



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

Statement
of the
AMERICAN BAR ASSOCIATION
to the
SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE
on the subject of
Older Voters -- Opportunities and Challenges
January 31, 2008

Mr. Chairman, Ranking Member Smith and Members of the Committee:

The American Bar Association commends the Senate Special Committee on Aging for undertaking an examination of issues related to voting and disability as Americans age and particularly issues arising from cognitive impairment. We appreciate this opportunity to share our views on these important issues.

The need to address voting by aging citizens who face some level of cognitive or other brain impairment has emerged from the relative shadows and into the light of day because of four salient, intersecting realities:

- Elections may be decided by very small margins. In 2000, George W. Bush officially won the Florida vote over Al Gore by a margin of 930 votes (out of six million), a virtual statistical tie.
- Older persons vote. Persons over 65 have a higher rate of participation than any other age group. In the 2004 presidential election, 71.8 percent of citizens age 55 and older reported voting. The next highest voting group were those age 45 to 54 years old, with 68.7 percent reported voting. Even in the oldest age category tracked, age 75 and older, 68.5 percent reported voting.
- The number of older persons is growing rapidly. Between years 2000 and 2030, the over age 65 population in the United States is projected to more than double from 35 million to 71.5 million, with the cohort of persons age 85 and over increasing at the highest percentage rate.
- The number of older persons with dementia and other disabilities will similarly expand. The prevalence of disabilities significantly increases with increasing age. The total number of people with dementia in the United States is not known with certainty, but a recent statistical report of the Alzheimer's Association estimates that, as of 2007, 4.9 million people age 65 and over had Alzheimer's disease, with another 200,000 individuals younger than 65 with early onset Alzheimer's. By 2030, those numbers are expected to increase by more than 50 percent. Alzheimer's disease comprises 50 percent to 70 percent of all cases of dementia, so estimates of the total population with dementia of any type could be as much as double the above figures.

The convergence of these numbers brings into focus a variety of questions about the disenfranchisement of persons with brain impairments who have a fundamental right and the threshold ability to vote, although they may need assistance. What kind of assistance may be needed and what kind is appropriate? Can technology help? And who makes decisions about capacity to vote, and by what criteria? Conversely, concerns abound about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of groups within this population, especially those living in group settings such as nursing homes.¹

Both failure to ensure proper access to the polls and failure to protect against the fraudulent manipulation of the vote of vulnerable populations compromises the integrity of elections. And as the above demographic trends continue, so the danger increases.

To address these issues, the ABA Commission on Law and Aging joined together with the Borchard Foundation Center on Law and Aging and the Capital Government Center on Law and Policy at the Pacific McGeorge School of Law to host a working symposium of invited national experts in law and aging, medicine, long term care, voting technology, and elections administration on the topic *Facilitating Voting As People Age: Implications of Cognitive Impairment*. The impetus for the symposium began with the work of Dr. Jason Karlawish and others who took the first steps in raising the questions posed above.² The Symposium convened from March 21-24, 2007 to address five key facets of these issues: (1) how aging and cognitive impairments fit into broader issues of access to voting; (2) issues in absentee balloting; (3) voting in long term care settings; (4) defining and assessing capacity to vote; and (5) the implications of voter technology for those with cognitive impairments. Prior to the symposium, the sponsors had commissioned six background papers that provided the starting points for discourse and analysis of each of the key facets.

¹ See, e.g., *Glover v. South Carolina Democratic Party*, No. C/A 4-04-CV-2171-25, 2004 WL 3262756 (D.S.C. 2004), *aff'd* by *Reaves v. S. Carolina Democratic Party*, 122 Fed. Appx. 83 (4th Cir. 2005) (allowing an unsuccessful candidate for the South Carolina state senate to successfully challenge the results of a democratic primary race by alleging voting irregularities including voting fraud with regards to the absentee ballots of nursing home residents); *State v. Jackson*, 102 Ohio St.3d 380 (Ohio 2004) (considering an evidentiary issue in a criminal case of an Ohio election board employee who allegedly marked nursing home residents ballots contrary to residents' wishes). Also see, David Josar & Lisa M. Collins, *State Targets Detroit Ballots*, DETROIT NEWS, Nov. 1, 2005 (reporting on a Detroit City Council candidate who initiated a lawsuit against the Detroit City Council clerk alleging that election officials assisted legally incapacitated persons to vote at a Detroit nursing home).

² Jason H. Karlawish *et al.*, *Addressing the Ethical, Legal and Social Issues Raised by Voting By Persons with Dementia*, 292 J.A.M.A 1345 (2004).

The symposium culminated with the adoption of a number of recommendations intended to protect voting rights of people with legal capacity and provide necessary assistance in voting, while protecting the integrity of the voting process. They are published in a special symposium issue of the *McGeorge Law Review*, Volume 38, Issue 4 (2007), along with several background articles.

