



# **Moving Forward: Election Reform in the District**

Report prepared by the Council Board of Elections and Ethics Investigation  
Special Committee

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# I. Introduction

## The Special Committee

On September 16, 2008, the Council of the District of Columbia established the Council Board of Elections and Ethics Investigation Special Committee (“Special Committee”) to investigate irregularities in the District’s 2008 Presidential Preference and Primary Elections and to make recommendations for reform of the administration of elections in the District.

As part of its charge, the Special Committee investigated the District’s management of elections; issued two preliminary reports with recommendations; and aided the Committee on Government Operations and the Environment in reforming the District’s elections laws. On November 3, 2009, the Council enacted the Omnibus Election Reform Amendment Act of 2009 (“OERA”),<sup>1</sup> which drew significantly on the preliminary findings and research of the Special Committee’s investigation. In addition, the Special Committee conducted a review of the hardware and software used during the 2008 election to determine the potential cause of the irregularities during the 2008 primary. This report represents the culmination of that effort.<sup>2</sup>

## Acknowledgments

The Special Committee would like to acknowledge the invaluable *pro bono* assistance of Jenner & Block LLP and Hunton & Williams LLP, which provided substantial guidance in the conduct of the investigation and drafting of the Special Committee’s report. In particular, the Special Committee would like to thank Lorelie Masters and her team at Jenner—Kristina Filipovich, Caroline Lopez, Albert Peterson, Damien Specht, and Nicholas Stephanopoulos—and Virginia Albrecht and her team at Hunton—E. Carter Chandler Clements and Aaron Flynn—for their extraordinary effort. In addition, the Special Committee appreciates the guidance from many technical experts, including Aaron Burstein, Steve Checkoway, and Joseph Hall. Finally, the Special Committee is deeply grateful to both Jeremy Epstein and Douglas Jones, who conducted the forensic evaluation of the voting machines.

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<sup>1</sup> Omnibus Election Reform Amendment Act of 2009, effective February 4, 2010 (D.C. Law 18-0103) (attached as Appendix C).

<sup>2</sup> The Special Committee released two preliminary reports—*Restoring Confidence in the District’s Elections* and an *After-Action Report for the November 2008 General Election* (attached as Appendices B and C, respectively)—which are incorporated and attached to this final report. Those reports contained factual findings and made policy recommendations, such as the adoption of post-election audits, and they will not be repeated in this final report.

## II. The Board of Elections and Ethics

The Board of Elections and Ethics (“Board”) is an independent, quasi-judicial body with jurisdiction over the management of the District’s elections and the interpretation, application, and enforcement of the District’s campaign-finance, conflict-of-interest, and lobbying laws. It is composed of three members, one of whom serves as a Chairman, selected by the Mayor, and each member serves a three-year term. Moreover, under the applicable law, “no more than 2 [members] shall be of the same political party.”<sup>3</sup> Although a stipend is available to Board members, the practice has been that they receive no compensation for their service.

Among the Board’s most important responsibilities is the oversight of the District’s elections. As an independent agency, the Board selects an Executive Director and General Counsel, who are responsible for administering special, primary, and general elections. The Board is responsible for approving contracts related to elections administration (including voting systems technology), certifying candidates and election results, and litigating matters before the District of Columbia Court of Appeals. The Board also reviews actions of the Office of Campaign Finance, a subordinate agency, which enforces the District’s campaign-finance and conflict-of-interest laws and has responsibility over District lobbyist rules.

Over the course of its investigation, the Special Committee determined that the Board’s governance structure required reform. The Board’s management of elections has been historically problematic, and the Board suffered from years of neglect due to a lack of significant oversight. As an initial matter, the Special Committee learned that, because Board members serve as volunteers and generally lack significant elections experience, there is a reluctance to make any significant changes to the practices and procedures of the election laws. In addition, the members rely heavily on staff to make high-level policy decisions.<sup>4</sup> Finally, as has been discussed in earlier reports of the Special Committee, over time, the Board has had an unfortunate record of lack of transparency and candor.

To address these concerns, the Special Committee identified three areas for reform in the Board’s governance structure: (1) establishing minimum qualifications for Board members; (2) requiring open meetings; and (3) expanding the number of Board members from three to five members. As part of the OERA, the Council adopted

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<sup>3</sup> D.C. Code § 1-1001.03(a).

<sup>4</sup> In 2003, for instance, the District of Columbia Office of Inspector General found that the Board provided “ineffective” oversight of the BOEE and the Office of Campaign Finance. D.C. Office of Inspector General, *Report of Investigation Concerning Inadequate Oversight and Misconduct at the District of Columbia Board of Elections and Ethics and the Office of Campaign Finance*, OIG No. 2002-0252 (May 22, 2003).

reforms for Board member qualifications and enhanced the open meeting requirements. In June 2010, a proposal to expand the Board's membership was introduced, though further action is necessary.<sup>5</sup>

### **Member Qualifications**

Until the Council enacted the OERA, to be selected to serve as a member of the Board, a person needed only to *qualify* as an elector and be a District resident for at least three years and "hold no other paid office or employment" in either District or federal government.<sup>6</sup>

As part of the OERA, though, the Council added substantive qualifications to Board nominees. Specifically, the OERA requires the Mayor and the Council to "consider whether the individual possesses demonstrated integrity, independence, and public credibility and whether the individual has particular knowledge, training, or experience in government ethics or in elections law and procedure." In the District, the Code requires several other Boards,<sup>7</sup> Directors,<sup>8</sup> and Commissions<sup>9</sup> to have substantive qualification requirements and jurisdictions such as Illinois<sup>10</sup> and New Hampshire,<sup>11</sup> as well as the federal Election Assistance Commission,<sup>12</sup> all require substantive

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<sup>5</sup> The District of Columbia Board of Elections and Ethics Membership Expansion Act of 2010, D.C. Bill 18-822.

<sup>6</sup> D.C. Code § 1-1001.04(a).

<sup>7</sup> *See, e.g.*, D.C. Code § 1-605.01(b) ("The Mayor shall select members of [the Public Employee Relations Board] from persons who through their experience have demonstrated an expert knowledge of the field of labor relations and who possess the integrity and impartiality necessary to protect the public interest and the interests of the District of Columbia government and its employees.").

<sup>8</sup> For example, the District's Chief Procurement Officer and Inspector General must have more than seven years of substantive experience in their respective fields. *See* D.C. Code § 2-301.05e(d) ("The CPO shall have not less than 7 years of senior-level experience in procurement and shall have demonstrated, through his or her knowledge and experience, the ability to administer a public procurement system of the size and complexity of the program established by this chapter."); D.C. Code § 2-302.08 (D), (D-i) (The Inspector General must have, among other things, "a minimum of 7 years of supervisory and management experience; and . . . a minimum of 7 years demonstrated experience and ability, in the aggregate, in law, accounting, auditing, financial management analysis, public administration, or investigations.").

<sup>9</sup> The Commission on Latino Community Development and the Commission on Asian and Pacific Islander Community Development require, for instance, that members be appointed based upon consideration of their affiliation with organizations concerned with Latino and Asian and Pacific Islander communities, respectively, and "evidence of particular dedication to, and knowledge of the needs" of the communities. D.C. Code §§ 2-1323, 2-1374.

<sup>10</sup> 10 ILCS 5/1A-2.

<sup>11</sup> N.H. Rev. Stat. Ann. § 665:1.

<sup>12</sup> 42 U.S.C. § 15323(a)(3) ("Each member of the Commission shall have experience with or expertise in election administration or the study of elections.").

qualifications for elections officials. The adoption of substantive qualifications for Board members will improve the ability of the Board to supervise elections activities and to proactively consider future improvements in the elections process.

Under the reforms in the OERA, Board members are prohibited from serving as an officer or a director of an organization receiving District funds, or as an employee of an organization receiving District funds with managerial or discretionary responsibilities with respect to those funds.

### **Open Meetings**

Although the Board is structurally designed to be politically independent, it is nonetheless critical that it act as a politically accountable body. In order to be truly accountable, the Board must conduct its activities in a transparent manner.

While the Board has long been subject to the District's open-meeting requirements, the Code provided no statutory guidance about the number of times that the Board must meet, the amount of notice that must be given about a meeting, or the manner by which such notice must be given. The OERA requires the Board to hold monthly meetings according to a regular schedule, to publish a proposed agenda on its website at least 48 hours before the meeting, and to publish the minutes of each Board meeting on its website. This added transparency will help improve the Board's decisionmaking process and improve public confidence in the Board's actions.

### **Expansion of Board Membership**

Since the adoption of the Home Rule Act,<sup>13</sup> the District has not revisited the composition of the three-member Board. This is the case notwithstanding the fact despite the fact that the Board has, over the years, taken on new responsibilities, including oversight of the Office of Campaign Finance. Moreover, the structure of the Board has never been reexamined, despite increasing complexities in the management of elections due in part to federal requirements under the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002.

The Special Committee recommends expanding the membership of the Board from three members to five. This proposal offers several advantages to the current approach. First, it would allow greater specialization of Board members and reduce dependence on staff. Second, additional members to the Board would reduce the opportunity for outside influence on the Board's decision-making. Third, the addition of two new

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<sup>13</sup> D.C. Code § 1-201 *passim*.

members of the Board would increase the ability of the Board to obtain a quorum when needed.<sup>14</sup>

### **III. Voter Qualifications**

District law currently extends the franchise to the vast majority of District residents. As part of the OERA, the District further expanded the franchise to cover (1) persons who have been deemed mentally incompetent but have the capacity to vote and (2) persons who are seventeen years-old to vote in primary elections if they will be eighteen by the time of the next general election. The District should also consider expanding the franchise by (1) allowing legal permanent residents to vote in certain elections and (2) providing greater assistance to former prisoners who wish to register to vote.

