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OSCE
Parliamentary Assembly of the OSCE
Office for Democratic Institutions and Human Rights of the OSCE

Election Observation Mission to the USA, November 2004
Preliminary Post-Election Statement

Dr. Barbara Haering
Special Coordinator appointed by the Chairman-in-Office

Press Conference, Washington, November 4, 2004
Speaking Notes

Ladies and Gentlemen

Thank you for attending our Press Conference. Three weeks ago when we introduced ourselves to you here in Washington, I underlined three key elements of our Election Observation Mission:

1. The credibility of the OSCE Election Observation is based on the fact, that we foster the commitments that have been agreed to by all OSCE participating States in the Copenhagen Document from 1990.
2. Our Election Observation Mission has taken place on the invitation of the US Government.
3. Our goal and responsibility was to give a balanced picture of the election procedures in the USA.

We thereby come to the following assessment:

- The 2 November elections in the USA mostly met of the commitments agreed to by the 55 OSCE participating States in the Copenhagen Document of 1990.
- The presidential elections were conducted in a highly competitive environment. The leading candidates enjoyed the full benefits of media. However, the Election Observation Mission took notice of the fact that only a very small proportion of the elections for the 434 congressional districts are generally considered to be competitive. In some cases this may be attributed to the way congressional boundaries are drawn.
- There was an exceptional public interest not only in the presidential candidates and their campaign issues but also with regard to the election process itself. Civil society played an active role, contributing substantially towards greater awareness of election issues; thus promoting voter interest and participation.

The high turnout indicates the importance of this election for the electorate and the strong democratic tradition in this country.

- Allegations of electoral fraud and voter suppression, primarily among minorities, were widely reported and presented to the EOM in the pre-election period. The EOM is concerned that the widespread nature of these allegations may undermine confidence in the electoral process.
- On election-day OSCE observers were granted access to polling stations in a number of states, sometimes only in specific counties. However, in others states, access was not possible or strictly limited. This as a result of state laws not including international observers in the statutory categories of persons permitted in polling places, or because lack of reference to international observers in state law was deemed to be an obstacle to their presence. The fact, that the OSCE had been invited by the US State Department to carry out this Election Observation Mission could not solve these problems. Congress and individual states should therefore consider introducing legal provisions allowing unimpeded access to all stages of the election process for international observers who have been invited to observe the elections by the US Government. Similar provisions should extend to domestic non-partisan observers. This would further enhance transparency and bring state law fully in line with the United States' international commitments.
- Although it was not possible for our observers to access polling stations in all states, it appears that the voting and the processing of ballots generally were carried out in an orderly manner. However, significant delays at poling stations are likely to deter voters from voting and may even restrict the right to vote. It is clearly desirable that steps are taken to reduce delays in future elections.
- The Election Observation Mission took notice that the USA are going through a crucial phase of election reform. For the first time a federal law (HAVA 2002) is providing nationwide rules and regulations for election procedures. Unfortunately, the requirements of HAVA have not been fully implemented yet. Moreover, we believe, US election reforms will have to go beyond HAVA.

In my capacity as Special Coordinator of the Chairman-in-Office of the OSCE let me end by underlining the importance of the fact that the US Government has invited the OSCE to carry out this Election Observation Mission. It is a sign of the credibility of the USA within the OSCE. And: Carrying out this Election Observation Mission in keeping with normal practice in the OSCE and in accordance with agreements made by the 55 OSCE-participating countries, enhances the credibility of the Organization for Security and Co-operation in Europe.

November 4, 2004/BH

ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE ELECTION OBSERVATION MISSION

UNITED STATES OF AMERICA
2 November 2004 Elections

Washington DC, 4 November 2004 – Following an invitation by the Government of the United States to the Organization for Security and Co-operation in Europe (OSCE), the OSCE deployed an Election Observation Mission (EOM) from 4 October 2004.

The EOM has been a joint effort of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the OSCE Parliamentary Assembly (OSCE PA).

