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Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme

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Abstract: The National Popular Vote (NPV) plan is the latest in a long line of schemes designed to replace the Electoral College. Imbued with the ideals of this nation's Founders, the Electoral College has proved itself to be both effective in providing orderly elections for President and resilient in allowing a stable transfer of power of the leadership of the world's greatest democracy. Therefore, while it would be a mistake to replace the Electoral College, replacing this system with the NPV would be a disaster. The NPV would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, encourage voter fraud, and radicalize the U.S. political system. It also would likely violate the U.S. Constitution's Compact Clause while directly contravening the Founders' view of federalism and a representative republic. In an age of perceived political dysfunction, effective policies already in place—especially successful policies established by this nation's Founders, such as the Electoral College—should be preserved.

Our system for electing a president has worked pretty well. There is no real case being made that it will work better if changed—only that it will look nicer if one subscribes to one particular vision of how democracies should work.... We are so accustomed to stable, generally good government that we sometimes forget that failure of government structures is historically

Talking Points

- The National Popular Vote scheme is an unconstitutional attempt to eliminate the Electoral College, because the proposed state compact would require congressional approval.
- The NPV scheme would elevate the importance of urban centers and diminish the influence of small states and rural areas.
- It would lead to closer elections, more recounts, increased litigation over provisional and other ballots, and conflicts over the results of presidential elections.
- It would allow the election of individuals with unprecedented small pluralities, raising grave issues about the legitimacy of a winner and any actions he took as President.
- It would encourage voter fraud since fraudulent votes cast anywhere (especially in one-party states) could change the outcome of a national race.
- The NPV scheme strikes directly at the Founders' view of federalism and a representative republic that balances popular sovereignty with structural protections for state governments and minority interests.

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much more common than success.... [W]e tinker with our success at our peril.

Bradley A. Smith, former Chairman, Federal Election Commission¹

Since the 2000 U.S. presidential election, there have been many ill-informed calls to abolish the Electoral College. Even before that contentious election, there had been more than 700 proposals introduced in Congress to amend the Constitution to change the Electoral College—more than on any other topic.²

The latest scheme, the National Popular Vote (NPV) plan, is bad public policy. The NPV plan would:

- □ Diminish the influence of smaller states and rural areas of the country;
- □ Lead to more recounts and contentious conflicts about the results of presidential elections; and
- □ Encourage voter fraud.

The NPV plan also strikes at the Founders' view of federalism and a representative republic—one in which popular sovereignty is balanced by structural protections for state governments and minority interests.

The Electoral College and the NPV

The Constitution provides that “Each State shall appoint, in such Manner as the Legislature there-

of may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”³ Although electors were initially appointed directly by state legislatures, some states like Pennsylvania and Virginia allowed popular election even in the first presidential election.⁴

By 1836, only South Carolina did not provide for the direct election of electors, and “since the Civil War, electors have been popularly chosen in all states.”⁵ The slate of electors chosen by voters then cast their votes for President and Vice President in their respective states on the first Monday after the second Wednesday in December.⁶ Forty-eight states have a winner-take-all system that allocates all of their electoral votes to whatever presidential candidate wins the popular vote in that state.⁷

Changing or eliminating the Electoral College can be accomplished only by an amendment to the Constitution, which requires the consent of two-thirds of Congress and three-fourths of the states.⁸ From a political standpoint, there is almost no probability that such an amendment will be approved in the near future.

Consequently, the NPV⁹ scheme proposes an interstate compact in which participating states agree in advance to automatically allocate their electoral votes to the winner of the national popular vote, disregarding the popular vote results in their states or what the relevant legislatures might then

1. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 *Electio*n 1 J. 3, 217 (2008).
2. *Frequently Asked Questions*, U.S. Electoral College, <http://www.archives.gov/federal-register/electoral-college/faq.html> (last visited Oct. 17, 2001). From 1889 to 2004, 595 amendments were introduced in Congress to amend the Electoral College. *conGRESEARCH SERv., THE Electoral College: an Overview and analysis of REform PropoSals* 17 (2004).
3. U.S. *conSt.* art. II, § 1, cl. 2.
4. *McPherson v. Blacker*, 146 U.S. 1, 29 (1892).
5. *conGRESEARCH SERv., THE Electoral College*: 1–2.
6. U.S. *conSt.* amend. Xii; 3 U.S.c. §§ 1–21. Congress meets in joint session to count the electoral votes in January. If no candidate wins a majority of the electoral votes, the House selects the President and the Senate selects the Vice President, with each state delegation in the House having only one vote. U.S. *conSt.* amend. Xii.
7. Nebraska and Maine provide for allocation of their electoral vote by congressional districts with two electors awarded to the state-wide winner.
8. U.S. *conSt.*, art. V.
9. See *National Popular Vote*, www.nationalpopularvote.com (last visited Oct. 11, 2011). For a justification for this change in extensive detail, see also John R. Koza et al., *Every Vote Equal: a State-Based Plan for Electing the President By National Popular Vote 2011*.

desire. The NPV would “put the fate of every presidential election in the hands of the voters in as few as 11 states and thus...give a handful of populous states a controlling majority of the Electoral College,”¹⁰ undermining the protections of the Electoral College.

This agreement would go into effect only after “states cumulatively possessing a majority of the electoral votes” needed to win an election (270 votes) join the purported compact. Because it is far easier politically to get a smaller number of states with the required electoral votes to join the compact than it is to get two-thirds of Congress and three-fourths of the states to pass an amendment, the compact is an expedient way for proponents of the NPV to circumvent the Electoral College without formally amending the Constitution.

So far, eight states representing a combined 132 electoral votes (Illinois, Washington, New Jersey, Hawaii, Maryland, Vermont, California, and Massachusetts) and the District of Columbia have approved the proposed scheme. The NPV is therefore 49 percent of the way to the goal of 270 votes—and to the activation of this unconstitutional, politically dubious, and dangerous cartel.

The Electoral College: Compromise and the U.S. Constitution

In creating the basic architecture of the American government, the Founders struggled to satisfy each state’s demand for greater representation while attempting to balance popular sovereignty against the risk posed to the minority from majoritarian rule.¹¹ Smaller states in particular worried that a system that apportioned representatives on the basis of population would underrepresent their interests in the federal structure.

Out of this concern arose a compromise proposed by the Committee of Eleven at the Constitutional Convention,¹² which helped to balance the competing interests of large states with those of smaller states. By allocating electors on the basis of a state’s cumulative representation in the House and Senate, the Electoral College system avoids purely population-based representation but still gives larger states greater electoral weight.

Furthermore, the arrangement prevents candidates from winning an election by focusing solely on high-population urban centers and forces them to seek the support of a larger cross section of the American electorate. This aspect of the U.S. election system addresses the Founders’ fears of a “tyranny of the majority,” a topic frequently discussed in the Federalist Papers. In the eyes of the Founders, this tyranny was as dangerous as the risks posed by despots like King George and had the potential to marginalize sizeable portions of the population, particularly in rural and more remote areas of the country. The Electoral College was devised as a response to these fears as a means of “ensuring the participation of a broad regional diversity in the outcome of elections.”¹³

Aside from shaping the electoral system, this fear of marginalizing large portions of the population is also the reason that the Constitution calls for a representative republic and not a direct democracy. Under the NPV, this electoral benefit to states would disappear, and presidential candidates could win elections by catering to high-density population centers and ignoring the rest of the country. As John Samples argues, the NPV would “encourage presidential campaigns to focus their efforts in dense media markets where costs per vote are lowest,” and states that are sometimes ignored now will “continue to be ignored under NPV.”¹⁴ There is no ques-

10. Letter from John Boehner, House of Rep. Speaker, Mitch McConnell, Senate Republican Leader, and Rick Perry, Governor of Texas, to Governors of the Fifty States (June 29, 2011) (hereinafter *Boehner Letter*), available at <http://www.cashreport.org/blog/wp-content/uploads/2011/08/Letter-Boehner.McConnell.Perry-1.pdf>.

11. See Tara Ross, *The Electoral College: Enlightened Democracy*, *Heritage Foundation Legal Memorandum* no. 15 (Nov. 1, 2004), available at <http://www.heritage.org/research/reports/2004/11/the-electoral-college-enlightened-democracy>.

12. James Madison, *Notes of Debates in the Federal Convention of 1787* 573–575 (W.W. Norton & Co. 1987).

13. *Boehner Letter*.

14. John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, *Cato Institute Policy Analysis* no. 622 (Oct. 13, 2008), available at <http://www.cato.org/pubs/pas/pa-622.pdf>.

tion that smaller states receive less attention than larger states, but any national direct election system “would magnify, not improve, this problem.”¹⁵

Despite these facts, both large and small states have joined the National Popular Vote movement. The NPV, at face value, may appeal to traditionally democratic notions of “every vote being equal.” Yet its supporters seemingly have no concern for the many other non-majoritarian aspects of the governmental structure established by the Constitution, such as:

- □ Every state having two Senators regardless of its size or population;
- □ A President’s ability to veto legislation passed by a majority of the people’s popularly elected representatives;
- □ The lifetime appointment of federal judges whose power is inherently undemocratic;
- □ The unequal representation in the U.S. House of Representatives due to widely varying populations in congressional districts between different states, such as Delaware (with a population of almost 900,000) and Wyoming (with a population of only 600,000); and
- □ The unequal apportionment among the states of House districts caused by the inclusion of large numbers of ineligible voters (such as non-citizens) in the census count.

As former Federal Election Commission (FEC) Chairman Bradley Smith says, “If such direct checks on popular majorities can be reasonable and acceptable in a democracy, then it is difficult to argue that indirect checks on popular majority such as the Electoral College, are inherently illegitimate.”¹⁶

We should also not forget that one of the major purposes of the Bill of Rights is to protect us from majoritarian rule—otherwise, popular democracy could abolish freedom of religion, limit political speech, or restrict the ability to assemble and asso-

ciate with disfavored minorities. The NPV movement seeks to create an unfair and unconstitutional system that diminishes the voting rights of citizens throughout the country and raises the prospect of increased voter fraud and post-election litigation contests over the outcome.

The Unconstitutionality of the NPV: Compact Clause

Supporters of the NPV claim that because the Constitution gives state legislatures the power to determine how electors are chosen, the NPV is constitutional and requires no approval by Congress. Such claims, however, are specious. The NPV is unconstitutional because it would give a group of states with a majority of electoral votes “the power to overturn the explicit decision of the Framers against direct election. Since that power does not conform to the constitutional means of changing the original decisions of the framers, NPV could not be a legitimate innovation.”¹⁷

The Constitution’s Compact Clause provides that “No State shall, without the Consent of Congress... enter into any Agreement or Compact with another State.”¹⁸ The Founders created the Compact Clause because they feared that compacting states would threaten the supremacy of the federal government in matters of foreign affairs and relations among the states.¹⁹ If states could make agreements among themselves, they could damage the nation’s federalist structure. Populist states, for example, cannot agree to have their U.S. Senators vote to seat only one Senator from a less populous state.

The very purpose of this clause was to prevent a handful of states from combining to overturn an essential part of the constitutional design. The plain text makes it clear that all such state compacts must be approved by Congress.

By circumventing the checks and balances of Congress, the NPV would risk setting a prec-

15. Ross, *supra* note 11, at 6.

16. Smith, *supra* note 1, at 198–199.

17. Samples, *supra* note 14, at 9.

18. U.S. c o n S t . art. I, § 10, cl. 3.

19. t h e H e r i t a g e G u i d e t o t h e C o n S t i t u t i o n 178 (Edwin Meese III et al. eds., 2005).

edent that states can validate non-congressionally approved compacts as a substitute for a constitutional amendment. Undoubtedly, many liberal activist groups would like to create their own compacts or to lobby states individually to join compacts. Such compacts could then create de facto constitutional amendments regarding many different public policy issues—including purely federal matters.

Even though the plain text of the Constitution makes it clear that no compact shall be made by states without the consent of Congress, courts have recognized certain narrow agreements as exceptions to the limitations of the Compact Clause.²⁰ Interstate compacts that governed boundary disputes between states were almost always upheld as valid.²¹ Although states sometimes did submit their compacts to Congress for ratification, there has been an implied understanding that interstate agreements were legitimate as long as they had a limited, specifically local impact and did not affect national prerogatives.

In the 1920s, interstate compacts expanded their scope and began to establish regulatory agencies.²² As the 20th century progressed, compacts were increasingly used to tackle broader issues facing the states. Modern interstate compacts can govern everything from environmental issues to water conservation, waste disposal, education, child welfare, crime control, and others—if approved by Congress.²³

Although some of the interstate compacts have expanded to include more national issues, none would affect the federal government or non-participating states to the extent that the NPV does. The NPV addresses an area of national concern by effectively abolishing the Electoral College and chang-

ing the method of choosing the President. However, unlike other agreements that are exempt from the requirement of congressional approval, the NPV aims to control the behavior of compacting and non-compacting states alike and “harms those states whose citizens benefit from the current system of election.”²⁴

Should the NPV movement reach its target of 270 electoral votes, states not involved in the compact will have been co-opted into an electoral regime despite having never consented to the compact. This distinction delineates this compact from others, which have dealt with even arguably national issues.

The Unconstitutionality of the NPV: U.S. Steel Corp.

In *U.S. Steel Corp. v. Multistate Tax Commission*,²⁵ the Supreme Court of the United States held that the Compact Clause prohibited compacts that “encroach upon the supremacy of the United States.”²⁶ The Court emphasized that the real test of constitutionality is whether the compact “enhances state power quoad the National Government.”²⁷ To determine this qualification, the Court questioned whether:

1. The compact authorizes the member states to exercise any powers they could not exercise in its absence;
2. The compact delegates sovereign power to the commission that it created; or
3. The compacting states cannot withdraw from the agreement at any time.²⁸

Unless approved by Congress, a violation of any one of these three prongs is sufficient to strike down a compact as unconstitutional; the NPV plan

20. Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?* 42 *Col Um. J.L. & Soc. ProBS.* 511, 516 (2009).

21. *Id.*

22. *Id.* at 518.

23. *Id.* at 519.

24. Samples, *supra* note 14, at 9.

25. 434 U.S. 452 (U.S. 1978); see also *Virginia v. Tennessee*, 148 U.S. 503 (1893).

26. *the Heritage Encyclopedia to the Constitution*, *supra* note 19.

27. *U.S. Steel Corp.*, 434 U.S. at 473.

28. *Id.*

violates two. Of course, congressional approval of a compact that attempts to change a provision of the Constitution without following the amendment requirement of Article V would also be invalid.

By eliminating the requirement that Congress approve a virtual constitutional amendment, the NPV would enhance the power of certain states at the expense of the national government—a result that would conflict with the first prong of the *U.S. Steel Corp.* test. Without question, the NPV deprives non-participating states of their right under Article V to participate in deciding whether the Twelfth Amendment, which governs the Electoral College, should be changed.