#### **Mental Incompetence and Capacity to Vote**

Before the enactment of the OERA, District law barred anyone who was “mentally incompetent as adjudged by a court of competent jurisdiction” from voting in the District.<sup>15</sup> By doing so, the District drew a distinction between people found to be “incapacitated,” who “retain all legal rights and abilities other than those expressly limited or curtailed in the [incapacity] order”;<sup>16</sup> and people determined to be fully “incompetent.”

As such, District law denied the franchise to persons who had the capacity to vote but were otherwise mentally incompetent. This stood in direct contrast with approximately a dozen states which have statutes specifically addressing a voter’s capacity.<sup>17</sup> California, for example, only bars a “person [who] is not capable of completing an affidavit of voter registration” from voting.<sup>18</sup> Florida, similarly, requires a committee to evaluate “the alleged incapacitated person’s ability to . . . vote” before that right is taken away.<sup>19</sup> Oklahoma directs courts to “make specific determinations regarding . . . whether the ward retains sufficient capacity . . . to vote.”<sup>20</sup> And New Jersey recently amended its constitution so that the franchise is denied only to people “who ha[ve]

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<sup>14</sup> The Special Committee notes, however, that adjusting the composition of the Board’s membership may require an amendment to the Home Rule Act.

<sup>15</sup> D.C. Code § 1-1001.02(2)(C).

<sup>16</sup> D.C. Code § 21-2004.

<sup>17</sup> See *Voting Rights and the Mentally Incapacitated*, 121 Harv. L. Rev. 1179, 1181-83 (2008) [hereinafter *Voting Rights*]; Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio State L.J. 481, 484-85 (2001).

<sup>18</sup> Cal. Elec. Code § 2208(a); see also Cal. Prob. Code § 1910.

<sup>19</sup> Fla. Stat. Ann. § 744.331(g)(2).

<sup>20</sup> Okla. Stat. Ann. § 3-113(B)(1).

been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting.”<sup>21</sup>

Through the OERA, the Council followed these states’ lead and amended the D.C. Code to allow mentally incompetent people to vote unless a court determines that they lack the capacity to do so. That step respects the presumption in favor of the franchise, while recognizing the “fact that not all those who are deemed mentally incapacitated in general are specifically incompetent to vote.”<sup>22</sup> This also aligned the District with the nationwide trend in favor of broadening the voting rights of those who are mentally incompetent for certain purposes. Over the past 20 years, at least five states have amended their statutes or constitutions to take voting capacity into account, while none has deleted such a provision.<sup>23</sup> Finally, the inclusion of an explicit statutory reference to voting capacity insulates the District from constitutional challenges under the Due Process and Equal Protection Clauses.<sup>24</sup>

### **Voting Age**

Like many jurisdictions, the District’s voting age is generally set at 18 years.<sup>25</sup> As part of an earlier reform effort the District allowed residents to “pre-register” after they turned 17, though they still could not have actually voted in any election until they turned 18.<sup>26</sup>

In the OERA, the Council followed the lead of states like Maine, Maryland, and Washington<sup>27</sup> by allowing 17-year-olds to vote in primary elections if they will be 18 by the next general election. This step enables students to participate in an entire election cycle if they will be 18 by its culmination, and ends the anomaly by which recently turned 18-year-olds are able to vote at general elections on candidates and issues on

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<sup>21</sup> N.J. Const. art. 2, § 1, ¶ 6.

<sup>22</sup> *Voting Rights*, *supra* note 17, at 1181-82; *see also id.* at 1182 (“If a person has opinions about and can understand voting, that person should be allowed to vote, even if he does not have the capacity to carry out other parts of his life independently.”); Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 *McGeorge L. Rev.* 931, 963 (2007) (“[T]he right to vote could be said to be the defining characteristic of a democratic polity. Hence, there would appear to be strong reasons to allow persons to exercise the franchise except in the clearest cases of substantial incapacity to do so.”).

<sup>23</sup> *Id.* at 1183-84.

<sup>24</sup> *See Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (ruling that Maine’s blanket disenfranchisement of the mentally ill violated both the Due Process Clause because of the high risk of unjustified deprivation of the right to vote and the Equal Protection Clause because the policy was not narrowly tailored to achieve the state’s interest in a capable electorate).

<sup>25</sup> *See* D.C. Code § 1-1001.02.

<sup>26</sup> *See* Student Voter Registration Amendment Act of 2008, effective Oct. 21, 2008 (D.C. Law 17-236).

<sup>27</sup> *See* Heather Davis, *Breaking the Piggy Bank: An Alternative Approach to Campaign Contributions by Minors After McConnell v. FEC*, 73 *Geo. Wash. L. Rev.* 353, 375 n.174 (2005).

which they had no input at the primary stage. As one commentator has noted: “[p]eople who are . . . seventeen years old . . . are typically just as well informed as eighteen year olds.”<sup>28</sup>

The Council’s actions in the OERA also permitted 16-year-olds to pre-register to vote. Under the federal National Voter Registration Act, most people already have the opportunity to register to vote when they apply for or renew driver’s licenses. Extending this opportunity to 16-year-olds – the age at which people typically first apply for driver’s licenses – is administratively simple and will likely result in substantially higher registration rates for newly eligible voters.

### **Non-Citizens**

District law only allows United States citizens to vote. In 1992, the Council considered a bill that would have allowed legal permanent residents to vote in local elections, but the bill did not advance through the Council.<sup>29</sup>

No states currently allow non-citizens to vote in local elections, but several cities across the country do. Chicago, for instance, has allowed non-citizen parents with children enrolled in public schools to vote in school board elections since 1998.<sup>30</sup> New York City had a similar policy, allowing non-citizen parents to run for school board, for more than 30 years.<sup>31</sup> Six Maryland towns, including District suburbs such as Takoma Park and Chevy Chase, permit *all* non-citizens to vote and run in local elections.<sup>32</sup> And two Massachusetts towns, Amherst and Cambridge, decided to allow legal permanent residents to vote but failed to receive state authorization for their decisions.<sup>33</sup>

Historically, a much larger number of states allowed non-citizens to vote. In fact, as one commentator notes, “at least twenty-two states and territories permitted noncitizens to vote over a 150-year period,” ending only with the influx of Eastern and Southern European immigrants in the early 1900s.<sup>34</sup> In 1874, the Supreme Court even acknowledged that “citizenship has not in all cases been made a condition precedent to

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<sup>28</sup> William N. Eskridge, *The Relationship Between Obligations and Rights of Citizens*, 69 *Fordham L. Rev.* 1721, 1734 (2001).

<sup>29</sup> See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *Law & Ineq.* 271, 311-12 (2000).

<sup>30</sup> See Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 *Asian Am. L.J.* 57, 60-61 (2006).

<sup>31</sup> *Id.* The policy came to an end with the 2002 elimination of New York City’s school boards.

<sup>32</sup> See Harper-Ho, *supra* note 29, at 311; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 *U. Pa. L. Rev.* 1391, 1462, 1465-66 (1993).

<sup>33</sup> See Fu-Yang, *supra* note 30, at 61; Harper-Ho, *supra* note 29, at 312-13.

<sup>34</sup> See Fu-Yang, *supra* note 30, at 59.



the enjoyment of the right of suffrage,” identifying nine states whose constitutions allowed non-citizens to vote.<sup>35</sup> Internationally, many countries permit non-citizens to vote. New Zealand, for example, allows non-citizens who have been in the country for more than a year to vote in all elections, local and national.<sup>36</sup> Similar laws are in effect in Australia, Denmark, Ireland, the Netherlands, and Sweden, among others.<sup>37</sup>

The Council should consider enacting the policy – allowing legal permanent residents to vote in local elections – that did not pass in 1992. This policy would enable documented non-citizens who have committed to living in the United States to have a voice in how their community is governed. These individuals already pay taxes and have expended substantial time and effort to obtain their green cards. As one scholar has written, “noncitizens have the same obligations as citizens [at the local level] and should therefore be entitled to the same civil privileges.”<sup>38</sup> Particularly because of its role in international affairs, the District is home to a large population of legal permanent residents who participate in local affairs.

The Council could also consider more limited steps, such as allowing legal permanent residents with children in public school to vote in State Board of Education elections. In considering such measures, the Council should carefully weigh potential logistical difficulties with extending the franchise.

### **Former Prisoners**

District law denies the franchise to individuals who have been convicted of a felony and are currently incarcerated. Such persons become eligible to vote again upon their release from prison.<sup>39</sup>

Many states have more restrictive felon disenfranchisement policies. Thirty-five states deny parolees the franchise, thirty states do not allow probationers to vote, and two states (Kentucky and Virginia) ban people who have been convicted of a felony from

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<sup>35</sup> *Minor v. Happersett*, 88 U.S. 162, 177 (1874).

<sup>36</sup> *See Fu-Yang*, *supra* note 30, at 61.

<sup>37</sup> *See id.*

<sup>38</sup> Harper-Ho, *supra* note 29, at 295.

