



THE CANVASS

States and Election Reform®



Number 12 / June 2010

State Voting Laws and the Mentally Disabled

can•vass (n.)
Compilation of election returns and validation of the outcome that forms the basis of the official results by a political subdivision.
—U.S. Election Assistance Commission: *Glossary of Key Election Terminology*

Access to voting for people with disabilities is often cast in terms of physical barriers. For example, under the 2002 Help America Vote Act, election officials must provide one accessible electronic voting machine in each polling place for the disabled community. However, as indicated by recently enacted legislation in Maryland, access for the mentally disabled is steadily attracting more attention.

Demographics

More than 1 million adults in the United States are diagnosed annually with a chronic brain disease or disorder. As of the 2000 census, there were almost 30 million voting-age Americans with some kind of disability—mental or physical. Of these, 4 million were designated as having a mental disability and 2 million were identified as having a sensory, physical and mental disability. In sum, 20 percent of those with disabilities have a mental disability—3 percent of the voting age population.

The aging baby boomer population is causing concern that the mentally disabled population will grow exponentially in as little as 10 years. As of July 1, 2007, there were 37.9 million people in the United States aged 65 and older. This age group accounted for 13 percent of the population. According to the Government Accountability Office, by 2030, those aged 65 and over will grow to more than 20 percent of

the population. The Family Caregiver Alliance points to an equally alarming estimate: The total prevalence of brain impairments of all types, including dementias, actually ranges from 13 million to 16 million. As the prevalence of disabilities rises with increasing age, researchers suggest that the number of older people with dementia and other disabilities will similarly expand. The question arises: To what degree do states preserve the right to vote for those who are “mentally incapacitated” but who nonetheless retain the mental ability to vote?

One thing is clear: A number of state laws reflect a bygone era when taboos were the standard. Other provisions appear vague or inconsistent with state constitutions, other code sections or regulations.

With primary season in full-swing and a major mid-term general election coming this fall, several states are in the process of determining who is mentally fit to vote. State constitutions or election statutes in a majority of states restrict people with mental disabilities from voting to one extent or another. However, sometimes conflicting provisions in estate, guardianship, mental retardation and even probate statutes, make the determination as to mental competency extremely difficult and complex. This issue recently arose in Maryland; and the way in which the General Assembly considered it provides insight into a thorny area of the law.

Maryland

Maryland citizens under the custody of a court-appointed guardian were historically excluded from voting. Article I, §4 of the Maryland Constitution gives the General Assembly “the authority to regulate or prohibit the right to vote of a person under care or guardianship for mental disability.” In general, a guardian is appointed for an individual when a circuit court determines that a disabled person cannot: 1) make or communicate responsible decisions concerning his or her person, or 2) cannot effectively

In This Issue

State Voting Laws and the Mentally Disabled.....1
District of Columbia Enacts Omnibus Election Reform Act ...3
Worth Noting5
Tally Sheet.....5
What They’re Saying6

manage his or her property and affairs. A person's capacity to vote is not part of the court's determination.

Correspondingly, state election law provides that "an individual under guardianship for mental disability is not qualified to be a registered voter." At the same time, a conflicting section of Maryland estate law provides that the appointment of a guardian does not "modify any civil right of the disabled person ... including rights relating to privilege or benefit under any law." This provision implicitly suggests that a specific court order would be necessary to revoke eligibility to vote.



In 2006, the Maryland governor's Transition Election Work Group Report recommended modifying the voting prohibition covering individuals under guardianship for mental disability. Advocates such as the National Alliance on Mental Illness and the Bazelon Center for Mental Health Law lobbied Maryland to change its law to remove this categorical disqualification. In 2007, the American Bar Association's House of Delegates adopted a resolution recommending that,

State constitutions and statutes that permit the 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 order is: 1) based on a judicial determination 2) due process is afforded 3) the court finds the person cannot communicate, with or without accommodations, a specific desire to vote; and 4) the findings are established by clear and convincing evidence.

