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COUNTING THE VOTE: SHOULD ONLY U.S. CITIZENS BE INCLUDED IN APPORTIONING OUR ELECTED REPRESENTATIVES?

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERALISM
AND THE CENSUS

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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CONTENTS

COUNTING THE VOTE: SHOULD ONLY U.S. CITIZENS BE INCLUDED IN APPORTIONING OUR ELECTED REPRESENTATIVES?

TUESDAY, DECEMBER 6, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERALISM AND THE CENSUS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:57 a.m., in room 2247, Rayburn House Office Building, Hon. Michael R. Turner (chairman of the subcommittee) presiding.

Present: Representatives Turner, Dent, Foxx, and Maloney.

Also present: Representatives Miller of Michigan, and Linda T. Sanchez of California.

Staff present: John Cuaderes, staff director; Ursula Wojciechowski, professional staff member; Juliana French, clerk; John Heroux, counsel; Peter Neville, fellow; Adam Bordes and Mark Stephenson, minority professional staff members; and Jean Gosa, minority assistant clerk.

Mr. TURNER. Call to order the Government Reform Subcommittee on Federalism and the Census. A quorum being present, this hearing of the Subcommittee on Federalism and the Census will come to order.

Welcome to the subcommittee's oversight hearing entitled, "Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?" We are here today to discuss a proposed amendment to the Constitution that would change how the Census Bureau determines the enumeration for the purposes of apportioning the U.S. House of Representatives.

The 14th amendment states, "Representatives of the House shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." In other words, all individuals residing in the United States on Census Day, except for nontaxed Indians must be enumerated to determine the apportionment base.

The issue of whether noncitizens should be included in the apportionment base has received considerable congressional attention in the past. In 1940, for example, Representative Celler of New York said on the floor of the House, "The Constitution says that all persons shall be counted. I cannot quarrel with the Founding Fathers. They said that all should be counted. The only way we can exclude anyone would be to pass a constitutional amendment."

Most legal scholars agree with the view of Representative Celler that any attempt to exclude noncitizens from enumeration must be accomplished by a constitutional amendment. That is what Representative Candice Miller has proposed by introduction of House Joint Resolution 53. This measure is a straightforward proposal to distinguish citizens of the United States from the total populations for purposes of determining the apportionment base.

I am willing to wager that many, if not most, Americans think that is exactly how it is done today and would be shocked to learn that noncitizens, especially those in the country illegally, have an impact on apportioning the membership of the House of Representatives.

Regardless of possible popular belief, there may be some very compelling reasons why the Framers used the word "persons" instead of the word "citizens" or "voters" when they crafted the 14th amendment. The primary question before us today is if H.J. Res. 53 is adopted by Congress and ratified by the States, how would things be different?

We have several witnesses today that may provide the subcommittee some insight into what the political landscape would have looked like in the past if the census excluded noncitizens, what it might look like after the 2010 census if H.J. Res. 53 is adopted. I think you will find this testimony most interesting.

This hearing has been structured in such a way that the subcommittee will first hear from Congresswoman Miller so that we she may describe her proposal. Subsequent to her testimony, she will join us as a member of the subcommittee in listening and questioning the other witnesses.

The subcommittee will then hear from a second panel comprised of two esteemed demographers, Clark Bensen, a consultant and publisher from the Polidata Co., and Steven Camarota, Director of Research for the Center for Immigration Studies. Joining these two will be Lawrence Gonzalez representing the National Association of Latino elected and appointed officials.

In our third panel we will hear from several legal and academic scholars including the former director of the Census Bureau, Dr. Ken Prewitt. Joining him will be James Gimpel, professor of government and politics at the University of Maryland; Johnny Killian, senior specialist in constitutional law in the American Law Division of the Congressional Research Service; and Andrew Spiropoulos, professor of law at the Oklahoma City University School of Law. Finally, we will hear from Nina Perales, Southwestern regional counsel of the Mexican American Legal Defense and Education Fund.

With that, my colleagues on the subcommittee and I welcome you Mrs. Miller and we look forward to your testimony. We look forward to the testimony of all our distinguished witnesses today and thank them for their preparation and time in participating today.

With that, I would like to recognize our ranking member Mrs. Maloney.

