Pence
Kansas	6	Trump/Pence	Tennessee	11	Trump/Pence
Kentucky	8	Trump/Pence	Texas	38	Trump/Pence
Louisiana	8	Trump/Pence	Utah	6	Trump/Pence
Maine	4	B/H: 3 T/P: 1	Vermont	3	Biden/Harris
Maryland	10	Biden/Harris	Virginia	13	Biden/Harris
Massachusetts	11	Biden/Harris	Washington	12	Biden/Harris
Michigan	16	Biden/Harris	West Virginia	5	Trump/Pence
Minnesota	10	Biden/Harris	Wisconsin	10	Biden/Harris
Mississippi	6	Trump/Pence	Wyoming	3	Trump/Pence
Missouri	10	Trump/Pence			

Source: National Archives, “2020 Electoral College Results”, <https://www.archives.gov/electoral-college/2020>

Of the 158,383,403 votes cast, 81,268,924 votes (51.31%) were cast for the Biden/Harris ticket, and 74,216,154 votes (46.86%) were cast for the Trump/Pence ticket.<sup>30</sup> Those results, as well as the results for the candidates of the Green and Libertarian parties, the other top two tickets, are shown in Table 2.

<sup>30</sup> Federal Election Commission, “Official 2020 Presidential General Election Results,” <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

**Table 2: Votes Cast for Presidential/Vice Presidential Candidates (Top 4 Tickets)**

Candidates for President & Vice President	Votes Cast	% of Votes Cast
Joseph R. Biden / Kamala D. Harris Democratic Party	81,268,924	51.31%
Donald J. Trump / Michael R. Pence Republican Party	74,216,154	46.86%
Jo Jorgensen / Jeremy “Spike” Cohen Libertarian Party	1,865,724	1.18%
Howie Hawkins / Angela Nicole Walker Green Party	405,035	0.26%

Source: Federal Election Commission, “Official 2020 Presidential General Election Results”, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>

Joseph R. Biden was sworn in as President of the United States on January 20, 2021.

The final results for the elections for the United States Senate gave 20 of the 35 seats up for election to candidates of the Republican Party, while candidates of the Democratic Party won 15 seats.

The final results for the United States House of Representative elections gave 222 of the 435 seats to candidates of the Democratic Party, while 213 seats were won by candidates of the Republican Party.

The Mission took note that a Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol was established by the House on June 30, 2021.<sup>31</sup> Ten public hearings were held between June 9, 2022 and December 19, 2022, with testimony from over 70 witnesses.<sup>32</sup> On December 22, 2022, the Committee issued its final report, which contained a series of findings, conclusions, and recommendations, including legislative recommendations, for corrective measures. This initiative was an important exercise in transparency and accountability.

## **F. FINDINGS AND RECOMMENDATIONS**

The 2020 elections were historic in many ways, including in the extraordinary efforts made by electoral authorities to expand voting options and facilitate safe and secure voting by a record number of voters during a debilitating global pandemic. While the environment of the elections was also competitive and fraught, and saw an intentional effort to question the electoral system, the high turnout of voters across the country and their ability to access the

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<sup>31</sup> H.Res.503 - Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol, <https://www.congress.gov/bill/117th-congress/house-resolution/503/text>.

<sup>32</sup> Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>

vote in less than ideal circumstances, exemplified the democracy for which the United States is renowned and which it has championed across the globe.

As stated by the OAS Mission to the 2016 elections in the United States, ...*"the strength of U.S. democracy goes beyond the particularities of an electoral process. It is based on its institutional strength, freedom of expression and press, balance of power, the rule of law and the principles on which this country was founded."*

The OAS Mission congratulates the United States on the strong attributes that characterize its electoral system and, in keeping with its commitment to support efforts by member states to enhance these systems and processes, offers the following recommendations for the consideration of the relevant state and federal authorities.

### **i. Electoral Organization**

The electoral system in the United States is highly differentiated, with each state individually regulating how it manages the different aspects of the electoral system, including registration, the voting process, vote tabulation and certification, and the making and publication of election returns. 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.

The responsibility for the conduct of elections also varies across the states, typically falling 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 political parties. While the Mission has no reason to doubt the integrity of any the elected officials responsible for elections, it 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

Despite the high level of decentralization and differentiation in the electoral process, and the difficult circumstances posed by the COVID-19 pandemic, the Mission found that the elections were generally well organized and were conducted in an efficient and professional manner. The Mission however noted several areas in which the electoral processes across the states could be enhanced, in order to ensure uniformity of standards and access for all voters, and recommends:

#### Legal Framework

- Federal and bipartisan efforts to promote the establishment of minimum, uniform election administration standards throughout the states.

#### Electoral Bodies

- Promoting the establishment of independent electoral bodies across all states, that are responsible for the organization of electoral processes and the certification of results, in order to preserve the non-partisan delivery of the electoral process.

### Electoral Administration and Organization

- Engaging efforts well in advance of future elections to ensure that the Election Assistance Commission and other federal agencies have the resources they need to assist the states, including local and smaller jurisdictions, in covering potential gaps in their electoral administration budgets.
- 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 poll worker training programs across the states to ensure a quality electoral product throughout the country.
- Establishing mandatory minimum, uniform standards for the design of ballots and other polling place materials to support the quality of the voter experience and the overall electoral process.
- Promoting access to in-person Early Voting in those states that do not currently offer this facility, to ensure equal access for all voters in the United States.
- Initiating the processing and tabulation of early and mail-in ballots prior to Election Day, in those states where it does not currently occur, to ensure that results are available in a shorter timeframe.

### Voter Registration and Access

- Promoting bipartisan efforts to encourage greater uniformity in voter registration procedures and deadlines across the states.
- Promoting measures to ensure equal access and respect for the voting rights of all citizens, in particular racial minorities, people with disabilities, the poor and both younger and older voters, who have tended to be disproportionately affected by voter disenfranchisement and voter suppression.

#### **ii. Electoral Technology**

For the 2020 Presidential Election, efforts were made 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. 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 adopted in 2005. These voluntary guidelines are significantly outdated and do not include a penetration testing process, which checks a computer system for exploitable security vulnerabilities. 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.

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.
- That all states and counties analyze the possibility of replacing outdated DRE machines with voting systems that produce a voter-verifiable paper record, thus creating a “paper trail” of each voter’s selections.

### **iii. Postal Voting**

During the 2020 electoral process, voting by mail and the role of the United States Postal Service was discussed at length in both the political and legal arenas and was severely questioned by the Republican campaign. The 2005 non-partisan Commission on Federal Electoral Reform (Carter-Baker Commission)<sup>33</sup> considered that voting by mail can be secure and meet democratic standards, and verification mechanisms exist to confirm or dispel doubts regarding the postal vote. The ability of the US Postal Service to process and deliver large volumes of mail per day is also proven.<sup>34</sup> Close deadlines for registration and the mailing of ballots can, however, create challenges in the closing days of an electoral process.

In that regard, the Mission noted that the deadlines for submitting applications for postal voting and for returning completed ballots by mail, vary significantly across the different states. While later deadlines enhance the rights of electors, they also place a heavy burden on electoral authorities and the postal service which must facilitate the delivery and return/receipt of mailed ballots within very tight timeframes. The Mission also noted that deadlines set by the local legislatures and electoral bodies were challenged in state and

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<sup>33</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>34</sup> US Postal Service, “Postal Facts,” <https://facts.usps.com/one-day/>.

federal jurisdictions, including up to the Supreme Court of Justice. In some cases, ballots arriving after November 3 were set aside to allow for a ruling on their validity.

While the rulings of the Court were 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 produced contradicting norms in various states, with the potential for confusion among the electorate on the rules that applied.<sup>35</sup>

The Mission therefore recommends:

- Retaining the expanded mail-in voting modality, beyond the end of the COVID-19 pandemic, given the efficiency with which it was deployed in 2020 and the enhanced voter turnout that resulted.
- Establishing deadlines for registration to vote via mail, which allow ample time for EMB’s to send ballots, and for citizens to cast their votes and either send or deliver them. Uniformity 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.

#### **iv. Electoral Justice**

The decentralized 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 and vary substantially across jurisdictions. Litigation in elections, both prior to and after an electoral process, has been steadily increasing in the United States. With over 400 cases filed ahead of the elections, the November 2020 poll was termed “the most litigated presidential election in recent U.S. history”.<sup>36</sup> Much of this litigation concerned modifications to the electoral process as a result of the COVID-19 pandemic, primarily to extend early voting and

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<sup>35</sup> *Republican Party of Pennsylvania v. Boockvar*, Nos. 20A53, 20A54, 20-542 (S. Ct.); *Timothy K. Moore, et al. v. Damon Circosta, Chair, State Board of Elections, et al.*, Nos. 20A72, 20-2107 20-2104; *Democratic National Committee, et al. v. Wisconsin State Legislature, et al.*, No. 20A66.

<sup>36</sup> Frontline, “COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down”, October 28, 2020, <https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/>.

distance voting, and whether these modifications preserved or expanded voting rights, or restricted them.

One concerning procedural element in the 2020 electoral process was 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 orders on emergency election applications were issued in the pre-election period with no written reasoning provided, including some contentious, high-profile cases.

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 occurred 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 were generally expedited by courts. There was 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:

- Standardized election rules for federal elections should be set out in federal law in order to provide consistency across states for federal elections, and to provide legal stability and certainty.
- Congress should pursue reforms that reduce the vulnerabilities of the current election dispute resolution system. In this regard, the House should consider the Supreme Court’s invitation to formulate a new coverage formula for the pre-clearance process, and should consider reforms to simplify and clarify the dispute procedures set out in the Electoral Count Act.
- States should consider further reforms to judicial recusal rules to strengthen the independence and impartiality of judges hearing election cases.
- 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.
- Where necessary, states should ensure that the provisions governing recounts and audits are clear and include timelines that allow these processes to be conducted

prior to the federal safe harbor date. Reasonable time limits for election litigation should also be codified.

- The Presidential Transition Act should be amended, removing the power to determine the “apparent winner” from a political appointee and awarding it to a nonpartisan commission, following objective criteria that should be set out in the law. The Act should also specify that the transition process be initiated at the earliest reasonable time, ideally as soon as the “apparent winner” has been determined, even if this is prior to the official certification of results.

#### **v. 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 U.S. elections. There have been efforts in some states to reform the redistricting process in order to de-politicize this area of the electoral process. While the majority of states continue to follow the legislative model mentioned earlier, several 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 2016 elections in the United States, 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, Virginia 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.
- Enhanced access for stakeholders (political parties, organized interests, advocacy groups) and the general public, to encourage greater transparency and accountability in the design of electoral maps, and ensure greater participation, trust and certainty regarding the boundary delimitation process.

## vi. Political Finance

In the United States the campaign finance regime comprises almost entirely private financing. While public funding at a federal level is available under the Federal Election Campaign Act (FECA) of 1974, no major party presidential candidate has used public funding since 2008 as it requires candidates to respect spending limits. For the 2020 general elections the spending limit for publicly funded presidential candidates was \$103.7 million.

When the total money raised and spent in the Presidential, Senate, and House races is combined,<sup>37</sup> the 2020 election was the costliest election in the history of the United States. The total amount spent by all candidates in all races, at November 2, 2021, was US\$7,857,353,508<sup>38</sup> - a more than 100% increase over the total spending reported for the 2016 general election.<sup>39</sup> Total federal spending in the 2020 election was \$14.4 billion.<sup>40</sup>

The absence of spending limits on private funding works against the principle of equity in the electoral process, given that a small number of wealthy individuals and powerful outside groups dominate election costs and have the monetary capacity to influence campaigns. The fact that disclosure laws do not apply to some outside spending groups, affects similarly both the level of equity and transparency of the process.

In this context, the Mission took note that for the 2020 elections, the Federal Elections Commission (FEC) was not fully constituted, with only three out of six Commissioners. While the FEC informed the Mission that it remained able to carry out many of its duties, the Mission noted that the absence of three Commissioners and the consequent inability to form a quorum, limited the effectiveness of the Commission's oversight ability and its capacity to impose fines and sanctions if and when campaign finance laws were violated.

The Mission therefore recommends:

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

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<sup>37</sup> Figures as of October 20, 2021 based on the reports submitted to the Federal Elections Commission (FEC) by the candidates in all competing races. Available on the FEC website at: <https://www.fec.gov/data/spending-bythenumbers/>. This data does not include outside spending (super PACs, social welfare groups, trade associations, unions, among others).

<sup>38</sup> Figures as of November 2, 2021, Available on the FEC website at: <https://www.fec.gov/data/spending-bythenumbers/>.

<sup>39</sup> The total for all candidates in all races for the General Election in 2016 was US\$3,166,071,993. This figure does not include outside spending.

<sup>40</sup> Open Secrets, "Most expensive ever: 2020 election cost \$14.4 billion," <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/>.

## **vii. Political Participation of Women**

The 2020 elections in the United States saw important advancements for women. For the first time in the country's history, a woman, Kamala Harris, was elected Vice President. In Congress and in most offices in the United States, with the exception of the offices of Governor, the 2020 elections also continued the decade-long upward trend in female political representation, with the number of women nominated and elected growing at both state and federal levels. Overall, women ran, donated and voted in record numbers during the 2020 election.

Despite these positive results, women make up less than 30% of Congress and only hold nine governorships. The under-representation of women holding office persists despite a long history of women's political activism in the United States. The gender imbalance raises questions about 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 United States 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 post of president, nor has there been except for 2016, when Hilary Clinton was the presidential nominee for the Democratic Party. 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 United States, 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.

- Encouraging political parties, women-focused PACs and other similar stakeholders to promote and sustain political financing particularly for women who are running for office for the first time.

### **viii. Media**

Media coverage, both the traditional and social media, plays a significant role in any modern electoral process. The Mission noted that, overall, the two major presidential candidates received a similar level of coverage. As with past elections, expenditure on the media was significant, exceeding US\$1.5 billion on TV, radio and digital media. The Mission also noted that the majority of ads were critical of opposing campaigns, with few proposals for voters.

The Mission observed that social media companies sought to regulate messages from certain candidates and their followers, based on their respective internal policies. While the absence of formal rules has required these companies self-regulate in terms of the content they publish, this is far from ideal.

The Mission also noted efforts by social media companies to establish new rules and guidelines for the 2020 elections, following the rise of disinformation in the 2016 U.S. elections and in other political processes around the world. These were important steps towards greater corporate social responsibility by these platforms.

The Mission therefore recommends:

- Maintaining a close collaboration between the different platforms to ensure better protections against future attempts at malicious use.

## **G. ACKNOWLEDGEMENTS**

The Mission wishes to thank the Government of the United States, in particular the U.S. 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.

The Mission is also grateful to the governments of Bolivia, Brazil, Chile, Colombia, the Dominican Republic and Panama for their financial contributions which made this Mission possible.

## **II. ANNEXES – REPORTS BY TOPIC**

### **i. ELECTORAL ORGANIZATION**

#### **1. Introduction**

The United States is a federal republic, with elected officials at the federal (national), state and local levels. The head of state is the President who, along with the Vice President, is elected indirectly through an Electoral College. The members of the federal legislature, the Congress (comprising the Senate and the House of Representatives), along with members of state legislatures, Governors and local officials are elected directly by the voters in each jurisdiction.

Presidential elections are held every four years and a President may only serve two four-year terms. The 100 members of the Senate are elected for a six-year term in two-member constituencies (2 per state), with approximately one-third of the members renewed every two years. The 435 members of the House of Representatives are elected for two-year terms in single seat constituencies and are considered for re-election in every even year. Other state and local elections are held under the rules and timeframes stipulated by each state. Executive power (with certain qualifications) is exercised by the President, while legislative power rests with the Congress. Judicial power is vested in the Supreme Court and inferior courts and exercised independently of the executive and legislative branches.

On Tuesday, November 3, 2020, General Elections were held for the offices of President and Vice President, 35 of the 100 seats in the United States Senate, all 435 seats in the House of Representatives and 13 state and territory governors. Regularly scheduled elections were held in 86 of the 99 state legislative chambers, along with contests for other state, local, district and judicial offices, and a variety of referenda.

For these elections an estimated 239,247,182 persons were eligible to vote<sup>41</sup> and according to the Federal Election Commission, 158,383,403 votes were cast.<sup>42</sup>

#### **2. Legal Framework**

Although the United States relies on a complex federal system of government, its election administration is highly decentralized. Article 1, Section 4 of the Constitution<sup>43</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections, with the result that the legal framework for elections varies between and within states. Each state individually regulates how it manages the different aspects of the electoral system (including registration, the voting process, vote tabulation and certification) and the making and

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<sup>41</sup> McDonald, Michael P, “2020 November General Election Turnout Rates”, December 7, 2020, Accessed February 11, 2020, <http://www.electproject.org/2020g>.

<sup>42</sup> Federal Election Commission, “Official 2020 Presidential General Election Results”, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

<sup>43</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

publication of election returns.<sup>44</sup> While the Constitution, as originally written, did not specifically establish a person's right to vote, four constitutional amendments<sup>45</sup> were subsequently passed stipulating that voting rights could not be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870)<sup>46</sup>, sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964).<sup>47</sup>

Seven federal laws have also been enacted over the years to help protect the right of Americans to vote and make it easier for citizens to exercise that right. In 1870, the Civil Rights Act<sup>48</sup> established, for the first time, federal protections against discrimination in voting. Those protections were later amended in 1957, 1960 and 1964. In 1965, the Voting Rights Act<sup>49</sup> was enacted to prohibit voter discrimination based on race, color, or membership in a language minority group. This Act was the first to require the provision of election materials in languages besides English. This law was later complemented by the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) of 1984,<sup>50</sup> that required polling places to be accessible to people with disabilities, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986,<sup>51</sup> that allowed members of the U.S. armed forces and overseas U.S. voters to register and vote by mail,<sup>52</sup> and the National Voter Registration Act (NVRA) of 1993,<sup>53</sup> that established new ways to register to vote. The NVRA also called for states to keep more accurate voter registration lists.

In 2002, after the 2000 presidential election tabulation crisis in Florida, the federal government enacted the Help America Vote Act (HAVA)<sup>54</sup> as an effort to establish minimum election administration standards for states and units of local government with

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<sup>44</sup> In carrying out these duties, state and local governments have varying degrees of independence in how they organize elections within their jurisdictions. Typically, these tasks are administered by each state's Secretary of State or a Board of Elections.

<sup>45</sup> National Archives, "The Constitution: Amendments 11-27", [https://www.archives.gov/founding-docs/amendments-11-27?\\_ga=2.129930764.107809335.1614006866-630143065.1614006866](https://www.archives.gov/founding-docs/amendments-11-27?_ga=2.129930764.107809335.1614006866-630143065.1614006866).

<sup>46</sup> Some states continued to limit this right by imposing literacy tests and other barriers on eligible voters of color.

<sup>47</sup> Prior to this amendment, five states (Alabama, Arkansas, Mississippi, Texas and Virginia) levied poll taxes - essentially a fee that the voter had to pay prior to voting. Poll taxes disproportionately affected African-American voters and exemplified "Jim Crow" laws, developed in the post-Reconstruction South, which aimed to disenfranchise black voters and institute segregation, <https://history.house.gov/HistoricalHighlight/Detail/37045>

<sup>48</sup> Yale Law School, "The Avalon Project: Civil Rights Act; July 2, 1964", [https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp).

<sup>49</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965", [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>50</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 201 - Voting Accessibility for the Elderly and Handicapped", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-201>.

<sup>51</sup> Federal Voting Assistance Program, "The Uniformed and Overseas Citizens Absentee Voting Act Overview", <https://www.fvap.gov/info/laws/uocava>.

<sup>52</sup> In 2009, a subtitle of the National Defense Authorization Act for Fiscal Year 2010, titled the Military and Overseas Voter Empowerment Act ("MOVE Act"), amended UOCAVA to establish new voter registration and absentee ballot procedures which states must follow in all federal elections.

<sup>53</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 205 - National Voter Registration", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>54</sup> U.S. Election Assistance Commission, "Help America Vote Act", [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

responsibility for the administration of federal elections. The Act also established the Election Assistance Commission (EAC), a bipartisan advisory body, to assist in the administration of elections and opened up the possibility of authorizing federal funds to improve election administration and replace outdated voting systems at the state level. The Mission noted that HAVA's efforts have not yet resulted in the standardization of electoral administration rules at the national level.

The Mission also noted that while the body of laws cited above refers specifically to the administration of federal elections, in practice, states do not have separate election procedures for federal, state, and local offices.

### **3. Electoral Framework**

As indicated earlier, the United States is a federal republic, with elected officials at the federal (national), state and local levels. The President and Vice President are elected indirectly through an Electoral College, while the members of the federal legislature, the Congress (comprising the Senate and the House of Representatives), members of state legislatures, Governors and local officials are elected directly by the voters in each jurisdiction.

#### **a. Electoral System**

##### *The Electoral College*

The U.S. Constitution specifies that the President and Vice President of the United States are to be chosen every four years by a group of persons who are referred to individually as "presidential electors" and collectively as the "Electoral College". The Electoral College is a unique method for indirectly electing the President of the United States. It was established by Article II, Section 1, Clause 2 of the U.S. Constitution and modified by the 12<sup>th</sup> and 23<sup>rd</sup> Amendments.<sup>55</sup> The Constitution specifies that each state is entitled to one member of the Electoral College for each of its Senators and Representatives.

For the 2020 election there were 538 electoral votes in the Electoral College, corresponding to the 435 members of the House of Representatives from the 50 states, along with the 100 Senators from the 50 states and the three members of the Electoral College to which the District of Columbia became entitled under the 23<sup>rd</sup> Amendment. A majority of these 538 votes (270 votes) is required to elect the President and Vice President.

Every 10 years, the 435 U.S. Representatives are reapportioned among the states in accordance with the latest federal census, thereby automatically reapportioning the membership of the Electoral College among the states. Membership of the Electoral College for the 2020 elections, as shown in Table 1, was based on the 2010 US Census.

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<sup>55</sup> National Archives, "The Constitution: Amendments 11-27", [https://www.archives.gov/founding-docs/amendments-11-27?\\_ga=2.129930764.107809335.1614006866-630143065.1614006866](https://www.archives.gov/founding-docs/amendments-11-27?_ga=2.129930764.107809335.1614006866-630143065.1614006866).

**Table 1: 2020 Electoral College - List of States and Votes**

State	Votes	State	Votes	State	Votes
Alabama	9	Kentucky	8	North Dakota	3
Alaska	3	Louisiana	8	Ohio	18
Arizona	11	Maine	4	Oklahoma	7
Arkansas	6	Maryland	10	Oregon	7
California	55	Massachusetts	11	Pennsylvania	20
Colorado	9	Michigan	16	Rhode Island	4
Connecticut	7	Minnesota	10	South Carolina	9
Delaware	3	Mississippi	6	South Dakota	3
Dist. of Columbia	3	Missouri	10	Tennessee	11
Florida	29	Montana	3	Texas	38
Georgia	16	Nebraska	5	Utah	6
Hawaii	4	Nevada	6	Vermont	3
Idaho	4	New Hampshire	4	Virginia	13
Illinois	20	New Jersey	14	Washington	12
Indiana	11	New Mexico	5	West Virginia	5
Iowa	6	New York	29	Wisconsin	10
Kansas	6	North Carolina	15	Wyoming	3

Source: National Archives, Electoral College – Distribution of Electoral Votes (based on 2010 Census), <https://www.archives.gov/electoral-college/allocation>

The members of the Electoral College are typically nominated by each political party in the months prior to the elections. While their names are not included on the ballots, citizens voting for a presidential ticket in each state are in fact voting for the electors already selected by the party nominating that ticket.

In 48 states and the District of Columbia electoral votes are awarded under a “winner-take-all” system. Thus when a presidential ticket wins a state's popular vote, the slate of electors nominated by the respective party casts the vote for President and Vice President. Maine and Nebraska are the only exceptions. These two states use the “district” system, where one electoral vote is awarded to the presidential candidate who wins the popular vote in each congressional district, and the remaining two electoral votes are awarded to the candidates receiving the most votes statewide. Although there is no federal law requiring electors to vote in line with their nominating party, some states may replace or sanction a “faithless elector” – a member of the Electoral College who does not vote for his/her party’s nominee for President or Vice President. In 32 states and the District of Columbia, laws have been approved to either impose a fine on 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 that state laws punishing or replacing faithless electors were constitutional.<sup>56</sup>

<sup>56</sup> Chiafalo et Al. V. Washington, Certiorari to the Supreme Court of Washington No. 19–465. Argued May 13, 2020, decided July 6, 2020, [https://www.supremecourt.gov/opinions/19pdf/19-465\\_i425.pdf](https://www.supremecourt.gov/opinions/19pdf/19-465_i425.pdf).

If no presidential ticket wins 270 or more electoral votes, the 12<sup>th</sup> Amendment provides for the House of Representatives to decide the presidential election and for the Senate to elect the Vice President.

The Mission notes that while any formal change to the Electoral College would require a constitutional amendment, several states have passed the National Popular Vote (NPV) Act, whereby states undertake to award their electoral votes to the winner of the national popular vote. As of December 2020, the NPV Act had been enacted in 15 states and the District of Columbia, for a total of 196 electoral votes.<sup>57</sup>

b. Electoral Administration

*Electoral Authorities*

The electoral system in the United States is highly decentralized and differentiated. There is no federal institution that administers the entire electoral process. At the level of the states, responsibility for the conduct of elections, including the enforcement of qualifying rules, oversight of campaign finance regulations, 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.

While the Mission has no reason to doubt the integrity of any of the elected officials responsible for elections, there is a 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.

Delivery of the electoral process itself, even an election for federal office, is administered at the county or city level. According to the National Conference of States Legislatures, this means that there are more than 10,000 election administration jurisdictions in the United States.<sup>58</sup> Election administrators – typically county or city officials or clerks – are responsible for registering voters throughout the year and for determining who is eligible to vote in a particular election. As a result, thousands of administrators nationwide are responsible for organizing and conducting elections in the United States, including certifying the eligibility of candidates, registering eligible voters and preparing voter rolls, selecting voting equipment, designing ballots, organizing a large temporary work force to administer the voting on Election Day, tabulating the votes and certifying the results.<sup>59</sup>

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<sup>57</sup> National Popular Vote, “Status of National Popular Vote Bill in Each State”, February 2021, <https://www.nationalpopularvote.com/state-status>.

<sup>58</sup> The size of these jurisdictions varies dramatically, with the smallest towns having only a few hundred registered voters and the largest jurisdiction in the country, Los Angeles County, having more than 4.7 million. See at National Conference of State Legislators, “Election Administration at State and Local Levels”, February 2020, <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>.

<sup>59</sup> NCSL, “Election Administration at State and Local Levels”.

The Mission noted that, despite the high level of decentralization and the difficult circumstances posed by the COVID-19 pandemic, the organization of the elections took place in an efficient and professional manner prior to, during and after Election Day. However, as no state administers elections in the same way as another state, and as election processes may vary even within states, the experiences of voters may differ, depending on the State in which they are registered to vote.

### *Other Electoral Organs*

In the United States, two federal agencies are directly involved with the electoral process; the Federal Election Commission (FEC) and the Electoral Assistance Commission (EAC). The Federal Election Commission (FEC) is responsible for collecting and disclosing campaign finance information, enforcing the provisions of the law (such as limits and prohibitions on contributions), and overseeing the public funding of Presidential elections. It is comprised of six Commissioners, no more than three of whom may represent the same political party. They are appointed by the President of the United States and confirmed by the Senate. For the 2020 electoral process, there were three vacant seats on the FEC. Since at least four votes are required for any official action by the Commission, this meant that the FEC was without quorum during a pivotal presidential election period. Quorum was only restored in December 2020 when the Senate voted to confirm three new commissioners to the body.<sup>60</sup>

The Election Assistance Commission (EAC) is an independent agency of the U.S. government created by the Help America Vote Act of 2002 (HAVA). The Commission serves as a national clearinghouse and information resource on election administration. It is responsible for administering payments to states and developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, accrediting voting system test laboratories and certifying voting equipment. The EAC also performs a number of specific election-related duties, including the creation of a national program for the testing, certification, and decertification of voting systems, maintenance of the National Mail Voter Registration Form required by the National Voter Registration Act of 1993 (NVRA), administration of federal funds to States for HAVA requirements and reporting best practices in effective administration, among others.

### *Electoral Administration Funding*

The funding for electoral administration comes from different levels of government: federal, state, local, and smaller political subdivisions.<sup>61</sup> At the state level, in highly centralized states, the state department of elections is fully responsible for conducting elections and bears the full cost. In contrast, in other states, expenses are assumed by counties and partially reimbursed by states.<sup>62</sup> For the 2020 elections, the Election Assistance Commission (EAC) distributed US\$400 million in emergency funds, as a part of the Coronavirus Aid, Relief, and

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<sup>60</sup> “Federal campaign finance watchdog has full slate for first time in years”. December 9, 2020, Politico, <https://www.politico.com/news/2020/12/09/federal-elections-commission-quorum-443919>.

<sup>61</sup> NCSL, “Who pays and with which funds”, March 2018, <https://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx>.

<sup>62</sup> NCSL, “Who pays and with which funds”.

Economic Security Act (CARES Act), to assist states in preventing, preparing for, and responding to the coronavirus for the 2020 federal election cycle.<sup>63</sup>

In spite of having access to these funding sources, the Mission was informed that, mainly due to the early expenses related to acquisition of the personal protection equipment (PPE) for polling workers, staff, and others, the allocated funds proved to be insufficient. Some local election administrators were obliged to access private funding to cover the financial gap, including resources provided by Facebook totaling some US\$300 million which were distributed by two non-profit organizations – the Center for Election Innovation and Research and the Center for Tech and Civic Life.<sup>64</sup>

### c. Political Parties and Candidates

#### *Candidate Registration*

Candidacy requirements for elections in the United States are provided in the Constitution and state laws. Under the Constitution, presidential and vice presidential candidates must be natural-born U.S. citizens, at least 35 years old, and resident in the United States for at least 14 years.<sup>65</sup> In order to be included on the ballot for elections, a presidential candidate must meet a variety of state-specific filing requirements and deadlines.<sup>66</sup>

All states offer recognized political parties the opportunity to nominate candidates.<sup>67</sup> A number of states also provide an alternative mechanism for an organization to qualify in order to nominate candidates, for example by filing a petition or having a certain number of voters affiliated with the organization. All states have a procedure for independent candidates, and in some cases individual presidential candidates of a political organization, to obtain ballot access. Most states also permit a presidential candidate to be a write-in candidate, and many of these states require that the candidate file a notice prior to the election.<sup>68</sup>

According to the Federal Election Commission,<sup>69</sup> 1,213 candidates filed to run for president of the United States in 2020, but only four qualified to appear on the ballot in sufficient states to win a majority of votes in the Electoral College. The qualifying candidates were Donald

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<sup>63</sup> Election Assistance Commission, “EAC expediting distribution of \$400 million in CARES Act election funding for coronavirus response”, March 27, 2020. See at: <https://www.eac.gov/news/2020/04/03/eac-expediting-distribution-400-million-cares-act-election-funding-coronavirus>.

<sup>64</sup> “Zuckerberg, Chan pledge \$300 million to promote safe voting”. September 2, 2020, Philanthropy News Digest, <https://philanthropynewsdigest.org/news/zuckerberg-chan-pledge-300-million-to-promote-safe-voting>.

<sup>65</sup> US Constitution. Article II, Section 1, Clause 5.

<sup>66</sup> National Association of Secretaries of State, “State Laws regarding Presidential Ballot Access for the General Election”, January 2020, [https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20\\_0.pdf](https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20_0.pdf).

<sup>67</sup> The definition of a ‘recognized’ party can vary and depends on the number of registered voters declaring their association with the party or the number of votes received by the party in previous elections.

<sup>68</sup> NASS, “State Laws regarding Presidential Ballot Access for the General Election”.

<sup>69</sup> Federal Election Commission, “Candidates”, [https://www.fec.gov/data/candidates/?election\\_year=2020&office=P](https://www.fec.gov/data/candidates/?election_year=2020&office=P)

Trump (Republican Party), Joseph Biden (Democratic Party), Howie Hawkins (Green Party) and Jo Jorgensen (Libertarian Party).<sup>70</sup>

At the other levels of the elections, candidates to the Senate must be at least 30 years old and citizens for at least 9 years, while candidates for the House of Representatives must be at least 25 years old and citizens for at least 7 years. Both Senators and Representatives must be residents of the state in which they are elected. For this election, 556 candidates were registered for the 35 Senate seats and 3,392 candidates for the 435 House seats.<sup>71</sup>

#### **4. Voter Registration**

Article 1, Section 4 of the United States Constitution stipulates that each state must individually regulate electoral matters, including registration, the voting process, vote tabulation and certification and the making and publication of election returns. This leads to variations in procedures and deadlines among states.

##### **a. Voter Registration**

Voter registration in the United States is active – which means that citizens must take certain actions to be included on the voter registers – and for the most part it is conducted continuously. While some states close voter registration months before the election, it is becoming more common that registration is permitted up to and even on Election Day.

In many states, citizens registering to vote may declare an affiliation with a political party, though this is not required. In some states, only voters affiliated with a party may vote in that party's primary elections. Currently, all U.S. states except North Dakota<sup>72</sup> require that citizens must register at state offices to vote.<sup>73</sup> Registration methods offered by states include in-person registration at the local elections office, automatic voter registration through the department of motor vehicles, online registration, same-day registration and pre-registration.<sup>74</sup> For the 2020 election, 19 states and the District of Columbia utilized automatic voter registration through the department of motor vehicles.<sup>75</sup>

Online voter registration was implemented in 40 states for this election, compared with only 18 states in 2016. Some states implemented online voter registration systems that allowed voters to input their information entirely online, thus avoiding the need to physically visit registration offices. The Mission was informed that four states experienced website

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<sup>70</sup> Ballotpedia, “Presidential Candidates, 2020”, [https://ballotpedia.org/Presidential\\_candidates,\\_2020](https://ballotpedia.org/Presidential_candidates,_2020).

<sup>71</sup> Federal Election Commission, [https://www.fec.gov/data/candidates/?election\\_year=2020&office=P](https://www.fec.gov/data/candidates/?election_year=2020&office=P).

<sup>72</sup> North Dakota does not require voter registration ahead of an election—eligible citizens can simply appear at the polls with required identification and are permitted to vote.

<sup>73</sup> NCSL, “Voter Registration”, October 2020, <https://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx>.

<sup>74</sup> Some states allow teens to “pre-register” to vote, that is, 16- or 17-year olds can register to vote, and then will be automatically added to the voter rolls upon turning 18.

