

Legal Memorandum

No. 28
July 10, 2008



Published by The Heritage Foundation

The Threat of Non-Citizen Voting

Hans A. von Spakovsky

In 2005, the U.S. Government Accountability Office found that up to 3 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.¹ While that may not seem like many, just 3 percent of registered voters would have been more than enough to provide the winning presidential vote margin in Florida in 2000. Indeed, the Census Bureau estimates that there are over a million illegal aliens in Florida,² and the U.S. Department of Justice (DOJ) has prosecuted more non-citizen voting cases in Florida than in any other state.³

Florida is not unique. Thousands of non-citizens are registered to vote in some states, and tens if not hundreds of thousands in total may be present on the voter rolls nationwide. These numbers are significant: Local elections are often decided by only a handful of votes, and even national elections have likely been within the margin of the number of non-citizens illegally registered to vote.

Yet there is no reliable method to determine the number of non-citizens registered or actually voting because most laws to ensure that only citizens vote are ignored, are inadequate, or are systematically undermined by government officials. Those who ignore the implications of non-citizen registration and voting either are willfully blind to the problem or may actually favor this form of illegal voting.

Americans may disagree on many areas of immigration policy, but not on the basic principle that only citizens—and not non-citizens, whether legally

Talking Points

- There is significant evidence of non-citizen voting. The 2000 presidential election and many local elections have been decided within the margin of the number of non-citizens illegally registered to vote.
- The problem is multifaceted: Federal agencies refuse to give election officials information on voters' citizenship status; a failed "honor system" relies on non-citizens to comply with the law; federal laws have been implemented in ways that encourage non-citizens to register; and lax enforcement gives non-citizens strong incentives to obtain voter registration cards.
- The solutions, however, are straightforward: Anyone who registers to vote should be required to provide proof of citizenship; election officials should have access to E-Verify to help determine registrants' citizenship status; state DMVs should not allow non-citizens to register to vote; and courts should notify election officials when individuals summoned for jury duty from voter registration lists are excused for non-citizenship.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm28.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

present or not—should be able to vote in elections. Unless and until immigrants become citizens, they must respect the laws that bar non-citizen voting. To keep non-citizens from diluting citizens' votes, immigration and election officials must cooperate far more effectively than they have to date, and state and federal officials must increase their efforts to enforce the laws against non-citizen voting that are already on the books.

An Enduring Problem

Illegal voting by immigrants in America is nothing new. Almost as long as there have been elections, there have been Tammany Halls trying to game the ballot box. Well into the 20th century, the political machines asserted their ascendancy on Election Day, stealing elections in the boroughs of New York and the wards of Chicago. Quite regularly, Irish immigrants were lined up and counted in canvasses long before the term “citizen” ever applied to them—and today it is little different. Yet in the debates over what to do about the 8 million to 12 million illegal aliens estimated to be in the United States, there has been virtually no discussion of how to ensure that they (and millions of legal aliens) do not register and vote in elections.

Citizenship is and should be a basic requirement for voting. Citizenship is a legal requirement to vote in federal and state elections,⁴ except for a small number of local elections in a few jurisdictions.⁵

Some Americans argue that alien voting is a non-existent problem or dismiss reported cases of non-citizen voting as unimportant because, they claim, there are no cases in which non-citizens “intentionally” registered to vote or voted “while knowing that they were ineligible.”⁶ Even if this latter claim were true—which it is not—every vote cast by a non-citizen, whether an illegal alien or a resident alien legally in the country, dilutes or cancels the vote of a citizen and thus disenfranchises him or her. To dismiss such stolen votes because the non-citizens supposedly did not know they were acting illegally when they cast a vote debases one of the most important rights of citizens.⁷

The evidence is indisputable that aliens, both legal and illegal, are registering and voting in federal, state, and local elections. Following a mayor's race in Compton, California, for example, aliens testified under oath in court that they voted in the election.⁸ In that case, a candidate who was elected to the city council was permanently disqualified from holding public office in California for soliciting

