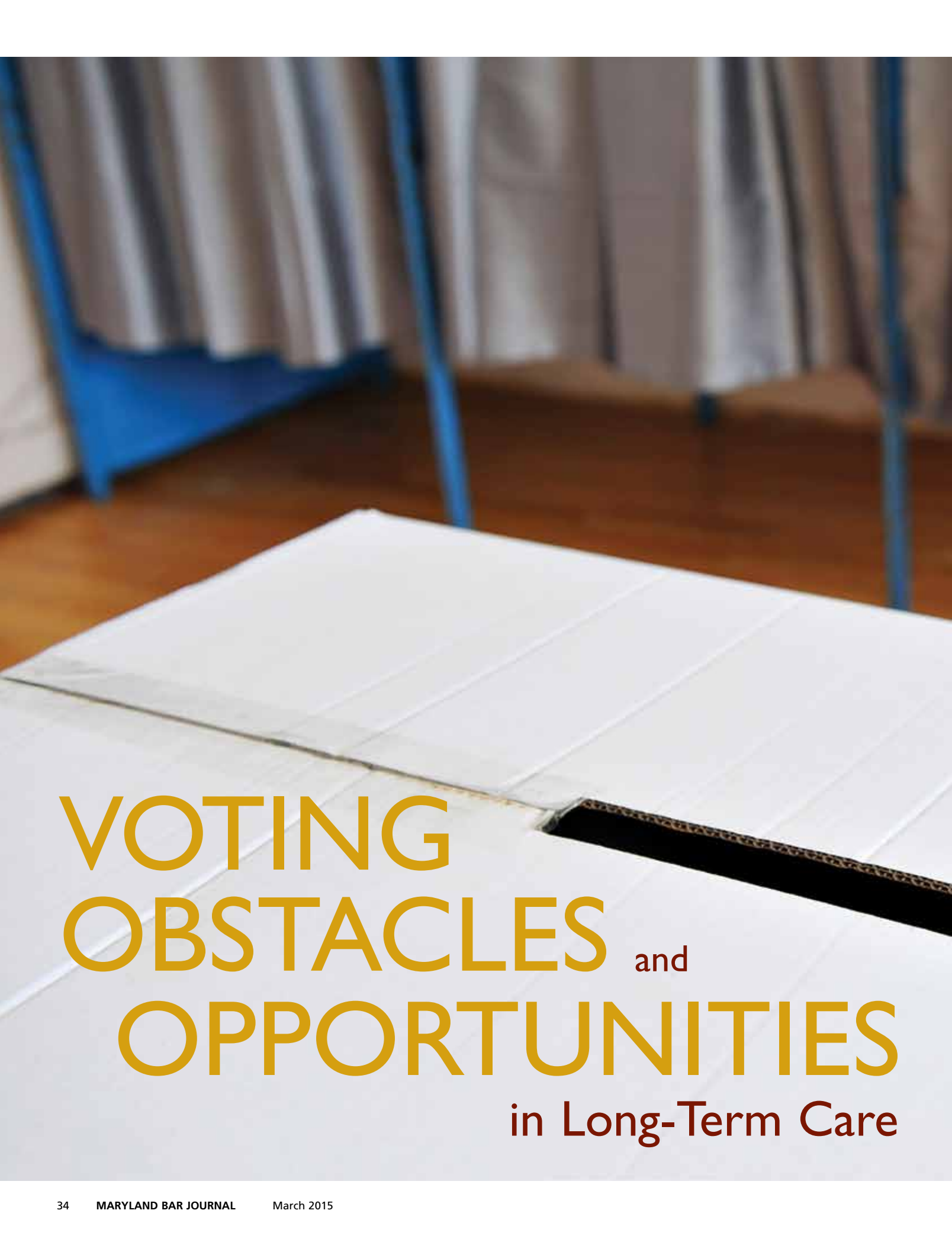




VOTING OBSTACLES and OPPORTUNITIES in Long-Term Care



By Charles P. Sabatino, Elena S. Boisvert and Camilla O. McRory

Voting is among our most fundamental of rights. Yet, for persons in long-term care facilities, substantial barriers exist to exercising this right. Fortunately, these barriers can be overcome, but that is not the norm in the United States today. Consider the example of Ms. Jimmie Everts reported in *The Austin Statesman* in 2012:

She's 83 now, and the former poll volunteer can't think of an election she hasn't voted in. But since falling and breaking both hips a few years ago, she's lived in a nursing home and now relies on the staff members at Hays Nursing & Rehab Center in San Marcos to help her vote.

