

TESTIMONY  
OF  
PROFESSOR MICHAEL E. WATERSTONE  
OF  
LOYOLA LAW SCHOOL (LOS ANGELES)  
  
BEFORE THE  
SENATE SPECIAL COMMITTEE ON AGING

January 31, 2008

Mr. Chairman and distinguished members of the Special Committee on Aging, thank you for inviting me to speak here today. My name is Michael Waterstone. I am a professor at Loyola Law School in Los Angeles. I am also a Commissioner on the American Bar Association's Commission on Physical and Mental Disability. Along with several of my fellow witnesses at today's hearing, I participated in the Symposium on Facilitating Voting as People Age convened by Borchard Foundation Center on Law and Aging, the American Bar Association, and McGeorge Law School. My comments represent my own personal views and are not necessarily those of Loyola Law School or any other organization with which I am affiliated.<sup>1</sup>

I will be testifying today as to challenges faced by elderly voters and voters with disabilities when they vote. I will conclude by suggesting how vigorous enforcement and implementation of federal laws, combined with some law reform, can and should create more equal voting opportunities for older voters and voters with disabilities in the election of 2008 and beyond. I note that I will be discussing both of these groups – older voters and voters with disabilities – together in my testimony. Although not identical, these two groups are very much linked. As our population ages,<sup>2</sup> more people are increasingly likely to need mobility assistance, have cognitive impairments, and have declining vision and hearing. As I will discuss below, many of the barriers that have existed in voting exclude people based on these types of impairments. I also note that although voting is a comprehensive process ranging from registration to vote tabulation, my testimony today will focus primarily on only one stage of that process: the actual act of voting.<sup>3</sup>

This issue has real and immediate importance. This Tuesday, February 5<sup>th</sup>, 2008 is an important day in our democracy. In what has been termed “Super Tuesday,” “Super-Duper Tuesday,” and even “Tsunami Tuesday,” large numbers of people are expected to go the polls and vote, or have already done so using some method of absentee voting. Why do they do so?

The most straightforward answer is to help pick the next President of the United States. Accordingly, one important voting policy is to make sure that their vote is

---

<sup>1</sup> My writings on this topic, from which much of this testimony is drawn, include *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 Stan. L. & Policy Rev. 353 (2003); *Civil Rights and the Administration of Elections – Toward Secret Ballots and Polling Place Access*, 8 J. of Gender, Race, & Justice 102 (2004); *Lane, Fundamental Rights, and Voting*, 56 Ala. L. Rev. 793 (2005); and *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 Vand. L. Rev. 1807 (2005).

<sup>2</sup> Between 2000 and 2030, the U.S. population aged sixty-five or older is expected to more than double from 35 million to 71.5 million. See Admin. On Aging, U.S. Dep't of Health and Human Servs., A Profile of Older Americans: 2006 3 (2006), <http://www.aoa.gov/PROF/Statistics/profile/2006/2006profile.pdf>.

<sup>3</sup> Therefore, other important legal and policy issues impacting the rights of older voters, including state statutes that disenfranchise various categories of people with disabilities, see, e.g., *Doe v. Rowe*, 156 F.Supp. 2d 35 (D. Me. 2001) (holding that Maine law disenfranchising any individual under guardianship violated Equal Protection Clause, ADA, and Section 504 of the Rehabilitation Act), and capacity assessments that are made by care-givers who are not qualified nor legally empowered to make them, see Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 McGeorge Law Review 1079-98 (2007), are not the main focus of my testimony.

accurately conveyed and counted, minimizing the chance of fraud, coercion, or mistake. But the strict instrumental act of choosing an elected official is unlikely to be the only reason that people vote. Even after the Bush v. Gore election in 2000, it is extraordinarily unlikely that *one* vote will ever make the difference in a large election.<sup>4</sup> So why do people turn out to vote in large numbers? Apart from their instrumental act of trying to choose elected officials and policies, voting is a way by which people assert their place in the community, making a symbolic statement that they belong and have a voice in the democratic process.<sup>5</sup> For groups like older voters that may be socially isolated and marginalized, this is exceptionally important.