<sup>75</sup> NCSL, “Automatic Voter Registration”, February 2021, <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

inaccessibility during critical voter registration periods, but that these problems were appropriately addressed and their registration deadlines extended in response.<sup>76</sup>

Under the National Voter Registration Act of 1993, states must establish voter registration deadlines for federal elections no more than 30 days before an election.<sup>77</sup> Actual deadlines vary widely, from 30 days prior to the poll, up to Election Day itself. The Mission noted that the number of states implementing same-day registration on Election Day increased from 12 in 2016 to 20, including the District of Columbia,<sup>78</sup> for the 2020 polls.

The United States has the only electoral system in the Western Hemisphere that has neither a unified national electoral registry nor a unified electoral list. However data compiled by the U.S. Elections Project<sup>79</sup> found that 239,247,182 persons were eligible to vote in 2020.

As mandated by the federal Help America Vote Act (HAVA), all states have established statewide voter registration databases that are either maintained by the state with information supplied by counties or maintained by counties that provide them to the state at regular intervals. The “Electronic Registration Information Center (ERIC)” interstate database<sup>80</sup> also allows the 30 participating states and Washington DC to identify duplicate registrations within their borders, and cooperate with other states to identify potential duplicate records across state lines.

#### b. Voter Identification

The electoral system in the United States does not establish a single, free form of national identification that citizens must use for electoral purposes. For the 2020 elections, 36 states implemented laws which required voters to present some form of identification at the polls, while the remaining states used other methods to verify the identity of voters.<sup>81</sup> Forms of identification accepted across the states ranged from a photo ID, such as a driver’s license, while others accepted non-photo identification, such as a bank statement with the voter’s name and address.

Those states that did not require the presentation of documentation verified the voter’s identity in other ways, such as by signing an affidavit or poll book, or by providing personal information.<sup>82</sup> In these cases, election officials, poll watchers, and others voters were entitled to challenge a voter’s identity and/or their eligibility to vote.

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<sup>76</sup> The issues affected Louisiana, Florida, Virginia and Pennsylvania. Information provided by the National Association of Secretaries of State (NASS).

<sup>77</sup> NCSL, “Voter Registration Deadlines”, October 2020, <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>.

<sup>78</sup> California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, Utah, Vermont, Washington, Wisconsin, Wyoming.

<sup>79</sup> United States Elections Project, “2020 November General Election Turnout Rates”, December 2020, <http://www.electproject.org/2020g>.

<sup>80</sup> Electronic Registration Information Center (ERIC), <https://ericstates.org/>.

<sup>81</sup> NCSL, “Voter Identification Requirements: Voter ID Laws”, August 2020, <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>82</sup> NCSL, “Voter ID Requirements”.

The Mission noted that the implementation of a verification requirement for elections has continued to expand among U.S. states, from 29 in 2012, to 33 in 2016 and 36 in 2020. The number of states requesting a photo ID also increased from 4 in 2012 to 18 in 2020.<sup>83</sup> While proponents of stricter identification requirements see this as a way to prevent in-person voter impersonation and increase public confidence in the election process, opponents believe that identification requirements restrict the right to vote and impose unnecessary costs and administrative burdens on elections administrators. The Mission observed that ethnic and racial minority populations in the United States are considered to be among the most affected by the implementation of stricter identification requirements.<sup>84</sup>

### c. Voting Rights

Access to the vote is an important right for all persons. The Mission notes however that in many cases, voter disenfranchisement and voter suppression disproportionately affect racial minorities, the poor and both younger and older voters.

#### *Felon Voting Rights*

Felon voting rights in the United States is one area in which disenfranchisement tends to occur. Its application varies across the states - in some states felons never lose their voting rights, while in others, voting rights may be suspended temporarily or indefinitely. In general, however, states that suspend voting rights for felons tend to restore those rights at some point – either automatically upon their release, automatically after a period of parole and/or probation, or following a governor’s pardon or some additional action.<sup>85</sup> In the past 25 years, half of all states have changed their legislation to expand voting access to people with felony convictions.<sup>86</sup>

According to several reports, approximately 5.2 million Americans are currently ineligible to vote because of felony disenfranchisement<sup>87</sup> although at least 2.23 million people (43%) of that total have completed their sentences.<sup>88</sup> The Mission noted reports that felony disenfranchisement disproportionately affects African Americans – over 6.2 percent of the African American population is reported to be disenfranchised, compared with 1.7 percent

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<sup>83</sup> History of Voter ID. See at: <https://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

<sup>84</sup> American Bar Association, “Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions”, June 2020, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/).

<sup>85</sup> NCSL, “Felon Voting Rights”, April 2021, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

<sup>86</sup> The Sentencing Project, “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction”, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>

<sup>87</sup> The Sentencing Project, “Locked Out 2020”.

<sup>88</sup> The Sentencing Project notes that Florida leads the nation in absolute disenfranchisement numbers - over 1.1 million people are currently banned from voting, often because they cannot afford to pay court-ordered monetary sanctions or because the state is not obligated to tell them the amount of their sanction.

of the non-African American population. Approximately 1.2 million women are disenfranchised, comprising over one-fifth of the total disenfranchised population.<sup>89</sup>

### *Voting Rights for Persons with Disabilities*

Several federal laws, including the Americans with Disabilities Act,<sup>90</sup> the Help America Vote Act and the Voting Rights Act, protect the voting rights of persons with disabilities. However persons with disabilities may lose these rights if they are placed under guardianship. Currently, 39 states and the District of Columbia have legal provisions in which people with disabilities can lose their right to vote if it is determined that they are unfit to make certain decisions.<sup>91</sup>

Provisions to ensure access to the vote are also mandated at the federal level, and OAS observers noted efforts to facilitate and prioritize persons with disabilities during in-person voting. However, some stakeholders complained that accessibility remains a challenge at polling places and vote centers across the United States for voters with disabilities.<sup>92</sup> According to Time Magazine, more than 40 states do not have fully accessible absentee ballots for millions of visually impaired voters and those with other disabilities.<sup>93</sup>

### *Voting Rights for Native Americans*

The Mission also noted the continuing barriers faced by Native Americans seeking to exercise their franchise, including a lack of traditional mailing addresses, difficulties in meeting voter ID requirements, unequal access to online voter registration, unequal access to in-person voter registration and restrictions on access to voter registration forms, among others.<sup>94</sup>

## **5. Electoral Organization**

For the 2020 elections, as a result of the COVID-19 pandemic, multiple states modified their processes to provide greater access to alternative voting methods for voters, which ensured their safety while avoiding their concentration in physical places.

### **a. Voting Methods**

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<sup>89</sup> The Sentencing Project, “Locked Out 2020”.

<sup>90</sup> ADA.gov, “Americans With Disabilities Act of 1990, as amended with ADA Amendments Act Of 2008”, <https://www.ada.gov/pubs/adastatute08.htm>.

<sup>91</sup> Center for American Progress, “Why Voting Matters for the Disability Community”, October 2020, <https://www.americanprogress.org/issues/disability/news/2020/10/22/492066/voting-matters-disability-community/>.

<sup>92</sup> National Disability Rights Network, “Polling Places Remain Inaccessible to Voters with Disabilities, Here’s How to Fix Them”, August 2020, <https://www.ndrn.org/resource/polling-places-remain-inaccessible-to-voters-with-disabilities-heres-how-to-fix-them/>.

<sup>93</sup> Time, “Absentee Ballot Applications Are Not Accessible to Voters with Disabilities in 43 States”, September 2020, <https://time.com/5894405/election-2020-absentee-ballot-applications-disability-rights/>.

<sup>94</sup> Native American Rights Fund, “Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters”, June 2020, [https://www.narf.org/wordpress/wp-content/uploads/2020/05/NARF\\_2020FieldHearingReport\\_SummaryDocument.pdf](https://www.narf.org/wordpress/wp-content/uploads/2020/05/NARF_2020FieldHearingReport_SummaryDocument.pdf).

Voting modalities and deadlines vary significantly between states and counties. Voting methods can be categorized as early voting – in person or absentee – and Election Day voting. In-person early voting may be available from as early as 45 days before the election up to the Friday before the election. For the 2020 poll early voting was available in 43 states and in the District of Columbia.<sup>95</sup> OAS observers visited early voting sites in Georgia, Iowa, Maryland, Michigan and the District of Columbia, to observe the processes in those jurisdictions.

Voters who are unable or unwilling to visit polling stations on Election Day are also able to vote using absentee ballots, which most states stipulate must be sent and received through the United States Postal Service. Some states allow "no excuse absentee" voting, where no reason is required to request an absentee ballot. Others require a valid reason, such as infirmity or travel, before a voter can participate using an absentee ballot.

There was a significant increase in absentee and in-person early voting for the 2020 elections. By Election Day, November 3, electoral authorities had received over 65 million mail ballots, with over 27 million votes outstanding – figures that more than doubled the 33,378,450 postal votes received in the 2016 election. Approximately 36 million voters cast their ballots early in-person. Taken together, in-person and absentee voting accounted for over 100 million ballots cast prior to Election Day.<sup>96</sup>

With respect to the mailed ballots, deadlines for their return and treatment vary significantly under the legislation in the different states. For their return, deadlines range from the day before the election in Louisiana to up to 14 days past Election Day in Illinois and Utah. Eighteen states count mail ballots arriving after Election Day as long as they are postmarked on or before Election Day, while 27 states require mailed ballots to be returned before or up to Election Day. For the 2020 elections, there were 11 different deadlines governing the process for returning ballots, varying from November 2 up to November 23.<sup>97</sup> The Mission noted that deadlines set by the local legislatures and electoral bodies were challenged in state and federal jurisdictions, including up to the Supreme Court of Justice. In some cases, ballots arriving after November 3 were set aside to allow for a ruling on their validity.

In terms of processing the mailed ballots, the rules in the majority of states and the District of Columbia allow some form of processing to begin before Election Day. Several states begin the process on Election Day before polls close, and in one state – Maryland – processing may only begin after the polls close on Election Day.<sup>98</sup>

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<sup>95</sup> NCSL, "State Laws Governing Early Voting", October 2020, <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

<sup>96</sup> United States Elections Project, "2020 General Election Early Vote Statistics", November 23, 2020, <https://electproject.github.io/Early-Vote-2020G/index.html>.

<sup>97</sup> NCSL, "Six Policy Decision Points on Absentee/Mail Voting", October 2020, <https://www.ncsl.org/research/elections-and-campaigns/six-policy-decision-points-on-absentee-mail-voting.aspx>

<sup>98</sup> NCSL, "VOPP Table 16: When Absentee/Mail Ballot Processing and Counting Can Begin", October 2020, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>.

The Mission also noted other early voting alternatives implemented during this electoral process. Multiple states provided members of the armed services and their families, as well as citizens who reside overseas, with greater access to absentee or mail ballots, as normally provided for by the 1986 Uniformed and Overseas Citizens Absentee Voting Act. Under UOCAVA provisions, Internet voting was utilized in 31 states and the District of Columbia,<sup>99</sup> allowing citizens overseas to transmit their votes via email, fax, or the Internet.

A detailed analysis of absentee voting by mail is available in the “Postal Voting” Annex to this report.

#### b. Polling Places

In the U.S. system, state laws typically determine where polling places can be located. Public buildings are generally the preferred locations, and their use is specifically mandated by 34 states. Some states impose restrictions on the location of polling stations (e.g. Delaware does not allow polling stations in private residences), while thirteen states do not specify polling place locations at all.<sup>100</sup>

For the 2020 elections, as a result of the COVID-19 pandemic, and as more voters chose to use alternative voting methods, some states moved to consolidate their traditional polling places into vote centers, which serve more than one precinct at a single location. According to the National Conference of States Legislators, 17 states allowed jurisdictions to use vote centers on Election Day.<sup>101</sup> The Election Assistance Commission also issued guidelines that could be used by states and local jurisdictions in identifying locations that could serve as vote sites during the COVID-19 pandemic. The guidelines included the exclusive use of the spaces, separate entrances and exits, and the avoidance of places with populations at particular risk for COVID-19, among others.<sup>102</sup>

Official data suggest that the 2020 elections saw a significant reduction in Election Day polling places, when compared to 2016 – in part due to the use of vote centers. In Maryland, for example, reports from the State Board of Elections indicate there were 1,604 polling places for the 2016 General Elections,<sup>103</sup> compared with 321 vote centers in 2020.<sup>104</sup> In the District of Columbia, the number of polling places was reduced from 140 in 2016<sup>105</sup> to 95

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<sup>99</sup> NCSL, “VOPP Table 16”.

<sup>100</sup> NCSL, “Polling Places”, October 2020, <https://www.ncsl.org/research/elections-and-campaigns/polling-places.aspx>.

<sup>101</sup> NCSL, “Polling Places”.

<sup>102</sup> U.S. Election Assistance Commission (EAC), “Finding Voting Locations and Poll Workers”, May 28, 2020, [https://www.eac.gov/sites/default/files/electionofficials/inpersonvoting/Finding\\_Polling\\_Locations\\_Poll\\_Workers\\_052820.pdf](https://www.eac.gov/sites/default/files/electionofficials/inpersonvoting/Finding_Polling_Locations_Poll_Workers_052820.pdf).

<sup>103</sup> Maryland State Board of Elections, “Number of Precincts and Polling Places By County”, September 22, 2016, [https://elections.maryland.gov/elections/2016/2016\\_general\\_precinct\\_counts.pdf](https://elections.maryland.gov/elections/2016/2016_general_precinct_counts.pdf).

<sup>104</sup> Maryland State Board of Elections, “Report on November 3, 2020 Election”, January 28, 2021, [https://elections.maryland.gov/press\\_room/2020\\_stats/Nov%203%20Election%20Report\\_Final.pdf](https://elections.maryland.gov/press_room/2020_stats/Nov%203%20Election%20Report_Final.pdf).

<sup>105</sup> DC Board of Elections, “November 8, 2016 General Election After-Action Report”, <https://dcboe.org/getattachment/About-Us/About-Us/FOIA-Info/2016GeneralElectioAfterActionReport.pdf.aspx?lang=en-US>.

vote centers in 2020.<sup>106</sup> Official data from the EAC’s Election Administration and Voting Survey (EAVS) reports indicate that Election Day polling places nationwide declined from approximately 116,990 in 2016, to 107,457 in 2020 – a reduction of 9,553 polling places.<sup>107</sup>

### c. Poll Workers

The majority of poll workers for elections in the United States have traditionally been older than 61 years.<sup>108</sup> Given the health risks associated with the COVID-19 pandemic – particularly for vulnerable groups, including persons with pre-existing conditions and/or those older than 65 years – states and local jurisdictions experienced particular challenges in recruiting sufficient workers for the 2020 elections.

To help address a critical shortage in poll workers, the Electoral Assistance Commission organized a “National Poll Workers Recruitment Day” to encourage more people to sign up to staff polling locations on Election Day. Similar initiatives were also launched by civil society, including “Power the Polls” and the “Poll Heroes Project.” In a report on the impact of COVID-19 on the 2020 Primaries, the Electoral Assistance Commission<sup>109</sup> noted that “the loss of experienced poll workers [could] have a ripple effect through the electoral process” and that “poll worker training [would] take on an elevated importance in 2020 due to the recruitment of inexperienced poll workers”.

#### *Poll Workers’ Training*

Training programs for poll workers in the United States are developed and implemented by local jurisdictions. In 44 states the laws explicitly require some or all poll workers to be trained before serving at a polling station.<sup>110</sup> In the remaining six states, three (Maine, New Hampshire, Texas) note that training is not required, but may be offered, while the other three states (Massachusetts, Oregon, Utah) do not address the issue at all. In these final three states local jurisdictions may provide training.<sup>111</sup> Training materials utilized by the states, including their design and content, 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.

### d. Electoral Materials

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<sup>106</sup> DC Board of Elections, “November 3, 2020 General Election After-Action Report - Board Overview”, <https://dcboe.org/dcboe/media/PDFFiles/After-Action-Report-Board-Overview-03112021.pdf>.

<sup>107</sup> U.S. EAC, “Studies and Reports”, <https://www.eac.gov/research-and-data/studies-and-reports>.

<sup>108</sup> Pew Research Center, “Majority of U.S. poll workers are over 60”, April 6, 2020, [https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/ft\\_2020-04-06\\_pollworkers\\_01/](https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/ft_2020-04-06_pollworkers_01/).

<sup>109</sup> US Election Assistance Commission, “Lessons Learned from the 2020 Primary during COVID-19”, 2020, [https://www.eac.gov/sites/default/files/electionofficials/workinggroup/Lessons\\_Learned\\_From\\_the\\_2020\\_Primary.pdf](https://www.eac.gov/sites/default/files/electionofficials/workinggroup/Lessons_Learned_From_the_2020_Primary.pdf).

<sup>110</sup> NCSL, “Election Poll Workers: What are State Poll Worker Training Requirements”, June 2020, <https://www.ncsl.org/research/elections-and-campaigns/election-poll-workers637018267.aspx>

<sup>111</sup> NCSL, “Election Poll Workers”.

In the United States, election administrators – typically county or city officials or clerks – are responsible for designing the materials used in the electoral process, including the ballots for each level of the election. The Mission noted that the Election Assistance Commission provided guidelines and best practices for the design of ballots and polling place materials, including samples for the design of ballots and polling place voter information materials, as well as considerations for touch screen, optical scan and audio ballots. Among the recommendations was a suggestion that jurisdictions create an election database containing the precincts, districts, and races participating in the election, ensure a verifiable chain of custody for ballots, and use recommended fonts when printing ballots.<sup>112</sup> The Mission noted that jurisdictions were advised to follow their state laws at all times, if differences arose between the EAC’s recommendations and local election laws or regulations.<sup>113</sup>

## **6. 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 tabulation centers to observe the tallying of results.

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

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<sup>112</sup> US Election Assistance Commission, “Ballot Building”, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Chapter\\_5\\_Ballot\\_Building.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Chapter_5_Ballot_Building.pdf).

<sup>113</sup> US EAC, “Ballot Building”.

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 commended 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.

## **7. Post-Electoral Phase**

While official election results have never been certified and available in the United States 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 statistical analysis, ongoing vote counts, surveys, exit polls and trends in the allocation of Electoral College votes. With varying rules and processes for how states conduct elections and a significant number of ballots cast prior to Election Day, major news networks like ABC, CBS, CNN, Fox News, NBC and the Associated Press advised their audiences not to expect conclusive results on election night as the projection of results would continue for several days. On Saturday, November 7, four days after the Election Day, the aforementioned news networks projected candidate Joseph R. Biden would be the new President of the United States.

The Mission continued to engage with and monitor the electoral process and the progress of the count in the days after the elections. 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.

In general, the Mission observed a significant disparity across states in their tabulation and reporting of results. 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.

In light of speculation and concerns about the tabulation processes, shared by some candidates and voters following the election, the Mission welcomed the efforts by electoral authorities 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.

### **a. Recount Processes**

The rules governing recounts vary across the states. A recount is automatically triggered in some states if the results fall within a specified margin. In 41 states and the District of Columbia, a recount can be requested or petitioned by a losing candidate, a voter, a group of voters or other concerned parties.<sup>114</sup> Recounts may also be conducted by order of the courts.

In Georgia, the Secretary of State announced a risk-limiting hand-count audit, after the margin of votes between the top two presidential tickets was deemed too narrow at 0.3%. The audit, which was completed on November 19, prior to the state’s certification deadline, confirmed that the Democratic ticket had won the state’s presidential election. A recount was subsequently requested by the Republican ticket on November 21. The results of that recount, which was completed on December 4, confirmed the results of the hand-count audit.<sup>115</sup>

The Mission also noted that a partial recount was requested by the Republican ticket in Wisconsin, where the difference between the two top tickets for federal office was approximately 20,000 votes. The recount, which took place in Milwaukee and Dane Counties, resulted in a net gain of 87 votes for the Democratic ticket.<sup>116</sup>

#### b. Certification Process

Once the votes cast in an election have been counted, election officials must proceed to the “canvass” – a process of accounting for every ballot cast, ensuring that every valid vote is included in the vote totals, and preparing official results and reports for the state. Rules for the canvass vary from state to state, and at times, within states. The results of the canvass are presented to the state’s Canvass Board, which certifies the election.

Deadlines for the certification of results at the state level vary from state to state. Most states provide a specific date or time-frame for the certification of results, while a few states are either vague on the deadline or do not specify a deadline at all. Following the certification of results, each state governor is required by U.S. law to prepare a “Certificate of Ascertainment” of the vote, which includes the names of the electors who have been selected by voters, and the number of votes cast for the candidates. One copy of the Certificate of Ascertainment of each state is sent to the Archivist of the United States, and another six copies submitted to the electors.<sup>117</sup>

The Mission noted that all 50 states certified their results within their respective timelines. In Georgia, which undertook a second recount after the state’s November 20 certification

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<sup>114</sup> NCSL, “Election Recounts”, October 2020, <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx>.

<sup>115</sup> Ballotpedia, “Noteworthy recounts in the United States”, [https://ballotpedia.org/Noteworthy\\_recounts\\_in\\_the\\_United\\_States#2020](https://ballotpedia.org/Noteworthy_recounts_in_the_United_States#2020).

<sup>116</sup> Ballotpedia, “Noteworthy recounts in the United States”.

<sup>117</sup> Congressional Research Service, “The Electoral College: A 2020 Presidential Election Timeline”, October 22, 2020, <https://crsreports.congress.gov/product/pdf/IF/IF11641>

deadline, the results were subsequently recertified. In Wayne County, Michigan, an initial refusal by the two Republican canvassers to certify the vote, was subsequently withdrawn.<sup>118</sup>

On December 14, 2020, the 538 members of the Electoral College cast their votes for President and Vice President of the United States in meetings held in the 50 state capitals and the District of Columbia and on January 6, in a joint meeting of the Congress, the results were counted and certified.

In this regard the Mission followed with alarm, the events of January 6, both within and around the Capitol building (the seat of the Congress) which interrupted the certification of the vote and generated grave concern for the safety of the lawmakers responsible for this process. As OAS missions have stated in other jurisdictions, violence has no place in an electoral process. As the events unfolded the OAS General Secretariat issued a statement repudiating the attack against institutions and urging a return to rationality and the constitutionally mandated process.<sup>119</sup> The Mission was happy to observe that lawmakers were not deterred by the occurrences of the day, and returned to their task late on January 6, finally completing the tally and certification of the electoral results early on the morning of January 7.

These results awarded 306 votes in the Electoral College to Joseph R. Biden and Kamala Harris of the Democratic Party, with 232 votes awarded to Donald J. Trump and Michael Pence of the Republican Party, as shown in Table 2.<sup>120</sup>

**Table 2: Votes Cast in the Electoral College by State and by Candidate**

State	Votes	Winning Candidates	State	Votes	Winning Candidates
Alabama	9	Trump/Pence	Montana	3	Trump/Pence
Alaska	3	Trump/Pence	Nebraska	5	B/H: 1 T/P: 4
Arizona	11	Biden/Harris	Nevada	6	Biden/Harris
Arkansas	6	Trump/Pence	New Hampshire	4	Biden/Harris
California	55	Biden/Harris	New Jersey	14	Biden/Harris
Colorado	9	Biden/Harris	New Mexico	5	Biden/Harris
Connecticut	7	Biden/Harris	New York	29	Biden/Harris
Delaware	3	Biden/Harris	North Carolina	15	Trump/Pence
Dist. of Colombia	3	Biden/Harris	North Dakota	3	Trump/Pence
Florida	29	Trump/Pence	Ohio	18	Trump/Pence
Georgia	16	Biden/Harris	Oklahoma	7	Trump/Pence
Hawaii	4	Biden/Harris	Oregon	7	Biden/Harris
Idaho	4	Trump/Pence	Pennsylvania	20	Biden/Harris

<sup>118</sup> Both canvassers subsequently signed affidavits attesting that they wished to rescind their votes to certify the county's election results, but this was not facilitated.

<sup>119</sup> OAS Press Release E-001/21, "Statement from the OAS General Secretariat on Incidents in Washington, D.C.," January 6, 2021, [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-001/21](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-001/21).

<sup>120</sup> National Archives, "2020 Electoral College Results", <https://www.archives.gov/electoral-college/2020>.

State	Votes	Winning Candidates	State	Votes	Winning Candidates
Illinois	20	Biden/Harris	Rhode Island	4	Biden/Harris
Indiana	11	Trump/Pence	South Carolina	9	Trump/Pence
Iowa	6	Trump/Pence	South Dakota	3	Trump/Pence
Kansas	6	Trump/Pence	Tennessee	11	Trump/Pence
Kentucky	8	Trump/Pence	Texas	38	Trump/Pence
Louisiana	8	Trump/Pence	Utah	6	Trump/Pence
Maine	4	B/H: 3 T/P: 1	Vermont	3	Biden/Harris
Maryland	10	Biden/Harris	Virginia	13	Biden/Harris
Massachusetts	11	Biden/Harris	Washington	12	Biden/Harris
Michigan	16	Biden/Harris	West Virginia	5	Trump/Pence
Minnesota	10	Biden/Harris	Wisconsin	10	Biden/Harris
Mississippi	6	Trump/Pence	Wyoming	3	Trump/Pence
Missouri	10	Trump/Pence			

Source: National Archives, “2020 Electoral College Results”, <https://www.archives.gov/electoral-college/2020>

Of the 158,383,403 votes cast, 81,268,924 votes (51.31%) were cast for the Biden/Harris ticket, and 74,216,154 votes (46.86%) were cast for the Trump/Pence ticket.<sup>121</sup> Those results, as well as the results for the candidates of the Green and Libertarian parties, the other top two tickets, are shown in Table 3.

**Table 3: Votes Cast for Presidential/Vice Presidential Candidates (Top 4 Tickets)**

Candidates for President & Vice President	Votes Cast	% of Votes Cast
Joseph R. Biden / Kamala D. Harris Democratic Party	81,268,924	51.31%
Donald J. Trump / Michael R. Pence Republican Party	74,216,154	46.86%
Jo Jorgensen / Jeremy “Spike” Cohen Libertarian Party	1,865,724	1.18%
Howie Hawkins / Angela Nicole Walker Green Party	405,035	0.26%

Source: Federal Election Commission, “Official 2020 Presidential General Election Results”, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>

Joseph R. Biden was sworn in as President of the United States on January 20, 2021.

<sup>121</sup> Federal Election Commission, “Official 2020 Presidential General Election Results”, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

The final results for the elections for the United States Senate gave 20 of the 35 seats up for election to candidates of the Republican Party, while candidates of the Democratic Party won 15 seats.

The final results for the United States House of Representative elections gave 222 of the 435 seats to candidates of the Democratic Party, while 213 seats were won by candidates of the Republican Party.

## **8. Recommendations**

Despite the high level of decentralization and differentiation in the electoral process, and the difficult circumstances posed by the COVID-19 pandemic, the Mission found that the 2020 elections were generally well organized and were conducted in an efficient and professional manner. The Mission however noted several areas in which the electoral processes across the states could be enhanced, in order to ensure uniformity of standards and access for all voters, and recommends:

### Legal Framework

- Federal and bipartisan efforts to promote the establishment of minimum, uniform election administration standards throughout the states.

### Electoral Bodies

- Promoting the establishment of independent electoral bodies across all states, that are responsible for the organization of electoral processes and the certification of results, in order to preserve the non-partisan delivery of the electoral process.

### Electoral Administration and Organization

- Engaging efforts well in advance of future elections to ensure that the Election Assistance Commission and other federal agencies have the resources they need to assist the states, including local and smaller jurisdictions, in covering potential gaps in their electoral administration budgets.
- 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 poll worker training programs across the states to ensure a quality electoral product throughout the country.
- Establishing mandatory minimum, uniform standards for the design of ballots and other polling place materials to support the quality of the voter experience and the overall electoral process.

- Promoting access to in-person Early Voting in those states that do not currently offer this facility, to ensure equal access for all voters in the United States.
- Initiating the processing and tabulation of early and mail-in ballots prior to Election Day, in those states where it does not currently occur, to ensure that results are available in a shorter timeframe.

#### Voter Registration and Access

- Promoting bipartisan efforts to encourage greater uniformity in voter registration procedures and deadlines across the states.
- Promoting measures to ensure equal access and respect for the voting rights of all citizens, in particular racial minorities, people with disabilities, the poor and both younger and older voters, who have tended to be disproportionately affected by voter disenfranchisement and voter suppression.

## **ii. ELECTORAL TECHNOLOGY**

### **1. Introduction**

The use of voting technology in the conduct of elections in the United States has developed in parallel with technological advances through history. The automation of voting processes began at the end of the 19<sup>th</sup> century and was applied in counting paper ballots along with the use of mechanical lever machines to cast votes. Punch card systems, where voters punch holes in cards using a supplied punch device to indicate the chosen candidate, were also used in many states from 1964 up to the 2000 presidential elections.

Technology is currently widely employed at different stages of the electoral process in the United States, from the registration of voters to the casting and tabulation of ballots. Given the highly decentralized nature of the U.S. electoral system, different types of technology and infrastructure are found across the different states, with varying rules and parameters governing their use.

In tandem with the increased use of technology there has been an increased risk of cyberattacks against U.S. election infrastructure at the state and local level. In January 2017, the U.S. Department of Homeland Security (DHS) designated the infrastructure used to administer the Nation's elections as critical infrastructure, following extensive activity by foreign actors to influence the 2016 U.S. presidential elections.

General Elections were held in the United States on November 3, 2020, for the offices of President and Vice President, 35 of the 100 seats in the Senate, all 435 seats in the House of Representatives and 13 state and territory governors. Regularly scheduled elections were held in 86 of the 99 state legislative chambers, along with contests for other state, local, district and judicial offices, and a variety of referenda. An estimated 239,247,182 persons were eligible to vote<sup>122</sup> and, according to the Federal Election Commission, 158,383,403 votes were cast.<sup>123</sup>

This report analyses the technology implemented in support of the 2020 elections and offers recommendations on how the use of this technological infrastructure might be enhanced.

### **2. Legal Framework**

Article 1, Section 4 of the United States Constitution<sup>124</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections. As a result, the legal framework for elections in the United States is highly decentralized and varies between and within states,

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<sup>122</sup> McDonald, Michael P, "2020 November General Election Turnout Rates", December 7, 2020, Accessed February 11, 2020, <http://www.electproject.org/2020g>.

<sup>123</sup> Federal Election Commission, "Official 2020 Presidential General Election Results", <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

<sup>124</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

with each state individually regulating how it manages the different aspects of its electoral system.

There are, however, laws that apply at the national level. They include four amendments to the United States Constitution<sup>125</sup> which stipulate that voting rights cannot be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964). Several federal laws have also been enacted over the years to help protect the rights of American voters, including the Civil Rights Act of 1870,<sup>126</sup> the Voting Rights Act of 1965,<sup>127</sup> the National Voter Registration Act of 1993,<sup>128</sup> and the Help America Vote Act (HAVA) of 2002.<sup>129</sup>

The Help America Vote Act in particular sought to establish minimum election administration standards for states and units of local government with responsibility for the administration of federal elections, while facilitating improvements to voting systems and voter access that were identified following the 2000 presidential election tabulation crisis in Florida. Some key reforms implemented by HAVA include:

- Authorization of federal funding for states to improve their administration of elections and upgrade voting machines. States that accepted funding had to replace punch card and lever voting systems which did not allow voters to change or correct any errors before their ballot was cast and counted. New voting machines would notify the voter if he/she was incorrectly voting for more than the maximum number of selections allowed in the contest.
- Establishment of an independent bipartisan body, the Electoral Assistance Commission (EAC),<sup>130</sup> to assist states in complying with HAVA and to distribute the aforementioned financial resources. The EAC was also charged with creating voting system guidelines and a voting system certification program and maintaining the National Voter Registration form.

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<sup>125</sup> National Archives, "The Constitution: Amendments 11-27", <https://www.archives.gov/founding-docs/amendments-11-27? ga=2.129930764.107809335.1614006866-630143065.1614006866>.

<sup>126</sup> Yale Law School, "The Avalon Project: Civil Rights Act; July 2, 1964", [https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp). The Act was amended in 1957, 1960 and 1964.

<sup>127</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965", [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>128</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 205 - National Voter Registration", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>129</sup> U.S. Election Assistance Commission, "Help America Vote Act", [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

<sup>130</sup> Electoral Assistance Commission, <https://www.eac.gov/>.

#### d. Voluntary Voting System Guidelines

In accordance with the HAVA mandate that the EAC should create voting system guidelines, the EAC developed a set of specifications and requirements against which voting systems can be tested to determine if they meet required standards.<sup>131</sup> The Voluntary Voting System Guidelines 1.0 (VVSG), which were adopted on December 13, 2005, increased security requirements for voting systems and facilitated improved access to voting, including the opportunity for persons with disabilities to vote privately and independently. A new version of the Guidelines, VVSG 1.1, was rolled out in March 2015, providing greater clarity on the Guidelines and enabling the National Institute of Standards and Technology (NIST) to create test suites for proposed revisions.<sup>132</sup>

Currently all voting machines used in elections in the United States have been EAC-certified to VVSG 1.0 voting standards.

### 3. **Electoral Technology**

Based on EAC certification states designate manufacturers and vendors of election technology that can be used by local jurisdictions. These jurisdictions are also in charge of the inventory, securing, and training of staff on the chosen voting election technology. According to the handbook for Elections and Infrastructure Security published by the Center for Internet Security CIS “depending on the size and resources of the jurisdiction, the number and technical skills of the staff can vary greatly, ranging from an elections team with its own dedicated IT and security personnel to a single person with little to no IT background. Many elections offices rely on IT resources shared with other administrative functions (e.g., other county agencies) or rely exclusively on technology providers (e.g., elections and IT systems vendors) for implementing and securing their election infrastructure.”<sup>133</sup>

#### a. **Types of Systems used in U.S. Elections**

##### *Voter Registration*

Voter registration systems provide voters with the opportunity to establish their eligibility and right to vote, and for states and local jurisdictions to maintain each voter’s record, including assigning voters to the correct polling location.

Voter registration generally occurs in one of two ways, each of which is recorded in a statewide registration system.

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<sup>131</sup> EAC, “Voluntary Voting System Guidelines,” <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>.

<sup>132</sup> EAC, “Voluntary Voting System Guidelines,” <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>

<sup>133</sup> Center for Internet Security, “A Handbook for Elections Infrastructure Security”, February 2018, <https://www.cisecurity.org/wp-content/uploads/2018/02/CIS-Elections-eBook-15-Feb.pdf>.

- Online registration: a website or other web application allows prospective voters to register electronically and have election officials review their registration for validity, which, if valid, is entered into the voter registration database.
- Paper-based registration: prospective voters submit a paper voter registration form that is reviewed by election officials and, if valid, entered into the voter registration database.

In many states, the most common way for voters to apply for or update their registration is through the respective state’s Department of Motor Vehicles (DMV). Many states allow voters to register to vote or change their voter registration when they renew or apply for a Driver’s license. Voters may also register directly through a state or county registration web portal. In the jurisdictions in which the OAS Mission observed the 2020 elections – Georgia, Iowa, Maryland, Michigan and the District of Columbia – individuals may complete their voter registration online.