The EOM focused on specific issues including those related to the implementation of the Help America Vote Act (HAVA) in the framework of the presidential and Congressional elections.

The EOM expresses its appreciation to the US State Department, other government bodies and election officials at federal, state and county levels for their assistance and co-operation.

PRELIMINARY FINDINGS

Overview

The 2 November elections in the United States mostly met the commitments agreed to by the 55 OSCE participating States in the Copenhagen Document of 1990 – see Annex 1. They were conducted in an environment that reflects a long democratic tradition, including institutions governed by rule of law, free and professional media and civil society involved in all aspects of the election process.

The presidential elections took place in a highly competitive environment. In what was perceived to be a very close race, the leading presidential candidates enjoyed the full benefits of free and vigorous media coverage throughout the campaign. There was exceptional public interest not only in the two main presidential candidates and respective campaign issues but also in the election process itself. Civil society contributed substantially towards greater awareness of election issues and promoting voter participation. However, a number of significant issues were brought to the attention of the EOM as set out below.

HAVA emerged as a prompt bi-partisan reaction to problems identified during the 2000 elections. At the same time it was also a political compromise and left a number of questions to be addressed in its implementation. This in turn created new problems, such as varying interpretations of the rules on provisional balloting. In general, HAVA's impact to date has been positive but limited.

> *It would seem appropriate to regard HAVA as work in progress in the context of a comprehensive electoral reform process, including the development of minimum election standards. It is to be hoped that future reforms will further enhance consistency regarding the following: voter registration criteria and procedures; rules for issuing, verifying and counting provisional ballots; voter identification requirements; absentee voting by eligible citizens living abroad.*

The performance of state and county election officials – mostly nominated by political parties – was generally marked by professionalism and dedication. Broad media coverage of all aspects of the election process ensured a high level of transparency of the election administration. However, the way in which election administrators are appointed may raise questions of possible conflict of interest, in particular when election officials run for office or act as campaign managers.

Allegations of electoral fraud and voter suppression, primarily among minorities, were widely reported and presented to the EOM in the pre-election period. The EOM is concerned that the widespread nature of these allegations may undermine confidence in the electoral process.

> *A coherent approach to such issues is highly desirable, addressing both fraud prevention and ensuring full enfranchisement. Suffrage is best protected when both election administrators and voters themselves take responsibility for ensuring that voter lists are accurately and well-maintained.*

In keeping with its OSCE commitments, the United States invited the OSCE to observe these elections. OSCE observers were able to assess aspects of the pre-election environment and were granted access to polling stations in a number of states, sometimes only in specific counties. However, in other states, access was not possible or was limited. This was a result of state law, either because international observers were not included in the statutory categories of persons permitted to be in polling places, or because the lack of reference to international observers in state law was deemed to constitute an obstacle to their presence in polling places.

> *Congress and individual states should consider introducing legal provisions allowing unimpeded access to all stages of the election process for international observers who have been invited to observe the elections by the US Government. Similar provisions should extend to domestic nonpartisan observers. This would further enhance transparency and bring state law fully in line with the United States' international commitments.*

Election day proceeded in an orderly and peaceful manner. There were, however, some concerns, for instance in relation to the use of provisional ballots and occasional problems with DRE (direct recording electronic) machines. Very long queues were

reported in many areas, with polling stations lacking the capacity to ensure a reasonably prompt throughput of voters. Delays may have been exacerbated by the fact that election day voting took place during working hours.

> *Significant delays at the polling station are likely to deter some voters from voting and may restrict the right to vote. While a solution to this problem may have cost implications, it is clearly desirable that steps are taken to reduce delays in future elections.*

The EOM took notice of the fact that only a small proportion of the elections for the 434 Congressional districts were generally perceived to be competitive. This was attributed largely to the way in which Congressional district boundaries are drawn so as to favour the incumbent party.

The OSCE/ODIHR will issue a comprehensive final report which will address certain issues not included in this statement, including candidate ballot access, open voting by fax and the restricted representation in Congress of residents of the District of Columbia.

