

Non-Citizen Voters Diluting the Rights and Privileges of Citizenship

By W.D. Reasoner

Executive Summary

This *Backgrounder* discusses one of the latest skirmishes in the federal-state boundary wars: efforts by state electoral officials to vet voter registration lists to prevent non-citizens from registering and casting ballots. Interestingly, it is once again the states that are demanding that the distinction between alienage and citizenship be enforced while the federal government again has acted to frustrate state efforts through denial of access to information and the filing of lawsuits.

Here are the key findings:

- Throughout American history, in keeping with established principles of national sovereignty, a bright line has been established by the Constitution between citizens and aliens with respect to the rights and privileges accorded to each, including the right to vote, a privilege reserved solely for citizens. The Constitution also apportions to the states the right to establish laws governing the electoral process for members of both houses of Congress. Yet some states have encountered resistance in attempting to verify the status of potentially ineligible non-citizen voters they have discovered on their registration lists.
- In Colorado, 11,805 discrepancies were discovered between individuals who presented proof of alienage when applying for driver's licenses, but who later registered to vote. Of these, many were resident aliens who may or may not have naturalized before registering to vote. But a significant number of other individuals who registered to vote were not even resident aliens and thus could not by law have naturalized. Colorado's request for Department of Homeland Security (DHS) SAVE database information to positively identify individuals' immigration or naturalization status was refused.
- In Florida, state officials developed a preliminary list of about 180,000, later refined to 2,700 apparent discrepancies, which was sent to local electoral officials for further review and inquiry. It also was refused assistance from DHS. When the federal Department of Justice (DOJ) threatened suit, many counties declined to take action on the questioned names; but some counties pressed forward, resulting in identification of nearly 100 noncitizens according to media reports. DOJ's lawsuit was dismissed in a federal district court, prompting DHS to agree to provide access to SAVE records. Despite the dismissal, DOJ has issued subpoenas for the records of those counties that were not deterred by the legal action.
- The federal government's denial of access to SAVE for vetting voter lists appears to have been in contravention of Title 8, Section 1373 of the United States Code, which unambiguously requires immigration authorities to respond to queries from other federal, state, or local officials seeking information relating to an individual's citizenship or immigration status.

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- Polling data has found strong public support for Florida's efforts to vet voter registration lists, despite the frequently negative tenor of media coverage, for example by referring to them as "purges". A June Quinnipiac University poll found that three-fifths of Floridians approved of state officials' investigations.
- Efforts to uncover voter fraud involving aliens are not a new phenomenon, but date back to the 1990s. A June 2005 report from the Government Accountability Office (GAO) identified the possibly significant scope of the problem, finding that up to 3 percent of individuals called for federal jury duty from voter registration lists in one district were not U.S. citizens.
- Federal law very specifically prohibits and criminalizes false claims to U.S. citizenship and voting by ineligible aliens. Congressional intent to see aliens prosecuted for voter fraud was reiterated as recently as the Help America Vote Act of 2002.
- Yet no U.S. Attorney's Office (USAO) appears to have initiated any effort to prosecute aliens for voting. Nor has the Department of Homeland Security (DHS) initiated the deportation of aliens who have registered or voted illegally, which it can do independently of a prosecution by the USAO or state prosecutors.
- The Help America Vote Act (HAVA) provided a basis for each state to develop and maintain a statewide voter registration list, with grant monies and a set of standards to support this effort. Little progress seems to have been made, however.

The author recommends the following steps as essential to making progress on voting integrity:

1. Systematize vetting efforts so that they are routine, expected, and transparent. This would include "front-end" screening and on-going list maintenance.
2. Use technology wisely and minimize the more error-prone biographic screening by integration of biometric screening tools such as digital photographs into the process as these are already part of the DHS records of aliens and naturalized citizens.
3. Promote federal-state cooperation, with DHS assisting state governments by providing information on non-citizens and also reviewing state efforts for fairness and consistency with civil rights statutes. The federal government should also facilitate registrars' efforts to correctly assess individuals' citizenship status and right to vote, particularly at polling places. This can be done through issuance of U.S. citizen identification cards to newly naturalized and derivative citizens; and through preparation and distribution of a pamphlet for registrars that clearly identifies and provides photos of various forms of citizenship and naturalization documents.

Introduction and Background

Matters touching on immigration directly or indirectly are among the subjects that most quickly breed incivility in the national dialog today. This is disheartening because poll after poll tells us that most Americans wish to see immigration laws enforced fairly and uniformly.

It is also curious to observe the fault lines in the debate because they do not always fall where and how one might expect. For instance, one would think that the federal government would have a keen interest in enforcement since laws dealing with immigration and nationality emanate at the federal level. Not always so — and certainly not in this administration, which has sharply curtailed immigration enforcement in ways large and small throughout the nation, and concurrently made clear its desire for a broad-based amnesty for illegal aliens. As a result of perceived federal laxity and inactivity, several states, including Arizona, enacted statutes to permit their police officers to enforce federal immigration statutes. In turn, the consequence of that, as most readers know, was a lawsuit promptly filed by the federal government alleging the statutes improperly interfered in federal prerogatives such as, apparently,

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the prerogative *not* to enforce immigration laws as it so chooses, despite the clear impact on states in areas ranging from education to health care to crime; most particularly on those states proximate to the border.

