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## Voting and Cognitive Impairments: An Election Administrator's Perspective

Deborah Markowitz\*

There was a time not too long ago when bureaucrats charged with elections administration were the only people who spent much time thinking about the challenges of running our nation's elections. But that all changed in November 2000, when the country experienced a dramatic example of how a poorly managed election could call the legitimacy of our democracy into question.<sup>1</sup> Since that time, our electoral system has undergone close scrutiny, resulting in public debate, judicial decisions,<sup>2</sup> federal and state legislation, and unprecedented investments in new technology.<sup>3</sup> One of the lessons we have learned from this

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1. Florida's recount of the presidential election highlighted the many problems faced in states with antiquated and under-funded voting systems. Florida's problems were not unique, insofar as many other states used voting technology that routinely failed to count or record tens of thousands of votes and used procedures that were inconsistent among jurisdictions within the state. CHARLES STEWART III, CALTECH/MIT VOTING TECHNOLOGY PROJECT, RESIDUAL VOTE IN THE 2004 ELECTION tbl.1 (2005), [http://www.vote.caltech.edu/media/documents/vtp\\_wp21v2.3.pdf](http://www.vote.caltech.edu/media/documents/vtp_wp21v2.3.pdf) (on file with the *McGeorge Law Review*). The Carter Ford Commission's study, which resulted in the enactment of the Help America Vote Act of 2002 (HAVA), cited the American National Election Study conducted in the years 1996 and 2000 to demonstrate that, while in 1996 approximately seventy-five percent of Americans believed the election was "somewhat fair," only fifty percent of Americans felt this way in 2000. Nat'l Comm'n on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, 1 ELECTION L. J. 111, 117 (2002).

2. The most notable decision was *Bush v. Gore*, 531 U.S. 98 (2000). However, there has been almost continuous litigation in state and federal courts challenging state election laws and procedures. *See, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006) (involving a constitutional challenge to Florida's manual recount procedures in counties using touchscreen voting machines); *Crane v. Perry County Bd. of Elections*, 839 N.E.2d 14 (Ohio 2005) (denying an election contest unless the challenger provided clear and convincing evidence that the alleged irregularities occurred and affected a sufficient number of votes to call in question the election results); *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005) (dismissing an elections contest related to the 2004 Gubernatorial election), available at <http://www.seattleweekly.com/2005-06-08/news/borders-et-al-v-king-county-et-al.php>.

3. Most notably, the Help America Vote Act of 2002 was passed to "establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes." 42 U.S.C.A. § 15301 (West 2006). Every state was required to amend its election law to come into conformity with the requirements of HAVA, and every state received some portion of the 3.9 billion dollars appropriated to improve the administration of Federal Elections. *Id.* This money was used to create centralized voter registration databases in every state, to purchase technology to permit voters with disabilities to vote privately and independently, and to replace outdated voting equipment. *See, e.g.*, Iowa Sec'y of State, HAVA Funds, <http://www.sos.state.ia.us/elections/hava/Funds/index.html> (last visited July 11, 2007) (on file with the *McGeorge Law Review*); Cal. Sec'y of State, Elections & Voter Information—Help America Vote Act of 2002 (HAVA), <http://www.sos.ca.gov/elections/hava.htm> (last visited July 11, 2007) (on file with the *McGeorge Law Review*).

experience is that it is not acceptable to wait until a system breaks to fix it, especially if it involves the fundamental expression of our democracy—voting. That is why it is vitally important that we anticipate and plan for the challenges our country's voting systems will face as our nation ages. One of the more complex issues will be how we address the unique legal and practical challenges of voting by people with cognitive impairments.