From 2009 through August of this year, reports show that nursing home residents in at least 18 Texas facilities have said that they didn't get to vote, including residents at a facility in Austin and two in Hays County. Citations in those documents range from failing to let residents know about an election to not helping them with their voter registration.

Officials say it's difficult to know exactly how pervasive such violations are in Texas and nationwide, but some experts think it's a serious problem that leaves the country's oldest people disenfranchised and discouraged.

This article will (1) describe, in general terms, the state of policy and practice nationally with respect to voting by elders, especially in long-term care facilities; (2) describe the Maryland protocols for election office outreach to facilities; (3) describe the emerging concept of *Mobile Polling*; and (4) offer several

other suggestions for strengthening the right to vote by older persons in long-term care settings, particularly for those with diminished capacity.

Voting by Elders

Consider some striking numbers that illuminate the significance of voting by older persons in long-term care settings:

- Elections can be decided by razor thin margins. In 2000, George W. Bush officially won the Florida vote over Al Gore by a margin of 930 votes (out of six million) – a virtual statistical tie.
- Older persons vote. Persons over 65 have a higher rate of participation than any other age group. In 2012, persons over age 65 represented 13.7 percent of the total U.S. population, but accounted for 22.3 percent of all voters in the 2012 presidential election. Elders over age 75 represented 6.1 percent of the U.S. population, but 9.4 percent of voters in that same election. Voting is clearly an important right in old age.
- The number of older persons is growing rapidly. The older population is projected to double, growing from 40 million in 2010 to nearly 84 million in 2050. By 2030, one in five Americans will be age 65 or older. During that same period, the cohort of persons over age 85 (who are the most likely to be in long-term care facilities), will grow from 14 percent to 21 percent of the older population.
- The number of older persons

with dementia and other disabilities will likewise expand. In 2014, an estimated 5.2 million Americans of all ages had Alzheimer's disease. This includes an estimated 5 million people age 65 and older. By 2050, the number of people age 65 and older with Alzheimer's disease may nearly triple, from 5 million to a projected 13.8 million, barring the development of medical breakthroughs to prevent, slow or stop the disease. When non-Alzheimer's types of dementias are added to those figures, they increase by as much as one-third.

- Of the approximately 1.5 million nursing home residents, estimates of the prevalence of some level of dementia range from a quarter to two-thirds of the population. Some 88 percent are 65-years-old and older and 45 percent were age 85 and older in 2004.
- In 2010, there were more than 51,000 assisted living facilities in the U.S. with more than 1.2 million beds. Estimates derived from national data indicate that seven out of 10 residents in these residences have some form of cognitive impairment, with 29 percent having mild impairment, 23 percent moderate impairment and 19 percent severe impairment.

The convergence of these numbers brings into focus a variety of concerns about whether persons with any kind of brain impairment, but who have the threshold ability to vote, are being disenfranchised because of the lack of appropriate accommodation. What kind of assis-





tance may be needed and what kind is appropriate? Is someone making decisions about capacity to vote, and by what criteria? Conversely, concerns abound about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of individuals and groups within this population.

If we were to begin by describing an ideal system, it would likely have these characteristics:

1. It would presume all persons have voting capacity unless formally adjudicated to lack voting capacity;
2. It would encourage and assist voting participation; and
3. It would provide education to election officials and caregivers on voting rights issues and proper steps to accommodate diminished capacity.

Approximately half the states, including Maryland, have specific voting laws or regulations to assist residents in long-term care settings. These laws generally address two key issues: proactive outreach to deliver ballots to long-term care residents and the provision of assistance with ballot completion (and sometimes registration completion). Most such laws are contingent, however, upon some threshold number of residents who live in the facility who actually request assistance.

Even with some level of proactive outreach to residents, there are substantial practical barriers to voting facing older adults:

- Physical barriers that reduce accessibility to polling places and inaccessible ballot

designs for those with vision impairments and dexterity limitations.

- Procedural barriers, such as onerous absentee balloting procedures (*e.g.*, prohibiting facility staff from witnessing absentee ballots), voter photo ID requirements, limited early voting periods, inability to register and vote at the same time and lack of proper or adequate assistance in completing ballots.
- Third-party imposed barriers, especially in long-term care facilities where studies have shown that staff (and sometimes election officials and family), may undertake inappropriate “capacity” screening of the resident to decide whether to let them vote.