<sup>39</sup> D.C. Code § 1-1001.02(7)(A) (“Any person in the District of Columbia who has been convicted of a crime in the United States which is a felony in the District of Columbia, may be a qualified elector, if otherwise qualified, at the end of his incarceration.”).

ever voting again.<sup>40</sup> In contrast, thirteen states have the same policy as the District while two states (Maine and Vermont) allow currently incarcerated felons to vote.<sup>41</sup>

Although the Special Committee does not recommend expanding the franchise to cover incarcerated felons, one area where the District could improve is assisting ex-felons in registering to vote. Both in the District and across the country, eligible ex-felons register to vote at much lower rates than the general population.<sup>42</sup> They often do not realize that they are entitled to vote or face bureaucratic obstacles from government officials who are unaware of their eligibility. The District could facilitate the registration process by better educating ex-felons about their rights and properly informing government officials about District law.

#### **IV. National Voter Registration Act Compliance**

Congress passed the National Voter Registration Act (“NVRA”) in 1993 “to establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office.”<sup>43</sup> Commonly called the “Motor Voter Act,” the NVRA requires states to adopt uniform voter registration procedures for federal elections in an effort to root out “discriminatory and unfair” registration-related procedures that impose an unreasonable hindrance on the fundamental right to vote.<sup>44</sup> The Act prescribes complex and detailed requirements for voter registration programs.<sup>45</sup> For instance, under the motor-voter provisions, state<sup>46</sup> bureaus of motor vehicles must provide voter-registration forms to citizens who seek driver’s licenses or automobile registrations.<sup>47</sup> The NVRA imposes similar requirements, some mandatory and some permissive, on a number of other state agencies, such as libraries, schools, county clerk’s offices, and welfare bureaus.<sup>48</sup> Additionally, the Act requires access to and provides uniform procedures governing mail and election-day registration.<sup>49</sup>

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<sup>40</sup> See The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, [http://sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf).

<sup>41</sup> See *id.*

<sup>42</sup> See Michael V. Haselswerdt, *Con Job: An Estimate of Ex-Felon Voter Turnout Using Document-Based Data*, 90 *Social Sci. Q.* 262 (2009).

<sup>43</sup> 42 U.S.C. § 1973gg(b)(1).

<sup>44</sup> S. Rep. No. 6, 103d Cong., 1st Sess. 2 (1993).

<sup>45</sup> See *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995) (describing the Act as a “complex statute of ten sections bearing the marks of legislative draftsmanship similar to those borne by the Internal Revenue Code.”).

<sup>46</sup> The NVRA defines “state” to include the District of Columbia. 42 U.S.C. § 1973gg-1(4).

<sup>47</sup> 42 U.S.C. § 1973gg-3.

<sup>48</sup> *Id.* § 1973gg-5.

<sup>49</sup> *Id.* § 1973gg-4.

In addition to these and other provisions governing the process of registration itself, the NVRA requires the states, including the District, to process registration applications within certain timeframes and to ensure that eligible registration applicants are registered to vote in an election if their applications have been properly submitted, generally, at least 30 days prior to an election.<sup>50</sup> The NVRA also requires that registration applicants be notified of the disposition of their application. Further, the Act places substantive limitations on the authority of states to purge voters from registration lists.<sup>51</sup> For instance, voters may not be purged based only on their failure to vote, and a removal program must be operated in a manner that is “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”<sup>52</sup>

Finally, the NVRA provides for both civil and criminal penalties for violations of its provisions. The Act authorizes civil enforcement of its requirements by the United States Attorney General and private rights of action for individuals who are aggrieved by a violation of the NVRA.<sup>53</sup> The NVRA also prescribes criminal penalties including fines and imprisonment of up to five years for a number of actions, including for knowingly and willfully intimidating, threatening, or coercing or attempting to intimidate, threaten, or coerce any person based on his or her exercise of any right guaranteed by the NVRA.<sup>54</sup>

### **Overview of Section 7 Requirements**

Section 7 of the NVRA is of particular relevance to the District’s reform of its election laws and regulations. That provision requires states to designate specified agencies as voter registration agencies (“VRAs”) and allows them to designate other agencies as VRAs. States *must* designate as VRAs “all offices in the State that provide public assistance” and “all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.”<sup>55</sup> States *may* designate other state agencies, including “State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described [above] that provide services to persons

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<sup>50</sup> *Id.* § 1973gg-6(a).

<sup>51</sup> *Id.* §§ 1973gg-6(c) & (d).

<sup>52</sup> *Id.* § 1973gg-6(a)(3), (b).

<sup>53</sup> *Id.* § 1973gg-9

<sup>54</sup> *Id.* § 1973gg-10.

<sup>55</sup> *Id.* § 1973gg-5(a)(2).

with disabilities.”<sup>56</sup> Additionally, states may designate nongovernmental or federal-government offices as VRAs, if such agencies agree.<sup>57</sup>

Agencies designated as VRAs have several duties. First, they must make voter-registration forms available to the public. VRAs that provide public assistance must distribute voter-registration forms with each application for assistance and with each renewal, recertification, or change of address related to that assistance.<sup>58</sup> Second, VRAs must provide assistance in filling out the forms (unless, of course, the applicant refuses assistance).<sup>59</sup> Third, they must collect completed forms and transmit them to the appropriate election official.<sup>60</sup> And finally, VRA personnel must refrain from seeking to influence a registrant’s political preference, displaying any political preference themselves, discouraging any applicant from registering to vote, or implying that the decision to register or not to register will affect the availability of services or benefits to the applicant.<sup>61</sup> Indeed, VRAs that provide public assistance must affirmatively state that the voter-registration decision will not affect services or benefits.<sup>62</sup>

To ensure that states fulfill these duties, the NVRA requires each state to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under th[e] Act.”<sup>63</sup> Generally, states designate their secretaries of state for this purpose.<sup>64</sup> Only ten states designate officials other than the secretary of state to serve as the chief election official.<sup>65</sup> In the District, the Executive Director of the Board is the designated official.

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<sup>56</sup> *Id.* § 1973gg-5(a)(3)(B)(i).

<sup>57</sup> *Id.* § 1973gg-5(a)(3)(B)(ii).

<sup>58</sup> *Id.* § 1973gg-5(a)(4)(A)(i); *Id.* § 1973gg-5(a)(6)(A).

<sup>59</sup> *Id.* § 1973gg-5(a)(4)(A)(ii).

<sup>60</sup> *Id.* § 1973gg-5(a)(4)(A)(iii).

<sup>61</sup> *Id.* § 1973gg-5(a)(5).

<sup>62</sup> *Id.* § 1973gg-5(a)(6)(B)(ii).

<sup>63</sup> *Id.* § 1973gg-8.

<sup>64</sup> *E.g.*, Ala. Code 1975 § 17-1-3(a); Ariz. Rev. Stat. § 16-142(A)(1); Ark. Const. Amend. 51 § 5(b)(1); Cal. Elec. Code § 10; Colo. Rev. Stat. Ann. § 1-1-107(1)(d); Conn. Gen. Stat. Ann. § 9-23k; Fla. Stat. Ann. § 97.012(7); Ga. Code Ann., § 21-2-210; Id. Code Ann. § 34-201; Iowa Code Ann. § 47.1(3); Kan. Stat. Ann. § 25-2504; Ky. Rev. Stat. § 117.015(2); La Const. Art. 4, § 7; Mich. Comp. L. Ann. 168.21; Miss. Code Ann. § 23-15-211.1(1); Vernon’s Ann. Mo. Stat. § 115.136(1); Mont. Code Ann. § 13-1-201; Nev. Rev. Stat. § 293.124(1); N.J. Stat. Ann. § 19:31-6a; N.M. Stat. Ann. 1978, § 1-2-1(A); Ohio Rev. Code § 3501.04; Or. Rev. Stat. § 246.110; R.I. Gen. L. 1956, § 17-6-1.3; S.D. Codified L. § 12-4-33; Tex. Code Ann., Elec. Code § 31.001(a); 17 Vt. Stat. Ann. § 2103(40); Rev. Code of Wash. Ann. 29A.04.230; W. Va. Code, § 3-2-3(c); Wy. Stat. Ann. § 22-2-103.

<sup>65</sup> *See* Alaska Stat. § 15.10.105(a) (lieutenant governor to appoint a director of elections to coordinate state responsibilities under the NVRA); Haw. Rev. Stat. § 11-1.6(a) (chief election officer appointed by elections commission); Ind. Code § 3-7-11-1 (co-directors of state elections commission serve as chief election

### **The District's Implementation of Section 7**

In conformance with Section 7 of the NVRA, the District designates as VRAs all public-assistance agencies and all disabilities-services agencies in the District.<sup>66</sup> It also designates both the Senior Citizens Branch of the Department of Recreation and Parks and the Office of Aging,<sup>67</sup> and permits the Mayor to designate other agencies with written notice to the Board.<sup>68</sup> As part of the OERA, the District designated additional VRAs, including the Department of Corrections and the Department of Youth Rehabilitation Services.

Under District law, the Board's Executive Director has the power to request that VRAs submit written reports and answers to any questions regarding their administration and enforcement of NVRA responsibilities.<sup>69</sup> Anyone alleging a violation of the NVRA or of the District's implementing statute may file a written violation with the Executive Director,<sup>70</sup> who has the power to sue for declaratory or injunctive relief in District of Columbia Superior Court to remedy any VRA's failure to comply with the NVRA or the District's implementing statute.<sup>71</sup> Additionally, the Board has the power to adopt regulations to administer the NVRA and the District's implementing statute.<sup>72</sup>

District law goes beyond Section 7's minimum requirements for protecting applicants' privacy rights in several respects. For instance, it prohibits VRAs from revealing whether any particular individual has applied to register to vote (except when an enforcement action so requires).<sup>73</sup> Similarly, it requires the Board to ensure that the VRA through which a given voter has registered is not disclosed publicly.<sup>74</sup>

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official); Md. Code, Elec. L., § 2-103(b)(8) (State Administrator of Elections is chief election official); N.C. Gen. Stat. Ann. § 163-82.2 (Executive Director of State Board of Elections is chief election official); 26 Okla. St. Ann. § 2-107 (Secretary of the State Election Board is chief election official); S.C. Code 1976 § 7-3-20(A), (C)(11) (State Election Commission shall elect an executive director to serve as chief election official); Utah Code. Ann. 1953 § 20A-2-300.6(1) (lieutenant governor is state's chief elections officer); Va. Code Ann. § 24.2-404.1 (Secretary of the State Board of Elections is state's chief election officer); W.S.A. 5.05(3g) (Government Accountability Board shall designate an employee to serve as the state's chief election officer).

