Questions and Answers: US Federal Elections & Human Rights

This Q & A from Human Rights Watch explains what human rights law says about how federal elections are administered in the United States including whether or not the process for certifying election results is aligned with international standards. It also explains what international human rights law requires regarding the presence of armed law enforcement or armed private individuals in and near polling places.

Which international human rights law applies to US federal elections?

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Who is in charge of the different law enforcement agencies in the US that might be involved in responding to any election-related or protest-related violence?
What rights-protective measures should be taken in the context of protests?

What are the rights-protective rules surrounding use of force and arrests during protests?

Which international human rights law applies to US federal elections?

International human rights law offers useful standards for protecting fundamental human rights during elections. Relevant law can be found in the International Covenant on Civil and Political Rights, ratified by the United States in 1992; the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994; and the Universal Declaration of Human Rights, which the United States played an important role in drafting and is considered reflective of customary international law. Many of these provisions are reflected in US constitutional, federal, and state law.

Is the way that US elections are administered aligned with international human rights standards?

International human rights law “does not impose any particular electoral system,” whether highly centrally controlled, or significantly decentralized, as in the United States. International human rights law does set out voting rights and non-discrimination obligations that are binding on the national, state, and local governments in the United States. In its general comment on the right to vote, the United Nations Human Rights Committee, the independent expert committee that provides authoritative interpretations of the International Covenant on Civil and Political Rights, stated that governments are obligated to take “effective measures to ensure that all persons entitled to vote are able to exercise that right.”

The decentralized administration of elections in the United States means that no state administers elections in exactly the same way as another state. Each US state has a chief election official who has ultimate authority over elections in the state, but there is variety in which officials hold this power. For example, many states rely on their secretaries of state as their chief election official, others require governors to appoint top election officials, and still others use appointed bipartisan election commissions. These top officials are responsible for things like ensuring election laws are followed, administering statewide voter registration, and certifying voting equipment and local election officials.

Moving beyond such macro-level tasks handled by top officials, the day-to-day of election administration in the United States is run at the county or municipal level by a single individual, a board or commission of elections, or a combination of the two. In all, this means that there are more than 10,000 election administration jurisdictions in the United States. When election duties are divided, the most common division of duties is between voter registration and the actual administration of elections, but there is enormous variety.
What international human rights responsibilities do US election officials have to ensure that all eligible voters are able to exercise their right to vote?

US election officials need to effectively communicate about voting procedures, making various voting options readily available, and adopting additional measures as needed. Election officials in the United States should counter any misinformation about polling procedures or locations promptly, consistently, accurately, and using languages and methods of communication designed to reach all eligible voters.

Officials should offer a range of in-person and other voting options that would ensure that all eligible voters are able to exercise their right to vote. Many existing problems and obstacles to voting have been exacerbated by the Covid-19 pandemic. For instance, the economic and societal impact of the pandemic means an increased likelihood of address changes because of evictions and housing transitions. It also includes anticipating problems people may have voting if they do not have time off from work, lack dependent care due to Covid-19-related school and daycare closures, have caregiving responsibilities for an adult, or have no access to safe or affordable transport. It also includes measures to ensure voting access to people with disabilities, older people, those ill with Covid-19 or with certain chronic health conditions, or others having difficulty complying with new public health measures applicable to voting.

What international human rights responsibilities do US officials have to ensure the right to vote without discrimination?

The US has a long history of discrimination against Black and brown people in their ability to exercise the right to vote. Even after the enactment of the US federal Voting Rights Act in 1965, Black, Latinx, and Native American citizens experienced many obstacles to voting. Changes by some states in recent years, including those enabled by a 2013 US Supreme Court case—Shelby County v. Holder, which eviscerated federal oversight under the act—have made voting harder, not easier. The Covid-19 pandemic has exacerbated these problems. Authorities throughout the United States should ensure that voting procedures do not have discriminatory effects, particularly on racial and ethnic minorities, Native Americans, women, and people with disabilities, among others. Authorities should end the disenfranchisement of people who have completed criminal sentences, ensure voting rights in jails, and review all automatic felony disenfranchisement laws, which have had a disproportionate impact on Black and brown people. Voting rights should be restored and respected for people under probation or parole supervision, or who may owe fines and fees.

Which entity certifies US election results and is this procedure aligned with international human rights law?