[The prepared statement of Hon. Michael R. Turner follows:]

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SUBCOMMITTEE ON FEDERALISM AND THE CENSUS
Congressman Michael R. Turner, Chairman

OVERSIGHT HEARING
STATEMENT BY MICHAEL R. TURNER, CHAIRMAN

Hearing topic: *"Counting the Vote: Should Only US citizens Be Included In Apportioning Our Elected Representatives?"*

Tuesday, December 6, 2005
10:00 am
Room 2247 Rayburn House Office Building

Welcome to the Subcommittee's oversight hearing entitled, *"Counting the Vote: Should Only U.S. Citizens Be Included In Apportioning Our Elected Representatives?"*

We are here today to discuss a proposed amendment to the Constitution that will change how the Census Bureau determines the enumeration for the purposes of apportioning the U.S. House of Representatives.

The Fourteenth Amendment states, "Representatives of the House shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." In other words, all individuals residing in the United States on Census Day, except for non-taxed Indians, must be enumerated to determine the apportionment base.

The issue of whether non-citizens should be included in the apportionment base has received considerable congressional attention in the past. In 1940, for example, Representative Celler of New York said on the floor of the House, "The Constitution says that all persons shall

be counted. I cannot quarrel with the founding fathers. They said that all should be counted . . . The only way we can exclude [anyone] would be to pass a constitutional amendment."

Most legal scholars agree with the view of Representative Celler that any attempt to exclude non-citizens from enumeration must be accomplished by a constitutional amendment. That is what Representative Candice Miller has proposed to do by introducing House Joint Resolution 53. This measure is a straightforward proposal to distinguish citizens of the United States from the total population for purposes of determining the apportionment base. I am willing to wager that many – if not most – Americans think this is exactly how it is done today and would be shocked to learn that non-citizens, especially those in the country illegally, have an impact on apportioning the membership of the House of Representatives.

Regardless of possible popular belief, there may be some very compelling reasons why the Framers used the word "persons" instead of the word "citizens" or "voters" when they crafted the Fourteenth Amendment. The primary question before us here today is: If H.J. Res. 53 is adopted by Congress and ratified by the states, how would things be different?

We have several witnesses today that may provide the Subcommittee some insight into what the political landscape would have looked like in the past if the census excluded non-citizens and what it may look like after the 2010 Census if H.J. Res. 53 is adopted. I think you will find this testimony most interesting.

This hearing has been structured in such a way that the Subcommittee will first hear from Congresswoman Miller so that she may describe her proposal.

The Subcommittee will then hear from a second panel comprised of two esteemed demographers, Clark Bensen, a consultant, and publisher from the Polidata Company and Steven Camarota, Director of Research for the Center for Immigration Studies. Joining these two will be Lawrence Gonzalez representing the National Association of Latino Elected and Appointed Officials.

Finally on our third panel we will hear from several legal and academic scholars including the former Director of the Census Bureau, Dr. Ken Prewitt. Joining Dr. Prewitt will be James Gimpel, Professor of Government and Politics at the University of Maryland; Johnny Killian, Senior Specialist in Constitutional Law in the American Law Division of the Congressional Research Service; Andrew Spiropoulos, Professor of Law at the Oklahoma City University School of Law, and Nina Perales, Southwestern Regional Counsel of the Mexican American Legal Defense and Educational Fund.

With that, my colleagues on the Subcommittee and I welcome you and look forward to your testimony.

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Mrs. MALONEY. Thank you, Chairman Turner, and I really very much appreciate your fairness in handling this hearing, and I always enjoy working with you. I particularly want to thank you for the hearing you held recently in New York City on the community development block grants and look forward to the passage of that report before Congress.

But today, unfortunately, we have before us a truly reckless constitutional proposal which on one hand runs counter to our American ideals and on the other hand makes little practical sense. Were it to become part of the Constitution, it would be the second amendment in our history which did not expand individual liberties. The other was prohibition. The amendment shrinks liberty and deliberately blinds the national government to the needs of millions upon millions of Americans.

This amendment reverses the explicit intent of the Framers that representation in the House should be based on population and that a periodic count of residents was the only legitimate means to assure equitable representation based on population in a changing nation.

The Census Act of 1790, introduced by James Madison and signed into law by George Washington, called for an enumeration of the, "inhabitants of the United States." This was deliberate. We were then and have always been a nation of immigrants. Indeed, seven signers of the Declaration of Independence and eight signers of our Constitution were foreign born. Noncitizens fought for liberty in the Revolutionary War for America and in every war since. Today, 35,000 noncitizens serve on active duty and 8,000 more enlist every year.