From a constitutional standpoint, one could argue that while states are given the power to decide how electors will be chosen, that power is not completely unrestricted. As Tara Ross has pointed out, the Constitution “presupposes that the electors belong to each individual state and the state may not delegate this responsibility outside of state borders.”²⁹ For example, in *Clinton v. New York*, the Supreme Court struck down the presidential line-item veto because it disrupted “the ‘wholly wrought’ procedure that the Framers designed” in the Constitution for the enactment of statutes—a procedure that was “the product of the great debates and compromises that produced the Constitution itself.”³⁰

Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court threw out state-imposed term limits on Members of Congress.³¹ A state-imposed qualification that was intended to evade the requirements of the Qualifications Clauses of the Constitution could not stand: “To argue otherwise is to suggest that the Framers spent significant time and energy

in debating and crafting Clauses that could be easily evaded.”³² Such an argument would trivialize the principles behind the Qualifications Clauses and treat them as an “empty formalism” rather than “the embodiment of a grand principle.... It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”³³

The NPV would obviously disrupt the “wholly wrought procedure” that the Framers designed into our presidential election process with the Electoral College that was a product of the great debates and compromises that produced the Constitution. It would trivialize the federalism principles behind the Electoral College. The supporters of NPV are not hiding their goal: trying to manipulate the Electoral College out of existence, an objective that cannot be achieved by state compact, especially without congressional approval.

There is another component of the NPV that most likely would also violate the first prong of the *U.S. Steel* test: the plan’s guarantee that “electors would no longer be accountable to the voters in the states they are from.”³⁴ As a result, voters in other states who are ineligible to vote in a particular state—such as felons—could control that state’s electoral votes. Furthermore, “candidates could end up being elected with the electoral votes of a state in which they weren’t even qualified to be on the ballot.”³⁵

Even more disconcerting, the NPV provides that if the “number of presidential electors nominated in a member state” is less than what the winner of the national popular vote is entitled to, that winner “shall have the power to nominate the presidential electors for that state.”³⁶ In other words, a winning

29. Tara Ross, *Federalism & Separation of Powers—Legal and Logistical Ramifications of the National Popular Vote Plan*, 11 *Engage* 2, 40 (Sept. 2010).

30. 524 U.S. 417, 439–440 (1998).

31. 514 U.S. 779 (1995).

32. *Id.* at 831.

33. *Id.* at 831 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm’n of Cal.*, 271 U.S. 583, 594 (1926)).

34. *Boehner Letter*.

35. *Id.*

36. *National Popular Vote, Agreement Among the States to Elect the President by National Popular Vote*, Art. III, available at <http://www.nationalpopularvote.com/resources/43-Compact-TAATS-V43.pdf> (last visited October 19, 2011).

candidate (say a governor from another state like Texas or Massachusetts) could appoint the electors for New York even if the candidate never qualified to get on the ballot in New York; he or she could even designate as electors individuals who are not residents or qualified voters in New York.

Under the third prong of the test delineated in *U.S. Steel Corp.*, the compact must allow states to withdraw at any time. The NPV, however, places withdrawal limitations on compacting states. The plan states that “a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.”³⁷ This provision is in direct conflict with the *U.S. Steel Corp.* test and therefore alone renders the compact unconstitutional without congressional approval.³⁸ It could also cause an irresolvable election crisis if a state withdrew in violation of the provision and thus threw into doubt the results of a presidential election. There is no provision in the NPV for enforcing this limitation or compliance with any of the provisions of the compact.

Moreover, this withdrawal limitation is in explicit violation of the Article II provision that gives to the legislatures of each state the power to select the manner in which electors are chosen. A legislature can delegate to the people of its state the ability to choose electors, but the legislature also retains the power to withdraw that delegation. The NPV scheme would temporarily suspend that legislative power—an act that would violate the Constitution.

The NPV Is Bad Public Policy

Outside of the question of constitutionality, however, there are also a number of public policy rea-

sons that such an amendment would be detrimental to America’s unique democratic system.

Swing States and Political Influence

Although the point has been argued that under the current system, swing states garner the majority of candidates’ attention, swing states can change from election to election, and many states that are today considered to be reliably “blue” or “red” in the presidential race were recently unpredictable. For example, “California was competitive for decades, only becoming a Democratic presidential bastion in the last 15 years. Florida was considered a safe Republican seat as late as 1996.”³⁹ With rare exceptions, however, established urban centers like Houston, Chicago, New York City, and Los Angeles will always have high populations that vote in a predictable fashion. While the Electoral College assures that minority interests in a variety of geographic regions are protected, the NPV will help to protect only select urban interests. The Electoral College “embodies the balance [the Founders] aimed to achieve through deference to states with smaller populations and by ensuring that the interests of these states be reflected in national decision-making.”⁴⁰

Although some legislators have embraced the NPV, such support appears to be rather shortsighted: Under the NPV, a majority of states will see their influence over the presidential election decrease. As John Samples of the Cato Institute has determined, the influence of a state under the Electoral College can be measured by dividing the state’s electoral votes by the total electoral votes; the measure under the NPV is the number of a state’s eligible voters divided by the total eligible voters in the country.

37. *Id.* at Art. IV.

38. Some might argue that the NPV compact has no formal enforcement mechanism and that states therefore maintain their right to withdraw as they see fit. See James Taranto, *Faithless Lawmakers*, WALL ST. J. (July 29, 2010), available at http://online.wsj.com/article/SB10001424052748703578104575397100729241576.html?mod=WSJ_Opinion_MIDDLETopOpinion. Nevertheless, this scenario creates a constitutional Catch-22: Either the states have created an unconstitutional compact that can be enforced or the compact could cause an electoral crisis if a state should withdraw from the compact during or immediately before an election.

39. Smith, *supra* note 1, at 210.

40. Boehner Letter.

When these measurements are compared, states such as California, Hawaii, and Vermont, as well as the District of Columbia, lose influence by switching to the NPV. While California's loss is relatively small (1 percent), Hawaii would lose 42 percent of its influence, Vermont 58 percent, and the District of Columbia a stunning 62 percent. Under Samples' analysis, 29 states and the District of Columbia would lose influence under the NPV.⁴¹ Based on the 2006 elections, "59 percent of voters...lived in states that would either lose influence under direct election or would be indifferent about moving away from the Electoral College."⁴²

Recounts

Under the NPV, recounts would be both more prevalent and more problematic. The basic principles of federalism—the principles upon which this nation was founded—were used to design the U.S. electoral process. As a result, federal elections are decentralized affairs; each of the 50 states and the District of Columbia run their own elections on the first Tuesday of November every four years or for a varying period before then in early voting states. Every state has different procedural rules for the administration of elections, from the definition of what constitutes a vote to how recounts are triggered and conducted.

The presidential election of 2000 saw an unprecedented vote recount in Florida. This recount was a belabored, emotional, costly process even though it was limited to only one state. For the most part, only one set of state laws was applicable in that recount. Under the NPV, however, any suspicions necessitating a recount in even a single district would be an incentive for a national recount. And

why not? Every additional vote a losing candidate could obtain anywhere in the country could make the difference in winning or losing the national election—even if the extra vote would not change the results of the electoral vote in that particular state under the current system.

The winner-take-all system for electoral votes reduces the possibility of a recount since popular vote totals are often much closer than the Electoral College totals. In fact, former FEC chairman Bradley Smith points out that "recounts may have been necessary in as many as six presidential elections since 1880, if a national popular vote system had been in place. That's nearly one out of every six elections"⁴³

The prospect of a candidate challenging "every precinct, in every county, in every state of the Union," should be abhorrent to anyone who witnessed the drama, cost, delay, and undue litigation sparked by the Florida recount of 2000.⁴⁴ Worse still, there is little chance that the ballots would be recounted in a consistent manner across the nation or that there would be a national, as opposed to piecemeal, recount.

Election laws vary by state, which means that 50 different standards (plus the District of Columbia's) would be applied to a recount,⁴⁵ and no state or group of states that wanted a national recount could force other states to participate. Ironically the NPV, which is supposed to make each vote count equally, would likely result in varied and even conflicting decisions among the states as to the validity of each vote.⁴⁶ Moreover, while the total of the national popular vote may be close, the vote totals in particular states may not be close at all—certainly not close enough to trigger a recount under that par-

41. Samples, *supra* note 14, at 3–4.

42. *Id.* at 6. The states that lose influence under the NPV (ranked from the smallest loss of influence to the largest) are California, Oklahoma, Minnesota, Louisiana, Oregon, Mississippi, Connecticut, Colorado, Arizona, Kansas, Arkansas, Iowa, Utah, West Virginia, Nevada, New Mexico, Nebraska, Maine, Montana, New Hampshire, Idaho, Hawaii, Rhode Island, Delaware, South Dakota, North Dakota, Vermont, Alaska, D.C., and Wyoming. *Id.* at 4, Table 1.

43. Ross, *supra* note 29, at 38, citing Smith, *supra* note 1, at 207.

44. Gary Gregg, Electoral College Watch, *National Review Online* (Oct. 25, 2004, 9:39 a.m.), <http://old.nationalreview.com/gregg/gregg200410270939.asp>.

45. Enacting the Agreement Among the States to Elect the President by National Popular Vote, Hearing on SB 344 Before the S. Comm. on Legislative Operations and Elections, 2011 Leg., 76th Sess. (Nv. 2011) (testimony of Tara Ross).

46. Smith, *supra* note 1, at 207.

particular state's recount laws even if a losing candidate believes a national recount is warranted.

Thus, the 2000 Florida recount madness could be replicated on a national level, with new complexities added by certain states refusing to participate in the recount or even devising their own recount rules. A national recount could result in 51 potential lawsuits heading to the Supreme Court (or more if lawsuits are filed in each relevant state and federal court). The margin of victory in the popular vote could be enough to warrant a recount in the eyes of some yet not large enough to trigger a recount in specific states with large vote margins. The votes for the presidential ticket could get recounted in selected jurisdictions across the country but not in others, leading to virtually the same type of equal protection problems the Supreme Court found in *Bush v. Gore*⁴⁷ because of the unequal treatment of ballots by election officials in separate Florida counties.

A national recount would result in protracted litigation and confusion, thus weakening public faith in the election process, delaying the final resolution of a presidential election, and exacerbating the exact "problem" that NPV claims to be solving. Just as important, however, is the fact that the 2000 election crisis was only a temporary one—a testament to the strength and reliability of this nation's electoral system. Indeed, the current electoral system has consistently produced Presidents without a constitutional crisis. Therefore, the burden is on the NPV's supporters to justify changing a system that has functioned well for over 200 years, not those who are defending that system.⁴⁸

Closer Elections and More Crises

In addition, the NPV could destabilize America's two-party system, leading to a higher incidence of close elections. The NPV awards the presidential election to whichever candidate receives the "largest" national vote, not the majority of the national popular vote. In an electoral system defined by the NPV, numerous fringe parties and radical can-

didates, appealing solely to the largest population centers, would likely emerge. Consequently:

Presidential campaigns would devolve into European-style, multi-candidate races. As more candidates enter the field, individual votes will necessarily be divided among an ever-increasing number of candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals.⁴⁹

The winner-take-all allocation of electoral votes within 48 states necessitates that a candidate be popular enough to appeal to a broad electorate, including moderate voters, and provides the winner of the presidential race with both quality and a mandate even if his popular vote total is slightly below 50 percent. With its plurality requirement, however, the NPV could lead to the election of presidential candidates by unprecedented, small margins. These smaller victory margins, combined with the overall decrease in popular support for a single candidate, could trigger chaotic and contentious elections. Furthermore, a President elected by only 25 or 35 percent of the American people would not have a mandate to govern, and questions about his legitimacy could pose grave consequences both for the nation and for any actions he took as President.

The Electoral College requires a presidential candidate to win simultaneous elections across 50 states and the District of Columbia; the idea of concurrent majorities means that "the president gains a popular legitimacy that a single, narrow, national" election does not provide and emphasizes "the breadth of popular support for the winner."⁵⁰

Provisional Ballots

Under the NPV, provisional ballots could also lead to an extensive, widespread, and complex battle that could further delay and confuse the results of a presidential election. Federal law requires provisional ballots for all voters whose eligibility

47. 531 U.S. 98 (2000).

48. Gregg, *supra* note 44.

49. Ross, *supra* note 29, at 38.

50. Smith, *supra* note 1, at 203.

is called into question or who are unable to cast a regular ballot at the polling place because they are not on the list of registered voters.⁵¹

Provisional ballots are counted by local election officials only if they are able to verify that the voter was entitled to vote, which happens after the election and after an investigation of the circumstances by election officials. Provisional ballots may not affect the outcome of the majority vote within a state under the current system because the number of provisional ballots is less than the margin of victory. However, if the total number of provisional ballots issued in all of the states is greater than the margin of victory, a national battle over provisional ballots could ensue.

Losing candidates would then have the incentive to hire lawyers to monitor (and litigate) the decision process of local election officials in every corner of the nation. This process would make the isolated fights over the chads in punch-card ballots in Florida in 2000 look almost insubstantial by comparison. Furthermore, lawyers contesting the legitimacy of the decisions made by local election officials on provisional ballots nationwide could significantly delay the outcome of a national election.

Voter Fraud

Another unforeseen consequence of the NPV is that the plan would encourage vote fraud. Currently, a fraudulent vote is counted only in the district in which it was cast and therefore can affect the electoral votes only in that particular state. Under the NPV, however, vote fraud in any state would affect the aggregate national vote.

To a would-be wrongdoer, this is a drastic increase in the potential benefit obtained from casting fraudulent ballots. Fraudsters would be encouraged to engage in fraud to obtain further votes for their national candidate or to deny votes for the opposition candidate. Under the current system, there are some states where such fraud would make

no difference, but with the NPV, every fraudulent vote obtained anywhere could make the difference in changing the outcome of the national race.

This prospect is even more worrisome when one considers how much easier it is to cast fraudulent votes in strongly partisan neighborhoods and one-party districts where there are no (or few) members of the opposition party to work as election officials or poll watchers. There is little incentive to engage in such partisan fraud where it is most possible now, since the dominant party is likely to win anyway, but under the NPV scheme, there is an increased incentive to engage in fraud in such states that are the most corrupt and one-sided even if others have relatively clean elections. Thus, this scheme makes all states—especially one-party states and those with a history of tolerating fraud—targets for fraud, likely increasing this type of misbehavior nationwide.

It should be noted that “[t]he popular vote winner has triumphed in 42 of 45 elections.”⁵² Supporters of NPV point to those elections (1876, 1888, and 2000) where the popular vote winner did not prevail.