1. GOV'T ACCOUNTABILITY OFFICE, ELECTIONS: ADDITIONAL DATA COULD HELP STATE AND LOCAL ELECTION OFFICIALS MAINTAIN ACCURATE VOTER REGISTRATION LISTS 42 (2005).
2. STEVEN CAMAROTA, CTR. FOR IMMIGR. STUD., IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 31 (2007).
3. CRIM. DIV., PUB. INTEGRITY SECTION, U.S. DEP'T OF JUST., ELECTION FRAUD PROSECUTIONS & CONVICTIONS: OCTOBER 2002–SEPTEMBER 2005 (2006).
4. See U.S. DEPT. OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 66 (7th ed. 2007), available at <http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf>; 18 U.S.C. § 611 (2008).
5. For example, non-citizens can vote in local elections in Chevy Chase and Takoma Park, Maryland. See Robert Redding, Jr., *Purging Illegal Aliens from Voter Rolls Not Easy; Maryland Thwarted in Tries So Far*, WASH. TIMES, Aug. 23, 2004.
6. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., THE TRUTH ABOUT VOTER FRAUD 18 (2007), available at <http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf>.
7. Another problem not discussed in this paper is the inclusion by the Census of non-citizens, legal and illegal, in apportionment, which leads to the misallocation of congressional seats in the U.S. House of Representatives. This causes states such as Indiana, Michigan, Montana, Oklahoma, Pennsylvania, Wisconsin, Kentucky, and Mississippi to have one less seat than they should and states such as Texas, New York, California, and Florida to gain seats they would not have if only citizens were counted. This represents an obvious and clear Equal Protection problem—a violation of the principle of “one man, one vote”—since it takes fewer votes to be elected to Congress in districts with large numbers of non-citizens. See DUDLEY L. POSTON, JR., STEVEN A. CAMAROTA, & AMANDA K. BAUMLE, CTR. FOR IMMIGR. STUD., REMAKING THE POLITICAL LANDSCAPE: THE IMPACT OF ILLEGAL AND LEGAL IMMIGRATION ON CONGRESSIONAL APPORTIONMENT I (2003).
8. Daren Briscoe, *Non-citizens Testify They Voted in Compton Elections*, L.A. TIMES, Jan. 23, 2002, at B5.

non-citizens to register and vote.⁹ The fact that non-citizens registered and voted in the election would never have been discovered except for the fact that it was a very close election and the incumbent mayor, who lost by less than 300 votes, contested it.¹⁰

Similarly, a 1996 congressional race in California may have been stolen by non-citizen voting.¹¹ Republican incumbent Bob Dornan was defending himself against a spirited challenger, Democrat Loretta Sanchez. Sanchez won the election by just 979 votes, and Dornan contested the election in the U.S. House of Representatives. His challenge was dismissed after an investigation by the House Committee on Oversight and Government Reform turned up only 624 invalid votes by non-citizens who were present in the U.S. Immigration and Naturalization Service (INS) database because they had applied for citizenship, as well as another 124 improper absentee ballots.¹² The investigation, however, could not detect *illegal* aliens, who were not in the INS records.

The Oversight Committee pointed out the elephant in the room: “[I]f there is a significant number of ‘documented aliens,’ aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County?”¹³ There is a strong possibility that, with only about 200 votes determining the winner,¹⁴ enough undetected

aliens registered and voted to change the outcome of the election. This is particularly true since the California Secretary of State complained that the INS refused his request to check the entire Orange County voter registration file, and no complete check of all of the individuals who voted in the congressional race was ever made.¹⁵

The “Quick Ticket”

Non-citizen voting is likely growing at the same rate as the alien population in the United States; but because of deficiencies in state law and the failure of federal agencies to comply with federal law, there are almost no procedures in place that allow election officials to detect, deter, and prevent non-citizens from registering and voting. Instead, officials are largely dependent on an “honor system” that expects aliens to follow the law. There are numerous cases showing the failure of this honor system.

The frequent claim that illegal aliens do not register in order “to stay below the radar”¹⁶ misses the fact that many aliens apparently believe that the potential benefit of registering far outweighs the chances of being caught and prosecuted. Many district attorneys will not prosecute what they see as a “victimless and non-violent” crime that is not a priority.¹⁷

On the benefit side of the equation, a voter registration card is an easily obtainable document—they

9. A judge’s removal of the mayor from office was later overturned, but the removal of a councilwoman who participated in non-citizen voter fraud was upheld. See *Bradley v. Perrodin*, 106 Cal. App. 4th 1153 (2003), *review denied*, 2003 Cal. LEXIS 3586 (Cal. 2003); Robert Greene, *Court of Appeal Upholds Perrodin Victory Over Bradley in Compton*, METRO NEWS-ENTER., March 11, 2003; Daren Briscoe, Bob Pool & Nancy Wride, *Judge Voids Compton Vote, Reinstalls Defeated Mayor*, L.A. TIMES, Feb. 9, 2002.

10. *Judge Voids Compton Vote, Reinstalls Defeated Mayor*, *supra* note 9.

11. See H.R. Doc. No. 105-416 (1998).

12. The Committee found “clear and convincing” evidence of 624 non-citizens voting but only “circumstantial” evidence of another 196 non-citizens voting. Thus, the Committee did not include the 196 in its tally of invalid votes. *Id.* at 15.