Background and electoral framework

The OSCE/ODIHR previously undertook an Election Assessment Mission to follow the Congressional mid-term elections in 2002, focusing mainly on on-going electoral reform in Florida, and a further visit in 2003 to follow the gubernatorial recall election in California. In advance of the present EOM the OSCE/ODIHR attended a meeting of the National Association of Secretaries of State devoted to HAVA implementation and subsequently conducted a Needs Assessment Mission in Washington DC. An advance team of the OSCE PA also visited the United States in October 2004 and conducted a series of preparatory meetings, and in early October 2004 the EOM core team was deployed. The EOM was accordingly well-positioned to form an assessment of the pre-election period.

On 2 November, US voters elected members of the Electoral College which will subsequently elect the President and Vice-President. Voters also elected all members of the House of Representatives, one third of Senators and numerous officials at state, county and local levels as well as participating in state and local referenda.

Voter registration for US elections is based on the active and honest participation of citizens. Citizens are asked to file with the respective officials a registration form stating in writing, among other things, that they are US citizens, are at least 18 years old on election day and reside in the respective county and state. They are also asked to sign a declaration or oath, which in most states reconfirms the above information and includes a confirmation that their civil rights are not restricted. If the form is completed correctly and filed within prescribed deadlines, the relevant officials must register the applicant or, in case of refusal, provide reasons for such refusal.

Given the highly decentralized nature of government and legislative regulation, various key aspects of the elections were administered differently in different states.

The legal framework for elections comprised a number of federal acts providing minimum standards for the conduct of elections, individual states' election laws and county regulations. Most aspects of the election, especially those relating to election day procedures, were governed by state law, with further significant variations occurring from one county to another within states. This high degree of decentralization fosters widely differing approaches to the conduct of elections across the country.

Pre-election Findings

There were allegations of voter fraud which focused mainly on the accuracy of the voter lists and the need to ensure that votes were only cast by those entitled to do so. These included references to voting by persons ineligible to cast a ballot, multiple voting and unlawful voting by ex-felons. Such concerns were addressed in part by the use of challenge procedures, which allowed party representatives, voters and poll workers to confront voters directly in the polling station and challenge their eligibility to vote. However, the EOM is concerned that even the prospect of such challenges might have the effect of deterring participation by legitimate voters.

Allegations about voter disenfranchisement and so-called voter suppression were also widely aired. It was claimed that such practices included non-processing of voter registration applications, the improper removal of eligible voters from voter lists, harassment and intimidation of voters.

While recognizing the seriousness of the above allegations, the EOM was not provided with first-hand evidence to substantiate them or to demonstrate that such practices were widespread or systematic.

Absentee and early voting was strongly encouraged by the major political parties, with considerable effect. Some estimates put the likely level of absentee and early voting as high as 20% of all voters. Other reasons for the high levels of absentee and early voting included the fact that the elections took place on a working day, that in some counties polling stations closed as early as 6 pm, and the large number of US citizens, both civilian and military, who were permitted to use absentee voting procedures from abroad. The EOM noted that there are no uniform standards for processing absentee ballots. It was also aware that in some states absentee voters abroad were permitted to send their ballots by fax, having signed a secrecy waiver. While this practice makes it easier for voters abroad to cast their vote, voting by fax compromises the secrecy of the ballot.

During the pre-election period expenditure by the candidates and parties on their campaigns was subject to limitations and disclosure rules imposed by federal law. However, by the end of the campaign a number of so-called "527" groups, tax exempt campaigning bodies which are not subject to limits on financial contributions, were effectively deployed in support of both leading presidential candidates. This innovation effectively circumvented the statutory regime for campaign finance in relation to the presidential elections.

In a number of states, citizens who have been convicted of any felony (a criminal offence more serious than a misdemeanor) are deprived of their voting rights, in some states for life. In this respect the restriction on the right to vote is not made proportionate to the seriousness of the criminal offence. In any event it is desirable that voter qualifications for federal elections are uniform. Otherwise, voters in different states do not enjoy equal suffrage.

