

IS THERE STILL A CHANCE FOR SAME-DAY VOTER REGISTRATION?

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I. Introduction

When Governor Thomas H. Kean delivered his seventh annual State of the State Message on January 10, 1989,¹ he stated, the right to vote is the most fundamental of all our civil rights. This statement, however, was not contained in the prepared text of Governor Kean's State of the State Message.² Although it is certainly not unusual for a Governor to digress from a prepared text, he usually does so to emphasize the importance of a previously proposed program, not to launch a completely new initiative. With the addition of this statement to the State of the State Message, the issue of electoral reform received new recognition and was returned to Trenton's legislative agenda from which it had been virtually absent for nearly a decade.

In the fall of 1988, another factor renewed interest in the issue of voting rights reform. Litigation initiated by New Jersey's Rainbow Coalition challenged the restrictive provisions of New Jersey's registration and voting laws.³ This legal action, coupled with the potential for new legislative activity, provided two avenues for proponents of election reform to advance new proposals for same-day registration.

II. Proposed Legislation

On April 18, 1977, then majority leader Senator Joseph Merlino (D-Mercer), introduced bill S. 3184, the first proposal introduced in the New Jersey Legislature which provided for same-day

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¹ State of New Jersey, Manual of the Legislature of New Jersey, 203D LEG., 2D SESS. 477-84 (1989).

² See *id.*

³ Brief and complaint for the New Jersey State Chpt. of the National Rainbow Coalition, *New Jersey State Chpt. of the National Rainbow Coalition v. Carla Squires* (No. W50913-88) [hereinafter Brief for Rainbow Coalition].

voter registration and voting.⁴ Senator Merlino's bill was referred to the Senate State Government Committee, but no hearings were ever scheduled, nor was any action ever taken in the Senate Committee or by the Senate as a whole.⁵

On January 10, 1978, the first day of the next legislative session, Senator Merlino was sworn in as President of the Senate. That same day, Senator Merlino, Senator Matthew Feldman (D-Bergen), and Senator Wyona Lipman (D-Essex) were reported as sponsors of S. 276, which had been pre-filed.⁶ The bill was basically identical to S. 3184 of the previous session.⁷ Although the provisions of the bills were the same, the political climate was significantly altered.

Within the first three weeks of the session, the Senate State Government Committee had considered the bill, made amendments, and reported it favorably to the entire Senate.⁸ In the Senate the bill was the subject of floor amendments before being passed on February 16, 1978, by a strict party line vote of 21-14.⁹

General Assembly Speaker Christopher Jackman (D-Hudson) sent the bill to the lower house's State Government Committee, which held a public hearing on the bill on April 10, 1978.¹⁰ After the hearing, committee amendments were added, and the bill was reported out of the Assembly Committee on June 22, 1978.¹¹ Despite the advantage the Democrats held in the lower house, there was never enough support in their caucus to venture a floor vote on this bill during this session.

The lack of action by the Assembly during the 1978-79 session did not dissuade Senators Merlino, Feldman, and Lipman, who reintroduced their now much amended same-day registration act on January 8, 1980, as S. 641.¹² New amendments were added by the Senate State Government Committee,¹³ and the en-

⁴ S. 3184, 198th Leg., 2d Sess. (1977).

⁵ N.J. Legis. Index (1976-77).

⁶ S. 276, 199th Leg., 1st Sess. (Jan. 30, 1978).

⁷ *See id.*

⁸ S. 276, 199th Leg., 1st Sess. (Jan. 30, 1978).

⁹ N.J. Legis. Index (1977-78).

¹⁰ *Id.*

¹¹ S. 276, 199th Leg., 1st Sess. (June 22, 1978).

¹² S. 641, 200th Leg., 1st Sess. (1980).

¹³ S. 641, 200th Leg., 1st Sess. (April 17, 1980).

ture Senate passed the bill on April 28, 1980, by a vote of 29-2.¹⁴ The bill was sent to the Assembly where Speaker Jackman referred it to the Assembly State Government Committee.¹⁵ Thereafter, it failed to receive any further legislative action.¹⁶

During the three years of legislative activity, or inactivity, just reviewed, Brendan T. Byrne was Governor. Although the Governor never specifically endorsed any of Senator Merlino's proposals, it was generally believed that he was sympathetic to the concept of same-day registration. Moreover, his approval would have been expected had both houses of the legislature delivered a bill to his desk. During these three years, the initial proposal was worked and reworked frequently by committees in both houses, and by the entire Senate through floor amendment.