The Maryland Protocols

In Maryland, the election protocols for residents of long-term care facilities are better than in most states, though not universally mandatory for long-term care facilities. Annotated Code of Maryland Election Law Article §2-202(b)(11) provides that:

(b) Each local board, in accordance with the provisions of this article and regulations adopted by the State Board, shall: (11) administer voter registration and absentee voting for nursing homes and assisted living facilities in accordance with procedures established by the State Administrator, subject to the approval of the State Board.

Pursuant to that mandate, the

State Administrator developed a detailed set of procedures that are regularly reviewed and revised to achieve the goal of insuring that all residents of nursing homes and assisted living facilities are able to exercise their right to vote. The procedures are mandatory for each local election board and can only be modified upon written request and for good cause shown. Unfortunately, though facilities are encouraged to do so, they are not required to participate in the program.

The program requires election officials to offer to assist with voter registration and absentee voting in each facility. Residents in facilities with 50 or more beds are eligible for in-person assistance; those in facilities with fewer than 50 beds are assisted by mail.

The process begins with each election board writing to each nursing home and assisted living facility in its jurisdiction to introduce them to the program, outlining the services that are available and requesting a list of residents who want to participate in the upcoming election. At approximately the same time, the Secretary of the Department of Aging, jointly with the Head of the Department of Health and Mental Hygiene, sends a letter to each facility explaining the program and encouraging the facilities to cooperate with the local election boards to insure that the residents are able to vote.

The election board letter makes clear that incapacity to vote is narrowly defined in Maryland. A resident is unable to vote if he/she is under a court-ordered guardianship for mental disability *and* was found by a court to be unable to communicate, with or without

accommodations.

If a facility with 50 or more beds accepts the offer of assistance, a date is set for a team of two election officials to visit the facility. Election team members receive training, and must be registered with different political parties or be unaffiliated. Registration and absentee voting can be completed during the same visit if the registration deadline has not passed. Team members have telephone support from election office staff while on site, if, for example, they need to verify the registration of a particular voter or check the identification number of a voter.

Assistance to the voter is limited. Team members are able only to read the instructions or content of the application form or absentee ballot or to complete the application form or ballot as instructed by the voter. The team is prohibited from offering any guidance or answering any questions about parties or candidates. They are instructed to tell the voter they have no opinion. Team members are also expressly prohibited from insisting that a person register or vote or allow anyone to coerce a resident into registering or voting. If a voter gets assistance with his or ballot, the team fills out a Certification of Assistance form which must be completed in the presence of the voter.

For facilities with fewer than 50 beds, assistance is provided by mail with telephone support for questions. After the facility forwards the names of prospective voters to the local election board, the board partially prepares the forms and mails the package to the facility with written instructions. Election officials are mindful that residents may, in fact, be registered to vote somewhere

other than in the jurisdiction of the facility. Teams and facility staff are urged to exercise caution in completing the forms to avoid jeopardizing the voting rights of a resident domiciled in another jurisdiction and to avoid the possibility of a resident voting twice.

While the process provides meaningful assistance for nursing home residents who generally reside in larger facilities, it is less effective for those in assisted living. Nearly half of Maryland's 21,000 assisted living residents live in facilities with fewer than 50 beds, and a not insignificant number of people are in facilities with three, four or five beds. Given that there are 1,468 assisted living facilities in Maryland, it would be a difficult task to ensure that the rights of the 10,000 potential voters are protected without requiring the facilities to participate in the program.