But Bradley Smith concludes that “the Electoral College clearly played a democratizing and equalizing role” in the 1876 and 1888 elections that “almost certainly better corresponded to true popular sentiment than did reported popular vote totals.” Why? Because in the 1876 election, for example, where Samuel Tilden defeated Rutherford B. Hayes in the popular vote, there was “rampant vote fraud and suppression in the southern states [that] make the actual vote totals from that election unknowable.” Similarly, in the 1888 election, Southern states voted overwhelmingly for Cleveland, the national popular vote winner, while Republican Benjamin Harrison carried the rest of the nation, winning 20 of 25 states. If blacks had not had their votes suppressed, there is little doubt that Harrison, as a Republican, would have received almost the entire

51. Provisional ballots are required by the Help America Vote Act, 42 U.S.C. § 15482 (2002).

52. Smith, *supra* note 1, at 213. Some NPV supporters also point erroneously to the election of 1824 in which the House of Representatives selected John Quincy Adams over Andrew Jackson; however, since some state legislatures still selected electors, there was no actual popular vote total.

black vote and would have won the national popular vote, which he lost by less than 100,000 votes.⁵³

Conclusion

The NPV is both unconstitutional and bad public policy. It would devalue the minority interests that the Founders sought to protect, create electoral administrative problems, and radicalize the U.S. political system. If the proponents of the NPV believe that this change is necessary, they should convince Congress and the American people and use the proper method for amending the Constitution.

The U.S. should maintain the Electoral College, which has successfully elected Presidents throughout this nation's history in a way that best represents the diverse and various interests of America. As wisely stated by Tara Ross:

America's election systems have operated smoothly for more than 200 years because the Electoral College accomplishes its intend-

ed purposes.... [It] preserves federalism, prevents chaos, grants definitive electoral outcomes, and prevents tyrannical or unreasonable rule. The Founding Fathers created a stable, well-planned and carefully designed system—and it works.⁵⁴

In an age of perceived political dysfunction, effective policies already in place—especially successful policies established by this nation's Founders, such as the Electoral College—should be preserved.

—Hans A. von Spakovsky is a Senior Legal Fellow in the Center for Legal & Judicial Studies at the Heritage Foundation. He is a former member of the Federal Election Commission and a former counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. He is also a former member of the Fulton County Registration and Election Board in Georgia and currently serves as vice-chairman of a county electoral board in Virginia.

53. *Id.* at 213. Smith also points out that the national popular vote margin of 540,000 votes between Gore and Bush in 2000 was within the margin of error, so “one cannot say with any confidence that Gore (or Bush) clearly represented the popular majority.”

54. Ross, *supra* note 11, at 13.

Governor's State-Issued ID Task Force

Report to the Governor August 2006



Criminal Justice Commission

State of Oregon

Background

In October of 2005, Governor Kulongoski created the State-Issued ID Task Force to determine what can be done to reduce the incidence of Oregon driver licenses and ID cards being used in criminal activities such as identity theft and identity fraud.

The Task Force, representing all Oregon law enforcement agencies and the Oregon DMV, met to discuss current issuance procedures, future changes anticipated from state and federal legislation, and ways that law enforcement can assist DMV. The group focused on whether adequate safeguards are in place to address the growing use of Oregon driver licenses and ID cards to commit identity theft and identity fraud. Identity theft and credit card fraud are major problems within Oregon and elsewhere in the United States.

The members of the Task Force were:

Gerry Gregg, Oregon State Police, Chair
Jason Bledsoe, Oregon State Police
Brad Berry, Yamhill County District Attorney, ODAA Representative
Raul Ramirez, Sheriff, Marion County, OSSA Representative
Larry Kanzler, Chief, Milwaukie Police Dept., OACP Representative
Lorna Youngs, DMV Administrator
Michael Ward, DMV Field Services Manager
Thomas McClellan, DMV Program Services Manager
Robin Freeman, ODOT Legislative Liaison

The Task Force met in October and November 2005, and January, February, March, April, May, June and July 2006 to discuss the issues outlined below, DMV's current efforts to resolve the identified problems, DMV's efforts to implement the Real ID Act and SB 640 and to propose solutions to ongoing problems regarding state-issued identification and fraud.

The Task Force heard stories about people coming to Oregon from other states and using fraudulent residency documents to prove eligibility for an Oregon driver license. In some cases, these fraudulent residency documents were accepted by private testing services to obtain certificates that were then accepted at DMV offices in lieu of drive tests conducted by state employees. Evidence also was provided that advertisements were appearing in various languages in East Coast newspapers encouraging people to buy their services and obtain a valid Oregon driver license.

Members of the Task Force also met with Deputy Attorney General Pete Shepherd from the Department of Justice. Mr. Shepherd provided the Task Force with an assessment of the legal issues surrounding the Robleto case in Washington County, which guided the Task Force's discussion of possible legislative and procedural changes.

History of Issues addressed by Task Force

Most state motor vehicle agencies require three types of documents that must be approved before issuing a driver license: 1) Resident Address; 2) Identity; and 3) Legal Status (or "legal presence").

Oregon law does not require people to prove "legal presence" as part of the eligibility process. This causes Oregon's list of acceptable identity documents to be more inclusive than other states because we can't limit it only to documents available to U.S. citizens and others in the country legally. Consequently, some documents that are more easily counterfeited (or more easily obtained fraudulently) are accepted in Oregon.

This has led to Oregon becoming a magnet for people here illegally who find it increasingly difficult to obtain a driver license in other states. This increases the risk that DMV will issue DL/ID cards to people who aren't who they say they are, and that more "fraudsters" will come to Oregon from out of state.

Also, as the Task Force met, prosecutors were going to court against three Hillsboro brothers accused of helping thousands of non-residents fraudulently obtain Oregon driver licenses. The brothers owned and operated Class C drive testing companies that were under contract with the Oregon DMV as 3rd-party testers/examiners. Eight other people had pled guilty to charges such as racketeering and forgery.

None of the brothers were convicted of the charges, but the cases served as a backdrop for discussions about the ease with which non-residents can prove residency. Several employees and associates admitted to making and selling postmarked envelopes to out-of-state customers who inserted their own names above the Oregon addresses. They then used the postmarked mail as proof of residency to apply for Oregon driver licenses and identification cards. The scheme was proven, but the suspects were not tied directly to the scheme.

The issues surrounding the issuance of these licenses and proposed remedies were discussed extensively during the initial meetings.

Other issues discussed were as follows:

1. The ease with which applicants could present fraudulent residency documents to both the 3rd Party testers and DMV field offices and then be issued an Oregon Driver's License or ID.
2. The possibility of DMV employees assisting applicants by accepting fraudulent documents to get Oregon Driver's Licenses.
3. The problem of document "shopping" where an applicant who is refused an Oregon Driver's License because of concerns about the validity of documents merely goes and applies at another field office without a 'red flag' on file..
4. The problem of the large number Oregon Driver's Licenses in circulation, even though DMV may have been provided false evidence of residency.

As a part of the Task Force process DMV outlined the efforts it was taking to minimize the incidents of fraudulent ID. These include:

1. Ending the “3rd Party Tester Program” in October, 2003.
2. Eliminating cancelled personal mail as evidence of Oregon residence address.
3. Expanding the background check program for people being hired by the DMV.
4. Creating a “Field Emergency Warning System” (FEWS) to deter ID applicants from ‘shopping’ their fraudulent documents between field offices.
5. Sending letters to approximately 11,000 people who received test completion certificates in 2003 from DME or Catt’s Testing to obtain an Oregon Driver’s License. (They will have 30 days to present residency documents to DMV or their driving privileges will be cancelled.)
6. Implementing procedural changes due to an Internal Audits report in 2003. (In 2004 DMV made significant changes to what is accepted as proof of identity and address.)
7. Providing tools such as black lights, magnifying glasses, and Docutector to all field employees in 2004.
8. Providing fraudulent document recognition training to all field office employees in 2004 and 2006.
9. Implementing additional checks and balances and other internal controls to reduce the likelihood of internal fraud.
10. Establishing a Fraud Prevention Unit that includes a part-time investigator who’s a retired OSP detective.
11. Strengthening policies and procedures for reporting suspected DMV-related fraud committed by employees and customers.
12. Partnering with Marion County Sheriff’s Office to create a form and procedure on the handling of DL/ID cards they confiscate. (That form and procedure have been sent to OSP and local Law Enforcement agencies for their use.)

Recommendations

1. The Governor should support the full implementation of SB 640, which creates 'biometric' standards for Oregon State-Issued Identification (Appendix "A"). The Governor should also support Oregon's adoption of the Federal "Real I.D. Act", which changes the minimum document requirements and issuance standards for federal recognition of state-issued I.D. (Appendix "B"). The Governor should also provide support for DMV's 2007 – 2009 Policy Option Packages, which include funding and staffing for both measures.

Rationale:

The Task Force agrees that the full implementation of these acts will resolve the vast majority of problems surrounding Oregon's State-Issued I.D.

2. Biometric requirements created in SB 640 for Oregon I.D. are a good step toward better identity verification, but other "best practices" to eliminate fraud should be explored, including the collection of a fingerprint during the application process.

Rationale:

The Task Force agreed that the biometric measures adopted by the legislature last session are a good start, but more research needs to be done on the best way to insure that there is only one State-Issued Identification issued to each person. One option is to collect fingerprints from applicants as an additional biometric besides using facial recognition technology with digital photos. to confirm that applicants do not have an I.D. issued from another state under a different name. OSSA, ODAA and OACP will actively support this measure.

3. Create legislation to allow DMV employees to hold suspected fraudulent documents for possible action by law enforcement agencies. This was introduced by DMV in the 2005 Legislative session as HB 2108 (Appendix "C") which failed to advance.

Rationale:

Although DMV has implemented the FEWS system to try to warn other DMV field offices of people who had their documents refused at one field office, this system is an e-mail based warning system which may or may not be seen by the staff working the counter. This legislation would close this loophole while still allowing a return of the documents should the applicant return with better documentation of residency.

4. The ODAA, OSSA and OACP will join with DMV to help create a public education campaign to explain the need and benefits of the Real ID Act and SB 640 and to help explain the process to the public.

Rationale:

Law enforcement can better explain to the public the problems, including criminality, associated with the current DMV ID issuance process and how the new procedures will help resolve those problems.

5. Law enforcement and DMV will establish a 'bridge' between local law enforcement and DMV offices to increase cooperation between these agencies and to explain the changing requirements that the Real ID Act and SB 640 will make in the licensing process and to help each group understand the needs of each. OSP will take the lead in facilitating this process.

Rationale:

Both Law enforcement and DMV offices have different missions but both are concerned with public safety. While some DMV offices and local law enforcement agencies have worked closely together it was felt that both groups needed to expand this contact and cooperation throughout the state.

6. Representatives of DMV and state level representatives of law enforcement (OSSA, OACP, ODAA, and OSP) should continue to meet on a regular basis to discuss and resolve statewide policy issues. The Governor's State-Issued ID Task Force should be dissolved.

Rationale:

Although issues surrounding state-issued IDs will continue to arise and law enforcement and DMV will still need to meet to address these issues, this Task Force was created to resolve specific issues surrounding this case and with this report they have either made efforts to resolve the issue or are making recommendations to the Governor and the Legislature that will resolve the issues. The Task Force's work is done.

Appendix A

Senate Bill 640

Sponsored by Senator WINTERS; Senators ATKINSON, BEYER, DEVLIN,
GEORGE, KRUSE, MORSE, B STARR, C STARR, WHITSETT

AN ACT

Relating to security measures for documents issued by Department of Transportation; creating new provisions; amending ORS 807.040, 807.110 and 807.400; repealing ORS 807.162; and limiting expenditures.

Be It Enacted by the People of the State of Oregon:

SECTION 1. { + Sections 2 to 5 of this 2005 Act are added to and made a part of the Oregon Vehicle Code. + }

SECTION 2. { + 'Biometric data' means measurements of the physical characteristics of an individual's face that can be used to authenticate the identity of an individual. + }

SECTION 3. { + (1) A person who applies for issuance, renewal or replacement of a driver license, driver permit or identification card shall submit to collection of biometric data by the Department of Transportation for the purpose of establishing the person's identity. Submitting to collection of biometric data under this section does not excuse a person from responsibility for complying with requirements for proof of identity, age or residence pursuant to ORS 807.050.

(2) For purposes of this section, a person's identity is established if:

(a) The department finds that the biometric data collected as required under subsection (1) of this section match the biometric data that are already in the department's records for that person; or

(b) The department finds that the biometric data collected as required under subsection (1) of this section do not match biometric data in the department's records for any other person and the department does not otherwise have reason to believe that the person is not who the person claims to be.

(3) If a person's identity is established as described in subsection (2) of this section, the department shall mail the driver license, driver permit or identification card to the address provided by the person when the person applied for the issuance, renewal or replacement of the license, permit or identification card.

(4) If a person's identity is not established as described in subsection (2) of this section, the department shall:

(a) Inform the person who submitted to collection of biometric data that the person's identity was not established; and

(b) Provide the person with the opportunity to establish the person's identity by an alternative method approved by the department by rule.

(5) If a person's identity was not established as described in subsection (2) of this section and the department has reason to believe that the crime of identity theft, as described in ORS 165.800, was committed by the person currently submitting to collection of biometric data or by a person who previously submitted to collection of biometric data under the identity of the person currently submitting to collection of biometric data, the department shall notify a law enforcement agency that has jurisdiction over the crime.

(6) The department by rule shall establish procedures for providing expedited processing of driver licenses, driver permits or identification cards.

(7) The department and employees of the department are immune from liability for any damages resulting from the issuance, renewal or replacement of a driver license, driver permit or identification card under another person's identity if the employee who processed the biometric data for a license, permit or identification card established the applicant's identity as described in subsection (2) of this section. + }

SECTION 4. { + (1) The Department of Transportation shall retain biometric data collected by the department in the course of issuing, renewing or replacing driver licenses, driver permits and identification cards.

(2) The biometric data may not be made available to anyone other than employees of the department acting in an official capacity. + }

SECTION 5. { + (1) In addition to any fee imposed under ORS 807.370 and 807.410, the Department of Transportation may impose a fee for each driver license, driver permit and identification card that is issued, renewed or replaced, for the purpose of covering the costs of purchasing equipment and establishing and maintaining a database used for collecting and verifying biometric data.

(2) A fee imposed under this section may not be more than \$3 per driver license, driver permit or identification card. + }

SECTION 6. ORS 807.040 is amended to read:

807.040. { + (1) + } The Department of Transportation shall issue a driver license to any person who complies with all of the following requirements:

{ - (1) - } { + (a) + } The person must complete application for a license under ORS 807.050.

{ + (b) The person must submit to collection of biometric data by the department that establish the identity of the person as described in section 3 of this 2005 Act. + }

{ - (2) - } { + (c) + } The person must not be ineligible for the license under ORS 807.060 and must be eligible for the license under ORS 807.062.

{ - (3) - } { + (d) + } The person must successfully pass all examination requirements under ORS 807.070 for the class of license sought.

{ - (4) - } { + (e) The person must pay + } the appropriate license fee under ORS 807.370 for the class of license sought { - must be paid - } .

{ - (5) - } { + (f) The person must pay + } the Student Driver Training Fund eligibility fee { - must be paid - } .

{ - (6) - } { + (g) + } If the application is for a commercial driver license, the { - applicant - } { + person + } must be the holder of a Class C license or any higherclass of license.