### *Voter Verification*

When elections are held, the voter registration information of eligible voters is compiled into poll books used by election workers at each polling location. These are important tools in the voter verification process, verifying both that an individual is eligible to vote and that they have not already cast a ballot during in-person early voting or with a mailed ballot. Historically, pollbooks were paper binders that contained essential voter information. While the paper-based system continues to be used today, many poll books utilized in the voter check-in and verification process are now electronic.

The Election Assistance Commission has found that the use of electronic poll books has increased steadily in recent elections, from 1,146 jurisdictions in the 2016 elections (17.7%), to 1,684 (26.1%) in 2018 and 1,991 (30.8%) in 2020.<sup>134</sup> Available information indicates that for the 2020 elections, at least 26 different makes and 28 different models of electronic poll books were used in the different states and counties.

Table 1 shows the make of the electronic poll books utilized by the different jurisdictions in 2020.

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<sup>134</sup> Election Assistance Commission, “Election Administration and Voting Survey 2020 Comprehensive Report,” [https://www.eac.gov/sites/default/files/document\\_library/files/2020\\_EAVS\\_Report\\_Final\\_508c.pdf](https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf)

**Table 1: Make of Electronic Poll Books used in the 2020 Elections**

<b>Make</b>	<b>Number of Jurisdictions</b>	<b>Percentage</b>
KNOWiNK	851	36.51%
Election Systems & Software	312	13.39%
Tenex	217	9.31%
Votec	125	5.36%
VR Systems	95	4.08%
DemTech	91	3.90%
State of Michigan	83	3.56%
IPAC	80	3.43%
North Carolina SBoE	79	3.39%
State of Wisconsin	75	3.22%
State of Colorado	64	2.75%
Data Unavailable	63	2.70%
Robis	44	1.89%
WA Secretary of State	39	1.67%
OR Secretary of State	36	1.54%
DFM	22	0.94%
Platinum Technology Resource	20	0.89%
BPro	12	0.51%
Iowa Secretary of State	11	0.47%
Runbeck	4	0.17%
State of Hawaii	2	0.08%
American Election Systems	1	0.04%
Content Active	1	0.04%
Montgomery County (Texas)	1	0.04%
Orange County (Florida)	1	0.04%
Rutherford County (Tennessee)	1	0.04%
Wilson County (Tennessee)	1	0.04%
	2,331	100%

**Source: Verified Voting,**

<https://verifiedvoting.org/verifier/#mode/search/year/2020/equipment/Electronic%20Poll%20Book>

### *Voting and Tabulation Equipment*

Eligible U.S. voters are able to cast their ballots in various ways prior to and on Election Day (see Electoral Organization Annex), with two principal types of devices used to capture and/or tabulate votes: Optical/Digital Scan Devices and Direct Recording Electronic systems.

Optical/Digital Scan Devices: Optical and Digital Scan devices scan, and tabulate ballots marked by hand or marked by ballot marking devices. Voters indicate their selection by filling in an oval or a box on a paper ballot. These ballots are then scanned into hand-fed optical scan tabulators at the polling place or collected in ballot boxes and scanned at a central location. High capacity batch-fed scanners are used to handle a large volume of ballots such as mail and provisional ballots. Older optical scan systems use infrared (IR) scanning technology and ballots with timing marks on the edges in order to accurately scan a paper ballot, while newer systems may use “digital scan” technology, which takes a digital image of each ballot during the scanning process.<sup>135</sup>

Direct-Recording Electronic (DRE) Voting Machines: DRE voting machines allow the voter to vote directly using different user interfaces to record their selections, such as a touch-screen, push-button, or dial. The voter’s selection is stored into the computer’s memory or on a smart card, instead of a paper ballot. Some DREs are equipped with a Voter-Verified Paper Audit Trail (VVPAT) - a permanent paper record showing all votes cast by the voter. DRE voting machines with paper trails allow the voter to verify their vote before it is cast.<sup>136</sup>

Ballot Marking Devices (BMDs): BMDs are devices with an electronic interface that allow voters to indicate their choice on a paper ballot. They were developed in response to federal requirements that all polling places must allow voters with disabilities to vote privately and independently. Most BMD machines provide a touchscreen interface that allows the voter to select their choices and then prints a paper ballot with the selections. The resulting printed paper ballot is then either hand counted or counted using an optical scan machine. Some systems produce print-outs with bar codes or QR codes instead of a traditional paper ballot.

Hybrid Voting Systems: Some jurisdictions also use hybrid systems, which combine different elements of Optical/Digital Scanners, DREs and Ballot Marking Devices. These systems can have a user interface and a printer that prints the ballot. Some of these hybrid voting systems also include a scanner that tabulates votes.

Finally, some jurisdictions continue to hand-count some or all of their paper ballots, without the use of any technology.

Table 2 shows the different types of vote capture devices used in the 2020 U.S. elections.

**Table 2: Vote Capture Devices used in the 2020 Elections**

<b>Equipment Type</b>	<b>Number</b>	<b>Percentage</b>
Hand-Fed Optical Scanner	4018	54.1%
Hand Counted Paper Ballots	1274	17.2%
DRE-Touchscreen	1143	15.4%
Hybrid Optical Scan/BMD	452	6.1%
DRE-Push Button	178	2.4%

<sup>135</sup> National Conference of State Legislatures, “Voting Equipment,” July 9, 2021, <https://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx>.

<sup>136</sup> NCSL, “Voting Equipment.”

DRE-Dial	165	2.2%
Optical Scan	89	1.2%
Hybrid Optical Scan/DRE	78	1.1%
Hybrid BMD/Optical Scan	26	0.4%
Internet Voting System	3	0.0%

Source: Verified Voting, <https://verifiedvoting.org/verifier/#mode/search/year/2020>

In the jurisdictions in which the OAS Mission observed the 2020 elections (Georgia, Iowa, Maryland, Michigan and the District of Columbia, the voting systems used produced a voter-verifiable paper record (paper trail) of each voter’s selections. The OAS Mission however identified some 18 states<sup>137</sup> that continue to use outdated Direct Recording Electronic DRE machines. Different studies by academics and independent security researchers indicate that these machines (which do not have a paper trail) are susceptible to potential vulnerabilities, including an inability to detect errors or deliberate alterations in the system or to independently verify vote totals.<sup>138</sup>

With respect to the tabulation of ballots, the jurisdictions observed by the OAS Mission used several different types of devices at the polling stations and to tabulate mail in and provisional ballots. With respect to the transmission of results, in Maryland and Georgia, information is stored locally on each scanner in a USB drive and taken to a central location to be tabulated using dedicated software. In the District of Columbia and Michigan, tabulators are connected at the end of the day and the information is sent via cellular network (modem) to the election management system (EMS). In Michigan and Iowa a number of jurisdictions use USB pen drives and others use cellular networks with a modem to transmit unofficial results to the EMS.

As noted earlier, voting machines and election management systems used by most states are certified by the Election Assistance Commission (EAC) using the Voluntary Voting System Guidelines 1.0 adopted in 2005. The OAS Mission notes that these voluntary guidelines are significantly outdated and do not include a penetration testing process,<sup>139</sup> which checks a computer system for exploitable security vulnerabilities. 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

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<sup>137</sup> States using DRE Machines in some counties include: Wisconsin, Louisiana, Texas, Kentucky, Indiana, Mississippi, Tennessee, Illinois, West Virginia, New Jersey, Nevada, Ohio, Kansas, Hawaii, Idaho, Missouri, Utah and Washington.

<sup>138</sup> Indiana University Public Policy Institute, “Indiana’s Voting Machines Vulnerable to Security Issues”, <https://policyinstitute.iu.edu/doc/indiana-voting-security-brief.pdf>; Harvard Kennedy School, “The State and Local Election Cybersecurity Playbook”, <https://www.belfercenter.org/sites/default/files/files/publication/StateLocalPlaybook%201.1.pdf>; Pennsylvania State University, “EVEREST: Evaluation and Validation of Election-Related Equipment, Standards and Testing,” December 7, 2007, <https://nordicinnovationlabs.com/wp-content/uploads/2018/07/everest.pdf>.

<sup>139</sup> Penetration testing is the process of exploiting weaknesses and vulnerabilities in networks, web applications, or people. This is different than just performing a vulnerability scan against your network. A penetration test takes the perspective of an outside intruder or an internal individual with malicious intent.

example, Maryland and the District of Columbia currently use voting systems that run partly 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.

#### **4. Cybersecurity in the Electoral Process**

The possibility of foreign interference in U.S. elections has been an area of considerable concern. Since the last presidential elections in 2016, foreign actors have directed extensive activity towards influencing the electoral process in the United States, launching cyber-attacks against U.S. election infrastructure at the state and local level. The conclusion of U.S. Intelligence Agencies that an elevated risk of cyber-attacks on election infrastructure was present, led 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 U.S. state websites, including election websites.<sup>140</sup> CISA and the FBI also determined that the foreign state actor was responsible for the mass mailing of voter intimidation emails to U.S. 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.

In a joint report prepared in February 2021, the Department of Justice (including the FBI) and the Department of Homeland Security (including CISA), confirmed there was no evidence that any foreign government or other actor was able to affect any technical aspect of the electoral process or election infrastructure, or otherwise compromise the results or integrity of the 2020 elections.<sup>141</sup>

The OAS Mission also notes that the federal government and states have made significant efforts to improve their cyber security posture. The level of awareness and recognition of 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.

For the 2020 presidential election in particular, steps were taken 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. The Department of Homeland Security also prioritized increasing the efficiency of sharing classified information by providing more briefings and facilitating the security clearance process for state and local officials, who often need access to classified information regarding

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<sup>140</sup> Cybersecurity & Infrastructure Security Agency, Alert (AA20-304A), <https://us-cert.cisa.gov/ncas/alerts/aa20-304a>.

<sup>141</sup> U.S. Department of Justice, “Key Findings and Recommendations from the Joint Report of the Department of Justice and the Department of Homeland Security on Foreign Interference Targeting Election Infrastructure or Political Organization, Campaign, or Candidate Infrastructure Related to the 2020 US Federal Elections”, March 2021, <https://www.justice.gov/opa/press-release/file/1376761/download>.

election threats. CISA played a significant role in helping state and local officials analyze cyber risk physical risks and threats by providing assistance in developing Cyber Resilience Reviews (CRR), analyzing risk scenarios and taking mitigating measures based on the likelihood of identified situations. Working in coordination with the nonprofit Center for Internet Security, CISA also helped states deploy endpoint detection and response software, which is designed to identify and block malware and anomalous activity and also provides to states the possibility to exchange threat information through the Elections Infrastructure Information Sharing and Analysis Center (EI-ISAC).

On Election Day, DHS's Cybersecurity and Infrastructure Security Agency launched a 24/7 virtual war room, to which election officials across the nation could dial in at any time to share notes about suspicious activity and to develop coordinated responses.

## **5. Observations on Election Day**

On Election Day the OAS Mission noted several technology-related issues in the jurisdictions where it observed the poll, including equipment freezes and software issues. The Mission notes that these issues were resolved as they occurred and did not impact either the voting process or the results of the elections.

## **6. Recommendations**

- 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.
- That all states and counties analyze the possibility of replacing outdated DRE machines with voting systems that produce a voter-verifiable paper record, thus creating a “paper trail” of each voter’s selections.

### iii. POSTAL VOTING

#### 1. Introduction

Political participation through mail-in/absentee voting was first recorded in the United States during the Civil War and began to gain traction in the 1970s. Oregon was the first state to approve a universal mail voting system<sup>142</sup> in 1998 and in 2000, was the first state to hold a presidential election entirely by mail-in vote.

This history of postal voting was fundamental to the successful expansion of absentee voting for the 2020 general elections in the United States, which saw wide-ranging modifications of existing electoral rules and processes, in light of the circumstances created by the COVID-19 pandemic. By Election Day, November 3, electoral authorities had received over 65 million mail ballots, with over 27 million votes outstanding – figures that more than doubled the 33,378,450 postal votes received in the 2016 election.<sup>143</sup>

When coupled with a significant increase in in-person Early Voting across the country, postal and early voting together accounted for over 100 million ballots cast prior to Election Day.<sup>144</sup>

#### 2. Legal Framework

Article 1, Section 4 of the United States Constitution<sup>145</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections. As a result, the legal framework for elections in the United States is highly decentralized and varies between and within states, with each state individually regulating how it manages the different aspects of its electoral system.

There are, however, laws that apply at the national level. They include four amendments to the United States Constitution,<sup>146</sup> which stipulate that voting rights cannot be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964). Several federal laws have also been enacted over the years to help protect the rights of American voters, including the Civil Rights Act of 1870,<sup>147</sup> the Voting Rights Act of 1965,<sup>148</sup> the Voting Accessibility for the Elderly and Handicapped Act

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<sup>142</sup> Ballot Measure 60, which established vote-by-mail as the standard mechanism for voting in Oregon, was e passed on November 3, 1998.

<sup>143</sup> United States Elections Project, “2020 General Election Early Vote Statistics”, November 23, 2020, <https://electproject.github.io/Early-Vote-2020G/index.html>.

<sup>144</sup> United States Elections Project, “2020 General Election Early Vote Statistics”.

<sup>145</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>146</sup> National Archives, “The Constitution: Amendments 11-27”, <https://www.archives.gov/founding-docs/amendments-11-27? ga=2.129930764.107809335.1614006866-630143065.1614006866>.

<sup>147</sup> Yale Law School, “The Avalon Project: Civil Rights Act; July 2, 1964”, [https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp). The Act was amended in 1957, 1960 and 1964.

<sup>148</sup> Yale Law School, “The Avalon Project: Voting Rights Act of 1965; August 6, 1965”, [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

(VAEHA) of 1984,<sup>149</sup> the National Voter Registration Act of 1993,<sup>150</sup> and the Help America Vote Act of 2002.<sup>151</sup>

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986,<sup>152</sup> allowed members of the U.S. armed forces and overseas U.S. voters to register and vote by mail,<sup>153</sup> and established new ways to register to vote.

### 3. Modifications to the Postal Voting Framework

For the 2020 elections, as a result of the COVID-19 pandemic, multiple states modified their processes to expand voting options, which ensured the safety of voters, 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, pro-actively mailed applications for absentee and/or mail ballots to voters or mailed ballots to all eligible voters with no request needed.<sup>154</sup> 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.

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 doubled the 33,378,450 postal votes received in the 2016 election.<sup>155</sup> 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.<sup>156</sup>

Regulations in most states require that the United States Postal Service (USPS) deliver mailed ballots to electoral bodies. For the 2020 elections the role and capacity of the United States Postal Service was therefore discussed at length in both the political and legal arenas. Some stakeholders were of the view 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

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<sup>149</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 201 - Voting Accessibility for the Elderly and Handicapped", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-201>.

<sup>150</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 205 - National Voter Registration", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>151</sup> US Election Assistance Commission, "Help America Vote Act", [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

<sup>152</sup> Federal Voting Assistance Program, "The Uniformed and Overseas Citizens Absentee Voting Act Overview", <https://www.fvap.gov/info/laws/uocava>.

<sup>153</sup> In 2009, a subtitle of the National Defense Authorization Act for Fiscal Year 2010, titled the Military and Overseas Voter Empowerment Act ("MOVE Act"), amended UOCAVA to establish new voter registration and absentee ballot procedures which states must follow in all federal elections.

<sup>154</sup> Ballotpedia, "Changes to absentee/mail-in voting procedures in response to the coronavirus (COVID-19) pandemic, 2020", [https://ballotpedia.org/Changes\\_to\\_absentee/mail-in\\_voting\\_procedures\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_2020#Debate](https://ballotpedia.org/Changes_to_absentee/mail-in_voting_procedures_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020#Debate).

<sup>155</sup> United States Elections Project, "2020 General Election Early Vote Statistics", November 23, 2020, <https://electproject.github.io/Early-Vote-2020G/index.html>.

<sup>156</sup> United States Elections Project, "2020 General Election Early Vote Statistics".

tampering and other forms of voter fraud. The Republican campaign in particular, severely questioned the security and legitimacy of voting by mail.

The OAS Mission noted that the non-partisan 2005 Commission on Federal Electoral Reform (Carter-Baker Commission) determined that once the necessary safeguards for ballot integrity are in place, voting by mail can be secure and meet democratic standards.<sup>157</sup> The OAS Mission also notes that the ability of the U.S. Postal Service to deliver over 400 million pieces of mail per day<sup>158</sup> suggests that its role in the expanded availability of postal voting would not compromise its effectiveness.<sup>159</sup> Close deadlines for registration and the mailing of ballots can, however, create challenges in the closing days of an electoral process.

a. Types of Postal Voting

Several types of voting in the 2020 election, required the use of postal services. They included:

*Absentee Voting*

- i. Universal postal voting: Ballots are automatically mailed to all voters. In 2020 nine states, the District of Columbia and most of Montana, allowed ballots to be sent to all voters.<sup>160</sup>
- ii. Application mailing: Eleven states mailed an application form to all registered voters to facilitate postal voting, while in New Mexico, counties were authorized to mail applications.<sup>161</sup>
- iii. Possibility of postal voting: Twelve states allowed voters to apply for postal voting without giving a specific excuse for utilizing this method. In some case the electoral authority did not mail application forms but provided for them to be downloaded from a website. In some states, partial measures to facilitate voting by mail were approved.<sup>162</sup>

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<sup>157</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>158</sup> US Postal Service, “Postal Facts”, <https://facts.usps.com/one-day/>.

<sup>159</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>160</sup> California, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, Oregon, Utah, Vermont, Washington, in National Conference of State Legislators, “Absentee and Mail Voting Policies in Effect for the 2020 Election”, November 2020, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx>.

<sup>161</sup> Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Ohio, Rhode Island, Wisconsin, in National Conference of State Legislators, “Absentee and Mail Voting Policies in Effect for the 2020 Election”.

<sup>162</sup> Alabama, Arkansas, Connecticut, Delaware, Kentucky, Massachusetts, Mississippi, Missouri, New Hampshire, New York, South Carolina, West Virginia, in National Conference of State Legislators, “Absentee and Mail Voting Policies in Effect for the 2020 Election”.

- iv. Qualified absentee voting: This model required a valid excuse (other than the pandemic) to vote by mail. In five states the rules were amended in order to allow for postal voting with a valid excuse, including age, physical disability, medical condition, quarantine or travel.<sup>163</sup>

### *Overseas Voting*

As noted earlier, members of the armed forces and their families, as well as citizens residing overseas, are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act.<sup>164</sup> Although the states retain the right to determine eligibility and procedures, there are certain federal provisions that ensure the right to participate. In most states, regulations require the United States Postal Service to deliver ballots from voters to the respective electoral authorities. The Mission notes that the 2020 elections saw new challenges regarding postal voting from overseas, mainly due to the impact of the COVID-19 pandemic on foreign postal services.<sup>165</sup>

For the 2020 elections, the majority of states modified existing norms regarding absentee ballots to facilitate voting via mail. There were early concerns regarding the broadening of postal voting, including the following:

- i. Voter identification and verification, which included challenges regarding ensuring uniform standards of verification, notice to voters prior to discarding votes due to the verification of signatures, electoral officials right to verify signatures (Pennsylvania), or time allowed to cure errors.
- ii. Universal postal voting, which assumed a high level of trust in the electoral authorities amid the rapid changes in voting methods.
- iii. Deadlines for registration, which compounded the challenges experienced by the electoral authorities and the postal service as they sought to adapt to late adjustments in their responsibilities, including the transmission of ballots to voters.
- iv. USPS increased role in the electoral process derived from the expansion of mail-in related services.
- v. Varying ballot receipt deadlines, which pre-supposed fluid communication between the electoral authorities and their respective county/state voters in order to provide accurate information on deadlines, thus avoiding/reducing late ballot returns.

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<sup>163</sup> Indiana, Louisiana, Mississippi, Tennessee, Texas, in FiveThirtyEight, “What Absentee Voting Looked Like in all 50 States”, <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/>.

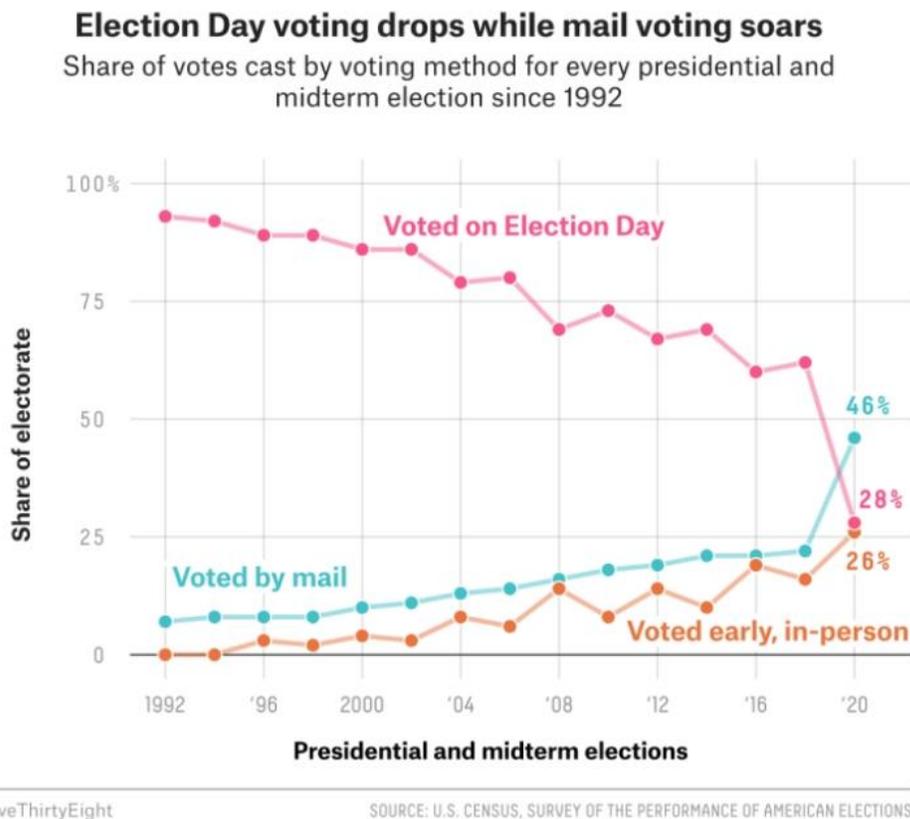
<sup>164</sup> UOCAVA, <https://www.fvap.gov/info/laws/uocava>.

<sup>165</sup> Information provided by Scott Wiedmann, Deputy Director, Federal Voting Assistance Program (FVAP).

#### 4. Use of Postal Voting and its Influence on Voter Turnout

The Mission noted that the expansion of opportunities for postal voting resulted in a greater share of voters casting mail ballots than in any other recent national election in the United States. Conversely, the share of voters who reported going to a polling place on Election Day dropped to its lowest point in at least 30 years.<sup>166</sup> FiveThirtyEight, a political and opinion poll analysis company, in compiling data of voting methods used by voters since 1992, found a sharp increase in mail voting from 21% in 2016 to 46% in 2020 nationally.

**Figure 1: Trends in Election Day Voting**



Source: FiveThirtyEight, “What Absentee Voting Looked Like in all 50 States”, <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/>

FiveThirtyEight’s data shows that almost half of the electorate voted by mail in the 2020 elections. There was also a significant increase in postal voting in 47 states and the District of Columbia. The only three states with no significant increase in mail voting were Colorado, Oregon, and Washington, which have held predominantly mail-in elections for years, with ballots mailed automatically to all voters.<sup>167</sup>

<sup>166</sup> FiveThirtyEight, “What Absentee Voting Looked Like in all 50 States”.

<sup>167</sup> FiveThirtyEight, “What Absentee Voting Looked Like in all 50 States”.

Data compiled by the United States Election Assistance Commission<sup>168</sup> on national Vote by Mail trends, 2008-2018, indicates that the total number of votes cast by mail has grown as a proportion of total voter turnout. While each election fluctuates depending on whether there is a presidential or a mid-term election, the overall rate of mail-in voting has increased in the last decade. In 2008, 23.1 million ballots were cast by mail out of a turnout of 132.8 million, representing 17.4% of total voter participation.<sup>169</sup> In 2018, states reported a total of 30.4 million (25.3%) votes cast by mail out of 120.3 million total votes cast.<sup>170</sup> This shows a gradual rise in the share of voters who cast their ballots by mail.

EAC data shows that the number of mail-in ballots sent to voters nationally also increased from 28.5 million in 2008 to 42.4 million in 2018.

Empirical data suggests that voter turnout has tended to diminish in countries that held elections during the COVID-19 pandemic. However, in the case of the United States there is evidence to suggest that the ability to vote from home contributed to the highest turnout rate in recent elections. The 66 percent turnout in 2020 compares favorably to voter turnout in the last five presidential elections: of 60.1% in 2016, 58.6% in 2012, 61.6% in 2008, 60.1% in 2004 and 54.2% in 2000.<sup>171</sup>

#### a. Deadlines

The Mission noted that the deadlines for submitting applications for postal voting, the return of mailed ballots and the treatment of these ballots, can vary significantly under the legislation in the different states.

Among the 35 states and Washington DC which do not have a permanent vote-by-mail system for all voters, the majority allow voters to submit an application to vote by mail up to seven days or less before the election. Several states accept applications up to the day before the election<sup>172</sup> and two states (Mississippi and North Dakota) do not set any deadlines. The Mission notes that while later deadlines enhance the rights of electors, they also place a heavy burden on electoral authorities and the postal service which must facilitate the delivery and return/receipt of mailed ballots within very tight timeframes.

With respect to the deadlines for the return of mailed ballots, these vary significantly under the legislation in the different states. Deadlines range from the day before the election in Louisiana to up to 14 days past Election Day in Illinois and Utah. Eighteen states count mail ballots arriving after Election Day as long as they are postmarked on or before Election Day, while 27 states require mailed ballots to be returned before or up to Election Day. For the

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<sup>168</sup> US Election Assistance Commission, “Vote by Mail Trends and Turnout in Six Election Cycles: 2008 – 2018”, <https://www.eac.gov/vote-mail-trends-and-turnout-six-election-cycles-2008-2018>.

<sup>169</sup> US EAC, “Vote by Mail Trends and Turnout in Six Election Cycles: 2008 – 2018”.

<sup>170</sup> US EAC, “Vote by Mail Trends and Turnout in Six Election Cycles: 2008 – 2018”.

<sup>171</sup> United States Election Project, “National General Election VEP Turnout Rates, 1789-Present”, <http://www.electproject.org/national-1789-present>.

<sup>172</sup> NCSL, “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options”, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#deadlines>.

2020 elections, there were 11 different deadlines governing the process for returning ballots, varying from November 2 up to November 23.<sup>173</sup> The Mission noted that deadlines set by the local legislatures and electoral bodies were challenged in state and federal jurisdictions, including up to the Supreme Court of Justice. In some cases, ballots arriving after November 3 were set aside to allow for a ruling on their validity.

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>174</sup> with the potential for confusion among the electorate on the rules that apply.

In terms of processing the mailed ballots, the rules in the majority of states and the District of Columbia allow some form of processing to begin before Election Day. Several states begin the process on Election Day before polls close, and in one state – Maryland – processing may only begin after the polls close on Election Day.<sup>175</sup>

## 5. Efficiency of Postal Voting

There are two main elements to consider when evaluating mail-in voting. The first is the return rate of ballots sent to citizens and returned for counting. The second comprises the percentage of valid votes that this method yields. In order to compare the 2020 elections, it is useful to study data from past election cycles.

The “Election Administration and Voting Survey (EAVS)” compiled by the U.S. Election Assistance Commission<sup>176</sup> for the 2016 presidential election, found that mail-in voting comprised 23.7% of all votes cast in that process. Approximately 80.1% of absentee ballots transmitted to voters in 2016 were returned and processed and 99% of absentee ballots categorized as “returned and submitted for counting” were ultimately counted in the election.

As shown in Table 1, the 2016 EAVS identified the most common reasons for the rejection of mailed ballots in those elections as non-matching signatures (27.5%), meaning the signature on the ballot did not match the signature on the state’s records; missed deadlines (23.1%); and missing voter signatures (20.0%). Other reasons given for the rejection of mail-in ballots comprised a range of issues. For example, the reason “problem with return materials”

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<sup>173</sup> NCSL, “Six Policy Decision Points on Absentee/Mail Voting”, October 2020,

<https://www.ncsl.org/research/elections-and-campaigns/six-policy-decision-points-on-absentee-mail-voting.aspx>

<sup>174</sup> *Republican Party of Pennsylvania v. Boockvar*, Nos. 20A53, 20A54, 20-542 (S. Ct.); *Timothy K. Moore, et al. v. Damon Circosta, Chair, State Board of Elections, et al.*, Nos. 20A72, 20-2107 20-2104; *Democratic National Committee, et al. v. Wisconsin State Legislature, et al.*, No. 20A66.

<sup>175</sup> NCSL, “VOPP Table 16: When Absentee/Mail Ballot Processing and Counting Can Begin”, October 2020,

<https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>.

<sup>176</sup> US Election Assistance Commission, “Election Administration and Voting Survey: 2016 Comprehensive Report”, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf).

included issues such as the envelope was returned without the ballot or multiple ballots were returned in a single envelope. “Other reason given” encompassed issues such as the ballot was not properly notarized, the voter had already cast an absentee ballot, or incomplete information was provided on the ballot envelope.

**Table 1: Top Reasons for Rejecting Absentee Ballots - 2016**

	Percentage of Ballots Returned and Submitted for Counting
Rejected (total)	1.0%
Non-matching signature	27.5%
Ballot not received on time / missed deadline	23.1%
No voter signature	20.0%
“Other” reason given	14.8%
Uncategorized	5.7%
No witness signature	3.0%
Problem with return materials (e.g., ballot missing from envelope)	1.9%
Voter deceased	1.5%
Voter voted in person	1.3%
First time voter without proper identification	1.1%

Source: US EAC, “Election Administration and Voting Survey: 2016 Comprehensive Report”, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2016\\_EAVS\\_Comprehensive\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf)

The 2018 EAVS<sup>177</sup> found that of the 30.4 million returned ballots in 2018 (71.6% of all ballots transmitted), 91.8% were counted and 1.4% were rejected (6.8% were reported by States as neither counted nor rejected). Table 2 shows that the most common reason cited for the rejection of mail-in ballots was “Other reason given” (34.9%). This category includes issues such as the voter was not registered or eligible; the ballot was missing an important document (such as an affidavit or certification) or included an incomplete document; or the voter had already voted with a different by-mail ballot or otherwise surrendered his/her by-mail ballot.

<sup>177</sup> US Election Assistance Commission, “Election Administration and Voting Survey: 2018 Comprehensive Report”, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf).

Other common reasons for the rejection of mail-in ballots in 2018 included missed deadlines (26.9%); non-matching signatures (15.8%); lack of the voter’s signature (13.0%); lack of a witness signature (2.5%), and because the voter had already voted in person (1.4%).<sup>178</sup>

**Table 2: Top Reasons for Rejecting Absentee Ballots - 2018**

	Percentage of Rejected Ballots
“Other” reason given	34.9%
Ballot not received on time / missed deadline	26.9%
Non-matching signature	15.8%
No voter signature	13.0%
No witness signature	2.5%
All additional reasons	2.2%
Voter already voted in person	1.4%

**Source:** US EAC, “Election Administration and Voting Survey: 2018 Comprehensive Report”, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf)

The 2020 figures follow this upward trend in mail-in voting, although with a sharp increase due to the pandemic. The United States Elections Project at the University of Florida reports that 92.2 million ballots were requested and 65.6 million returned in 2020.<sup>179</sup> This indicates that returned ballots more than doubled from 2016 to 2020, maintaining the ratio of 71% of returns of 2018.

Data from 27 states and the District of Columbia compiled by FiveThirtyEight<sup>180</sup> indicates that 297,347 out of 47,999,299 (0.6%) absentee ballots cast in 2020 were rejected. An improvement over 2018. One of the main factors outlined for the reduced rejection rate was that voters submitted their absentee ballots early, thus avoiding their rejection due to missed deadlines. Several states reported steep declines in the number of mailed ballots received late, including Delaware (from 1.3 percent in 2016 to 0.2 percent in 2020), Maryland (1.3 percent to 0.1 percent) and Massachusetts (1.7 percent to 0.04 percent). These three states, along with Minnesota, Oklahoma, South Carolina and Vermont, reported that the decline in late ballots accounted in large part for their overall reduction in rejected ballots.<sup>181</sup>

<sup>178</sup> US Election Assistance Commission, “Election Administration and Voting Survey: 2018 Comprehensive Report”.

<sup>179</sup> United States Elections Project, “2020 General Election Early Vote Statistics”.

<sup>180</sup> FiveThirtyEight, “Why so Few Absentee Ballots were Rejected in 2020”, <https://fivethirtyeight.com/features/why-so-few-absentee-ballots-were-rejected-in-2020/>.

<sup>181</sup> FiveThirtyEight, “Why so Few Absentee Ballots were Rejected in 2020”.

FiveThirtyEight suggests that the improved on-time receipt of ballots was due in part to voters' positive reaction to calls by election officials to return their mail in ballots as early as possible, and that other factors in this regard likely included constant reminders in the media and widespread coverage of ongoing challenges at the U.S. Postal Service. Actions by states to proactively change their election policies to prevent ballots from being annulled due to tardiness, and the extension of ballot receipt deadlines in several states, were also considered likely contributing factors.<sup>182</sup>

Some states also actively sought to address common voter errors, such as a missing or invalid signature on the ballot envelope. Fifteen states and the District of Columbia offered voters the option to "cure" or fix mistakes on their absentee ballots which, according to state data, prevented thousands of ballots from being rejected.<sup>183</sup> In Florida, mail-in ballot envelopes included a space where voters could provide their email address or phone number, allowing election officials to contact them more quickly regarding mistakes, so they could be fixed on time.

## **6. Litigation regarding Postal Voting**

The widespread adjustment of electoral norms in order to facilitate mail-in voting naturally led to an increase of litigation. The main aspects of legal challenges filed in 2020 included the following.

### **a. Regarding eligibility and application processes for mail-in/absentee voting**

Whilst most states allow eligible voters to vote by mail, some states have specific requirements for eligibility, such as a minimum age, a disability, or any valid excuse outlined in local state law. Only five states (Colorado, Hawaii, Oregon, Utah, Washington), send ballots automatically to all voters. As a result of the pandemic, four other states (California, Nevada, New Jersey, Vermont) and the District of Columbia, along with most of Montana, followed suit during this election cycle.