Background

As of 2009, 39 states barred people with some kind of mental impairment from voting. For example, broad and arcane terms such as "idiot," "unsound mind," or "*non compos mentis*" are still found in more than a dozen state constitutions. *Non compos mentis* is a Latin term meaning "not sound of mind or insane." Other states exclude from voting those who are:

- involuntarily committed to a mental hospital
- suffering from mental illness
- under guardianship, or
- those who are adjudged mentally incompetent or incapacitated.

It should be noted that states have a compelling interest in ensuring that voters understand the election process at least well enough to make an independent choice for whom and for which issues to vote. *See, for example, Doe v. Rowe*, 156 F. Supp 2d 35, 51 (D. Me. 2001): "Additionally, for purposes of summary judgment, the parties agree that Maine has a compelling state interest in ensuring that "those who cast a vote have

the mental capacity to make their own decisions by being able to understand the nature and effect of the voting act itself."

In the last two decades, states have gradually removed broad categorical voting prohibitions on the mentally disabled by requiring a specific court proceeding to determine whether a person is competent to vote. In the 1990s, Alaska and California adopted these adjudication-based reforms.

Conversely, legal challenges have also spurred change. In 2000, Maine voters rejected a referendum lifting a constitutional disqualification imposed on those under guardianship for reasons of mental illness. The following year a federal district court found that the prohibition (similar to Maryland's) violated the Due Process and Equal Protection clauses of the U.S. Constitution and that Maine had violated the Americans with Disabilities Act and the federal Rehabilitation Act. In contrast to Maine, where litigation resolved the issue, six states currently do not have any express voting exclusion, limitation or competency standard: Colorado, Illinois, Indiana, Kansas, Michigan and New Hampshire.

In 2003, Minnesota removed its categorical disqualification for those under guardianship and replaced it with one that required a specific judicial proceeding revoking eligibility to vote. Nevada voters approved a similar referendum in 2006. The following year, New Jersey voters approved a constitutional amendment removing the blanket disenfranchisement of "idiots" or "insane" persons. The amendment replaced it with, "No person shall have the right of suffrage who has been adjudicated... to lack the capacity to understand the act of voting."

Maryland House Bill 816/Senate Bill 28

Sponsored by Maryland Delegate Jon Cardin, House Bill 816, as introduced, would have simply removed the disqualification of individuals under guardianship starting Oct. 1, 2010. This proposal would have made it similar to the six states with no constitutional or statutory limitations. After hearings in the Ways and Means Committee, members of the House minority proposed amendments to retain the guardianship disqualification only "if a court has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process." This change essentially mirrored the recommendations of the American Bar Association. The committee approved these changes and added Delegates George and Shank as cosponsors—making it a bipartisan bill. The bill then passed in the House by a vote of 125-14 and in the Senate, 41-4. On May

4, it was signed by the governor.

Reflecting on the bill's passage, Delegate Cardin noted,

“Nothing in the Maryland Family Law code prohibits or denies a person under guardianship the ability to exercise his right to vote; nor does being under guardianship for mental disability signify a person is any less rational in how he votes than those of us not disabled. Therefore, the disenfranchisement of citizens under guardianship was wrong and unnecessarily restrictive. I am thrilled to have led the fight for thousands of silent citizens whose right to vote has been restored.”

Delegate Christopher Shank, the House Minority Whip added:

“The former law created a situation where there were people out there who were disenfranchised, through no fault of their own, because of an overbroad definition within a restrictive statute. Through the amendment we offered, we created a more generous process to help disabled people participate. At the end of the day, American history is about expanding the franchise and the disabled should have the right to participate.”

Delegate Rick Impallaria, who serves as a guardian, abstained from voting on the measure to avoid a conflict of interest in accordance with

the state's ethics law. However, he expressed his strong concern with the outcome:

“The bill was one of a package of bills that would make it easier to manipulate certain people who would not otherwise vote in Maryland, e.g., felons, college students, etc. HB 816 is particularly troubling given that Maryland has no-excuse absentee voting, which will allow certain activists to ask the disabled: “Do you want to vote?” If they say “yes,” then the activist is essentially free to vote the absentee ballot as he or she sees fit.”