The ABA reviewed the results of the symposium and, in August 2007, adopted as policy a careful distillation of the symposium recommendations. These recommendations supplement numerous existing ABA policies related to improving election administration and ensuring access to the polls, and highlight the critical need to address issues impacting the voting rights of a significant, and often vulnerable, segment of our society.

First, the ABA recommends four broad cross-cutting actions that would benefit not only voters with cognitive or other impairments but all voters: (1) the study and development of best practices for ballot design; (2) the use of “mobile polling”; (3) the use of communications accessible to those with disabilities; and (4) the acceptance of alternative forms of identification to facilitate registration and voting.

Mobile polling is the process by which election officials bring a polling station to voters in long-term care facilities or other outreach sites. The polling device used depends on the technology available in the voting district, but it uses some sort of polling device rather than an absentee ballot. It is preferable to reliance on mail-in, paper absentee ballots, because the latter can be hard for anyone with diminished reading ability to understand as well as much more susceptible to abuse. Most states do not yet have the technology to bring accessible portable electronic balloting capability to long-term care settings, but that technology is on the horizon. In the meantime, some twenty-three states currently prescribe responsibilities for absentee voting by nursing home or assisted living residents under some circumstances, and all place responsibilities on election officials to assist.³

Acceptance of alternative forms of identification is critical for voters with disabilities, especially those in long-term care settings, who are less likely to have driver’s licenses or other standard forms of identification.

³ Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Home and Assisted Living Facilities: State Law Accommodations*, 26 BIFOCAL 1 (2004), at <http://www.abanet.org/aging/publications/bifocal/261.pdf>.

Second, the ABA urges governmental entities to ensure that otherwise qualified persons are not excluded from voting on the basis of medical diagnosis, disability status, or type of residence. Voting is a fundamental constitutional right and a hallmark of democracy, therefore the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for persons who are capable of voting. In regard to the issue of mental capacity to vote, due process protections are necessary to ensure that the right is never arbitrarily or prematurely forfeited. Any limitations should be narrowly circumscribed in terms of specific functional abilities, rather than on categorical exclusions. State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where the following criteria must be met: (1) The exclusion is based on a determination by a court of competent jurisdiction; (2) Appropriate due process protections have been afforded; (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and (4) The findings are established by clear and convincing evidence.

In contrast to that principle, research has found that state constitutions and election laws often fall far short. The constitutions in all but court order where the following criteria must be met: (1) The exclusion is based on a determination by 12 states bar people with various kinds of mental impairment from voting – for example, those who are *non compos mentis*, admitted to a mental institution, under guardianship, incapacitated, or mentally ill. The categories are sweeping and imprecise.⁴ State statutes addressing voter eligibility on cognitive grounds do not necessarily track state constitutional provisions, using different terminology in all but 14 states. Additionally, the vagueness of many of the provisions creates uncertainty concerning capacity. At the same time, election laws in some 29 states do not address voter eligibility due to mental status at all.⁵

In the context of guardianship law, only 19 states have specific statutory provisions that persons under full or limited guardianship *retain* all legal and civil rights not explicitly removed – which would include the right to vote. Along with additional provisions that favor limited

⁴ Sally Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

⁵ *Id.*

guardianship, a total of 32 states do appear to allow a judicial determination that a person under guardianship may retain the right to vote.⁶ Only a few statutes and cases specifically articulate a *requirement* for the court to determine capacity to vote.⁷

The ABA supports expansion of the approach that requires an individualized determination of capacity to vote in a judicial setting with strict due process protections. This approach would be applicable in any jurisdiction that permits exclusion of a person from voting on the basis of mental incapacity. As to a legal standard for assessing capacity to vote, scant existing case law and statutes provide some guidance,⁸ but as a legislative policy principle, the ABA supports a standard that can be applied universally with little potential for discrimination – specifically, whether the person indicates that he or she has a specific desire to participate in the voting process. This provides a low threshold that is most inclusive and most protective of the right. The objective is to *not* treat people any differently in voting rights based on any perceived impairment or other personal characteristic.

Third, the ABA urges that citizens be permitted to opt freely for absentee balloting, permanently or temporarily, including at the time of registration, with the ability to change one’s choice thereafter. Implementing this recommendation would serve to expand the option for absentee balloting and suggests the use of a more normal characterization of it as “vote-at-home” balloting. In recent decades, absentee balloting has become a central feature of our electoral landscape. All states now allow at least some categories of voters to cast their votes before election day, most commonly by mail. And, most states now permit “no excuse” absentee voting. However, as of 2004, only 17 states provided for *permanent* absentee status.⁹ This recommendation advocates for no-excuse temporary or permanent absentee status, available as an option to choose at the time of registration or at a later time.