<sup>66</sup> D.C. Code § 1-1001.07(d)(1)(A).

<sup>67</sup> D.C. Code § 1-1001.07(d)(1)(B). This law no longer exists.

<sup>68</sup> D.C. Code § 1-1001.07(d)(1)(C).

<sup>69</sup> D.C. Code § 1-1001.07(d)(12)(B)(i).

<sup>70</sup> D.C. Code § 1-1001.07(d)(11).

<sup>71</sup> D.C. Code § 1-1001.07(d)(12)(B)(ii).

<sup>72</sup> D.C. Code § 1-1001.07(d)(13).

<sup>73</sup> D.C. Code § 1-1001.07(d)(7).

<sup>74</sup> D.C. Code § 1-1001.07(d)(10).

Despite this otherwise broad mandate, the Board generally lacks regulations to further govern or clarify the implementation of the District's NVRA program. A 2008 report issued jointly by Project Vote and Demos, generally concluded that state noncompliance with the NVRA and inconsistent implementation of the Act's requirements has resulted in substantial declines in VRA registrations.<sup>75</sup> Moreover, this report concluded that inadequate implementation in the District has been responsible for declines in voter registration at VRAs of more than 90% when the periods of 1995-1996 and 2005-2006 are compared.<sup>76</sup> Indeed, based on data compiled by the United States Election Assistance Commission, the District processed voter registration applications from public assistance agencies in the following numbers:

- 1995 to 1996: 14,268
- 2001 to 2002: 4,454
- 2003 to 2004: 3,024
- 2005 to 2006: 1,196.<sup>77</sup>

### **Recommendations**

Although District law thoroughly implements Section 7's requirements, the District can take several steps to ensure that its purposes are met in practice.

*Training Programs & Compliance Recordkeeping.* The Board should adopt regulations providing for a uniform training program to ensure that personnel at District VRAs understand and comply with their Section 7 responsibilities. A crucial part of this training must be to ensure that VRA personnel understand the registration forms and are capable of helping those they serve to complete required paperwork. Additionally, the Board should impose appropriate compliance monitoring and recordkeeping mechanisms to maintain reliable information on VRAs' efforts. These mechanisms should provide VRAs and the Board with information regarding registration rates in the District's various VRAs and will allow effective review of the District's programs for ensuring NVRA compliance.

*Reporting.* The Board should adopt regulations requiring VRAs to report their registration statistics on a weekly basis. Specifically, this regulation should require that all VRAs report: (1) the total number of voter-registration applications distributed; (2)

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<sup>75</sup> Douglas R. Hess and Scott Novakowski, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007* at 3, 5 (Feb. 2008) ("According to available data and field observations, the large declines reported in agency-based registration can be largely attributed to states failing to adequately implement the public assistance provisions of the NVRA.").

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* at 15.

the number of applications completed; and (3) the number of declination forms marked “no,” “yes,” or left incomplete. As stated above, this information will allow adequate and continuing review of the effectiveness of the efforts of VRAs to comply with the NVRA and related District policies, and similar policies have been identified as key to successful state efforts to increase voter registration at VRAs.<sup>78</sup>

*Designation of Voter-Registration Officials.* The Board should adopt regulations requiring each VRA office to designate at least one employee as its primary voter-registration official. The voter-registration official would be primarily responsible for administering the VRA’s implementation of its Section 7 duties, as well as for reporting to the Board information regarding this implementation.

*Investigative Powers.* The Board should adopt regulations granting the Board’s Executive Director the authority to investigate alleged violations of Section 7 or of the District’s implementing statute, including the power to issue subpoenas for testimony and documents. This authority will complement the Executive Director’s power to bring suit to correct violations.

*Designation of Additional VRAs.* As part of the OERA, the District designated its correctional facilities as VRAs. As previously discussed, the District currently extends the franchise to citizens who are not incarcerated, even if they were previously convicted of felonies.<sup>79</sup> Re-registration, however, is not automatic, and the burden to avail oneself of this fundamental right falls squarely on the formerly incarcerated. Designating correctional facilities as VRAs, which will apply the NVRA’s registration assistance requirements on correctional facility personnel, significantly facilitates individuals’ reintroduction into society by allowing them, at the time of their release from incarceration, to register to vote.

A substantial body of research has demonstrated the various harms that result from policies that limit access to the vote by people with felony convictions, and there is little to no evidence that continued disenfranchisement serves any legitimate law enforcement purpose.<sup>80</sup> For these reasons, the Brennan Center for Justice at the New York University School of Law has recommended making “the Department of Corrections and Probation and Parole authorities responsible for assisting with

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<sup>78</sup> *Id.* at 12 (“Frequent reporting . . . is critical to a successful NVRA plan.”)

<sup>79</sup> D.C. Code § 1-1001.02.

<sup>80</sup> *See, e.g.,* Erika Wood, *Restoring the Right to Vote*, Brennan Center for Justice at 6 (2d ed. 2009) (noting that “Felony disenfranchisement laws in the United States are deeply rooted in the troubled history of American race relations.”); *id.* at 10 (“[T]here is absolutely no credible evidence showing that continuing to disenfranchise people after release from prison serves any legitimate law enforcement purpose.”).

voluntary voter registration.”<sup>81</sup> Designation of such facilities as VRAs under the NVRA is the most effective way to achieve these goals. For similar reasons related to the removal of unnecessary barriers to registration, the Mayor should seek the permission of the Court Services and Offender Supervision Agency for the District of Columbia and United States Military to designate as VRAs military recruitment offices, hospitals, and comparable sites. Further, the Mayor should seek similar permission from the Department of Veterans Affairs.

## **V. Same Day Registration and Automatic Voter Registration**

Another opportunity for reform in the District is reducing barriers for eligible voters to register to vote. As discussed below, same-day registration and automatic-voter registration offer substantial advantages in promoting higher voter turnout and in ensuring that eligible voters are not disenfranchised through “bureaucratic snafu.”

### **Same Day Registration**

Same-day registration allows a voter to register to vote and cast a ballot on the same day. As part of the OERA, the District joined nine other jurisdictions throughout the United States—Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Wisconsin, and Wyoming—which allow for same-day registration.

Same day registration encourages higher voter turnout and ensures that eligible voters are able to cast ballots on Election Day. In addition, successfully implementing same-day registration can reduce the need for special ballots, which impose substantial back-end costs for election administration.

Contrary to concerns raised by critics of same-day registration, who claim that reducing barriers increases the risks associated with voter fraud, the empirical evidence suggest that there is no direct correlation. Moreover, as the Committee on Government Operations and the Environment stated in its report for the OERA, “procedural safeguards can be built into the system to thwart potential voter fraud.” These safeguards include use of special ballots for same-day registrants, maintenance of records of voters who register on Election Day in order to track trends, and post-election verification of residence. The Committee also found that “if the Board conducts a comprehensive review of the voter registry . . . and takes all legally permissible steps to ensure that it is as accurate as possible, same-day registration will provide even further opportunities to make sure that the District’s registry will be accurate.” Ultimately, as the Secretary of State of Minnesota said: Same-day registration is “much

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<sup>81</sup> *Id.* at 18.



more secure because you have the person right in front of you—not a postcard in the mail. That is a no-brainer. We have 33 years of experience with this.”<sup>82</sup>

### **Automatic-voter-registration**

As part of the OERA, the Council required the Board to conduct a study of the feasibility of implementing an automatic-voter-registration (AVR) system in the District. Unlike the current registration system, which relies heavily on voters to register to vote, an AVR system would place the burden of creating a voter registry on the Board.

When combined with same-day registration, AVR offers the District with an opportunity to radically improve the quality of its voter registry, while at the same time realizing cost savings achieved through the reduction of administrative burdens that are associated with voter-initiated registration.

On April 30, 2010, the Board released its findings related to the adoption of AVR. In that report, the Board found that “an automatic voter registration system is technologically feasible and would improve the accuracy, efficiency and cost-effectiveness of voter registration,” and provided a road-map for the adoption of AVR. The Council should pursue the possibility of adopting AVR in the District, and should take necessary steps in the next Council period to establish its legal and policy framework.

## **V. Alternative Voting Methods**

One area of the District’s elections process in need of reform was increasing voter accessibility through adoption of “early voting” methods. Unlike other jurisdictions, which had long sought to make voting more convenient and accessible, the District’s statutory scheme did not provide for other meaningful alternatives to traditional, in-person Election Day voting. This reduces convenience for voters and limits the potential voter turnout; most estimates of the effect of the various forms of early voting on voter turnout involve modest increases of voter turnout.

### **“Absentee Voting” in the District**

The most common form of convenience voting is the use of “absentee” voting. Before enactment of the OERA, the District allowed a voter to cast an absentee ballot only when the voter could demonstrate that he or she was unable to vote on Election Day.<sup>83</sup> Voters could request an absentee ballot by mail no later than seven days before the

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<sup>82</sup> Lorraine Minnite, *Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security*.