Reacting to the proliferation of state statutes, many open-borders and immigrant advocacy groups referred disparagingly to “states’ rights” and “state supremacy” battles, deliberately using inflammatory language designed to harken back to this country’s troubling history of segregation. But it is apparently a selective kind of abhorrence of states’ rights (which, by the way, are firmly grounded in the language of the Constitution), because they have no reluctance at all in calling for state and local governments to pass sanctuary laws in defiance of federal statutes and regulations — and even ordinances prohibiting police from honoring detainers filed by federal immigration authorities against illegal aliens arrested for crimes — again, one of those curious fault lines that zigs and zags according to the needs of the moment. And the federal government, which did not hesitate to file multiple lawsuits against various states, has to date stood idly by while states and localities obstruct the enforcement of our nation’s immigration and nationality laws through those sanctuary ordinances and policies.

In a split decision issued in the latter part of June 2012, the Supreme Court selectively upheld key provisions of the Arizona statute, while ruling others unconstitutional for improperly intruding on a federal prerogative.¹ The decision left both sides declaring victory, and probably puzzled many members of the public who don’t fully comprehend the nuances of immigration law and the notion of federal preemption, which can be as baffling as the mythical maze of the Minotaur.

It is against this backdrop that one of the latest skirmishes in the federal-state boundary wars has flared up. And interestingly, it is once again the states that are demanding that the bright line between illegal and legal immigration, between alienage and citizenship, be enforced while the federal government again has acted to frustrate state efforts through denial of access to information and the filing of lawsuits. Although, as before, several states are involved, this time Florida has come to the fore as the battleground in which this will play out.

This skirmish involves efforts by electoral officials in several states to vet voter registration lists to ensure that ineligible voters — including, specifically, aliens who may have falsely claimed United States citizenship — are removed from those lists. Many media outlets and opponents of the efforts have taken to disparagingly referring to the process as “purging” the lists. Opponents have also alleged that it amounts to an effort to curtail the right of certain minorities — primarily Hispanics — to vote.

Sovereignty, Citizenship, the Right to Vote, and Our Federal System

To properly frame the issues surrounding the right to vote, it is necessary to take a short detour into the philosophical underpinnings of sovereignty and citizenship. The concept of the nation-state is a relatively recent development in the course of human history. For a nation-state to assert that it truly exists, both in a practical and legal sense, it must be able to establish its sovereignty on a continuing basis. Generally, sovereignty involves the ability to claim dominion and control over a finite piece of territory (although border fringes may sometimes be in dispute with neighbors, the core area is not in doubt). Such control also requires a functioning government capable of defending its claim over its borders. The third necessary ingredient of a nation-state is to be possessed of a people, who generally are born and reside in its territory, that claim certain rights, privileges, and responsibilities in return for allegiance to the laws and governing structure of the state.

By its very nature, there is a certain “us and everyone else” inherent in a nation-state. Citizens are accorded a right of preference: they can live within its borders perpetually, providing of course they do not become disenfranchised, for instance by expatriation or acts of treason. Others who are not citizens — foreigners, or “aliens” in modern usage — are granted or denied the privilege to enter or reside in the territory of the nation under rules established by the state.

Generally accepted in today’s world is the right of citizens to vote; even autocracies usually go through the charade of holding elections (though the results may be pre-ordained) in a bow to modern notions of universal suffrage. But

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“universal” is an elastic term, and does not mean the right of aliens within a country’s borders to vote in its elections. The reason is obvious enough: for a people to exercise dominion over themselves, their vote must not be diluted by those who have not naturalized, have not become a part of the whole, and whose commitment to the territory, to the body politic, and therefore to the future of the nation, is significantly less than those whose individual and collective wellbeing are comingled with the nation’s.

Denying aliens the right to vote, like establishing immigration laws by which aliens may be admitted or excluded, is inextricably linked to a nation’s assertion of sovereignty. If a nation cannot, or chooses not to, meaningfully differentiate between citizens and aliens, then it is simply a welcome mat or transit point for all peoples, and not truly a nation at all. It may be overrun, or abandoned, at the whim of the entire world.

Establishing sovereignty through clear distinctions between citizens and “others” is not an exercise in elitism, but an act of enlightened self-interest. The United States is perhaps the most liberal nation-state on the globe where immigration is concerned. And yet our founders and their successors, obviously concerned to ensure that the government should be formed by and protect those with the most firmly established attachment to (and vested interest in) the nation, deemed it so important they embedded a number of important “delimiters” in our supreme law of the land, the Constitution and its amendments² —

- Only Congress is authorized to determine which aliens may become citizens by “establish[ing] a uniform Rule of Naturalization”.³
- “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”⁴
- The president must be a natural-born citizen of the United States, and have resided in the country for a minimum of 14 years.⁵
- Members of the House of Representatives and the Senate must have been citizens of the United States for seven and nine years, respectively.⁶

These delimiters make clear that even in our federal system where states possess the powers and authorities not specifically granted to the federal government,⁷ they do so within a delineated framework. Congress retains the authority to exercise adequate oversight in ensuring that the right to vote is not improperly abridged, as it did when passing the Voting Rights Act, although it generally (and wisely) treads lightly where voting enrollment systems and procedures are concerned, as those matters are undeniably within the province of states’ rights.