13. *Id.*

14. The margin is just 35 votes if one includes the 196 non-citizens found by the Committee based on “circumstantial” evidence.

15. Press Release, California Sec’y of State, Jones Releases Report on Orange County Voter Fraud Investigation (Feb. 3, 1998).

16. Richard Hasen, a professor at Loyola Law School, doubts that illegal aliens register to vote because “committing a felony for no personal gain is not a wise choice.” Jessica Rocha, *Voter Rolls Risky for Aliens: Non-citizens’ Registering Is a Crime; 4 Cases Turn up in N.C.*, NEWS & OBSERVER, Dec. 7, 2006.

17. GOV’T ACCOUNTABILITY OFFICE, *supra* note 1, at 60.

are routinely issued without any checking of identification—that an illegal alien can use for many different purposes, including obtaining a driver's license, qualifying for a job, and even voting.¹⁸ The Immigration Reform and Control Act of 1986, for example, requires employers to verify that all newly hired employees present documentation verifying their identity and legal authorization to work in the United States.¹⁹ In essence, this means that new employees have to present evidence that they are either U.S. citizens or legal aliens with a work permit. The federal I-9 form that employers must complete for all new employees provides a list of documentation that can be used to establish identity—including a voter registration card.²⁰

How aliens view the importance of this benefit was illustrated by the work of a federal grand jury in 1984 that found large numbers of aliens registered to vote in Chicago. As the grand jury reported, many aliens “register to vote so that they can obtain documents identifying them as U.S. citizens” and have “used their voters’ cards to obtain a myriad of benefits, from social security to jobs with the Defense Department.”²¹ The U.S. Attorney at the time estimated that there were at least 80,000 illegal aliens registered to vote in Chicago, and dozens were indicted and convicted for registering and voting.²²

The grand jury's report resulted in a limited cleanup of the voter registration rolls in Chicago, but just one year later, INS District Director A. D. Moyer testified before a state legislative task force that 25,000 illegal and 40,000 legal aliens remained on the rolls in Chicago. Moyer told the Illinois Senate that non-citizens registered so they could get a voter registration card for identification,

adding that the card was “a quick ticket into the unemployment compensation system.”²³ An alien from Belize, for example, testified that he and his two sisters were able to register easily because they were not asked for any identification or proof of citizenship and lied about where they were born. After securing registration, he voted in Chicago.

Once such aliens are registered, of course, they receive the same encouragement to vote from campaigns' and parties' get-out-the-vote programs and advertisements that all other registered voters receive. Political actors have no way to distinguish between individuals who are properly registered and non-citizens who are illegally registered.

A Failure to Cooperate

Obtaining an accurate assessment of the size of this problem is difficult. There is no systematic review of voter registration rolls by states to find non-citizens, and the relevant federal agencies—in direct violation of federal law—refuse to cooperate with state election officials seeking to verify the citizenship status of registered voters. Federal immigration law requires these agencies to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information,” regardless of any other provision of federal law, such as the Privacy Act.²⁴ However, examples of refusal to cooperate are legion:

- In declining to cooperate with a request by Maryland to check the citizenship status of individuals registered to vote there, a spokes-

18. In a typical example, voter registration cards are listed as an acceptable secondary source document to prove identity when obtaining a driver's license in Maryland. See Maryland Motor Vehicle Association, Sources of Proof, <http://www.marylandmva.com/DriverServ/Apply/proof.htm> (last visited July 7, 2008).

19. 8 U.S.C. § 1324a (2008).

20. U.S. Citizenship and Immigr. Serv., Form I-9, Employment Eligibility Verification, <http://www.uscis.gov/files/form/i-9.pdf> (last visited July 7, 2008).

21. See In Re Report of the Special January 1982 Grand Jury 1, No. 82 GJ 1909 (N.D. Ill. Dec. 14, 1984), at 8–9.

22. See Douglas Frantz, *Vote Fraud in City Outlined at Hearing*, CHI. TRIB., Sept. 20, 1983, at A1; HANS VON SPAKOVSKY, THE HERITAGE FOUNDATION, WHERE THERE'S SMOKE, THERE'S FIRE: 100,000 STOLEN VOTES IN CHICAGO (2008), available at <http://www.heritage.org/Research/Legalissues/lm23.cfm>.