Governor Byrne and Senate President Merlino left their respective offices in January 1982, with little progress having been made on the subject of same-day registration. In fact, the many amendments made during the three years of debate turned the bill into a retreat to, rather than a bold departure from, the existing law.¹⁷ Although S. 641 constituted a modest liberalization of the status quo, it was, at best, a mere shadow of the reforms originally proposed in 1977.¹⁸

As first conceived and drafted, the 1977 bill was a dramatic, if not radical, transgression from existing law. It permitted an individual, who was otherwise qualified to vote but not registered, to present himself, with one suitable identifying document,¹⁹ at the office of the county election board or municipal clerk in his voting district on election day.²⁰ The individual would then become eligible to vote in the ongoing general or municipal election.²¹

A suitable identifying document was defined in the bill as a valid New Jersey driver's license or any standard piece of identification generally recognized by the federal, state, or local govern-

¹⁴ N.J. Legis. Index (1980-81).

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See* N.J. STAT. ANN. §§ 19:31-5 to -19 (West 1962 & Supp. 1989).

¹⁸ *See* S. 641, 200th Leg., 1st Sess. (1980).

¹⁹ S. 3184, 198th Leg., 2d Sess. § 1(a) (April 18, 1977).

²⁰ *Id.* § 2.

²¹ *Id.*

ment, as long as it showed the person's current and complete address.²² Once registered, a new voter could cast his ballot immediately if he swore under oath that he was not already registered in another district and had not already voted in the present election.²³

A would-be voter unable to produce the requested suitable identifying document could still register if he was accompanied by a registered voter from the same voting district.²⁴ This person was required to make a sworn statement verifying the prospective registrant's identity and address.²⁵ By the time the 1978 version of the bill was introduced, however, advocates of these reforms were making concessions on these provisions.

Although the first proposal had allowed anyone to avail himself of the same-day procedure, the second incarnation was significantly narrower. It permitted only those voters whose registrations were technically defective, because they had moved or otherwise changed their names, to register and vote on election day.²⁶ Further, it stipulated that the New Jersey Secretary of State was to promulgate the rules and regulations that might be necessary to effectuate the purposes of the bill.²⁷

Thereafter, a total of fourteen amendments were made to the bill at various steps of the legislative process, which diluted the reforms even further.²⁸ The legislature, apparently satisfied with the status quo, showed little interest in expanding voting rights and facilitating enfranchisement. There was particular concern that the proposed procedures held the potential for fraud, although evidence of such a threat was not apparent in the record. An examination of the amendments illustrates a bill significantly different from the bill originally introduced.

The Senate State Government Committee amended the bill on January 30, 1978.²⁹ The Senate Committee amended the bill to prohibit an applicant who is registered on an election day to

²² *Id.* § 1(a).

²³ S. 3184, 198th Leg., 2d Sess. § 2 (April 18, 1979).

²⁴ *Id.* § 3.

²⁵ *Id.*

²⁶ S. 276, 199th Leg., 1st Sess. § 1(b) (1978).

²⁷ *Id.* § 4.

²⁸ See S. 276, 199th Leg., 1st Sess. (Jan. 30, 1978); S. 276, 199th Leg., 1st Sess. (Feb. 9, 1978); S. 276, 199th Leg., 1st Sess. (June 22, 1978).

²⁹ S. 276, 199th Leg., 1st Sess. (Jan. 30, 1978).

then act as a verifier for another applicant on the same day.³⁰ The bill was also amended to limit a permanently registered voter to verifying the identities of no more than five applicants during any given election.³¹ The Senate Committee added a penalty provision which made it a misdemeanor to fraudulently register or to aid in fraudulent registration.³² The amendment required that the penalty provision be read to both the applicant and the verifier prior to the acceptance of any signed or sworn statements.³³