According to the U.S. Census Bureau, the number of Americans who are fifty-five and older will nearly double between 2007 and 2030, from sixty million (or twenty percent of the population) to 107.6 million (thirty-one percent of the population).<sup>4</sup> By 2030, there will be 70.3 million Americans who are sixty-five and older, nearly two times the 34.8 million alive today.<sup>5</sup> This demographic bloc will make up twenty percent of the overall population.<sup>6</sup> We do not have to wait that long to see the effect of the “aging of America”; between 2007 and 2015, the number of Americans ages eighty-five and older is expected to increase by forty percent.<sup>7</sup>

With medical advances, not only are Americans living longer, but more will also be healthy and active.<sup>8</sup> The rates of disability and functional limitation among the older population have declined substantially over the past two decades,<sup>9</sup> with a decrease from 26.2 percent in 1982 to 19.7 percent in 1999.<sup>10</sup> That being said, we can expect an increase in long-term care needs, as more people will live long enough to develop age-related conditions like dementia.<sup>11</sup> It is projected that among Americans who reach age sixty-five, sixty-nine percent will need long-term care at some time in their lives.<sup>12</sup> Indeed, the Congressional Research Service has reported that “[t]wo-thirds of the people receiving long-term care are over [sixty-five], an age group expected to double by 2030. After

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4. EXPERIENCE CORPS, FACT SHEET ON AGING IN AMERICA (2007), <http://www.experiencecorps.org/research/factsheet.html> (on file with *the McGeorge Law Review*).

5. WAN HE ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: 65 + IN THE UNITED STATES: 2005 1 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf> (on file with *the McGeorge Law Review*). The report was commissioned by the National Institute on Aging's (NIA) Behavioral and Social Research Program. *Id.* The NIA is the lead federal agency conducting and supporting basic, biomedical, and behavioral and social research on aging and the special needs and problems of older people. For more information, visit the NIA website at <http://www.nia.nih.gov>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 60.

10. *Id.* at 62 tbl.3-20.

11. FEDERAL INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS UPDATE 2006: KEY INDICATORS OF WELL-BEING 22 (2006), [http://www.agingstats.gov/agingstatsdotnet/Main\\_Site/Data/2006\\_Documents/OA\\_2006.pdf](http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2006_Documents/OA_2006.pdf) (on file with *the McGeorge Law Review*).

12. CAROL O'SHAUGHNESSY ET AL., LONG-TERM CARE: CONSUMERS, PROVIDERS, PAYERS, AND PROGRAMS 1 (2007), [http://openers.cdt.org/rpts/RL33919\\_20070315.pdf](http://openers.cdt.org/rpts/RL33919_20070315.pdf) (on file with *the McGeorge Law Review*).

2030, even faster growth rates are anticipated for people over [eighty-five], the age group most likely to need care.”<sup>13</sup>

As Americans age we do not expect to see a decline in their interest in participating in civic life by voting. People ages sixty-five and older consistently vote in higher proportions than other age groups.<sup>14</sup> In 2004, sixty-nine percent of the older population voted, compared with fifty-two percent of those ages twenty-five to forty-four.<sup>15</sup> In 2004, of all the votes cast, nineteen percent were by people age sixty-five and older.<sup>16</sup> By the 2040 presidential election, people sixty-five and older are projected to cast forty-one percent of all of the votes.<sup>17</sup> This means that as we plan for future elections, we must consider the unique opportunities and challenges that will be presented by the aging of America.

One significant challenge will be to address the needs of voters with cognitive impairments. Alzheimer’s disease now accounts for fifty to seventy percent of dementia cases, and a growing number of Alzheimer’s cases means the number of Americans with dementia is also growing. In 2000, researchers estimated that 4.5 million people ages sixty-five and over had Alzheimer’s disease.<sup>18</sup> A 2007 statistical report of the Alzheimer’s Association estimates that number as 4.9 million in 2007, plus another estimated 200,000 individuals younger than sixty-five with early onset Alzheimer’s.<sup>19</sup> By 2030, those numbers are expected to increase by more than fifty percent.<sup>20</sup>

With more Americans living longer, the challenge of meeting the civic needs of people with cognitive impairment will need to be addressed by the individuals and institutions that serve this growing population and by those who run our elections. As the complex issues that arise with voters who may have cognitive impairments are considered, it is important to keep in mind the varied body of state and federal laws designed to ensure voting rights, discourage voter suppression, and prevent voter fraud.<sup>21</sup> It is also important to remain clear about

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13. CAROL O’SHAUGHNESSY ET AL., LONG-TERM CARE: WHAT DIRECTION FOR PUBLIC POLICY? 1-2 (2005), <http://usinfo.state.gov/usa/infousa/society/socwelf/lc.pdf> (on file with the *McGeorge Law Review*).