A record number of women were nominated to compete for seats in the House of Representatives (139 as compared to 124 in 2002). There was also a high proportion of women working in election administration and as poll workers.

Implementation of Help America Vote Act

HAVA addressed problems identified during the 2000 elections. However, it was also a political compromise which left a number of questions to be addressed in its implementation. Whilst the ultimate deadline for the implementation of HAVA is 1 January 2006, there were creditable attempts to do as much as possible before the 2 November 2004 elections. It would appear that, for practical reasons, some deadlines for the implementation of HAVA's key provisions may have been too ambitious. Overall, to date HAVA has had a visible and positive, albeit limited, impact on the US election process.

Election Assistance Commission

HAVA provided for the creation of a federal Election Assistance Commission (EAC) with powers to issue guidance on the implementation of minimum federal election standards and administer payments to the states for the introduction of new election technology. However, the EAC was appointed only in December 2003, nine months after the deadline established under the Act. This, in turn, limited its impact on these elections. Nevertheless, since taking up its duties, the EAC has acted swiftly to meet its responsibilities.

Statewide Voter Registration Databases

HAVA requires all states to introduce statewide voter registration databases by 1 January 2004, with a possibility to apply for a waiver until 1 January 2006. Most states have opted for a waiver due to the complexity of the task. As a result, the advantages which statewide registration would provide, including the prevention of multiple registration, were not available in the majority of states.

New Voting Equipment

One of HAVA's central objectives was the replacement of lever and punch card voting machines. The Act recommended the introduction of electronic voting machines, or DREs (direct recording electronic machines), with a manual audit capacity. Although the older technology has been replaced in some counties, most notably in the entire state of Florida, many states have obtained a waiver extending the deadline for replacement until 1 January 2006. Moreover, given that the current

federal standards for election technology are not mandatory, there are no uniform certification procedures. This may account in part for the reported distrust of DREs, especially touch screen machines, a distrust compounded by the decertification of certain DREs in California. In the absence of uniform certification standards, safeguards which do not entirely depend on electronic data, would enhance public confidence in the DREs. The most obvious solution would be the prompt introduction of a paper audit trail, which appears to have been successfully implemented in certain areas. Consideration could also be given to enhancing the role of the national certification agency (the National Institute for Standards and Technology) and the EAC in this area.

Provisional Ballots

Provisional ballots have been introduced nationwide except in those states with same-day voter registration or no voter registration at all. Under this procedure, voters who claim to be registered but whose names do not appear on the polling station voter lists are permitted to cast a provisional ballot. Such ballots are only counted if a voter's eligibility is subsequently verified by the polling officials. While this innovation was intended to ensure enfranchisement of voters whose names were improperly omitted from the voter register, its introduction has created problems of its own. In particular, the statutory text is ambiguous as to whether the voter must cast the ballot in his/her allocated precinct for the provisional ballot to be counted. The statutory provisions have been litigated in a number of states and have been interpreted differently by different courts. It is highly desirable that this ambiguity is resolved in a consistent and timely manner. Additionally, deadlines for verification and counting of provisional ballots vary widely from state to state and have the potential to delay announcement of final results at the federal level.

Voter Identification (ID) Requirements in Polling Stations

The introduction of limited ID requirements has also been implemented nationwide. All first time voters who registered by mail and did not submit a copy of their ID with their registration application must show ID at the polling places. It seems likely that this innovation under HAVA will have deterred fraud and forestalled allegations of fraud in relation to this category of voters. The issue does not arise in the 17 states where all voters are required to present ID at the polling station, a requirement which is a rule rather than an exception in most OSCE participating States.

Access for Voters with Disabilities

Ensuring access for voters with disabilities is one of the minimum requirements under HAVA, which must be met by 1 January 2006. The EOM was not in a position to form a general assessment of the extent to which this goal was met for these elections. However, it would appear that many polling stations provided good access for visually impaired and other disabled voters.