The New Jersey Senate also passed floor amendments on February 9, 1978.³⁴ The first amendment made same-day registration applicable only to general elections, and not to non-partisan municipal elections held in May.³⁵ A Senate floor amendment required that the verifier reside within the same municipality as the applicant³⁶ and that the applicant vote only at the place of registration.³⁷ Specific sanctions were added to the penalty provisions requiring a fine of not more than \$1,000 or imprisonment for not more than three years, or both.³⁸

The General Assembly State Government Committee amended the bill on June 22, 1978.³⁹ One amendment provided that an applicant could only register and vote at the polling place in the election district in which he actually resided.⁴⁰ Another amendment required the applicant to produce a suitable identifying document, which must have either the full address or the signature of the applicant, and to have present a verifier who had previously voted in the district and who would swear under oath as to the applicant's identity and address.⁴¹ The Assembly Committee amended the bill to provide for the judge of each polling place, or the judge's designee, to be responsible for the register-

³⁰ *Id.* § 4.

³¹ *Id.*

³² *Id.* § 6.

³³ *Id.* § 5.

³⁴ S. 276, 199th Leg., 1st Sess. (Feb. 9, 1978).

³⁵ *Id.* § 2.

³⁶ *Id.* § 3.

³⁷ *Id.*

³⁸ *Id.* § 6.

³⁹ A. 276, 199th Leg., 1st Sess. (June 22, 1978).

⁴⁰ *Id.* § 2.

⁴¹ *Id.*

ing of the applicant.⁴² The Assembly Committee also required an appropriate county official to send to the registrant written notification of the registration immediately following the election.⁴³ Investigations and random samplings were required to be made within twenty-five days of the election to determine if any violations had occurred.⁴⁴

Finally, it should be noted that the 1980 version of this bill was voted on by the Senate only after the Senate Committee had clarified that any violations of the procedures would be a crime of the third degree,⁴⁵ on par with car theft⁴⁶ or burglary.⁴⁷ Furthermore, the law was to be applicable only to individuals who had previously registered and whose status was uncertain due to change of address or name, or because they had not voted in any elections in the previous four years.⁴⁸

In retrospect, the New Jersey Legislature appears to have been obsessed with the wrong issue, rather than advancing the broadest possible enfranchisement and facilitating electoral participation. At this writing, legislatures in North Dakota,⁴⁹ Maine,⁵⁰ Minnesota,⁵¹ and Wisconsin⁵² have been reform minded and bold enough to make same-day registration law. To the present, however, the New Jersey Legislature has focused most of its energy on designing a system that would be secure against any potential fraud.

If Governor Kean's premise that voting is the most fundamental of all rights is correct, and the courts seem to agree with this statement,⁵³ then the dynamic that should drive all further legislative action must be the facilitation of the right to vote.

⁴² *Id.* § 3.

⁴³ *Id.* § 6.

⁴⁴ *Id.*

⁴⁵ S. 641, 200th Leg., 1st Sess. § 7 (April 17, 1980).

⁴⁶ N.J. STAT. ANN. § 2C:20-2(b)(2)(b) (West 1982).

⁴⁷ N.J. STAT. ANN. § 2C:18-2(b) (West 1982).

⁴⁸ S. 641, 200th Leg., 1st Sess. § 1(b) (April 17, 1980).

⁴⁹ N.D. CENT. CODE § 16.1-01-04 (1981).

⁵⁰ ME. REV. STAT. ANN. tit. 21-A, § 122(4) (Supp. 1988).

⁵¹ MINN. STAT. ANN. § 201.061 (West Supp. 1989).

⁵² WIS. STAT. ANN. § 6.29 (West 1982).

⁵³ See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); see also *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325, 294 A.2d 233 (1972).

III. Same-Day Litigation

While the legislature was making little progress in voter reform, legal initiative was taken by the Rainbow Coalition to obtain same-day registration.⁵⁴ In October 1988, the New Jersey Chapter of the National Rainbow Coalition filed suit in superior court against, Carla Squier, the Superintendent of Elections for Essex County.⁵⁵ Ms. Squier was selected as the defendant for a number of reasons. First, Essex County, the largest county in the state, had the greatest number of unregistered voters.⁵⁶ Second, Essex County had the largest population of minorities and people living below the poverty line.⁵⁷ Third, Essex County allegedly possessed sophisticated computers which were available for the use of the superintendent of elections.⁵⁸ Fourth, notwithstanding this computer capacity, registration of voters in Essex County was purported to be a manual, labor oriented procedure.⁵⁹ Finally, the defendant's office appeared to be insufficiently funded to perform even the tasks assigned to it.⁶⁰

The main thrust of the litigation was to abolish the mandatory twenty-eight day cut-off provision required for the registration of voters prior to an election.⁶¹ After two and one-half days of testimony, Judge Leo Yanoff denied the plaintiffs' application for an injunction indicating that he was persuaded that changing the procedures for an election less than two weeks away

⁵⁴ Brief for Rainbow Coalition, *supra* note 3.