Mobile Polling

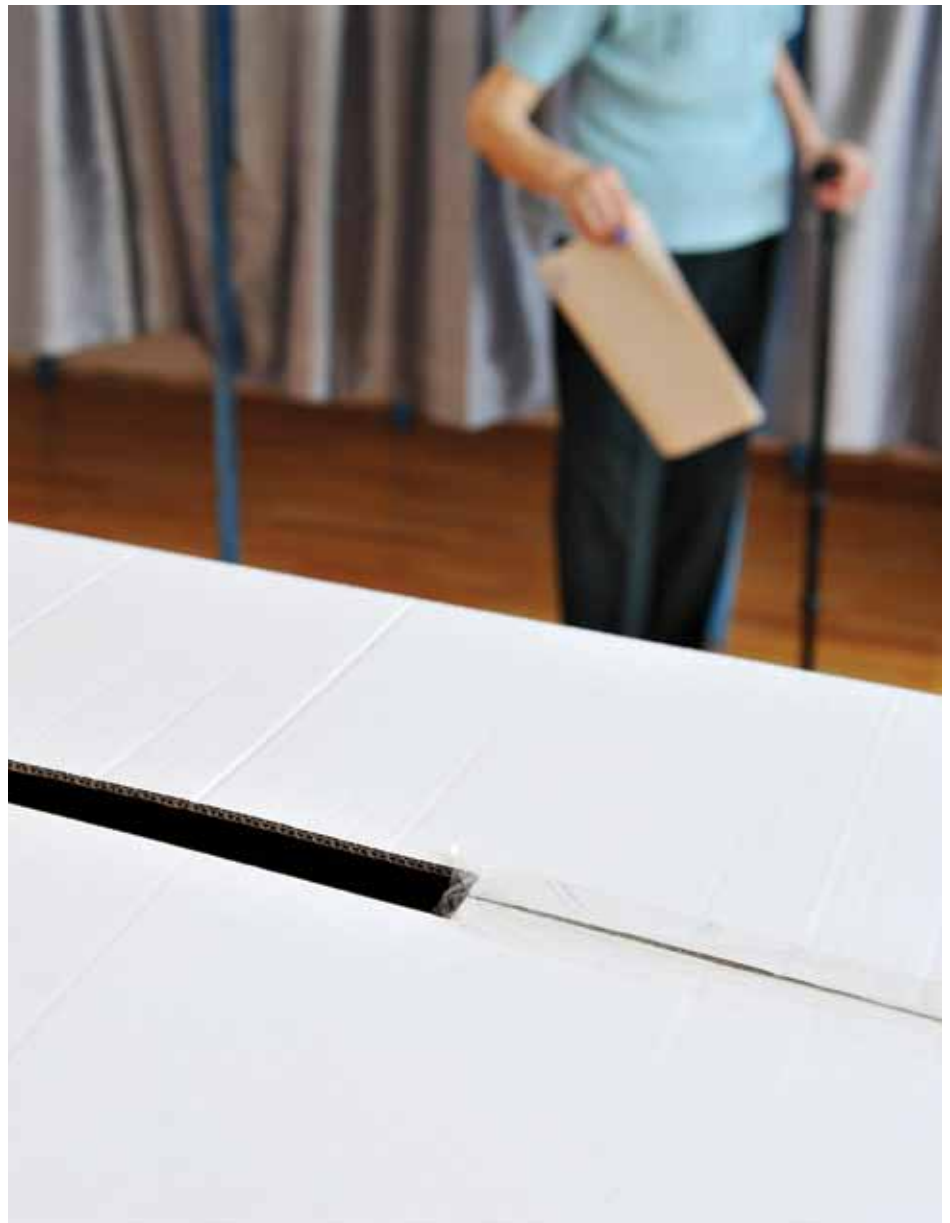
The model used in Maryland can be described as a variation of "Mobile Polling". Mobile polling requires physically bringing the ballot to residential care facilities by trained election workers before the election to allow eligible residents to register and vote. Residents who are unable to vote independently are offered assistance, ideally from bipartisan pairs of election workers who are trained to work with elderly voters, and in particular, voters who have cognitive impairments. In its purest form, mobile polling utilizes the same election machinery that is used at polling places, although the predominant model today is to rely on paper absentee ballots, which are typically not user-friendly to older

persons with disabilities.

The opportunity exists today to simplify voting with technology transportable on laptop computers that can accommodate visual and information processing impairments effectively and enable many long-term care residents to vote privately on their own without third-party assistance. Unfortunately, that technology is far from commonplace.

Mobile polling offers both a prophylactic to fraudulent manipulation of the vote as well as a significant enhancement of access to the polls

by those in nursing homes. The procedure builds upon a solid conceptual and empirical foundation. In 2007, a *Symposium on Voting and Cognitive Impairment*, cosponsored by the ABA Commission on Law and Aging and other groups, developed recommendations for voting in long-term care, including the use of mobile polling. See: Symposium Issue - Facilitating Voting as People Age: Implications of Cognitive Impairment, 38 (4) *McGeorge Law Review* 843-1143 (2007). In the 2008 presidential election, a mobile polling model was put



to the test. The ABA Commission on Law and Aging, in collaboration with the University of Pennsylvania Division of Geriatric Medicine and the Secretary of State of Vermont, conducted a pilot project at long-term care facilities in the State of Vermont.