Just as international human rights law offers no set blueprint for the way elections should be administered (other than in a way that protects human rights), there is no requirement as to what entity certifies official election results. In the United States, the US Congress is ultimately responsible for certifying the winner of the presidential election, but official certification is more of a process than a single act. The process, which is outlined in US law in Title 3, Chapter 1 of the US Code, begins when the governors for each of the 50 US states prepares their state’s Certificate of Ascertainment for submission
to the US Archivist, based on the electoral vote count in their state. This year, the vote count is likely to be completed at different times by each state on or well after the closing of the polls on November 3, 2020. The Certificate of Ascertainment confirms the winning candidate and their electors (members of the US Electoral College) as well as how many votes each elector received in the state. Each state’s Electoral College electors meet in their state’s capital to formally cast their votes for president and vice president on the first Monday after the second Wednesday in December. In 2020, this will be on December 14. On January 6, 2021, the US Congress will convene to count the electoral votes and certify the winner of the election. The elected president is to take office on January 20, a date that is established by the 20th Amendment to the US Constitution.

Which nongovernmental organizations are responsible for protecting the integrity of US elections?

While it is the responsibility of each state’s election authorities to ensure the integrity of the elections under their jurisdiction, there is a long history of US civil society groups playing a role in ensuring the right to vote without intimidation or discrimination. Some of these groups are partisan, with the primary examples being individuals appointed by the Democratic and Republican National Committees to observe polls. However, the civil society groups that are independent or non-partisan include: the American Civil Liberties Union (ACLU), Asian and Pacific Islander American Vote (APIAVote), Arab American Institute, Asian Americans Advancing Justice, the Brennan Center for Justice, Common Cause, the Lawyers’ Committee for Civil Rights Under Law, the Leadership Conference for Civil and Human Rights, the League of Women Voters, National Association of Latino Elected Officials (NALEO) Educational Fund, and the National Association for the Advancement of Colored People (NAACP).

Each US state has its own rules governing the use of election observers. Only 35 US states have laws explicitly allowing and regulating the use of non-partisan election observers. However, impartial, non-partisan observers are useful in ensuring that elections are free and fair. Such observers can add to the credibility of elections by recognizing and highlighting procedures and practices that help protect the right to vote, as well as identifying problems. International election observers from the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS), and from nongovernmental organizations such as the Carter Center have observed elections internationally, and the OSCE and the OAS have observed elections inside the United States in the past. However, as of October 2020, only the OSCE had deployed observers to monitor the November 3 US general election. The OAS needs to receive an invitation from the US government before deploying observers and one had not been received as of October 1.

In the context of Covid-19, how does the international human right to life and health intersect with the right to vote?

Election officials in the United States should ensure safe access to voting in the context of the Covid-19 pandemic. This includes adopting a range of measures, such as mail-in voting, secure drop boxes, multi-day early voting, increased numbers of polling places to decrease crowding, social distancing rules, special assistance to people at high risk of severe illness if infected or who have been quarantined, and
protocols ensuring access to hygiene materials and freely available personal protective equipment at polling places. Candidates should act to ensure that campaign activities do not imperil public health.

**What does international human rights law require if there is a voting rights violation?**

In accordance with international standards, US election officials need to provide prompt review, appeal, and remedy for voting rights violations. International law requires an effective remedy—a solution or “cure”—for violation of an individual’s human rights, including voting rights violations. Voters who report that their rights have been denied or violated should have a prompt, fair hearing and appeal, and the right to a speedy and effective solution. Such review should ensure voters the opportunity to correct routine issues like forgetting to sign their ballot envelope or using a different signature style than the one on record. An effective solution would allow voters to exercise their voting rights within the election timeframe so that their vote can be counted.

**What does international human rights law require regarding ballot counting?**

US citizens have the right to vote for candidates of their choice and to have that vote counted. Similarly, international human rights law recognizes that government derives its authority from the “will of the people.” An increase in the number of people voting by mail and other changes made to voting procedures in light of the Covid-19 pandemic means it may take longer than in previous elections for local election officials in the over 10,000 US election jurisdictions to generate accurate tallies of results to allow for their preparation of the official Certificate of Ascertainment (discussed above). Officials at all levels should ensure that all valid ballots be counted, keeping the rights of voters, and ascertaining the will of all voters at the center of efforts to resolve any controversy.

Elections should occur within an established legal framework that is conducive to free and fair elections. In general, laws governing the elections should not be changed immediately prior to or in the midst of elections or vote counting; any legal adjustments that may be required due to unforeseen events should prioritize ensuring the effective exercise of voting rights and the counting of all votes.