<sup>83</sup> 3 D.C.M.R. § 715.2.

election;<sup>84</sup> by fax not earlier than three days before the deadline for submitting requests by mail;<sup>85</sup> or in person not earlier than fifteen days before the election and not later than 4:45 p.m. on the day preceding the election.<sup>86</sup> Accordingly, while the District has employed systems to allow early voting, it was only available if a voter had a justification. As part of the OERA, the District rejected that approach, and expanded early voting options by adopting no-excuse absentee voting and early voting centers.

*“No-Excuse” Absentee Voting.* No-excuse absentee voting differs from use of traditional absentee ballots only in that it does not require voters to provide reasons for their absence on Election Day.<sup>87</sup> Currently, 28 states<sup>88</sup> allow for no-excuse absentee voting, and five states allow for permanent absentee balloting.<sup>89</sup> As part of the OERA, the District adopted no-excuse absentee voting. Moving toward a no-excuse absentee balloting system presents important advantages without raising additional security concerns. This system allows more people to vote early and, to the extent that absentee voters can vote in-person, they will also be able to access the usual administrative support for voters that would be available on Election Day.<sup>90</sup>

*Early Voting and “Vote Centers”.* Early in-person voting “is traditionally defined as a process by which voters cast their ballots before Election Day at precinct-like polling stations throughout a jurisdiction”<sup>91</sup> Before enactment of the OERA, the District allowed for in-person absentee voting only at the central office of the Board of Elections and Ethics. The District did not utilize multiple polling stations and always required a justification for voting absentee. By adopting no-excuse absentee voting, though, the District joined approximately 31 states<sup>92</sup> that offered no-excuse early in-person voting. Furthermore, by implementing vote centers, the District will dramatically increase voters’ opportunities to vote early.

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<sup>84</sup> *Id.* § 716.

<sup>85</sup> *Id.* § 717.

<sup>86</sup> *Id.* § 718.

<sup>87</sup> Some states allow voters to register for permanent absentee voting status through which the voters receive absentee ballots automatically for every election, rather than having to request absentee ballots each time.

<sup>88</sup> National Conference of State Legislatures, *Absentee and Early Voting*, <http://www.ncsl.org/programs/legismgt/elect/absentearly.htm> (last visited Apr. 6, 2009) [hereinafter NSCL, *Absentee and Early Voting*].

<sup>89</sup> California, Colorado, Hawaii, Montana, and Washington allow for permanent, no-excuse absentee balloting. NSCL, *Absentee and Early Voting*, *supra* note 88.

<sup>90</sup> John Mark Hansen, *Early Voting, Unrestricted Absentee Voting, and Voting by Mail*, Task Force on the Federal Election System 8 (July 2001), *available at* [http://www.tcf.org/Publications/ElectionReform/NCFER/hansen\\_chap5\\_early.pdf](http://www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap5_early.pdf).

<sup>91</sup> U.S. ELECTION ASSISTANCE COMMISSION, *ALTERNATIVE VOTING METHODS 2* (Sept. 2008).

<sup>92</sup> NSCL, *Absentee and Early Voting*, *supra* note 96.

The state of Texas offers the longest-lasting and most robust model for early voting.<sup>93</sup> There, registered voters may cast their ballots at any early voting location in their county within four to 17 days before the election.<sup>94</sup> The larger counties must operate a centralized, temporary branch that is open 12 hours every day in the final week of early voting and open during the final weekend before the election.<sup>95</sup>

One of the concerns periodically raised about voter centers is the risk of “double voting.” Procedural safeguards exist to protect against this issue. Texas, for instance, has implemented a variety of procedures to prevent voters from casting multiple ballots: Texas updates a centralized list through a system of modems, telecommunication devices, and internally developed election-management software that “provide[s] real-time connectivity [from the early voting locations] to the elections office.”<sup>96</sup>

Early voting systems yield numerous advantages. Providing for early voting in conjunction with creating multiple early vote centers will enable more people to vote in more convenient locations. These early voting centers need not be located at every precinct; rather, centers should be located in areas of heavy urban traffic or in areas that would be accessible to voters.<sup>97</sup> During special elections, for example, the Board could locate early voting centers within the affected voting unit. Using an early voting system, lines would be diminished and the pressure associated with closing the polls on Election Day by 8:00 p.m. would be alleviated.<sup>98</sup> Studies of early voting also suggest that providing a simple, convenient early-voting process promises to yield a slightly larger

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<sup>93</sup> See, e.g., ALTERNATIVE VOTING METHODS, *supra* note 99, at 2-9.

<sup>94</sup> *Id.* at 2.

<sup>95</sup> *Id.* at 4. Eight other states also provide vote centers in the context of early, in-person voting. National Association of Secretaries of State, Facts Sheets: Election 2008, State Data on Convenience Voting, E-Poll Books, and Back-Up Paper Ballots, [http://nass.org/index.php?option=com\\_content&task=view&id=151&Itemid=159](http://nass.org/index.php?option=com_content&task=view&id=151&Itemid=159) (last visited on Apr. 6, 2009). California, Colorado, Indiana, Iowa, New Mexico, and North Dakota provide for vote centers in conjunction with in person, no-excuse absentee voting or early voting. Also Kansas offers vote centers in satellite advance voting programs but not on Election Day; while Washington also provides for vote centers but uses vote by mail methods, rather than an early voting system. *Id.*

<sup>96</sup> *Id.* at 5.

<sup>97</sup> Many jurisdictions that provide for early voting have expanded their early-voting locations to include satellite locations, including centralized locations in large counties and even in places like post offices and grocery stores.

<sup>98</sup> See, e.g., Hansen, *supra* note 90, at 8.

increase in participation.<sup>99</sup> Finally, early-voting systems have proved popular with voters.<sup>100</sup>

Early voting centers do come with a financial cost.<sup>101</sup> Proper staffing and technological improvements are needed in order to ensure smooth implementation and to avoid double-voting. Moreover, there are costs associated with opening and closing the centers, providing security, and rent.

Despite these costs, depending on the use of early voting centers, there may be other efficiencies that can be gained through precinct consolidation or other mechanisms. The Board should examine ways to decrease costs associated with early voting. The Special Committee cautions, however, against reducing voting options until there is adequate data to document the District's experience with early voting.

## **VI. Polling Place Workers**

Perhaps no aspect of an election is as important as having qualified polling place workers. These workers are the "front line" of an election, though often they are relatively low-paid volunteers. In 2001, the United States Government Accountability Office ("GAO") reported that almost 51% of voting jurisdictions in the United States reported major problems in obtaining sufficient numbers of polling place workers in the 2000 Presidential election.<sup>102</sup>

By contrast, in the November 2008 General Election, the Board successfully recruited and a large number of polling place workers. Despite this success, the Special Committee documented in its "After-Action Report" several areas where the District could benefit from substantial improvements related to the experience of polling place workers. For instance, the Special Committee found that disorganized and inadequate training sessions for polling place workers left the District with a disordered and often ill-prepared workforce in some locations. Furthermore, poor coordination of and

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<sup>99</sup> See, e.g., *id.*, at 5.

<sup>100</sup> In the 2006 general election, 32.9% of Texas's voters cast their ballots before Election Day at one of the in-person voting sites. THOM FILE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2006 13 (June 2008), available at <http://www.census.gov/prod/2008pubs/p20-557.pdf>. See also Paul Gronke, Early Voting Reforms and American Elections, at 4 [paper presented at conference Sept. 2-5, 2004] (citing various studies of Texas voters' satisfaction with early voting) (hereinafter Early Voting Reforms and American Elections).

<sup>101</sup> ALTERNATIVE VOTING METHODS, *supra* note 99, at 5. The EAC reported that estimates from two of the larger counties in Texas regarding the cost of early voting range from \$1.14 to \$1.70 per voter. *Id.*

<sup>102</sup> See GAO, MAIL SURVEY OF JURISDICTIONS, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION 8 (2001) [hereinafter GAO REPORT].

communication with polling place workers left them frustrated and without suitable communication channels for addressing questions and problems on-site.

Because these problems of administration have been documented in greater detail in the After-Action report, the Special Committee will focus on strategies to improve recruit, train, measure, and retain polling place workers.

### **Recruiting Polling Place Workers**

Although the District has not recently had difficulties recruiting polling place workers, the Board must use all means possible to attract highly qualified workers. In addition to direct outreach, the Board should use public-relations channels to motivate registered voters to work at polling places on Election Day. Specifically, the Board should consider using multiple media outlets, including public service radio announcements, newspaper advertisements, metro-rail fliers, and television appearances.<sup>103</sup> In other jurisdictions, for example, officials have used church bulletins, water bills, voter register forms, and online applications to increase volunteer rates. The key to having an excellent polling place workforce is to have a large pool of potential volunteers.

#### *Adopt-a-Poll Programs*

Another strategy used by other jurisdictions is the implementation of programs for encouraging local businesses or community groups to “adopt a poll” and enroll company or group employees as poll workers. An EAC Report discovered that election officials in larger jurisdictions took advantage of enlisting local companies and service organizations to good effect.<sup>104</sup> Some jurisdictions also reached out to charities and thus recruited “volunteers from a charity organization adopted a poll and [who] donated their poll worker pay to the charity.”<sup>105</sup> In such instances “staffing a poll was both an exercise of civic duty and a fundraising event.”<sup>106</sup> The District has large numbers of institutions that could be natural partners in polling place worker recruitment. For instance, universities, hospitals, law firms, bar and other associations, and the federal government could all be allies in polling place worker recruitment.