COVID-19-related fears, however, prompted legal suits at the local and federal level seeking to expand eligibility for mail-in/absentee voting and/or exempt voters from providing an excuse to do so. One of the landmark cases in this election cycle regarding the expansion of eligibility for mail-in/absentee voting arose in Texas, where local election laws state that, in order to vote absentee, voters must have an excuse, such as being age 65 or older, being out of town on Election Day, or having a disability, defined as "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health". Citing a lack of immunity against COVID-19 as a disability, complaints were filed seeking to expand eligibility to vote by mail to anyone lacking immunity ahead of the Primary Election runoffs

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<sup>182</sup> FiveThirtyEight, "Why so Few Absentee Ballots were Rejected in 2020".

<sup>183</sup> FiveThirtyEight, "Why so Few Absentee Ballots were Rejected in 2020".

and the General Election. Also, challenges were presented on the limits to mail-in/absentee voting on the basis of age.<sup>184</sup>

Tennessee law also states that mail-in voting is only available to those physically unable to attend the polls and their caregivers. In that regard, challengers sought relief from the prohibition to vote by mail, arguing compromised immune systems and/or the risk of transmitting COVID-19 to an immunocompromised person.<sup>185</sup> In Indiana, challenges to eligibility in 13 statutory categories were presented;<sup>186</sup> whilst election authorities in Missouri<sup>187</sup> and Connecticut<sup>188</sup> were also sued seeking an exemption of a valid excuse to exercise the right to vote absentee or by mail.

Other challenges were presented against particular aspects of the application process for mail-in/absentee voting. In Iowa for instance, while the law does not require citizens to present an excuse to vote by mail, they must request an absentee ballot in a process requiring specific information and an affidavit. Traditionally, local election officials were permitted to fill out missing or imprecise information on application forms using available voter databases. After local legislation was passed prohibiting election officials from doing so, challengers argued the new regulations curtailed the right to vote by mail at a time when COVID-19-related concerns would motivate more voters to do so.<sup>189</sup>

#### b. Regarding mail-in ballot receipt deadlines

The unprecedented number of requests received by election authorities to vote by mail due to the COVID-19 pandemic, as well as internal logistical changes within the national postal service posed challenges for both election authorities and for voters. Most litigation surrounding mail-in/absentee voting was related to the validity of ballots, dependent on the date they were received by election officials, the date they were postmarked, and/or the date they were dropped off at designated sites for them to be processed and counted. While all states have particular rules in this regard, many of them were modified to accommodate COVID-19-related concerns.

Pennsylvania saw a high number of lawsuits related to mail-in/absentee voting, particularly with cases regarding ballot receipt deadlines. Following a series of new measures approved by the local legislature in March 2020, the state Supreme Court determined that it was not necessary for election authorities to receive mail-in ballots within the established deadline. It also determined that ballots received up to three days after the November 3 poll would be considered valid, as long as they were postmarked by Election Day. The court also ruled that ballots without or with an illegible postmark should be considered valid if they were

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<sup>184</sup> *Texas Democratic Party v. Abbott*, No. 5:20-cv-00438 (W.D. Tex.), 2020 WL 2541971.

<sup>185</sup> *Fisher v. Hargett*, No. 20-0435-III (Tenn. Chancery Ct., Davidson Cnty.).

<sup>186</sup> *Tully v. Okeson*, No. 20-2605.

<sup>187</sup> *Missouri NAACP v. Missouri*, No. 20AC-CC00169 (Mo. Cir. Ct., Cole Cnty.).

<sup>188</sup> *Fay v. Merrill*, No. SC20477 (Conn. S. Ct.).

<sup>189</sup> *League of United Latin American Citizens of Iowa v. Pate*, No. 06521-CVCV081901 (Iowa Dist. Ct., Johnson Cnty.).

received within the newly approved deadline.<sup>190</sup> The case was heard by the Supreme Court of the United States (SCOTUS) under the argument that the state court's decision violated the Elections Clause of the Constitution.<sup>191</sup> SCOTUS rejected the appeal on the grounds that there was insufficient time to settle the case before Election Day.

In a related case, local electoral authorities were sued alleging violations of the Elections Clause and Presidential Electors Clause, and the Equal Protection Clause for admitting ballots received after Election Day, but postmarked by Election Day, in accordance with the Pennsylvania Supreme Court decision stated above. Challengers sought to prevent ballots received after the original Election Day receipt deadline from being counted and a declaration that the Pennsylvania Supreme Court's decision was contrary to the United States Constitution.<sup>192</sup> Further, in the state of Minnesota, a federal district court denied a request to invalidate a decree issued by local electoral authorities which rejected the state's absentee ballot receipt deadline of 8:00 p.m. on Election Day, establishing that ballots postmarked prior to November 3 and received within one week of Election Day were to be considered valid.<sup>193</sup>

c. Regarding the verification of mail-in/absentee ballots

Every state determines the method by which a voter's identity is verified in order for a mail-in/absentee ballot to be considered valid. To be considered valid, the submitted ballot must match with the registered voter who requested the ballot. In some cases, states simply require a signature; while others might require poll workers to verify that the signature on the ballot matches that of the ballot request. In some cases, absentee ballots must be notarized or signed by a third-party witness.

In a case dismissed by a federal district court, one of the campaigns sued Pennsylvania electoral authorities, arguing a lack of uniform standards to verify signature matching requirements or proof of identification on absentee and main-in ballots, therefore violating state election law and the United States Constitution.<sup>194</sup> Another case involved a request by one of the campaigns to halt ballot processing and counting in one county in Nevada, arguing a lack of signature verification processes for mail-in ballots, and requesting the judge allow observation of the verification of mail-in ballots, including access to verify data and being able to see individual voters' signatures.<sup>195</sup>

d. Post-Election Day litigation

Litigation regarding electoral results included several cases involving mail-in voting. They included:

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<sup>190</sup> *Pennsylvania Democratic Party v. Boockvar*, No. 407-MD-2020 (Penn. Commonw. Ct.).

<sup>191</sup> *Republican Party of Pennsylvania v. Boockvar*, No 20-542 (U.S.).

<sup>192</sup> *Bognet v. Boockvar*, No. 20-3214 (3rd Cir.).

<sup>193</sup> *Carson v. Simon*, No. 20-cv-2030 (D.Minn.).

<sup>194</sup> *Donald J. Trump for President Inc. v. Boockvar*, No.602MD2020.

<sup>195</sup> *Kraus v. Cegavske*, No. 82018 (Nev.).

- Pennsylvania.
  - Extension of mail-in ballot receipt violates the Elections Clause of the Constitution.<sup>196</sup>
  - Extension of receipt deadline and establishing a presumption of timeliness for un-postmarked ballots.<sup>197</sup>
  - Extension of period for absentee and mail-in voters to provide proof of identification.<sup>198</sup>
- Minnesota
  - Extension of deadline to receive absentee ballots.<sup>199</sup>
- Nevada
  - Halting mail-in ballot counting to permit poll watchers to observe.<sup>200</sup>

## 7. Recommendations

- Retaining the expanded mail-in voting modality, beyond the end of the COVID-19 pandemic, given the efficiency with which it was deployed in 2020 and the enhanced voter turnout that resulted.
- Establishing deadlines for registration to vote via mail, which allow ample time for EMBs to send ballots, and for citizens to cast their votes and either send or deliver them. Uniformity 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.

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<sup>196</sup> *Republican Party of Pennsylvania v. Boockvar*, No 20-542 (U.S).

<sup>197</sup> *Bognet v. Boockvar*, No. 20-3214 (3rd Cir.).

<sup>198</sup> *Donald J. Trump for President Inc. v. Boockvar*, No.602MD2020.

<sup>199</sup> *Carson v. Simon*, No. 20-cv-2030 (D.Minn.).

<sup>200</sup> *Kraus v. Cegavske*, No. 82018 (Nev).

## iv. ELECTORAL JUSTICE

### 1. Introduction

The November 2020 elections in the United States saw approximately 160 million voters cast ballots for President and Vice President, the 435 members of the House of Representatives, 35 members of the Senate, and various state and local-level representatives. Beyond the electoral administration complexities involved in such an undertaking, electoral justice is critical for ensuring every step of the election process is in line with the law and protects fundamental electoral rights. As the Organization of American States (OAS) notes in its Manual on Observing Electoral Justice Systems, “electoral justice has taken on a key role as a guarantor of the transparency and legality of elections.”<sup>201</sup>

Election dispute resolution (EDR) is the system and mechanisms through which electoral justice is protected, and encompasses a wide range of complaints, disputes, violations and offences that can occur throughout an electoral cycle. The OAS has identified both *organic* and *procedural* guarantees applicable to electoral justice. Organic guarantees include the independence of the electoral dispute resolution body, the independence and impartiality of adjudicators, and a system of accountability within the EDR system. Procedural guarantees include transparency, clarity, and simplicity; access to full and effective justice; justice rendered free-of-charge, or at least, at a reasonable cost; timeliness; due process and the right to a defense or to be heard; and certainty and legal security. These standards help inform an analysis of the EDR system in the 2020 U.S. elections.<sup>202</sup>

This report analyzes the system for election dispute resolution in the United States within the aforementioned parameters and presents recommendations that can help to enhance them.

### 2. Legal Framework for Election Dispute Resolution in the United States

The legal framework governing elections and election dispute resolution in the United States includes international commitments, the United States Constitution, federal laws, and state and local legislation and regulations.

In terms of international commitments regarding political and electoral rights, the United States is a state party to the 1966 International Covenant on Civil and Political Rights<sup>203</sup> which sets out the basic principles for democratic elections - although when it ratified the Convention in 1992, it did so with a number of reservations. The United States is also party

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<sup>201</sup> OAS, “Observing Electoral Justice Systems: A Manual for Election Observation Missions”, available at <http://www.oas.org/es/sap/deco/Pubs/Manuales/Observing-Electoral-Justice-Systems-a-Manual-for-OAS-Electoral-Observation--Missions.pdf>.

<sup>202</sup> OAS, “Observing Electoral Justice Systems: A Manual for Election Observation Missions”.

<sup>203</sup> OHCHR, “International Covenant on Civil and Political Rights”, 1966, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

to the 1965 Convention on the Elimination of all forms of Racial Discrimination<sup>204</sup> (but again with the reservation that it is “non-self-executing” - i.e., not binding on the United States without federal legislation), and the 2003 United Nations Convention against Corruption.<sup>205</sup> However, the United States has not yet ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>206</sup> and the Convention on the Rights of Persons with Disabilities (CRPD),<sup>207</sup> which set out important protections for the political and electoral rights of women and persons with disabilities.

Article 1, Section 4 of the United States Constitution<sup>208</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections, which has resulted in a highly decentralized and varied framework of electoral laws and electoral administration. While the Constitution does not specifically establish a person’s right to vote, four constitutional amendments<sup>209</sup> stipulate that voting rights cannot be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964).

At the federal level, multiple laws establish principles for the conduct of elections, including those shown in Table 1:

**Table 1: Federal Laws Governing Elections in the United States**

Federal Law	Provisions
Civil Rights Act, 1870 <sup>210</sup>	Established, for the first time, federal protections against discrimination in voting. Those protections were later amended in 1957, 1960 and 1964.
Electoral Count Act, 1887 <sup>211</sup>	Sets out procedures for counting electoral votes following a presidential election
Hatch Act, 1939	Prohibits civil service employees in the executive branch of the federal government from engaging in certain forms of political activity

<sup>204</sup> OHCHR, “International Convention on the Elimination of All Forms of Racial Discrimination”, 1965, <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

<sup>205</sup> UNODC, “Convention Against Corruption”, 2003, [https://www.unodc.org/unodc/en/corruption/tools\\_and\\_publications/UN-convention-against-corruption.html](https://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html).

<sup>206</sup> UN Women, "Convention on The Elimination of All Forms of Discrimination Against Women", 1979, <https://www.un.org/womenwatch/daw/cedaw/>.

<sup>207</sup> United Nations, "Convention on The Rights of Persons With Disabilities (CRPD)", 2006, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

<sup>208</sup> Constitution of the United States (1787), Article I, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>209</sup> National Archives, “The Constitution: Amendments 11-27”, <https://www.archives.gov/founding-docs/amendments-11-27? ga=2.129930764.107809335.1614006866-630143065.1614006866>.

<sup>210</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965", [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>211</sup> Cornell Law School Legal Information Institute, “3 U.S. Code § 5”, <https://www.law.cornell.edu/uscode/text/3/5>

Federal Law	Provisions
Presidential Transition Act, 1963	Authorizes funding for the General Services Administration (GSA) to provide suitable office space, staff compensation, and other services associated with the presidential transition process
Voting Rights Act, 1965 <sup>212</sup>	Provides nationwide protections for voting rights that are set out in the Constitution, and prohibits racial discrimination in voting
Federal Contested Elections Act, 1969	Sets out a procedure for candidates to the United States House of Representatives to contest general elections
Federal Electoral Campaign Act, 1971	Increases disclosure of contributions for federal political campaigns and established the Federal Election Commission (FEC)
Voting Accessibility for the Elderly and Handicapped Act, 1984 <sup>213</sup>	Requires that all polling facilities must be accessible to all individuals with disabilities
Uniformed and Overseas Citizens Absentee Voting Act, 1986 <sup>214</sup>	Requires states to allow certain U.S. citizens to register to vote and to vote by absentee ballot in federal elections
Americans with Disabilities Act, 1990	Prohibits discrimination against individuals with disabilities in all areas of public life, including elections
National Voter Registration Act, 1993 <sup>215</sup>	Requires states to offer voter registration for any eligible person who applies for or renews a driver's license or applies for public assistance, and requires the United States Postal Service to mail election materials of a state as if the state is a nonprofit
Help America Vote Act, 2002 <sup>216</sup>	Creates mandatory minimum standards for states to follow in election administration and provides funding to help states meet these standards. The law also established the Election Assistance Commission (EAC)
Bipartisan Campaign Reform Act, 2002	Places limits on political campaign contributions by interest groups and national political parties
Military and Overseas Voting Empowerment Act 2009	Sets out provisions to help military members serving overseas and citizens who live abroad to vote in U.S. elections more effectively

**Source: Compiled by the OAS Mission**

<sup>212</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965", [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>213</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 201 - Voting Accessibility for the Elderly and Handicapped", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-201>.

<sup>214</sup> Federal Voting Assistance Program, "The Uniformed and Overseas Citizens Absentee Voting Act Overview", <https://www.fvap.gov/info/laws/uocava>.

<sup>215</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 205 - National Voter Registration", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>216</sup> U.S. Election Assistance Commission, "Help America Vote Act", [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

Together, these laws and rules, along with the United States Constitution, set out basic principles for elections, campaigns, voter registration, voting, dispute resolution, and transitions. There are also relevant provisions in the Federal Rules of Civil Procedure<sup>217</sup> and the US Civil Code,<sup>218</sup> particularly for civil litigation related to elections. Many of the federal laws listed, however, have been amended multiple times, including in response to federal court rulings, such as *Citizens United v. Federal Election Commission*,<sup>219</sup> which significantly reduced campaign finance restrictions.

As noted earlier, each state also has the authority to set its own rules for elections, with the result that core election rules and procedures exist at the state level (and in some states at the county level). This decentralized electoral legal framework impacts legal certainty and stability, as state level laws may be easier to amend. While several federal bills relating to elections were submitted to Congress following the last federal elections, none were adopted. Conversely, there were a myriad of amendments to legislation at the state level, primarily related to the COVID-19 pandemic (this is discussed further below).

### **3. Election Dispute Resolution Model, Jurisdiction and Procedure in the United States**

#### **a. Model**

The United States has a hybrid EDR model involving state courts, federal courts, and the legislature. For disputes regarding the results of elections, the Constitution states that each House (in Congress) shall be the judge of its own elections, returns, and Member qualifications.<sup>220</sup> This means that disputes related to Senate and House returns are ultimately decided in the Senate and House respectively. For presidential elections, each state-level certification of electors to the Electoral College can generally be challenged in state courts and ultimately appealed to the Supreme Court.

An impartial and informed arbiter is particularly important when resolving election complaints, which are generally politically sensitive.<sup>221</sup> The non-neutral appointment of judges can reduce public trust in the dispute resolution process and give rise to, at a minimum, the perception of bias. One unique facet of the EDR model in the United States is the method of judicial selection or appointment, which varies by state. In some states, judges are appointed by the governor directly or on the recommendation of a nominating committee. In other states, judges will be on the ballot for direct election in partisan<sup>222</sup> or

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<sup>217</sup> Cornell Law School Legal Information Institute, “Federal Rules of Civil Procedure”, <https://www.law.cornell.edu/rules/frcp>.

<sup>218</sup> Cornell Law School Legal Information Institute, “U.S. Code”, <https://www.law.cornell.edu/uscode/text>.

<sup>219</sup> *Citizens United v Federal Election Commission*, Appeal from the United States District Court for the District of Columbia No. 08-205. Argued March 24, 2009, Reargued September 9, 2009, Decided January 21, 2010, <https://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>220</sup> U.S. Constitution, Article I, Section 5.

<sup>221</sup> Chad Vickery, “Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)”, 2011, [https://www.ifes.org/sites/default/files/guarde\\_final\\_publication\\_0.pdf](https://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf)

<sup>222</sup> Partisan, meaning that their political affiliation is listed on the ballot.

non-partisan elections. In some cases, judges are selected by the state legislature. The selection process may also comprise elements of the different methods.<sup>223</sup>

A total of 278 state appellate court seats were up for election in 2020.<sup>224</sup> While rules for judicial elections and recusals vary across states, judicial elections may present challenges to the integrity of the EDR system if a judge hears cases involving parties that have provided significant donations to that judge's election campaign. Alternatively, there may be a conflict if a judge is to hear a case regarding an electoral process in which he or she is on the ballot - a situation that occurred in 2020 in Nevada. Finally, partisan elections for judicial seats may also raise questions around the impartiality of judges and party affiliation when hearing cases related to elections and election results.

#### b. Jurisdiction

As a result of the decentralized nature of election administration in the United States, there is no single centralized administrative or judicial process for submitting election complaints. Individual states have the authority to administer national, state, and local elections within their jurisdiction, with the result that procedures, rules and deadlines for the adjudication of election complaints are covered by state law and vary substantially across jurisdictions.<sup>225</sup> This can result in different decisions across different states for similar election disputes. In contrast with other countries, where this could be seen as inconsistent judicial precedent however, the differences in judicial outcomes can occur because the election laws and rules being interpreted are also divergent across states - even for national-level elections.

In general, election disputes can be classified into pre-election disputes and violations, and post-election petitions against the results. Most of the pre-election litigation in the United States in 2020 focused on the legality or constitutionality of election rules or changes to election rules. A significant part of this was in response to the COVID-19 pandemic, as states sought to adapt voting procedures to the pandemic environment. Post-election litigation focused on both the election and counting process, as well as on the result.

#### c. Pre-election Disputes and Violations

For disputes regarding the electoral process, complaints can be filed in state courts according to respective state law and rules of procedure. Cases can then be appealed to respective state appeals courts, and then federal appeals courts - including ultimately the Supreme Court of the United States.

There are centralized (federal) complaints processes for some types of disputes or violations. Campaign finance complaints are handled by the Federal Election Commission (FEC) and media or broadcasting complaints are handled by the Federal Communications

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<sup>223</sup> Ballotpedia, "Judicial selection in the states", [https://ballotpedia.org/Judicial\\_selection\\_in\\_the\\_states](https://ballotpedia.org/Judicial_selection_in_the_states).

<sup>224</sup> Ballotpedia, "State judicial elections, 2020", [https://ballotpedia.org/State\\_judicial\\_elections,\\_2020](https://ballotpedia.org/State_judicial_elections,_2020).

<sup>225</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).

Commission (FCC). The Department of Justice is responsible for investigating violations of *federal* law, including the 1965 Voting Rights Act and the 2002 Help America Vote Act. If individuals suspect a violation of federal election laws, they may report it to the Department of Justice by completing an Election Complaint Report, or they may report it to their state or local election office. Groups and individuals can also file complaints with the relevant state court, and violations of state laws are investigated (and potentially prosecuted) by each state’s law enforcement body.

#### d. Presidential Election Petitions

For disputes regarding the presidential election, complaints are brought to state courts according to respective state law and rules of procedure. Cases can then be appealed to the U.S. Supreme Court. All disputes must be resolved, and a state’s results certified, within 35 days of Election Day, six days before the Electoral College meets to cast their votes. Congress is required to treat as “conclusive” those state election results that have been finalized by this date, known as the “Safe Harbor” deadline.<sup>226</sup> If the deadline is not met, a states’ electors will not be recognized for the purpose of the electoral college vote.

If there are small vote margins in “swing states” and a litany of litigation, there is a risk that the “Safe Harbor” provision results in the clock running out on any hearing and appeal process, or any recount or audit (as occurred with the 2000 presidential election recount in Florida with the *Bush v. Gore* case).<sup>227</sup> In terms of process and jurisdiction, if a state reaches the “Safe Harbor” date without a resolution on litigation or an audit process, there are three possible outcomes: (1) electors progress to the Electoral College, but within a climate of uncertainty regarding the results in the particular state; (2) litigation prevents the state’s electors from being confirmed or replaces them with electors of the party controlling the state legislature; or (3) the Electoral College fails to reach a majority and the election process moves to the House of Representatives, as prescribed by the Constitution. If the third outcome materializes, the House would not vote by representative but by state, with one vote per delegation.

The U.S. Code stipulates that the Electoral College must vote on the Monday after the second Wednesday in December.<sup>228</sup> For the 2020 elections, that day fell on December 14. The “Safe Harbor” deadline for the resolution of all disputes fell six days before that, on December 8, 2020. The deadline is traditionally considered met when a state certifies its votes, and while the certification processes vary by state, all require the governor to compile the certified results and send them to Congress, along with the names of Electoral College delegates. However, some states have litigation procedures that allow certification to be challenged even after certification has occurred. For that reason, in 2020, the state of Wisconsin did not

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<sup>226</sup> The Electoral Count Act of 1887, which governs this process, has been described by the National Task Force on Election Crises as “extraordinarily complex” and “almost unintelligible”. See at: National Task Force on Election Crises, “The Electoral Count Act & The Process of Electing a President”, <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f59223d94b21d2ebe8e6957/1599676990875/Electoral+Count+Act.pdf>.

<sup>227</sup> *Bush v Gore*, 531 US 98 (2000), <https://www.law.cornell.edu/supct/pdf/00-949P.ZPC>.

<sup>228</sup> 3 U.S. Code § 7.

technically meet the “Safe Harbor” date as a case (which was subsequently rejected) was pending in state court on December 8.<sup>229</sup> All other states met the “Safe Harbor” deadline, meaning that the results were considered “conclusive” and therefore eligible to be counted by Congress.

The last formal opportunity to dispute presidential election results takes place as the votes in the Electoral College are counted and certified. Members of Congress may object to a state’s electoral votes in writing as part of the certification of the Electoral College vote. According to the Electoral Count Act, the objection must “state clearly and concisely, and without argument, the ground [for the objection]” and “be signed by at least one Senator and one member of the House of Representatives.”<sup>230</sup> After all objections pertaining to a state’s returns have been received and read, the House and Senate meet separately to consider the objections.

The certification of results on January 6 were interrupted by disruptive events within and around the Capitol building (the seat of the Congress). After the Capitol was secured and the certification process resumed, members submitted objections for six states. Two objections were formally presented by a Senate and House member, one for Arizona, where the Senate voted against sustaining the objection by a vote of 6-93 and the House voted against sustaining this objection by a vote of 121-303.<sup>231</sup> The second objection was raised regarding Pennsylvania; the Senate voted against sustaining the objection by a vote of 7-92, while the House voted against sustaining the objection by a vote of 138-282.<sup>232</sup> Four states (Georgia, Michigan, Nevada, and Wisconsin) were counted following incomplete objections presented by a U.S. House member without the support of a U.S. Senator.<sup>233</sup>

#### e. Congressional Elections Petitions

The election dispute resolution process is more complex for congressional elections. According to the Constitution, the House of Representatives and the Senate have the authority to arbitrate electoral disputes for the election of their members, respectively. The Senate utilizes a series of informal precedents to guide its adjudication of election contests, while procedures in the House are governed by the Federal Contested Elections Act of 1969.<sup>234</sup> These processes operate alongside a variable state-based regime for judging congressional election contests, in which courts are often asked to intervene.

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<sup>229</sup> Molly Beck and Associated Press, “With case pending in state court, Wisconsin is only state to miss election safe-harbor deadline,” *Milwaukee Journal Sentinel*, December 8, 2020.

<https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002/>.

<sup>230</sup> 3 U.S.C. § 15.

<sup>231</sup> Ballotpedia, “Counting of electoral votes”, [https://ballotpedia.org/Counting\\_of\\_electoral\\_votes\\_\(January\\_6-7,\\_2021\)](https://ballotpedia.org/Counting_of_electoral_votes_(January_6-7,_2021)).

<sup>232</sup> Ballotpedia, “Counting of electoral votes”.

<sup>233</sup> Ballotpedia, “Counting of electoral votes”.

<sup>234</sup> 2 U.S. Code § 381-396.

The existing regimes in states fall into three general categories: (1) those that allow congressional election contests to proceed in the courts without restriction; (2) those that prohibit such proceedings; and (3) those that permit congressional election contests to go forward, but with substantive or procedural constraints on the proceedings.

For the 2020 elections, a claim was filed in the District Court to halt the Georgia runoff Senate race that saw Democrats Jon Ossoff and Raphael Warnock elected. The case was dismissed for lack of standing, and failed on appeal.<sup>235</sup> In Iowa, Democrat Rita Hart chose to contest her election loss to Republican Mariannette Miller-Meeks at the federal level in the House of Representatives, rather than at the state level. For disputed federal elections, the Iowa Code provides for the creation of a special five-member court comprised of the chief justice of the state supreme court and four district court judges that the supreme court selects.<sup>236</sup> However, pursuant to the Federal Contested Elections Act, disputes can also be settled directly in the House. Hart ultimately conceded to Miller-Meeks and withdrew her challenge on March 31.<sup>237</sup>

#### f. Procedure, Timelines and Remedies

Clear standards and procedures are imperative for the effective resolution of electoral disputes.<sup>238</sup> Procedures must be clearly written, accessible, and applied equally in order to protect due process and provide adequate notice to parties. Election cases in federal courts are governed by the Federal Rules of Civil Procedure, and while each state has its own rules of civil procedure, in most cases these mirror the federal rules. Most complaints in U.S. elections originate with individuals, candidates, political parties, and civil society groups, but the United States does have generally stricter legal standing requirements compared to other countries. These standing requirements are set out in the laws of each state, but typically require a direct injury to the plaintiff.

The U.S. Supreme Court in *Lujan v. Defenders of Wildlife* set out a three-part test to determine legal standing for civil claims.<sup>239</sup> In order to bring a case, a complainant must show injury in fact (i.e., that the plaintiff suffered harm), and that injury must be concrete, particularized, and actual or imminent (that is, not abstract). The complainant must also show that the defendant caused the harm, and a complaint must be capable of redress (that is, a favorable court decision will redress the injury).

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<sup>235</sup> David Wickert, “Supreme Court rejects another Georgia election lawsuit,” *The Atlanta Journal-Constitution*, March 8, 2021. <https://www.ajc.com/politics/election/supreme-court-rejects-another-georgia-election-lawsuit/ZYPXZRJT2NHF7FQL62Y3F6CZCO/>.

<sup>236</sup> Statutes and Regulations, Iowa Code, “Section 60.1 – Court of Contest”, “<https://casetext.com/statute/code-of-iowa/title-ii-elections-and-official-duties/subtitle-1-elections/chapter-60-contesting-elections-of-presidential-electors-and-congresspersons/section-601-court-of-contest>.”

<sup>237</sup> “Months after the November election, Rita Hart concedes to Mariannette Miller-Meeks,” *KCRG*, March 31, 2021,” <https://www.kcrg.com/2021/03/31/months-after-the-november-election-rita-hart-concedes-to-mariannette-miller-meeks/>.

<sup>238</sup> OAS, *Observing Electoral Justice Systems: A Manual for Election Observation Missions*. See also Chad Vickery, *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)*, Chapter 1.

<sup>239</sup> *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992), <https://www.law.cornell.edu/supremecourt/text/504/555>.

An example of the application of these standing requirements in a 2020 election claim can be seen in *Yazzie v. Hobbs* in Arizona.<sup>240</sup> The case, which was appealed to the Ninth Circuit of the United States Court of Appeals, sought an injunction that would require Arizona to count mail ballots from on-reservation Navajo Nation tribal members that are postmarked (rather than received) by Election Day. The appellants, six members of the Navajo Nation who resided on a reservation in Arizona, challenged Arizona's existing receipt deadline pursuant to the 1965 Voting Rights Act, the Equal Protection Clause of the United States Constitution, and Arizona's Constitution. The Ninth Circuit did not consider the merits of the claim and the lower court's decision, as the appeal was dismissed due to lack of legal standing. The judge found that the appellants (1) could not show potential injury that was "particularized" (i.e. specific to the 6 plaintiffs, rather than just potential general harm to Navajo voters); and (2) that the remedy they were seeking (a different postmark date for Navajo voters versus general Arizona voters) could not be granted by the court posited as it would be essentially unenforceable and the Postal Service was not party to the case.<sup>241</sup>

The result of these strict standing requirements is that cases may be dismissed in the United States although they might otherwise proceed to a full hearing on the merits in other countries that have wider standing provisions.

One concerning procedural element in the 2020 electoral process was the increased use of emergency applications, particularly in the Federal Supreme Court (the "shadow docket"). For rulings on these applications, the Supreme Court is not required to provide a written judgment with reasons for its decisions.<sup>242</sup> Several orders on emergency election applications were issued in the pre-election period with no written reasoning provided. This included some contentious, high-profile cases, such as a Florida case on felon disenfranchisement (discussed further below), where an unsigned order, with no reasons for the decision, was issued, although a written dissent was produced. As noted elsewhere, "reasoned decisions are important to ensure that cases are not dismissed in an arbitrary manner, that electoral grievances are litigated through the courts and not the media, and that judgments are ultimately accepted."<sup>243</sup> In *Castañeda Gutman v. México*, the Inter-American Court of Human Rights has found that "it is a minimum guarantee for anyone who files a remedy that the grounds for the ruling deciding it are stated; otherwise the ruling will violate the guarantee of due process."<sup>244</sup>

Because the legitimacy of the presidency and other elected offices rests on the validity of election results, and the electorate expects to know the results as soon as possible, electoral dispute proceedings must be expeditious.<sup>245</sup> In general, the longer it takes to announce

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<sup>240</sup> *Yazzie v Hobbs* (20-16890), D.C. No.3:20-cv-08222-GMS, <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/15/20-16890.pdf>.

<sup>241</sup> *Yazzie v Hobbs*.

<sup>242</sup> New York Times, "Missing From Supreme Court's Election Cases: Reasons for Its Rulings", <https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html>, retrieved October 26, 2020.

<sup>243</sup> Katherine Ellena, "Elections on Trial: The Effective Management of Election Disputes and Violations", IFES, 2018, [https://www.ifes.org/sites/default/files/ifes\\_managing\\_electoral\\_disputes\\_and\\_violations\\_final.pdf](https://www.ifes.org/sites/default/files/ifes_managing_electoral_disputes_and_violations_final.pdf).

<sup>244</sup> *Castañeda Gutman v. México*, Inter-American Court of Human Rights, Judgment of August 6, 2008, ¶ 93

<sup>245</sup> Chad Vickery, "Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE)".

results, the more suspicions of fraud arise, regardless of how well the process was administered. For post-election disputes, the “Safe Harbor” date creates additional pressure on courts to address claims as quickly as possible, without sacrificing due process protections. EDR timelines generally vary widely between states and in some cases do not exist. This raises the risk that cases may be left languishing for many months, although cases leading up to the 2020 election were generally expedited by the courts.

There was a focus on the timing of election litigation for the 2020 elections, given the volume of pre-election litigation (including challenges to changes in rules made by states in response to the COVID-19 pandemic). This has placed a spotlight on the ‘Purcell principle’, which takes its name from the 2006 case of *Purcell v. Gonzalez*,<sup>246</sup> where the Supreme Court reversed a decision of the U.S. Court of Appeals for the 9th Circuit that had blocked an Arizona voter ID law during that year’s midterm election. The Supreme Court based its decision on the short amount of time between the 9th Circuit’s order and the election, and the importance of not changing election rules so close to an election. As noted by SCOTUSblog, “litigants typically assert Purcell arguments when asking an appellate court to block, or “stay,” a lower court decision that would change the rules for an upcoming election.”<sup>247</sup>

The principle rose in prominence in 2020 in part because of the Supreme Court ruling on absentee voting in *Republican National Committee v. Democratic National Committee*, where the Court—one day prior to Wisconsin’s April primary election—blocked a district court ruling that had been issued five days before the election extending the deadline for submitting absentee ballots.<sup>248</sup> Both the majority opinion and the dissent referenced *Purcell*, with the majority arguing that the lower court’s ruling altered the rules too close to the election in a way that altered the nature of the election (by permitting absentee ballots to be cast, not just postmarked, after the polls closed on Election Day). The dissenting opinion argued that the Supreme Court’s ruling itself was issued too close to the election and would cause confusion among voters, especially as election officials had already moved forward based on the lower court’s ruling. The dissent also noted that the district court’s ruling was in the context of an evolving pandemic and not in relation to a regular electoral situation.<sup>249</sup>

The Venice Commission has affirmed that “stability of the law is crucial to credibility of the electoral process” and recommends no substantive legal changes in the year prior to an election.<sup>250</sup> However, as has been noted elsewhere, “..some countries may not have the luxury of time in responding to COVID-19...and the preservation of legal certainty and

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<sup>246</sup> *Purcell v Gonzalez*, Nos. 06A375 (06–532) and 06A379 (06–533). Decided October 20, 2006.

<https://www.law.cornell.edu/supremecourt/text/06-375>.

<sup>247</sup> SCOTUSblog, “The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures”, <https://www.scotusblog.com/educational-resources/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/>.

<sup>248</sup> *Republican National Committee v. Democratic National Committee*, [https://www.supremecourt.gov/opinions/19pdf/19a1016\\_o759.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf).

<sup>249</sup> *RNC v DNC*.

<sup>250</sup> Guidelines and Explanatory Report of the European Commission for Democracy Through Law (Venice Commission), No. 190/2002, Code of Good Practice in Electoral Matters (October 30, 2002).

stability will be a particular challenge.”<sup>251</sup> As law professor Michael Morey has noted about the United States: “[m]any states lack ‘election emergency’ laws that empower officials to adequately respond to these crises. As a result, courts are frequently called upon to adjudicate the consequences of election emergencies as a matter of constitutional law, often applying vague, subjective, ad hoc standards in rushed, politically charged proceedings.”<sup>252</sup> This was a challenge for many different courts leading up to the November 2020 elections.