23. Desiree F. Hicks, *Foreigners Landing on Voter Rolls*, CHI. TRIB., Oct. 2, 1985.

man for the U.S. Citizenship and Immigration Service (CIS) mistakenly declared that the agency could not release that information because “it is important to safeguard the confidentiality of each legal immigrant, especially in light of the federal Privacy Act and the Immigration and Nationality Act.”²⁵

- One surprising result of this policy: In 2004, a guilty verdict in a murder trial in Maryland was jeopardized because a non-citizen was discovered on the jury—which had been chosen from the voter rolls.²⁶
- In 2005, Sam Reed, the Secretary of State of Washington, asked the CIS to check the immigration status of registered voters in Washington; the agency refused to cooperate.²⁷
- A request from the Fulton County, Georgia, Board of Registration and Elections in 1998 to the old Immigration and Naturalization Service to check the immigration status of 775 registered voters was likewise refused for want of a notarized consent from each voter because of “federal privacy act” concerns.
- In 1997, the FBI and the U.S. Attorney’s office in Dallas were investigating voting by non-citi-

zens. They sent a computerized tape of the names of individuals who had voted to the INS requesting a check against INS records, but the INS refused to cooperate with the criminal investigation.²⁸ An INS official was quoted as saying that the INS bureaucracy did not “want to open a Pandora’s Box.... If word got out that this is a substantial problem, it could tie up all sorts of manpower. There might be a few thousand [illegal voters] in Dallas, for example, but there could be tens of thousands in places like New York, Chicago or Miami.”²⁹

These incidents show that the CIS and U.S. Immigration and Customs Enforcement (ICE),³⁰ the successor agencies to the INS, are either ignorant of federal legal requirements or deliberately ignoring them. An inquiry by a state or local election official regarding voter eligibility based on citizenship falls squarely within their statutory authority.

To be sure, CIS and ICE databases are not comprehensive; they contain information only about legal immigrants who have applied for the documentation necessary to be in the United States and illegal immigrants who have been detained. But even access to that information

24. 8 U.S.C. §§ 1373(a), (c). Given the requirements of this statute, the initial refusal of the Justice Department and the INS to comply with “numerous requests from the Committee and California election officials to provide citizenship data on individuals” in the Dornan–Sanchez investigation was inexplicable; the Attorney General either made a basic legal error or decided, for political reasons, not to cooperate in an investigation that could have thrown out the Democratic winner of a congressional race. See H.R. Doc. No. 105-416, at 13 (1998).

25. Robert Redding, *Purging Illegal Aliens from Voter Rolls Not Easy; Maryland Thwarted in Tries So Far*, WASH. TIMES, Aug. 23, 2004.

26. *Id.*

27. See Letter of March 22, 2005, from Sam Reed to Robert S. Coleman, Director, Seattle District Office, USCIS (Mar. 22, 2005).

28. *INS Hampers Probe of Voting by Foreigners, Prosecutor Says*, HOUSTON CHRON., Sept. 20, 1997. The investigation was started when a random check by local INS agents found 10 non-citizens who had voted in just one 400-person precinct, and the case was eventually turned over to the local district attorney for prosecution. The government, however, refused to expand the probe to cover the full country as requested by the agents, who claimed that the probe was halted because of the supervisor’s fear of the potential “political ramifications.” See Frank Trejo, *Internal Strife Embroils Dallas INS Office—Local Agents’ Whistle-Blowing Leads to Far-Flung Controversy*, DALLAS MORNING NEWS, March 8, 1998; Dena Bunis, *Dallas INS’ Probe of Electorate Echoes Here: Fallout from the Dornan–Sanchez Inquiry Sparks an Internal INS Debate Over a Texas Computer-Match Investigation*, ORANGE COUNTY REG., June 5, 1997.

29. Ruth Larson, *Voter-Fraud Probe in Dallas Runs into INS Roadblock: Agency Denies It Should Have Further Aided U.S. Attorney*, WASH. TIMES, Sept. 25, 1997.

30. On March 1, 2003, the Immigration and Naturalization Service was split into two different divisions of the new Department of Homeland Security. USCIS is responsible for legal immigration and naturalization functions, while ICE is responsible for enforcing immigration and customs laws, including against illegal aliens.

would be a big step forward for election officials in their attempts to try to clean up registration lists and find those aliens who are illegally registered and voting in elections.