#### *Split Shifts for Poll Workers*

A significant barrier to worker recruitment is the significant time commitment required on Election Day. In order to address this, the Board should consider expanding opportunities to “split shifts” (i.e. allowing polling place workers to work only during

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<sup>103</sup> E.g., Christina Vasile & Regina Eaton, Demos Election Day Registration Best Practices: An Implementation Guide, 2009, at 2 available at [http://www.demos.org/pubs/EDR\\_bestpractices\\_final.pdf](http://www.demos.org/pubs/EDR_bestpractices_final.pdf).

<sup>104</sup> U.S. Election Assistance Commission, *Successful Practices for Poll Worker Recruitment, Training and Retention* (July 2007).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

the mornings or afternoons). The Board already allows split-shifts, but does so only in relatively limited circumstances. It should consider extending this to option more poll-worker positions.

Doing so will help recruit poll workers who have less physical capacity to endure the 16-18 hour election days, or who have only a portion of the day available to work. It will also avoid problems caused by onset of fatigue. As the GAO Report noted:

Many people who are available for occasional full-day employment as poll workers are older, perhaps retired, and likely attracted to the work because of something other than the pay, which is generally low. An election official in a small jurisdiction said that over 70 percent of their poll workers are over 65 years of age. Another election official reported that “inspectors serve 17 or 18 hours, a very long day. Because many of our inspectors are senior citizens, between the age of 70 and 80-plus years, such conditions are difficult on them physically, as well as creating the potential for errors at the end of election day. Since compensation for this job is only \$80 to \$135 per day, depending upon the election district, it is not sufficient to attract a younger workforce.”<sup>107</sup>

Election officials from at least one jurisdiction using “split shifts said that poll workers are very pleased with the option of working only part of a day” and that “they have had less trouble recruiting poll workers since they don’t have to work an entire election day.”<sup>108</sup>

### **Improve Training and Performance Management**

Ensuring that polling place workers are adequately trained is critical to administering an election. Unfortunately, as documented in the Special Committee’s After-Action Report, the training offered by the Board was “very uneven” and “not tailored” to match the experience levels of polling place workers. Equally troubling is the fact that the Board had no formal, systematic approach to evaluating the efficacy of its training program.

In a 2008 report, the Election Assistance Commission set forth a number of best practices for a polling place worker training program. Among the recommendations are providing for hands-on training, role playing, using multiple-media visual aids, and customizing training to specific positions. Many of these practices are in use in the

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<sup>107</sup> GAO REPORT at 160.

<sup>108</sup> *Id.* at 163.

District to varying degrees, though little information is readily available about the quality of training.

As recommended by the Carter-Baker Commission,<sup>109</sup> the District has implemented “log-books” in each precinct on Election Day to record problems and complaints.<sup>110</sup> However, “there is no indication that this data collection is taken seriously or that precinct captains make full use of the forms because no analyses of the feedback has ever been released.”<sup>111</sup> With such feedback, the Board could better identify particulars of problems and tailor regulations and procedures to prevent similar problems from occurring in the future. Similarly, the Board makes little concentrated effort to collect feedback from poll workers in the District for use in adapting future rules and regulations, or to provide poll workers with feedback about their performance so that they can improve.

As part of the OERA, the Board is required to implement a polling place training worker program that ensures that each polling place worker completes at least 4 hours of training and is certified by the Board. In addition, the OERA requires the Board to implement a performance management program to measure polling place workers’ performance, and to use that information “before appointing him or her to work as a polling place worker in a subsequent election.” Finally, the OERA mandates that the Board create “after-action reports” in which the Board must evaluate issues raised by precinct captains and area representatives in their logs, and to report on performance measurement data of polling place workers. Taken together, these steps will help foster a more systematic approach to polling place worker training and to tailoring the Board’s program to ensure that the District most effectively trains its polling place workers.

### **Polling Place Worker Retention**

Retention of trained and experienced polling place workers is essential to the continuing success of the District’s poll-worker program. Various jurisdictions’ approaches include establishing a Poll Worker Appreciation Week, merchant coupons, recognition lapel pins, and making an effort to provide poll worker’s with assignments that reflect any special requests they make. Special training can help retention efforts with experienced poll workers. Ultimately, though, what is most important for retention of polling place workers is providing quality training and offering necessary support on Election Day.

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<sup>109</sup> Commission on Federal Election Reform, Building Confidence in U.S. Elections Report (Sept. 2005).

<sup>110</sup> Statement by Alison L. Prevost, Center for Democracy and Election Management, to the Special Committee (Jan. 26, 2009).

<sup>111</sup> *Id.*

## **VII. Voting Equipment Technology**

The use of technology is an extremely important aspect of the administration of modern elections. The use of electronic voting machines at the polling place is now common, though the challenges associated with electronic voting machines are still relatively new. Indeed, perhaps the most significant impetus for the creation of this Special Committee was the irregularity discovered during the September 2008 Primary Election related to so-called “phantom” votes discovered in preliminary election returns, discussed below. As part of its charge, the Special Committee was tasked with investigating the causes of the irregularity by the voting system, which the District purchased from Sequoia Voting Systems. Although this “glitch” represented only a small part of the District’s administration of elections, and was largely outside of the control of local officials, it sparked significant concern over the integrity of the District’s elections.

### **Results of the Special Committee’s forensic investigation**

As part of its October 8, 2008, report, the Special Committee evaluated the explanations offered by Sequoia Voting Systems for the anomaly experienced during the September 2008 primary election. In particular, the Special Committee found that “Sequoia’s inability to replicate these results under the same conditions, the technical implausibility of the explanation, and expertise of experienced elections specialists suggest that Sequoia was too quick to exonerate itself and the equipment used in the tabulation process.” Based on the testimony, the Special Committee recommended “a targeted forensic evaluation of the voting equipment and software provided by Sequoia Voting Systems.”

Following the issuance of the report, several voting technology experts offered to aid the investigation into the reported anomalies. In order to conduct such an investigation, however, the Special Committee needed to obtain key documents from Sequoia Voting Systems, including source code for the WinEDS system and documentation for the hardware used. Under a protective order, the Special Committee’s experts reviewed the hardware and source code to evaluate Sequoia’s claims.

*The vote tabulation process.* After each vote is cast at the precinct, the vote is recorded in a memory cartridge that is secured within the machine. After the polls close, the precinct captain prints a memory tape, removes the cartridge from the machine, and delivers them both (under seal and police protection) to the Board’s office. Once the Board receives the memory cartridges, it inserts them one at a time into a “memory pack



reader” (“MPR”), which then transmits the data from the cartridge into the WinEDS system.<sup>112</sup> The WinEDS system then generates a tabulation report.



*Election Night and Reproduction of the Error.* On Election Night, after receiving the memory cartridges, the Board processed approximately two dozen memory cartridges and inserted them one after another into the MPRE. The Board generated a first report, which had normal returns.

The Board then processed another batch of cartridges and generated another report, which was released to the press. This report contained obviously inaccurate numbers, including the 1542 “phantom” write-in votes.

Shortly after the report was released, the Board attempted to determine what the source of the inaccuracy was, and traced it back a voting machine at Precinct 141. The Board then reinserted the cartridges from the precinct in question, and generated “normal” results, the accuracy of which was later established through a hand-count of the ballots at the precinct.

According to interviews taken as part of this investigation, the Special Committee learned that the day after the election, the Board attempted to reproduce the problem by creating an empty election database and by processing the cartridges. After processing several dozen cartridges, the Board was able to reproduce the same error—including the same number of “phantom” votes—on a *different* memory pack than the night before. According to the Board, the system did not provide any error indications when reading the packs.

*Evaluating the explanations.* Following the election, the Board requested that Sequoia provide an explanation for the cause of the anomaly. In a preliminary report, Sequoia stated that it found “no anomalies or irregularities in either the data or the internal event logs that can be identified as having caused or contributed to the issue experienced election night.”

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<sup>112</sup> After the 2008 primary election, the Board changed its standard operating procedures to create an additional redundancy in the process. Specifically, the Board reads the cartridge twice, using two memory pack readers.

After the Board demanded a fuller explanation, though, Sequoia claimed that the issues reported on election night were “not a problem with Sequoia’s software or hardware [but rather] a matter of human interaction with a mechanical device . . . and a cartridge with data, combined with a process issue in the [Board] not thoroughly reviewing their reports before releasing to the media.” Sequoia ruled out “[e]ndemic hardware and software failures” as the cause of the failure and instead identified four possibilities: (1) a transient malfunction of the MPR; (2) improper seating of the cartridge in the MPR; (3) accidental manual ejection of the cartridge prior to completing the cartridge reading process; or (4) electrostatic discharge during the reading or ejection of the cartridge. Moreover, the report indicated that “[n]one of [those] instances would be recorded in the voting system event logs, making it impossible to provide a more definitive answer.”

As part of its forensic investigation, the Special Committee asked its voting-systems experts to evaluate the claims by Sequoia. Both Jeremy Epstein and Professor Doug Jones concluded that “the speculative hypotheses offered by Sequoia are all reasonable, but to accept any of them, *I would have to conclude that the Optech Eagle, the MPR, and the WinEDS do not comply with some basic requirements of the 1990 Federal Election Commission Voting System Standards.*”<sup>113</sup>

Upon review of the hardware used during the elections and the source code provided to the Special Committee by Sequoia, the Special Committee concluded that the voting system failed to include the necessary defenses against this type of data failure. Specifically, based on an analysis of the design and construction of the cartridge, the Special Committee determined that it “shows no evidence of any special care taken to protect against electrostatic discharge,” including a lack of “perimeter defenses” or other “protective measures.” In addition, with respect to the design and construction of the MPR, the Special Committee found that it lacks “key elements required to defend against electrostatic discharge” and that the “instructional material provided for election workers does not adequately document the defensive measures needed to prevent damage due to electrostatic discharge.” Ultimately, with respect to the design of the hardware, the Special Committee’s review has shown that the “physical design of the Optech Eagle [memory cartridges] and memory pack reader do not offer significant defense against damage from electrostatic discharge. The primary weakness of the system in this regard lies in the memory [cartridge] itself.”

