

The Right to Vote and Be Counted: A Liberty at Risk

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Voting is a fundamental right—a liberty that generations of Americans fought to obtain; a liberty that is now at risk because recent events have shaken voter confidence in our electoral system.

The 2000 presidential election left many voters wondering whether their votes would make a difference, or even be counted. Confidence in the system began to deteriorate. Although our electoral system was flawed long before the 2000 presidential election, voter confidence seems to be at an all time low. We must now look to the law to determine what legal changes need to be made to increase voter turnout, increase voter confidence and increase the probability that each and every legal vote will be counted.

The Right to Vote and Be Counted

Abraham Lincoln best described democracy as “government of the people, by the people, and for the people.” For our government to truly embrace this concept, the people must vote and have their votes counted. Although the right to vote has evolved over the course of American history—with the gradual expansion of the right from a ballot limited to white, male property owners to a universal franchise for nearly everyone over the age of 18—we are still struggling to create a system where every vote counts.

The right to vote is a fundamental constitutional right guaranteed under both the New Jersey and

the United States constitutions. New Jersey law grants the right to vote to citizens of the United States who are 18 years of age or older, and have been residents of the election district in which they expect to vote for at least 30 days before that election.¹

Pursuant to the United States Constitution, a person meeting these requirements cannot be denied the right to vote on account of race, color, sex or age. A person may, however, be disqualified from voting if he or she is an "idiot" or "insane," as declared by a court of competent jurisdiction; has been or shall be convicted of a violation of New Jersey election law for which criminal penalties are imposed; and/or is serving a sentence or is on parole or probation as a result of a conviction of an indictable offense under the laws of New Jersey or another state.² Similarly, in Alabama, a person convicted of a felony involving moral turpitude, or who is mentally incompetent, will be ineligible to vote until restoration of civil and political rights or removal of their respective disability.³ Virginia and Mississippi also have comparable statutes.⁴

Voter Turnout

Despite the fundamental nature of the right to vote, it is estimated that in the 2004 presidential election only 52.3 percent of the voting age population in the United States turned out to vote.⁵ The number was slightly lower in New Jersey, with 51.5 percent of the voting-age population casting ballots.⁶ In states with Election Day registration, it is estimated that 69.0 percent of the voting age population turned out to vote in 2004.⁷ The fact that states with same-day registration had larger numbers of registered voters turn out to vote supports the theory that the fewer obstacles a voter must overcome to cast his or her ballot, the more likely he or she is to vote on Election Day.

The fact that voter turnout is low is surprising considering the historical fight for universal suffrage and the issues at stake in modern elections. These issues include, but are not limited to, whether one will have health insurance; whether one will have a job; whether one will have to pay higher taxes; and whether there will be peace, war, or a draft.

The right to vote is meaningless without the guarantee that eligible voters will turn out to vote and their votes will be counted. Every time an eligible voter decides not to register or cast a ballot, or is otherwise deprived of his or her right to vote, democracy suffers. As Chief Justice Earl Warren stated in *Reynolds v. Sims*, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."⁸

Improvements to the System Through HAVA

Because voter confidence in the system has been shaken and the fundamental right to vote and be counted is now at risk, we must look to the law to change our electoral system and bring about an increase in voter confidence, voter turnout and the probability that each and every legal vote will be counted.

Through the Help America Vote Act of 2002 (HAVA),⁹ both federal and state officials are taking the first steps of using the law to effectuate change in the system. For example, through federal funding HAVA is allowing states to replace their antiquated voting machines, improve voting system standards to assure accurate vote counts, create a statewide voter registration system, impose new identification requirements for first-time mail-in registrants and increase poll site accessibility for disabled voters. Despite these strides, we still must look to the law to enhance the system in New Jersey to potentially include same-day registration, e-voting, early voting and vote-by-mail.

Voting Machines

Although the majority of New Jersey voters currently cast their ballots by direct-recording electronic (DRE) voting machines and optical scan machines, some are still voting on lever machines.