{ - (7) - } { + (h) + } If the application is for a commercial driver license, the { - applicant - } { + person + } must submit to the department, in a form approved by the department, the report of a medical examination that establishes { - , to the satisfaction of the department, - } that the { - applicant - } { + person + } meets the medical requirements for the particular class of license. The department, by rule, shall establish medical requirements for purposes of this { - subsection - } { + paragraph + }. The medical requirements established under this { - subsection - } { + paragraph + } may include any requirements the department determines are necessary for the safe operation of vehicles permitted to be operated under the class of license for which the requirements are established.

{ - (8) - } { + (i) + } If the application is for a commercial driver license, the { - applicant - } { + person + } must have at least one year's driving experience.

{ - (9) - } { + (2) + } The department shall work with other agencies and organizations to attempt to improve the issuance system for driver licenses.

SECTION 7. ORS 807.110 is amended to read:

807.110. { + (1) + } A license issued by the Department of Transportation shall { - comply with - } { + contain + } all of the following:

{ - (1) - } { + (a) + } { - A license shall bear - } The distinguishing number assigned to the person issued the license by the department.

{ - (2) - } { + (b) + } { - A license shall contain, - } For the purpose of identification, a brief description of the person to whom the license is issued.

{ - (3) - } { + (c) + } { - A license shall contain - } The name, date of birth and, except as provided for officers or eligible employees in ORS 802.250, residence address of the person to whom the license is issued and a space for the person's signature.

{ - (4) - } { + (d) + } Upon request of the person to whom the license is issued, { - a license shall indicate on the license - } the fact that the person is an anatomical donor.

{ - (5) - } { + (e) + } Upon order of the juvenile court, { - a license shall indicate on the license - } the fact that the person to whom the license is issued is an emancipated minor.

{ - (6) - } { + (f) + } Except as otherwise provided in this { - subsection - } { + paragraph + }, { - a license shall bear - } a photograph described in this { - subsection - } { + paragraph + }. The Director of Transportation, by rule, may provide for issuance of a valid license without a photograph if the applicant shows good cause.

The director shall include religious preferences as good cause for issuance of a license without a photograph but shall not limit good cause to religious grounds. A photograph required under this { - subsection - } { + paragraph + } shall:

{ - (a) - } { + (A) + } Be a full-faced, color photograph of the person to whom the license is issued;

{ - (b) - } { + (B) + } Be of a size approved by the department; and { - (c) - } { + (C) + } Be taken at the time of application for issuance of the license whether the application is for an original license, replacement of a license under ORS 807.160 or for renewal of a license under ORS 807.150.

{ - (7) A license is not valid until signed by the person to whom it is issued. - }

{ - (8) - } { + (g) + } { - A license shall indicate - } The class of license issued and any endorsements granted. If the license is a commercial driver license, the words 'commercial driver license' or the letters 'CDL' shall appear on the license.

{ + (2) A license is not valid until signed by the person to whom it is issued. + }

{ - (9) - } { + (3) + } The department shall use { - such - } security procedures, processes and materials in the preparation, manufacture and issuance of any license that prohibit as nearly as possible anyone's ability to alter, counterfeit, duplicate or modify the license without ready detection. The security features used in the production of the licenses shall provide for { + :

(a) + } The { - rapid - } authentication of a genuine document { + in a reasonable time; and

(b) The production of the license only by equipment that requires verification of the identity of the operator of the equipment before a license may be produced + }.

SECTION 8. ORS 807.400 is amended to read:

807.400. (1) The Department of Transportation shall issue an identification card to any person who:

(a) Is domiciled in or resident of this state, as described in ORS 807.062;

(b) Does not have a current, valid driver license; { - and - }

(c) Furnishes such evidence of the person's age and identity as the department may require { - . - } { + ; and

(d) Submits to collection of biometric data by the department that establish the identity of the person as provided in section 3 of this 2005 Act. + }

(2) The department shall work with other agencies and organizations to attempt to improve the issuance system for identification cards.

(3) Every original application for an identification card must be signed by the applicant. The department shall require at least one document to verify the address of an applicant for issuance of an identification card in addition to other documents the department may require of the applicant. If the address of an applicant has changed since the last time an identification card was issued to or renewed for the applicant, the department shall require proof to verify the address of an applicant for renewal of an identification card, in addition to anything else the department may require.

(4) Every identification card shall be issued upon the standard license form described under ORS 807.110 and shall bear a statement to the effect that the identification card is not a license or any other grant of driving privileges to operate a motor vehicle and is to be used for identification purposes only.

The department shall use the same security procedures, processes, materials and features for an identification card as are required for a license under ORS 807.110.

(5) Upon order of the juvenile court, the department shall include on the card the fact that the person issued the identification card is an emancipated minor.

(6) Each original identification card shall expire on a date consistent with the expiration dates of licenses as set forth in ORS 807.130.

(7) Identification cards shall be renewed under the terms for renewal of licenses as set forth in ORS 807.150.

(8) The fee for an original identification card or a renewal thereof shall be the fee established under ORS 807.410. { - In no event shall the issuance or renewal of an identification card be subject to any fee in addition to that set forth in ORS 807.410. - }

(9) An identification card becomes invalid if the holder of the card changes residence address from that shown on the identification card and does not provide the department with notice of the change as required under ORS 807.420.

(10) If a person to whom an identification card was issued and who changes residence address appears in person at a department office that issues identification cards, the department may do any of the following:

(a) Issue a new identification card containing the new address but bearing the same distinguishing number as the old identification card upon receipt of the old identification card and payment of the fee established for issuing a new identification card with a changed address under ORS 807.410.

(b) Note the new address on the old identification card in a manner to be determined by the department.

(11) An identification card becomes invalid if the holder of the card changes the person's name from that shown on the card, including a change of name by marriage, without providing the department with notice of the change as required under ORS 807.420. Upon receiving such notice and the old identification card, the department shall issue a new identification card upon payment of the fee required under ORS 807.410.

(12) In the event an identification card is lost, destroyed or mutilated, the person to whom it was issued may obtain a duplicate or replacement identification card from the department upon furnishing proof satisfactory to the department of such fact and payment of the duplicate or replacement fee under ORS 807.410.

(13) Upon cancellation of an identification card, the card is terminated and must be surrendered to the department. An identification card may be canceled for any of the reasons that driving privileges or a license may be canceled under ORS 809.310. The department may reissue an identification card canceled under this subsection when the applicant has satisfied all requirements for the identification card.

(14) Notwithstanding any other provision of this section, the department may issue an identification card to a person under this subsection without charge when the person surrenders a license or driver permit to the department for reasons described in this subsection. If the department issues an identification card under this subsection, the identification card shall expire at the same time as the surrendered driver license or driver permit would have expired. An identification card issued under this subsection is subject to the same requirements and fees for renewal or upon expiration as any other identification card issued under this section. The department may issue identification cards under this subsection as described under any of the following:

(a) The department may issue an identification card under this subsection to a person who voluntarily surrenders a license or driver permit to the department based upon the person's recognition that the person is no longer competent to drive.

(b) The department may issue an identification card to a person under this subsection when the person's driving privileges are suspended under ORS 809.419 (1). This paragraph only applies if the person voluntarily surrenders the person's license or driver permit to the department as provided under ORS 809.500.

SECTION 9. { + Sections 10 to 12 of this 2005 Act are added to and made a part of the Oregon Vehicle Code. + }

SECTION 10. { + (1) The Department of Transportation shall provide for the issuance of applicant temporary identification cards in a manner consistent with this section.

(2) The department may issue an applicant temporary identification card to an applicant while the department is determining all facts relative to the application for an identification card.

(3) An applicant temporary identification card shall be valid for a period of 30 days from the date issued. The department may extend the term of the applicant temporary identification card for sufficient cause. An extension of the term of the applicant temporary identification card may not

be for more than 30 additional days. An applicant temporary identification card automatically becomes invalid if the applicant's identification card is issued or refused for good cause.

(4) The department may not charge a fee for issuance of an applicant temporary identification card under this section. + }

SECTION 11. { + If an applicant has complied with all requirements for an application for a driver license, driver permit or identification card, the department at the time of application may issue to the applicant:

(1) An applicant temporary driver permit as provided in ORS 807.310; or

(2) An applicant temporary identification card as provided in section 10 of this 2005 Act. + }

SECTION 12. { + Notwithstanding any provision of the Public Contracting Code, the Department of Transportation may, without competitive sealed bidding, competitive sealed proposals or other competition required in ORS 279B.050 to 279B.085, extend or amend any contract related to the security procedures, processes and materials used in the preparation, manufacture and issuance of driver licenses, driver permits and identification cards provided that:

(1) The extended or amended contract is financially prudent; and

(2) The contract is not extended or amended beyond July 1, 2013. + }

SECTION 13. { + Section 11 of this 2005 Act is repealed on July 1, 2008. + }

SECTION 14. { + Section 12 of this 2005 Act is repealed on July 1, 2013. + }

SECTION 15. { + ORS 807.162 is repealed on July 1, 2008. + }

SECTION 16. { + Notwithstanding any other law limiting expenditures, the limitation on expenditures established for the Department of Transportation for driver and motor vehicle services, for the biennium beginning July 1, 2005, as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds and federal funds, collected or received by the Department of Transportation, is increased by \$298,000 for the purpose of carrying out the provisions of sections 2 to 5 and 10 to 12 of this 2005 Act and the amendments to ORS 807.040, 807.110 and 807.400 by sections 6 to 8 of this 2005 Act. + }

SECTION 17. { + Sections 2 to 5 of this 2005 Act and the amendments to ORS 807.040, 807.110 and 807.400 by sections 6 to 8 of this 2005 Act become operative on July 1, 2008. + }

SECTION 18. { + The Department of Transportation may take any action before the operative date of sections 2 to 5 of this 2005 Act that is necessary to enable the department to implement sections 2 to 5 of this 2005 Act and the amendments to ORS 807.040, 807.110 and 807.400 by sections 6 to 8 of this 2005 Act on and after the operative date of sections 2 to 5 of this 2005 Act. + }

Appendix B

REAL ID Act of 2005 (Engrossed as Agreed to or Passed by House)

TITLE II--IMPROVED SECURITY FOR DRIVERS' LICENSES AND PERSONAL IDENTIFICATION CARDS

SEC. 201. DEFINITIONS.

In this title, the following definitions apply:

- (1) DRIVER'S LICENSE- The term `driver's license' means a motor vehicle operator's license, as defined in section 30301 of title 49, United States Code.
- (2) IDENTIFICATION CARD- The term `identification card' means a personal identification card, as defined in section 1028(d) of title 18, United States Code, issued by a State.
- (3) SECRETARY- The term `Secretary' means the Secretary of Homeland Security.
- (4) STATE- The term `State' means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

SEC. 202. MINIMUM DOCUMENT REQUIREMENTS AND ISSUANCE STANDARDS FOR FEDERAL RECOGNITION.

(a) Minimum Standards for Federal Use-

- (1) IN GENERAL- Beginning 3 years after the date of the enactment of this Act, a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.
- (2) STATE CERTIFICATIONS- The Secretary shall determine whether a State is meeting the requirements of this section based on certifications made by the State to the Secretary of Transportation. Such certifications shall be made at such times and in such manner as the Secretary of Transportation, in consultation with the Secretary of Homeland Security, may prescribe by regulation.

(b) Minimum Document Requirements- To meet the requirements of this section, a State shall include, at a minimum, the following information and features on each driver's license and identification card issued to a person by the State:

- (1) The person's full legal name.
- (2) The person's date of birth.
- (3) The person's gender.
- (4) The person's driver's license or identification card number.
- (5) A digital photograph of the person.
- (6) The person's address of principle residence.
- (7) The person's signature.
- (8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.
- (9) A common machine-readable technology, with defined minimum data elements.

(c) Minimum Issuance Standards-

- (1) IN GENERAL- To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following

information before issuing a driver's license or identification card to a person:

(A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth.

(B) Documentation showing the person's date of birth.

(C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number.

(D) Documentation showing the person's name and address of principal residence.

(2) SPECIAL REQUIREMENTS-

(A) IN GENERAL- To meet the requirements of this section, a State shall comply with the minimum standards of this paragraph.

(B) EVIDENCE OF LAWFUL STATUS- A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person--

(i) is a citizen of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

(iii) has conditional permanent resident status in the United States;

(iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;

(v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;

(vi) has a pending application for asylum in the United States;

(vii) has a pending or approved application for temporary protected status in the United States;

(viii) has approved deferred action status; or

(ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

(C) TEMPORARY DRIVERS' LICENSES AND IDENTIFICATION CARDS-

(i) IN GENERAL- If a person presents evidence under any of clauses (v) through (ix) of subparagraph (B), the State may only issue a temporary driver's license or temporary identification card to the person.

(ii) EXPIRATION DATE- A temporary driver's license or temporary identification card issued pursuant to this subparagraph shall be valid only during the period of time of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.

(iii) DISPLAY OF EXPIRATION DATE- A temporary driver's license or temporary identification card issued

pursuant to this subparagraph shall clearly indicate that it is temporary and shall state the date on which it expires.

(iv) RENEWAL- A temporary driver's license or temporary identification card issued pursuant to this subparagraph may be renewed only upon presentation of valid documentary evidence that the status by which the applicant qualified for the temporary driver's license or temporary identification card has been extended by the Secretary of Homeland Security.

(3) VERIFICATION OF DOCUMENTS- To meet the requirements of this section, a State shall implement the following procedures:

(A) Before issuing a driver's license or identification card to a person, the State shall verify, with the issuing agency, the issuance, validity, and completeness of each document required to be presented by the person under paragraph (1) or (2).

(B) The State shall not accept any foreign document, other than an official passport, to satisfy a requirement of paragraph (1) or (2).

(C) Not later than September 11, 2005, the State shall enter into a memorandum of understanding with the Secretary of Homeland Security to routinely utilize the automated system known as Systematic Alien Verification for Entitlements, as provided for by section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (110 Stat. 3009-664), to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card.

(d) Other Requirements- To meet the requirements of this section, a State shall adopt the following practices in the issuance of drivers' licenses and identification cards:

(1) Employ technology to capture digital images of identity source documents so that the images can be retained in electronic storage in a transferable format.

(2) Retain paper copies of source documents for a minimum of 7 years or images of source documents presented for a minimum of 10 years.

(3) Subject each person applying for a driver's license or identification card to mandatory facial image capture.

(4) Establish an effective procedure to confirm or verify a renewing applicant's information.

(5) Confirm with the Social Security Administration a social security account number presented by a person using the full social security account number. In the event that a social security account number is already registered to or associated with another person to which any State has issued a driver's license or identification card, the State shall resolve the discrepancy and take appropriate action.

(6) Refuse to issue a driver's license or identification card to a person holding a driver's license issued by another State without confirmation that the person is terminating or has terminated the driver's license.

(7) Ensure the physical security of locations where drivers' licenses and identification cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced.

(8) Subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements.

(9) Establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards.

(10) Limit the period of validity of all driver's licenses and identification cards that are not temporary to a period that does not exceed 8 years.

SEC. 203. LINKING OF DATABASES.