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<sup>113</sup> Emphasis added. All quotations in this section are to affidavits prepared by Jeremy Epstein and Professor Doug Jones. These affidavits were reviewed by the Special Committee but, pursuant to a protective order, they are not being publicly released in order to safeguard confidential information produced to the Special Committee by Sequoia.

- 6.1.2. Consider formal “adopt-a-poll” programs with local institutions and partners
- 6.1.3. Expand opportunities for workers to “split shifts”
- 6.2. Provide polling place workers with excellent training
  - 6.2.1. Improve training through adoption of best practices
  - 6.2.2. Conduct systematic review of training efficacy
- 6.3. Measure performance of polling place worker program
  - 6.3.1. Adopt formal polling place worker measurements and integrate those measurements through each phase of the polling place worker program\*
  - 6.3.2. Publish after-action reports following elections describing the potential challenges and solutions for future elections\*
- 6.4. Retain qualified polling place workers through nominal incentives and through first-class training
- 7. Voting Equipment Technology**
  - 7.1. Procure new voting systems\*
  - 7.2. Improve cost, performance, and enforcement terms of new voting systems by requiring competitive procurement processes\*
  - 7.3. Require voter-verifiable records as part of the voting system\*

## **IX. Conclusion**

The future of the District’s elections depends largely on the long-term commitment of the District government to improve accessibility, efficiency, integrity, transparency, and accountability in the administration of elections. The District has already taken steps to structurally reform the Board of Elections and Ethics and made great strides in expanding the franchise through changes in voter qualifications and increasing convenience voting. Yet much more work is needed. There have been severe deficiencies at the Board, and some of those deficiencies remain. Nevertheless, the District has the potential to be a model for elections administration. Ensuring that the Board realizes its potential demands assiduous oversight, regularized reporting and evaluation, an appreciation of the need for transparency, and a demand for excellence in the operations of the Board.

The Special Committee's review also found fault with the software used. In particular, the software lacked "instructions that would warn the operator of the MPR if a cartridge was removed before the data had been completely read, or to record in any logs that such an event had occurred." Moreover, the software appears to have contained no instructions to re-read the cartridge "if a transient fault [was] detected." With respect to the source code, the Special Committee found that the "software design of the Sequoia WinEDS system does not offer significant defense against transient or permanent data errors."

*Conclusion.* Based on the above, the Special Committee concluded that incomplete defenses against transient data errors contributed to the erroneous results produced on election night. The Special Committee was unable to determine with absolute certainty that the error was caused by an intermittent "race condition" caused when the cartridges are inserted and then removed quickly, perhaps before all the data is processed. More troubling though is the fact that a critical review of the source code reveals that if such an error occurred, there would be no advance warning and that there would be no recorded instance of the error in an error log.

#### **Need to procure new voting systems**

During the course of the Special Committee's investigation, it became immediately clear that an essential element of any election reform effort in the District concern involved the procurement of new voting equipment. The Special Committee also determined that, in order to avoid and mitigate any future voting machine problems, the District must use its procurement powers to promote competition and prepare for future errors.

In particular, the District stood to benefit greatly from introducing competition into its voting machine and ballot contracts; competition results in lower prices and provides incentives for better service during the life of a resulting contract. In addition, the Special Committee concluded that, through the use of "Most Favored Customer" provisions, the District could guarantee value pricing for the purchase of additional voting machines throughout contract performance.

The voting machines used in the 2008 Elections were purchased in 2000 through a sole-source contract to Sequoia to supply 160 OPTECH IIIPe Eagle precinct tabulation units and a Sequoia 400C central office unit at a total price of \$995,000. Before it awarded the contract, the Board did not perform a market survey, did not do a qualitative review of Sequoia's offerings, and did not compare prices from different vendors for comparable equipment. Instead, the Board made a sole-source award to Sequoia based on the "full retention of all detailed District-unique functions" and the conclusion that "no other vendor can provide systems with these degrees of continuity."

The Special Committee finds that this procurement approach was inappropriate. Even though the voting-equipment industry involves a relatively small set of vendors, there is ample opportunity for a competitive purchasing process while maintaining continuity in elections administration. Thus, as part of the OERA, the Council required the Board to use negotiated procurement practices to ensure best value for its voting systems. The legislation mandated that the Board procure all voting systems for use after the 2010 elections through use of a request for proposals or similar competitive process. In addition, the OERA required that the solicitation include specific terms that will protect the District's investment in voting systems, such as a "most-favored jurisdiction" provision, a source-code escrow requirement, a warranty provision, and a performance bond requirement. These provisions are discussed below.

In 2010, through the use of a competitive procurement process, the Board purchased new voting equipment for use in the election cycle. As a result, the District realized significant cost savings and far more favorable terms. Although the contract does not include all of the precise terms described in the OERA, it represents a significant improvement over prior procedure. Following the upcoming election, the Board and vendors will be able to, once again, begin a procurement process to ensure that the District obtains best value.

*Specific clauses.* Beyond pricing decisions, inclusion of contractual terms such as a "most favored customer" clause can ensure that the District receives the best value possible. Such provisions, which require that the buyer receive the best price on any future purchases, are common in federal government schedule contracts. Often, these provisions require the vendor to provide cost and pricing information or certifications related to its voting machines. For example, the state of Ohio included the following provision in its contract with Diebold, Inc.:

During the term of this Contract, including any renewals or extensions hereof, Vendor will provide the Voting Systems to the Secretary and the Counties as a most favored customer ("MFC"). "MFC" means a customer(s) of Vendor who receives pricing terms that are at least as favorable as those received by any other customers except the federal government . . .

Vendor agrees it will provide the Secretary and Counties with a certification upon request, but no more frequently than annually, which confirms the Secretary's and Counties MFC status. If any annual certification reveals, or if the Secretary or Counties independently discover that the Secretary or Counties has not retained its MFC status

Vendor will reimburse the Secretary or Counties retroactively for the savings the Secretary or Counties should have received as an MFC.

An MFC clause can ensure that the District receives favorable pricing terms and that its costs stay consistent with jurisdictions throughout the country.

Another important element to a voting system procurement is an explicit “source-code escrow” provision. During the Special Committee’s investigation, it subpoenaed the source code and other relevant documents from Sequoia Voting Systems. As many voting-technology experts warned, Sequoia resisted efforts to examine its source code, despite an admission that data-entry anomalies alone could not account for the inconsistencies in the erroneous report. Despite its assurance of its intent to cooperate, Sequoia blankly refused to provide access to the source code, citing the need to protect its proprietary information. In the end, the Council was required to file an action in District of Columbia Superior Court in order to determine obtain the documents and source code subpoenaed by the Special Committee on September 18, 2008, less than two after the September 9, 2008, primary election

In order to avoid future conflict and to protect its interests, it is vital that the District require a source-code escrow as part of any voting machine contract. Under an escrow provision, a vendor provides a copy of the current version of its source code to a third party. That third party then stores the code until certain specifically enumerated events occur. When an enumerated event occurs, such as a vendor bankruptcy or software malfunction, the third party is pre-authorized to release the code to the District. With access to the code, the District can perform repairs or investigate problems without expending the time and effort involved in demanding source code directly from the vendor. The vendor’s intellectual property, however, is also protected as third party release is only authorized in limited instances. Had such provisions been included in the District’s 2000 contract with Sequoia, the Special Committee’s litigation in the Superior Court to obtain source code would have been unnecessary.

Many jurisdictions have implemented escrow provisions, and vendors have agreed to the provision. For example, the contract between the State of Ohio and Diebold, Inc., included the following provision:

Vendor shall continuously maintain an escrow agreement . . . covering all software source code for the software licensed under this Contract. The Secretary shall have the right to access the escrow and use the source code to maintain, support and enhance the Licensed Materials in the event: (i) Vendor becomes subject to bankruptcy, insolvency or other similar condition; (ii) Vendor goes out of business or ceases to conduct this

particular line of business in its normal course; (iii) Vendor discontinues providing Maintenance for any of the Licensed Materials for any cause other than the Secretary's terminating such coverage or failure to pay Vendor; (iv) Vendor makes the source code generally available to other users of the Licensed Materials (in which case Vendor shall make it available to the Secretary under similar terms and conditions); (v) Vendor is unable to correct a logic error or other bug in the software and such failure to correct constitutes an uncured breach of its obligations under Schedule E; or (vi) For purposes of temporarily auditing and/or testing the software source code held in escrow in accordance with the Escrow Agreement.

Another strategy for avoiding future problems with the District's voting machines is to require vendors to provide updates to the voting software. These updates can be required as general updates, as responses to defects discovered in other jurisdictions, or as needed in order to maintain compliance with changes in law or regulation.

Finally, should errors occur in the future, it is essential that the District of Columbia have clear warranty protection related to voting machines. Voting machine malfunctions are more visible than other supplier errors, and thus require increased protection for the District. Moreover, past experience shows that voting machine vendors are often aware of the existence of problems, but that they have little incentive to disclose those problems. Thus, vendors are in the best position to warrant the effectiveness of voting machines.