Other, equally important constitutional provisions make the right to vote nearly universal among citizens of the United States (although the Constitution does not forbid states from disenfranchising certain citizens, such as the insane or convicted felons whose rights have not been restored by the relevant state laws):

- “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁸
- The right to vote “shall not be denied or abridged by the United States or by any State on account of sex.”⁹
- “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.”¹⁰
- “The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.”¹¹

It is obvious that, where the right to vote is concerned, throughout American history a bright line has been established between citizens and aliens by the Constitution itself—supreme law of the land and basis for existence of the federal government. However, the same Constitution apportions to the states the right to establish laws governing the electoral process for members of the House of Representatives and Senate¹² provided, however, that a state’s U.S. Senators must be elected by the people of the state (i.e. they may not be selected by state legislative bodies).¹³

Current Efforts to Vet State Voter Registration Lists

The foundation for the most recent skirmish was laid in early 2011 when several states, including New Mexico and Colorado, indicated their intent to check statewide voter lists to ensure that no individuals were enrolled who had no right to vote. In Colorado’s case, a rationale for the decision was prepared by way of a white paper dated March 8, 2011.¹⁴ In a letter of the same date, Colorado Secretary of State Scott Gessler wrote Department of Homeland Security Secretary Janet Napolitano requesting access to the DHS SAVE database in order to cross-reference names on Colorado voter rolls with alien data contained in that database.¹⁵ In his letter Gessler said, “It is imperative to the integrity of Colorado elections that we ensure only U.S. citizens are registered to vote and voting in our elections.”

The problem laid out by Secretary Gessler is not a minor one. As the Colorado white paper indicated, after a lengthy culling process to eliminate duplicate records, a comparison of motor vehicle records with voter registration lists still reflected the existence of 11,805 discrepancies; that is to say, individuals registered to vote who, by the documents they themselves presented when obtaining licenses, were not citizens at the time they obtained driver’s licenses from the state. This surprisingly substantial number is what caused senior state officials to seek the assistance of the federal government in further examining the discrepancies in order to make the best determinations possible as to the integrity of Colorado’s voter registration rolls. Table 1 reproduces the relevant portion of the table prepared by the state as shown in its white paper.

	Employment Authorization Document	I-94 Arrival/ Departure Record	Resident Alien Card	Totals
Individuals Listed on the Voter Rolls	1,338	419	10,048	11,805
Individuals Who Voted in the 2010 General Election	603	130	4,214	4,947

It is possible, even likely, that some proportion, although by no means all, of the individuals who presented documents establishing alienage at the time they obtained their driver’s licenses later naturalized — or, in a few cases even may have been determined to be derivative United States citizens (a rare, but not unknown circumstance) — and therefore were showing themselves to be responsible citizens by registering to vote.

But, as clearly shown in the white paper, Colorado law requires the motor vehicle agency to accept several forms of alien registration documents from individuals who are not resident aliens — e.g. from nonimmigrant students, asylees, and individuals given work authorization cards (for instance, when granted temporary protected status or in connection with another temporary legal status) — and who therefore would not have been eligible to naturalize.

And even resident aliens, as a general rule, cannot naturalize until they have been resident in the United States for at least five years (or three years if married to a U.S. citizen), and establish other requisite requirements such as a period of physical presence, good moral character, English competency, etc.

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However, let us assume for the sake of argument that fully half of the individuals who presented resident alien cards at the time of obtaining driver’s licenses later naturalized. That still leaves us with the data in Table 2.

	Employment Authorization Document	I-94 Arrival/ Departure Record	Resident Alien Card, Reduced by Half	Adjusted Totals
Individuals Listed on the Voter Rolls	1,338	419	5,024	6,781
Individuals Who Voted in the 2010 General Election	603	130	2,107	2,840

We can see that, all factors considered, it is reasonable to assume that a significant number of aliens in the state of Colorado registered to vote, and/or voted, illegally. Certainly, there are innumerable articulable facts pointing in that direction; so many that some might consider it misfeasance if Colorado state officials did not go to the federal government to ask for the data required to resolve their concerns.

Nonetheless, as the matter garnered media attention, positions began to harden, critics became vocal, and Congress got involved. According to the *Denver Post*, when Colorado Secretary of State Scott Gessler was called last March to testify before Congress about his concerns over state voter rolls, Rep. Charles Gonzalez (D-Texas) “raised doubts about the reporting, noting that the study itself said it was based on inconclusive data and that it was ‘impossible to provide precise numbers’ on how many people who were registered to vote in the state were not citizens” and “asked Gessler, a former prosecutor, if he would have pursued a court case on such evidence.”

Rep. Gonzalez’s line of questioning seems, at least to this writer, to be both inapt and circular.

Inapt, because no prosecutor files charges until there has been a thorough investigation to determine whether a crime has been committed and a suspect has emerged. What Colorado was trying to do was the administrative equivalent of such an investigation — gather the facts in order to determine whether unauthorized individuals had registered to vote — and was asking for federal assistance to do so. This was evident when Gessler answered in a restrained way that “the goal of the study was to expose voter registration issues and pursue administrative avenues to resolve them. ‘We don’t have a screen for citizenship on the front end when people register to vote,’ he said.”¹⁶

Circular, because the gist of his logic, like that of many opponents of voter vetting efforts, seems to be something along the lines of, “you have no absolute evidence that there is significant fraud in your voter lists because you don’t have access to the systems you need to find out; therefore, you don’t get substantial proof that there is a problem; ergo you shouldn’t get access to those systems, and you need to drop this.”

It was well over a year later, on May 10, 2012, before Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services (USCIS), a DHS component agency, wrote back declining to negotiate with Colorado the terms for providing the state access to SAVE, stating, “[W]e must further assess serious legal and operational issues that remain before we can make a determination on your request. Accordingly we are unable to enter into a SAVE Memorandum of Agreement [MOA] at this time”.¹⁷

The denial appears to have been in contravention of federal law, which unambiguously requires immigration authorities to respond to queries from other federal, state, or local officials seeking information relating to an individual’s citizenship or immigration status.

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Title 8 of the United States Code, Section 1373(c) states:

“(c) Obligation to Respond to Inquiries

“The Immigration and Naturalization Service [the now-defunct predecessor to DHS’s immigration compliance and enforcement agencies] shall 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.”