(a) In General- To be eligible to receive any grant or other type of financial assistance made available under this title, a State shall participate in the interstate compact regarding sharing of driver license data, known as the 'Driver License Agreement', in order to provide electronic access by a State to information contained in the motor vehicle databases of all other States.

(b) Requirements for Information- A State motor vehicle database shall contain, at a minimum, the following information:

(1) All data fields printed on drivers' licenses and identification cards issued by the State.

(2) Motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses.

SEC. 204. TRAFFICKING IN AUTHENTICATION FEATURES FOR USE IN FALSE IDENTIFICATION DOCUMENTS.

(a) Criminal Penalty- Section 1028(a)(8) of title 18, United States Code, is amended by striking 'false authentication features' and inserting 'false or actual authentication features'.

(b) Use of False Driver's License at Airports-

(1) IN GENERAL- The Secretary shall enter, into the appropriate aviation security screening database, appropriate information regarding any person convicted of using a false driver's license at an airport (as such term is defined in section 40102 of title 49, United States Code).

(2) FALSE DEFINED- In this subsection, the term 'false' has the same meaning such term has under section 1028(d) of title 18, United States Code.

SEC. 205. GRANTS TO STATES.

(a) In General- The Secretary may make grants to a State to assist the State in conforming to the minimum standards set forth in this title.

(b) Authorization of Appropriations- There are authorized to be appropriated to the Secretary for each of the fiscal years 2005 through 2009 such sums as may be necessary to carry out this title.

SEC. 206. AUTHORITY.

(a) Participation of Secretary of Transportation and States- All authority to issue regulations, set standards, and issue grants under this title shall be carried out by the Secretary, in consultation with the Secretary of Transportation and the States.

(b) Compliance With Standards- All authority to certify compliance with standards under this title shall be carried out by the Secretary of Transportation, in consultation with the Secretary of Homeland Security and the States.

(c) Extensions of Deadlines- The Secretary may grant to a State an extension of time to meet the requirements of section 202(a)(1) if the State provides adequate justification for noncompliance.

SEC. 207. REPEAL.

Section 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458) is repealed.

SEC. 208. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this title shall be construed to affect the authorities or responsibilities of the Secretary of Transportation or the States under chapter 303 of title 49, United States Code.

Appendix C

73rd OREGON LEGISLATIVE ASSEMBLY--2005 Regular Session

NOTE: Matter within { + braces and plus signs + } in an amended section is new. Matter within { - braces and minus signs - } is existing law to be omitted. New sections are within { + braces and plus signs + } .

House Bill 2108

Ordered printed by the Speaker pursuant to House Rule 12.00A (5).
Presession filed (at the request of Governor Theodore R. Kulongoski for Department of Transportation)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Allows Department of Transportation to retain certain documents presented or submitted to department.

A BILL FOR AN ACT

Relating to retention of documents by Department of Transportation.

Be It Enacted by the People of the State of Oregon:

SECTION 1. { + Section 2 of this 2005 Act is added to and made a part of the Oregon Vehicle Code. + }

SECTION 2. { +(1) As used in this section, 'document' means any:

(a) Information that is written or in a tangible medium and that is presented or submitted by a customer of the Department of Transportation at an office of the department in the course of the administration or enforcement of the vehicle code; or

(b) Item used for a financial transaction that is presented or submitted by a customer of the department at an office of the department in the course of the administration or enforcement of the vehicle code.

(2) The department may retain a document when the department has reason to believe that the document:

(a) Contains false or fictitious information;

(b) Is counterfeit;

(c) Has been altered;

(d) Was unlawfully or erroneously issued; or

(e) Is presented or submitted by a person who is not in lawful possession of the document.

(3) At the time a document is retained under subsection (2) of this section, the department shall provide the person who presented or submitted the document with:

(a) The reason the document was retained;

(b) The name, telephone number and address of the law enforcement agency to which the department will forward the document as provided under subsection (4) of this section;

(c) The time frame in which the person first will be able to contact the law enforcement agency regarding the retained document; and

(d) Any other information required by the department by rule.

(4) Within two business days of retaining a document under subsection (2) of this section, the department shall forward the document to a law enforcement agency that has jurisdiction over an investigation involving the document. + }

Gresham, OR 97080
Feb 15, 2015

House Rules Committee
Chair Val Hoyle
Vice-Chair Barbara Smith Warner
Vice-Chair Vic Gillam

Members:

Rep. Phil Barnhart
Rep Bill Kennemer
Rep Mike McLane
Rep Rob Nosse
Rep Dan Rayfield
Rep Carl Wilson

Honorable Chair Hoyle, Co-Vice Chairs Smith Warner and Gilliam, and Members of the House Rules Committee,

I am writing to you in opposition of HB3475

The National Popular Vote scheme (NPV) is an unconstitutional attempt to eliminate the Electoral College, because the proposed state compact would require congressional approval.

The NPV scheme would elevate the importance of urban centers and diminish the influence of small states and rural areas.

It would lead to closer elections, more recounts, increased litigation over provisional and other ballots, and conflicts over the results of presidential elections.

It would allow the election of individuals with unprecedented small pluralities, raising grave issues about the legitimacy of a winner and any actions he took as President.

It would encourage voter fraud since fraudulent votes cast anywhere (especially in one-party states) could change the outcome of a national race.

The NPV scheme strikes directly at the Founders' view of federalism and a representative republic that balances popular sovereignty with structural protections for state governments and minority interests.

Thank you for considering my testimony,
Janice Dysinger
Gresham, Or 97080

**Testimony of Kris W. Kobach
Kansas Secretary of State**

Before the United States House of Representatives

Committee on Oversight and Government Reform

Subcommittee on National Security, and

Subcommittee on Health Care, Benefits, and Administrative Rules

**Hearing on “The President’s Executive Actions on Immigration
and Their Impact on State and Local Elections”**

February 12, 2015

Mr. Chairman and Members of the Committee, I come before you today chiefly in my capacity as Kansas Secretary of State. However, I also serve in my private capacity as the lead attorney representing the ten ICE agents who have sued the Secretary of Homeland Security for the reason that the DACA Directive of June 2012 orders the agents to violate federal law. The US District Court for the Northern District of Texas held that the DACA Directive compels ICE agents to violate the requirements of federal law found at 8 U.S.C. § 1225(b)(2)(A). *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788. The case is currently pending before the Fifth Circuit of the U.S. Court of Appeals. *Crane v. Johnson*, Case No. 14-10049. In both capacities, I have observed the troubling consequences of the Obama Administration’s executive actions.

Four States Require Proof of Citizenship to Prevent Aliens from Voting.

At the outset, it is important to note that four States – Kansas, Arizona, Georgia, and Alabama – require documentary proof of citizenship in order to register to vote. The other 46 states require no such proof of citizenship and face considerably greater vulnerability to the problems caused by the executive actions in immigration. However, even the four states that require proof of citizenship are vulnerable, due to a recent decision of the Election Assistance Commission that allows registrants who use the federal voter registration form to avoid proving their citizenship.

The Problem of Aliens Registering and Voting is Very Real.

The problem of aliens registering to vote is a massive one, nationwide. And I have seen it firsthand in Kansas. Because there is no way of scanning a state’s voter rolls and identifying which of the registered voters are aliens, determining the exact number of aliens on the voter rolls is virtually impossible. But we know that the number is significant, because specific election episodes present evidence of aliens voting and because we can gain some information by

matching driver's license databases against voter rolls. We have used both methods in Kansas, and the substantial evidence of alien voting helped convince the Kansas Legislature to adopt our proof of citizenship requirement, which I proposed in 2011 (along with our photo ID requirement and our security requirements for mail-in ballots).

(1) Seward County, Kansas

The most notorious case of aliens voting in Kansas comes from a county-wide election in Seward County, in the southwest corner of the State. In 1997, Charter Resolution 97-3 to prohibit large hog farming operations was a referendum issue that was placed before county voters. It was a hugely controversial issue that generated 51% voter turnout for the countywide special election. The investors in the proposed hog farming operation were working with a hog processing plant across the state line in Guyman, Oklahoma; and they hoped to raise the hogs in Kansas and render the hogs in Oklahoma. But they would have to win the county referendum in order to bring their plan to fruition.

In the run-up to the election, an astonishing thing happened. More than 50 employees of the Guyman, Oklahoma, hog processing plant sent in voter registration applications in a single envelope addressed to the county clerk's office in Seward County, Kansas. Many of the registration forms contained made-up addresses in Seward County. However, the clerk had no legal authority to reject the registration applications.

Then, on election day, the workers at the Oklahoma hog processing plant were bussed to the Seward County, Kansas, clerk's office in a series of vanloads to vote. The county clerk strongly believed that the registrants were non-citizens, based on her knowledge that most of the plant employees were not citizens, based on the fact that the driver of the van was translating the ballot for the plant employees who could not read English, and based on the fact he was overheard telling the plant workers how to vote. In some cases, personnel at the clerk's office knew that the specific voters were not U.S. Citizens. However, they were powerless to disqualify the voters. All that the clerk could do was instruct the driver not to tell the workers how to vote. At the end of the day, the attempt to use alien votes to steal the election fell short.

(2) North Kansas City, Missouri

Another, more recent, incident of alien voting occurred in August 2010 across the state line in Kansas City, Missouri. In the Democratic primary race for state representative between J.J. Rizzo and Will Royster – a race in which the winner of the primary would almost certainly win the general election – multiple forms of voter fraud occurred. The most troubling was the coordinated voting by members of the Somali refugee community in the North Kansas City area.

On election day, poll workers observed a total of more than 50 Somalis who showed up at the polls to vote. Similar to the Seward County, Kansas, episode, they were escorted into the polling place by a translator/coach. Unable to speak English, the Somalis were directed by the

coach how to vote. They were all told to vote for Rizzo. On this occasion, the use of alien votes to steal the election succeeded; Rizzo won the election. The margin of victory? One vote. I have attached to my testimony an affidavit from a supervising poll judge who observed the fraud firsthand at one of the polling locations where it occurred.

(3) Aliens Found on the Voter Rolls Using Driver's License Databases

One way that a state can identify a small subsection of the aliens on its voter rolls is to cross-check its voter rolls against the state's list of driver's licenses, if the state designates some of its driver's licenses as being held by aliens. In Kansas, in 2009 and 2010, this was done by taking the names of holders of "temporary driver's licenses" that had been issued to aliens during 2007-2010 and checking them against the names on the State's voter rolls. The exercise yielded the names of 20 aliens who had successfully registered to vote before Kansas implemented its proof-of-citizenship requirement in 2013. And many of them had voted. However, it should be noted that this is a small subset of the total number of aliens on our voter rolls: it only includes those aliens who obtained a Kansas driver's license, and only those who did so during a specific three-year period. The total number of aliens on the voter rolls is likely to be in the hundreds. This evidence was presented to the U.S. District Court for the District of Kansas in the case of *Kobach, et al., v. Election Assistance Commission* (2014), to demonstrate that merely signing a statement claiming to be a citizen is not enough. The State of Arizona, a co-plaintiff in the lawsuit, undertook a similar, limited study of its voter rolls and found approximately 200 aliens who had registered.

How the President's Executive Actions Exacerbate the Problem

On June 15, 2012, the Obama Administration unlawfully granted deferred action to approximately 1.8 million illegal aliens willing to claim that they entered the United States before the age of 16 (the "DACA Directive"). And on November 20, 2014, the Administration extended the same executive amnesty to another approximately 4 million illegal aliens. I describe these executive actions as "unlawful" because the only two federal courts that have addressed the question both concluded that the President acted in violation of the law. On April 23, 2013, the Northern District of Texas concluded that the DACA Directive compelled ICE officers to violate 8 U.S.C. § 1225(b)(2)(A). *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788. And on December 16, 2014, the Western District of Pennsylvania concluded that the November 20, 2014, Directive was an unconstitutional exercise of legislative power by the executive branch. *United States v. Elionardo Juarez-Escobar*, Criminal No. 14-0180.

The Directives authorize U.S. Citizenship and Immigration Services to issue employment authorization documents to these amnesty recipients. The aliens can then use their employment documents to obtain driver's licenses in any states. Whether or not a particular state will issue driver's licenses to these aliens is a question of state law. In some states, such as Wisconsin, state law compels the department of motor vehicles to issue driver's licenses to all deferred

action recipients. See WIS. STAT. § 343.14(2)(es)(6). In other states, namely those states within the Ninth Circuit (California, Arizona, Nevada, Oregon, Washington, Oregon, Idaho, Montana, Alaska, and Hawaii), a flawed Ninth Circuit holding now compels those states to give driver's licenses to DACA aliens if the state gives driver's licenses to any other deferred action aliens. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). In a dozen other states, the state legislatures are considering bills that would make clear that recipients of this unlawful amnesty are not entitled to driver's licenses in those states.

Where a deferred action alien is able to obtain a driver's license, doing so allows the alien to easily satisfy one of the documentation requirements of the Help America Vote Act. However, even if the alien resides in a state that does not provide driver's licenses to such aliens, the alien will still be able to obtain a Social Security Number, another acceptable form of identification. Provided that the alien is willing to sign the application stating that he is a U.S. citizen – something that occurs all the time either because the alien does not understand that he is declaring U.S. citizenship or because the alien is intentionally breaking the law – he will almost certainly become registered in one of the 46 states that do not require proof of citizenship. If the alien registers using the federal voter registration form in Kansas, Arizona, Georgia, or Alabama, he will succeed in registering to vote in federal elections (unless and until the U.S. Supreme Court grants a writ of certiorari to review the Tenth Circuit's holding in *Kobach v. Election Assistance Commission* and reverses the court of appeals).

Based on the empirical evidence that I have seen as the Kansas Secretary of State, it is a certainty that the Administration's executive actions will result in a large number of additional aliens registering to vote throughout the country, in violation of state and federal law. These are irreversible consequences, because *once an alien registers to vote, it is virtually impossible to detect him and remove him from the list of registered voters*. In states like Kansas, we have been working hard to address the problem of aliens illegally voting in our elections. The Administration's actions have set us back in our efforts, increasing the risk of stolen elections and gravely undermining the rule of law.

AFFIDAVIT

State of Missouri)
) ss
County of Platte)

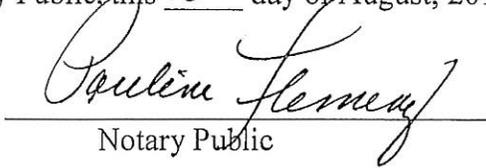
Lindee Hopkins, of 3514 Windsor Avenue, Kansas City, Missouri 64123, being duly sworn does hereby depose and state under oath, to-wit:

1. I was the Supervisory Republican Election Judge for the August 3, 2010, primary election in Jackson County, Missouri, for Ward 11, Precinct 5.
2. That morning a group of three or four Somali adults came in to vote. None of the Somali's were able to speak any English whatsoever. An adult male escorted them into the polling location.
3. None of them could communicate with us election officials at all about voting procedures or which ballot they wanted to cast.
4. The adult male who was with them went outside and brought in a "Rizzo yard sign" into the polling place, he stood in front of the Judge's table, and pointed to the sign and kept saying "this one...this one".
5. Delton, the Democratic Judge, said "that's illegal, that's not supposed to be in here". Shawn, the Democratic Supervisor took no action to remove the sign despite being advised of the problem by Delton.
6. The yard sign was placed at the Judge's table for at least 10-15 minutes in full view of every voter who entered the polling place.
7. At one point the adult male attempted to take the yard sign back to the voting stations but was unable to do so.
8. The group of Somali voters sat at a table together in the voting stations.