The Honor System

The refusal of federal agencies to obey the law compels local election officials to rely almost entirely on the “honor system” to keep non-citizens from the polls. As Maryland’s state election administrator has complained, “There is no way of checking... We have no access to any information about who is in the United States legally or otherwise.”³¹

Most discoveries of non-citizens on the registration rolls are therefore accidental. Though the Department of Justice has no procedures in place for a systematic investigation of these types of criminal violations, in just a three year period, it prosecuted and convicted more than a dozen non-citizens who registered and voted in federal elections in Alaska, Florida, the District of Columbia, and Colorado.³² Among them was an alien in southern Florida, Rafael Velasquez, who not only voted, but even ran for the state legislature.³³ Eight of the 19 September 11 hijackers were registered to vote in either Virginia or Florida—registrations that were probably obtained when they applied for driver’s licenses.³⁴

In 1994, Mario Aburto Martinez, a Mexican national and the assassin of Mexican presidential candidate Luis Donaldo Colosio, was found to have registered twice to vote in California.³⁵ A random sample of just 10 percent of the 3,000 Hispanics registered to vote in California’s 39th Assembly District by an independent group “revealed phony addresses and large numbers of

registrants who admitted they were not U.S. citizens.”³⁶ This problem may be partially explained by the testimony of a Hispanic member of the Los Angeles Police Department who had been a volunteer for the California-based Southwest Voter Registration Education Project. When she reported to her supervisor that her fellow volunteers were not asking potential voters whether they were citizens, she was reprimanded “and told that she was not to ask that question...only whether the person wished to register to vote.”³⁷ Similarly, the Dornan–Sanchez investigation produced an affidavit from a non-citizen stating that the Sanchez campaign’s field director, an elected member of the Anaheim Board of Education, told him that it “didn’t matter” that he was not a U.S. citizen—he should register and vote anyway.³⁸

In 2006, Paul Bettencourt, Voter Registrar for Harris County, Texas, testified before the U.S. Committee on House Administration that the extent of illegal voting by foreign citizens in Harris County was impossible to determine but “that it has and will continue to occur.” Twenty-two percent of county residents, he explained, were born outside of the United States, and more than 500,000 were non-citizens. Bettencourt noted that he cancelled the registration of a Brazilian citizen in 1996 after she acknowledged on a jury summons that she was not a U.S. citizen. Despite that cancellation, however, “She then reapplied in 1997, again claiming to be a U.S. citizen, and was again given a voter card, which was again cancelled. Records show she was able to vote at least four times in general and primary elections.”³⁹

In 2005, Bettencourt’s office turned up at least 35 cases in which foreign nationals applied for or

31. Christina Bellantoni, *Little to Stop Illegal Aliens from Voting*, WASH. TIMES, Sept. 24, 2004, at A1.

32. CRIMINAL DIV., *supra* note 3.

33. *Id.*

34. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 1 (2004); *see also* Kathleen Hunter, *States Slow to Give Driver’s Licenses to Illegal Aliens*, Stateline.org, July 1, 2004.

35. Karen Saranita, *The Motor Voter Myth*, NAT’L REV., Nov. 11, 1996, at 42.

36. *Id.*

37. *Id.*

38. Affidavit of Nelson Molina, H.R. Doc. No. 105-416, at 181 (1998). Molina’s wife was in the meeting with the field director and filed a supporting affidavit.

received voter cards, and he pointed out that Harris County regularly had “elections decided by one, two, or just a handful of votes.” In fact, a Norwegian citizen was discovered to have voted in a state legislative race in Harris County that was decided by only 33 votes.⁴⁰ Nor is this problem unique to Harris County. Recent reports indicate that hundreds of illegal aliens registered to vote in Bexar County, Texas, and that at least 41 of them have voted, some several times, in a dozen local, state, and federal elections.⁴¹

In 2005, Arizona passed Proposition 200, which requires anyone registering to vote to provide “satisfactory evidence of United States citizenship,” such as a driver’s license, a birth certificate, a passport, naturalization documents, or any other documents accepted by the federal government to prove citizenship for employment purposes. The state issues a “Type F” driver’s license to individuals who are legally present in the United States but are not citizens. Since Proposition 200 took effect, 2,177 non-citizens applying for such licenses have attempted to register to vote.⁴² Another 30,000 have been denied registration because they could not produce evidence of citizenship.⁴³

The constitutionality of Arizona’s requirement is currently being litigated in federal court. The district court hearing the case refused to issue a preliminary injunction against enforcement of the law, and the Supreme Court vacated a preliminary injunction issued by the Ninth Circuit Court of Appeals.⁴⁴ Trial is scheduled for July 2008.⁴⁵ The plaintiffs will have to convince the presiding judge

that the very same proof of citizenship required by the federal government before an individual can work is somehow unlawful when imposed by a state before a person can vote.