The plain language of the law clearly requires the appropriate components of DHS, in this case USCIS, to cooperate by providing state electoral officials access to the information needed to permit them to effectively screen out ineligible aliens who have registered to vote. Instead, DHS chose to take the path of most resistance in steadfastly declining to assist states in ensuring, in a fair and even-handed way, that voter registration is maintained only for those who are legally entitled to vote.

While all of this was playing out, though, at least one other state — Florida — determined to undertake a similar vetting of its statewide voter registration rolls. At about the time that Mr. Mayorkas was sending his response to Colorado, articles began appearing in Florida newspapers outlining the efforts in that state to determine the citizenship of persons on voter rolls. State officials developed a preliminary list of about 180,000, later refined to 2,700 apparent discrepancies that were sent to local electoral officials for further review and inquiry. They also asked for information from the SAVE database to aid their efforts and, as in Colorado, were refused.

One might reasonably call many of the media articles describing Florida’s efforts as negative, in that they gave ample space for critics of the exercise to engage in histrionics and hyperbole about the dark reasons (partisanship, race, ethnicity) it was taking place, at the same time dwelling on the few number of persons discovered by the state’s vetting — although like Colorado and other states, it was hamstrung by the DHS/USCIS refusal to cooperate through provision of information.

For instance, an item appearing in the *Miami Herald* on May 29, 2012, entitled “South Florida Democrats say Gov. Rick Scott leading ‘misguided’ effort to purge voters from state rolls”, highlighted the case of a native-born citizen, one Bill Internicola, who received a notice from the Broward County supervisor of elections questioning his citizenship.¹⁸ He expressed his outrage, flanked by two legislators from south Florida. Clearly a mistake had been made, based on insufficient data.

Harkening back to Colorado Secretary Gessler’s comment (“We don’t have a screen for citizenship on the front end when people register to vote.”), at heart one suspects it is not that Mr. Internicola was asked to establish his citizenship *per se*, but rather the uniqueness of the exercise; it was being singled out after the fact that incurred his ire. Were such checks commonplace either at the front end or periodically afterward, he probably would think no more of it than having to establish his identity when making a credit card purchase. It is also noteworthy that — despite assertions in Florida and elsewhere that these exercises are aimed at purging Hispanics from the voter lists — the example put forward was a man of Italian-American heritage.

Interestingly, despite the frequently negative tenor of news items and critical op-eds in the media, when Quinnipiac University polled Floridians, it found that three-fifths approved of the state’s effort to vet voter registration lists.¹⁹ This should not be a surprise since, as mentioned earlier, most Americans favor immigration control measures of virtually all sorts when asked their opinions.

Not only did DHS decline to assist Florida, however; in a letter dated May 25, 2012, T. Christian Herren, Jr., Chief of the Department of Justice (DOJ) Voting Section, wrote to Florida Secretary of State Ken Detzner demanding that Florida cease its efforts.²⁰ On June 6, Detzner wrote back, declining to put a halt to the vetting. Nonetheless, the letter served a valuable purpose — once aware that DOJ disapproved and was making threatening noises, many

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county electoral officials either declined to participate in the vetting process or ceased their activities. Because they are independently elected officers in Florida's constitutional schemework, it is unclear what leverage the state holds to require them to move forward or take other actions.

Yet even in the absence of federal database information or assistance, and in the face of an increasingly intransigent DOJ, at least 100 aliens not authorized to vote were in fact identified as being on Florida's voter rolls in those counties that conducted any reviews, according to articles that have appeared in the *Orlando Sentinel*, *Miami Herald*, and *Tampa Bay Times* newspapers.²¹ Based on information in the articles, it appears that some may be charged criminally by state authorities for voter fraud.²² There is no way to know how many more might have been identified had all counties conducted thorough reviews and had access to SAVE information.

After Secretary Detzner declined on behalf of the state to halt vetting activities, DOJ and Florida filed suits against one another in U.S. District Court. The federal action sought an injunction against Florida, alleging violation of the Voting Rights Act, as detailed in the May 25 Herren letter. Significantly, in its suit Florida asked the Court to issue an order requiring DHS to provide the state access to the SAVE database as required by the federal statute cited previously, 8 U.S.C. § 1373(c).²³

At a hearing on June 27, the U.S. District Court rejected the federal government's request for injunction, with the presiding judge, Robert Hinkle, quoted as saying, "Questioning someone's citizenship unnecessarily is not as trivial as the state would have it. But leaving an ineligible voter on the list is not a solution. People need to know we are running an honest election."²⁴

In a matter of weeks, with Florida's suit against DHS still pending, USCIS Director Mayorkas — probably attempting to forestall the increasingly likely embarrassment of a District Court order requiring his agency to obey federal law — wrote to Florida Secretary Detzner advising him that USCIS was amenable to signing a MOA. According to the Associated Press, many more states are now pressing for access to SAVE for similar purposes: Alaska, Arizona, Arkansas, Georgia, Iowa, Kansas, Michigan, New Mexico, Ohio, and Utah.²⁵

The latest zig-zag in the *U.S. v. Florida* contest came on July 30 when, according to subsequent media sources, the federal government subpoenaed the electoral records of multiple Florida counties, so that it could examine information "generated, provided, or transmitted by Florida to [your] county that identify registered voters, including [your] county registered voters, as potential non-citizens based on Florida's data matching procedures using the Florida Voter Registration System (FVRS) and the Florida Department of Highway Safety and Motor Vehicles' (DHSMV) Driver and Vehicle Information (DAVID) database."²⁶ The cynically inclined among us might conclude from the move that this administration only honors judicial decisions when they are favorable. Those even more jaded might see a darker strategic motive: leapfrogging past states in order to harass and intimidate the local officials who are actually responsible under most state constitutions for registering voters. What is more, county governments are even less likely to have the deep pockets needed to fight such moves either politically or legally.