9. The adult male stood over the women while they voted, continually talking to them, and would point at specific things on the ballots, instructing the women how to cast their vote and for whom to vote for.
10. He did this to all the voters at the table.


LINDEE HOPKINS

Subscribed and sworn to before me, a Notary Public, this 16th day of August, 2010.


Notary Public

My commission expires:
AUGUST 15, 2010
Notary Public - Notary Seal
State of Missouri
Commissioned for Clay County
My Commission Expires: November 15, 2010
Commission Number: 06523245

Judgment pending on Hillsboro employer

Driver's licenses | Miguel Robleto is accused in what federal officials call the state's biggest immigration fraud

By **HOLLY DANKS**
THE OREGONIAN

HILLSBORO — After four weeks of testimony, a Washington County circuit judge may decide this week whether a Hillsboro man masterminded a scheme that helped thousands of illegal immigrants fraudulently obtain Oregon driver's licenses, or performed a legitimate service.

Miguel F. Robleto is charged with racketeering and 159 counts of money laundering, forgery, tampering with public records, falsifying business records and other crimes. The charges are related to Drive Master Education, a private driver-testing business 47-year-old Robleto ran under contract from Oregon Driver and Motor Vehicle Services.



Robleto

Charges include money laundering

Twelve people have been arrested in the case, which federal immigration officials characterize as the biggest immigration fraud in Oregon. Eight have pleaded guilty and have been sentenced. Robleto's younger brothers — Sergio and Fabio Robleto — are awaiting trial.

Washington County Circuit Judge Steven L. Price said it could be next week before he announces a decision in Miguel Robleto's case, which included about 175 exhibits and 42 witnesses. Price will update attorneys on his progress Tuesday.

If found guilty, Robleto could face a sentence of probation to 50 years in prison.

State investigators say Robleto and his brothers, who ran the La Unica driver-testing business in Beaverton,

B8 ■ ■ 2M

Robleto: Defense shifts responsibility to DMV staff

Continued from Page B1

license at a DMV office.

An Oregon driver's license opens doors. With one, a person can open bank accounts, get credit cards, buy airplane tickets and apply for jobs and social services. A license holder also can exchange an Oregon license for one in many other states with no questions asked.

When sentencing one of Miguel Robleto's employees last month, Washington County Circuit Judge Mark Gardner said he was concerned illegally obtained Oregon driver's licenses could be used by people who "engage in criminal enterprises and acts of terrorism against the United States."

Jeff Lesowski, Washington County senior deputy district attorney, said there is no way to track who got the Oregon driver's licenses through the Robleto's because their true identities and addresses are unknown.

"There are hundreds of people out there with valid Oregon driver's licenses who should not have them," Lesowski said, "and it's anybody's guess what people are doing with those licenses."

The DMV suspended the private testing program for drivers of passenger vehicles in late 2003. Third-party contractors still test commercial drivers, and Miguel Robleto continues to run a commercial driving school, though he doesn't test applicants.

Prosecutors Lesowski and Vitols presented evidence that they said proves Robleto, a former DMV employee, ran a criminal enterprise that:

- Sold postmarked envelopes and fake IDs in the parking lot of his office on Southwest Walnut Street in Hillsboro.
- Falsified drive-test documents

by certifying fake addresses or selling them to applicants who didn't take the test.

- Billed DMV for tests not given.

Robleto doesn't testify

Court-appointed defense attorney Fred C. Nachtigal said prosecutors failed to prove Robleto, who did not testify, knew applicants did not live in Oregon or what was going on in his business's parking lot.

Nachtigal also argued that DMV workers were responsible for preventing fraud, not Robleto.

Joan Wirta, a former DMV branch manager and one of two defense witnesses, said the agency's workers verified identities of people who came to a branch office for a license after passing third-party driver tests. DMV employees also told applicants who didn't have proof of their address to mail themselves a letter, she said.

Until 2004, DMV accepted personal mail as proof of residency.

Lesowski countered that Robleto is charged with aiding and abetting; he didn't have to forge any names or addresses himself to be convicted. And, Lesowski said, just because nonresidents could defraud DMV doesn't absolve Robleto, who signed forms indicating he

checked for Oregon residency.

"While it was not exactly 'one-stop shopping,' he expedited and made it much easier than it would have been without him," Lesowski said in last week's closing arguments.

Veronica Trejo Jasso, who pleaded guilty in the case; testified that she wrote her name and address on dozens of envelopes in pencil and mailed them to herself. After they were delivered, she erased her personal information, wrote addresses she picked out of the phone book and sold the post-marked envelopes to nonresidents in Robleto's parking lot.

Prosecutors also presented registration forms from the Dunes Motel in Hillsboro that had been filled out by people Robleto tested. The motel guests registered with California addresses but received driver's licenses the next day using Oregon addresses.

Melchor Salvador Bernardino Turrubiates, who pleaded guilty for bringing Robleto customers from California, testified that after they received their licenses, he would bring them beer to party at the mo-

...the state attorney general's organized crime unit, said the majority of Robletos' customers received licenses fraudulently because they lived elsewhere. The Robletos' businesses gave driving tests under a DMV program that privatized the service. Drivers who passed could get an Oregon driver's

Please see **ROBLETO**, Page B8

Holly Danks: 503-221-4377;
hollydanks@news.oregonian.com

12 SUSPECTS,
1,250 CHARGES

MIGUEL F. ROBLETO



Owner of Drive Master Education in Hillsboro

190 charges: Racketeering, money laundering, unlawful financial activity, first-degree for-

gery, first-degree possession of a forged instrument, tampering with public records, unsworn falsification, falsifying business records, criminal forfeiture

Outcome: After a four-week trial, a Washington County Circuit Court judge acquits him on all charges.

FABIO ALBERTO ROBLETO



Co-owner of La Unica third-party driver testing company in Beaverton

137 charges: Racketeering, money laundering, unlawful financial activity, first-degree forgery,

first-degree possession of a forged instrument, tampering with public records, unsworn falsification, criminal forfeiture

Outcome: After a weeklong trial, a Washington County Circuit Court judge acquits him on all charges.

SERGIO ANTONIO ROBLETO



Co-owner of La Unica third-party driver testing company in Beaverton

137 charges: Racketeering, money laundering, unlawful financial activity, first-degree forgery,

first-degree possession of a forged instrument, tampering with public records, unsworn falsification, criminal forfeiture.

Outcome: After a weeklong trial, Washington County Circuit Court judge acquits him on all charges.

PATRICIA TRINIDAD ROBLETO



Receptionist, Drive Master Education; daughter of Miguel Robleto

169 charges: Racketeering, money laundering, unlawful financial activity,

first-degree forgery, first-degree possession of a forged instrument, tampering with public records, unsworn falsification, falsifying business records, criminal forfeiture

Outcome: Pleaded no contest in October 2005 to racketeering. Sentenced to three years of probation and 200 hours of community service.

JORGE ROBLETO PASTORA



Employee, Drive Master Education; another Robleto brother

166 charges: Racketeering, first-degree forgery, criminal possession of a

forged instrument, tampering with public records, unsworn falsification, falsifying business records, criminal forfeiture

Outcome: Pleaded no contest in July 2005 to six counts of first-degree forgery. Sentenced to 13 months in prison; scheduled for release in June from Eastern Oregon Correctional Institution.

VERONICA TREJO JASSO



Made envelopes with fake addresses and sold them in the Drive Master Education parking lot as proof of Oregon residency

15 charges: Possession of a forgery device, first-degree possession of a forged instrument, conspiracy to commit first-degree forgery

Outcome: Pleaded guilty in January 2004 to one count of possession of a forgery device, four counts of possession of a forged instrument and four counts of conspiracy to commit first-degree forgery. Sentenced to two years in prison and released in Sep-

tember 2005. Testified against Miguel Robleto; deported to Mexico.

RENE ARENAS GUTIERREZ



Made and sold envelopes; husband of Veronica Trejo Jasso

16 charges: Felon in possession of a firearm, possession of a forgery device, possession of a forged instrument, conspiracy to commit first-degree for-

gery
Outcome: Pleaded guilty in April 2004 to being a felon in possession of a firearm, possession of a forgery device, two counts of possession of a forged instrument and one count of conspiring to commit forgery. Sentenced to 2½ years in prison; deported to Mexico in 2005.

MELCHOR SALVADOR BERNARDINO TURRUBIATES



Transported illegal immigrants from other states to Drive Master Education; made and sold envelopes

13 charges: First-degree for-

gery
Outcome: Pleaded guilty in June 2004 to six counts of forgery; sentenced to six months in jail. Violated probation after release, sentenced to an additional year in jail. Testified for the prosecution in Miguel Robleto's trial; deported to Mexico.

CARLOS AYON ESQUEDA



Transported illegal immigrants from California to Drive Master Education; made and sold envelopes; sold fake IDs

120 charges: Racketeering, first-degree forgery, first-degree possession of a forged instrument, tampering with public records, unsworn falsification, identity theft

Outcome: Pleaded guilty in November 2004 to racketeering, 22 counts of first-degree forgery and three counts of identity theft. Sentenced to

two years in prison. Testified in prosecution in Miguel Robleto's trial; released in January 2006; deported to Mexico.

MANUEL LOPEZ SANTAELI



Certified third-party driver examiner, Master Education

165 charges: Racketeering, first-degree forgery, possession of a forged instrument, tampering with public records, unsworn falsification, falsifying business records, criminal forfeiture

FERNANDO AGUDO MENDEZ



Transported illegal immigrants from California to La Unica

11 charges: Racketeering, first-degree forgery, first-degree possession of a

forged instrument, tampering with public records, unsworn falsification
Outcome: Pleaded no contest in November 2004 to racketeering and two counts of first-degree forgery. Sentenced to three years of probation.

MAXIM CHOW SANG LAM



Accused of bringing Chinese illegal immigrants from New York to Oregon and providing them with fake documents

111 charges: Racketeering, money laundering, unlawful financial activity, first-degree forgery, possession of a forged instrument, tampering with public records, unsworn falsification

Outcome: Missing after he was released from jail on his own recognition and ordered not to leave the area. He is wanted on a \$1 million fugitive warrant and thought to be in British Columbia.

2-15-06 METRO



Jon Husted
Ohio Secretary of State

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STATEMENT OF JON A. HUSTED
OHIO SECRETARY OF STATE

ON

**THE PRESIDENT'S EXECUTIVE ACTIONS ON IMMIGRATION AND THEIR
IMPACT ON FEDERAL AND STATE ELECTIONS**

BEFORE THE

**U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEES ON NATIONAL
SECURITY AND HEALTHCARE, BENEFITS & ADMINISTRATIVE RULES**

FEBRUARY 12, 2015

Chairman DeSantis, ranking member Lynch and members of the Subcommittee on National Security and Subcommittee on Healthcare, Benefits and Administrative Rules, my name is Jon Husted and I am the Ohio's Secretary of State, and in that capacity I serve as our state's chief elections official.

Thank you for the opportunity to be here today to proactively address what I believe is an important issue facing my state and the nation regarding the integrity of our elections.

As the chief elections official in a key swing state, I have tried to build an elections system where it is easy to vote and hard to cheat. We've done this by ensuring easy access to the voting process and by working to ensure that only eligible voters are on the voting rolls.

I want to bring to your attention my concern that the President's recent *Immigration Accountability Executive Actions* will make it more difficult for elections officials to determine if all voters meet the primary standard for voting – U.S. citizenship.

I am not here to debate immigration policy or the President's executive actions. However, I am here to emphatically say that we cannot follow both the federal law and the executive action and ensure the integrity of the elections process without further assistance from Congress and the Obama administration.

I'll briefly explain why.

For an estimated four to five million non-citizens, the President's executive actions provide access to Social Security numbers and driver's licenses. These are the same documents that federal law requires the states to recognize as valid forms of identification for voter registration.

Under federal law, anyone with a valid Social Security number or driver's license number can register to vote, provided they attest that they are a U.S. citizen. However, there is no way for us to validate this citizenship statement, since under the executive actions previously undocumented non-citizens will have access to the same documents as U.S. citizens. The issue becomes especially complicated in states like Ohio where millions of dollars are spent on third-party voter registration drives where no election official would be present to make clear the eligibility requirements for voting.

By signing a voter registration form and asserting citizenship, falsely or erroneously, non-citizens could face real legal consequences. In Ohio, falsification is a 5th degree felony – this could affect their ability to remain in the United States and become citizens.

Let me interject some perspective before I go further. It is not my belief that four to five million non-citizens are going to get on the voting rolls, nor is it my belief that third-party registration drive organizers are waiting to exploit a loophole in law.

While I am committed to ensuring the security and integrity of elections in Ohio and throughout the country; it is important for us to recognize that people can sometimes sign documents – in this case a voter registration forms – without fully comprehending the rules and requirements.

Acknowledging that I do not expect this to be a systemic or widespread problem, we also cannot ignore that there are real electoral consequences. Presidential elections get the most attention, but every year there are thousands of state and local elections in Ohio, and in the last 15 months alone, 70 elections were decided by one vote or tied.

These were mayoral races, school and tax levies, bond issues, members of city councils, township trustees and school boards. In light of these examples alone we simply cannot overlook policies that may allow ineligible voters to cast ballots.

We want to find the least intrusive solution to closing this loophole without making it unnecessarily difficult to register or vote.

While opinions may vary as to the best solution for this issue, one thing is clear: We cannot solve this federal problem solely at the state level alone.

In a letter to President Obama on January 27, I asked that his administration provide state elections officials with real-time access to accurate, searchable, electronic databases of non-citizens who have valid Social Security numbers.

This would enable me and my counterparts in other states to prevent illegal registrations, and more importantly, reassure the public that steps have been taken to ensure only eligible voters are participating in federal, state and local elections.

In Ohio, we are doing what we can to prevent non-citizen registrations and voting.

We electronically share data between the state's bureau of motor vehicles and the county boards of elections, which process voter registrations. This partnership and the data provided have allowed my office to conduct a review of Ohio's voter rolls to determine if, through the use of a driver's license, non-citizens were registered to vote in Ohio.

Following the 2012 Presidential election we found through driver's license information that 291 non-citizens were registered to vote and 17 had actually cast ballots. Those 17 were referred for further investigation and possible prosecution and my office sent letters to the other 274 to cancel their voter registrations.

However, without federal assistance we cannot perform the same cross match on registrations using Social Security numbers. As a result, these executive actions could significantly increase the potential pool of illegal registrations in Ohio and around the country.