Another factor that may have resulted in an increase of pre-election litigation and a focus on the Purcell principle is the removal of coverage formula for the federal ‘preclearance’ process for changes to state voting rules under the Voting Rights Act of 1965. Previously, Section 5 of the Act required states (based on a coverage formula set out in Section 4) to seek federal ‘preclearance’ of any changes to voting rules. This process was designed to ensure that no changes could be made by states that might have the effect of denying or abridging the right to vote “on account of race or color.” In the 2013 case of *Shelby County v. Holder*, the Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act was unconstitutional because it is based on an old formula.<sup>253</sup> This rendered the Section 5 preclearance process inoperable until Congress enacts a new coverage formula. While the court’s decision invited Congress to enact a new formula, it has to date declined to do so.

Finally, an important procedural provision in the context of EDR in the United States is Rule 11(b) of the Federal Rules of Civil Procedure, which covers representations to the court. This rule states that “by presenting to the court a pleading, written motion, or other paper...an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

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<sup>251</sup> Katherine Ellena, Legal Considerations when Delaying or Adapting Elections”, IFES 2020, [https://www.ifes.org/sites/default/files/ifes\\_covid-19\\_briefing\\_series\\_legal\\_considerations\\_when\\_delaying\\_or\\_adapting\\_elections\\_june\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid-19_briefing_series_legal_considerations_when_delaying_or_adapting_elections_june_2020.pdf).

<sup>252</sup> Michael T. Morely, “Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks, 546 Emory L.J. 545, available at <https://law.emory.edu/elj/content/volume-67/issue-3/articles/election-emergencies-voting-natural-disasters-terrorist-attacks.html>.

<sup>253</sup> *Shelby County, Alabama v Holder, Attorney General, et al.* [https://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf).

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”<sup>254</sup>

Rule 11(c) then provides the court with specific sanctioning power if it finds that Rule 11(b) has been violated. This provides a legal protection against frivolous or vexatious lawsuits, including those challenging the election process or result.

#### 4. Pre-election Federal and State Litigation

The amount of litigation in elections in the United States, both pre- and post-election, has been steadily increasing. With over 400 cases filed ahead of the elections, the November 2020 poll was termed “the most litigated presidential election in recent U.S. history”.<sup>255</sup> As mentioned above, much of this litigation concerned modifications to the electoral process as a result of the COVID-19 pandemic, primarily to extend early voting and distance voting, and whether these modifications preserved or expanded voting rights, or restricted them. Cases were filed in at least 44 states.<sup>256</sup>

In Texas, the Republican Party sued the Texas Secretary of State over the decision to extend early voting, permit voters to drop off absentee ballots to the early voting clerk’s office, and send out unsolicited vote-by-mail applications. Plaintiffs alleged that these practices violated the Texas Constitution and would lead to voter fraud. The Texas Supreme Court denied the petition without hearing oral arguments or issuing an opinion.<sup>257</sup> In Indiana, plaintiffs challenged a state law that provides that voters may only vote by mail if they are disabled, military, or seniors, and argued that all voters should be permitted to vote by mail in the November 2020 election in light of the COVID-19 pandemic. On appeal, the Seventh Circuit found that the state’s voting laws did not interfere with plaintiffs’ right to vote and did not violate the U.S. Constitution.<sup>258</sup>

Many complaints were filed in state courts regarding absentee ballot deadlines, including in Montana,<sup>259</sup> Massachusetts,<sup>260</sup> Michigan,<sup>261</sup> Minnesota,<sup>262</sup> Ohio,<sup>263</sup> Pennsylvania,<sup>264</sup> and Wisconsin,<sup>265</sup> with different outcomes, including on appeal with the Federal Supreme Court. The Court heard three appeals regarding deadline extensions for mail-in ballots in three

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<sup>254</sup> Federal Rules of Civil Procedure, Rule 11(b).

<sup>255</sup> Frontline, “COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down”, October 28, 2020, <https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/>.

<sup>256</sup> Stanford-MIT, COVID-Related Election Litigation Tracker, <https://healthyelections-case-tracker.stanford.edu>.

<sup>257</sup> *In re Hotze*, No. 20-0671 (Tex. S. Ct.), <https://healthyelections-case-tracker.stanford.edu/detail?id=230>.

<sup>258</sup> *Indiana Vote by Mail, Inc. v. Okeson*, No. 20-02605 (7th Cir.), <https://healthyelections-case-tracker.stanford.edu/detail?id=267>.

<sup>259</sup> *Driscoll v. Stapleton*, No. OP20-0293, DA20-0295 (Mont. S. Ct.).

<sup>260</sup> *Grossman v. Galvin*, No. SJC-2020-XX (Mass. S. Ct.).

<sup>261</sup> *League of Women Voters of Michigan v. Benson*, No. 161671 (Mich. S. Ct.).

<sup>262</sup> *LaRose v. Simon*, No. A20-1040 (Minn. S. Ct.) and *NAACP of Minnesota v. Simon*, No. A20-1041 (Minn. S. Ct.).

<sup>263</sup> *Ohio Dep’t of Health v. LaRose*, No. 2020-0388 (Ohio S. Ct.).

<sup>264</sup> *Republican Party of Pennsylvania v. Boockvar*, Nos. 20A53, 20A54, 20-542 (S. Ct.).

<sup>265</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.).

states. It did not allow an extension in Wisconsin, but did so in Pennsylvania and North Carolina, in part based on reasoning by Chief Justice Roberts that the court should be reluctant to approve changes imposed by federal judges, but view those imposed by state courts or agencies differently.

There have also been cases related to signature matching requirements for absentee ballots in Ohio,<sup>266</sup> Texas,<sup>267</sup> and North Dakota.<sup>268</sup> In Ohio and North Dakota, both cases touched on the opportunity for voters to cure any defects in signatures, with the courts offering differing opinions based on the arguments presented.

The provision of ballot drop boxes in various states has also led to litigation in Ohio<sup>269</sup> and Texas,<sup>270</sup> both related to a limit of one drop box per county in each state. The number of polling locations provided was also challenged in Georgia during the primary elections,<sup>271</sup> and since then in North Carolina,<sup>272</sup> Texas,<sup>273</sup> Hawaii,<sup>274</sup> Kentucky,<sup>275</sup> and Washington DC.<sup>276</sup> In the latter case in DC, plaintiffs alleged that the closure of the majority of polling places in Ward 8 violated the Voting Rights Act because the policy prevented members of a protected class from having equal opportunities to participate in elections.<sup>277</sup> This case was settled.

A prominent case, *Washington v. Trump*, was brought by 14 states against the Trump Administration, challenging some of the changes to the operation of the United States Postal Service (USPS) implemented by U.S. Postmaster General Louis DeJoy in July 2020. The U.S. District Court for the Eastern District of Washington blocked the implementation of the USPS policy, and DeJoy ultimately rolled back the changes.<sup>278</sup>

There were also cases related to ongoing debates such as voter identification and felony voting, which have not been strictly related to the COVID-19 pandemic. Both Wisconsin<sup>279</sup> and North Dakota<sup>280</sup> have seen litigation around voter identification requirements, with the former related to student IDs, and whether a student had to also show current enrolment at the educational institution in question. The latter related to the state's requirement that the identification card include the voter's current residential street address to cast a ballot; a

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<sup>266</sup> *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843 (S.D. Ohio).

<sup>267</sup> *Lewis v. Hughs*, No. 20-50654 (5th Cir.).

<sup>268</sup> *Self Advocacy Solutions North Dakota v. Jaeger*, No. 3:20-cv-00071 (D.N.D.).

<sup>269</sup> *A. Philip Randolph Inst. of Ohio v. LaRose*, Nos. 20-4063, 20-4068 (6th Cir.).

<sup>270</sup> *Texas League of United Latin American Citizens v. Abbott*, No. 20-50867 (5th Cir.).

<sup>271</sup> *Anderson v. Raffensperger*, No. 1:20-cv-03263 (N.D. Ga.).

<sup>272</sup> *Democracy North Carolina v. North Carolina State Board of Elections*, No. 20-1728 (4th Cir.); No. 20-cv-457 (M.D.N.C.).

<sup>273</sup> *Texas Organizing Project v. Callanen*, No. 5:20-cv-01189 (W.D. Tex.).

<sup>274</sup> *Griffin v. Hawaii*, No. 1:20-cv-00298 (D. Haw.).

<sup>275</sup> *Nemes v. Bensinger*, No. 3:20-cv-00407 (W.D. Ky.).

<sup>276</sup> *Robinson v. Board of Elections*, No. 1:20-cv-01364 (D.D.C.).

<sup>277</sup> Approximately 92% of the residents of Ward 8 are African-American, <https://www.dchealthmatters.org/demographicdata?id=131494>.

<sup>278</sup> *Washington v. Trump*, <https://www.scotusblog.com/election-litigation/washington-v-trump/>.

<sup>279</sup> *Luft v. Evers*, No. 2:11-cv-1128 (7th Cir.) and *The Andrew Goodman Foundation v. Bostelmann*, No. 3:19-cv-00955 (W.D. Wis.); *Common Cause v. Thomsen*, No. 3:19-cv-323 (W.D. Wis.).

<sup>280</sup> *Spirit Lake Tribe v. Jaeger*, Nos. 1:16-cv-008, 1:18-cv-222 (D.N.D.).

requirement that potentially disenfranchises Native American tribes that do not have traditional addresses. The Wisconsin District Court declined to make a decision on the merits of the case until after the election was over, citing the *Purcell* principle and the fact that early voting had already started.<sup>281</sup> In North Dakota, the Secretary of State agreed to settle the case and ensure that tribal IDs and tribally designated street addresses are accepted as valid.<sup>282</sup>

In a prominent judgment in Florida,<sup>283</sup> plaintiffs challenged the requirement that felons pay all fees, fines, and other restitution ordered by a court in order to complete their sentences and restore their right to vote, arguing that this violates the Equal Protection Clause of the Fourteenth Amendment, the Twenty-Fourth Amendment, the Voting Rights Act, and the Florida Constitution. A key argument presented was that this requirement constituted an illegal poll tax, essentially requiring individuals to pay to vote. On appeal, the Eleventh Circuit ruled for the defendants, determining that the Due Process Clause did not impose an obligation on Florida to provide felons with the information necessary to determine whether they had paid all court-ordered fees and completed their sentences.

## 5. Post-election Disputes, Recounts, Audits

An important element of post-election dispute resolution in the United States, is the availability of various legal processes and avenues of challenge following Election Day. These vary by state and include applications for injunctive relief, recounts and audits, and petitions against the results. The Department of Justice can also investigate credible allegations of electoral malfeasance.

### a. Recounts and Audits

As defined by the International Foundation for Electoral Systems (IFES) and Democracy International (DI), “a recount is a process by which ballots in an electoral contest are tallied again after the initial count following an election, [while] an audit may include a recount of the votes, but it also involves other aspects of an investigation into allegations of fraud.”<sup>284</sup> In the United States, certain states have also introduced (or piloted in 2020) a specific type of audit called a ‘risk-limiting audit’, which “provides statistical assurance that election outcomes are correct by manually examining portions of the audit trail, including paper ballots or voter-verifiable paper records.”<sup>285</sup>

Recounts and audits are governed by state law and there is 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

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<sup>281</sup> *Common Cause v Thomsen*, [https://www.courtlistener.com/recap/gov.uscourts.wiwd.43659/gov.uscourts.wiwd.43659.51.0\\_2.pdf](https://www.courtlistener.com/recap/gov.uscourts.wiwd.43659/gov.uscourts.wiwd.43659.51.0_2.pdf).

<sup>282</sup> *Spirit Lake Tribe v. Jaeger*, <https://www.narf.org/cases/spirit-lake-tribe-v-jaeger/>.

<sup>283</sup> Ballotpedia, “Florida Senate Bill 7066 (2019)”, [https://ballotpedia.org/Florida\\_Senate\\_Bill\\_7066\\_\(2019\)](https://ballotpedia.org/Florida_Senate_Bill_7066_(2019)).

<sup>284</sup> IFES and DI, “Election Audits: International Principles that Protect Election Integrity”, [https://www.ifes.org/sites/default/files/2015\\_ifes\\_di\\_election\\_audit\\_white\\_paper.pdf](https://www.ifes.org/sites/default/files/2015_ifes_di_election_audit_white_paper.pdf).

<sup>285</sup> <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.229.883&rep=rep1&type=pdf>.

and recounts lack clarity. Timelines for recounts and audits can also be a problem, especially if they conflict with the “Safe Harbor” clause, as occurred in *Bush v. Gore*.

With respect to the “swing states” in the 2020 election, the following rules for recounts and audits applied:

### *Georgia*

Prior to the certification of results, the superintendent may order a recount on his or her own initiative, or if petitioned by a party or candidate. Following the certification of results, if the margin of victory is less than 0.5%, a party or candidate can petition the Secretary of State for a recount, or it is otherwise in the Secretary of State’s discretion to conduct such an exercise.

Georgia law has also introduced a risk limiting audit with a risk limit of 10 percent, to be conducted prior to certification of the vote. However, for the 2020 elections the margin of victory was so small (less than half a percent) that incremental sampling would have led to a full hand recount. To meet the November 20 certification deadline, the Secretary of State ordered a 100% hand tally of all ballots (essentially setting the risk limit at 0%). As the Carter Center has noted, “the RLA is not to be confused with the Georgia “recount” process, which can occur only after certification, with ballots scanned again but not hand counted. Nor should it be confused with the processes for assessing the eligibility of voters before they cast a vote in person (early or on Election Day) or before their absentee or provisional ballot is counted. The RLA simply checks the accuracy of the tabulation of the legally cast ballots.”<sup>286</sup> Following the conclusion of the RLA process and the certification of the results, the Trump campaign requested a recount, which affirmed Biden’s win in the state.

### *Pennsylvania*

State law provides for both automatic and requested recounts. If the margin of victory for statewide office is less than 0.5 percent, then an automatic recount takes place.<sup>287</sup> A recount can also be requested by three voters of an election district within five days after the completion of computational canvassing, by submitting an affidavit alleging errors in the vote totals. In order to conduct the recount in multiple election districts, requests must be made in each respective district. The deadline to request such a recount is no later than five days after the completion of computational canvassing. Requesters are responsible for costs associated with the recount unless the recount shows that fraud or substantial error occurred, in which case the costs are refunded.

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<sup>286</sup> Carter Center, “The Carter Center Congratulates the State of Georgia on a Successful Audit Process”, [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/democracy/georgia-audit-nov020.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/georgia-audit-nov020.pdf).

<sup>287</sup> Pennsylvania Statutes and Consolidated Statutes, Title 25 P.S. Elections & Electoral Districts 25 P.S. § 3154.

## *Nevada*

State law does not provide for automatic recounts, but any candidate defeated at any election can request a recount after the results have been certified.<sup>288</sup> The requestor bears the cost of the recount unless it changes the result, in which case the costs are refunded. No recount was conducted in Nevada as part of the presidential race.

## *Arizona*

State law requires counties to perform a hand count of ballots cast in at least 2% of all precincts or vote centers, as well as 1% of all early ballots.<sup>289</sup> This is a process of checking tabulation by hand against the tabulation conducted by machines. In addition, an automatic recount is conducted when the margin of victory is within one tenth of one percent (which it was not in 2020, therefore not triggering this provision).<sup>290</sup> A party or candidate cannot otherwise request a recount.

## *Wisconsin*

A presidential candidate can petition for a recount on the first business day following the canvass. The margin required is 1% in a race with more than 4,000 votes, and the deadline for completion is within 13 days of the order for the recount. On November 18, the President and Vice President petitioned the Wisconsin Elections Commission for recounts in Dane and Milwaukee counties on the basis of "mistakes and fraud."<sup>291</sup> Because the margin was greater than 0.25% of the total vote, the petitioner (Trump) was required to pay the costs of the recount. This recount affirmed the Biden-Harris win in the state.

## *Michigan*

A recount can be requested by a candidate within 48 hours of the completion of the canvas. The requesting party must have "a good-faith belief that but for fraud or mistake, the candidate would have had a reasonable chance of winning the election."<sup>292</sup> An elector can also petition for a recount, and the requester is responsible for costs associated with the recount unless the recount changes the election outcome, in which case the costs are refunded.<sup>293</sup> A recount is automatic if the margin of victory is less than 2,000 votes. Michigan law also allows for post-election audits, at the discretion of the Secretary of State,<sup>294</sup> and has been piloting risk-limiting audits since 2019. In an Op Ed on November 23, 2020, Michigan

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<sup>288</sup> Nevada Revised Statutes, NRS 293.403, <https://www.leg.state.nv.us/nrs/nrs-293.html>.

<sup>289</sup> 2016 Arizona Revised Statutes, Title 16 - Elections and Electors, § 16-602, <https://www.azleg.gov/arsDetail/?title=16>.

<sup>290</sup> 2016 Arizona Revised Statutes, Title 16 - Elections and Electors, § 16.661.

<sup>291</sup> "Recount Petition – the 2020 Election for President of the United States", <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Trump%20Campaign%20Recount%20Petition.pdf>.

<sup>292</sup> Michigan Election Law, Act 116 of 1954, section 168.879, <http://www.legislature.mi.gov/documents/mcl/pdf/mcl-act-116-of-1954.pdf>.

<sup>293</sup> Michigan Election Law, Act 116 of 1954, section 168.881.

<sup>294</sup> Michigan Election Law, Act 116 of 1954, section 168.879.

<sup>294</sup> Michigan Election Law, Act 116 of 1954, section 168.31a.

Secretary of State Jocelyn Benson confirmed that “following the certification of Michigan’s elections, our statewide risk-limiting audit will be paired with comprehensive local audits.”<sup>295</sup> This was conducted and affirmed the Biden-Harris win in Michigan.

b. Post-election Litigation

As of April 16, 2021, 100 post-election lawsuits had been filed in 15 states and the District of Columbia. Of these, 34 lawsuits dealt directly with the presidential election, and were filed in 8 states (Arizona, Georgia, Nevada, Michigan, New Mexico, Pennsylvania, Texas, Wisconsin) and the District of Columbia.<sup>296</sup> Key allegations are listed below:

*Arizona:*

The Trump campaign alleged that ballots with facial irregularities (e.g., apparent overvotes, stray markings, etc.) cast in-person on Election Day were illegally disqualified without additional review.<sup>297</sup> However, lawyers for the Trump campaign ultimately dropped the lawsuit on November 13.

*Georgia:*

The Trump campaign alleged that absentee/mail-in ballots received after the statutory receipt deadline had been illegally accepted and mixed with ballots received prior to the deadline.<sup>298</sup> The court dismissed the lawsuit on November 5, 2020.

*District of Columbia:*

The Michigan Welfare Rights Organization brought a claim against the Trump campaign, alleging that the campaign had been exerting pressure on state and local officials not to count or certify votes, and that this amounted to a violation of the federal Voting Rights Act. This case remains pending at October 22, 2021.

*Michigan:*

The Trump campaign alleged that an election challenger was illegally prevented from participating in the absentee/mail-in ballot review process.<sup>299</sup> The lower court declined to intervene, denying the plaintiffs' motion for relief. The Trump campaign also brought a

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<sup>295</sup> Detroit Free Press, “Benson pens oped to Michigan: The will of the people is clear – and facts will carry the day,” <https://www.freep.com/story/opinion/contributors/2020/11/23/benson-says-michigan-audit-presidential-election-after-votes-certified/6389371002/>.

<sup>296</sup> Ballotpedia, “Ballotpedia’s 2020 Election Help Desk: Tracking election disputes, lawsuits and recounts”, [https://ballotpedia.org/Ballotpedia%27s\\_2020\\_Election\\_Help\\_Desk:\\_Tracking\\_election\\_disputes,\\_lawsuits,\\_and\\_recounts](https://ballotpedia.org/Ballotpedia%27s_2020_Election_Help_Desk:_Tracking_election_disputes,_lawsuits,_and_recounts).

<sup>297</sup> *Donald J. Trump for President, Inc. v. Hobbs. Maricopa County Superior Court.*

<sup>298</sup> In re: enforcement of election laws and securing ballots cast of received after 7:00 P.M. on November 3, 2020. Court: Chatham County Superior Court.

<sup>299</sup> *Donald J. Trump for President, Inc. v. Benson.* Court: Michigan Court of Appeals (lower court: Michigan Court of Claims).

challenge against the Secretary of State alleging that Republican poll watchers were illegally prevented from observing the ballot counting process and that illegal ballots were counted over the objections of Republican challengers.<sup>300</sup> However, the complaint was voluntarily dismissed.

*Nevada:*

The Trump campaign questioned whether Clark County election officials could use artificial intelligence to verify mail-in ballot signatures and make copies of ballots whose originals could not be machine-processed. The Nevada Supreme Court declined to block a lower court's order on this question, allowing officials to continue using the aforementioned processing procedures. The Trump campaign subsequently withdrew its appeal.<sup>301</sup>

*Pennsylvania:*

The Trump campaign filed several lawsuits in Pennsylvania on various issues:

- i. Whether some absentee and mail-in ballots were accepted and counted in violation of state law, and whether those ballots should be stricken from the count. The District Court Judge dismissed the lawsuit with prejudice, noting that “this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state.” The Trump campaign appealed that dismissal to the United States Court of Appeals for the Third Circuit, which affirmed the District Court’s decision.<sup>302</sup>
- ii. Whether the Secretary of the Commonwealth illegally extended the deadline for mail-in voters to provide missing proof of identification after submitting their ballots. The judge ruled that the Secretary of the Commonwealth had illegally extended the deadline for mail-in voters to provide missing proof of identification after submitting their ballots, and barred election officials from counting ballots for which proof of identification was provided after the statutory deadline of November 9, 2020.<sup>303</sup>
- iii. Whether the Philadelphia County Board of Elections violated state law and the U.S. Constitution by declining to allow poll watchers for the Trump campaign and the Republican Party to observe the mail-in ballot counting process. The parties to the

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<sup>300</sup> *Donald J. Trump for President, Inc. v. Benson*. Court: United States District Court for the Western District of Michigan.

<sup>301</sup> *Kraus v. Cegavske*. Nevada Supreme Court (lower court: Clark County District Court).

<sup>302</sup> *Donald J. Trump for President, Inc. v. Boockvar*. United States District Court for the Middle District of Pennsylvania.

<sup>303</sup> *Donald J. Trump for President, Inc. v. Boockvar*. Pennsylvania Commonwealth Court.

lawsuit ultimately agreed to allow 60 observers each from the Democratic and Republican parties. The court dismissed the lawsuit as moot in light of this agreement.<sup>304</sup>

- iv. Whether Bucks County election officials illegally counted 2,251 absentee and mail-in ballots for various alleged deficiencies.<sup>305</sup> The judge dismissed the suit, writing in his opinion, "There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election."
- v. Whether Montgomery County election officials illegally counted approximately 600 absentee and mail-in ballots for which the outer envelope declaration had not been filled out. The court agreed with the Montgomery County Board of Election's interpretation of the Election Code, that the law does not require that voters provide their addresses on the declaration envelope.<sup>306</sup>
- vi. Whether candidates and their representatives can observe aspects of the canvassing process from within 6 feet of election workers. The state supreme court reversed a lower court's order that had directed election officials to allow candidates and their representatives to observe all aspects of the counting process from within six feet of election workers. As a result, the local election board's rule requiring observations to take place with at least six feet separating the observer from the election worker was allowed to stand.<sup>307</sup>
- vii. Whether the Bucks County Board of Elections violated state law by allowing the disclosure of voter identification information for mail-in ballots voided during the pre-canvass meeting prior to the close of polls. The court dismissed the petition.<sup>308</sup>
- viii. Whether a state supreme court order extending the mail-in ballot receipt deadline to November 6, 2020, overriding the statutory receipt deadline of November 3, 2020, was legal. Associate Justice Samuel Alito ordered county election officials to segregate and separately count mail-in ballots received between 8 p.m. on November 3, 2020, and 5 p.m. on November 6, 2020.<sup>309</sup>

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<sup>304</sup> *Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections*. United States District Court for the Eastern District of Pennsylvania.

<sup>305</sup> In re: canvass of absentee and mail-in ballots of November 3, 2020, general election. Bucks County Court of Common Pleas.

<sup>306</sup> In re: canvass of absentee and mail-in ballots of November 3, 2020, general election. Montgomery County Court of Common Pleas.

<sup>307</sup> In re: canvassing observation; Appeal of: Donald J. Trump for President, Inc. Pennsylvania Supreme Court (on appeal from the Pennsylvania Commonwealth Court; lower court: Philadelphia County Court of Common Pleas).

<sup>308</sup> In re: pre-canvass of absentee and mail-in ballots of November 3, 2020, general election. Bucks County Court of Common Pleas.

<sup>309</sup> *Republican Party of Pennsylvania v. Boockvar*. Supreme Court of the United States. No. 20A84 of November 6, 2020.

*Wisconsin:*

The Trump campaign questioned whether certain absentee/mail-in ballots were accepted illegally and, if so, whether those ballots should be set aside and omitted from the final count. Judge Stephen Simanek of the Milwaukee County Circuit Court dismissed the lawsuit from the bench, saying, "There is no credible evidence of misconduct or wide-scale fraud." The Wisconsin Supreme Court affirmed the judgment, and the Supreme Court of the United States declined the Trump campaign's motion for expedited consideration of the case.<sup>310</sup>

## **6. Executive Transition**

The transfer of executive authority in the United States is governed by the Presidential Transition Act of 1963, which has been amended various times since its passage.<sup>311</sup> The law mandates the General Services Administration (GSA) to provide office space and administrative support to Presidents-elect and Vice Presidents-elect, as well as pre-election space and support to major candidates. In line with requirements under the law, the White House Executive Office of the President sent a memo to the heads of all executive agencies in April, initiating the required process of naming points of contact to assist with transition efforts, developing transition materials and briefings, and developing succession plans.<sup>312</sup> For the pre-election period, the incumbent administration reported met all statutory deadlines for required transition activities.<sup>313</sup>

Section 4(D) of the Act provides that the Head of the GSA will initiate transition support when he or she "is able to determine the apparent successful candidates for the office of President and Vice President." Unfortunately, the Act provides no further guidance on how this determination is to be made, and therefore when it will take place. Traditionally, this process has commenced based on the concession by one candidate. However, the act of concession is a norm, not a legal requirement

In 2000, the GSA Administrator was criticized for delaying transition processes, first because neither candidate had conceded, and later citing pending litigation.<sup>314</sup> The 9/11 Commission later observed that the delay in presidential transition activities in 2000 may have undermined the readiness of the national security apparatus in the lead up to terrorist

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<sup>310</sup> *Trump v. Biden*, [https://www.supremecourt.gov/DocketPDF/20/20-882/164938/20201229165341814\\_No.%2020-\\_\\_PetitionForAWritOfCertiorari.pdf/](https://www.supremecourt.gov/DocketPDF/20/20-882/164938/20201229165341814_No.%2020-__PetitionForAWritOfCertiorari.pdf/).

<sup>311</sup> 3 U.S.C. § 102 note. The Act has been updated in the last two decades by the Presidential Transition Act of 2000 (P.L. 106-293), the Pre-Election Presidential Act of 2010 (P.L. 111-283), the Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Act of 2015 (P.L. 114-136), and the Presidential Transition Enhancement Act of 2019 (P.L. 116-121).

<sup>312</sup> Memorandum for The Heads of Executive Departments And Agencies, <https://www.whitehouse.gov/wp-content/uploads/2020/04/M-20-24.pdf>.

<sup>313</sup> Government Executive, "Despite President's Comments, Transition Efforts Required by Law are Underway", Sept. 30, 2020, <https://www.govexec.com/management/2020/09/despite-presidents-comments-transition-efforts-required-law-are-underway/168893/>.

<sup>314</sup> Ryan Goodman and Kate Shaw, "The GSA's Delay in Recognizing the Biden Transition Team and the National Security Implications", Just Security, November 10, 2020, <https://www.justsecurity.org/73317/the-gsas-delay-in-recognizing-the-biden-transition-team-and-the-national-security-implications/>.

attacks on September 11, 2011: “the 36-day delay cut in half the normal transition period. Given that a presidential election in the United States brings wholesale change in personnel, this loss of time hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees.”<sup>315</sup>

Because there is a short timeframe between the presidential election in November (set by statute) and the Presidential inauguration (set by the Constitution), there is pressure to initiate the transition process as quickly as possible. The non-partisan Advisory Board of the Center for Presidential Transition issued a statement on November 8 noting that “While there will be legal disputes requiring adjudication, the outcome is sufficiently clear that the transition process must now begin.”<sup>316</sup> The GSA Administrator signed the letter of ascertainment on 23 November, two weeks after Biden was projected as the winner of the electoral college. This initiated the post-election transition process.

## 7. Recommendations

- Standardized election rules for federal elections should be set out in federal law in order to provide consistency across states for federal elections, and to provide legal stability and certainty.
- The new Congress should pursue reforms that reduce the vulnerabilities of the current election dispute resolution system. In this regard, the House should consider the Supreme Court’s invitation to formulate a new coverage formula for the pre-clearance process, and should consider reforms to simplify and clarify the dispute procedures set out in the Electoral Count Act.
- States should consider further reforms to judicial recusal rules to strengthen the independence and impartiality of judges hearing election cases.
- 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.
- Where necessary, states should ensure that the provisions governing recounts and audits are clear and include timelines that allow these processes to be conducted prior to the federal safe harbor date. Reasonable time limits for election litigation should also be codified.
- The Presidential Transition Act should be amended, removing the power to determine the “apparent winner” from a political appointee and awarding it to a nonpartisan commission, following objective criteria that should be set out in the law. The Act should also specify that the transition process be initiated at the earliest

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<sup>315</sup> “The 9/11 Commission Report”, <https://www.9-11commission.gov/report/911Report.pdf>.

<sup>316</sup> <https://presidentialtransition.org/publications/message-from-the-center-advisory-board/>.

reasonable time, ideally as soon as the “apparent winner” has been determined, even if this is prior to the official certification of results.

## v. ELECTORAL BOUNDARIES

### 1. Introduction

Redistricting is a key element of the electoral process. As the population of a territory changes – in terms of its numbers and demographics – it is important to review the electoral division of that territory to ensure that voters are equally distributed and that electoral processes are truly representative.

The delimitation of electoral boundaries has been a hotly contested issue throughout American history<sup>317</sup> and remains so today. Because members of the House of Representatives of the United States Congress are elected in mutually exclusive geographic units, how lines are drawn in the electoral map will affect the fundamental nature of representation.<sup>318</sup> Overrepresenting some groups at the expense of others directly impacts the partisan control of Congress, and therefore the distribution of benefits and costs flowing from policy.

On Tuesday, November 3, 2020, General Elections were held in the United States for the offices of President and Vice President, 35 of the 100 seats in the United States Senate, all 435 seats in the House of Representatives and 13 state and territory governors. Regularly scheduled elections were held in 86 of the 99 state legislative chambers, along with contests for other state, local, district and judicial offices, and a variety of referenda.

This report focuses on the issue of redistricting as it concerns the election of the 435 Representatives to the Congress of the United States, touching briefly on the Electoral College which elects the President of the United States. Senators, who are elected within boundaries that do not change (the states), and contests for the sub-national races are not addressed in the report.

### 2. Legal Framework

Article 1, Section 4 of the United States Constitution<sup>319</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections. As a result, the legal framework for elections in the United States is highly decentralized and varies between and within states, with each state individually regulating how it manages the different aspects of its electoral system.

There are, however, laws that apply at the national level. They include four amendments to the United States Constitution<sup>320</sup> which stipulate that voting rights cannot be abridged on

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<sup>317</sup> The term gerrymandering, referring to the manipulation of boundaries for partisan gain, dates from the year 1812  
<sup>318</sup> Handley, Lisa and Bernard Grofman (2008). *Redistricting in Comparative Perspective*. Oxford: Oxford University Press.

<sup>319</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>320</sup> National Archives, “The Constitution: Amendments 11-27”, [https://www.archives.gov/founding-docs/amendments-11-27?\\_ga=2.129930764.107809335.1614006866-630143065.1614006866](https://www.archives.gov/founding-docs/amendments-11-27?_ga=2.129930764.107809335.1614006866-630143065.1614006866).

account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964). Several federal laws have also been enacted over the years to help protect the rights of American voters, including the Civil Rights Act of 1870,<sup>321</sup> the Voting Rights Act of 1965,<sup>322</sup> the National Voter Registration Act of 1993,<sup>323</sup> and the Help America Vote Act of 2002.<sup>324</sup>

With respect to boundary delimitation, federal level legislation is limited. The authority granted to states under Article 1, Section 4 of the Constitution to conduct federal elections, also extends to boundary delimitation – although this is not explicitly expressed. The Reapportionment Act of 1929<sup>325</sup> and the Voting Rights Act of 1965 also include provisions related to delimitation.

The Reapportionment Act caps the size of the House of Representatives at 435 seats and mandates that districts must be distributed according to state populations after each decennial census. Unlike the statute of 1911 that it replaced, the 1929 Reapportionment Act makes no mention of requirements that congressional districts be contiguous, compact, and equally populated, leaving ample discretion to states when drawing boundary delimitations.

Section 5 of the Voting Rights Act creates a preclearance requirement for certain states, meaning those states cannot implement a new district map unless the United States Attorney General or in the case of the District of Columbia, the United States District Court, certifies that the change does not discriminate against protected minorities.<sup>326</sup> The list of jurisdictions or "coverage formula" has changed since the Act was passed in 1965.

In 2010 – the year prior to the last redistricting exercise – the coverage formula included the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and areas with concentrated minorities in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. Figure 1 includes maps of the coverage formula used in 2010.

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<sup>321</sup> Yale Law School, "The Avalon Project: Civil Rights Act; July 2, 1964",

[https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp). The Act was amended in 1957, 1960 and 1964.

