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American Confidence in Elections: Preventing Noncitizen Voting and Other Foreign Interference

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My name is Hans A. von Spakovsky.¹ I appreciate the invitation to be here today. I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Edwin Meese III Center for

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Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years (2006-2007), where I was one of six commissioners responsible for enforcing the Federal Election Campaign Act.

Before that, I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act (“NVRA”), the Help America Vote Act (“HAVA”), and the Uniformed and Overseas Citizens Absentee Voting Act.²

Introduction

Preserving and protecting the ability of American citizens to participate fully in our democratic system is one of the most important duties of Congress. That requires ensuring that aliens – whether they are here legally or illegally – are not unlawfully registering and voting, raising and spending money to support or oppose candidates and referenda, and distorting and diluting the representation of citizens by being included in apportionment and redistricting in federal, state, and local elections.

While there is a great deal that the states can do to protect their citizens from alien interference in the election process, many of the responsibilities for accomplishing those objectives reside with Congress due to its authority over all aliens under Article I, Section 8, Clause 4 of the Constitution, the Naturalization Clause. There is no question that state and federal governments have the authority to take such actions. As Judge (now Justice) Brett Kavanaugh outlined succinctly in *Bluman v. FEC* in 2011,³ the “Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government.” That includes barring “aliens from voting, serving as jurors, working as police or probation officers, or teaching at public schools.”⁴

Alien Registration and Voting

What do the following aliens have in common? All of them unlawfully registered and voted in North Carolina before they were caught and removed from the rolls: Alessandro Cannizzaro

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

² I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

³ *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

⁴ *Bluman*, 800 F.Supp.2d at 283.

(Italy), Roberto Hernandez-Cuarenta (Mexico), Jose Cruz Solano-Rodriguez (Mexico), Ramon Esteban Paez-Jerez (Dominican Republic), Jose Jaime Ramiro-Torres (El Salvador), Dieudonne Soifils (Haiti), Guadalupe Espinosa-Pena (Mexico), Maria Rufina Castillo-Boswell (Philippines), Dora Maybe Damata-Rodriguez (Panama), Juan Francisco Landeros-Mireles (Mexico), Hyo Suk George (Korea), Merious Jean (Haiti), Daniel Tadeusz Romanowski (Poland), Diana Patricia Franco-Rodriguez (Mexico), Ruth Elizabeth Bran (Guatemala), Elizabeth Nene Amachaghi (Nigeria), Gabriela Guzman-Miguel (Mexico), Jose Abraham Navarro (Mexico), and Joshua Workman (Canada).⁵

We know that aliens are registering and actually voting, although we do not know the extent of the problem since the vast majority of states are not verifying the citizenship of registered voters. But the indicators that it *is* occurring are there, and it is important to understand that every vote by an alien cancels and effectively voids the vote of a citizen, no matter what political party that citizen supports and regardless of his or her race or ethnicity.

As an example, when I served on the Electoral Board of Fairfax County, Virginia, we discovered 278 individuals registered to vote who were not U.S. citizens, 117 of them had voted before we were able to remove them from the voter roll. Since it is illegal under both federal and Virginia law⁶ for an alien to register or vote by falsely asserting citizenship, we submitted information about these aliens to both the local prosecutor and the U.S. Department of Justice.⁷ Neither took any action to investigate or prosecute these cases, illustrating one of the problems in this area – too many prosecutors refuse to enforce the law even when such illegal behavior is discovered by election officials or others.

The Public Interest Legal Foundation has issued numerous reports⁸ on its findings based on official registration records of thousands of aliens who are registered in various jurisdictions including Arizona, Illinois, Michigan, North Carolina, New Jersey, Pennsylvania, Virginia, and sanctuary cities like Philadelphia and Chicago. These numbers can make a difference in close elections, and we have close elections all the time, particularly in local elections, as demonstrated by the Public Interest Legal Foundation’s database of elections decided by either a tie or just one vote (762 at last count).⁹

Yet, despite its publication of these reports, virtually no prosecutors have expressed any interest in obtaining this data from the Public Interest Legal Foundation in order to investigate and potentially

⁵ The cases are documented in the Heritage Foundation’s Election Fraud Database at <https://www.heritage.org/voterfraud>. These aliens were prosecuted by the U.S. Attorney in North Carolina, an all too rare an occurrence when it comes to this problem.