The newly enacted version of HB 816 went into effect on June 1, 2010, and allows citizens under guardianship to register to vote for the 2010 Maryland gubernatorial primary election. In a related development, in April, the Kansas Legislature approved a referendum that will give its voters the opportunity to revoke a 150-year-old constitutional provision authorizing the Legislature to exclude people from voting because of mental illness. The Kansas Constitution gives legislators the authority to deny voting rights to convicted felons, people in jail or prison, and those with mental illness.

Senate Concurrent Resolution 1622 would remove mental illness from that list. Current law does not bar voting by people with mental illness. However, supporters maintain striking the language from the Constitution would be helpful. “It's stigmatizing,” Representative Annie Tietze said of the language in the Constitution. “It lumps those with mental illness in with felons.” Ω

District of Columbia Enacts Omnibus Election Reform Act, Shifts to Implementation

As reported in the December 2009 issue of *The Canvass*, on Nov. 30, 2009, the mayor of the District of Columbia signed the Omnibus Election Reform Act of 2009 (A18-0238). Originally enacted as an emergency provision, the legislation became permanent law on March 19, 2010, following congressional review and official publication. This sweeping new law includes a number of noteworthy provisions including allowing: “no-fault” absentee voting, pre-registration of 16-year-olds, 17-year-olds to vote in primaries if they will turn 18 before the general election, same-day registration, and the electronic transmission of military and overseas blank ballots. The new law also creates a voter-verified paper audit system and designates the D.C. Department of Corrections and the D.C. Department of Youth Rehabilitative Services as voter registration agencies in addition to those already covered by the National Voter Registration Act of 1993 (“Motor Voter” Law). Washington, D.C. joins Florida, Hawaii, Maryland, North Carolina and Rhode Island in permitting all 16-year-olds to pre-register.

In accord with the new law, D.C. will be using newly purchased iVotronic electronic voting machines with a paper audit trail, precinct-based scanners and electronic poll books. These upgrades were financed chiefly with federal Help America Vote Act funds, though the District expects some additional costs through FY 2013.

Beginning 15 days before the Sept. 14, 2010, primary, same-day registration will be available to all residents who can provide proof of residence under federal law, e.g., driver's license, government ID, etc. This year, all same-day registrants will vote by provisional ballot. Beginning in 2011, same-day registrants who cannot provide photo identification must vote a provisional ballot. The new law also provides for early voting seven days before Election Day at four vote centers in addition to standard early voting at the Board of Elections during the two weeks before the September primary.

In addition, the new law expands options for absentee voting by removing excuse requirements and permitting ballots to be postmarked up until Election



continued on page 5

Worth Noting

California Voters Approve Moving to a Top-Two Primary

On June 8, by a margin of 54 to 46 percent, California voters approved Proposition 14 to adopt a top-two primary. Proposition 14 was one of five measures on California's June 8 ballot. It was referred to the ballot by the Legislature and proposed changing California's primary election system. Under the current primary system, separate ballots are prepared for each political party. Voters select candidates from their own party, and the winning candidates go on to the general election. Parties may allow voters who are not affiliated with a political party to vote in their primary election. This is commonly referred to as a partially closed primary, and California is one of 15 states that scheduled this type of primary in 2010.

Proposition 14 will move California to a top-two primary. Only two states—Louisiana and Washington—currently use this type of primary. In a top-two primary, all candidates, regardless of their party affiliation, appear on the same ballot. They may add their party preference to their name on the ballot, or may choose not to state a party preference. Voters may vote for any candidate, regardless of both the voter's and candidate's political party affiliation. The two candidates receiving the most votes advance to the general election. It is possible that both candidates may be of the same party and the new system does not provide for write-in votes. Partisan primaries will continue to be held for presidential candidates and party offices. Read more about Proposition 14 at ncsl.org. [Ω](#)

U.S. Census Releases Final Data on 2008 Voter Turnout

The U.S. Census Bureau recently released its final report on voter turnout in the 2008 election. The report found similar results to other published studies. About 63.6 percent of eligible voters exercised their right to vote, which was down slightly from the 2004 election when 64.8 percent of eligible voters participated. Minnesota led the nation with 75 percent turnout. The report includes several tables showing voting participation by state and by demographic. The full report is available on the Census Bureau's website here: [Voting and Registration in the Election of November 2008](#). [Ω](#)

About 63.6 percent of eligible voters exercised their right to vote in the 2008 elections, down slightly from the 2004 turnout of 64.8 percent.