DRE machines are touch-screen machines that directly record votes. Currently, DRE machines in New Jersey do not provide a verified paper trail.¹⁰ Optical scan machines allow voters to electronically scan their paper ballots into an optical-scan tabulating machine.¹¹ Optical scan machines produce a paper trail, but do not count ballots that are marked incorrectly. For example, when somebody circles a candidate's name instead of filling in an oval with a black marker, his or her vote will not count.¹²

On lever machines, the name of each candidate or ballot issue choice is assigned a particular lever, and a set of printed strips visible to the voters identifies the lever assignment for each candidate and issue choice. To vote, the voter pulls down selected levers to indicate his or her choices.¹³ Because lever machines are no longer being produced, and are unlikely to meet the standards set forth by HAVA, they will all be replaced by January 2006.

HAVA requires all voting systems in the United States to: 1) allow voters to review the accuracy of their selections before casting their ballot; 2) allow voters to correct any votes, including over-votes; 3) provide an audit or permanent paper trail of the votes cast; 4) allow a means to ensure that voters with disabilities will be able to vote independently; 5) furnish multi-lingual ballots in required election districts; 6) produce an error rate that does not exceed the error rate standards established by the Federal Election Commission; and 7) establish uniform and non-discriminatory standards for what constitutes a vote.¹⁴

Voting systems are not required to be HAVA compliant until January 2006.

This means that New Jersey voters will be voting on DRE, optical-scan and lever machines in the 2005 gubernatorial election. The differences among these three types of machines and their reliability begs the question of whether or not the votes citizens cast on different machines will be counted equally, or whether certain citizens will have a greater probability of having their votes count depending on the type of machine on which they vote.

Although DRE machines are sophisticated pieces of equipment that store information in multiple formats and multiple places within their program, those currently used in New Jersey do not provide a paper trail. This compromises the rights of all voters. Voters who vote on DRE machines are unable to verify that their vote has been recorded and stored as intended. Rather, votes are stored in an impermanent electronic form that can be altered and erased, and election officials are denied the ability to preserve voter-verified permanent records of the vote for subsequent recounts or audits of the election, thereby making meaningful recounts impossible.

Despite the problems that many have with DRE machines, the Department of Justice maintains that because they provide a final summary screen before the voter asks the machine to officially record his or her vote, as well as an auditory component that informs sight-impaired and illiterate voters of the summary screen's contents, the production of a contemporaneous paper record is not necessary for the voting system to comply with HAVA.¹⁵ A paper trail does, however, afford an additional means for a voter to verify his or her choices before casting a vote.¹⁶

The question now becomes whether DRE machines improve or hinder the growth of voter confidence in the system. Even though voters confirm their ballot choices on an electronic machine

before they cast their vote, DRE machines require they rely upon technology to assure that their vote is counted exactly as intended. To improve voter confidence, assist in recounts and assure voters that their ballots are being counted as intended, the only logical solution seems to be for the law to require DRE machines to produce a permanent paper trail.

Voter Registration/Statewide Registration

The United States is one of a few, if not the only, major democracy in the world that requires advance registration as a prerequisite to voting without the government's assuming responsibility to see to it that all eligible people are registered to vote. Although some states—such as Minnesota, Maine, Wisconsin, New Hampshire, Wyoming and Idaho—allow election-day voter registration, New Jersey requires eligible voters to register at least 29 days before an election.¹⁷

Despite this requirement, many eligible voters show up at the polls on Election Day only to learn that their name is not on the registration list, or they are at the wrong polling place. HAVA attempts to solve these problems by requiring each state to implement a "single, uniform, official, centralized, interactive, computerized state-wide voter registration list that is maintained and administered at the state level."¹⁸ Such a system must provide for the elimination of duplicate registrations and the purging of ineligible voters, in accordance with the National Voter Registration Act.¹⁹

Two of the key benefits of adopting a statewide voter registration system are that same-day registration will be possible and voters will be able to cast their ballots at any precinct in the state.²⁰ Because, however, no system is perfect, statewide registration systems come with a price. Besides being expensive and a major clerical task, the key ques-

tion regarding statewide voter registration systems is whether putting control of the registration list *purges* into the hands of a centralized authority could result in voter disenfranchisement by facilitating more sweeping purges of minority voters.