⁶ See e.g., 52 U.S.C. § 20511, 18 U.S.C. § 1015(f), 18 U.S.C. § 911, and 18 U.S.C. § 611.

⁷ Letter from Edgardo Cortes, General Registrar, Fairfax County, Virginia, to Neil H. MacBride, U.S. Attorney for Eastern District of Virginia, U.S. Department of Justice (August 19, 2011); Letters from General Registrar, Fairfax County, to Raymond F. Morrogh, Commonwealth’s Attorney, Fairfax County, Virginia (June 25, 2010; Feb. 28, 2011; May 3, 2011; and August 18, 2011).

⁸ <https://publicinterestlegal.org/reports/>. In the interests of full disclosure, I am a member of PILF’s Board of Directors.

⁹ “Tracking Elections That ended in Ties and Close Results,” Public Interest Legal Foundation, <https://publicinterestlegal.org/tied-elections/>.

prosecute these aliens for their felony violations of state and federal laws.

One of the most-cited, and also most-criticized, studies from 2014 by three scholars based on a national voter survey and a database of registered voters estimated that about one quarter of aliens in the U.S. are registered to vote. The study estimated that 6.4% of aliens present in the U.S. voted in the 2008 presidential election and 2.2% voted in the 2010 congressional election.¹⁰ The same study found 14.8% of aliens admitted they were registered to vote in 2008 and 15.6% admitted they were registered in 2010.

A new study that reexamined that data as well as more recent data from the 2022 election points out the “unrealistic assumptions” and flawed analyses of the critics of the original 2014 report. This new study not only affirms the conclusions of the 2014 report, but, based on an analysis of the more recent data, estimates that 10% to 27% of all aliens currently in the U.S. are registered to vote and that “about 5 to 13% of them will illegally vote in the 2024 presidential and congressional elections.”¹¹

Preventing Alien Registration and Voting

Under both state and federal laws, the maintenance of voter registration records is almost entirely a state responsibility. It is, however, an area where federal cooperation is required. That includes giving state election officials access to Social Security Administration records as required by the Help America Vote Act, as well as other relevant federal databases such as the alien records contained in the U.S. Department of Homeland Security’s databases including the Systematic Alien Verification for Entitlement system and E-Verify.¹² States should be given unfettered access to these DHS databases, although I have been reliably informed by numerous state election officials that DHS has made this very difficult and has generally been uncooperative.

The National Voter Registration Act should be amended to require the clerks of all federal district courts and all U.S. Attorneys in all federal districts to provide relevant information about voter ineligibility gained from jury selection to state election officials, particularly lack of citizenship. The NVRA already requires all U.S. Attorneys to notify the chief state election official of the state of a federal criminal defendant’s residence when that defendant is convicted in federal court and directs them to provide whatever information state officials need “for determining the effect that a conviction may have on an offender’s qualification to vote.”¹³

Federal courts obtain their lists of potential jurors from state voter registration rolls which, in some states, is supplemented by driver’s license data from the department of motor vehicles. Potential jurors who have been summoned for federal jury service must fill out a “jury qualification

¹⁰ Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, “Do non-citizens vote in U.S. Elections?” *Electoral Studies* 36 (2014) 149-157.

¹¹ James D. Agresti, “Study: 10% to 27% of Non-Citizens Are Illegally Registered to Vote,” *Just Facts Daily* (May 13, 2024), https://www.justfacts.com/news_non-citizen_voter_registration.

¹² <https://www.uscis.gov/save> and <https://www.e-verify.gov/>.

¹³ 52 U.S.C. § 20507(g).

questionnaire” under oath, which includes certifying that the individual is a U.S. citizen and has “never been convicted of a felony (unless civil rights have been legally restored).”¹⁴ Such information is potentially relevant to a registered voter’s eligibility, and federal courts officials in both the executive and judicial branches should be required to transmit that information back to state election officials who maintain state voter rolls.