Pew Center on the States Releases Several New Reports on Key Election Issues

➤ Online Voter Registration: Ariz. and Wash. Show Cost Savings and Increased Efficiency

According to a Pew-funded study from the 2008 presidential election, online voter registration systems pioneered in Arizona and Washington have led to notable improvements in voter file accuracy, administrative cost savings, and less paperwork by election staffs.

Prepared by researchers at the University of Washington and the University of California, Berkeley, the report also notes that most voters found online registration easy and convenient. The study comes as increasing numbers of states are adopting comparable systems.

Online Voter Registration (OLVR) Systems in Arizona and Washington: Evaluating Usage, Public Confidence and Implementation Processes examines how these states created the online option by building on existing registration procedures at their state motor vehicle agencies. In both states, voter information has to match the driver file before the application can be processed and the registrant added to official lists. Cost savings in Arizona have been substantial. For example, the report finds that the paperless registration process cost \$.03 per online application, compared to \$.83 for paper. The full report is available on the Pew website.

➤ Alternative Voting Methods

As reported in the December 2009 issue of *The Canvass*, academic researchers recently presented reports on Pew-funded studies covering the many unseen effects of not voting in one's precinct—the traditional way—as well as some of the administrative and procedural hurdles that election officials face in conducting early voting, vote-by-mail and same-day registration. In 2008, following a request for proposals, Pew and the former JEHT Foundation selected seven projects by leading researchers in the field. Their reports can now be found in one convenient location on the Pew Center on the States' website. Several of the reports examine turnout and voter behavior associated with these methods.

➤ Issue Brief: Voter Information Project

Despite the fact that approximately 120 million people went online in search of answers to their questions about the general election in 2008, no standardized, reliable source currently exists for voters to obtain basic Election Day information such as the location of their polling place, candidates and issues on the ballot, identification requirements and requests

Worth Noting

for or instructions about absentee ballots. At the same time, the transformational shift to Google-type sites as one stop sources for movie information, maps, and consumer data led the Pew Center on the States to explore using the same technology to inform voters about elections and voting. The Voting Information Project is a long-term, nonpartisan effort to connect voters, via the Web, with information to help them be more involved citizens. In partnership with Google and election officials, the project is working to get all 50 states to publish polling place and candidate information in a standard format. Released in April,

the Issue Brief details how the project is working across the nation to provide cutting-edge technology to make voting information accessible online to all Americans.

➤ **The Real Cost of Voter Registration: Updated Cost Data for Oregon**

The March 2010 *Canvass* reported on this groundbreaking cost study of voter registration in Oregon using data from the 2008 presidential election. Oregon is an all-mail election state. Since that time, the Pew Center on the States released amended cost data, which shows increased savings associated with the state's centralized voter registration database system. [Ω](#)

✓ Tally Sheet

Substance... It's time to reissue a warning bell, again, now that the election cycle is in full swing. On page 7 of the July 2008 issue of *The Canvass*, we featured a story entitled, "School and Library Safety on Election Day." The article summarized efforts by legislatures to protect students from predators who can easily get into schools and libraries when they serve as polling locations. Pennsylvania recently witnessed firsthand the need for greater security in this area. In the last two months, the Penn-Delco School District has experienced three incidents where strangers have attempted to lure students into a motor vehicle. The most recent instance occurred on May 18, during the state's primary election, at a polling location at the Northley Middle School in Aston, Penn. An unidentified man, estimated to be in his 50s, chatted with a 14-year-old girl about the Philadelphia Flyers after noticing the girl's Flyer tee shirt. He then went inside to vote. Five minutes later he returned to her and reinitiated a conversation before he offered her a ride home. She told the stranger "no" and then went inside the school to report the incident to a teacher, police noted. "We are very concerned anytime a stranger comes up and offers a student a ride home," Penn-Delco Superintendent George Steinhoff said.

Steinhoff says the district will review the decision to use the school as a polling location in light of the incident. As schools let out and summer vacations begin, we again respectfully commend to your attention this important safety issue.