⁵⁵ *Id.* at 2; *see also* Transcript, New Jersey State Chpt. of the National Rainbow Coalition v. Carla Squires (No. W50913-88) (Oct. 26, 1988) [hereinafter Transcript].

⁵⁶ *See* Brief for Rainbow Coalition, *supra* note 3, at 2.

⁵⁷ *Id.*

⁵⁸ Transcript, *supra* note 52, at 9-11.

⁵⁹ *Id.* at 11.

⁶⁰ *Id.* at 8-9.

⁶¹ Brief for Rainbow Coalition, *supra* note 3, at 3-4; *see also* Transcript, *supra* note 52, at 4; N.J. STAT. ANN. § 19:31-6.1 (West Supp. 1989). Section 19:31-6.1 provides that

any person authorized by law to accept applications for voter registration shall accept, during the 28-day period prior to any election, the application for registration for all eligible voters who shall personally appear for registration before such person, or the registration card mailed or delivered to such person, but no eligible voter so registered shall be entitled to vote in the election immediately following said 28-day period.

Id.

would potentially result in chaos.⁶² Judge Yanoff, however, did indicate that he found voting to be a fundamental right.⁶³

The recognition of voting as a fundamental right is critical for two reasons. Such designation triggers strict scrutiny by the reviewing court which requires the state to demonstrate that it has a compelling interest which justifies its interference with the free exercise of this right, and that it has chosen the least restrictive methods of regulation.⁶⁴

The facts that will be presented to the court in support of reform will also be advanced before a legislative committee, during this, or any future, session. In fact, the following salient facts are essentially unchallenged.

Both registrants and actual voters have declined in number over the past three decades.⁶⁵ Proportionally, there are more whites than blacks, home owners than tenants, college graduates than high school drop outs, employed than unemployed and underemployed, suburbanites than urban dwellers, and more upper income than poor registered to vote.⁶⁶ These patterns seem to appear in every county of this state and in every state in the nation.⁶⁷

Furthermore, instances of voter fraud are statistically insignificant.⁶⁸ Modern computer technology can readily and effectively be applied to a number of functions involved in the voting process including, but not limited to, permanent registration and the prevention of fraud.⁶⁹ New Jersey has delegated a large portion of the responsibility for the funding of elections to the counties,⁷⁰ which in turn have not adequately funded efforts to facilitate the process.⁷¹ Instead, the counties have concentrated a large amount of available resources on preventing fraud.⁷²

⁶² Transcript, *supra* note 52, at 20-21.

⁶³ *Id.* at 15, 19. The trial was scheduled for Nov. 13, 1989.

⁶⁴ Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667, 670 (1966); *see also* Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 334, 346, 294 A.2d 233, 237-38, 244 (1972).

⁶⁵ F. PIVEN & R. CLOWARD, WHY AMERICANS DON'T VOTE 162, 164 (1988).

⁶⁶ *Id.* at 203-04.

⁶⁷ *Id.*

⁶⁸ *Id.* at 99-101.

⁶⁹ *See* Transcript, *supra* note 52, at 9, 11-12, 25.

⁷⁰ *See* N.J. STAT. ANN. § 19:31-2 (West 1962 & Supp. 1989).

⁷¹ *See* Transcript, *supra* note 52, 8-9.

⁷² *See id.* at 8-12.

IV. Conclusion

It is not surprising to conclude after a review of the prospects for electoral reform that we can do better. The capability, technology, and concern exists to implement reforms immediately. However, there are insufficient funds for the computerization of election registration. Furthermore, it is highly unlikely that the necessary funds will ever be appropriated by a legislature that has consistently resisted efforts to liberalize voting registration.