It is also important to note that federal law limits the ways states can maintain their voter rolls, in some cases prohibiting states from removing a voter from the rolls until they have been inactive for two consecutive federal general elections. That means that when evidence suggests

that a person is a non-citizen on the rolls we cannot remove them immediately, they have to remove themselves.

This makes it especially important that we prevent an ineligible voter from getting on the rolls in the first place.

As I stated earlier, my focus as the chief elections official in Ohio is to make it easy to vote and hard to cheat. The debate over voter fraud and voter suppression already breeds significant hyperbole from across the political spectrum that erodes public confidence. In this environment, administering elections fairly and accurately becomes more difficult when a path exists by which millions more non-citizens can register to vote and elections officials have no way to identify these individuals.

What we need to resolve this problem is access to the names, date of birth and last four digits of Social Security numbers for non-citizens who receive a Social Security number. We can then cross match that information with our statewide voter database.

I welcome any assistance this committee is able to provide me and my colleagues across the nation.

With your help, we can ensure the confidence of the American voter remains intact by preserving the integrity of our elections systems.

Thank you again for the opportunity to come before the committee today to speak on this issue. I am happy to answer any questions.

Jon Husted

Ohio Secretary of State



As Ohio's 53rd Secretary of State, Jon Husted is responsible for oversight of elections in one of the nation's most hotly-contested swing states. Under his leadership, Ohio delivered a smooth 2012 Presidential Election and 2014 Gubernatorial Election. To ensure all voters were treated fairly and equally, Husted has worked to

implement uniform rules that included the first ever statewide absentee ballot application mailing to voters in all 88 counties in 2012 and again in 2014, as well as setting expansive hours for early, in-person voting. These efforts made it easier to vote and helped reduce the chance of long lines at the polls on Election Day.

From using technology to streamline the voting process to cleaning up Ohio's voter rolls, and making it easier for military families to vote no matter where their service takes them, Jon is always looking to improve how we run elections in Ohio – and it's getting noticed nationally. In 2013, the *Washington Post's* blog "The Fix" named him one of their "Top 10 Rising Stars" in America. For his outreach to military families, Jon was recently recognized by the Association of the United States Army and Ohio was deemed an *All-Star State* by the Military Voter Protection Project. Under his watch, Ohio also received high marks for elections preparedness by voter advocacy groups, including Common Cause, the Verified Vote Foundation and Rutgers University Law School. In addition, Jon currently serves as co-chair of the National Association of Secretaries of State Election Committee and previously served on the organization's Executive Board and as Vice President for its Midwestern Region.

In addition to serving as chief elections official, the Secretary of State is also the custodian of business filings in Ohio. Secretary Husted is committed to ensuring that Ohio's job creators have a positive first interaction with the state of Ohio. He has achieved this through innovative reforms like allowing businesses to file online and reminds his team that government should be in the business of good customer service, working every day to eliminate bureaucratic delays that cost businesses time and money. During his tenure Ohio has seen record business filings five years in a row.

PREVIOUS SERVICE AND PERSONAL HISTORY

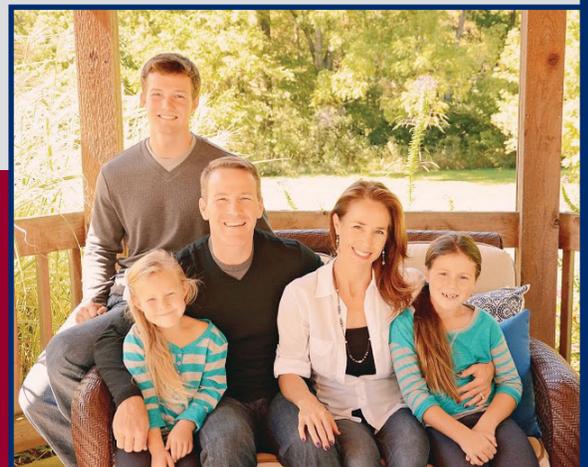
Jon Husted was first elected to public office in 2000 as a member of the Ohio House of Representatives. Only four years later, Jon's colleagues elected him Speaker of the Ohio House, making him one of the youngest ever to lead the body.

As Speaker, Jon was instrumental in passing the most fiscally-conservative budget in 40 years that included the reform of the state tax code and the largest income tax cut in Ohio's history. He also led the passage of the Ed Choice Scholarship -- a school choice option for children trapped in chronically-failing schools -- and the creation of the Choose Ohio First Scholarship to encourage Ohio students studying in the STEM disciplines of science, technology, engineering, mathematics and medicine. For his legislative work, he's proud to have been recognized as a *Watchdog of the Treasury* and as a *Legislative Trail Blazer* by School Choice Ohio.

After serving two terms as Speaker, Husted was elected to the Ohio Senate, where he was a leading advocate for redistricting reform – a cause he continues to champion as Secretary of State.

Raised in Montpelier, Ohio, Husted attended the University of Dayton (UD), where he earned All-American Defensive Back honors as a member of the 1989 Division III National Championship football team. After receiving his bachelor's and master's degrees from UD, Husted stayed in the Dayton area where he served as Vice President of Business and Economic Development at the Dayton Area Chamber of Commerce.

With all of his responsibilities, Secretary Husted considers his most important roles as that of husband to his wife Tina and father to his children, Alex, Katie and Kylie.



JON HUSTED'S

KEY GOALS FOR THE OHIO SECRETARY OF STATE'S OFFICE

- Provide leadership that builds trust and confidence in Ohio's system of elections through consistent and timely policy directives, just arbitration of disputes and enhanced services to voters and county boards of election.
- Enhance economic growth and job creation using technology and customer service practices that save businesses time and money.



DUTIES AND RESPONSIBILITIES

CHIEF ELECTIONS OFFICER

As Ohio's chief elections officer, the Secretary of State oversees the elections process and appoints the members of boards of elections in each of Ohio's 88 counties. The Secretary of State supervises the administration of election laws; reviews statewide initiative and referendum petitions; chairs the Ohio Ballot Board, which approves ballot language for statewide issues; canvasses votes for all elective state offices and issues; oversees the investigation of election fraud and irregularities; trains election officials, and works with counties to train poll workers. The Elections Division of the Secretary of State's office also compiles and maintains election statistics and other election-related records.

Campaign Finance Compliance

Statewide and state legislative candidates' campaign finance reports are filed with the office, together with the reports for state political action committees (PACs), state political parties and legislative caucus campaign committees.

Apportionment Board

The Secretary of State is a member of the Ohio Apportionment Board, which meets every 10 years following the decennial census. The five-member board redraws boundaries for each of the 99 Ohio House and 33 Ohio Senate districts to reflect population changes. Other members of the Apportionment Board are the Governor, the Auditor of State and two members, one Republican and one Democrat, appointed by state legislative leaders.

GRANTING AUTHORITY TO DO BUSINESS IN OHIO

The Business Services Division receives and approves articles of incorporation for Ohio business entities and grants licenses to out-of-state corporations seeking to do business in Ohio. Limited partnerships and limited liability companies also file with the Secretary of State's office.

The Corporations Section of the Business Services Division also approves amendments to filed documents, mergers, consolidations and dissolutions, registers trademarks, trade names, service marks and fictitious names. This section also approves and keeps a registry of business names, names and addresses of statutory agents, incorporators' names, corporations' charter numbers, dates of incorporation, and the number of authorized shares per corporation.

Documenting Secured Commercial Transactions

Secured parties file financing statements in the Uniform Commercial Code section of the Business Services Division to claim an interest in collateral used for a loan and to have the claim indexed for public notice.

RECORDS CERTIFICATION & FILING

Document Certification

The Secretary of State provides authentication of documents for use overseas. Authentications are in the form of either an apostille or a gold seal certificate. Apostilles are used for documents pertaining to countries that are part of the Hague Convention of 1961. Gold seal certificates are used if a country is not part of this convention.

Historical Records

All laws passed by the Ohio General Assembly, municipal charters, administrative rules adopted by agencies, and executive orders issued by the Governor are filed with the Secretary of State's office.

Minister Licenses

The Secretary of State's office licenses ministers for the purpose of solemnizing marriages in Ohio. Licenses are issued to any ordained or licensed minister of any religious society or congregation requesting the license.

Notary Commission

Part of the Secretary of State's office, the Notary Commission maintains records of all registered notaries in Ohio. Additional information is available on the duties and requirements of notaries in Ohio, as well as guidelines for newly commissioned notaries public on our website at www.OhioSecretaryofState.gov.



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LEGISLATIVE TESTIMONY

THE PRESIDENT'S EXECUTIVE ACTIONS ON IMMIGRATION AND THEIR IMPACT ON FEDERAL AND STATE ELECTIONS

**Testimony before the House of Representatives, Committee on
Oversight and Government Reform, Subcommittee on National
Security and the Subcommittee on Health Care, Benefits, and
Administrative Rules**

February 12, 2015

**Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation**

My Background and Experience:

My name is Hans A. von Spakovsky.¹ I am a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation and Manager of the

¹ The title and affiliation are for identification purposes. The staff of The Heritage Foundation testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under § 501(c) (3) of the Internal Revenue Code. It is privately supported and receives no funds from government at any level; nor does it perform any government or other contract work. Heritage is also the most broadly supported think tank in the United States, with nearly 700,000 supporters in every state, 78% of whom are individuals, 17% are foundations, and 5% are corporations. The top five corporate givers provide The Heritage

Election Law Reform Initiative. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I spent four years at the Justice Department as a career civil service lawyer, including three years as Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal voting laws. I spent two years as a commissioner at the Federal Election Commission. I served on the Board of Advisors of the U.S. Election Assistance Commission and on the Fulton County (Ga.) Board of Registrations and Elections. I am the former vice chairman of the Fairfax County (Va.) Electoral Board and a former member of the Virginia Advisory Board to the U.S. Commission on Civil Rights.

I am the author of numerous studies and articles on voting, elections, and campaign issues, including as a contributor to the American Bar Association's book on elections, "America Votes! A Guide to Modern Election Law and Voting Rights" (ABA Section of State and Local Government 2012). I am the coauthor with John Fund of "Who's Counting? How Fraudsters and Bureaucrats Put Your Vote At Risk" (Encounter Books 2012).

Summary of Testimony

The U.S. already has a problem with noncitizens being able to easily register and vote in our elections – whether they do so intentionally or not – with little chance of detection or even prosecution when they are detected. There have been numerous such cases around the country, from Florida to Virginia to Ohio to California. Those ineligible voters could make the difference in a close election, and we have many close elections, particularly in local races.

On Nov. 20, President Obama announced his new immigration policy, which is being implemented through a series of directives issued by Jeh Johnson, the Secretary of the Department of Homeland Security. This executive action, which will not only provide "deferred action" for aliens illegally in the United States – no prosecution or enforcement of federal law requiring their removal – but will also provide them with social security numbers and employment authorization documents or work permits. Lawsuits are already ongoing to force states to provide all aliens granted deferred status with driver's licenses, and other states such as Georgia are already granting driver's licenses to such aliens.²

With an estimated five million illegal aliens being granted government identification documents and social security numbers, the problems associated with noncitizens and elections will increase exponentially. When combined with the history of the Department of Homeland Security's prior reluctance to fully cooperate with election officials' attempts to verify the citizenship status of registered voters, it will be extremely difficult for election officials to

Foundation with 2% of its 2011 income. A list of major donors is available from The Heritage Foundation upon request.

² See *Arizona Dream Act Coalition v. Brewer*, Case No. 12-02546 (D.AZ Jan. 22, 2015); Josh McKoon, *Unlike Mexico, Georgia is Issuing Drivers Licenses to Illegal Immigrants*, Townhall (Feb. 10, 2015); Roque Planas, *Connecticut To Issue Driver's Licenses To Undocumented Immigrants Who Qualify For DACA*, Huffington Post (Jan. 7, 2013)..

prevent or detect those who intentionally or negligently affirm their eligibility to vote on voter registration forms and vote in local, state and federal elections.

The Current Problem

On Oct. 13, 2010, an immigration judge in Orlando, Florida, issued an order in a removal case involving Anailin Reyes.³ She is a Cuban citizen who entered the U.S. in Miami on April 26, 2004. Four months after she arrived she registered to vote and voted in the November 2004 election. Reyes's aunt, Jobitza Soto, a U.S. citizen, told the court that Soto, Reyes, and Reyes' mother (who was also a Cuban citizen) were approached by a woman outside the Duval County Courthouse who was part of a third party organization holding a registration drive. Soto claimed that she told the woman that her two companions were not U.S. citizens, but that the woman told her that "noncitizens could legally vote." So Soto filled out voter registration forms for all three of them.

The fact that Reyes and her mother were not U.S. citizens and therefore not entitled to vote was not detected by local Duval County election officials and Soto was unable to identify which third party organization prompted her, and presumably other noncitizens, to register and vote. This only came to light when Reyes applied for a change in her immigration status. During that process she initially lied to the Department of Homeland Security about registering and voting, but admitted it after "seeing evidence to the contrary" uncovered by DHS from a check of local voter registration records.

If she had not tried to change her immigration status, Reyes could have easily continued to vote illegally and without detection – as too many noncitizens (both legal and illegal) do in elections all over the country. Unfortunately for the interests of election integrity, the immigration judge in the proceeding, Rafael B. Ortiz-Segura, refused to do anything about Reyes's violation of federal and state law because he blamed election officials for mistakenly approving her registration in the first place.⁴

This is not an isolated case. Noncitizens are on voter registration lists all over the country. 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.⁵ 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.

It is estimated that there are over a million illegal aliens in Florida. In 2012, a local NBC station found at least 100 individuals in just one Florida county who had been excused from jury duty because they were not U.S. citizens but who were registered to vote.⁶ One Coral Gables

³ *In the Matter of Anailin Reyes*, A 097-952-267, U.S. Dept. of Justice, Executive Office for Immigration Review, Immigration Court, Orlando, Florida.

⁴ *In the Matter of Anailin Reyes*.

⁵ Gov't Accountability Office, *Elections: Additional Data Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists* 42 (2005).

⁶ Andy Pierrotti, *NBC Investigates: Voter Fraud* (Feb. 2, 2012), available at www.nbc-2/story/16662854/2012/02/02/nbc2-investigates-voter-fraud?clienttype=printable.

resident, Hinako Dennett, who is not a citizen, told the NBC reporter that she votes “every year.” A Naples resident, Yvonne Wigglesworth, who is also not a citizen, claimed she did not know how she had been registered but records showed she had voted in six different elections over the past eleven years.

In just one three-year period from October 2002 to September 2005, the U.S. Department of Justice prosecuted a dozen noncitizens for registering or voting in elections beginning in 1998 all over Florida, including in Broward, Miami-Dade, St. Lucie, Martin and Palm Beach Counties.⁷ The Justice Department even prosecuted a noncitizen, Rafael Velasquez, who had not only voted illegally, but also had been a candidate for the Florida legislature.⁸ These cases were discovered accidentally – not through any systematic review of election records.