<sup>322</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965",

[https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>323</sup> Cornell Law School Legal Information Institute, 52 U.S. Code Chapter 205 - National Voter Registration",

<https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>324</sup> U.S. Election Assistance Commission, "Help America Vote Act",

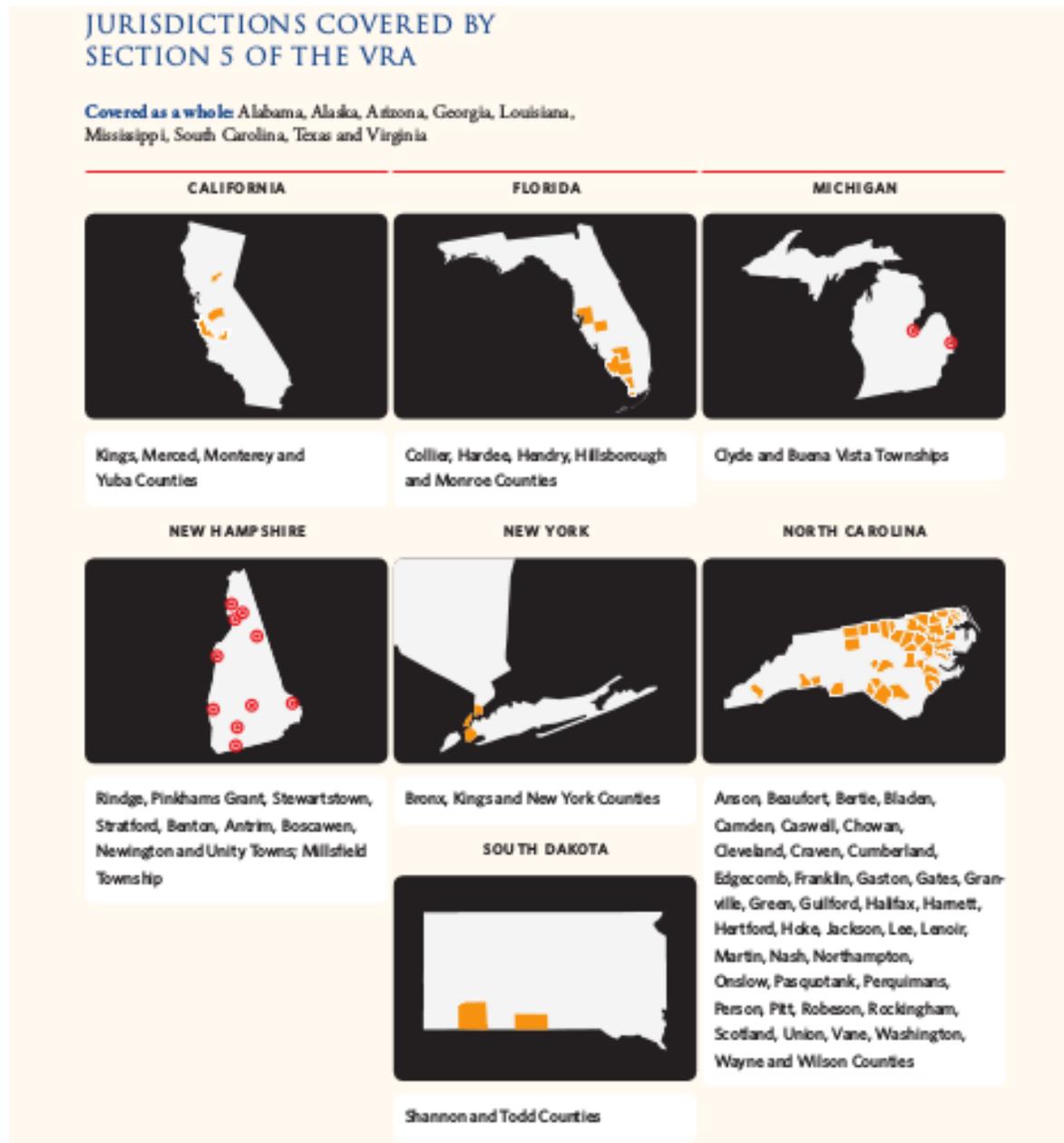
[https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

<sup>325</sup> Library of Congress, "Seventy-First Congress, Sess. I. Ci. 28. 1929 - An Act To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress",

<https://www.loc.gov/law/help/statutes-at-large/71st-congress/session-1/c71s1ch28.pdf>.

<sup>326</sup> Justin Levitt and Erika Wood, A Citizen's Guide to Redistricting", 2010, New York: Brennan Center for Justice-NYU School of Law.

**Figure 1: Jurisdictions requiring Preclearance in 2010**



Source: Justin Levitt and Erika Wood, *A Citizen's Guide to Redistricting*, 2010, New York: Brennan Center for Justice-NYU School of Law.

In 2013, in *Shelby County v. Holder*,<sup>327</sup> the United States Supreme Court struck down the coverage formula as unconstitutional, reasoning that conditions that led to systematic voting discrimination in 1965 have changed fundamentally.<sup>328</sup> Without a coverage formula, Section 5 becomes unenforceable in 2021.

<sup>327</sup> *Shelby County, Alabama v Holder, Attorney General*, 570 US 529 (2013), [https://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf).

<sup>328</sup> Ballotpedia, "Shelby County v Holder", [https://ballotpedia.org/Shelby\\_County\\_v.\\_Holder](https://ballotpedia.org/Shelby_County_v._Holder).

### 3. Timeframe for Redistricting

Federal redistricting in the United States takes place the year after the population census, which, since 1790, has been conducted every ten years in years ending in zero. Congressional apportionment and redistricting last took place in 2011, at which time the district maps used for the 2020 House of Representatives elections, as well as the intervening elections in 2012, 2014, 2016, and 2018, were drawn. Boundary delimitations will be re-drawn once more in 2021 for the 2022 mid-term elections.

Unlike evaluations of other aspects of the electoral process – such as the organization of elections and access to justice – which address events taking place as the actual elections unfold – redistricting involves inspecting actions which took place almost a decade in the past, when the current map was drawn, and actions that will take place in the future, when maps are redrawn.

### 4. Reapportionment

Prior to the delimitation of boundaries, seats for each state in the House of Representatives must be apportioned. The Reapportionment Act of 1929 capped the number of House seats at 435, which Congress must distribute among the 50 states according to their relative populations. Each state must have a minimum of at least one seat. Congress has used different apportionment formulas over the years in an effort to distribute seats equitably in accordance with states' populations. The use of different formulas can impact not only which states win and which lose, but also the composition of Congress.<sup>329</sup>

Congress has used the “Method of Equal Proportions” for apportionment since 1941.<sup>330</sup> If this method is used again in 2021, as is likely to be the case, population projections suggest which states might win and which might lose seats in the House of Representatives, as indicated in Table 1. In this regard, reapportionment will also impact states' relative weights in the Electoral College for the 2024 presidential election.

In general, western and southern states are expected to accrue their delegations in the House of Representatives, with Texas and Florida expecting the most gains. Since apportionment is a constant-sum game, what these states gain, midwestern and eastern states must lose.

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<sup>329</sup> Michel L. Balinski and H. Peyton Young, “Fair representation: Meeting the ideal of one man, one vote, 2nd edition”, Washington D.C.: Brookings, 2001. See also George G. Szpiro, “Numbers Rule: The Vexing Mathematics of Democracy from Plato to the Present”, Princeton NJ: Princeton University Press, 2010.

<sup>330</sup> The US Census Bureau explains that this method assigns seats in the House of Representatives according to a "priority" value. The priority value is determined by multiplying the population of a state by a "multiplier." Each of the 50 states is given one seat out of the current total of 435. The next, or 51st seat, goes to the state with the highest priority value and becomes that state's second seat. This continues until all 435 seats have been assigned to a state. See <https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html>

**Table 1: Expected Reapportionment of the U.S. House of Representatives in 2021, Based on Population Projections**

States expected to lose seats (change)	States expected to win seats (change)
Alabama (-1)	Arizona (+1)
California (no change or -1)	Colorado (+1)
Illinois (-1)	Florida (+2)
Michigan (-1)	Montana (+1)
Minnesota (no change or -1)	North Carolina (+1)
New York (-2)	Oregon (+1)
Ohio (-1)	Texas (+3)
Pennsylvania (-1)	
Rhode Island (-1)	
West Virginia (-1)	

**Source: Kimball W. Brace, “Arizona Gains Rhode Island’s Seat With New 2018 Census Estimates; But Greater Change Likely by 2020”, Election Data Services, December 19, 2018 ([www.electiondataservices.com](http://www.electiondataservices.com)).**

## 5. Modes of Boundary Delimitation

With exceptions, discussed below, 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. Otherwise, lawmakers must accommodate the governor’s objections.

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. A party with unified control of the elected branches needs to make no concessions to the other party. Split control of the branches or the chambers of the assembly, open room for bipartisan negotiation – and, presumably, neater representation.

There have been efforts in some US states to reform the redistricting process in order to depoliticize this area of the electoral process. Table 2 lists the mode of redistricting utilized in the 50 states. There are three general groups. The first group consists of the seven smallest states, which elect a single member of the House of Representatives (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming). In these jurisdictions, the whole state serves as a district-at-large, and therefore requires no boundary delimitation. The second group, comprising eight states (Arizona, California, Colorado, Hawaii, Idaho, Michigan, Virginia, and Washington) relies on bipartisan commissions for redistricting instead of the legislative process. In these states, experts, not politicians, are responsible for boundary delimitation.

The remaining 35 states conduct redistricting through the legislative process. In two of those states (Connecticut and North Carolina) the governor has no authority to veto the map, which is drawn by lawmakers only. In another five states (Alabama, Indiana, Kentucky, Tennessee, and West Virginia) the governor’s veto can be overridden by a majority.

**Table 2: 2021 Congressional Redistricting Processes**

State	Redistricting Mode	State Government in 2021	Congressional House Seats
Alabama	Legislative process (weak gov. veto)	Unified Republican	7
Alaska	No redistricting	Unified Republican	1
Arizona	Bipartisan commission (since 2000)	Unified Republican	9
Arkansas	Legislative process	Unified Republican	4
California	Bipartisan commission (since 2010)	Unified Democratic	53
Colorado	Bipartisan commission (since 2018)	Unified Democratic	7
Connecticut	Legislative process (no gov. veto)	Unified Democratic	5
Delaware	No redistricting	Unified Democratic	1
Florida	Legislative process	Unified Republican	27
Georgia	Legislative process	Unified Republican	14
Hawaii	Bipartisan commission (since 1992)	Unified Democratic	2
Idaho	Bipartisan commission (since 1994)	Unified Republican	2
Illinois	Legislative process	Unified Democratic	18
Indiana	Legislative process (weak gov. veto)	Unified Republican	9
Iowa	Legislative process	Unified Republican	4
Kansas	Legislative process	Split between the parties	4
Kentucky	Legislative process (weak gov. veto)	Split between the parties	6
Louisiana	Legislative process	Split between the parties	6
Maine	Legislative process	Unified Democratic	2
Maryland	Legislative process	Split between the parties	8
Massachusetts	Legislative process	Split between the parties	9
Michigan	Bipartisan commission (since 2018)	Split between the parties	14
Minnesota	Legislative process	Split between the parties	8
Mississippi	Legislative process	Unified Republican	4
Missouri	Legislative process	Unified Republican	8
Montana	No redistricting	Unified Republican	1
Nebraska	Legislative process	Unified Republican	3
Nevada	Legislative process	Unified Democratic	4
New Hampshire	Legislative process	Unified Republican	2
New Jersey	Legislative process	Unified Democratic	12
New Mexico	Legislative process	Unified Democratic	3
New York	Legislative process	Unified Democratic	27
North Carolina	Legislative process (no gov. veto)	Unified Republican	13
North Dakota	No redistricting	Unified Republican	1
Ohio	Legislative process	Unified Republican	16

State	Redistricting Mode	State Government in 2021	Congressional House Seats
Oklahoma	Legislative process	Unified Republican	5
Oregon	Legislative process	Unified Democratic	5
Pennsylvania	Legislative process	Split between the parties	18
Rhode Island	Legislative process	Unified Democratic	2
South Carolina	Legislative process	Unified Republican	7
South Dakota	No redistricting	Unified Republican	1
Tennessee	Legislative process (weak gov. veto)	Unified Republican	9
Texas	Legislative process	Unified Republican	36
Utah	Legislative process	Unified Republican	4
Vermont	No redistricting	Split between the parties	1
Virginia	Bipartisan commission (since 2020)	Unified Democratic	11
Washington	Bipartisan commission (since 1983)	Unified Democratic	10
West Virginia	Legislative process (weak gov. veto)	Unified Republican	3
Wisconsin	Legislative process	Split between the parties	8
Wyoming	No redistricting	Unified Republican	1

Source: Prepared with information from <https://redistricting.ills.edu> and state governments' web pages

**Table 3: States and Congressional Seats by Party and 2021 Redistricting Process<sup>331</sup>**

	Number of States	Democratic Seats	Republican Seats	Total
Politicized process				
- Republican trifecta	18	51	124	175
- Democratic trifecta	9	58	20	78
- split	8	35	32	67
Bipartisan commission	8	75	33	108
At-large district (no redistricting)	7	1	6	7
<b>Total</b>	<b>50</b>	<b>220</b>	<b>215</b>	<b>435</b>

Source: Prepared with information from <https://redistricting.ills.edu>, state governments' web pages and [nytimes.com/interactive/2020/11/03/us/elections/results-house.html](https://www.nytimes.com/interactive/2020/11/03/us/elections/results-house.html).

## 6. Over- and Under-Representation

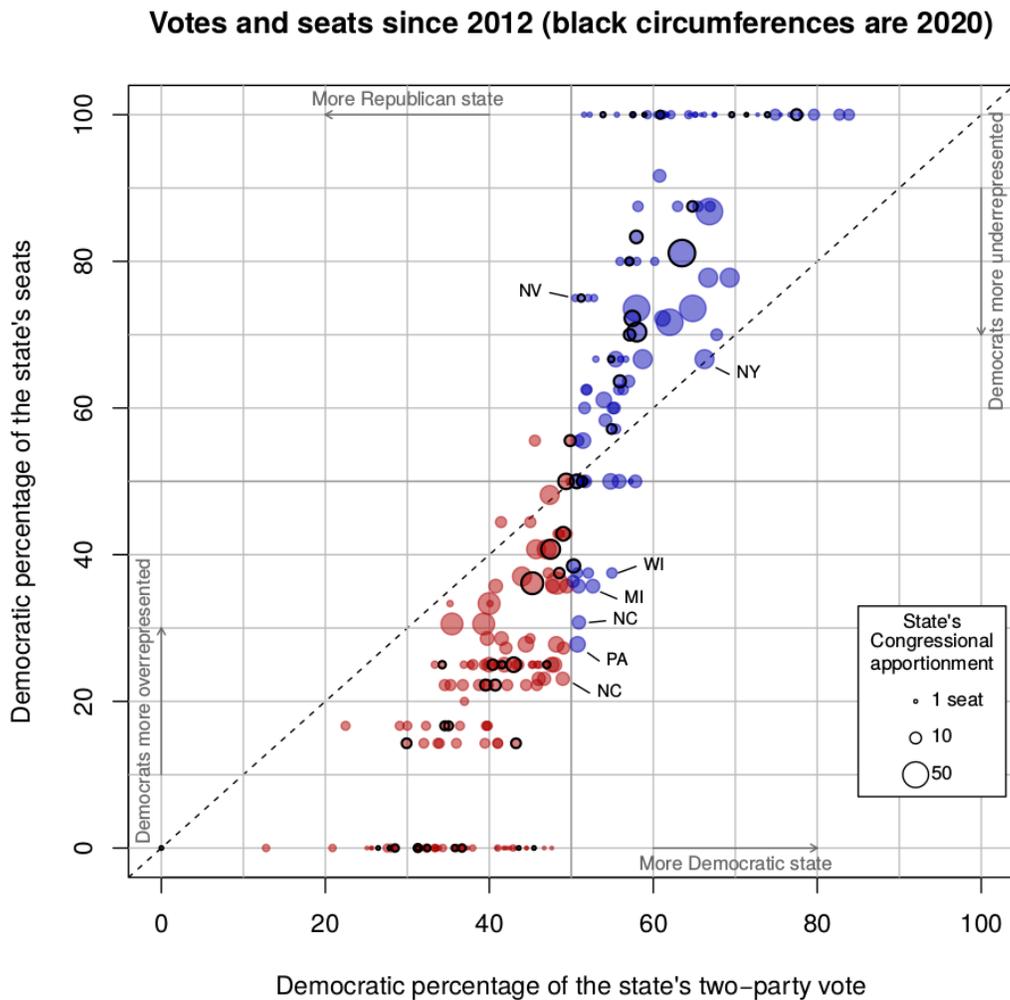
A standard assessment of district boundary maps is by means of votes and seats plots. Such diagrams capture clearly how congressional district boundaries convert votes into seats by systematically comparing the vote percentage that a party received and the share of House seats it won across states. In the diagram, by virtue of the two-party system, Republicans are the mirror image of Democrats and vice-versa.

Figure 2 shows the votes and seats plot for 2012-2020; the full period during which electoral boundary maps remained unchanged. Each point in the plot is one state in a given year.

<sup>331</sup> Trifectas are states where the governor and majorities in both chambers of the legislature are from the same party (and include two cases where the governor cannot veto the redistricting, regardless of the governor's party).

States appears five times in the diagram; once for every congressional election conducted in the period (the black circumferences identify the 2020 races). The point size increased with the number of seats apportioned to the state in Congress, with the result that California, with 53 seats in the House, has the largest points (visible in the upper right quadrant), whereas Montana, with a single seat, has tiny points (situated in the bottom line). Points are colored blue for state-years in which Democrats won a vote majority, and red when Republicans gained the majority.

**Figure 2: State Delegations to the House of Representatives in Five Election Years held with the Current District Maps<sup>332</sup>**



Source: Prepared with data from the Federal Elections Commission, [ballotpedia.org](http://ballotpedia.org), [electproject.org](http://electproject.org), and [nytimes.com/interactive/2020/11/03/us/elections/results-house.html](http://nytimes.com/interactive/2020/11/03/us/elections/results-house.html).

The dotted, diagonal line in the plot shows what a seat distribution that is perfectly proportional to votes won would look like. Even if exceptions exist – such as New York in

<sup>332</sup> Each point in a diagram is a state in one even year between 2012 and 2020, inclusive. Point diameters are proportional to the number of representatives the state sent to Congress in the period.

2016, when Democrats won 67 percent of seats with 66 percent of votes – it is not expected that the distribution of seats to votes in the United States would approximate this ideal dotted line. It is well documented that simple plurality elections in single-member districts grant a substantial seat bonus to the winning party.<sup>333</sup>

## **7. The Role of Gerrymandering**

Understanding distortions in votes to seats conversion engages the concept of vote wasting. A party's votes are wasted when they are not being converted into seats. One way the problem arises is when the party wins a seat by too large a margin and those extra votes could help elect another candidate if they could be counted in that candidate's district. Thus, from the party's perspective, the votes are wasted. The problem also arises when the party's support is spread too thinly across several districts, amounting to no victories unless they could somehow be grouped into a single constituency. Vote wasting leads parties to fewer seats than they potentially could have won.

Vote wasting can be intentional, accidental, or both.<sup>334</sup> It is intentional through partisan gerrymandering, by manipulating district lines in order to focus vote wasting on the opposition, denying it seats it could otherwise have won. It is accidental when it arises as a result of where voters live, when social, economic and other forces result in the geographic concentration of voters of like mind or propensity.

Ultimately, it is difficult to determine the influence of gerrymandering, and other factors that occur simultaneously, on fair representation. This is not to say that a significant reduction or removal of political manipulation of electoral boundaries is not desirable. But it serves as a reminder that even the most public-spirited independent map maker will find it near impossible to remove every source of bias in electoral boundary maps in first past the post systems.

## **8. Judicialization**

Another distinctive aspect of electoral boundary delimitation in the United States is judicialization. Actors who oppose electoral boundaries routinely challenge them, or the process itself, in court. Judicial supervision can serve as an important check to undue influence in politicized redistricting, but there is no guarantee of this.

## **9. Recommendations**

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<sup>333</sup> Edward R. Tufte, "The Relationship between Seats and Votes in Two-Party Systems", in *American Political Science Review*, 1973, 67:540-554; Rein Taagepera, "Seats and Votes: A generalization of the cube law of elections", in *Social Science Research*, 1973, 2(3):257-275.

<sup>334</sup> Bernard Grofman, William Koetzle, and Thomas Brunell, "An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares", 1997, in *Electoral Studies* 16(4).

- Promoting reform that delegates redistricting to bipartisan or non-partisan commissions instead of state legislators. Successful reform cases, such as California, Virginia 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.
- Enhanced access for stakeholders (political parties, organized interests, advocacy groups) and the general public, to encourage greater transparency and accountability in the design of electoral maps, and ensure greater participation, trust and certainty regarding the boundary delimitation process.

## vi. POLITICAL FINANCE

### 1. Introduction

The role of money in elections is key, given its potential to impact the equity and undermine the integrity of the electoral process. The OAS Manual on Observing Political-Electoral Financing Systems, notes that the right of all citizens to universal suffrage and access to power carries with it an expectation of equity and transparency in political-electoral financing systems; conditions that are necessary for the full and equal enjoyment of political rights by all citizens.<sup>335</sup> Article 5 of the Inter-American Democratic Charter<sup>336</sup> also underscores that systems for financing electoral campaigns must be ‘balanced and transparent’.

While the legal framework for political finance in the United States was initially characterized by a regulatory approach to managing party and campaign expenditure and behavior, in order to moderate the impact of money in elections, it has been substantially influenced by deregulation and free speech.<sup>337</sup> Legal rulings have favored the defense of the First Amendment and the Supreme Court, which has played an important role in shaping campaign finance law since 1976,<sup>338</sup> has interpreted restrictions on political financing as detrimental to political rights and free speech.<sup>339</sup> As a result, the U.S. political finance system relies mostly on private financing, whether from individuals, political action committees (PACs) or other entities. This in turn has meant increased contributions and spending along with the proliferation of interest and outside groups.

While there are some limits to contributions, there are no spending limits. According to data filed with the Federal Elections Commission (FEC), the 2020 elections were 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.<sup>340</sup>

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<sup>335</sup> OAS, “Observing Political-Electoral Financing Systems: A Manual for OAS Electoral Observation Missions”, [https://www.oas.org/es/sap/deco/pubs/manuales/MOE\\_Manual\\_e.PDF](https://www.oas.org/es/sap/deco/pubs/manuales/MOE_Manual_e.PDF).

<sup>336</sup> OAS, “Inter-American Democratic Charter”, [http://www.oas.org/en/democratic-charter/pdf/demcharter\\_en.pdf#page=10](http://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf#page=10).

<sup>337</sup> Alexander, H.E. (2005). “Comparative Analysis of Political Party and Campaign Financing in the United States and Canada”. In Zovatto, D. and Griner, S., eds. (2005). Funding of Political Parties and Election Campaigns in the Americas. Organization of American States.

<sup>338</sup> Briffault, R. (2016), Chapter 10 “The United States”. In Norris, P. and Abel van Es, A. (2016). Checkbook Elections? Political Finance in Comparative Perspective. Oxford University Press. P. 180.

<sup>339</sup> “The First Amendment of the U.S. Constitution protects freedom of speech and association, and the Supreme Court has long treated speech and association concerning political issues and elections as at the core of the First Amendment”. From Briffault, R. (2016), Chapter 10 “The United States”. In Norris, P. and Abel van Es, A. (2016). Checkbook Elections? Political Finance in Comparative Perspective. Oxford University Press. P. 180.

<sup>340</sup> Open Secrets, “Most expensive ever: 2020 election cost 14.4 billion”, <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/>

## 2. Legal and Regulatory Framework

Article 1, Section 4 of the United States Constitution<sup>341</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections. As a result, the legal framework for elections in the United States is highly decentralized and varies between and within states, with each state individually regulating how it manages the different aspects of its electoral system.

There are, however, laws that apply at the national level. They include four amendments to the United States Constitution<sup>342</sup> which stipulate that voting rights cannot be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964). Several federal laws have also been enacted over the years to help protect the rights of American voters, including the Civil Rights Act of 1870,<sup>343</sup> the Voting Rights Act of 1965,<sup>344</sup> the National Voter Registration Act of 1993,<sup>345</sup> and the Help America Vote Act of 2002.<sup>346</sup>

With respect to political finance, the first efforts to design campaign finance legislation date back to 1907, when Congress passed the Tillman Act; although it was not until the enactment of the Taft-Hartley Act in 1947 that limits were placed on corporate, bank and labor contributions and the ability of spending to influence elections. The regulatory system began to have a greater impact on elections, as well as candidate and party behavior following the enactment of the 1971 Federal Election Campaign Act (FECA).<sup>347</sup> The 1971 laws made obligatory the reporting of campaign contributions and expenditures, limited spending on media ads, and approved a presidential public funding program.

Amendments to FECA in 1974 represented a turning point in the system, imposing limits on various types of expenditures for candidates running in federal elections. The 1974 amendments were also an important milestone for campaign finance regulation, creating the bipartisan Federal Election Commission (FEC), the agency in charge of oversight and

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<sup>341</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>342</sup> National Archives, “The Constitution: Amendments 11-27”, [https://www.archives.gov/founding-docs/amendments-11-27?\\_ga=2.129930764.107809335.1614006866-630143065.1614006866](https://www.archives.gov/founding-docs/amendments-11-27?_ga=2.129930764.107809335.1614006866-630143065.1614006866).

<sup>343</sup> Yale Law School, “The Avalon Project: Civil Rights Act; July 2, 1964”, [https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp). The Act was amended in 1957, 1960 and 1964.

<sup>344</sup> Yale Law School, “The Avalon Project: Voting Rights Act of 1965; August 6, 1965”, [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>345</sup> Cornell Law School Legal Information Institute, 52 U.S. Code Chapter 205 - National Voter Registration”, <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>346</sup> U.S. Election Assistance Commission, “Help America Vote Act”, [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

<sup>347</sup> Ballotpedia, “Federal campaign finance laws and regulations”, [https://ballotpedia.org/Federal\\_campaign\\_finance\\_laws\\_and\\_regulations#Federal\\_Election\\_Campaign\\_Act\\_of\\_1971](https://ballotpedia.org/Federal_campaign_finance_laws_and_regulations#Federal_Election_Campaign_Act_of_1971).

enforcement of the law. Before this, several entities<sup>348</sup> monitored compliance and accountability, which made the enforcement of campaign finance regulations cumbersome. Two years after the FECA 1974 amendments laid out an initial contribution and spending limits framework at the federal level, the law was challenged on the grounds that it violated the First Amendment guarantees of free speech.<sup>349</sup> In *Buckley v. Valeo*<sup>350</sup> the plaintiffs argued, among other issues, that without spending money, political expression was hampered. On January 30, 1976 the U.S. Supreme Court ruled that contributions and spending restrictions "*necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached [as] virtually every means of communicating ideas in today's mass society requires the expenditure of money.*"<sup>351</sup> While the Court upheld FECA's contribution limits, disclosure requirements and public funding for presidential races, it struck down FECA's limits on spending, ruling that they constituted "*direct and substantial restraints on the quantity of political speech*".<sup>352</sup>

In response to *Buckley v. Valeo*, Congress revised campaign finance legislation. The amendments that repealed expenditure limits and revised other governance provisions to FECA were enacted on May 11, 1976. Congress adopted further reforms to FECA in 1979, which according to the FEC contributed to the simplification of reporting requirements, incentivized party activity at the State and local levels, and increased funding for presidential nomination conventions.<sup>353</sup> The 1979 amendments also exempted from regulation certain low-cost campaign practices.<sup>354</sup> The rise of PACs<sup>355</sup> was a key development after 1979.

A second major thrust in campaign finance reform at the federal level began with the enactment of the Bipartisan Campaign Reform Act (BCRA),<sup>356</sup> also known as the McCain-Feingold law, in 2002. BCRA basically introduced "twin bans": it proscribed soft money contributions to federal candidates and national political party organizations and banned corporate and labor union funding of electioneering communications (issue advertising or issue advocacy).

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<sup>348</sup> The three entities in charge of oversight before FECA 1974 were: Clerk of the House; the Secretary of the Senate; and the Comptroller General of the United States Accounting Office (GAO).

<sup>349</sup> On January 2, 1975 Senator James L. Buckley of New York, former Senator Eugene McCarthy, and others filed the suit alleging that the FECA and the Presidential Election Campaign Fund Act were unconstitutional on various grounds.

<sup>350</sup> Cornell Law School Legal Information Institute, "James L. BUCKLEY et al., Appellants, v. Francis R. VALEO, Secretary of the United States Senate, et al", <https://www.law.cornell.edu/supremecourt/text/424/1>.

<sup>351</sup> Federal Election Commission, "Buckley v. Valeo", <https://www.fec.gov/legal-resources/court-cases/buckley-v-valeo/>.

<sup>352</sup> FEC, "Buckey v. Valeo".

<sup>353</sup> FEC, "The Federal Election Campaign Laws: A Short History", <https://transition.fec.gov/info/appfour.htm>.

<sup>354</sup> Briffault, R. (2016), Chapter 10 "The United States". In Norris, P. and Abel van Es, A. (2016). *Checkbook Elections? Political Finance in Comparative Perspective*. Oxford University Press. P. 181. Briffault explains that low-cost campaign practices include the use of volunteers, grass-roots campaign paraphernalia, voter registration and get-out-the-vote activities.

<sup>355</sup> From Briffault, R. (2016), Chapter 10 "The United States". In Norris, P. and Abel van Es, A. (2016). *Checkbook Elections? Political Finance in Comparative Perspective*. Oxford University Press. P. 181. PACs are defined as "business, trade, labor, and ideological groups that could collect contributions from their members (and corporations from their officers, directors, and shareholders) and then make donations to candidates and parties.

<sup>356</sup> Cornell Law School Legal Information Institute, "BCRA", <https://www.law.cornell.edu/wex/bcra>.

As a result of the proscriptions introduced, 527s political committees,<sup>357</sup> which spent soft money beyond contribution and spending limits, started to emerge. In *McConnell v. FEC* in 2003,<sup>358</sup> the Supreme Court upheld BCRA. In a 5-4 vote, the Court ruled that bans on unlimited donations were not a violation of free speech. With BCRA and McConnell, the trend appeared to be towards restrictions on campaign financing.

However, the trend shifted soon after in favor of the First Amendment and the right of political expression, and against restrictions. For instance, the 2007 Supreme Court ruling in *Wisconsin Right to Life v. FEC*, which declared unconstitutional the electioneering communication financing restrictions applied to the WRTL,<sup>359</sup> is an example, and a legal precedent, in which the right to political expression overtook financing restrictions. The Court argued that there was “no sufficiently compelling governmental interest to justify burdening WRTL’s speech”.<sup>360</sup>

Then came the landmark *Citizens United v. FEC*<sup>361</sup> ruling in 2010, which overturned FECA’s and BCRA’s limits on corporate and labor union independent spending in campaigns. By far, the Citizens United case is the most important decision on campaign finance in the United States. In a 5-4 vote, the Supreme Court ruled unconstitutional governmental limits on spending by corporations, unions, and other groups for political campaigns arguing that it is these groups’ rights to support candidates of their preference. Before Citizens United, unions and corporations were limited in their ability to fund electioneering communications within 30 days of an election. The ruling allowed them to advocate for or against candidates at any time. In sum, the Citizens United ruling stated that anonymous donations and independent expenditures are free speech. As a result, super PACs, which can raise unlimited funds from both corporations and individuals,<sup>362</sup> proliferated.<sup>363</sup>

A recent milestone in campaign finance legislation is the 2014 *McCutcheon v. FEC* ruling,<sup>364</sup> which followed the ongoing trend in favor of the First Amendment. In this case, the Supreme Court struck down limits on contributions an individual could provide to federal candidates. By a vote of 5-4, the Court concluded that aggregate contribution limits during a two-year period were unconstitutional under the First Amendment. The decision resulted in the removal of the cap on individual contributions, but not on the individual contributions to federal candidate campaigns, PACs or party committees. According to the FEC, as of 2014, individuals could contribute up to \$2,600 per election to a federal candidate; \$10,000 per

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<sup>357</sup> Ballotpedia, “527 group”, [https://ballotpedia.org/527\\_group](https://ballotpedia.org/527_group).

<sup>358</sup> Cornell Law School Legal Information Institute, “McConnell, United States Senator, et al. v. Federal Election Commission et al”, <https://www.law.cornell.edu/supct/html/02-1674.ZS.html>.

<sup>359</sup> FEC, “Wisconsin Right to Life, Inc. v. FEC”, <https://www.fec.gov/legal-resources/court-cases/wisconsin-right-to-life-inc-v-fec/>.

<sup>360</sup> FEC, “Wisconsin Right to Life, Inc. v. FEC”.

<sup>361</sup> FEC, “Citizen’s United v. FEC”, <https://www.fec.gov/legal-resources/court-cases/citizens-united-v-fec/>

<sup>362</sup> Scott-Sheets, J. (2016). “Public financing is available for presidential candidates. So what’s not to like about free money?”. *OpenSecrets Blog*. <https://www.opensecrets.org/news/2016/04/public-financing-is-available-for-presidential-candidates-so-whats-not-to-like-about-free-money/>.

<sup>363</sup> Briffault, R. (2016), Chapter 10 “The United States”. In Norris, P. and Abel van Es, A. (2016). *Checkbook Elections? Political Finance in Comparative Perspective*. Oxford University Press. P. 183.

<sup>364</sup> FEC, “McCutcheon, et al. v. FEC”, <https://www.fec.gov/legal-resources/court-cases/mccutcheon-et-al-v-fec/>.

calendar year to a state party committee; \$32,400 per calendar year to a national party committee; and \$5,000 per calendar year to a PAC.<sup>365</sup>

Table 1 summarizes the milestones in campaign finance legislation from 1971 to 2014, as well as the trend of each milestone in terms of political expression versus restrictions and regulation versus deregulation.

**Table 1: Campaign Finance Milestones**

Year	Campaign Finance Reforms	Trend towards Free Speech or Restrictions?	Trend towards Regulation or Deregulation?
1971	Federal Election Campaign Act (FECA)	Restrictions on contributions and spending	Regulation
1974	Amendments to FECA	Restrictions on contributions and spending	Regulation
1976	<i>Buckley v. Valeo</i> – Amendments to FECA	Free speech, on spending. Restrictions on contributions	Mixed. Deregulation on spending
1979	Amendments to FECA	N/A	N/A
2002	Bipartisan Campaign Reform Act (BCRA)	Restrictions on contributions and spending	Regulation
2003	<i>McConnell v. FEC</i>	Restrictions on contributions and spending	Regulation
2007	<i>FEC v. Wisconsin Right to Life</i>	Free Speech, on spending	Deregulation on spending
2010	<i>Citizens United v. FEC</i>	Free Speech, on spending	Deregulation on spending
2014	<i>McCutcheon v. FEC</i>	Free Speech, on contributions	Deregulation on contributions

Source: Prepared by the OAS Mission with information drawn from sources cited in the text.

As a result of the previously explained legal changes in federal campaign finance, there are currently some limits and bans on contributions. In addition, parties are subject to limits in relation to expenditure made in coordination with candidates running for federal office, but independent expenditures have no limits. In the case of candidates, expenditure limits only apply if they accept public funding. Major candidates and nominees have declined public funding in past years.

Tables 2 and 3 provide further details on the current contribution bans and limits.

**Table 2: Current contribution bans and limits on private income**

Type of Ban/Limit	Current Status	Notes
Ban on donations from foreign interests to political parties.	Yes	Both direct and indirect donations of cash or other things of value are banned, as well as promising or implying donations.
Ban on donations from foreign interests to candidates.	Yes	Both direct and indirect donations of cash or other things of value are banned, as well as promising or implying donations.