14. See U.S. CENSUS BUREAU, TABLE A-1. REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE GROUPS: NOVEMBER 1964 TO 2004 (2005), <http://www.census.gov/population/socdemo/voting/tabA-1.xls> (on file with the *McGeorge Law Review*) (providing a breakdown by age group of those who are registered and how many voted).

15. See *id.*

16. See *id.* According to another report by the U.S. Census Bureau, approximately seventy-one percent of people aged sixty-five and older cast a ballot in the 2004 election. U.S. CENSUS BUREAU, OLDER AMERICANS MONTH: MAY 2007 (2007), <http://www.census.gov/Press-Release/www/2007/cb07ff-06.pdf> [hereinafter OLDER AMERICANS MONTH] (on file with the *McGeorge Law Review*).

17. OLDER AMERICANS MONTH, *supra* note 16, at 3.

18. Leisi E. Herbert et. al, *Alzheimer’s Disease in the U.S. Population: Prevalence Estimates Using the 2000 Census*, 60 ARCHIVES NEUROLOGY 1119, 1122 (2003).

19. ALZHEIMER’S ASS’N, ALZHEIMER’S DISEASE FACTS AND FIGURES: 2007, at 5 (2007), [http://www.alz.org/national/documents/Report\\_2007FactsAndFigures.pdf](http://www.alz.org/national/documents/Report_2007FactsAndFigures.pdf) (on file with the *McGeorge Law Review*).

20. *Id.*

21. On the federal level, these laws include The National Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1973aa-6 (2007); The National Voter Registration Act of 1993 (also known as the “NVRA” and the “Motor

our underlying values: that in a democratic society, access to voting should be facilitated while ensuring that there are safeguards in place to preserve its voting integrity.

Maximizing access to voting, while protecting the integrity of the election, is not always as easy as it sounds. First, every state has its own unique history, traditions, and legal structure related to the administration of elections within its jurisdiction.<sup>22</sup> Indeed, states have a variety of protections and prohibitions relating to the voting rights of people who are “mentally incompetent” or who are under guardianship.<sup>23</sup> Further, this narrow issue cannot be taken out of the broader political context in which policies related to balancing the tension between increasing access and preserving integrity are hotly debated, particularly as applied to such issues as voter registration reforms, the need for voter identification, and technology that will permit all voters to cast a private and independent vote. The tension between voting access and integrity raises unique challenges when it is applied to people with cognitive disabilities because they may need assistance to vote, may no longer have current identification, and may not have easy access to the polling place.

The issues concerning voting by people with cognitive impairment are not merely hypothetical. Indeed, those who run elections routinely confront sticky questions about the ability of particular voters to exercise the franchise. The following are four examples gleaned from my experience as the chief elections official for the State of Vermont:

1. In the first case, we received a call from a town clerk<sup>24</sup> who was concerned because the daughter of an elderly woman she knew had fairly advanced Alzheimer's disease had called requesting an absentee ballot for her mother to vote. The clerk wanted to know whether she could refuse to send the ballot since she believed that the mother was unable to vote because “she doesn't even know what day it is, much less who is running for office.”

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Voter Act”), 42 U.S.C. § 1973gg (2007); Voting Accessibility for the Elderly and Handicapped, 42 U.S.C. § 1973ee (2007); The Americans with Disabilities Act, 42 U.S.C. § 12101 (2007); and the Help America Vote Act (also known as “HAVA”), 42 U.S.C. § 15301 (2007).