A report in 2005 by the U.S. Government Accountability Office found that up to three percent of the 30,000 individuals called for jury duty from voter registration rolls over a two-year period in just one U.S. district court were not U.S. citizens.¹⁵ Although other courts reported smaller numbers, the point is that federal jury information is a source of information on aliens who have illegally registered that should be provided to state election officials, even if it is only a relatively small subset of the aliens present in the U.S.

Congress should further amend the NVRA, to make it clear that the NVRA does *not* prohibit states from requiring voting registration applicants to provide proof that they are U.S. citizens.¹⁶ Due to its constitutional authority over aliens, the federal government also has the authority to require such proof from individuals registering to vote in federal elections.

In that regard, it is worth noting that the federal government already requires that individuals submit such proof in order to be employed in this country. As the U.S. Citizenship and Immigration Services explains in the use of the federal I-9, “Employment Eligibility Verification” form, all potential employees “must attest to their employment authorization” and present “acceptable documents as evidence of identity and employment authorization” as either a citizen or a legally admitted alien with a work authorization.¹⁷

The right to work and earn a living to support one’s family is just as important as the right to vote. Barring states from requiring the same proof as to citizenship when it comes to voting makes no sense and deprives states of information essential to determining voter eligibility. In fact, the I-9 form lists a “Voter’s registration card” as one of the documents that can be used to establish an employee’s identity.

The federal “Application for Naturalization” form, N-400, asks in Part 9, Question 2, whether an applicant has “EVER registered to vote or voted in any Federal, state, or local election in the United States?”¹⁸ When an alien answers “yes,” the Department of Homeland Security should be required by federal law to provide that information to (1) the chief election official and attorney general of the state and local registrar of the political jurisdiction in which the alien illegally registered and/or voted, and (2) the Public Integrity Section of the U.S. Department of Justice, as well as the U.S.

¹⁴ <https://www.uscourts.gov/services-forms/jury-service/national-ejuror-program>.

¹⁵ “Elections: Additional Data Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists,” GAO-05-478 (June 2005), p. 42.

¹⁶ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). Such an amendment is necessary to correct the Supreme Court’s opinion in that case which, in my view, was an erroneous interpretation of the NVRA.

¹⁷ <https://www.uscis.gov/i-9>.

¹⁸ <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf>.

Attorney in the political jurisdiction where the alien illegally registered and/or voted, so that election officials can remove the alien from the registration list and state and federal prosecutors can investigate for possible prosecution.

The move by some local jurisdictions, such as the District of Columbia and New York City, to allow aliens to vote in local elections is fundamentally unfair to citizens, effectively disenfranchising them by diluting their votes, something we passed the Voting Rights Act in 1965 to prevent.¹⁹ Moreover, by allowing any adult who has resided in the nation's capital for 30 days to vote, there is nothing to prevent illegal aliens or employees of foreign embassies from voting in local elections, including diplomats from foreign governments that are openly hostile to the United States, as well as U.S.-based foreign reporters and journalists employed by government-propaganda organs such as *Pravda* and *The People's Daily*. Such a distortion of our democratic process is a recipe for foreign interference in our elections—and our governance—and should not be allowed.

Foreign Interference in State Referenda Elections

Federal campaign finance law prohibits foreign governments and aliens from participating in local, state, and federal elections of candidates for office, but it does *not* prevent them from participating in elections involving referenda and issue-based ballot measures. They may not engage in independent expenditures or make contributions or donations “directly or indirectly” to a candidate or political party of “money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election.”²⁰

Although Congress's constitutional authority to proscribe the rules governing state and local elections is limited, the Federal Election Campaign Act bans foreign interference in state and local elections as well as federal elections. That is based on extensive congressional authority over aliens through the Naturalization Clause previously discussed. In 1995 in *McIntyre v. Ohio Elections Commission*, however, the U.S. Supreme Court concluded that the definition of “election” in the Federal Election Campaign Act “regulates only candidate elections, not referenda or other issue-based ballot measures.”²¹ The Federal Election Commission has also concluded that this same definition does not cover recall elections, either, and has recommended on a bipartisan basis that Congress should amend the law to fix this loophole.²²

Congress should amend FECA to extend the candidate election ban to all elections involving referenda and issue-based measures as well as recall elections to prevent foreign interference and intrusion into the state referendum process. This Committee should be complimented on its bipartisan approval of H.R. 3229, the “Stop Foreign Funds in Elections Act,” which would do exactly

¹⁹ Zack Smith and Hans von Spakovsky, “Forget Open Borders. This Crazy Law Opens Voting Booths to Aliens, The Daily Signal (March 16, 2023).