Election Day Findings

Election day was characterized by very high turnout, resulting in long queues and pressure on poll workers at some polling stations. It seems likely that protracted waiting periods may have deterred or prevented some voters from participating in the election, particularly those who were working on 2 November and were not given time off by their employers. The EOM commends both the patience of voters who waited to cast their vote, in some cases for several hours, and the commitment of poll workers under difficult conditions.

EOM observation reports indicated that the electoral process was orderly and peaceful. While the polls were generally well administered by election officials, observers also noted that poll workers displayed varying levels of knowledge on correct procedures. It was not clear that poll workers had generally received sufficient training to perform their functions.

OSCE observers were granted access to polling stations in a number of states. Access was sometimes limited to specific counties or to specific polling stations within a particular county. In those places where access was granted, OSCE observers noted that the key elements of HAVA were being implemented. There were, however, a number of concerns.

Specifically, there was considerable confusion and varying approaches from one state to another regarding the use of provisional ballots. The prompt release of an authoritative record of the number of provisional ballots cast would contribute to clarity in announcing results. Occasional faults and breakdowns of DRE machines sometimes resulted in delays for voters while election officials sought technical support or advice. Observers also noted that some voters, mostly but not exclusively the elderly, had difficulties with newer voting technologies, necessitating assistance by poll workers.

Some concerns were expressed by observers regarding the secrecy of the vote due to the positioning of the voting machines in polling stations. Political party observers were present in many polling stations, although domestic non-partisan observers often had no legal right to such access.

It would appear that relatively few voters were challenged in the polling stations to confirm their eligibility to vote, despite indications that such challenges would be launched on a large scale. Similarly, the high number of lawyers deployed by each of the major parties does not appear to have led to a significant level of litigation on election day.

MISSION INFORMATION & ACKNOWLEDGEMENTS

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

Kessler MP (Italy), Vice-President of the OSCE PA was appointed by the OSCE Chairman-in-Office as deputy to Ms. Haering.

This statement is based on the findings of 92 OSCE observers from 34 OSCE participating States, including 56 members of the OSCE Parliamentary Assembly.

It should be noted that this statement of preliminary findings is issued before the announcement and certification of results and the final adjudication of election-related legal challenges. The relatively small number of OSCE observers and difficulties in gaining access to polling stations under a number of states' laws should also be taken into account.

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

The OSCE/ODIHR will issue a final report on these elections approximately six weeks after the completion of the electoral process.

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Annex 1: Copenhagen Document[1] (extracts)

Key provisions on international election standards:

(6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.

(7) To ensure that the will of the people serves as the basis of the authority of government, the participating States will

(7.1) - hold free elections at reasonable intervals, as established by law;

(7.2) - permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;

(7.3) - guarantee universal and equal suffrage to adult citizens;

(7.4) - ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;

(7.5) - respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

(7.6) - respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;

(7.7) - ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

(7.8) - provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;

(7.9) - ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

(8) The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

Related commitments in the Copenhagen Document include:

[1] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, 29 June 1990

In order to strengthen respect for, and enjoyment of, human rights and fundamental freedoms, to develop human contacts and to resolve issues of a related humanitarian character, the participating States agree on the following:

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) - free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

(5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

(5.4) - a clear separation between the State and political parties; in particular, political parties will not be merged with the State;

(5.9) - all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(10) In reaffirming their commitment to ensure effectively the rights of the individual to know and act upon human rights and fundamental freedoms, and to contribute actively, individually or in association with others, to their promotion and protection, the participating States express their commitment to

(10.1) - respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate and publish such views and information;

(10.3) - ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups;

(10.4) - allow members of such groups and organizations to have unhindered access to and communication with similar bodies within and outside their countries and with international organizations, to engage in exchanges, contacts and co-operation with such groups and organizations and to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.

(24) The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured. Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

Annex II: States in Which OSCE Observers Were Deployed

OSCE observers were deployed in the following states on election day.

California; Florida; Illinois; Maryland; Minnesota; Nevada; New Jersey; New Mexico; North Carolina; Ohio; Virginia; Washington DC