22. See John Samples, *Election Reform, Federalism, and the Obligations of Voters*, POL'Y ANALYSIS, Oct. 23, 2001, <http://www.cato.org/pubs/pas/pa417.pdf> (on file with the *McGeorge Law Review*); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

23. 42 U.S.C. § 1973gg-6(a)(3)(B) (2006) (permitting states to prevent voting by people based on mental capacity). See Sally Balch Hurme & Paul S. Appelbaum, *The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931 (2007) (providing a survey of state laws on voting and guardianship and/or mental impairment).

24. In Vermont, the town clerk oversees the elections locally. In most states, the elections are overseen by the county clerk or director of the local board of elections.

2. In the second case, the wife of a man who had recently had a stroke called to request an absentee ballot for her husband. The town clerk called us for advice about sending the ballot. She knew the voter personally and believed that he was so seriously impaired by the stroke that he did not understand what was happening around him. And even if he did understand, he was completely unable to communicate an intention to vote. The man had been very politically active, and the clerk believed that the wife asked for the ballot on his behalf as a way to respect his strong feelings about voting (and about the candidates), and because of her psychological need to preserve an image of him as a fully functioning person.
3. In the third case, we received a complaint about a nursing home activity director who had requested absentee ballots for many of the residents. The complainant believed this worker was involved with one of the political parties and would be influencing the nursing home residents to vote for particular candidates because “some of the ones she requested ballots for were completely out of it.”
4. In the fourth case, we received a very angry call from the parents and guardian of a young adult with Downs Syndrome. The young woman, “Mary,” worked in a school cafeteria. She had been registered to vote and was assisted at the polling place by a co-worker who was trying to elect a new school board member who had promised to increase the cafeteria workers’ wages. Mary’s parents believed that she had been “used” by her co-worker and demanded that we take their daughter’s name off of the voter checklist.<sup>25</sup>

There are certain principles to follow when approaching situations like the ones described above. First, it is important to remember that the goal of elections administrators must be to facilitate access to the polls and provide reasonable accommodations to ensure that people with disabilities, including cognitive disabilities, have access to voting. It is important to remember that people with disabilities should not be held to a different and higher standard than the general population. However, it is also important to ensure that there is integrity in the voting process. For this reason, my office’s advice in each of these cases focused on the obligations of the person assisting the voter, rather than on making a judgment about whether the voter was capable of exercising a choice and voting.<sup>26</sup>

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25. The parents said that their daughter had an IQ of a seven-year-old, so she should not be allowed to vote. They were particularly upset because the person their daughter voted for had defeated the candidate that they supported.

26. Vermont law does not disqualify a person under guardianship or with a mental incapacity from voting. In states that have laws that govern qualification to vote, voters should be presumed to have the capacity to vote absent adjudication.

The first and second cases required a similar approach. We advised that it was not her role to screen out voters and that people are entitled to assistance in voting.<sup>27</sup> However, we also advised her to inform the family member that, although family members may assist with voting, the ballot must reflect the voter's intent. It is not sufficient to vote another person's ballot in the way you believe he or she would have wanted to vote if capable of doing so. Rather, if the voter cannot express an intent to vote or cannot indicate how he or she wishes the ballot to be marked, then the ballot should not be returned or should be returned un-voted, as it would otherwise be a violation of Vermont law.<sup>28</sup>

In the third case, we spoke with the nursing home administrator and encouraged her to put safeguards into place to protect her staff from allegations of undue influence.<sup>29</sup> We applauded their efforts to encourage residents to vote and emphasized that voters had a right to seek assistance in voting from the person of their choice. We suggested that she call the town clerk to see if some of the town's Justices of the Peace<sup>30</sup> could come to assist voters in marking their ballots. In the alternative, we suggested that having a family member or more than one staff member present while giving assistance to a voter could help ensure that there was not even an appearance of impropriety.