The Vermont pilot confirmed the feasibility and benefits of mobile polling. The pilot found that residents of long-term care facilities appreciated mobile polling; it increased accessibility to voting; was felt by nursing home staff to be beneficial; and was seen positively by election officials who were trained to assist residents with diminished capacities. See: Jason Karlawish, et al., "Bringing the Vote to Residents of Long-Term Care Facilities: A Study of the Benefits and Challenges of Mobile Polling," 10(1) *Election Law J.* 5 (2011). Around the time of the 2008 election, the Election Assistance Administration also issued a Quick Start Management Guide on Serving Voters in Long-Term Care Facilities with advice on outreach and assistance to nursing home residents that reflected a mobile polling model.

A more important lesson of the Vermont pilot is that it dispels the notion that a capacity assessment screen is needed to determine whether persons of diminished capacity can vote. The project focused, instead, on training election officials on the nature and extent of assistance that can be properly rendered to individuals with cognitive impairments. Because capacity to vote is essentially self-effectuating, election officials found that if the individual could not communicate either a desire to vote or provide a discernible choice on the ballot, despite

the assistance provided, the process simply came to a halt and no ballot was completed. Alternatively, the individual may be able to express some choices on the ballot, such as for a presidential candidate, but not for more complicated ballot issues such as a lengthy referendum proposition. In this regard, capacity to vote is similar to the capacity to ride a bike: you can help the person on the bike, but then the individual rides successfully, falls off immediately, or falls off part-way down the street. Capacity is self-demonstrating, but proper assistance is essential.

Strengthening the Right to Vote

Despite these promising developments, much more needs to be done to protect this most fundamental of civil rights for residents of long-term care. Assuring that this vulnerable

and often marginalized population has access to the right to vote will not only strengthen their civic role in advancing their collective interests, but it will also advance their dignity and their quality of life in long-term care. Here are some steps policy-makers could consider taking:

Federal Nursing Home Policy

Federal regulations could be revised to include affirmative assistance with the right to vote in 42CFR§483.10, the Resident Rights provision. The regulation currently states only that the resident "has the right to exercise his or her rights ... as a citizen or resident of the United States."

In addition, the Center for Medicare and Medicaid Services and/or Maryland regulators and state legislators could take steps to:

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1. Require facilities to develop a policy on voting.
2. Include in the Guidance for Surveyors of Nursing Homes and the Survey Protocol for Long-Term Care Facilities the requirement to ask about and record the facility policy on voter registration and voting.
3. Clarify that HIPAA regulations do not infringe upon the ability of election officials to obtain residents' names in connection with their authority to conduct and monitor elections.
4. Require training of long-term care staff on how to provide proper assistance to residents who require help in voting.
5. Provide demonstration grants to facilities and election officials that wish to try out promising practices to improve voting access by residents.

Research Needed

1. Long-term care voting outreach laws and procedures need examination, evaluation and updating, especially in states that actually conduct some form of mobile polling.
2. Funding and research on promising practices is needed to enhance access, especially through the use of evolving ballot technology.
3. Researching the number of elders affected by more restrictive voter ID laws, absentee balloting laws, proof of citizenship requirements, same day/election day registration roll-back and shorter early voting periods need to be developed.

Demonstration Projects

1. Replicate the Vermont Mobile Polling project in multiple states to determine the impact of state differences in voting law, practice and culture.
2. Prepare election official guides to assisting voters with diminished capacity.

The extent to which governments and society genuinely focus on voters in long-term care is a clear measure of the value we place on elders with diminished capacities. Winston Churchill said, "Those who fail to learn from history are doomed to repeat it." When seniors vote, they bring with them an array of experiences that include wars, depressions, recessions, upturns, downturns and encounters with all types of political figures. These are the people who have raised families, built busi-

nesses, served the country and given back to the community. They have volunteered their time and skills and have even been community activists. If we do not include those voices in our elections, we lose the benefit of their historical perspectives that could perhaps bring us to a better place as a nation. Moreover, to the extent we choose to ignore their access to the polls, we strip them of one of the most central pillars of membership in civil society – the right to be heard.

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