<sup>365</sup> FEC, “*McCutcheon, et al. V. FEC*”.

Type of Ban/Limit	Current Status	Notes
Ban on corporate donations to political parties and/or candidates.	Yes	Corporations and labor organizations may however establish Political Action Committees (PACs) where they can raise voluntary contributions from a restricted class of individuals and use those funds to support federal candidates and political committees.
Ban on donations from corporations with government contracts or partial government ownership to political parties.	Yes	Donations, personal services and material, supplies or equipment cannot be donated by a person or company that has entered a contract with a government department or agency.
Ban on donations from Trade Unions to political parties.	Yes	It is unlawful for labor organizations to make a contribution or expenditure in connection with any election to any political office.
Ban on anonymous donations to political parties.	No, but specific limit	If an anonymous cash contribution over \$50 is received, the amount must be used for some purpose unrelated to federal elections.
Ban on anonymous donations to candidates.	No, but specific limit	If an anonymous cash contribution over \$50 is received, the amount must be used for some purpose unrelated to federal elections.
Ban on state resources being given to or received by political parties or candidates (excluding regulated public funding)?	Yes	State resources cannot be used to finance, directly or indirectly, any activity influencing the outcome of any election to Federal office.
Ban on any other form of donation.	Yes	There is a ban on donations over \$100 in cash, on donations from a national bank and on donations in the name of another.
Limit on the amount a donor can contribute to a political party over a time period (not election specific).	Yes. There are different limits depending on the type of the contributor.	
Limit on the amount a donor can contribute to a political party in relation to an election.	Regular limit applies.	The existing limits for donations to national party committees are per calendar year.
Limit on the amount a donor can contribute to a candidate.	Yes. There are different limits depending on who the contributor is.	

Source: IDEA International, "Bans and Limits on Private Income in the United States", <https://www.idea.int/data-tools/country-view/295/55>

**Table 3: Current Spending Limits**

Type of ban/limit	Current status	Notes
Ban on vote buying.	Yes	
Bans on state resources being used in favor or against a political party of candidate.	Yes	Federal employees face limits to their involvement in election campaigns
Limits on the amount a political party can spend.	Yes, the limit for coordinated expenditure is an amount equal to 2 cents multiplied by the US Voting Age Population (VAP). However, Independent expenditures are excluded	Parties are subject to limits in relation to expenditure made in coordination with candidates (presidential and for federal office). However, there are no such limits for expenditure made without such coordination (independent spending)
Limits on the amount a candidate can spend.	No	The expenditure limits is only applicable to candidates (presidential and for federal office) who accept public funding in the general election. Candidates who accept public funding must limit spending to the amount of the grant

Source: IDEA International, “Regulations of Spending in the United States”, <https://www.idea.int/data-tools/country-view/295/55>

### 3. Equity in the 2020 Campaign

#### a. Promotion of Public Funding

In the United States, candidates seeking nomination by a political party in the Presidential elections are eligible for public funding. Campaigns for the Senate or House are not.<sup>366</sup> Direct public funding is available for political parties, but its use is limited to financing party convention committees and candidates. There is no free or subsidized access to the media for either political party or candidates. While indirect public funding is possible in the case of 527s organizations, the law does not permit these organizations to coordinate their activities with a candidate or a party.

Presidential candidates in primaries and general elections who accept public funding are obliged to limit spending to the amount of their grant and not seek or accept private contributions - except to pay for legal and accounting expenses associated with complying with the campaign finance law. They can spend personal funds, but only up to \$50,000.<sup>367</sup>

<sup>366</sup> See Table 4, which summarizes the current federal public funding provisions.

<sup>367</sup> FEC, “Public Funding of Presidential Elections”, <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/#anchor684182>.

The prevailing trend is that major party candidates and nominees do not use public financing. In 2000 and 2004, respectively, George W. Bush and John Kerry were the first major candidates to campaign in primaries without recurring to the public funding program. No general election nominee declined federal funding until 2008, when Barack Obama did not accept. For the 2020 elections the spending limit for publicly funded presidential candidates was \$51.8 million for the primary elections and \$103.7 million for the general elections.<sup>368</sup> Neither of the major presidential candidates sought public funding.

A further challenge regarding public funding is the downward trend in taxpayers who choose to have \$3 of their taxes transferred into the Presidential Election Campaign Fund.<sup>369</sup> Tax return contributions to the Presidential Fund peaked at \$71 million in 1994, but have steadily declined since then, with \$24 million contributed in 2020.<sup>370</sup>

While some states have public-funding systems, and these are used in some cases, they are unable to effectively counter the influence and magnitude of private funding in electoral giving and spending.

**Table 4: Current Federal Public Funding Provisions**

Type of Provisions	Current Status	Notes
Direct public funding to political parties.	Yes. However, funding is ear marked and minor parties must fulfill eligibility criteria.	<p>Public funding is only provided to the party convention committees and candidates. Presidential candidates who accept the public funding must limit spending to the amount of the grant. There are public grants available for candidates in both the primary and general elections.</p> <p>Eligibility criteria differ between major and minor parties. Major parties are entitled to public funding (\$4 million plus cost-of-living adjustments to finance Presidential nominating convention), minor parties may be eligible for partial convention funding if they fulfill certain criteria (share of popular votes in preceding Presidential election).</p> <p>Allocation of public funding is distributed equally between eligible major parties. Funding is ear marked to be used for Presidential nomination conventions.</p>
Political parties' free or subsidized access to media.	No	

<sup>368</sup> FEC, “Presidential spending limits for 2020”, <https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/presidential-spending-limits-2020/>.

<sup>369</sup> Blake Ellis, “The real story behind the \$3 tax checkoff box”, <http://money.cnn.com/2014/04/11/pf/taxes/checkoff-box>.

<sup>370</sup> FEC, “Presidential Election Campaign Fund tax check-off chart”, [https://www.fec.gov/resources/cms-content/documents/Pres\\_Public\\_Funding.pdf](https://www.fec.gov/resources/cms-content/documents/Pres_Public_Funding.pdf).

Type of Provisions	Current Status	Notes
Candidates' free or subsidized access to media.	No	
Indirect public funding.	For 527s political organizations.	Tax relief is given to the so called 527s (following section 527 of the IRS code), which are organizations exempted from tax. They may not coordinate their activities with a candidate or a party.
Direct public funding to political parties related to gender equality among candidates.	No	
Other financial advantages to encourage gender equality in political parties.	No	

Source: International IDEA, "Public Funding in the United States", <https://www.idea.int/data-tools/country-view/295/55>

The 2020 election was the costliest election in the history of the United States, according to the total money raised and spent in the Presidential, Senate, and House races combined.<sup>371</sup> According to the FEC, the total amount spent by all candidates in all races, at November 2, 2021, was US\$7,857,353,508<sup>372</sup> - a more than 100% increase over the total spending reported for the 2016 general election.<sup>373</sup> According to Open Secrets, total federal spending in the 2020 election was \$14.4 billion, making it the most expensive election in the history of the United States.<sup>374</sup>

b. Prohibition of publicity for government affairs, the use of public office, and use of government resources in campaigns

The use of publicity in government affairs, of public office, and of public resources for campaign purposes, to help an incumbent candidate or any candidate, is prohibited in the United States. The Hatch Act of 1939<sup>375</sup> sets the boundary between politics and government, restricting the political activities of all federal, state, and local government employees.<sup>376</sup> The Act does not apply to the President and Vice President.

<sup>371</sup> Figures as of October 20, 2021 based on the reports submitted to the Federal Elections Commission (FEC) by the candidates in all competing races. Available on the FEC website at: <https://www.fec.gov/data/spending-bythenumbers/>. This data does not include outside spending (super PACs, social welfare groups, trade associations, unions, among others).

<sup>372</sup> Figures as of November 2, 2021, Available on the FEC website at: <https://www.fec.gov/data/spending-bythenumbers/>.

<sup>373</sup> The total for all candidates in all races for the General Election in 2016 was US\$3,166,071,993. This figure does not include outside spending.

<sup>374</sup> Open Secrets, "Most expensive ever: 2020 election cost \$14.4 billion", <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/>.

<sup>375</sup> U.S. Office of Special Counsel, "Hatch Act Overview", <https://osc.gov/Services/Pages/HatchAct.aspx>

<sup>376</sup> Local government employees who work in connection with federally funded programs.

Federal employees are defined within two categories: “further restricted” and “less restricted”.<sup>377</sup> According to the U.S. Office of Special Counsel, the purposes of the law “are to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.” The Hatch Act is not a criminal statute; it is considered an administrative constraint on government employees.<sup>378</sup> Other branches of government, as well as federal agencies and States, have created their own guidelines to institutionalize this principle that government funds should not be spent for electoral purposes.

Both the U.S. Senate and U.S. House have rules that proscribe the use of public resources for campaign activity. In the Senate, “employees are free to engage in campaign activity” but may do so “*in their own time, outside of Senate space, and without using Senate resources*”.<sup>379</sup> Other bans also apply, such as no campaign activity in a federal building, no solicitation of federal employees, and no use of equipment and supplies. Moreover, the House Ethics Manual contains a chapter related to campaign activity,<sup>380</sup> which details laws and rules on the proper use of official resources.

Vote buying is banned at the federal and state level, but some laws apply only to primary and general elections.<sup>381</sup> The buying of votes, or payment to influence a voter, is deemed to be equivalent to corruption and bribery. The existing legislation bans the exchange of money or goods for votes, but does not necessarily apply to “non-election” events, such as conventions and caucuses. Statute 42 U.S.C. § 1973i(c), the current law that bans vote buying at a federal level, was enacted in 1965. Although federal law prohibits monetary or in-kind payments in exchange for votes, it allows for some actions to facilitate voting such as a “ride to the polls or a stamp to mail an absentee ballot”.<sup>382</sup> Each State has different laws regarding vote buying and different ways of defining “non-election” events.

### c. Restrictions on private financing

The United States campaign finance regime is highly deregulated. Its foundation was laid in 1976, when *Buckley v. Valeo* established that as contributions implied a direct exchange and potential “pay for play” and spending did not, the anticorruption interest justified limits on the former but not on the latter. The principle that has guided campaign finance law in the last ten years is the First Amendment principle of freedom of speech, after the Supreme Court’s finding in *Citizens United* that ‘spending as political speech’ allowed independent spending by corporations and unions. A lower-court decision in the 2010 case of

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<sup>377</sup> U.S. OSC, “Federal Employee Hatch Act Information”, <https://osc.gov/Services/Pages/HatchAct-Federal.aspx>

<sup>378</sup> The Hatch Act is officially known as “An Act to Prevent Pernicious Political Activities”.  
<http://www.cnn.com/2016/10/31/politics/what-is-the-hatch-act/>

<sup>379</sup> U.S. Senate Select Committee on Ethics, “Campaign Activity”,  
<https://www.ethics.senate.gov/public/index.cfm/campaign-activity>.

<sup>380</sup> Committee on Ethics, “House Ethics Manual”, <https://ethics.house.gov/house-ethics-manual>.

<sup>381</sup> Holzer, B. (2008), Legislation and Public Policy, Vol 12:211, <https://nyujlpp.org/wp-content/uploads/2012/10/Holzer-Political-Vote-Buying-Statutes.pdf> p. 211.

<sup>382</sup> Holzer, “Legislation and Public Policy”, p. 214.

*SpeechNow.org v. FEC* also allowed outside groups to raise unlimited funds, which in turn led to the surge of super PACs.

Primarily as a result of court rulings, the federal campaign finance landscape depends almost entirely on private financing from different sources: individuals, political action committees (PACs), super PACs, and other outside groups. Contribution limits vary according to the type of race, type of donor and recipient. The following table summarizes the current contribution limits set for Federal elections. It is important to note that the parameters of contributions are skewed. While an individual’s contribution limit for a candidate is \$2,800 to a candidate committee, there is no limit to what corporations and unions can voluntarily contribute to independent expenditures by forming a super PAC that advocates expressly for or against a candidate without coordination. The limits for contributions to PACs and party committees are higher.

**Table 5: Contribution Limits for 2019-2020 Federal Elections**

		Recipient				
		Candidate committee	PAC† (SSF and nonconnected)	Party committee: state/district/local	Party committee: national	Additional national party committee accounts‡
Donor	Individual	\$2,900* per election	\$5,000 per year	\$10,000 per year (combined)	\$36,500* per year	\$109,500* per account, per year
	Candidate committee	\$2,000 per election	\$5,000 per year	Unlimited transfers	Unlimited transfers	
	PAC: multicandidate	\$5,000 per election	\$5,000 per year	\$5,000 per year (combined)	\$15,000 per year	\$45,000 per account, per year
	PAC: nonmulticandidate	\$2,900* per election	\$5,000 per year	\$10,000 per year (combined)	\$36,500* per year	\$109,500* per account, per year
	Party committee: state/district/local	\$5,000 per election (combined)	\$5,000 per year (combined)	Unlimited transfers	Unlimited transfers	
	Party committee: national	\$5,000 per election**	\$5,000 per year	Unlimited transfers	Unlimited transfers	

Source: FEC, “Contribution Limits”, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>

At the state level, limits on contributions to candidates vary from case to case. For instance, contributions of all types are unlimited in Alabama, Nebraska, Oregon, Utah and Virginia; Nevada sets the contribution limit of \$5,000 from individuals to candidates for all types of contribution sources and recipients; Iowa has no limits except for contributions from corporate to candidate; Texas prohibits contributions from corporate and unions to

candidates; and West Virginia limits all types of contributions to \$2,800 per candidate per election, except for corporate contributions, which are prohibited.<sup>383</sup>

FECA prohibits fundraising or spending in federal, state, and local U.S. elections by foreign nationals.

Federal government contractors cannot give money directly to federal office candidates. This ban is known as the “pay-to-play” prohibition and its purpose is “to restrict officials from conditioning government contracts or benefits on political support in the form of campaign contributions to the controlling political party or public officials”.<sup>384</sup> Corporations or unions cannot make contributions directly to candidate or party committees. However, they can make contributions as independent expenditures outside spending vehicles (PACs and super PACs).

Super PACs are independent spending groups that do not give directly to candidates and are not supposed to contribute directly to candidates. There are no contribution or spending limits to super PACs, they can receive contributions from corporations and labor unions.

There is no limit on how much a candidate can contribute to himself/herself with his/her own funds, based on the premise that you cannot corrupt yourself.

#### d. Limits of Campaign Spending

The United States does not have laws limiting or specifying campaign lengths. In all jurisdictions, there are no spending limits following *Buckley v. Valeo* (1976) and *Citizens United v. FEC* (2010). Spending limits are applicable only if a candidate voluntarily accepts public funding.

The first amendment premise of “spending as political speech” has guided the modern and current campaign finance regime since the *Citizens United* ruling changed the campaign finance landscape. One of the key characteristics of the political finance law is that not policymakers but courts, through relevant rulings such as *Citizens United v. FEC*, have had a significant impact in determining the nature of the rules governing campaign finance.

With no spending limits as a key characteristic, the regime works against the principle of equity, given that a small number of wealthy individuals and powerful outside groups dominate election costs and have the monetary capacity to influence campaigns. The fact that disclosure laws do not apply to some outside spending groups, affects similarly both the level of equity and transparency of the process.

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<sup>383</sup> NCSL, “State Limits on Contributions to Candidates, 2019-2020 Election Cycle”, <https://www.ncsl.org/Portals/1/Documents/Elections/Contribution-Limits-to-Candidates-2019-2020.pdf?ver=2019-10-02-132802-117>.

<sup>384</sup> Congressional Research Service (CRS R45320), “Campaign Finance Law: Analysis of Key Issues and Recent Developments”, p. 25, <https://sgp.fas.org/crs/misc/R45320.pdf>.

The role of outside spending in elections, particularly super PACs, has increased since the Citizens United ruling. Citizens United stated that corporations and unions could use treasury funds to engage in issue and candidate advocacy as long as there was no coordination with the candidate and/or the party.

It is important to note that the term “outside spending” does not exist in the law. It is a journalistic term that is defined as all spending that is non-candidate and non-party related. According to Open Secrets,<sup>385</sup> the total of outside spending in the 2020 race (as of November 3, 2020), was \$2,966,055,232. Outside spending has continued to increase in general elections since Citizens United. According to figures reported by the Center for Responsive Politics, outside spending increased by 29% from 2012 to 2016, and by 78% from 2016 to 2020.

For the 2020 general election, the biggest outside spenders were the super PACs (\$1,871,755,681 / 63% of the total outside spending). A major shift, if compared to 2016, was that instead of social welfare groups (501 (c)4), other groups (corporations, individual people, other groups) were the second biggest spenders. Contributions from small-dollar donors increased substantially. The third biggest spenders were social welfare groups (501(c)4), followed by unions (501(c)5) and trade associations (501(c)6) as the fourth and fifth largest outside spenders, respectively.

A new, relevant trend in the 2020 election was that the small-dollar donors (\$200 or less) increased their share of contributions. Of the money raised by presidential candidates, almost a third, came from contributions of \$200 or less.<sup>386</sup> Small donors totaled 22.40% of all campaign raising, compared to 15.19% in the 2016 election.<sup>387</sup> Large individual donations decreased from 48.62% to 41.53% of total sources of funds.<sup>388</sup>

Before Citizens United, unions and corporations were limited in their ability to fund electioneering communications within 30 days of an election. Now they can not only expressly advocate for or against candidates, but at any time.

#### **4. Transparency in the Campaign**

##### **a. Reporting**

Federal Law requires that political parties, campaigns, PACs and outside groups report the identities of donors who give at least \$200. Any individual that contributes more than \$200

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<sup>385</sup> Open Secrets, “Outside Spending”, [https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=2020](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2020).

<sup>386</sup> Commissioner Ellen Weintraub, “Revisiting Campaign Finance in the 2020 Elections”, FEC, October 21, 2020, <https://www.state.gov/briefings-foreign-press-centers/elections-2020-revisiting-campaign-finance-in-the-2020-elections/>.

<sup>387</sup> Center for Responsive Politics (2020), “2020 election to cost \$14 billion, blowing away spending records”, October 28, 2020, <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update>.

<sup>388</sup> Center for Responsive Politics (2020), “2020 election to cost \$14 billion, blowing away spending records”, October 28, 2020, <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update>

must disclose his or her name, address, occupation and employer, and the date and amount of contribution to facilitate reporting.

Candidates, campaigns, party committees and PACs are required to report every quarter, on the 15<sup>th</sup> day after the end of the quarter. Presidential campaigns are required to report on a monthly basis. PACs, super PACs, politically active tax-exempt nonprofits, and other outside groups must also file reports.

The FEC is in charge of receiving and disclosing campaign finance data publicly and conducts relevant training in this regard.<sup>389</sup> Under FECA, Title 2, Chapter 14, subchapter “Disclosure of Federal Campaign Funds”, all reports are available within 48 hours on the FEC website.

Although PACs, super PACs, and 501 (c)4<sup>390</sup> are required by law to disclose expenditures and report their list of donors to the FEC, tax exempt 501 (c)4<sup>391</sup> and 501 (c)6<sup>392</sup> organizations are required to disclose expenditures but not donors.<sup>393</sup> These organizations are regulated by tax law, which prioritizes taxpayer privacy and therefore does not oblige them to report their list of contributors. In the current regulatory framework, anonymous contributions therefore have the potential to influence voters and an election even though the interests and motivations behind their contributions remain hidden.

Efforts have been made to improve disclosure to allow better tracking of the source and flow of money (this is referred to by some as the “Russian Doll problem”), particularly from the growing number of independent expenditures-only committees and tax-exempt organizations that are not required by law to report their donors. A reform attempt was made through the “Democracy is Strengthened by Casting Light on Spending in Elections Act” (DISCLOSE Act) introduced in 2010 and in later years. Shortly after *Citizens United*, democratic lawmakers sponsored the bill, but it barely passed in the House and did not pass in the Senate. It was reintroduced in 2019, but did not pass the House. It was introduced once more in February 2021 and, at the time this report was finalized, was before the Committee on Rules and Administration.<sup>394</sup>

Given the increased role of super PACs, which can raise unlimited funds, advocate for or against a candidate, and spend without limits (as long as they do not coordinate with the candidates or parties), stricter and more precise coordination rules are important to increase the level of transparency, prevent back-door influence and prevent the collusion of interests, particularly in the case of super PACs.

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<sup>389</sup> R. Sam Garret, “Federal Election Commission: Membership and Policymaking Quorum, In Brief”, Congressional Research Service, R45160, October 6, 2020, <https://sgp.fas.org/crs/misc/R45160.pdf>.

<sup>390</sup> Name given to unions in the tax law.

<sup>391</sup> Name given to social welfare nonprofit interest groups in the tax law.

<sup>392</sup> Name given to trade association in the tax law.

<sup>393</sup> Code of Federal Regulations (CFR) 104.5(c)(1)(ii); 104.3(b)(3)(vii)(A); 104.4(a), (b) and (c); and 11 CFR 104.3(b)(3)(vii)(C).

<sup>394</sup> Congress.Gov, “S.443 - DISCLOSE Act of 2021”, <https://www.congress.gov/bill/117th-congress/senate-bill/443/text>.

Further, strengthening disclosure laws would allow for more information on the sources of outside spending. In particular, greater transparency on tax exempt 501(c)4 and 501(c)6 groups, which are not obliged to report their donors, would ensure voters are better informed on interests behind the spending of super PACs and other outside groups that attempt to influence electoral preferences. Addressing the influence of anonymous donations would require action by different government agencies, such as inter-institutional coordination between the IRS (which regulates 501 (c) Groups, and the FEC (which is responsible for Election Law enforcement).

#### b. Regulatory Oversight

The Federal Election Commission (FEC), created in 1974, is a bipartisan regulatory federal agency established to administer and enforce the Federal Election Campaign Act (FECA), the legal framework for campaign finance. According to the FEC, its duties are “to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections”.<sup>395</sup> The Commission is comprised of six members.

The bipartisan structure of the commission makes it difficult to achieve the 4-2 vote needed to initiate campaign-finance related investigations or negotiate agreements, which is conducive to gridlock that hurts the FEC’s oversight power.

It was anticipated in some quarters that the FEC would create new rules following *Citizens United*. Congress did not enact a statute, and while the FEC did recognize the Supreme Court’s decision, it deleted rules that were inconsistent with the ruling as opposed to creating new guidelines. Conservatives argue that it was the decision of Congress not to enact statute and therefore new rules are unnecessary. The liberal position states that the FEC could issue new guidelines, particularly to address the super PACs phenomenon post *Citizens United*.

Even if the campaign finance regime is reformed in order to respond better to the equity and transparency challenges it faces today, it is insufficient without the presence of a strong regulatory body that enforces such rules. According to the Congressional Research Service, at least four FEC commissioners are necessary in order to authorize the following actions:

- Hold hearings
- Make, amend, or repeal rules
- Initiate litigation or defend the agency in litigation, including appeals
- Issue advisory opinions
- Conduct investigations, make referrals to other enforcement agencies
- Approve enforcement actions and audits
- Issue and amend forms (i.e. those used in the disclosure process)”<sup>396</sup>

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<sup>395</sup> Federal Election Commission, “About”, <http://www.fec.gov/about.shtml>.

<sup>396</sup> Garret, S. (2020), “Federal Election Commission: Membership and Policymaking Quorum, In Brief”, Congressional Research Service, R45160, October 6, 2020, P. 7.

For the 2020 elections, the FEC was not fully constituted, with only three out of six Commissioners. While the FEC informed the Mission that it remained able to carry out many of its duties, the Mission noted that the absence of three Commissioners and the consequent inability to form a quorum, limited the effectiveness of its oversight ability and its capacity to impose fines and sanctions if and when campaign finance laws were violated.

The FEC quorum was restored in December 2020, when the Senate voted to confirm three new commissioners to the body.<sup>397</sup> The Mission notes that in light of the record-breaking cost of the 2020 elections and the influence of foreign money on elections, it is important to ensure a fully constituted FEC capable of enforcing the rules governing federal campaign finance.

## **5. Recommendations**

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

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<sup>397</sup> “Federal campaign finance watchdog has full slate for first time in years”. December 9, 2020, *Politico*, <https://www.politico.com/news/2020/12/09/federal-elections-commission-quorum-443919>.

## **vii. POLITICAL PARTICIPATION OF WOMEN**

### **1. Introduction**

The 2020 elections in the United States saw important advancements for women. For the first time in the country's history, a woman, Kamala Harris, was elected Vice President. Vice President Harris is also the first African-American and the first South Asian person elected to this office. In Congress and in most offices in the United States, with the exception of the offices of Governor, the 2020 elections continued the decade-long upward trend in female political representation, with the number of women nominated and elected growing at both state and federal levels.

Other relevant events occurred from a gender point of view. In a country where electoral financing is private, some women politicians achieved high levels of fundraising and were among the top ten fundraisers at the federal level in the 2020 elections. Women also continued to play a more active role as donors in both political parties.

Women ran, donated and voted in record numbers during the 2020 election.<sup>398</sup> Despite these positive results, women make up less than 30% of the 117<sup>th</sup> Congress. The underrepresentation of women holding office persists despite a long history of women's political activism in the United States. While the Congress and many state legislatures are becoming more representative than before, it is important to sustain and consolidate the number of women in office, and continue the move towards parity.

### **2. Legal Framework**

Article 1, Section 4 of the United States Constitution<sup>399</sup> entrusts states with the responsibility for enacting legislation for overseeing federal elections. As a result, the legal framework for elections in the United States is highly decentralized and varies between and within states, with each state individually regulating how it manages the different aspects of its electoral system.

There are, however, laws that apply at the national level. They include four amendments to the United States Constitution<sup>400</sup> which stipulate that voting rights cannot be abridged on account of race, color or previous condition of servitude (15<sup>th</sup> Amendment of 1870), sex (19<sup>th</sup> Amendment of 1920), age (26<sup>th</sup> Amendment of 1971) or through the imposition of a poll tax (24<sup>th</sup> Amendment of 1964). Several federal laws have also been enacted over the years to help protect the rights of American voters, including the Civil Rights Act of 1870,<sup>401</sup> the

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<sup>398</sup> Rutgers University Center for American Women and Politics (CAWP), "Measuring Success: Women in 2020 Legislative Elections", <https://womenrun.rutgers.edu/2020-report/>

<sup>399</sup> Constitution of the United States (1787), Article 1, Section 4, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>400</sup> National Archives, "The Constitution: Amendments 11-27", [https://www.archives.gov/founding-docs/amendments-11-27?\\_ga=2.129930764.107809335.1614006866-630143065.1614006866](https://www.archives.gov/founding-docs/amendments-11-27?_ga=2.129930764.107809335.1614006866-630143065.1614006866).

<sup>401</sup> Yale Law School, "The Avalon Project: Civil Rights Act; July 2, 1964", [https://avalon.law.yale.edu/20th\\_century/civil\\_rights\\_1964.asp](https://avalon.law.yale.edu/20th_century/civil_rights_1964.asp). The Act was amended in 1957, 1960 and 1964.

Voting Rights Act of 1965,<sup>402</sup> the National Voter Registration Act of 1993,<sup>403</sup> and the Help America Vote Act of 2002.<sup>404</sup>

There are also federal laws that prohibit discrimination based on gender in specific circumstances, such as employment, pregnancy, salary, access to credit, housing, education, and others.<sup>405</sup> Many states have civil rights laws of their own which mirror those at the federal level, however there are currently no equal rights provisions at the constitutional level. The Equal Rights Amendment (ERA), a proposed amendment to the United States Constitution designed to guarantee equal legal rights for all American citizens regardless of sex, was first proposed in 1926 and was passed by Congress in 1972. It was not ratified by the required 38 states before the 1982 deadline, and advocacy continues (at the writing of this report) to address the obstacles that remain to its adoption.<sup>406</sup> The US Supreme Court has had a prominent role in addressing sex and gender discrimination.

The United States has not ratified any international or regional women's human rights treaties. While the United States signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980, it has not ratified it.<sup>407</sup> In the Americas, only the United States and Canada have not signed the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (known as the Belem do Para Convention).

### 3. Competitiveness of the Elections from a Gender Perspective

There are several factors that affect gender equality in electoral contests in the U.S. political system:

- 1) Electoral rules do not include gender quotas for party nomination and a change to include a gender quota is highly unlikely in the United States given the nature of the

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<sup>402</sup> Yale Law School, "The Avalon Project: Voting Rights Act of 1965; August 6, 1965", [https://avalon.law.yale.edu/20th\\_century/v](https://avalon.law.yale.edu/20th_century/v).

<sup>403</sup> Cornell Law School Legal Information Institute, "52 U.S. Code Chapter 205 - National Voter Registration", <https://www.law.cornell.edu/uscode/text/52/subtitle-II/chapter-205>.

<sup>404</sup> U.S. Election Assistance Commission, "Help America Vote Act", [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx).

<sup>405</sup> Law on violence against women <https://www.congress.gov/bill/113th-congress/senate-bill/47?q=%7B%22search%22%3A%5B%22discrimination+against+women%22%5D%7D&s=3&r=46>; Laws against sex discrimination at work <https://www.eeoc.gov/youth/sex-discrimination>; Pregnancy Discrimination Act <https://www.eeoc.gov/pregnancy-discrimination>; Equal Pay Act <https://www.eeoc.gov/statutes/equal-pay-act-1963>; Laws against sex discrimination in education <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html>; Fair Housing Act [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/housing\\_discrimination\\_and\\_persons\\_identifying\\_lgbtq#\\_Fair\\_Housing\\_Act](https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq#_Fair_Housing_Act).

<sup>406</sup> Brennan Center for Justice, "The Equal Rights Amendment Explained", <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained>.

<sup>407</sup> CEDAW (<https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>) is the most comprehensive international treaty on women's rights. The United States is one of only seven countries in the world (along with Iran, Sudan, South Sudan, Somalia, Palau and Tonga) that has not ratified the treaty.

political/electoral system and historical American jurisprudence.<sup>408</sup> This represents a significant difference compared to Latin America where almost all countries have adopted gender quota laws and parity laws. Because of these laws, Latin America is today the first region in the world with a majority of women in parliament.

- 2) The Electoral System has some features that research suggests favor men, including a majoritarian system in single-member districts for all congressional seats and most legislators (*vs. multi-member districts, which according to scholars are more beneficial for the election of women*), and a lack of public funding for campaigns, which tends to result in less women running for office.<sup>409</sup>
- 3) As noted by the OAS Mission for the 2016 elections in the United States, the role of political parties and party leaders in recruiting and supporting women candidates seems to be one of the main challenges in the political system regarding women seeking and winning election in much larger numbers.
- 4) Gender bias, gender stereotypes and sexism against women candidates. The unprecedented number of women presidential candidates in 2020<sup>410</sup> opened public discourse about how women are perceived and scrutinized as viable candidates. Scholar Kelly Dittmar has called this phenomena “running a dual campaign” – to be elected and to convince skeptics of their “electability”.<sup>411</sup> Women candidates faced sexism from voters, their political opponents, the media and the internet.<sup>412</sup>
- 5) Structural social inequality affects political inequality. This refers to the burden that gender roles pose on women and how this limits political opportunities for women, particularly in the context of COVID-19. The Inter-American Commission of

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<sup>408</sup> Anisa A. Somani, “The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?”, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3477&context=wmlr>. Also, in a 2016 interview, Susan J. Carroll a prominent US scholar on women’s political participation stated: “Having women on a party list is certainly a form of quotas, but we can’t use that word freely because of the history of affirmative action in the United States. So the minute the subject comes up people assume that it represents unfair advantage. (...) It’s very difficult to see how you might implement it in the United States. Our system of elections is (...) really district- and candidate-driven rather than party-driven. And so, people get elected less based on their party and more on the composition of their districts so we don’t have lists of that kind. So I can’t foresee it happening”.

<sup>409</sup> Kira Sanbonmatsu, “Women’s Underrepresentation in the U.S. Congress”, <https://www.amacad.org/publication/womens-underrepresentation-us-congress> and Susan J. Carroll and Kira Sanbonmatsu, “More Women Can Run: Gender and Pathways to the State Legislatures”, (Oxford: Oxford University Press, 2013).

<sup>410</sup> CAWP/Rutgers University, “Women Presidential and Vice Presidential Candidates: A Selected List”, [https://cawp.rutgers.edu/levels\\_of\\_office/women-presidential-and-vice-presidential-candidates-selected-list](https://cawp.rutgers.edu/levels_of_office/women-presidential-and-vice-presidential-candidates-selected-list)

<sup>411</sup> CAWP/Rutgers University, “Women on the VP Short List are Qualified to Serve Today or Tomorrow”, <https://cawp.rutgers.edu/election-analysis/women-vp-qualified>.

<sup>412</sup> See a selection of articles at: The Guardian, “Elizabeth Warren endured sexism at every step of her campaign”, <https://www.theguardian.com/commentisfree/2020/mar/07/elizabeth-warren-campaign-sexism>; The Atlantic, “The Sexism is Getting Sneakier”, <https://www.theatlantic.com/entertainment/archive/2019/11/elizabeth-warren-and-sneak-sexism/601876/>; New York Times, “Kamala Harris and the “Double Bind” of Racism and Sexism”, <https://www.nytimes.com/2020/10/09/us/politics/kamala-harris-racism-sexism.html>; “Did Gender keep Democratic Women from Winning the Presidential Primary?” <https://www.npr.org/2020/04/17/818952460/did-gender-keep-democratic-women-from-winning-the-primary>.

Women (CIM/OAS) has stated that the pandemic has had a negative gender impact with women assuming even more work at home.<sup>413</sup> It is not clear yet though, what impact this will have on the electoral field, on women as voters and women as candidates.

a. Regarding Campaign Financing

Research shows that campaign finance remains a barrier to entry for many demographic groups of women, especially in primary elections.<sup>414</sup> In the absence of a public campaign financing system on which affirmative action can be taken to support the candidacies of women, as is the case in several countries in Latin-American, endorsements and financial support are crucial to addressing the underrepresentation of women in political office.

In the primaries, data showed that the win rate for women candidates endorsed by women-oriented PACs was higher than it was for women overall. The win percentage of female candidates endorsed by three women's groups in primaries for the Senate, House and governor, where no incumbent was running, was over 80%.<sup>415</sup>

While research suggests that campaign fundraising is typically dominated by white men running for office,<sup>416</sup> some progress for women was observed in the 2020 election. According to the Federal Election Commission, three out of the ten most successful fundraisers in the House were women, and two of them were among the top five, most expensive elections run of all-time.<sup>417</sup> That represents a significant change from the 2018 election, where the top ten fundraising candidates were all men.<sup>418</sup> In the 2016 election, there were also three women among the top ten fundraisers in the House of Representatives, but only one among the top five.<sup>419</sup>

In the 2020 elections for Senate, of the ten candidates that raised the most financing, three were women, but none were in the top five.<sup>420</sup> In 2018, four women, of which one was in the top five, were among the top ten candidates who raised the most financing.<sup>421</sup> Still, in 2020

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<sup>413</sup> OAS | Inter-American Commission of Women, "COVID-19 in Women's Lives: Reasons to Recognize the Differential Impacts", <https://www.oas.org/en/cim/COVID-19.asp>

<sup>414</sup> Open Secrets, "Which Women Can Run? The Fundraising Gap in the 2020 Elections' Competitive Primaries", <https://www.opensecrets.org/news/reports/2020-gender-race>.