A Look in the Rearview Mirror

Many readers will be surprised to discover that this issue isn't by any means new; it simply lies dormant and flares up from time to time because it has never been adequately resolved. For instance, in June 2005 GAO issued a report entitled "Elections: Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists".²⁷ That report speaks to many of the issues that have been present in the current debate. It also makes reference to efforts to uncover voter registration fraud involving aliens and others going back to the 1990s. It was one of a series of reports dealing with the complex matter of voter registration integrity.

In July 2008, Hans A. von Spakovsky produced an article for the Heritage Foundation entitled "The Threat of Non-Citizen Voting". He cites, among other things, the GAO report noted above, which 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.”²⁸ A difference of 3 percent is enough to change the results of a close election, as we have seen in a number of congressional races in recent years²⁹ — not to mention the 2000 presidential election in which Florida’s “hanging chads” figured so prominently.

Bright Lines and Penalties

On June 30, 2012, Brent Wilkes, national executive director of the League of United Latin American Citizens (LULAC) was interviewed by a Florida newspaper in the middle of the flap over state efforts to ensure the integrity of its voter registration rolls, leading to this interesting question-and-answer:

“**Q:** But isn’t Florida obligated to boot ineligible voters?”

“**A:** Absolutely. But one thing you have to be cognizant of is that ... there’s no way anybody is going to convince someone who is undocumented to stick their head out just to go vote when that could be an opportunity to [run into] authorities that could lead to your deportation.”³⁰

The response is sophistry at its finest. Who said anything about illegal aliens registering to vote? They may or may not have — that will only be known after a careful review of voter registration lists —but the fact is that it is *just as unlawful for resident aliens to vote*, something Mr. Wilkes in his position is most surely aware of, and apparently wishes to draw our attention away from, by offering up a scenario deliberately intended to trivialize electoral integrity concerns. This misdirection appears to be part of a pattern and practice by many immigrant advocates of blurring the bright line between alienage and citizenship.

Alien residents who wish to vote know what they need to do: assimilate. Take the final step. File for naturalization and swear the oath of citizenship. Until they are ready to make that commitment, why should they avail themselves of the right to select the leaders who govern our country at any level? And why should we allow them to do so?

In fact, as a legal (if not necessarily factual) proposition, we don’t. Each of the sovereign states, with its own constitutionally protected powers, provides significant criminal and civil penalties against election fraud of many sorts, including false statements in registering to vote.

Congress certainly takes the issue of citizenship and voting very seriously:

- 18 U.S.C. § 911 criminalizes false claims to U.S. citizenship.
- There are substantial penalties in the federal criminal code that prohibit committing fraud and false statements generally — see, for instance, 18 U.S.C. § 1001 — which may be applied toward false statements on voter registration forms.
- 18 U.S.C. § 611 (a recent provision added by Congress in 1996) makes it a crime for aliens 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, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner”.
- 18 U.S.C. § 1015(f) very specifically criminalizes false claims to citizenship for the purpose of voting in any federal, state, or local election.
- 42 U.S.C. § 1973GG–10(2) generally criminalizes submission of voter registration applications, or casting of ballots, that are known to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held.

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Congressional intent to see aliens prosecuted for voter fraud was reiterated as recently as 2002, with enactment of the Help America Vote Act (HAVA). Section 905(b) of HAVA, codified at 42 U.S.C. §15544(b), asserts plainly:

“(b) False Information in Registering and Voting. — Any individual who knowingly commits fraud or knowingly makes a false statement with respect to the naturalization, citizenry, or alien registry of such individual in violation of section 1015 of title 18, United States Code, shall be fined or imprisoned, or both, in accordance with such section.”

Notwithstanding this clear direction, it is interesting to note that media reports surrounding the various “purge” efforts, notably in Florida, speak only to possible state prosecutions of aliens discovered to have fraudulently registered and voted. No U.S. Attorney’s office appears to have initiated any effort whatsoever to prosecute those aliens.

But that is not the only effort remarkable by its absence. In civil immigration proceedings, false claims to U.S. citizenship, including those made by an alien to procure employment or to vote, render that alien subject to exclusion or deportation.³¹ It is notable that the removal of an alien for violation of these provisions requires proof (as do all charges of removability), but does not require a conviction. It is also notable that the provisions apply to all aliens *regardless* of their status in the United States. Yet to date, no effort has been made by DHS or any of its component agencies to initiate deportation of aliens who have registered or voted illegally.

Back to the Future

Those who denigrate the efforts of state officials to ensure that their voter rolls include only those United States citizens eligible to vote have said that comparing those lists against information in motor vehicle records, which in turn have been matched against Homeland Security databases, does not always establish proof that an individual isn’t eligible to vote because the biographic data can be erroneous or inconclusive; or based on persons with similar names, dates of birth, etc.