... & Style: In April, we celebrated our second year of publishing for legislatures. We hope you like the new sharper and smoother design of *The Canvass*. As always, we welcome your comments and requests for information. Feel free to submit them to elections-info@ncsl.org or call us at **(303) 856-1379**. In the meantime, we hope to see you at the 2010 Legislative Summit in Louisville—July 25-28! [Ω](#)



District of Columbia...from page 3

Day. Alysoun McLaughlin, Public Affairs manager with the D.C. Board, notes that in 2008, under the former rules, the number of residents using these convenient voting options was fairly modest: Approximately 10.5 percent voted absentee—that is either in-person (early) voting or by mail. "Accordingly, I don't think the District is a vote-by-mail culture. Unlike other parts of the country, our geographic area is not large

and people are accustomed to taking the Metro (rail system) to the polls." On top of the new reform law, the District is busy working on its compliance plan for the federal Military and Overseas Voter Empowerment Act. "Because we're changing so much, so fast this year, we're almost building processes from scratch—redesigning paperwork and publications to reflect these changes," she said. [Ω](#)



What They're Saying

“Voters like options. Options cost money and election administration funds are very tight. A high percentage of voters have already moved to the mailbox.”

—Scott Doyle, clerk and recorder, Larimer County, Colo., in an interview with *The Canvass*, on April 30, 2010.

“Another suggestion from the Postal Task Force was to get legislation similar to the MOVE Act, the Military and Overseas Voter Empowerment Act, that would allow for election offices to send the ballots out electronically. While that would only help in sending them out, we do not have legislation to allow the return of the ballot electronically. But it can't be far away now. As more and more voters choose to vote by mail, it will take

education to make sure all voters understand if the Post Office changes to a five-day delivery plan what responsibilities they have.”

—Jill Lavine, registrar of voters, city of Sacramento, chair of the Postal Task Force for the Election Center, in testimony before the U.S. Postal Regulatory Commission on the USPS “Six-Day to Five-Day Delivery Proposal,” May 12, 2010, Sacramento, Calif.

“The changes in communication to electronic and digital have been very significant, and there's also the effect of the recession. The result is less and less mail. We've had significant declines in revenue. We can't continue to lose [nearly] \$20 billion.”

—Stephen Masse, vice president, Finance and Planning, U. S. Postal Service, commenting on the extent of USPS net losses since 2007 and noting that the five-day plan is part of a suite of solutions to rein in costs, in the *Sacramento Bee*, May 13, 2010. [Ω](#)

NCSL Spring Forum Session Focused on Voter Registration Developments

At the NCSL Spring Forum in Washington, D.C., last April, NCSL's Redistricting and Elections Committee hosted a very informative discussion on state voter registration trends that included a presentation on what action Congress might take. Indiana State Senator Sue Landske moderated the session, which was anchored by David Becker from the Pew Center on the States. He presented a valuable set of slides covering the issue, which is available on NCSL's website here. Delaware's elections commissioner, Elaine Manlove, talked about her state's move to electronic registration, and Thomas Hicks, chief counsel for the U.S. House Committee on House Administration, discussed pending congressional action. You can view a video of the session on NCSL's website here: <http://www.ncsl.org/default.aspx?tabid=20115>. [Ω](#)

THE CANVASS

States and Election Reform
A Newsletter for Legislatures © 2010



NATIONAL CONFERENCE OF STATE LEGISLATURES
The Forum for America's Ideas

Published by the National Conference of State Legislatures
William T. Pound, Executive Director
7700 East First Place
Denver, Colorado 80230
(303) 364-7700
(303) 364-7800
www.ncsl.org

In conjunction with NCSL, funding support for this publication is provided by the Pew Charitable Trusts through its Pew Center on the States' Election Initiatives project. The Canvass seeks to inform legislators and staff through the sharing of research, analysis and legislative best practices, thereby helping legislatures to achieve voter-focused election reform. Any opinions, findings or conclusions in this publication are those of NCSL and do not necessarily reflect the views of the Pew Center on the States.

NCSL Elections Staff
Jennie Drage Bowser, Tom Intorcio and Tim Storey
Layout and design: Leann Stelzer