Some non-citizen registrations can be detected through the jury process. The vast majority of state and federal courts draw their jury pools from voter registration lists, and the jury questionnaires used by court clerks ask potential jurors whether they are U.S. citizens. In most states, however, and throughout the federal court system, court clerks rarely notify local election officials that potential jurors have sworn under oath that they are not U.S. citizens. In jurisdictions that share that information, election officials routinely discover non-citizens on the voter rolls. For example, the district attorney in Maricopa County, Arizona, testified that after receiving a list of potential jurors who admitted they were not citizens, he indicted 10 who had registered to vote. (All had sworn on their registration forms that they were U.S. citizens.) Four had actually voted in elections. The district attorney was investigating 149 other cases.⁴⁶

The county recorder in Maricopa County had also received inquiries from aliens seeking verification, for their citizenship applications, that they had not registered or voted. Thirty-seven of those aliens had registered to vote, and 15 of them had actually voted. As the county’s district attorney explained, these numbers come “from a relatively small universe of individuals—legal immigrants who seek to become citizens.... These numbers do not tell us how many illegal immigrants have regis-

39. *Non-Citizen Voting and ID Requirements in U.S. Elections: Hearing Before the Committee on House Administration*, 109th Cong. (2006) (statement of Paul Bettencourt, Harris County Tax Assessor-Collector and Voter Registrar).

40. Joe Stinebaker, *Loophole Lets Foreigners Illegally Vote; ‘Honor System’ in Applying Means the County Can’t Easily Track Fraud*, HOUSTON CHRON., Jan. 16, 2005.

41. Guillermo Garcia, *Voter Fraud Case Takes a New Twist*, EXPRESS-NEWS, Sept. 12, 2007; Jim Forsyth, *Hundreds of Non Citizens Have Registered to Vote in Bexar County*, 1200 WOAI, May 16, 2007.

42. Interview with Kevin Tyne, Deputy Sec’y of the State of Arizona (May 27, 2008).

43. *AZ to Seek Dismissal of Challenge to Voter ID Law*, KTAR 92.9 FM, May 26, 2008.

44. *See Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006).

45. *AZ to Seek Dismissal of Challenge to Voter ID Law*, *supra* note 43.

46. *Securing the Vote: Arizona: Hearing Before the Committee on House Administration*, 109th Cong. (2006) (statement of Andrew P. Thomas, Maricopa County District Attorney); *see also* Transcript of Southwest Conference on Illegal Immigration, Border Security and Crime, May 16, 2006.

tered and voted.”⁴⁷ Even these small numbers, though, could have been enough to sway an election. A 2004 Arizona primary election, explained the district attorney, was determined by just 13 votes. Clearly, non-citizens who illegally registered and voted in Maricopa County could have determined the outcome of the election.⁴⁸

These numbers become more alarming when one considers that only a very small percentage of registered voters are called for jury duty in most jurisdictions. The California Secretary of State reported in 1998 that 2,000 to 3,000 of the individuals summoned for jury duty in Orange County each month claimed an exemption from jury service because they were not U.S. citizens, and 85 percent to 90 percent of those individuals were summoned from the voter registration list, rather than Department of Motor Vehicles (DMV) records.⁴⁹ While some of those individuals may have simply committed perjury to avoid jury service, this represents a significant number of potentially illegal voters: 20,400 to 30,600 non-citizens summoned from the voter registration list over a one-year period.

Helping Aliens Vote

Under the Constitution, an individual’s eligibility to vote is left mostly to the states. Article I and the 17th Amendment provide that the electors for Members of Congress shall have the qualifications for electors of the most numerous branch of the state legislatures.⁵⁰ Article II provides that presidential electors shall be chosen in the manner directed by state legislatures.⁵¹ All of the states

require voters to be U.S. citizens to vote in state elections,⁵² and 18 U.S.C. § 611 makes it a crime for “any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector,” or Congress.⁵³

Other federal laws authorize the Justice Department to prosecute non-citizens for registering and voting in elections. The National Voter Registration Act of 1993 (NVRA) requires individuals registering to vote to affirm eligibility requirements, including citizenship.⁵⁴ The Help America Vote Act of 2002 (HAVA) added a specific citizenship question to the federal voter registration form.⁵⁵ Since citizenship is clearly material to a voter’s eligibility, aliens can be prosecuted for providing false registration information and voting under the NVRA.⁵⁶ They can also be prosecuted under 18 U.S.C. § 1015(f), which criminalizes making a false statement or claim about citizenship “in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum),” and under 18 U.S.C. § 911, which prohibits making a false claim of citizenship.

The NVRA has contributed to the problem of aliens registering to vote. The largest source of voter registrations are state programs created under Section 5 of the NVRA, known as “Motor Voter,” which requires all states to allow individuals who apply for a driver’s license to register to vote at the same time.⁵⁷ States such as Maryland, Hawaii, Maine, Michigan, New Mexico, Oregon, Utah, and Washington allow illegal aliens to obtain driver’s

47. *Id.*

48. *Id.*

49. Press Release, California Sec’y of State, Official Status Report on Orange County Voter Fraud Investigation (Feb. 3, 1998).