That may be true, but it’s a shortcoming inherent in all biographic-based systems, not just those relating to immigration records. The *Orlando Sentinel* recently ran a story about a native-born citizen who has been stricken from voter lists (among other harms) because the Social Security Administration — whose Death Matching File (DMF), please note, is also made available for voter registration integrity efforts, apparently without adverse comment by sundry interest groups or obstruction by the federal government — has repeatedly and erroneously declared her dead.³²

Some opponents also have noted that state motor vehicle records used to help flag potential non-citizen voters may be flawed because of lag times between when an individual naturalizes or is determined to be a derivative U.S. citizen and when DHS electronic systems — including SAVE, which helps vet motor vehicle records — are updated. That is probably true, as at least one newspaper article has pointed out,³³ but it seems a doubtful proposition at best to suggest that states should not engage in voter registration integrity examinations because of flaws in the way the federal government goes about its business, especially since the fix is readily achieved by forms and methods already available to USCIS. This point also argues eloquently for why states should be given unhindered access to that information that DHS does possess in its records, instead of motor vehicle records that are only updated as often as an individual applies for a driver’s license, an extension, or a replacement.

As a matter of logical consistency, one would also think that those who object to the biographical data limitations would also then object as strenuously to motor-voter registration programs as to de-registration efforts since the methodology of the one mirrors the other, and it is just as likely to result in false positives or negatives. But they don’t. Their advocacy for, or objection to, data limitations is a curious one-way street. By way of example, published news accounts indicate that the state of Washington has recently initiated a plan to permit individuals to register to vote using Facebook.³⁴ According to the accounts, the Facebook registration will marry up against Washington state motor vehicle records behind a firewall that supposedly cannot be hacked. Those records, in turn, will rely on SAVE data to make a confirmation of the individual’s citizenship. Advocates have embraced the plan with enthusiasm,

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though it remains to be seen whether their plan possesses sufficient safeguards to protect against fraud, identity theft, error, or hacking.

Ironic though it may be in light of the suits and countersuits that states' voter list vetting has engendered, their efforts to confirm voters' eligibility, including through verification of citizenship status, and maintain the integrity of statewide lists aren't likely to abate — they will most probably intensify. This is because the little-remarked federal law mentioned earlier, the Help America Vote Act of 2002, among other things, established the basis for the first time in our nation's history for each state to develop and maintain a computerized statewide voter registration list, providing grant monies and establishing standards for doing so.³⁵ Prior to HAVA, most electoral lists were maintained exclusively by local governments (counties, parishes, municipalities, etc.) within each state.

HAVA additionally required the Attorney General to review, and report to Congress on, the adequacy of existing electoral fraud statutes and penalties, although it established no timeframe or deadline for completion of the task.³⁶ We could not locate such a report, but did find a report on election crimes prepared by consultants to the federal Elections Assistance Commission (EAC) established by HAVA³⁷ and a Justice Department handbook, "Federal Prosecution of Election Offenses, Seventh Edition (Revised August 2007)",³⁸ which speaks briefly to alien voting crimes.

Reasonably enough, Congress also embedded in that portion of the law a requirement that "[t]he appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis" It is clear from the follow-on language of the statute that maintenance includes removal of ineligible voters from the lists. The likely reason that it has taken several years between passage of HAVA and the current vetting efforts is because there was a statutory phase-in period, with waivers available to states as they developed their HAVA compliance plans.

Yet even the National Voter Registration Act of 1993 (NVRA), commonly referred to as the "motor voter registration law" because it authorizes registration of voters concomitant with obtaining driver's licenses at state motor vehicle agencies, contained language authorizing officials to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters" and to engage in "program[s] or activit[ies] to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office."³⁹

The curious thing is not that such efforts are undertaken, it is that they have not been undertaken routinely and systematically despite the passage of so much time since enactment of NVRA in 1993, and the reiterated requirements enacted by HAVA in 2002.

Given that voter registration integrity efforts are unlikely to go away — nor should they; to the contrary, they should be performed regularly as required by law — the question is: Where do we go from here? Here are a few ideas.

1. States should systematize the vetting efforts in the short term so that individuals do not feel threatened or singled out, while focusing long-term efforts on developing acceptable front-end screening.
2. State and federal governments should embrace the wise but restrained use of technology that can assist in overcoming the errors and shortcomings of solely biographic data when vetting registered voter lists.
3. Federal officials in the executive branch must resolve to actively aid states in maintaining the integrity of their voter rolls. This actually provides them opportunities to shape the manner in which maintenance and vetting take place.

Recommendations

Systematize Efforts. Transparent procedures must be adopted and used routinely by states in scrubbing existing lists. Efforts to safeguard the integrity of voter registration rolls should not be so exceptional as to raise eyebrows or hackles when conducted. To the contrary, such efforts should be systematized, and include both statistical sampling and targeted efforts as necessary. Public information campaigns would greatly help in alleviating fears or the feeling of having been singled out.

In the long run, voter registrations should include “front-end” screening efforts of the type mentioned by Colorado Secretary of State Gessler, as well as the type required for the routine maintenance outlined in HAVA.

Use Technology Wisely. There is nothing wrong with leveraging technology to achieve universal voter registration — for those entitled to vote, and provided that intelligent and appropriate safeguards are in place. What is troubling is that many advocates who push for adoption of cutting-edge technology that expands the vote — at least among those segments of the population they purport to represent — show another face to the world when that same technology is then used to winnow out, and possibly punish, ineligible voters. It is even more troubling when governments take the same horse blinders approach.

Technology is neither inherently good nor evil; it depends on the uses to which it is put. What is clear, though, is that technology isn't going away, and sometimes seems to move at an ever-faster pace with which many of us struggle to stay abreast. So it should be harnessed to do the jobs it can do best. Among those things is to both promote voter registration and at the same time prevent fraudulent registries. How? Through use of biometrics to positively identify voters in addition to the use of biographic data, which when used alone inevitably lead to error.