When thinking about challenges that any group of voters face, it is important to focus on protecting a person's actual choice as well as voting's more expressive and symbolic elements. All too often, older voters with cognitive and physical impairments have not had these two vital elements of the right to vote protected.

### *Voting Experiences for Older Voters and Voters with Disabilities*

#### Voting at the Polling Place

Many older voters and voters with disabilities want to vote in the polling place in the same way as their fellow citizens. Yet historically, they have had problems doing so. Despite federal laws including the Voting Rights Act of 1965 (as amended in 1982),<sup>6</sup> the Voting Accessibility for the Elderly and Handicapped Act,<sup>7</sup> Section 504 of Rehabilitation Act of 1973,<sup>8</sup> and the Americans with Disabilities Act (ADA),<sup>9</sup> voters who use wheelchairs have encountered accessibility barriers at polling places, including high door thresholds, ramps with steep slopes, and a lack of accessible parking.<sup>10</sup> Older voters and voters with disabilities who are able to actually enter the polling place have seen their

---

<sup>4</sup> See Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274, 306 n 117 (2001) (“The wonder of it all is that people do actually turn out in massive numbers in spite of the unlikelihood that their vote will have any instrumental value.”).

<sup>5</sup> See Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 368 (1993) (“[By voting], the individual says essentially, ‘I am a member of the American community.’ Through participation itself, the voter expresses an identification with the greater community and reveals her attachments to and associations with it. In this way, the act of voting is the individual’s alignment to the greater society; it is the method by which the individual ‘signs’ her name to the social contract and becomes herself part of the collective self-consciousness.”).

<sup>6</sup> 42 U.S.C. § 1973aa-6 (requiring, *inter alia*, that a voter who requires assistance to vote by reason of blindness or disability may be given assistance by a person of the voter’s choice).

<sup>7</sup> 42 U.S.C. § 1973ee (providing that state and state political subdivisions must assure that polling places used in federal elections are accessible).

<sup>8</sup> 29 U.S.C. § 794 (providing that entities that receive federal financial assistance cannot discriminate on the basis of disability).

<sup>9</sup> Title II of the ADA, 42 U.S.C. § 12132, provides that public entities cannot discriminate against qualified individuals with disabilities on the basis of disability.

<sup>10</sup> See, e.g., U.S. Government Accountability Office, *Voters with Disabilities – Access to Polling Places and Alternative Voting Methods* 7 (Oct. 2001) (noting that 84% of polling places visited in study had at least one impediment), <http://www.gao.gov/new.items/d02107.pdf>.

right to cast a secret and independent ballot compromised.<sup>11</sup> People with manual dexterity impairments can have trouble using voting machines that require them to mark a paper ballot with a pen or other writing device. People with cognitive and vision impairments may have difficulty reading certain ballot formats. And people with hearing impairments may not be able to hear or understand instructions from poll workers. All of these impairments are common to older voters. Until recently, voters falling into all of these categories have been directed to vote with the assistance of a poll worker or friend at the polling place. While this can be helpful to an elderly voter who truly desires assistance, it can cheapen the voting experience for voters who would rather vote like everyone else – secret and unassisted.<sup>12</sup>

### Absentee Voting

The use of absentee balloting has expanded greatly in the last four decades.<sup>13</sup> Undoubtedly, this provides an opportunity to reach elderly voters and voters with disabilities for whom it is difficult or impossible to get to the polls on Election Day. Yet to the extent that a state still offers some of its citizens an opportunity to vote on Election Day,<sup>14</sup> it is unacceptable to use absentee voting as a substitute for accessible polling places. When older voters are directed to vote at home *instead* of going to the polling place with their fellow citizens, it sends a harmful message about their full citizenship and inclusion in the community. Moreover, absentee ballots themselves are usually inaccessible, meaning that voters with vision, cognitive, or manual dexterity impairments may be required to rely on the assistance of another party when completing their ballot.<sup>15</sup> This increases the potential for fraud or coercion, an especially important concern in the instance of elderly voters in long term care facilities who may be reliant on others for contact with the outside community.<sup>16</sup> Finally, absentee ballots typically have to be received before Election Day, which means that voters can miss the opportunity to base their decisions on late-breaking developments.<sup>17</sup> In short, while absentee voting can be a useful tool to increase the capability of elderly voters with cognitive or physical impairments to participate in the electoral process, as currently practiced it is not a panacea.