⁶ *Id.*

⁷ *See e.g.*, Wash. Rev. Code § 11.88.010(5) (the imposition of a guardianship does not result in the loss of the right to vote unless the court determines that the person lacks the capacity to exercise the franchise, and the court’s order must specify whether the ward retains voting rights); *also see*, *Doe v. Rowe*, 156 F. Supp. 35 (D. Me. 2001) (striking down Maine’s constitutional provision that automatically excluded from the polls persons under guardianship by reason of mental illness).

⁸ *E.g.*, Washington’s statute characterizes incompetence to vote as “lacking the capacity to understand the nature and effect of voting, such that she or he cannot make an individual choice” Wash. Rev. Code § 11.88.010(5).⁸ Wisconsin similarly looks to whether the person is “incapable of understanding the objective of the elective process.” Wis. Stat. § 54.25(2)(c)1.g. The federal District Court in *Doe v. Rowe*, 156 F. Supp. 35 (D. Me. 2001) adopted a functional standard identical to that found in the Washington statute.

⁹ *See*, the survey of absentee balloting law and alternatives in Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

It is particularly important to focus on issues related to voting in long-term care settings, broadly defined. The prevalence of dementia in the nursing home population is estimated to range from a quarter to more than two-thirds of the population.¹⁰ The prevalence of dementia in assisted living facilities is even less certain, although one survey of assisted living facilities reported that over one-third of residents had moderate to severe dementia.¹¹ A diagnosis of dementia, in itself, does not mean that the individual lacks capacity to vote. Some still retain the capability and some do not. However, little is known about how many of these nursing home and assisted living facility residents actually have the capacity to vote. Even less is known about the voting capacity of persons residing in other long-term care settings such as adult homes, community care facilities, and group homes for persons with a variety of disabilities.

Fourth, the ABA urges improving access to voting by residents of long-term care facilities that provide room, board, and any level of personal care to persons in need of assistance. Such efforts should include making mobile polling stations a reality for long-term care residents; and in the interim, utilizing election officials proactively in the role of overseeing absentee balloting in these settings. In addition, there should be training of residents, staff, and others involved in the care of residents regarding the voting rights of persons with disabilities and the resources available to assist in the exercise of those rights. Finally, it is important to clarify that people who provide assistance in voting do not have authority to determine capacity to vote, and that assistance in voting is limited to assisting voters to express the voter's intent. If people who provide assistance are unable to determine the voter's intent, then, to avoid the possibility of fraudulent manipulation, they must decline to mark the ballot for the voter.

Fifth, the ABA urges development and required use of voting systems that achieve universal design, such that all voters can cast ballots privately and independently on the same voting machine, adaptable to accommodate any impairment, including physical, sensory, cognitive, intellectual, or mental. Balloting technology is currently undergoing a major transformation in the direction of electronic systems, such as direct-recording electronic (DRE) voting systems. Electronic systems are still very much in their infancy. Most currently deployed voting systems do not meet current HAVA and ADA disability accommodation requirements,

¹⁰ Jay Magaziner, et. al., *The Prevalence of Dementia in a Statewide Sample of New Nursing Home Admissions Aged 65 and Older*, 40 GERONTOLOGIST 663, 663 (2000).

¹¹ Catherine Hawes, Charles D. Phillips, Miriam Rose, Scott Holan, & Michael Sherman, *A National Survey of Assisted Living Facilities*, 43 GERONTOLOGIST 875, 875 (2003).

and they are far from compliant with the U.S. Election Assistance Commission's Voluntary Voting System Guidelines.¹² The premise of this recommendation is that technology's goal is to create *access*, which is different from *assistance*. The more access is facilitated and barriers removed, the less need there is to depend on assistance by another person in the voting booth or with paper absentee ballots, and thus, the less danger there is of fraud or undue influence by persons assisting with balloting.

In his review of evolving voting technology and its implications for voters with cognitive impairments, Professor Ted Selker identified several design approaches that have shown promise but are still under trial and development. Evolving design characteristics with particular promise include: electronic interfaces that focus on one task at a time; simplified navigation through the steps of the voting process with an ability to refer back to instructions; redundancy of information; feedback (audio as well as visual) on selections made with the opportunity to change selections.¹³ The ultimate goal is to design effective optional capabilities into all voting stations so that accessibility is truly universal and segregation of voting by disability accommodation is unnecessary.

Sixth, the ABA urges the recruitment and training of election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities. There is a significant need for sufficient numbers of election workers, appropriately trained to meet the needs of voters with disabilities of any kind. If poll workers and other election officials do not understand how to accommodate the increasingly broad range of disabilities voters present at the polls, or they do not understand how to operate the new technologies being introduced in polling sites, then even the best technologies will fall short. Many poll workers serve as volunteers, and training may be brief and informal. Recruitment and training is an essential component to ensuring access to the polls and we urge governments to place a greater emphasis on that task.