²⁰ 52 U.S.C. 30121. There is an exception in the statute for permanent resident aliens.

²¹ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 356 (1995).

²² Jimmy Cloutier, “FEC urges Congress to close foreign money loophole,” OpenSecrets.org (Dec. 21, 2023), <https://www.opensecrets.org/news/2023/12/fec-urges-congress-to-close-foreign-money-loophole/>.

that. This is a bill that members of both political parties in the House of Representatives and Senate should support.

Distorting Representation: Apportionment and Redistricting

Article I, Section 2 of the U.S. Constitution mandates an “actual Enumeration” of the U.S. population every 10 years. That enumeration is used to determine the number of members in the House of Representatives to which each state is entitled.

Section 2 of the Fourteenth Amendment to the Constitution, ratified in 1868, provides that representatives in the House “shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”

Because Congress limited the size of the House to 435 members in 1929 by passing the *Permanent Apportionment Act*, those 435 representatives are divided among the states.²³

Reapportionment after the 2020 census by the Census Bureau of the U.S. Department of Commerce based on the apportionment formula specified in federal law gave additional seats to six states: Colorado, Florida, Montana, North Carolina, Oregon, and Texas. It also reduced the number of seats held by seven states: California, Illinois, Michigan, New York, Ohio, Pennsylvania, and West Virginia.²⁴

But that reapportionment was based on the country’s total population, which includes aliens who are here both legally and illegally even though they have no right or ability to participate in our democratic political process.

In addition to distorting representation in the House of Representatives, that reapportionment also affects the outcome of presidential races, since this same apportionment determines how many votes a state has in the Electoral College. Under Section 1 of Article II, the number of Electoral College votes for each state is the total of its two U.S. senators and the number of its representatives in the House.

The Trump administration unsuccessfully tried to add a citizenship question back to the 2020 census form; the question first appeared in the 1820 census. Although it has not been included on the census form in more recent years, it continues to be a question on the American Community Survey that is sent out yearly by the Census Bureau.²⁵

As the U.S. Supreme Court noted in 2019 in *Department of Commerce v. New York*, such “demographic questions have been asked in every census since 1790, and questions about

²³ 2 U.S.C. §2a; *see also* “The Permanent Apportionment Act of 1929,” U.S. House of Representatives, <https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/>.

²⁴ “2020 Census Apportionment Results Delivered to the President,” Census Bureau, U.S. Dept. of Commerce (April 26, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html#:~:text=Texas%20will%20gain%20two%20seats,states%20number%20of%20seats%20will>.

²⁵ https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS_Information_Guide.pdf.

citizenship in particular have been asked for nearly as long.” In fact, the High Court noted, the Constitution “vests Congress with virtually unlimited discretion in conducting” the census.²⁶

Although the Supreme Court specifically held that the Constitution’s Enumeration Clause “permits Congress, and by extension the Secretary [of Commerce], to inquire about citizenship on the census questionnaire,” it didn’t allow the Trump administration to go forward with adding a citizenship question. Instead, the Court held that the commerce secretary had not provided a sufficient explanation for his actions under applicable administrative law. There was not enough time after this decision for a more extensive explanation to be provided by the secretary before the census form needed to be printed and distributed, so the 2020 census did not include a citizenship question.

But the Supreme Court’s decision makes it clear that H.R. 7109, which just passed the House of Representatives and restores the citizenship question to the census, is well within the authority of Congress, as well as the commerce secretary, under existing law. That information is needed not just for apportionment and redistricting, but for the development of effective public policy on important issues ranging from immigration to education.