Despite the benefits of a statewide voter registration system, county election officials should be charged with reviewing each and every name in their county that is supposed to be purged, to ensure that the requirements of the National Voter Registration Act²¹ are being followed. Because the county boards of elections are familiar with the names of the registered voters in their county, the streets on which those voters live and problems unique to that county, the law must require the county boards to play a key role in purging names from the rolls to prevent the erroneous disenfranchisement of otherwise eligible voters.

Voter Identification

Pursuant to HAVA and New Jersey state conforming legislation, first-time applicants who registered to vote by mail after January 1, 2003, were asked through a separate letter from their applicable county commissioner to provide either their driver's license number, the last four digits of their Social Security number, a copy of a valid and current photo ID or a current document with their name and address.²²

If a voter did not meet these identification requirements, or if his or her identification could not be verified prior to Election Day 2004, he or she was required to provide identification at the polls. If the individual showed identification at the polls, he or she was permitted to vote on the voting machine. If, however, the individual did not show identification, he or she was required to vote by provisional ballot and his or her vote would be counted *only* if he or she then provided identification to the

county commissioner of registration by the close of business two days after the election.²³

Although many states, such as New Jersey, have made these requirements clear, HAVA's new procedures may have caused confusion on Election Day 2004, leading to the wrongful disenfranchisement of voters at the polls. This election year, confusion existed among many county election officials regarding what constituted proper identification under HAVA.²⁴ Specifically, some county officials indicated that it was their policy to only accept driver's licenses or Social Security cards as identification, when in fact HAVA requires that counties also accept "current and valid photo identification or a copy of a current utility bill, bank statement, government check, pay check, or other government document that shows the name and address of the voter."²⁵ A Costco membership card could, in fact, be a proper form of identification under HAVA.

Because a disproportionate number of racial and ethnic minority voters may not have identification or the financial means to acquire it, HAVA's photo identification requirements could discriminate against minorities and violate the Voting Rights Act of 1965.²⁶ This position is supported by a 2001 Massachusetts case where a federal court outlawed the use of an identification requirement at the polls in Lawrence, Massachusetts.²⁷ In reaching its decision, the court explained that the use of photo identification could cause a disparate impact on ethnic and racial minority communities.²⁸

Based on the foregoing, it seems that if HAVA's photo identification requirements are not properly applied, rather than strengthening the integrity of our system they will open the door to the unequal and discriminatory treatment of voters. The law needs to clarify HAVA's requirements so that

otherwise eligible voters are not driven away from the polls due to confusion, frustration or discrimination. We have come a long way since the days of the poll tax and literacy tests. HAVA's identification requirements seem, however, to take us back to the days where millions of Americans were fighting for their right to vote and millions of Americans were being turned away from the polls because of their socioeconomic status. Although we need to protect the integrity of our system to prevent fraud, we should not do so at the expense of minority voters who are entitled to an equally weighted vote under the Equal Protection Clause of the United States Constitution.²⁹

Poll Site Accessibility and the Disabled Voter

The National Organization on Disability reports that more than 54 million Americans have a disability; a total of 40 million are over 18.³⁰

According to a recent survey, 21 percent of United States adults with disabilities, representing more than eight million potential voters, say that they have been unable to vote in a presidential or congressional election due to barriers faced either at, or in getting to, the polls.³¹ HAVA attempts to erode these barriers by fully integrating persons with disabilities into the electoral process.

For example, HAVA requires that election forms, such as the voter registration application, the sample ballot, absentee ballots and provisional ballot materials, be provided in alternative forms such as large print, braille and audio.

In addition to these procedural requirements, New Jersey law generally requires that every polling place be accessible to disabled voters.³² If a New Jersey voter is assigned to an inaccessible polling place, he or she can request permission to vote at another polling place or by absentee ballot.³³ Allowing

disabled voters to request permission to vote at another polling place or to vote by absentee ballot is not a legally acceptable solution. Instead of providing disabled voters with a meaningful opportunity to participate in the electoral process, making them vote at a place or through a means different from all other eligible voters in their district reduces them to second-class citizens.

With the goal of creating a system that is 100 percent accessible to all eligible voters, the New Jersey Division of Civil Rights, in conjunction with the Division of Elections has initiated a program where state employees inspect various polling sites throughout the state to determine if they are accessible to handicapped individuals. Through this process, inspectors look at the ability of disabled voters to park at a polling place, get through the door, sign in at the registration table and cast ballots on the voting machines. Although this is a massive undertaking, as the state's chief election official Attorney General Peter C. Harvey stated in a recent letter to the county boards of elections, "[f]ailure to make voting places handicap-accessible raises serious issues under federal and state anti-discrimination laws [and] jeopardizes the State's funding under HAVA."