Actively Aid States. The Real ID Act established basic biometric thresholds for motor vehicle licenses and identity cards issued by states — photos in most instances, although a few states apparently also use digital thumb- or fingerprints. Biographic motor vehicle records are already being tapped for voter vetting efforts. Why not use the biometrics as well? Section 221(e) of HAVA (42 U.S.C. §15361(e)) authorizes and directs the Election Assistance Commission to consult with the National Institute on Standards and Technology (NIST) on ways to strengthen voting processes. HAVA also authorizes the EAC to periodically examine electoral administration issues including fraud, and to conduct pilot programs. Digitized photographs form a part of the DHS records of aliens and naturalized citizens. Facial recognition technology may merit examination in the context of such a pilot, overseen with NIST assistance, when base biographic data are not adequate to positively identify individuals whose right to vote has been questioned by biographic data anomalies.

Federal-State Cooperation

Furthermore, when biographic data matching techniques are pursued to their logical and fair conclusion, using the best technology available in as non-intrusive manner as possible, but still fail to reconcile the identity of an individual whose right to vote has been questioned, then discreet, respectful interviews are surely appropriate. Were this the norm instead of the notable exception, few would object. Instead of keeping state officials at bay with lawsuits and statutorily prohibited denials of access to needed information, the federal government should commit itself to working fully and cooperatively with them in their effort to discharge their constitutional and *federally mandated* responsibilities in a legally responsible way. Two concrete and practical ways in which this can be done are ready at hand.

First, DHS should facilitate registrars' efforts to correctly assess individuals' citizenship status and right to vote, particularly at polling places on Election Day. This can be done through reinstating issuance of U.S. Citizen Identification Cards to newly naturalized and derivative citizens — preferably at the same time that these individuals receive their certificates of citizenship.⁴⁰ This would ameliorate the problem of lag times between the time of

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naturalization (or a finding of derivative citizenship), and when records may be updated in electronic systems and downloaded into SAVE or motor vehicle databases.

Second, DHS should prepare and distribute, free of charge, a pamphlet for registrars that clearly identifies and provides photos of various forms of citizenship and naturalization documents such as the identity card described above, passports, certificates of citizenship, etc. The prototype for such a document exists already in the *M-274 Handbook for Employers* prepared and distributed by USCIS to facilitate compliance with federal immigration employment verification laws, or in the *Guide to Selected U.S. Travel and Identity Documents*, produced by ICE's Forensic Document Laboratory. Significant effort should be expended to make its existence known and to ensure wide distribution—an appropriate task for the Justice and Homeland Security civil rights entities described below.

In addition, USCIS employees should stand ready to aid state and local elections officials—not in determining who is entitled to vote, but in providing expert advice on an individual's status as an alien versus a derivative or naturalized citizen. The model for such a “business process” already exists; it is how USCIS reconciles information for the E-verify system to determine whether or not an individual is legally entitled to work. It would take little to expand the concept to include determinations of status for inquiring electoral officers. The procedure for contacting USCIS officers to obtain such determinations could be included in the registrars' information pamphlet described above.

Finally, DOJ's Civil Rights Division and DHS's Office of Civil Rights and Civil Liberties should actively participate through review and participation in developing the methods by which DHS agencies provide system information and expert advice on an individual's citizenship status so as to assist the state and local electors in ensuring that they are fair and consistent with existing civil rights statutes while at the same time accurate in removing aliens ineligible to vote.

Conclusion

If, as this administration wants us to believe, the federal government is truly responsible for matters of immigration and citizenship, and if they want to ensure that scrutiny of state voter lists is done in a responsible, even-handed, apolitical and racially neutral manner, then they need to quit impeding state efforts to ensure that there is integrity in their voter enrollment efforts.

Efforts to vet voter registration rolls should not be thought of as a numbers game requiring evidence of a large volume of violators to justify the time and expense, and they should not be referred to disparagingly as “purges”. The integrity of electoral lists should be beyond question, because there are few rights so important to citizens as the right to vote. If we are so lax as to permit resident aliens to vote, simply because uninformed representatives of voter registration drives say they may — and it is not challenged or corrected by those charged with maintaining the lists — then what is the impetus for long-time, eligible residents to take the final step of assimilation and naturalization? To so blur the distinction between citizens and aliens as to render the two indistinguishable is, in the most fundamental sense, to render both our citizenship and our national sovereignty meaningless. What is more, to permit aliens to vote because of negligence or indifference is to cede to them the right to choose our leaders in close elections.

Voter registration integrity efforts must be undertaken scrupulously and transparently. With our nation's history and the existing polarity in the public arena, there can neither be, nor appear to be, partisan or minority-exclusion motivations. By the same token no citizen — without regard to his or her racial or ethnic origin — should want to see the rights and privileges of American citizenship watered down to meaninglessness.

Political and civic leaders should not reflexively cry wolf at these efforts; it is unlikely they will go away, and given the tremendous sacrifices many individuals at the forefront of the civil rights movement have made to advance suffrage for minorities, women, and young adults, one would think they might recognize it as in the public interest to ensure that hard-won voting rights not be diluted by enrollment of ineligible voters. Instead, our leaders should devote time, energy, and personal capital in ensuring that protecting the integrity of voter registration lists is done consistently, and in a fair and even-handed manner.