**How should officials in the US prevent and respond to voter intimidation and violence by groups and individuals, before, during, and after the elections?**

Officials at all levels and candidates for office should publicly condemn groups and individuals seeking to intimidate, harass, incite or engage in violence against voters and other members of the public, including on the basis of race, color, national origin, gender, gender identity, sexual orientation, religion, and disability. They should seek to prevent such intimidation and violence, including near polling places and during protests. Law enforcement authorities should promptly and thoroughly investigate and appropriately prosecute offenses (including violence and threats of violence) against candidates, elected officials, voters, election officials, and others.
Federal and state authorities should immediately investigate and address credible allegations or evidence of collusion by local law enforcement officials, police, or members of the armed forces, including the National Guard, with white supremacist and other extremist groups. Implicated officials should be put on leave pending appropriate disciplinary measures or prosecution.

Government agencies and officials as well as others who effectively wield governmental authority or exercise effective control over territory and population have a duty not to engage in any speech advocating violence, discrimination, or hostility toward any individual or social group.

**How should US government and election officials disseminate information about voting and elections? What responsibilities do social media platforms have?**

Government officials should ensure access to accurate electoral information. Government officials should not make, sponsor, encourage, or further disseminate information about the electoral process that they know to be false, or which demonstrates a reckless disregard for verifiable information. They should disseminate accessible, reliable, and trustworthy information about the electoral process.

Internet intermediaries, like social media platforms, have a responsibility to respect human rights and mitigate harm—such as incitement to violence—resulting from their business practices. Where they take action to restrict third-party content (such as deletion or moderation) that goes beyond legal requirements in order to, for example, preserve the integrity of the electoral process, they should adopt clear, pre-determined policies governing those actions. Those policies should be based on objectively justifiable criteria that can be both easily accessed and understood, with clear information about how they are enforced. Internet intermediaries should implement their policies in a fair, unbiased, and consistent manner to effectively protect the right to vote and to accurate electoral information, while providing users access to appeal and remedy for moderation decisions.

**Are there standards relating to media freedom and public access to information during elections?**

Democratic elections require an environment of respect for and enjoyment of human rights without arbitrary or unreasonable restrictions. Key human rights, whether exercised online or offline, that need to be protected during elections include but are not limited to freedom of expression and access to information held by public bodies. One key component of these human rights is media freedom. The UN special rapporteur on the right to freedom of opinion and expression has issued detailed guidance on how to ensure freedom of opinion, expression, and access to information during elections. The special rapporteur emphasizes that, besides promoting an adequate environment for the work of the media during elections, government officials should protect freedom of expression during electoral processes by promoting pluralism (to secure a diverse electoral process which is hospitable to candidates and parties from across the political spectrum), transparency (in political and electoral financing and in means and methods of political polling, for example), and accountability (to ensure laws and regulations are enforced and abuses of power are rectified, and to combat impunity for attacks against journalists).
Does international human rights law offer guidance regarding voter intimidation at polling places? What about if people or law enforcement bring guns into polling places?

Voter intimidation is illegal under US federal and state law. International human rights law also prohibits voter intimidation and requires authorities to protect the right to vote from interference through threats, harassment, or violence. While the human right to freedom of expression needs to be protected during elections, international human rights law also recognizes that this right can be restricted if necessary and proportionate to protect the rights of others, including the right to vote. This is particularly relevant in the immediate vicinity of and inside polling stations.

In the United States, state (not federal) law enforcement personnel trained in their law enforcement duty to protect the right to vote and to ensure non-discrimination in voting, such as armed and uniformed police, sheriffs, or state national guard personnel, may be present at polls in accordance with state or municipal law. Laws vary widely on this issue throughout the United States, however. For example, in Pennsylvania and California police are prohibited from showing up at polls unless there in their personal capacity to vote or unless invited by election authorities. By contrast, New York state law requires the presence of “at least one police officer” at polls. Depending therefore on the governing state or local law in the US, law enforcement presence at polls may be legal, but such officers should be focused on protecting the right to vote and protecting public safety, and their role should be neutral, impartial, and disengaged from the political process in order to comport with international human rights standards.

The presence of armed and uniformed law enforcement personnel may be required to protect intimidation of voters by private actors, but election authorities and law enforcement personnel should balance this important function against the fact that their presence can intimidate citizens from exercising their fundamental right to vote. There is a troubling history of the use of off-duty armed police officers wearing official-looking uniforms to intimidate voters in New Jersey in 1981 in the United States. Today, some citizens harbor similar fears of intimidation or that the presence of law enforcement may escalate violence. Others may fear that they will risk arrest for unpaid fines and fees or warrants that are completely unrelated to their fundamental right to vote. A recent poll found that one-third of Black respondents, 29 percent of Asian Americans, and 24 percent of Hispanic Americans worry they could face arrest at the polls—compared with just 14 percent of white respondents.