---

<sup>11</sup> *Id.* at 7 (“[T]he types and arrangement of voting equipment used may ... pose challenges for people with mobility, vision, or dexterity impairments”).

<sup>12</sup> As Jim Dickson, the President of the American Association of Disabilities, who is blind, explained it: “Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. I held firm, but to this day I really do not know if they cast my ballot according to my wishes. To voters with disabilities, there is always some level of uncertainty when another person marks your ballot for you.” James C. Dickson, Testimony Before the N.Y. City Council Comm. On Mental Health, Mental Retardation, Alcoholism, Drug Abuse, and Disability Services (July 22, 2002).

<sup>13</sup> See Daniel P. Tokaji and Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015, 1020 (2007).

<sup>14</sup> The state of Oregon has abolished precinct-based voting and moved entirely to an all-mail voting system.

<sup>15</sup> See Tokaji and Colker, *supra* note 13, at 1036-1040.

<sup>16</sup> See Kohn, *supra* note 3.

<sup>17</sup> For example, in the California gubernatorial recall election in 2003, there were late-breaking revelations relating to alleged sexual harassment by one of the candidates that were not publicized until just before Election Day, but after the absentee ballots were due.

## Existing Law

Why, despite several federal laws that address this topic, have the rights of older voters and people with disabilities been allowed to be degraded? I believe there are several reasons. First, until the recent passage of the Help America Vote Act, no federal statute explicitly recognized the right to a secret and independent vote. Courts have split on whether the ADA mandates secret and independent voting for people with disabilities.<sup>18</sup> Although Title II of the ADA requires programs that are run by public officials to be accessible when viewed in their entirety (which should translate into accessible polling places), the ability of private litigants to enforce these provisions have been undercut by standing problems and the Court's sovereign immunity decisions.<sup>19</sup> Nor have public enforcement authorities shown leadership on this issue.<sup>20</sup> The combination leads to chronic underenforcement.

The most recent law impacting these issues is the Help America Vote Act (HAVA).<sup>21</sup> HAVA is unique in explicitly requiring that people with disabilities be provided "the same opportunity for access and participation (including privacy and independence) as other voters."<sup>22</sup> HAVA's provisions regarding accessible polling places are less concrete; rather than any specific requirements, it makes grant funds available for the purpose of making polling places more accessible.<sup>23</sup> And HAVA does not directly apply to absentee voting.

### *Moving Forward: Opportunities to Expand Access*

Looking ahead, there are opportunities to expand more meaningful access to voting older voters. In doing so, we need to be mindful of the important values of ensuring that the voting experiences of elderly voters who may have cognitive or physical impairments – particularly the ability to vote secretly and independently, and in a polling place if they so choose – are protected, as well as the importance of integrity and accuracy in elections. I offer several suggestions in this effort.

---

<sup>18</sup> Compare *American Association of People with Disabilities v. Hood*, 310 F.Supp.2d 1226 (M.D. Fla. 2004) (holding that Florida had violated Title II by purchasing voting system that was not readily accessible to people with disabilities without third-party assistance); *American Association of People with Disabilities v. Shelley*, 324 F.Supp.2d 1120 (C.D. Cal. 2004) (holding that Title II does not provide the right to a secret and independent vote for people with disabilities). The Department of Justice has taken the position that curb-side voting, whereby a polling place worker will bring a voting machine curbside for voters who cannot get into an inaccessible polling place, does not constitute discrimination under the ADA. See DOJ Letter of Finding #18 (Aug. 25, 1993), <http://www.usdoj.gov/crt/foia/lofc018.txt>; see also DOJ Letter of Finding #21 (Sept. 10, 1993), <http://www.usdoj.gov/crt/foia/lofc021.txt>.

<sup>19</sup> See Waterstone, *Untold Story*, *supra* note 1, at 1855-56, 1860-65.

<sup>20</sup> *Id.* at 1865-67. It should be noted that the Department of Justice has promulgated a checklist for polling places relating to ADA compliance. See <http://www.usdoj.gov/crt/ada/votingchecklist.htm>.