To ensure that no voter is discriminated against because of a disability, the law should provide disabled voters with the same choices as every other eligible voter. Disabled voters must be guaranteed the right to vote at the polling place to which they have been assigned. Disabled voters should not be required to vote elsewhere, or to vote by absentee ballot, simply because a polling place is not accessible. The key to the successful implementation of HAVA and to restoring confidence in the electoral system is poll site accessibility. The most technologically advanced machines, which enable disabled voters to vote without third-party assistance, are absolutely

useless if disabled voters are unable to complete their registration forms, get to the polling place and make it through the polling place door.

Guaranteeing the Intent of the Voter

Despite problems with the mechanics of the system, unlike many states New Jersey law guarantees that the intent of the voter is enforced. In determining whether to count a particular vote, courts adhere to the basic principle that, "[e]lection laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons."³⁴

For example, *In the Matter of Gray-Sadler*, where write-in candidates for the offices of mayor and borough council challenged the results of an election because of irregularities related to write-in instructions and non-compliant voting machines, the New Jersey Supreme Court held that a special election must be held to safeguard citizens' constitutional rights.³⁵ The holding was based, in part, on the theory that election law statutes must be read in light of the broad purpose to prevent disenfranchisement of qualified voters.³⁶ According to the Court, even where a statute appears to be straightforward, such as the provision of Title 19, which states that if a write-in or "irregular ballot," is not "in its appropriate place on the [voting] machine,...it shall be void and not counted,"³⁷ the law should not be applied in a manner that would frustrate the free expression of the voters' will.³⁸ This is especially true when the incorrect placement of a write-in vote is the result of mistakes or problems beyond the voters' control.³⁹

Similarly, *In the Matter of the Petition of Kriso*—where the issue was whether an absentee ballot mailed by a person other than the voter must be automatically disqualified simply because the

outer envelope was not completed in conformity with the New Jersey law—the court held that the ballot should not be automatically disqualified on the basis of this error.⁴⁰ Rather, the court looked at whether the failure to place the ballot in the outer envelope would affect the integrity of the electoral process.⁴¹ It concluded that the integrity of the process had not been compromised.⁴² Reaching another result and "[v]oiding the ballot and thus disenfranchising the voter is too harsh a remedy where the deficiency does not affect the integrity of the electoral process."⁴³

As the above-cited cases demonstrate, because a citizen's constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted "'at full value without dilution or discount,'"⁴⁴ New Jersey's election laws must be construed to guarantee the intent of the voter.

Using the Law to Change the System

Even though New Jersey's election laws are narrowly construed to protect the intent of the voter, the law must also be improved to eliminate the risks set forth above. The law, however, is not the only way to increase voter turnout, increase voter confidence in the system and increase the probability that every legal vote will be counted. Other possible methods include weekend voting, early voting, increased absentee voting, vote-by-mail and Internet voting. Perhaps these methods will increase voter turnout, but the question then becomes whether they will also increase voter confidence and the probability that each and every legal vote will be counted, or whether these methods simply open the door up to fraud.

Only time will tell what technology can accomplish, but one thing is certain: Even though we are unlikely to create a perfect system where every eligible voter casts a ballot on Election Day and has his or her vote counted, we can

change the law to deal with problems with voter registration, erroneous purging of the registration rolls, poll site accessibility, voting machines, identification requirements and provisional ballots. We can create a system where fewer voters face the risk that their vote will not count. ☞