How bad is the distortion in representation in the House caused by including aliens, both legal and illegal, in apportionment? A 2019 study by the Center for Immigration Studies estimates that if aliens were removed from the apportionment population, these eight states would each gain a congressional seat: Ohio, Michigan, Missouri, Minnesota, Alabama, Idaho, West Virginia, and Rhode Island. California alone would lose three seats, since it has the largest population of illegal aliens in the country, while Texas would lose two seats and Florida, New Jersey and New York would each lose one seat.²⁷

Similarly, a 2015 report by the Congressional Research Service estimated that apportionment based on citizen population, excluding aliens, would shift seven congressional seats. Gaining a seat: Louisiana, Missouri, Montana, North Carolina, Ohio, Oklahoma, and Virginia. California would lose four seats and Florida, Texas, and New York would each lose one seat according to the report.²⁸

Given the unprecedented influx of millions of aliens into the U.S. illegally in recent years, the distortion in representation no doubt has grown even worse since these reports were issued.

Those who claim that the language in Section 2, that apportionment is based on the “number of *persons* in each State,” means that aliens must be included in the apportionment calculation are incorrect. The term “persons” historically has been interpreted in this context, as the Supreme Court explained in 1992 in *Franklin v. Massachusetts*, to mean an individual who not only has a physical presence but “some element of allegiance or enduring tie to a place.”²⁹

²⁶ Department of Commerce v. New York, 588 U.S. ____ (2019).

²⁷ The Impact of Legal and Illegal Immigration on the Apportionment of Seats in the U.S. House of Representatives in 2020,” Center for Immigration Studies (Dec. 19, 2019), <https://cis.org/Report/Impact-Legal-and-Illegal-Immigration-Apportionment-Seats-US-House-Representatives-2020>.

²⁸ “Apportioning Seats in the U.S. House of Representatives Using the 2013 Estimate Citizen Population,” Congressional Research Service, R41636 (Oct. 30, 2015).

²⁹ Franklin v. Massachusetts, 505 U.S. 788 (1992).

That is why the Census Bureau, for example, does not include aliens who visit the U.S. for a vacation or a business trip in the population count, since they have no political or legal allegiance to any state or the federal government, and their only “enduring tie” is to their native or home countries.³⁰ However, demonstrating the illogic of the Bureau’s policy on this issue, it does count aliens “who are members of the diplomatic community” at their embassy or consulate.

It is simply outrageous that diplomatic personnel who often represent countries whose interests are inimical to the well-being of the United States are included in apportionment and redistricting when they have no right whatsoever to participate in our political process, the democratic election system that is the heart of our republic.

The Census Bureau is not constitutionally required to include *any* aliens in the population count for apportionment purposes since aliens, particularly those here illegally, have no “allegiance or enduring tie” politically or otherwise to the United States. Including aliens in apportionment dilutes the votes and political representation of American citizens. It unfairly gives political power to states that deliberately obstruct enforcement of our immigration laws and implement sanctuary policies intended to attract illegal aliens who endanger the safety of the public and cost taxpayers huge amounts of money. Including aliens in apportionment also cheats states and voters not only in the House of Representatives, but through distortion of the Electoral College system used to decide presidential races.

Conclusion

We should provide both access and security in the election process. We want to ensure that every eligible *citizen* is able to vote and that those votes are not diluted, voided, or stolen due to unlawful registration and voting by aliens who have no right to participate in our political and election process and by the unfair and unjust inclusion of aliens in the apportionment of the House of Representatives, as well as the drawing of boundary lines for political districts at the federal, state and local level.

Individual aliens and foreign entities and governments should also not be able to interfere in recall elections and ballot-issue referenda. That is essential in convincing the public that they can and should turn out to exercise the franchise and actively and meaningfully participate in the governance of our nation.

I thank you again for holding this hearing and for inviting me to testify, and I am happy to answer any questions you might have.

³⁰ “2020 Census Residence Criteria and Residence Situations,” Census Bureau, U.S. Dept. of Commerce, https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_04-appendix.pdf.