<sup>21</sup> 42 U.S.C. §§ 15301-15545.

<sup>22</sup> *Id.* at § 15481(a)(3)(B).

<sup>23</sup> *Id.* at § 15421(b).

## Vigorous Enforcement of HAVA's Secret and Independent Voting Requirement

On paper, HAVA is a strong law. Although more study is needed, the existing reports I have seen indicate that compliance is a problem. A report commissioned by the Electoral Assistance Commission in 2004 found that less than a quarter of polling places allowed voters with visual impairments to cast a secret ballot.<sup>24</sup> Although these numbers had improved by 2006,<sup>25</sup> these patterns are troubling, particularly when seen in the light of systemic underenforcement of predecessor disability rights laws, especially as they relate to voting.<sup>26</sup> HAVA's enforcement mechanisms are weak: it provides for no private right of action for individuals who are denied their right to a secret and independent ballot, and the Department of Justice (DOJ) has opposed a judicial recognition of one.<sup>27</sup> The DOJ does have the power to bring "civil actions against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief as may be necessary,"<sup>28</sup> although it appears the it has only brought two such cases (in Maine and New York). This should be made a priority for the 2008 election.

Along with others, I have called for HAVA to be amended to allow individuals who are denied a secret and independent vote to sue in federal court.<sup>29</sup> This would take sole enforcement responsibility off the DOJ, and create incentives for states to take their compliance efforts more seriously.

## Continued Efforts to Develop Accessible Voting Technology

To realize the goals of providing voting experiences to older voters and voters with disabilities that are commensurate, to the greatest extent possible, with other voters, we need to continue to develop expertise in voting technologies that both accommodate reasonable security concerns and create access, including a secret and independent ballot. HAVA takes strong steps in this regard: it calls for the Election Assistance Commission to conduct studies of accessible voting for people with disabilities,<sup>30</sup> and also requires the National Institute of Standards and Technology to report to Congress on the usability of

---

<sup>24</sup> See U.S. Election Assistance Comm'n, *A Summary of the 2004 Election Day Survey: Access to Voting for the Disabled* 14-4 (2005). This report noted that more than half the states failed to even respond to the survey questions on accessibility.

<sup>25</sup> A 2006 survey found some improvement, both in terms of states that had reported (nearly 80% of jurisdictions) and percentage of polling places that allowed voters with disabilities to cast a private ballot (self reported at 84.5%). See U.S. Election Assistance Comm'n, *2006 Election Administration and Voting Survey* 26 (2006).

<sup>26</sup> See Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn. L. Rev. 434 (2007).

<sup>27</sup> See Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, 2006 WL 1505602, \*2 (arguing HAVA confers no private right of action) in *Taylor v. Onorato*, 428 F.Supp.2d 384 (W.D. Pa. 2006) (holding that private plaintiffs have no private right of action HAVA access provisions).

<sup>28</sup> 42 U.S.C. § 15511.

<sup>29</sup> See Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, *supra* note 1, at 382; see also Recommendations of McGeorge Symposium on Facilitating Voting as People Age, 38 McGeorge L. Rev. 861, 862 (2007).

<sup>30</sup> 42 U.S.C. § 15381.

different types of voting equipment for individuals with disabilities.<sup>31</sup> This should be done also with an eye toward the needs of older voters with sensory and cognitive impairments.

### Vigorous Enforcement of ADA Accessibility Provisions

Inaccessible polling places violate the ADA. As discussed above, in 2000, the GAO found that 84% of polling places that they visited contained one or more accessibility barriers.<sup>32</sup> A 2005 Election Assistance Commission study found that only 70.9% of precincts from reporting states were wheelchair accessible.<sup>33</sup> As yet another example, on October 2, 2004, a half-page advertisement in the Memphis Commercial Appeal proclaimed in bold letters: “Notice of Polling Locations That Do Not Meet All ADA Standards, November 2, 2004, Election.” It then listed 139 polling place locations. This many years after the ADA’s passage, this is unacceptable, and leads to too many older voters and voters with disabilities not being able to get to their polling places. In the 2008 election, public enforcement authorities need to take the lead in prosecuting public entities that do not live up to their accessibility obligations.