50. U.S. CONST., art. I, § 2, amend. XVII.

51. U.S. CONST., art. II, § 1, cl. 2.

52. See U.S. DEPT OF JUST., *supra* note 4, at 66.

53. An exception exists if the election is held partly for some other purpose, the alien is authorized to vote for such other purpose under a state or local law, and that voting is conducted “independently of voting” for candidates for federal offices. 18 U.S.C. § 611 (2008).

54. 42 U.S.C. §§ 1973gg-3(c)(2)(C), 1973gg-5(a)(6)(A)(i), 1973gg-7(b)(2) (2008).

55. 42 U.S.C. § 15483(b)(4)(A)(i) (2008).

56. 42 U.S.C. § 1973gg-10(2) (2008).

57. 42 U.S.C. § 1973gg-3 (2008).

licenses, and other states, such as Tennessee, provide licenses to resident aliens.⁵⁸

To comply with Motor Voter, states automatically offer voter registration to all applicants for a driver's license. Most government employees do so even when they know the applicants are not citizens because these employees do not want to face claims that they discriminated based on ethnicity, and they believe it is the responsibility of election officials, not state DMVs, to determine the eligibility of voter registration applicants. Yet when license bureaus submit completed registration forms to state election officials, they often omit the citizenship status of the applicants.

Savvy politicians may already have taken advantage of this state of affairs. During the Clinton Administration, for example, the Justice Department allegedly forced states to offer voter registration to non-citizens. In response, the Texas Secretary of State reportedly asked his attorney general to sue the department.⁵⁹

Confusion still reigns in the states. In 2004, a Maryland state legislator contacted the DOJ to express his concern that the Maryland Department of Motor Vehicles was allowing non-citizens applying for driver's licenses to register to vote. When he asked the DMV to stop, he was told that it was required by the NVRA to offer all driver's license applicants the opportunity to register to vote. The Justice Department quickly sent the Maryland delegate a letter pointing out that the NVRA had no such requirement and that federal law makes it a crime for a non-citizen to register. The letter went

on to say that a state that issues licenses to non-citizens should not offer such an individual the right to register to vote.⁶⁰ Nonetheless, there is no evidence that the Maryland DMV has changed its procedures to deter non-citizens from registering, and Maryland officials recently testified that they were issuing 2,000 driver's licenses per week to undocumented aliens.⁶¹

Utah, which issues licenses to illegal aliens, switched to a two-tiered system that issues a visibly different "driving privilege" card to illegal aliens after a limited 2005 audit by the state's Legislative Auditor General. The audit found that hundreds of illegal aliens had registered to vote when they obtained their Utah driver's licenses—and at least 14 of them had voted.⁶² The audit used a small sample; Utah State Senator Mark Madsen said that an extrapolation of the audit numbers suggested that 5,000 to 7,000 aliens were registered to vote.⁶³

This problem has been exacerbated by many states' interpretation of a HAVA provision that requires a citizenship question on the federal mail-in voter registration form. The provision, in 42 U.S.C. § 15483, requires the following question: "Are you a citizen of the United States of America?" If an applicant fails to answer this question, HAVA provides that the local election official must notify the applicant of the failure and "provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form" prior to the election.⁶⁴ Under the threat of lawsuits by organizations like the American Civil Liberties Union, states such as Ohio,

58. Daniel Vock, *Tighter License Rules Hit Illegal Immigrants*, Stateline.org, Aug. 24, 2007; Kathleen Hunter, *States Slow to Give Driver's Licenses to Illegal Aliens*, Stateline.org, July 1, 2004.

59. Juan Elizondo, Jr., *Agency Accused of Misusing Law*, AUSTIN AM.-STATESMAN, June 27, 1997.

60. Letter from Joseph D. Rich, Chief, Voting Section, Civ. Rts. Div., U.S. Dep't of Just., to Donald H. Dwyer, Jr. (Aug. 24, 2004), available at http://www.usdoj.gov/crt/voting/hava/MD_ltr2.htm. In my discussions with election officials when I was at the Justice Department, it seemed that they were very concerned about being sued by the Department of Justice under the NVRA for not fully complying with the driver's license voter registration provisions. Most state officials found it easier and less risky to register all driver's license applicants regardless of their citizenship status.

61. Interview with Don Dwyer, Maryland Delegate (June 23, 2008).

62. Off. of the Legis. Auditor Gen., State of Utah, ILR 2005-B, February 8, 2005; Deborah Bulkeley, *State Says 14 Illegals May Have Cast Ballots*, DESERET MORNING NEWS, Aug. 8, 2005. At least 20 of the registered voters were under deportation orders.