While there is no proposed legislation that this recommendation immediately addresses, there are many critical activities underway at the federal, state, territorial, and local government

¹² Noel H. Runyan, IMPROVING ACCESS TO VOTING: A REPORT ON THE TECHNOLOGY FOR ACCESSIBLE VOTING SYSTEMS, A REPORT BY VOTER ACTION AND DÉMOS (February 2007), at <http://www.demos.org/page504.cfm>. See the Election Assistance Commission's voluntary guidelines at http://www.eac.gov/vvsg_intro.htm.

¹³ Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, in SYMPOSIUM, FACILITATING VOTING AS PEOPLE AGE: IMPLICATIONS OF COGNITIVE IMPAIRMENT, 38 MCGEORGE L. REV. (forthcoming 2007).

level to modify voting procedures that this recommendation impacts. For example, at the federal level the 2002 Help America Vote Act has gave the National Institute of Standards and Technology (NIST) a key role in helping to realize nationwide improvements in voting systems. To assist the Election Assistance Commission with the development of voluntary voting system guidelines, HAVA established the Technical Guidelines Development Committee and directed NIST to chair the Committee. NIST research activities have included: security of computers and computer data storage used in voting systems; methods to detect and prevent fraud; protection of voter privacy, and; the role of human factors in the design and application of voting systems, including assistive technologies for individuals with disabilities and varying levels of literacy. However, NIST has not had a focus on cognitive impairments or other brain impairments, a focus that the ABA would encourage.

At the state level, in addition to election improvements, the ABA has had a long history of supporting guardianship reform and long-term care quality regulation, especially through its Commission on Law and Aging. These recommendations have immediate implications for key aspects of guardianship law and long-term care regulation relevant to cognitively impaired elders and other adults.

Access to and integrity of the voting process has never been a more important issue in America than it is today. We recognize the significant challenges faced by the federal, state and local governments in developing and implementing new voting policies and procedures and realize that some of these recommendations would need to be considered in the context of near-, medium- and long-term goals. However, we believe that progress can, and must, be made in ensuring the fundamental right to vote for the growing number of citizens with some level of cognitive impairment but that are still capable of voting, while at the same time preventing manipulation of the vote within this population.

Again, we thank you for examining these important issues and would be happy to provide any additional information or assistance that may be helpful to the Committee's work. Please feel free to contact Charlie Sabatino, Director of the ABA Commission on Law and Aging, at 202-662-8686 or Kristi Gaines in the ABA Governmental Affairs Office at 202-662-1763.

Approved by the ABA House of Delegates on August 13, 2007

AMERICAN BAR ASSOCIATION

**COMMISSION ON LAW AND AGING
STANDING COMMITTEE ON ELECTION LAW
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to improve the administration of elections to facilitate voting by all individuals with disabilities, including people with cognitive impairments, by:

- (1) Studying and developing best practice guidelines for ballot design to maximize access;
- (2) Adapting their laws, practices and technologies to permit “mobile polling” stations;
- (3) Ensuring that instructions, signage, and other communications regarding elections are accessible; and
- (4) Permitting sufficient alternative forms of identification verification to facilitate registering and voting.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to ensure that no governmental entity exclude any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence. State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where the following criteria must be met:

- (1) The exclusion is based on a determination by a court of competent jurisdiction;
- (2) Appropriate due process protections have been afforded;
- (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- (4) The findings are established by clear and convincing evidence.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to permit citizens to opt freely for absentee (“vote at home”) balloting, permanently or temporarily, including at the time of registration, with the ability to change one’s choice thereafter.

FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial governments to improve access to voting by residents of long-term care facilities that provide room, board, and any level of personal care to persons in need of assistance. Such efforts should include the following:

- (1) Establishing mobile polling stations in long-term care facilities under the supervision of trained teams of local election officials;
- (2) Where mobile polling is not available, providing teams of election officials at the local level to conduct absentee voting in long-term care facilities; and
- (3) Training residents, staff, and others involved in the care of residents about the rights of persons with disabilities in relation to voting and the community resources available to provide assistance.
- (4) Clarifying that people who provide assistance in voting do not have authority to determine capacity to vote, and that assistance in voting is limited to assisting voters to express the voter's intent. If people who provide assistance are unable to determine the voter's intent, then, to avoid the possibility of fraudulent manipulation, they must decline to mark the ballot for the voter.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to require and fund the development of voting systems that achieve universal design, such that all voters can cast ballots privately and independently on the same voting machine, adaptable to accommodate any impairment, including physical, sensory, cognitive, intellectual, or mental.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.