The final case was perhaps the most challenging. Because Vermont law does not remove a person's right to vote simply because they are under guardianship, the parents did not have a legal right to require us to remove their daughter from the voter checklist. The daughter would have to make the request herself. We took seriously the parent's concern about undue influence and asked whether they had any evidence that the daughter was influenced in her vote. We explained that unless there was evidence that the person who assisted their daughter directed her to vote in a particular way, there was no basis for a claim of undue influence. The fact that the co-worker was helping a particular candidate was not, alone, sufficient evidence of influence. We offered to pursue the matter further if they could provide a statement by the daughter or some other witness to the alleged influence.<sup>31</sup>

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27. In Vermont, voters may be assisted in marking a ballot by a person of his or her choice. VT. STAT. ANN. tit. 17, § 2569 (2007). Every state has provisions for assisting voters, but the specific rules about who may provide assistance and which voters may receive assistance may vary from state to state. See Hurme & Appelbaum, *supra* note 23.

28. Vermont law permits a person to assist another in voting, but it is a crime to vote another person's ballot. VT. STAT. ANN. tit. 17, §§ 1971, 2015, 2017, 2569 (2007). This makes it clear that the voter must be able to direct the person offering assistance in marking the ballot so that the ballot reflects the intent of the voter, and not merely the intent of the person marking the ballot on behalf of the voter. See *id.* In this case, the ballot was not returned.

29. VT. STAT. ANN. tit. 17, § 2017 (2007) makes it a crime to exert undue influence "to dictate, control or alter the vote" of a voter.

30. In Vermont, Justices of the Peace are elected to serve as election officials. They are elected by party or as independents and assist voters in bipartisan pairs to ensure that there is no undue influence or collusion.

31. The parents never followed up with their complaint.

These examples suggest some basic rules to follow when addressing issues related to voting by people with cognitive impairment. First, because every individual is different, each situation must be addressed on a case-by-case basis. That being said, there are some general rules that should be followed:

1. Elections administrators, caregivers, and other people who provide assistance to voters with cognitive impairment should not screen out voters by deciding whether a particular voter is capable of casting a vote.
2. Voters with disabilities, including those with cognitive impairments, are entitled to assistance to help formulate and express their intent to vote. Those giving assistance should be trained to successfully assist voters to express the voter's intent. However, whenever there is assistance, there must be some safeguards to ensure that the ballot reflects the voter's intent.
3. People who provide assistance should understand that their obligation is limited to assisting a voter in expressing the voter's intent to vote. If people who provide assistance are unable to determine the voter's intent, then they must decline to mark the ballot for the voter.

Over the next decade, as America's older population increases, steps must be taken to ensure that the right to vote by individuals with cognitive impairment is not unnecessarily compromised. The people who run our elections, and those who serve our elderly population,<sup>32</sup> must be trained to ensure maximum access to voting by people with cognitive impairment. Indeed, law and policies should focus on the obligation of the person who provides assistance to reflect the intent of the voter and should seek to mitigate the risk of undue influence, rather than creating sweeping rules about who is ineligible to vote. Our laws should be given a fresh look to see where they might discriminate against people who are interested in voting, but who are under guardianship or who have mental disabilities, with an understanding that an individual's capacity to express a voting intent must be determined on a case-by-case basis.

Access to voting by elderly people, including those people with cognitive impairment, can be improved by enforcing existing laws like the National Voting Rights Act, the Help America Vote Act, and the Americans with Disabilities Act. In addition, to prepare for the future, research should be conducted to determine how best to communicate with people with cognitive impairment so that voter education and outreach communications can more effectively reach this group. New technologies and voting innovations, like mobile polling places and mail-in ballots, should also be explored so that many different options are available to

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32. This includes everyone involved in caring for our elders—long-term care agencies, healthcare providers, home care agencies, and family members.

best facilitate voting by people with disabilities, including those with cognitive impairment.

In this era of election reform, it is important to anticipate demographic changes that will tax our system so that we are not caught unprepared. The unprecedented aging of America is one such change. Before 2030, when one out of every five Americans will be over the age of sixty-five, we must have the technology, laws, policies, and procedures in place to ensure that these voters can continue to participate in civic life by voting.