End Notes

- ¹ For one discussion of the decision and its practical consequences, see the op-ed of Jan Ting, law professor and member of the board of directors of the Center, as published in the *Philadelphia Enquirer* on June 27.
- ² Article VI, Clause 2 of the United States Constitution states in pertinent part, “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”
- ³ Article I, Section 8.
- ⁴ Amendment XIV, Section 1.
- ⁵ Article II, Section 1.
- ⁶ Article I, Sections 2 and 3.
- ⁷ Amendment X states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
- ⁸ Amendment XV, Section 1.
- ⁹ Amendment XIX.
- ¹⁰ Amendment XXIV, Section 1, speaking directly to the “Jim Crow” laws of segregated states still attempting to deny minorities the vote, notwithstanding Amendment XV.
- ¹¹ Amendment XXVI, Section 1.
- ¹² See, e.g. Sections 2 and 4 of Article I, which address elections of members of the House of Representatives and Senate, respectively.
- ¹³ Amendment XVII.
- ¹⁴ State of Colorado Department of State, “Comparisons of Colorado’s Voter Rolls with Department of Revenue Non-Citizen Records”, March 8, 2011.
- ¹⁵ Complaint of Petitioner, Florida Department of State vs. U.S. Department of Homeland Security et al., (D.D.C. June 11, 2012).
- ¹⁶ Debbie Siegelbaum, “GOP says 5,000 non-citizens voting in Colorado a ‘wake-up call’ for states”, *The Hill*, March 31, 2011.
- ¹⁷ USCIS Director Alejandro Mayorkas letter to Colorado Secretary of State Scott Gessler, May 10, 2012.
- ¹⁸ Amy Sherman, “South Florida Democrats say Gov. Rick Scott leading ‘misguided’ effort to purge voters from state rolls”, *Miami Herald*, May 29, 2012.
- ¹⁹ “Florida Voters Back Voter Purge, Stand Your Ground, Quinnipiac University Poll Finds; Gov. Scott’s Job Approval Still Very Low”, press release, Quinnipiac University, June 20, 2012.
- ²⁰ Letter from T. Christian Herren, Jr., Chief, Voting Section, Department of Justice, to Ken Detzner, Florida Secretary of State, May 31, 2012.
- ²¹ See, for instance, Marc Caputo and Steve Bousquet, “Feds demand voter-purge info from Florida counties”, *Miami Herald*, August 9, 2012.

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- ²² Scott Powers, “Few non-citizens on Central Florida voter rolls”, *Orlando Sentinel*, May 30, 2012; and Mark Caputo and Monique O. Madan, “Investigation of two noncitizen voters may bolster Scott’s fight with feds”, *Miami Herald*, June 2, 2012; and Steve Bousquet, “Plenty misses, few hits in Rick Scott’s search to purge non-U.S. citizens from voter rolls”, *Tampa Bay Times*, June 10, 2012.
- ²³ Complaint of Petitioner, Florida Department of State vs. U.S. Department of Homeland Security et al., (D.D.C. June 11, 2012).
- ²⁴ Dara Kam, “Federal judge won’t stop governor’s purge of non-citizens from voter rolls”, *The Palm Beach Post*, June 27, 2012; and “Federal judge rejects DOJ request to stop voter purge”, *Orlando Sentinel* blog, June 27, 2012.
- ²⁵ Jeremy Redmon, “Georgia election officials seek access to immigration database”, *The Atlanta Journal-Constitution*, July 17, 2012.
- ²⁶ Amy Sherman, “South Florida Democrats say Gov. Rick Scott leading ‘misguided’ effort to purge voters from state rolls”, *Miami Herald*, May 29, 2012.
- ²⁷ Government Accountability Office, “Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists”, June 10, 2005.
- ²⁸ Hans A. von Spakovsky, “The Threat of Non-Citizen Voting”, The Heritage Foundation, July 10, 2008.
- ²⁹ For instance, the 2008 senatorial election in Minnesota, which was won by non-incumbent Al Franken by a margin of 302 votes.
- ³⁰ Scott Powers, “Woman cut twice from voter rolls is dead certain she’s alive”, *Orlando Sentinel*, July 17, 2012.
- ³¹ The exclusion provision may be found at Section 212(a)(6)(C)(ii)(I) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1182(a)(6)(C) (ii)(I); the companion deportation provision may be found at Section 237(a)(6) of the INA; 8 U.S.C. § 1227(a)(6).
- ³² Scott Powers, “Woman cut twice from voter rolls is dead certain she’s alive”, *Orlando Sentinel*, July 17, 2012.
- ³³ Refer to the case of one Murat Limage, as described in: Marc Caputo, “ACLU sues Florida to stop noncitizen voter purge”, *Tampa Bay Times*, June 11, 2012.
- ³⁴ Laura L. Myers, “Washington state first to launch Facebook voter registration”, Reuters, July 18, 2012.
- ³⁵ HAVA Section 303, codified as 42 U.S.C. § 15483.
- ³⁶ HAVA Section 904, 42 U.S.C. § 15543.
- ³⁷ U.S. Election Assistance Commission, “Election Crimes: An Initial Review and Recommendations for Future Study”, December 2006.
- ³⁸ Department of Justice, “Federal Prosecution of Election Offences, Seventh Edition”, May 2007.
- ³⁹ NVRA, as codified at 42 U.S.C. § 1973gg–6(a)(4) and § 1973gg–6(b), respectively.
- ⁴⁰ Such identity cards, designated Form I-197, are already authorized by law and regulation, but were discontinued several years ago.



Non-Citizen Voters Diluting the Rights and Privileges of Citizenship

By W.D. Reasoner

This *Backgrounder* discusses one of the latest skirmishes in the federal-state boundary wars: efforts by state electoral officials to vet voter registration lists to prevent ineligible non-citizen voters from registering and casting ballots. Interestingly, it is once again the states that are demanding that the distinction between alienage and citizenship be enforced while the federal government again has acted to frustrate state efforts through denial of access to information and the filing of lawsuits.

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