63. *Bill Would Change Voter Registration Rolls*, Associated Press, Feb. 7, 2006.

64. 42 U.S.C. § 15483(b)(4)(A) (2008).

Iowa, and South Dakota will register an individual even if he fails to answer the citizenship question. The Justice Department so far has failed to sue these states to force compliance with HAVA.⁶⁵

HAVA also imposes an identification requirement for first-time voters who register by mail.⁶⁶ Many states, including California, have interpreted this provision to apply only to registration forms received through the U.S. mail, so the requirement is easily avoided by turning in the registration form directly to election officials. Additionally, documents named in the law as acceptable forms of identification for voter registration, such as utility bills and bank statements, are easily obtained by non-citizens. HAVA also requires applicants to provide a driver's license number or the last four digits of their Social Security number but allows an individual to register even if he has neither number.⁶⁷

Practical Solutions

There are several changes that states and the federal government can and should make to prevent non-citizens from registering and voting illegally in state and federal elections:

- Congress and state legislatures should require all federal and state courts to notify local election officials when individuals summoned for jury duty from voter registration rolls are excused because they are not United States citizens. United States Attorneys are already under a similar obligation: Under the NVRA, they must send information on felony convictions to local election officials so that the felons can be removed from voter registration rolls.⁶⁸
 - All states should require anyone who registers to vote to provide proof of U.S. citizenship. This requirement should be identical to the federal requirement of proof for employment.
 - ICE and CIS should comply with federal law and confirm the citizenship status of registered voters
- when they receive requests for such information from state and local election officials. If the agencies decline to do so, they should be investigated by Congress and the Inspector General of the Department of Homeland Security (DHS) for their failure to follow the law.
 - The database, known as E-Verify, that is being used by U.S. employers to check the citizenship status of prospective employees should be made available to election officials and administrators of the statewide registration databases required by HAVA so that election officials can run database comparisons to identify registered voters who are not citizens.
 - The DOJ should file enforcement actions against all states that allow an individual to register to vote when he or she has not answered the citizenship question on the voter registration form required by HAVA.
 - Local district attorneys must be made to realize that registration and voting by non-citizens are offenses against the basic principles of our democratic system and that such cases must be prosecuted. CIS and ICE should also realize that all information they have on non-citizen voting—such as when immigrants applying for citizenship admit they have registered and voted or when illegal aliens who are detained are found to possess voter registration cards or other documents indicating they are registered to vote—must be referred to the DHS for institution of removal proceedings, to the DOJ for prosecution, and to the relevant election officials so that the individual can be struck from the registration rolls.
 - The DOJ should conduct a survey of all state DMVs to determine which ones have rules and procedures in place that prevent non-citizens who apply for driver's licenses from registering to vote and then file enforcement actions

65. See Ohio Sec'y of State, Directive No. 2004-31, Sept. 7, 2004; Letter from Chris Nelson, South Dakota Sec'y of State, to County Auditors (Oct. 25, 2004); Letter from Thomas J. Miller, Iowa Att'y Gen., to Chester J. Culver, Iowa Sec'y of State (Oct. 20, 2004).

66. 42 U.S.C. § 15483(b) (2008).

67. 42 U.S.C. § 15483(a)(5) (2008).

68. 42 U.S.C. § 1973gg-6(g) (2008).

against any state that refuses to comply with this requirement.

- A voter registration card should not be a valid identifying document to obtain a driver's license or employment.

Conclusion

America has always been a nation of immigrants, and we remain today the most welcoming nation in the world. Newly minted citizens assimilate and become part of the American culture very quickly. Requiring that our laws—all of our laws—be complied with requires no more of an alien than it does of a citizen. It is a violation of both state and federal law for immigrants who are not citizens to vote in state and federal elections. These violations effectively disenfranchise legitimate voters whose votes are diluted, and they must be curtailed.

Election officials have an obligation not only to enforce those laws, but also to implement registration and election procedures that do not allow those laws to be bypassed or ignored. Anything less encourages contempt for the law and our election process. Lax enforcement of election laws permits individuals who have not entered the American social compact or made a commitment to the U.S. Constitution, U.S. laws, and the U.S. cultural and political heritage to participate in elections and potentially change the outcome of closely contested races that affect how all Americans are governed.

—Hans A. von Spakovsky served as a member of the Federal Election Commission for two years. Before that, he was Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, where he specialized in voting and election issues. He also served as a county election official in Georgia for five years as a member of the Fulton County Board of Registration and Elections.