



## Cognitive Impairment & Voting

Reasons why persons with cognitive impairments are prevented from voting generally fall into two categories: **legal restrictions** and **practical barriers**.

### Legal Restrictions

- State constitutions
  - Some states' constitutions use language to bar different categories of people from voting like "unsound mind" or "incompetent".
  - Other states restrict those who are involuntarily committed to mental hospitals or those with mental illness.
  - Some states exclude those under guardianship.
  - Thirty-nine states bar persons with some kind of mental impairment from voting.
- Election law
  - Twenty-two state election laws address voter eligibility based on mental status.
  - Frequently, states' constitutions and election laws use different terminology to define who cannot vote. When the restrictions conflict, it falls upon the courts to make decisions on who can vote.
- Guardianship Laws
  - Most laws define incapacity by a nuanced assessment of particular cognitive and functional abilities.
  - States differ – some states have specific provisions that state that people under full or limited guardianship maintain all legal and civil rights, but some states require the court to determine the capacity to vote.<sup>i</sup>

### Practical Barriers

- Voters are entitled to assistance to cast their ballots, but the extent to which states take action to support or promote voting by persons with cognitive impairments varies by state<sup>ii</sup>.
  - Inside the voting booth, an impaired person can receive assistance by another person.
    - The impaired person must provide a written statement saying that the person assisting is not the impaired person's employer or agent of his/her labor organization and the impaired person has a physical disability and/or has the inability to read or write English.<sup>iii</sup>
    - Persons assisting voters may not in any way try to influence the voter's choices.

- Persons assisting voters must not mark the ballot if the voter cannot communicate his or her intent.<sup>iv</sup>
- Many times staff of long-term care facilities are responsible for encouraging and facilitating residents voting. Often times, this staff receives limited direction from election authorities. Federal LTC regulations require nursing homes to respect residents' voting rights without providing clear guidance on how a facility can fulfill this requirement.
  - Some states have guidelines, but the content and specifics of the guidelines vary significantly by state.<sup>v</sup>
- Procedures required in order to vote can be complicated and overly confusing, inhibiting those with cognitive impairments. Registration processes, absentee balloting procedures and the ballot itself can increase the cognitive demands of voting.<sup>vi</sup>
- For more information about practical barriers faced by residents of long-term care facilities, read [“Common Issues Faced When Residents Vote,”](#) a fact sheet from the Consumer Voice.

### **Should those with cognitive impairments be allowed to vote? How can you measure who is capable of voting?**

- Aside from legal and practical barriers faced by cognitively impaired persons who want to vote, the issue remains whether these people should be allowed to vote and how does one decide who is able to vote.
- “Persons with moderate or severe cognitive impairments may not only be unable to make informed voting choices, but may not even understand the nature and consequences of the voting process. A person is commonly said to have the capacity to make a decision when he or she has the ability to understand the nature and consequences of that decision. Using this approach, a person can be said to lack cognitive capacity to vote when he or she cannot understand the nature or effect of voting.” – Nina A. Kohn in [“Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections”](#)
- *On the other hand...* “People whose mental capacities are clearly intact may vote for candidates based on any whim or reason, rational or irrational, profound or frivolous....Similarly, for persons with some level of cognitive impairment, if they can indicate a desire to participate in the voting process and can indicate a choice among available ballot selections, their reasons for such choice are not relevant.” – Charles P. Sabatino and Sally Hurme in [“Who Has the Capacity to Vote?”](#)

### ***Doe v. Rowe***

- In 2001, *Doe v. Rowe*, a federal district court decision in Maine, for the first time laid out the criteria that should be applied in individualized assessments of capacity to vote.
  - The lawsuit was brought by three people with mental illness who objected to a provision in Maine’s constitution excluding all persons from voting who were under guardianship because of mental illness.

- The federal district court ruled that the exclusion of these people violated their rights, and the court adopted a test: persons are considered incompetent to vote only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice.”
- This criterion became known as the “Doe voting capacity standard,” and it applies to all persons whose competence to vote may be in question.
- In 2005, a study published in the *American Journal of Psychiatry* tested the Doe voting capacity standard. The study found:
  - Using the Doe voting capacity standard, the data suggested that people with severe Alzheimer’s disease are likely not competent to vote, but people with very mild to mild Alzheimer’s disease are likely competent to do so (although the latter may benefit from memory aids when casting their ballots).
  - People with moderate dementia need to be assessed individually.
  - When there is no clear indication of incapacity, however, the essential nature of voting suggests that such a person should be regarded as eligible to cast a ballot.
  - Because of concerns that the use of any test of voting capacity creates a risk of misuse and exclusion of people who are in fact competent to vote, it is sometimes suggested that any person who expresses a desire to vote should be allowed to do so. However, the study’s data showed that not all persons who say they want to vote understand the nature and effect of voting. Without an objective criterion for assessing capacity to vote (like the Doe voting capacity standard), it seems likely that voters who do not understand what voting is may still cast ballots, potentially compromising the integrity of the electoral process.<sup>vii</sup>

*Cognitive impairment and voting is a complicated issue. Contact your state’s Secretary of State Office for more information on guidelines and restrictions in your state.*

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<sup>i</sup> Sabatino, Charles P. and Sally Hurme. “Who has the capacity to vote?” *Experience*. 2009.

[http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/who\\_has\\_the\\_capacity\\_to\\_vote\\_vol\\_19\\_no\\_1\\_2009.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/who_has_the_capacity_to_vote_vol_19_no_1_2009.authcheckdam.pdf)

<sup>ii</sup> Klem, Ellen. “More Help is Needed for Persons with Cognitive and Other Brain Impairments, Especially Those in Long-term Care Facilities, Who Want to Vote.” American Bar Association.

[http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/more\\_help\\_pers\\_w\\_cog.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/more_help_pers_w_cog.authcheckdam.pdf)

<sup>iii</sup> “Election: Voters with Disabilities.” Clark County, Nevada. <http://www.clarkcountynv.gov/Depts/election/Pages/Dis.aspx>.

<sup>iv</sup> “Voting for People with Cognitive Impairments and/or Under Guardianship.” Office of the Minnesota Secretary of State. <http://www.sos.state.mn.us/index.aspx?page=1612>

<sup>v</sup> “Identifying the barriers and challenges to voting by residents of long-term care facilities: A study of the 2003 Philadelphia mayor’s race.” University of Pennsylvania, Penn Memory Center. <http://www.uphs.upenn.edu/ADC/info-DVP-abstracts.shtml#ABS3>

<sup>vi</sup> Kohn, Nina A. “Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections.”

[http://www.law.syr.edu/media/documents/2009/1/Kohn\\_Cognitive\\_Impairment\\_Right\\_to\\_Vote\\_Final\\_PDF.pdf](http://www.law.syr.edu/media/documents/2009/1/Kohn_Cognitive_Impairment_Right_to_Vote_Final_PDF.pdf)

<sup>vii</sup> Appelbaum, Paul S., Richard J. Bonnie and Jason H. Karlawish. “The Capacity to Vote of Persons with Alzheimer’s Disease.” *American Journal of Psychiatry*. 2005.

<http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/appelbaum.authcheckdam.pdf>

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