### Improved Practices on Absentee Voting

As discussed above, current absentee balloting practices do not provide the opportunities for all older voters or voters with disabilities who wish to and are able to vote unassisted to do so. HAVA does not include any requirements in this regard, nor has Title II of the ADA been interpreted to require accessibility in absentee voting.<sup>34</sup> This is troubling, because all of the arguments supporting the need for a secret and independent vote in the polling place context apply equally to voting at home.

Absentee balloting, to the extent it is a choice and not a substitute for accessible polling places, does offer an opportunity to reach out to older voters and voters with disabilities. This needs to be done, however, in a way that protects secret and independent voting to the greatest extent possible; minimizes chances for fraud, undue influence, or unsanctioned capacity screening; and is offered through a process that is easy for voters to navigate. In a recent article, Professors Daniel Tokaji and Ruth Colker address these issues, and offer a “menu of choices for policymakers and election officials to consider.”<sup>35</sup> These include better outreach, easing the application process, allowing permanent absentee voter status, more accessible ballots (including development of HTML ballots and phone voting), guidance for caregivers, and mobile polling (whereby

---

<sup>31</sup> *Id.* at § 15383. For one expert’s views on creating voting systems that are accessible to older voters and voters with disabilities, see Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, 38 McGeorge L. Rev. 1113 (2007).

<sup>32</sup> See *supra* note 10.

<sup>33</sup> See *supra* note 24.

<sup>34</sup> This view of the ADA, however, is not inevitable. See Tokaji and Colker, *supra* note 13, at 1035-36 (offering an argument why absentee voting should be covered by Title II’s program access standard).

<sup>35</sup> *Id.* at 1047.

election officials bring the accessible polling technology to voter's homes or facilities and assist them in voting).<sup>36</sup>

### *Conclusion*

Currently, the turnout level of voters with disabilities lags behind other groups.<sup>37</sup> As our population ages and additional number of voters develop physical and cognitive impairments, the population of older voters could view the voting process with a skeptical eye, potentially depressing turnout among this group.<sup>38</sup> We cannot let this happen. We need to focus on making the voting experience for older voters as commensurate with other voters as is possible: namely, focusing on the opportunity to vote secretly or independently when possible, and giving older voters the true choice as to whether they want to do so at the polling place or at home.

I thank you for the opportunity to address you on this issue, and I look forward to working with you on it in the future. I close with a quote from Representative Steny Hoyer. It speaks to the need and value of creating real opportunity and access for all voters:

One of our most profound accomplishments since the founding of the United States is the progressive broadening of the franchise to include African-Americans, women and others subject to pervasive discrimination. In this process, we have learned that few of the rights or interest of a particular group of Americans can be secure so long as that group lacks the right to vote for officials who will become accountable to them. We have also learned that, as more adult citizens become full participants in our polity, the democratic process is enriched for all. We are still in the process of learning this lesson with regard to persons with disabilities.<sup>39</sup>

---

<sup>36</sup> *Id.* at 1047-50; *see also* Kohn, *supra* note 3 (offerings similar ideas).

<sup>37</sup> One study found that people with disabilities have lower levels of voter registration than people without disabilities (62% versus 78%, respectively). *See* 2000 Nat'l Org. on Disabilities, Harris Survey of Americans with Disabilities 83 (2000). Another set of researchers found that in the 1998 elections, people with disabilities were about 20% less likely to vote than those without disabilities, even after controlling for demographics and other factors related to voting. *See* Douglas L. Kruse *et. al.*, *Empowerment Through Civic Participation: A Case Study in the Political Behavior of People with Disabilities 2* (April 1999).

<sup>38</sup> Older voters have traditionally voted in larger numbers than other age groups. In the 2004 presidential election, 71.8 % of citizens ages fifty-five and older reported voting, which was the highest percentage of any age group. *See* U.S. Census Bureau, Voting and Registration in the Electino of November 2004: Population Characteristics 4 tbl.B (2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

<sup>39</sup> H.R. Rep. No. 107-329, pt. 1, at 79 (2001).