<sup>415</sup> Meredith Conroy and Nathaniel Rakich, "More Women Than Ever Are Running For Office. But Are They Winning Their Primaries?", <https://fivethirtyeight.com/features/more-women-than-ever-are-running-for-office-but-are-they-winning-their-primaries/>.

<sup>416</sup> Open Secrets, "Which Women Can Run? The Fundraising Gap in the 2020 Elections' Competitive Primaries".

<sup>417</sup> Federal Election Commission, "Raising: by the numbers – 2020 (House)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2020&office=H](https://www.fec.gov/data/raising-bythenumbers/?election_year=2020&office=H).

<sup>418</sup> FEC, "Raising: by the numbers – 2018 (House)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2018&office=H](https://www.fec.gov/data/raising-bythenumbers/?election_year=2018&office=H).

<sup>419</sup> FEC, "Raising: by the numbers – 2016 (House)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2016&office=H](https://www.fec.gov/data/raising-bythenumbers/?election_year=2016&office=H).

<sup>420</sup> FEC, "Raising: by the numbers – 2020 (Senate)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2020&office=S](https://www.fec.gov/data/raising-bythenumbers/?election_year=2020&office=S).

<sup>421</sup> FEC, "Raising: by the numbers – 2018 (Senate)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2018&office=S](https://www.fec.gov/data/raising-bythenumbers/?election_year=2018&office=S).

there has been some progress compared to the 2016 election, when only two of the top ten candidates in fundraising were women.<sup>422</sup>

It is important to note that data from the organization Open Secrets shows that intersectional barriers still make it difficult for women of color to fundraise at the same rate as white women. In fact, Black women received significantly less financial support than any other demographic group running for office.<sup>423</sup>

### *Women as Donors*

In the 2020 election women raised more money than ever before and played a more important role as donors to congressional campaigns. Analysis by the Center for Responsive Politics and the National Institute on Money in Politics<sup>424</sup> shows that contributions by women accounted for 33 percent of donations to congressional candidates and 31 percent of donations to state-level candidates, both records.

### *Using Campaign Funds for Campaign-related Childcare Expenses*

According to CAWP/Rutgers University,<sup>425</sup> in May 2018, the Federal Elections Commission (FEC) ruled that Liuba Grechen Shirley, a congressional candidate from New York, could use campaign funds to pay for childcare expenses incurred during her candidacy. The FEC issued a similar ruling in 2019 related to congressional candidate MJ Hegar.<sup>426</sup> In March 2021, U.S. Representative Katie Porter introduced the "Help America Run Act" to codify this practice into law for federal candidates. It was referred to the House Committee on House Administration.<sup>427</sup> This is an important step that will help balance campaign and family responsibilities, which are additional burdens women candidates face based on their gender.

## **4. Gender Balance in Electoral Bodies**

At the state level, the responsibility for the conduct of the elections falls either on the Office of the Secretary of State or a Board of Elections. One way to account for gender differences and avoid any bias against women is to achieve a gender balance in the composition of the institutions responsible for conducting the electoral process.

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<sup>422</sup> FEC, "Raising: by the numbers – 2016 (Senate)", [https://www.fec.gov/data/raising-bythenumbers/?election\\_year=2016&office=S](https://www.fec.gov/data/raising-bythenumbers/?election_year=2016&office=S).

<sup>423</sup> Open Secrets, "Which Women Can Run?" and Kira Sanbonmatsu and Claire Gothreau, "Money Matters in the Fifty States. Individual Contributions in Statewide Executive Elections, 2001-2020", <https://cawp.rutgers.edu/sites/default/files/resources/money-matters-in-the-states.pdf>.

<sup>424</sup> Open Secrets, "In 2020 women ran, won and donated in record numbers", <https://www.opensecrets.org/news/2020/12/women-ran-won-donate-record-numbers-2020-nimp/>.

<sup>425</sup> CAWP/Rutgers University, "State Candidates and the Use of Campaign Funds for Childcare Expenses", <https://cawp.rutgers.edu/use-campaign-funds-childcare-expenses>.

<sup>426</sup> The written opinion of the Federal Electoral Commission can be found here: <https://www.fec.gov/files/legal/aos/2019-13/2019-13.pdf>.

<sup>427</sup> Congress.Gov, "H.R.1515 – Help America Run Act", <https://www.congress.gov/bill/117th-congress/house-bill/1515?q=%7B%22search%22%3A%5B%22help+america+run+act%22%2C%22help%22%2C%22america%22%2C%22run%22%2C%22act%22%5D%7D&s=2&r=1>.

In this regard, Table 1 shows that the highest authority in electoral institutions for the 2020 elections, was male in 33 out of 50 States and the District of Columbia. Thus, the percentage of women among the electoral authorities is 35.29%, which leaves a significant gap in achieving a gender-balanced composition in electoral bodies.

**Table 1: Electoral Authorities for the November 3, 2020 General Elections**

State	Chief State Election Official	Gender
Alabama	John H. Merrill Secretary of State	Male
Alaska	Kevin Meyer Lieutenant Governor	Male
Arizona	Katie Hobbs Secretary of State	Female
Arkansas	John Thurston Secretary of State	Male
California	Shirley N. Weber Secretary of State	Female
Colorado	Jena Griswold Secretary of State	Female
Connecticut	Denise W. Merrill Secretary of State	Female
Delaware	Anthony J. Albence State Election Commissioner	Male
District of Columbia	Michael Bennett Chair, Board of Elections and Ethics	Male
Florida	Laurel M. Lee Secretary of State	Female
Georgia	Brad Raffensperger Secretary of State	Male
Hawaii	Scott T. Mago Chief Election Officer, Office of Elections	Male
Idaho	Lawrence Denney Secretary of State	Male
Illinois	Charles W. Scholz Chair, State Board of Elections	Male
Indiana	Connie Lawson Secretary of State	Female
Iowa	Paul Pate Secretary of State	Male
Kansas	Scott Schwab Secretary of State	Male
Kentucky	Michael G. Adams Secretary of State	Male
Louisiana	R. Kyle Ardoin	Male

<b>State</b>	<b>Chief State Election Official</b>	<b>Gender</b>
	Secretary of State	
Maine	Matthew Dunlap Secretary of State	Male
Maryland	Linda H. Lamone Administrator of Elections, State Board of Elections	Female
Massachusetts	William Galvin Secretary of the Commonwealth	Male
Michigan	Jocelyn Benson Secretary of State	Female
Minnesota	Steve Simon Secretary of State	Male
Mississippi	Michael D. Watson Secretary of State	Male
Missouri	John R. Ashcroft Secretary of State	Male
Montana	Corey Stapleton Secretary of State	Male
Nebraska	Robert B. Evnen Secretary of State	Male
Nevada	Barbara K. Cegavske Secretary of State	Female
New Hampshire	William M. Gardner Secretary of State	Male
New Jersey	Tahesha Way Secretary of State	Female
New Mexico	Maggie Toulouse Oliver Secretary of State	Female
New York	Pete S. Kosinski Douglas A. Kellner Co-Chairs, State Board of Elections	Male
North Carolina	Damon Circosta Chair, State Board of Elections	Male
North Dakota	Al Jaeger Secretary of State	Male
Ohio	Frank LaRose Secretary of State	Male
Oklahoma	Paul Ziriix Secretary, State Election Board	Male
Oregon	Bev Clarno Secretary of State	Female
Pennsylvania	Kathy Boockvar Secretary of State	Female

State	Chief State Election Official	Gender
Rhode Island	Nellie M. Gorbea Secretary of State	Female
South Carolina	John Wells Chair, State Election Commission	Male
South Dakota	Steve Barnett Secretary of State	Male
Tennessee	Tre Hargett Secretary of State	Male
Texas	Ruth R. Hughs Secretary of State	Female
Utah	Deidre M. Henderson Lieutenant Governor	Female
Vermont	Jim Condos Secretary of State	Male
Virginia	Robert H. Brink Chairman, State Board of Elections	Male
Washington	Kim Wyman Secretary of State	Female
West Virginia	Andrew 'Mac' Warner Secretary of State	Male
Wisconsin	Meagan Wolfe Administrator, Elections Commission	Female
Wyoming	Edward A. Buchanan Secretary of State	Male

Source: Prepared by the OAS Mission with information drawn from the National Association of Secretaries of States, <https://www.nass.org/> and the National Association of State Election Directors, <https://www.nased.org/>

## 5. Elective Public Offices from a Gender Perspective

### a. Analysis of Electoral Results

#### *Women in the Vicepresidency*

For the first time in the history of the United States, a woman, notably one of African American and South Asian heritage, is serving as Vice President. Kamala Harris was one of the six women that ran for President in the 2020 primaries.

#### *Women in Congress*

In the 2020 election for the Congress, a new record was set for elected women, continuing a long running trend towards more equal representation in the federal legislature, as shown

in Table 2. A total of 142<sup>428</sup> (26.5%) women are serving in the 117th Congress. The previous record was set in 2019 with 127 (23.7%) women serving in Congress.

The distribution of women elected to the House and the Senate is the following:

- A total of 118 (89 Democrat, 29 Republican) women are serving in the U.S. House, comprising 27.1% of all members. The previous record was held in 2019 with 102 (23.4%) women serving in the House.
  - A total of 27 non-incumbent women won their elections in 2020. The previous record was set in 2018 with 36 non-incumbent women elected.
- A total of 24 (16 Democratic, 8 Republican) women are serving in the U.S. Senate. The previous record was held in 2020 with 26 (23.4%) women serving in the Senate.
  - One non-incumbent woman won a Senate seat.

The new Congress is more diverse with a record number of women of color elected in 2020. A total of 51 (9.5%) women of color are serving in Congress, which represents a slight increase compared to the previous period, when a total of 49 (9%) women of color served in the Congress.

Additionally, a total of six transgender candidates were elected to state office. This increases the number of trans elected officials in state legislatures from four to seven nationwide. Trans candidates were elected, or reelected, in Arkansas, California, Colorado, Delaware, Illinois, Kansas, New Hampshire and Vermont.

While the number of women Democrats increased significantly in the 2018 elections, in 2020, a significant increase occurred in the Republican Party, moving from 22 to 37 women in Congress.

In sum, the 2020 elections resulted in a record number of women elected. Despite this important progress, women still make up less than 30% of the 117<sup>th</sup> Congress, far from parity.

**Table 2: Women elected in the U.S. House of Representatives and the U.S. Senate, 2012-2020**

Election	U.S. House of Representatives			U.S. Senate		
	Seats	Women	% Women	Seats	Women	% Women
2020	434	118	27.1%	100	24	24%
2018	434	102	23.5%	100	24	24%
2016	433	83	19.2%	100	21	21%
2014	435	84	19.3%	100	20	20%

<sup>428</sup> The number of women serving in Congress following the 2020 elections (January 2021) include 17 (14 Democratic, 3 Republican) incumbent women senators who were not up for election in 2020. Numbers do not include Kamala Harris (D-CA), who resigned from the U.S. Senate on January 18, 2021 to ascend to the Vice Presidency (CAWP, 2020).

2012	434	78	18%	100	20	20%
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Source: Prepared by the OAS Mission. Year 2020 based on data drawn from CAWP/Rutgers University, available from <https://cawp.rutgers.edu/sites/default/files/resources/press-release-post-election-2016.pdf>. Years 2012-2018 based on data from Inter Parliamentary Union, available at <http://archive.ipu.org/wmn-e/classif-arc.htm>.

### *Women in State Legislatures*

Regarding the election of women in State legislatures, data from CAWP mirrors the positive trend that occurred at the federal level. Aggregated data in Table 3 shows that in the 2020 State legislative elections the total of women candidates was higher than in the 2018 election, and the number of women elected increased in 2020 compared with 2018. In the 2020 election, a total of 3,587 women ran for office and a total of 1,947 women were elected to serve in the next State Legislature. A total of 27 States out of the 46 that held elections in 2020 saw the number of elected women increase.

**Table 3: Women Candidates and Winners in State Legislatures, 2018-2020**

Election Year	Candidates	Winners
2020	3,589	1,947
2018	3,387	1,809

Source: Prepared by the OAS Mission. Year 2020 based on data drawn from CAWP/Rutgers University, available at <https://cawp.rutgers.edu/women-candidates-state-leg-historical-summary>

A total of 94 women are serving in statewide elected executive office (including governor) in 2021. This includes 15 women of color. Women make up 30.3% of all statewide elected executive officials. These figures represent a slight increase compared to the previous period (2019), where women held 28.9% of these positions in 2020.

According to CAWP/Rutgers University data, women represent 50% or more of state legislators only in Nevada. Women hold at least 50% of seats in three state senates (Nevada, Rhode Island, and Arizona) and four state houses (Nevada, Colorado, New Mexico, and Oregon).

No new women governors were elected in 2020. As a result, 9 (6 Democratic, 3 Republican) women are serving as governors in 2021, including 1 woman of color.

## **6. Recommendations**

- 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.

- Encouraging political parties, women-focused PACs and other similar stakeholders to promote and sustain political financing particularly for women who are running for office for the first time.

**viii. MEDIA**

**1. Introduction<sup>429</sup>**

Media coverage plays a significant role in any modern electoral process. For the 2020 General Election in the United States this was even more so given the impact of the COVID-19 pandemic on the organization of in-person events such as campaign activities and public debates.

For this report, two broad types of media were considered:

- **Traditional Media:** print, broadcast radio/TV, cable TV and online media.
- **Social Media:** Facebook, Twitter and Google (YouTube).

The following tools were used to analyze the U.S. presidential election media coverage:

- LexisNexis Newsdesk (a news aggregator and media monitoring tool)
- Sysomos (a social media analytic platform)
- Socialbakers (a social media marketing platform)

Data from trusted media outlets, NGOs, industry think tanks and research firms was also assessed.

The time frame analyzed in this report spanned August 15 to November 2, 2020. This period included media coverage two days prior to the Democratic and Republican National Conventions, and the subsequent campaigns of the candidates of these two major parties.

**2. Number of Media Outlets Analyzed for the 2020 OAS Mission**

This report analyses media coverage in both English and Spanish languages published and broadcast by 28,020 news outlets.

**Table 1: Media Outlets Analyzed**

	<b>Media Type</b>	<b>Numbers Analyzed</b>
	Online (includes several platforms of the same media outlet, such as licensed content, news wires, international channels, etc.)	20,962

<sup>429</sup> This report was prepared by Javier Tejado Dondé.

	Print (national and regional)	5,509
 	Broadcast, cable TV and radio stations (national and regional)	1,549

Source: LexisNexis Newsdesk

### 3. Media Coverage of Presidential Candidates

#### a. Overall Media Coverage and Sentiment

The total coverage for both major presidential candidates was very similar. Donald Trump received the most media attention, while coverage for Joe Biden was 15% lower. 76% of the reviewed content consisted of neutral information about the contenders, which shows that the overall coverage of both candidates was similar in numbers and sentiment. According to LexisNexis Newsdesk (“LN”), between August 15 and November 2, total media coverage was as follows:

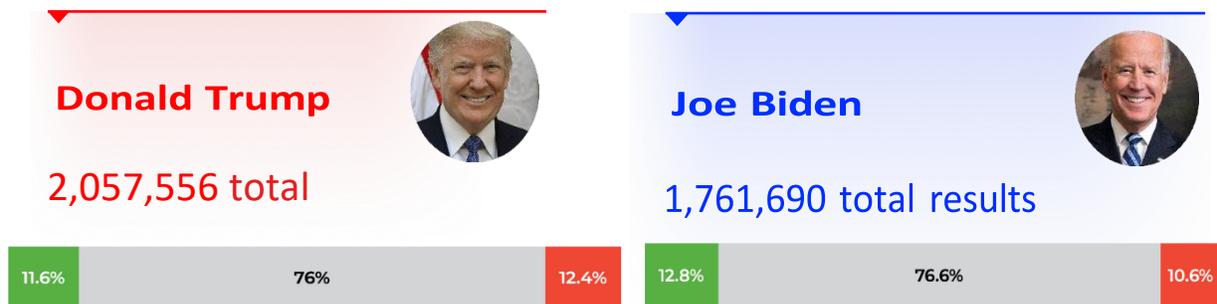
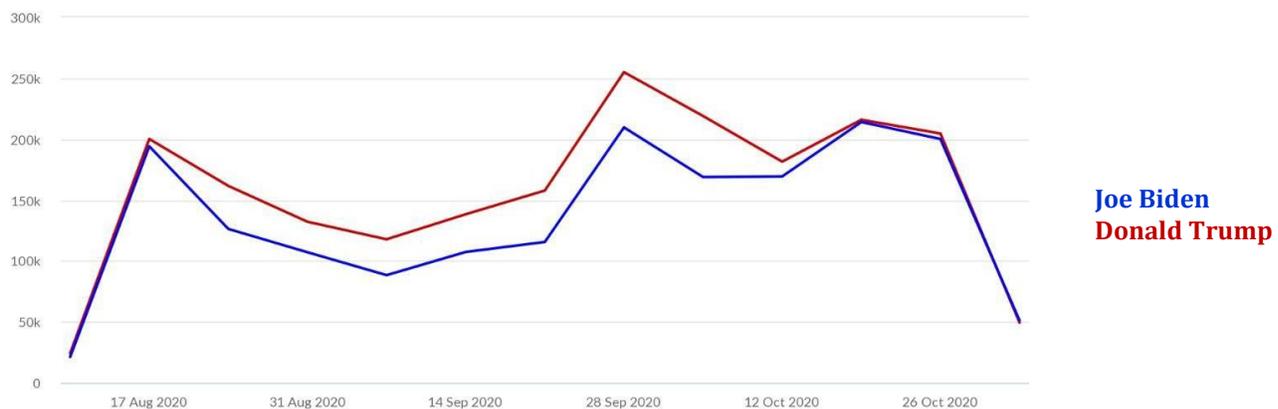
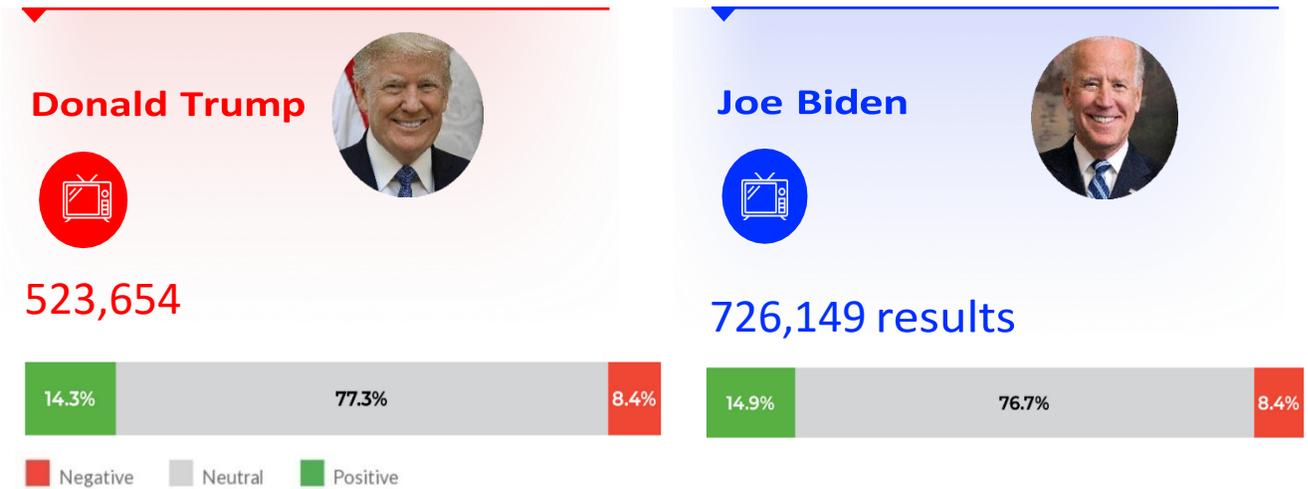


Figure 1: Coverage Over Time



Source: LexisNexis Newsdesk

b. TV Coverage (Broadcast and Cable TV) and Sentiment

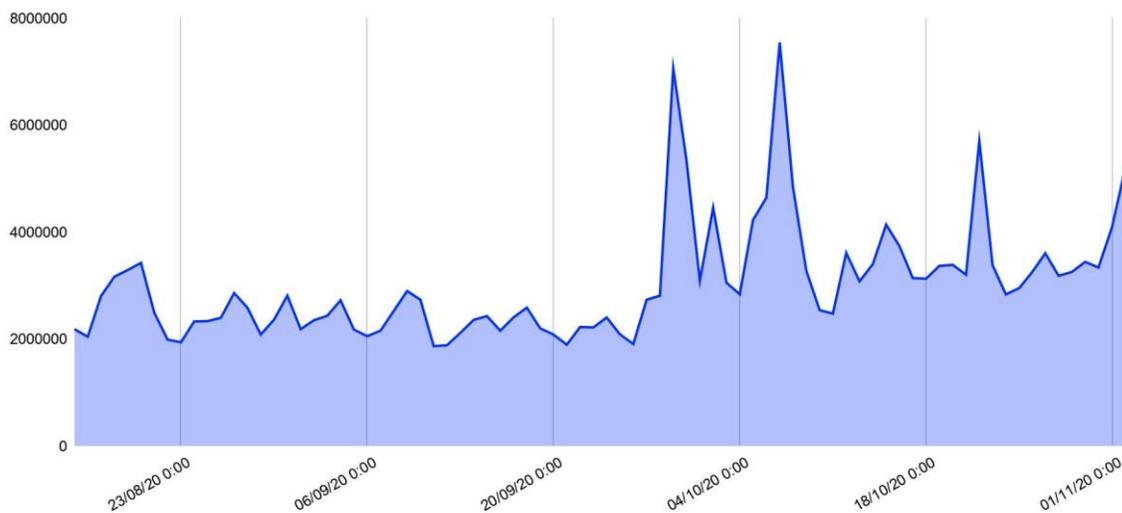


Although most media maintained a neutral tone (sentiment) throughout the electoral campaign in their coverage of both major presidential candidates, media outlets overwhelmingly publicly endorsed the democratic candidate. This is compatible with the U.S. legal framework, and in particular with free speech constitutional guarantees.

c. Social Media Coverage

Throughout the analyzed period (August 15 - November 2) there were 242 million digital mentions registered on social media; 3.02 million mentions per day on average.

**Figure 2: Social Media Coverage**

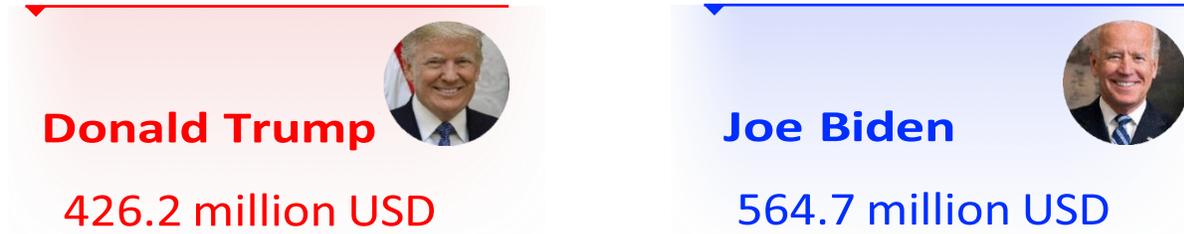


Source: Meltwater / Sysomos

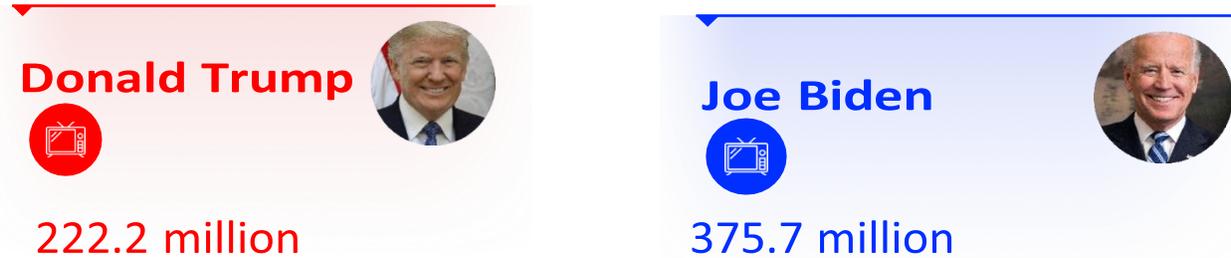
#### 4. Spending on Media

According to *The Wesleyan Media Project* and the *Center for Responsive Politics*, over \$1.5 billion was spent on TV, digital and radio content in the presidential election between April 9 and October 25.<sup>430</sup> Of that total, about \$991 million -or 65%- was spent by presidential candidates and their respective campaigns. The rest was spent by outside groups (mainly supporters and party committees). It is worth noting that media spending during electoral campaigns is not regulated in the U.S. as long as the amounts are properly disclosed.

##### a. Total Media Spending



##### b. Total TV Spending



Source: The Wesleyan Media Project, <https://mediaproject.wesleyan.edu/releases-102920/>

**Table 2: Expenditure on TV, Cable and Radio (April 9 - October 25, 2020)**

	Est. Trump Expenditure	Trump %	Est. Biden Expenditure	Biden %
<b>Broadcast TV</b>	US\$174,641,694	41%	US\$249,866,340	44.20%
<b>Digital</b>	US\$201,460,242	47.30%	US\$166,118,753	29.40%
<b>Local Cable</b>	US\$12,128,040	2.80%	US\$81,526,877	14.40%
<b>National Cable</b>	US\$34,223,485	8%	US\$41,245,639	7.30%

<sup>430</sup> Wesleyan Media Project, “Presidential General Election Ad Spending tops \$1.5 Billion”, <https://mediaproject.wesleyan.edu/releases-102920/>.

Satellite TV	US\$1,245,864	0.30%	US\$3,050,659	0.50%
Radio	US\$2,563,809	0.60%	US\$22,947,694	4.10%
Totals	US\$426,263,134		US\$564,755,962	

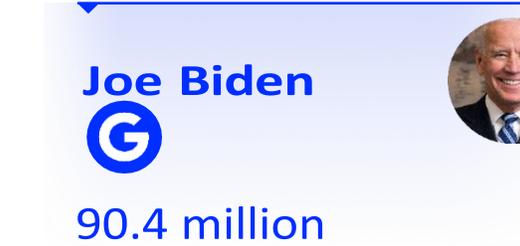
Source: Kantar/CMAG estimates for TV, cable and radio with analysis by the Wesleyan Media Project. Digital spending totals come from Wesleyan Media Project analysis of the Facebook Ad Library, Google Transparency Reports and the Snapchat Political Ads Library.

c. Social Media Spending

Expenditure on social media is not regulated in the United States, as long as it is properly disclosed. At October 25, 2020, the amounts reported by Facebook Ad Library Report and Google Transparency Report were the following:



Source: Facebook. (2020). Presidents Ad Library report. Data covers April 9 - October 25, 2020: <https://www.facebook.com/ads/library/report>



Source: Google Transparency Report, DONALD J. TRUMP FOR PRESIDENT, INC. Data covers April 9 - October 25, 2020: <https://transparencyreport.google.com/political-ads/advertiser/A R105500339708362752?hl=es>

Source: Google Transparency Report, BIDEN FOR PRESIDENT. Data covers April 9 - October 25, 2020: <https://transparencyreport.google.com/political-ads/advertiser/A R108481940364984320?hl=es>

## 5. Conversation Trends and Political Ads

### a. Negative Ads

It is worth highlighting that both presidential campaigns decided to air and support mostly negative TV ads. Close to 70% of ads were critical of their opponents and few had actionable proposals for voters. That said, negative ads are not regulated in the U.S. and are part of a very complex system that values the right of freedom of speech highly.<sup>431</sup>

### b. Self-Regulation on Social Media Platforms

After social media platforms were used in the 2016 U.S. presidential election and other political processes around the world to disseminate false or misleading information, companies enacted new rules and guidelines for the 2020 election.

On November 22, 2019, Twitter updated its Political Content Policy in order to prohibit any form of political advertising.<sup>432</sup> Also, Twitter designed a special tag that made its users aware of misleading information.

Facebook also implemented a wide range of measures, which included hiring thousands of fact-checkers to review posts and multimedia content. The social media platform reached a partnership with the Associated Press to review information posted on its feed and finally, did not run any new political ads during the last week of the election, due to time constraints to review them properly.<sup>433</sup>

In general, social media platforms invested significant time and resources, and made important changes to their policies, to prevent their usage in a way that would affect the electoral process. Perhaps as a result of these more stringent measures, misinformation campaigns were more visible on other platforms such as SMS-messaging services, Telegram and WhatsApp.<sup>434</sup> Ensuring that these messaging apps are better protected and making their users aware of potentially malicious content, will be a key challenge for future elections.

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 favors the expansion of freedom of speech, the

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<sup>431</sup> The New York Times, "Flush With Cash, Biden Eclipses Trump in War for the Airwaves", <https://www.nytimes.com/interactive/2020/10/17/us/politics/trump-biden-campaign-ad-spending.html?referringSource=articleShare>.

<sup>432</sup> Twitter, "Ads Transparency", <https://business.twitter.com/en/help/ads-policies/product-policies/ads-transparency.html>.

<sup>433</sup> Facebook, "New Steps To Protect The US Elections - About Facebook", <https://about.fb.com/news/2020/09/additional-steps-to-protect-the-us-elections/>.

<sup>434</sup> The New York Times, "Disinformation Moves From Social Networks to Texts.", <https://www.nytimes.com/2020/10/28/technology/disinformation-moves-from-social-networks-to-texts.html>.

absence of formal rules has required these companies to self-regulate in terms of the content they publish. This is far from ideal.

## 6. Media Endorsements

In the United States it is allowed, and even customary, for the media to endorse the candidate of their choice. During the 2020 election, several newspapers, including USA Today, Scientific American and the Pittsburgh Post-Gazette, broke decades of a tradition of non-endorsement to show their support for a candidate. The vast majority of media endorsements (which included national, regional, local and college newspapers) went to Joe Biden (182 endorsements), when compared to those received by Donald Trump (16 endorsements).

## 7. Debates and Town Halls

Two Presidential Debates were held. A third was cancelled due to health concerns and replaced by simultaneous Town Halls featuring the democratic and republican candidates.

**Table 2: Presidential and Vice Presidential Debates and Town Halls**

September 29	October 22	October 7	October 15
1 <sup>st</sup> Presidential Debate Cleveland, Ohio	2 <sup>nd</sup> Presidential Debate Nashville, Tennessee	Vice Presidential Debate Salt Lake City, Utah	Trump and Biden Town Halls NBC and ABC

While the U.S. media endeavored to broadcast these events to a wide audience, viewership<sup>435</sup> for the two Presidential Debates was lower than expected. This may have been due to more people streaming the debates online.

The first Presidential Debate drew 73 million viewers, a 13% decline from the 2016 first Presidential Debate, which was seen by 84 million people. The second Presidential Debate was accessed by 63 million viewers, a decline of about 10.1 million from the 2020 first Presidential Debate.

The Vice Presidential Debate had an audience of 57.9 million viewers; a sharp increase on the 2016 Vice Presidential Debate, which drew only 37.2 million viewers.

<sup>435</sup> Figures cited for the Presidential and Vice Presidential Debates and the Town Halls, were drawn from Nielsen TV ratings cited by the Washington Post (The Washington Post, “More than 73 million people watched that crazy presidential debate”, <https://www.washingtonpost.com/media/2020/09/30/presidential-debate-ratings/>), the New York Times (New York Times, “At 63 million viewers final debate is Trump’s Least Watched”, <https://www.nytimes.com/2020/10/23/business/media/trump-biden-debate-ratings.htm>), NBC News (NBC News, “Ratings drop for final presidential debate with 63 million viewers”, <https://www.nbcnews.com/news/all/ratings-drop-final-presidential-debate-63-million-viewers-n1244594>), and the Washington Post (The Washington Post, “Biden’s ABC town hall ratings beat Trump’s three-network NBC event”, <https://www.washingtonpost.com/media/2020/10/16/biden-trump-townhall-ratings/>).

With respect to the Town Halls, Joe Biden had 13.9 million viewers, while Donald Trump had 10.6 million viewers.

## **8. Media Efforts towards Fair and Equitable Electoral Coverage**

There was an overall media effort to inform in a neutral and balanced way about both presidential candidates and their respective campaigns. Each candidate received more than 76% of neutral coverage. Both traditional and social media also made important efforts to broadcast the two Presidential Debates.

The Mission noted that social media platforms had learned lessons from previous electoral processes, including the 2016 U.S. elections, and had taken important steps to address manipulation campaigns by discouraging the dissemination of false information, conducting focused fact-checking and banning the publication of new political ads one week before Election Day.

Facebook and Twitter also made important efforts to discourage users from sharing publications, pictures or multimedia content that could hinder or negatively affect voters' decisions during the electoral process, emphasizing the above during Election Day and its aftermath.

Given the challenges of the COVID-19 pandemic, both of the principal candidates amended their campaigns to minimize person-to-person contact and limit the number and size of their rallies. This was replaced by a greater presence in media through higher spending on traditional and social media when compared to previous presidential campaigns.

The overall coverage reflected significant media interest in the U.S. election and voters had ample sources to get information during the process in order to decide how to cast their votes.

## **9. Recommendations**

- Maintaining a close collaboration between the different platforms to ensure better protections against future attempts at malicious use.

**MEMBERS OF THE MISSION**

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Gerardo de Icaza	Mexico	Director of Electoral Cooperation and Observation	M
Brenda Santamaria	Argentina	Chief, Electoral Observation Section	F
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Stella Yeruti Mendez	Paraguay	General Coordinator	F
Anja Brenes	Costa Rica	Assistant General Coordinator	F
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Daniel Tovar	Venezuela	Electoral Organization Specialist	M
Nelson Sosa	Argentina	Electoral Technology Specialist	M
Patricio Ballados	Mexico	Postal Voting Specialist	M
Eric Magar	France	Electoral Boundaries Specialist	M
Marian Vidaurri	Mexico	Political Finance Specialist	F
Marta Martinez	Spain	Political Participation of Women Specialist	F
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Gustavo Cinosi	Argentina	Special Advisor	M
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Pablo Gonzalez	Argentina	International Observer	M
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Aryanne Quintal	Canada	International Observer	F
Mike Mora	Colombia	International Observer	M
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