There is no rational reason for active duty immigration enforcement personnel to be deployed inside or near polling stations, and therefore, their presence does not comport with international human rights law. The active deployment of federal military or law enforcement personnel from any federal law enforcement agency (including immigration enforcement) also violates US federal law.

Under some state and local laws, private individuals in the United States may be legally permitted to carry weapons inside polling places. According to a recent study by the Giffords Law Center, six states and the District of Columbia explicitly prohibit guns at polling locations. Four additional states prohibit
concealed firearms at the polls. Guns may also be prohibited when polling locations are in schools and other types of public property where firearms are not permitted. Additionally, even where guns are not prohibited outright, nearly all 50 states have laws that prohibit using firearms to intimidate others. Thus, in accordance with international human rights law, even when permitted under state law, private individuals carrying guns should be prevented from intimidating other voters in accordance with US and human rights law. Open communication and clear roles between law enforcement and election authorities are necessary, **together with accountability**, to ensure a non-intimidating environment at the polls. The failure to ensure a non-intimidating polling location due to any of the above factors is likely to both violate the right to vote and to constitute racial discrimination under international human rights law. A recent poll indicates that 32 percent of Black respondents and 30 percent of Hispanic Americans and Asian Americans—but only 20 percent of white respondents—are concerned about physical violence or armed groups at their polling locations.

**Who is in charge of the different law enforcement agencies in the US that might be involved in responding to any election-related or protest-related violence?**

State governors are in charge of all law enforcement within their state, and have direct command over their state’s division of the national guard—a military reserve force. Sheriffs are most often elected officials, who serve at the county level, and **have a multitude of law enforcement functions** during any response to violence. And states, cities, counties, and towns typically have police who most often report, via their police chiefs, to mayors or other elected officials, and are deployed to address violence or unrest. At the federal level, the Federal Bureau of Investigation (FBI) and US Attorneys conduct criminal investigations and prosecutions of alleged offenses—including threats and violence by armed groups against officials—under federal law. The US government has at times deployed members of various federal agencies, including Customs and Border Protection, and members of the National Guard, to perform law enforcement duties during protests. Human Rights Watch has serious rights concerns about these deployments (addressed below). Under extraordinary, unusual, and specific circumstances—to “suppress an insurrection”—the president may be able to deploy the US military to perform law enforcement functions on US soil by **invoking the Insurrection Act**. The president may also be able to **command the National Guard** for federal law enforcement duties in similarly extraordinary circumstances.

**What rights-protective measures should be taken in the context of protests?**

Government officials should ensure the right of peaceful assembly. Authorities at all levels in the United States are **obligated under international law** to protect the right of peaceful assembly, including by adopting measures to enable such assemblies. Authorities should presume all assemblies to be non-violent, even in cases where there are isolated incidents of violence, or where external actors—such as counter-protesters—engage in violence. They should only restrict such assemblies to the extent that restrictions are necessary and proportionate, and are the least intrusive measures necessary, to achieve a legitimate goal, such as protecting the rights of others or public order.
What are the rights-protective rules surrounding use of force and arrests during protests?

In accordance with international human rights standards, authorities in the United States need to minimize arrests and the use of force in responding to protests. Law enforcement should avoid the use of force to disperse protests, regardless of whether they deem the protests unlawful.

Even in the event of violence, law enforcement, including armed forces acting in a law-enforcement capacity, should adhere to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, using force only when strictly necessary and proportionate to respond to a genuine threat, and only when other, less harmful measures have proven to be or are clearly ineffective to address the threat. Law enforcement authorities should also ensure that officers are trained in the UN Guidance on Less-Lethal Weapons in Law Enforcement with the aim of preventing the unnecessary or improper use of weapons such as teargas, rubber bullets, water cannons, and batons, which can cause injury including death.

If arrests are necessary, police should whenever possible issue summonses on the street instead of bringing people to jail. Because of the heightened risk of Covid-19 for detainees and jail staff, authorities should refrain from custodial arrests for misdemeanors and low-level felony offenses that do not involve the infliction or threat of infliction of serious bodily injury or a known likelihood of physical harm.

Authorities should ensure that guidelines and regulations on crowd control and the use of force conform to international standards and are clearly communicated to law enforcement prior to protests, with the message that they will pursue appropriate disciplinary measures and criminal prosecutions against law enforcement officials who commit violations.

The federal government and other authorities should not deploy the National Guard or other agencies to respond to protests if their members do not have significant training in crowd control and minimizing the use of force. They should also not deploy agencies, such as Customs and Border Protection, that have records of engaging in serious human rights abuses.