The current Justice Department is not interested in prosecuting such cases and enforcing federal laws that make it a crime for noncitizens to register and vote.⁹ In 2011, when I was still on the Fairfax County Electoral Board in Virginia, we discovered 278 individuals who had registered to vote despite telling the Virginia Department of Motor Vehicles that they were not U.S. citizens. 117 of those noncitizens had “a history of voting in Virginia.”¹⁰ We provided that information to both the U.S. Attorney for the Eastern District of Virginia and the Public Integrity Section of the Justice Department. No action was taken to either investigate or prosecute these cases.

In fact, such violations of federal law by noncitizens are not even likely to prevent them from becoming citizens. This was demonstrated in 2010 in Tennessee when Putnam County election administrator Debbie Steidl revealed that she had been given a form letter sent by DHS to an immigrant seeking to become a citizen telling him to submit evidence that he had “been removed from the roll of registered voters.” The Obama administration seemed uninterested in the fact that the noncitizen had actually voted illegally in the 2004 election.¹¹

A study by several professors at Old Dominion University and George Mason University released in 2014 estimated that 6.4% of noncitizens voted in 2008 and 2.2% voted in 2010.¹² This estimate was based on the Cooperative Congressional Election Studies survey that surveyed 32,800 individuals in 2008 and 55,400 in 2010. There has been much dispute over the validity of these estimates, including claims by some that the sampling estimate was too small, something the authors dispute.¹³

⁷ Crim. Div., Pub. Integrity Section, U.S. Dep't of Just., *Election Fraud Prosecutions & Convictions: October 2002-September 2005* (2006). DOJ also prosecuted noncitizens for registering and voting in Alaska, Colorado, and North Carolina.

⁸ U.S. v. Velsquez, Case No. 03-CR-20233 (So. D. Fla 2003).

⁹ See 18 U.S.C. §611, 18 U.S.C. §1015(f), and 18 U.S.C. §911.

¹⁰ Letter of August 19, 2011, from Edgardo Cortes, General Registrar, Fairfax County, Virginia, to Neil H. MacBride, U.S. Attorney for the Eastern District of Virginia, and to Jack Smith, Chief of the Public Integrity Section, U.S. Department of Justice.

¹¹ *Immigrant Who Voted Illegally on Road to Becoming a U.S. Citizen*, FOX News, August 26, 2010.

¹² Jesse T. Richman, Gulshan A. Chattha, and David C. Earnest, *Do noncitizens vote in U.S. elections?* Electoral Studies 36 (2014) 149-157.

¹³ Jesse Richman and David Earnest, *Do noncitizens vote in U.S. elections? A reply to our critics*, Washington Post (Nov. 2, 2014).

But whatever the extent of the problem, 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.¹⁴ In that case, a candidate who was elected to the city council was permanently disqualified from holding public office in California for soliciting noncitizens to register and vote.¹⁵ The fact that noncitizens registered and voted in the election would never have been discovered except that the incumbent mayor, who lost by less than 300 votes, contested the election.

Similarly, a 1996 congressional race in California was clearly affected by illegal noncitizen voting. Republican incumbent Bob Dornan was beaten by his Democratic challenger Loretta Sanchez. Congresswoman 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 this Committee discovered 624 invalid votes by noncitizens who were present in the U.S. Immigration and Naturalization Service (INS) database, as well as another 124 improper absentee ballots.¹⁶ The Committee found "circumstantial" evidence of another 196 noncitizens voting, but the Committee did not include the 196 in its tally of invalid votes.

Although the election was not overturned, this Committee found that hundreds of votes had been cast illegally by noncitizens in just *one* congressional race. And the investigation could not detect *illegal* aliens who were not in the INS records. To my knowledge, neither the Justice Department nor California prosecutors ever prosecuted a single one of the noncitizens who illegally voted in that close contest.

Some claim that illegal aliens do not register in order "to stay below the radar" and because "committing a felony for no personal gain is not a wise choice."¹⁷ But there are many noncitizens who don't seem to understand that they are not entitled to voter and for others the potential benefit of registering can outweigh the chances of being caught and prosecuted. That is unfortunately true since most states have no measures in place to verify citizenship and even when caught, many district attorneys will not prosecute what they see as a "victimless and non-violent" crime.¹⁸

On the benefit side of the equation, a voter registration card is an easily obtainable document, routinely issued without checking identification, that an illegal alien can use for many different purposes, including obtaining a driver's license, qualifying for a job, and even

¹⁴ Daren Briscoe, *Noncitizens Testify They Voted in Compton Elections*, L.A. Times (Jan. 23, 2002), at B5.

¹⁵ A judge's removal of the mayor from office was later overturned, but the removal of a councilwoman who participated in noncitizen 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.

¹⁶ See H.R. Doc. No. 105-416 (1998).

¹⁷ Jessica Rocha, *Voter Rolls Risky for Aliens: Noncitizens' Registering Is a Crime; 4 Cases Turn up in N.C.*, News & Observer (Dec. 7, 2006).

¹⁸ Gov't Accountability Office, *Elections: Additional Data Could Help State and Local Election Officials Maintain Accurate Voter Registration Lists* 60.

voting.¹⁹ 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.²⁰ 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.

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 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 voter rolls in Chicago. Moyer told the Illinois Senate that noncitizens registered so they could get a voter registration card for identification, adding that the card was "a quick ticket into the unemployment compensation system."²² 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 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 noncitizens who are illegally registered.

Some dismiss reported cases of noncitizen voting as unimportant because, they claim, there are no cases in which noncitizens "intentionally" registered to vote or voted "while knowing that they were ineligible."²³ Even if this latter claim were true – which it is not – every vote cast by a noncitizen, whether an illegal alien or a resident alien legally in the country, dilutes or cancels the vote of a citizen, effectively disenfranchising that citizen. To dismiss such nullified votes because the noncitizens supposedly did not know they were acting illegally debases one of the most important rights of citizens.

Obtaining an accurate assessment of the size of this problem is difficult. There is no systematic review of voter registration rolls by most states to find noncitizens, and the relevant federal agencies – in direct violation of federal law – have either refused to cooperate with those few state election officials who seek to verify the citizenship status of registered voters or put up burdensome red tape to make such verification difficult. Federal immigration law requires these

¹⁹ In a typical example, voter registration cards are listed as an acceptable secondary source document to prove Maryland residency when obtaining a driver's license in Maryland. See Maryland Motor Vehicle Administration, Sources of Proof, <http://www.marylandmva.com/DriverServ/Apply/proof.htm>.

²⁰ 8 U.S.C. § 1324a (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 Desiree F. Hicks, *Foreigners Landing on Voter Rolls*, Chi. Trib. (Oct. 2, 1985).

²³ Justin Levitt, Brennan Ctr. for Justice, *The Truth About Voter Fraud* 18 (2007).

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

Examples of the Department of Homeland Security's intransigence include the following:

- Florida was forced to sue DHS in 2012 because the department refused to provide citizenship verification information for registered voters as required by federal law.²⁵
- In declining to cooperate with a request by Maryland in 2004 to check the citizenship status of individuals registered to vote there, a spokesman 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."²⁶
- In 2005, Washington's Secretary of State Sam Reed asked the CIS to check the immigration status of registered voters in Washington; the agency refused to cooperate.²⁷
- In 1997, the FBI and the U.S. Attorney's office in Dallas were investigating voting by noncitizens. The investigation was started when a random check by local INS agents found 10 noncitizens who had voted in just one 400-person precinct, but the criminal investigation was turned over to local prosecutors. 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) (the successor agencies to the INS within the Department of Homeland Security), were either

²⁴ 8 U.S.C. §1373.

²⁵ See *Florida Department of State v. U.S. Department of Homeland Security*, Case No. 1:12-00960 (D. D.C. June 11, 2012)

²⁶ Robert Redding, *Purging Illegal Aliens from Voter Rolls Not Easy; Maryland Thwarted in Tries So Far*, Wash. Times, Aug. 23, 2004.

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). 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).

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. It is only since Florida filed its successful lawsuit against DHS that the department has finally started working with state officials³⁰ to give them limited access to the Systematic Alien Verification for Entitlements (SAVE)³¹ database for citizenship verification. But this system is apparently slow and cumbersome and DHS needs to work with the states to develop a more accessible process or system to verify the citizenship of registrants.

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. With President Obama's executive action on immigration, however, they will now also contain information on the millions of illegal aliens who apply for deferred status. Access to that information will be crucial for election officials in their attempts to clean up registration lists and find aliens who are illegally registered and voting in elections. However, there is not yet any indication that the Obama administration will provide state election officials access to information on those aliens granted deferred status.

The past obstinacy of federal agencies over complying with the law compelled local election officials to rely almost entirely on the "honor system" to keep noncitizens 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."³² Most discoveries of noncitizens on the registration rolls are therefore accidental.

But it continues to happen. The former Colorado Secretary of State testified before Congress in 2011 that a check of the voter registration rolls against state DMV records found many noncitizens had registered and voted.³³ New Mexico Secretary of State Dianna Duran reported that a preliminary check of voter registration rolls had already found 37 noncitizens who had voted in New Mexico elections.³⁴

In 2006, Paul Bettencourt, the former 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 noncitizens. 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, "[s]he then reapplied in 1997, again

³⁰ Tom Curry, *Election official could be pivotal in battleground Colorado*, NBC News (Jul. 27, 2012).

³¹ See <http://www.uscis.gov/about-us/about-save-program>.

³² Christina Bellantoni, *Little to Stop Illegal Aliens from Voting*, Wash. Times (Sept. 24, 2004), at A1.

³³ The 2010 Election: A Look Back at What Went Right and Wrong Before the Comm. On House Administration, 112th Cong. (2011) (Statement of Colorado Secretary of State Scott Gessler).

³⁴ Milan Simonich, *Secretary of State Says Voter Fraud Probably Uncovered*, Alamogordo Daily News (March 15, 2011).

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."³⁵

In 2005, Bettencourt's office turned up at least 35 cases in which foreign nationals applied for or 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.³⁶

As the story by the local NBC station in Florida demonstrated, some noncitizen 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 noncitizens on the voter rolls. For example, the former 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.³⁷

The county recorder in Maricopa County 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 registered and voted." 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, noncitizens who illegally registered and voted in Maricopa County could have determined the outcome of the election.

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.³⁸ While some of

³⁵ *Noncitizen 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).

³⁶ Joe Stinebaker, *Loophole Lets Foreigners Illegally Vote; 'Honor System' in Applying Means the County Can't Easily Track Fraud*, *Houston Chron.* (Jan. 16, 2005).

³⁷ *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).

³⁸ Press Release, California Sec'y of State, Official Status Report on Orange County Voter Fraud Investigation (Feb. 3, 1998).

those individuals may have simply committed perjury to avoid jury service, this represents a significant number of potentially illegal voters: 24,000 to 36,000 noncitizens summoned from the voter registration list over a one-year period.

Utah, which issues driver's licenses to illegal aliens (as do a number of other states), 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.³⁹ 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.⁴⁰

President Obama's Executive Action on Immigration

On Nov. 20, President Obama announced his new immigration policy, which is being implemented through 10 directives issued by Jeh Johnson, the Secretary of the Department of Homeland Security. This executive action will provide "deferred action" for certain aliens illegally in the United States, which Johnson defines as deferring "the removal of an undocumented immigrant for a period of time."⁴¹ This means no prosecution or enforcement of federal law requiring the removal and deportation of illegal aliens. The Social Security Administration and DHS will also provide them with social security numbers and employment authorization documents or work permits for three years, which can be renewed. Lawsuits are already ongoing to force states to provide all aliens granted deferred status with driver's licenses, while a number of states have already voluntarily implemented such a policy.⁴²

It is estimated that up to five million aliens who are here illegally may be granted deferred status,⁴³ along with government identification documents and social security numbers. This will greatly exacerbate the problems associated with noncitizens and elections just given the sheer numbers of new individuals who will be given a quasi-legal status to be present – and working – in the United States.

Additionally, these aliens will also be given social security numbers and will eventually be able to obtain driver's licenses as states change their policies voluntarily or are forced to through litigation. Thus, it will be easier for these aliens to register to vote illegally since they

³⁹ Off. of the Legis. Auditor Gen., State of Utah, ILR 2005-B (Feb. 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.

⁴⁰ *Bill Would Change Voter Registration Rolls*, Associated Press (Feb. 7, 2006).

⁴¹ Memorandum from Jeh Johnson, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents," U.S. Department of Homeland Security (Nov. 20, 2014).

⁴² See *Arizona Dream Act Coalition v. Brewer*, Case No. 12-02546 (D.AZ Jan. 22, 2015).

⁴³ *Obama's Immigration Plan Could Affect Millions*, New York Times (Nov. 15, 2014), at http://www.nytimes.com/interactive/2014/11/15/us/politics/obama-immigration-plan-could-affect-millions.html?_r=0.

will be able to meet the Help America Vote Act of 2002 requirement⁴⁴ that mail voter registration applicants provide the last four digits of their social security number or their current driver's license number.

As a result, it may be extremely difficult for election officials to prevent or detect those noncitizens who intentionally or negligently affirm their eligibility to vote on voter registration forms and vote in local, state and federal elections using their newly-obtained identification documents.

Recommendations

There are several changes that states and the federal government can and should make to prevent noncitizens 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 for felons: 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.⁴⁵
- All states should require anyone who registers to vote to provide proof of U.S. citizenship and Congress should make it clear that federal law does not prohibit such a requirement.
- All social security numbers issued to aliens should have the letter "N" (to designate a noncitizen) at the end of the number so they can easily be identified by government officials as noncitizens.
- Although the Department of Homeland Security has finally started complying with federal law and is working with some states to verify the citizenship status of registered voters through the use of the SAVE system, it is apparently a slow and cumbersome process. DHS should work with the states to develop a more accessible process or system to verify the citizenship of registrants.
- Congress should investigate why the Justice Department is not prosecuting registration and voting by noncitizens, which are serious offenses against the basic principles of our democratic system.
- Congress should investigate whether DHS is granting citizenship or deferred status to aliens who have illegally registered or voted in past elections. Such aliens should not be eligible for citizenship or deferred status. They should be referred to the Justice Department for

⁴⁴ 42 U.S.C. §15483.

⁴⁵ 42 U.S.C. § 1973gg-6(g).

prosecution and removal, as well as to the relevant state election officials so that they can be struck from the registration rolls.

- A voter registration card should not be accepted as a valid identifying document to obtain a driver's license or for identification under federal employment rules unless states have implemented proof-of-citizenship requirements for voter registration.

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 and punished.

Election officials have an obligation not only to enforce the law, but also to implement registration and election procedures that do not allow those laws to be bypassed or ignored. The federal government has an obligation to assist election officials in maintaining the security of our election process, and that requires giving states immediate and complete access to all DHS records on noncitizens.

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.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – “Truth in Testimony”
Required by House Rule XI, Clause 2(g)(5)

Name: HANS A. VON SPAKOVSKY

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying in my personal capacity.
For identification purposes only, I am a
Senior Legal Fellow at the Heritage Foundation.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.

Signature:

Hans A. von Spakovsky

Date:

Feb. 10, 2015