Endnotes

1. N.J.S.A. 19:31-5 (2004) and N.J. Const. Art. II, Sect. I, para. 3(a).
2. N.J.S.A. 19:4-1 (2004).
3. Alabama Const., Art. VIII, § 182.
4. Miss. Code Ann. § 23-15-11 and Va. Const. Art. II, § 23.
5. State-By-State Turnout Rates 1998 – 2004 by Voting Age Population, available at <http://www.nypirg.org/election04/VAP.pdf> (access on December 27, 2004).
6. *Id.*
7. *Id.*
8. *Reynolds v. Sims*, 377 U.S. 533 (1964).
9. Codified at 42 U.S.C.A. § 15301, *et. seq.* (2004).
10. Tom Zellar, Jr. New Jersey Lawsuit Challenges Electronic Voting, *The New York Times* (New York, NY) Section B, Page 1, Column 5 (Oct. 19, 2004).
11. Candice S. Miller, Press Release, *Statewide Optical Scan Use*, (Lansing, Mich. May 17, 2001) (copy of press release on file with the Michigan Secretary of State).
12. *Id.*
13. www.fec.gov/pages/lever.htm (accessed on December 5, 2004).
14. Section 301, Title III of HAVA, codified at 42 U.S.C.A. §15481 (2004).
15. www.usdoj.gov/olc/drevotingsystems.htm (accessed on December 5, 2004).
16. *Id.*
17. N.J.S.A. 19:31-6.1 (2004).
18. Section 302, Title III of HAVA, codified at 42 U.S.C.A. § 15483 (2004).
19. 42 U.S.C.A. 1973gg-1, *et. seq.* Under the National Voter Registration Act,

- a person can be removed from the voter registration rolls upon: 1) death; 2) written confirmation that he or she has changed his or her address to a location outside of the registrar's jurisdiction (*i.e.*, outside a county); 3) failure to respond to mailings from state or local election officials asking the voter to confirm that he or she has moved to an address outside of the registrar's jurisdiction *and* the voter fails to vote in two subsequent federal elections; 4) the request of the voter; 5) the finding of mental incapacity of the voter as provided by state law; or 6) the criminal conviction of the voter under state or federal law.
20. John Mark Hansen, *Statewide Voter Registration Systems, Task Force on the Federal Election System*, www.miller-center.virginia.edu (July 2001).
 21. 42 U.S.C.A. 1973gg-1, *et. seq.*
 22. N.J.S.A. 19:61-1 through 19:61-8 (2004) codified in P.L. 2004 C. 88 (2004) and Section 303, Title III of HAVA, codified at 42 U.S.C.A. § 15483 (2004).
 23. Section 302, Title III of HAVA, codified at 42 U.S.C.A. §15482 (2004). HAVA creates the right of voters in federal elections to cast provisional ballots if they fail to provide the required identification information, or if they are voting after the polls close by way of federal or state court order. New Jersey has provided for provisional balloting since 1996.
 24. Brennan Center for Justice, Press Release, *Survey Finds New ID Checks Threaten to Disenfranchise Voters*. (New York, NY Apr. 13, 2004) (copy of press release on file with Brennan Center for Justice).
 25. *Id.*
 26. 42 U.S.C.A. § 1971, *et. seq.* (2004).
 27. *Carolina Morris v. City of Lawrence*, No. 01-011889WGY (D.C. Mass. Nov. 5, 2001).
 28. U.S. Const. Amend. XIV.
 29. *Id.*
 30. Brewster Thackery, "The Disability Vote Made History in 2000, in 2004 it May Do So Again"(May 2004) (www.nod.org/content.cfm?id=1486 (accessed on December 5, 2004)).
 31. www.nod.org/political/index.cfm (accessed on December 5, 2004).
 32. N.J.S.A. 19:8-3.1 (2004).
 33. N.J.S.A. 19:8-3.2 (2004).
 34. *Lesniak v. Budzash*, 133 N.J. 1 (1993)(quoting *Kiburrary v. Gilfert*, 10 N.J. 425 (1952)); *see also Wene v. Meyner*, 13 N.J. 185, 197 (1953).
 35. *In the Matter of Gray-Sadler*, 164 N.J. 468, 475 (2000).
 36. *Id.* at 476.
 37. N.J.S.A. 19:49-5 (2004).
 38. *Gray-Sadler*, 164 N.J. at 477.
 39. *Id.*
 40. 276 N.J. Super. 337, 339, 345 (App. Div. 1994).
 41. *Id.* at 344-45.
 42. *Id.* at 345.
 43. *Id.* at 344-345; *see also Wene v. Meyner*, 13 N.J. at 196.
 44. *Reynolds v. Sims*, 377 U.S. at 555 n. 29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950)).

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