Warranty provisions are only as effective as their enforcement mechanisms. As such, failure to comply with warranty obligations should result in liquidated or treble damages. These provisions would not only permit the District to recover damages for the vendor's failure to comply with the warranty, but would also provide the vendor with incentives to voluntarily comply rather than rely on litigation.

In some states, these incentives take the form of "performance bonds." When a set of conditions are satisfied, such as a vendor's failure to correct a known defect, these bonds are paid over to the state as liquidated damages. For example, the city of San Diego requires a performance bond of 100% of contract value under its current voting machine contract based on the following conditions:

Contractor shall furnish to County within ten (10) days after Contractor's execution of this Agreement, and in all events prior to the Effective Date, a performance bond in an amount equal to one hundred percent (100%) of the amount equal to Maximum Contract Sum as of the Effective Date.

\* \* \*

The performance bond shall secure Contractor's performance, including performing all Contractor's Work in accordance with the [Scope of Work] and providing Deliverables, and shall secure any and all damages, costs or expenses, resulting from Contractor's default in performance of this Agreement.

In the event of termination under Paragraph 33 (Termination for Default), the performance bond shall become payable to County for any outstanding damage assessments made by County against Contractor. An amount up to the full amount of the performance bond may also be applied to Contractor's liability for any administrative costs and/or excess costs incurred by County in obtaining a similar Integrated System to replace in whole or in part, the system terminated as a result of Contractor's default. In addition, upon such a termination, County may seek any other remedies permitted under this Agreement or available at law or in equity.

Such a performance-bond provision reduces the downside risk for the District and creates built-in economic incentives for a vendor to take prophylactic steps to avoid potential errors.

*Voter-Verified Records.* Recent advances in electronic voting equipment technology have made it possible for election officials to count votes more quickly, more accurately, and more cost effectively. Completely digital voting machines make paper ballots unnecessary, eliminating the need for costly ballot printing—and the possibility of Election Day ballot shortages. Technological advances have also made the ballot box more accessible to persons with disabilities.

Unfortunately, the same technologies have created a new set of potential election issues. Electronic voting machines are susceptible to user error, for example if older voters who are unfamiliar with using computers do not receive proper instructions from poll workers. Electronic voting machines also create new opportunities for fraud and vote tampering, and open up the possibility that anything from a minor computer error to an outright system failure could cause inaccurate election results.

Two distinct categories of electronic voting machines are now in wide use in the United States. The first category consists of optical scan voting systems. In an optical-scan system, a voter receives a paper ballot, and uses a pen or pencil to mark votes for her preferred candidates. The voter or an election official then inserts the ballot into a



tabulation computer that reads and counts the votes. Ballot reading and counting may take place at the polling place or at a central location outside the polling place. Optical-scan systems are not particularly controversial because they preserve a paper record of each voter's preferences in case of computer failure or manipulation. However, because optical-scan systems rely on paper ballots, they are subject to the same problems as paper ballots, particularly the possibility of Election Day ballot shortages.

The second category of electronic voting machines has been the subject of significant controversy during recent elections. Unlike optical scan systems, Direct Recording Electronic ("DRE") voting machines do not necessarily preserve any paper record of voters' intentions. DRE voting machines manufactured by Sequoia, Diebold, and other high-profile firms resemble bank ATMs. In a DRE system, the voter approaches a computer terminal and uses the terminal to cast her votes. After entering all of her votes on a touch screen or on buttons, a voter will typically have an opportunity to review her whole ballot before electing to submit her entire ballot electronically.<sup>114</sup> The computer terminal automatically counts the votes.

Research has shown that, while electronic voting machines have many potential benefits, most of the widely available DRE machines pose significant security and reliability liabilities.<sup>115</sup> The Electronic Voting Best Practices Guide published by the Kennedy School of Government at Harvard University has posed as a solution that "[a] hybrid of paper ballots and electronic systems can capture the benefits of each while avoiding the pitfalls inherent in relying on one or the other."<sup>116</sup>

Though not a panacea, Voter Verified Paper Audit Trails ("VVPAT"), also known as a Verified Paper Records ("VPR"), provide a solution to the most significant problems posed by a DRE machines. VVPAT refers to any system that creates a record of a voter's intended selections on a DRE machine which the voter can verify on paper before leaving the voting booth. VVPAT-equipped DRE machines help ensure that election officials can identify computer errors or voting manipulation, and remedy the problem before it is too late. They also ensure that an accurate paper record is available in case the DRE's memory is lost. DRE vendors now offer a variety of VVPAT attachments for most of their machines. The major vendors all use paper reel printer behind glass:

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<sup>114</sup> Federal law requires that voters have an opportunity to review their full ballot for errors before submitting it in federal elections. *Id.* § 15481(a)(1)(A)(ii).

<sup>115</sup> Wendy R. Weiser, Brennan Center for Justice at New York University School of Law & Jonah Goldman, Lawyers' Committee for Civil Rights Under Law, *An Agenda for Election Reform* 10 (2007), available at [http://www.brennancenter.org/content/resource/an\\_agenda\\_for\\_election\\_reform/](http://www.brennancenter.org/content/resource/an_agenda_for_election_reform/).

<sup>116</sup> Harvard University, Kennedy School of Government, *Electronic Voting Best Practices* 5-9 (2004), available at <http://www.ljean.com/files/ABPractices.pdf>.

voters can see the record of their vote but may not touch it or alter it, and the devices record votes in the order cast.<sup>117</sup>

Computer scientists and political activists have consistently advocated for laws mandating VVPAT-equipped voting machines, and several jurisdictions have already heeded their call. California has gone even further and required machines with Accessible Voter Verified Paper Audit Trails (“AVVPAT”).<sup>118</sup> AVVPAT ensures that voters with disabilities can also verify their vote from a paper record—an important goal, since one of the key advantages of DRE machines is that they are more accessible to disabled voters. The Brennan Center for Justice and the Lawyers’ Committee for Civil Rights Under Law have urged Congress to mandate AVVPAT nation-wide.<sup>119</sup>

While the use of VVPAT-equipped voting machines in all elections in the District may be desirable, the immediate case for mandating AVVPAT is not as clear because voting machine manufacturers have found it exceedingly difficult to meet AVVPAT standards while satisfying the requirements of the Help America Vote Act. HAVA requires that each polling place where an election for federal office takes place be equipped with at least one DRE machine for use by persons with disabilities and DRE machines that exist today are not compliant with the AVVPAT concept. Thus, while requiring AVVPAT may be a laudable future goal, the Special Committee concludes that it is not technically feasible at the present, and the District should not mandate it until voting machines that satisfy both VVPAT and HAVA are available on the market.

As part of the OERA, the District adopted a requirement that voting machines create a “voter verifiable record”<sup>120</sup> that allows for verification of the true and accurate outcome of the election. Specifically, the OERA demands that all voting systems used in the District after January 1, 2012, be capable of producing a permanent, voter-verifiable record that is capable of being inspected for the purpose of audits and recounts.

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<sup>117</sup> See Dan S. Wallach, *Electronic Voting and Other Voting Practices in the United States: Voting System Risk Assessment via Computational Complexity Analysis*, 17 Wm. & Mary Bill of Rts. J. 325, 339 (2008).

<sup>118</sup> Cal. Elec. Code § 19250 (West 2009) (“[T]he Secretary of State shall not approve a direct recording electronic voting system unless the system has received federal qualification and includes an accessible voter verified paper audit trail.”).

<sup>119</sup> Weiser & Goldman, *supra* note 123, at 10-11.

<sup>120</sup> The Council explicitly stated that the record need not be a paper record, if such technology becomes available.

## **VIII. Summary of Recommendations<sup>121</sup>**

### **1. Board Governance**

- 1.1. Establish minimum qualifications for Board members\*
- 1.2. Enhance open meetings requirements\*
- 1.3. Expand the membership of the Board from three members to five members

### **2. Voter Qualifications**

- 2.1. Ensure that individuals who have capacity to vote are permitted to vote\*
- 2.2. Allow 17-year-olds to vote in primary elections if they will be 18 by the next general election\*
- 2.3. Allow 16-year-olds to pre-register to vote\*
- 2.4. Consider the possibility allowing legal permanent residents to vote in certain local elections
- 2.5. Provide greater assistance to ex-felons to register to vote

### **3. National Voter Registration Act Compliance**

- 3.1. Adopt regulations providing for uniform training program to improve VRAs' compliance with Section 7
- 3.2. Require weekly reporting of VRA registration statistics and for compliance monitoring
- 3.3. Require each VRA to designate a primary voter registration official
- 3.4. Adopt regulations granting authority to investigate alleged violations of Section 7 of the NVRA
- 3.5. Designate the Department of Corrections and the Department of Youth Rehabilitation Services as a VRA\*
- 3.6. Seek permission of Court Services and Offender Supervision Agency for the District of Columbia, the United States military recruitment offices, and the Department of Veterans Affairs to be designated as VRAs

### **4. Alternative Voting Methods**

- 4.1. Permit voters to cast "no-excuse" absentee ballots\*
- 4.2. Expand the use of early voting through in-person voting at vote centers\*

### **5. Same Day Registration and Automatic Voter Registration**

- 5.1. Adopt same-day registration in the District of Columbia\*
- 5.2. Pursue adoption of Automatic Voter Registration in the District of Columbia

### **6. Polling Place Workers**

- 6.1. Recruit highly qualified polling place workers
  - 6.1.1. Use multiple public media channels to recruit polling place workers

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<sup>121</sup> Many of the recommendations have been implemented through the OERA. Those that have been explicitly authorized by the OERA or have been already implemented by the Board are designated with an asterisk.