Most noncitizens are here legally. They are legal, permanent residents and visa holders who pay local, State and Federal taxes. The Framers decided that only citizens would have the right to choose their Representatives through the right to vote. They just as firmly intended that, "all inhabitants," of the country be counted for purposes of apportioning the seats of Congress. They mandated a census of the entire population to prevent the, "manipulation of political power and taxation."

The census is itself one of the many vital checks and balances embedded in our constitutional form of government which are at the root of why it has endured so long. This amendment before us today, however, turns the census into a political gadget.

As we will hear today in testimony, the census has become a weapon in today's political debate on immigration. Proponents of this amendment will point to recent growth in the percentage of foreign-born residents to make a case that this has somehow, "diluted voting representation of nonborder States." The truth is that compared to the post-Civil War counts, for instance, this percentage is historically low.

As we will hear today, this amendment is a management nightmare. It requires the Census Bureau first to count everyone, then for the first time in our Nation's history, ask everyone for proof that they are a citizen, only for the purpose of going back and removing people from the count. That will be a huge cost in time and taxpayer money.

Imagine when proponents of this amendment demand that residents show proof of citizenship. The end result will be a national ID card. And let's not sugar coat the effects of this amendment; it will discriminate, it will disproportionately exclude Hispanics, who make up the lion's share of our Nation's most recent immigration. To politically manipulate the count and generate undercounts in border States to benefit interior States is discrimination.

Some of our friends on the other side of the aisle profess to prefer a limited Federal Government, so why would they propose a big government, expensive, time-consuming, invasive and last, but certainly not least, discriminatory amendment to our Constitution? It is simple. This amendment is about shifting power. By artificially altering the population in certain areas, the consequence, of course, is an inaccurate census count.

A government that spends its resources in the wrong places, where it would skew representation, will result in a loss of faith in leadership.

This is about sacrificing 210 years of constitutional practice and history merely to increase short-term power at the expense of millions of Americans and those that will soon be Americans in our country.

I am opposed to this amendment. Thank you.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

Congresswoman Carolyn Maloney (NY-14)

Opening Statement

"Counting the Vote: Should Only U. S. Citizens Be Included in Apportioning our Elected Representatives?"

Subcommittee on Federalism and the Census

2247 RHOB – 10:00 A.M.

December 6, 2005

Thank you Mr. Chairman. I appreciate your fairness in handling this hearing, and always enjoy working with you. I wish Census Director Kincannon could have been here to discuss this proposed change to the way his agency does business.

Unfortunately, before us is a truly reckless constitutional proposal, which on one hand runs counter to our American ideals and on the other hand makes little practical sense. Were it to become part of the Constitution, it would be the second Amendment in our history which did not expand individual liberties – the other was prohibition. This Amendment shrinks liberty and deliberately blinds the national government to the needs of millions upon millions of Americans.

This Amendment reverses the explicit intent of The Framers – that representation in the House should be based on population and that a periodic count of residents was the only legitimate means to assure equitable representation in a changing nation.

The Census Act of 1790 – introduced by James Madison and signed into law by George Washington – called for an enumeration of the – quote – "inhabitants" of the United States. This was deliberate. We were then, and have always been, a nation of immigrants. Indeed, seven signers of the Declaration of Independence and eight signers of the Constitution were foreign born. Non-citizens fought for liberty in the Revolutionary War, and for America in every war since. Today, 35,000 non-citizens serve on active duty and 8,000 more enlist every year.

Most non-citizens are here legally. They are legal permanent residents and visa holders, who pay local, state and federal taxes. The Framers decided that only citizens would have the right to choose their representatives through the right to vote. They just as firmly intended that "all inhabitants" of the country be counted for purposes of apportioning the seats in Congress. They mandated a decennial census of the entire population to prevent the "manipulation" of political power and taxation. The Census is itself one of the many and vital "checks and balances" imbedded in our Constitutional form of government which are at the root of why it has endured so long.

This Amendment, however, turns the Census into a political gadget. As we will hear in testimony today, the Census has become a weapon in today's political debate on immigration.

Proponents of this Amendment will point to recent growth in the percentage of foreign-born residents to make a fallacious case that this has somehow "diluted voting representation" of non-border states. The truth is that compared to the post-Civil War counts, for instance, this percentage is historically low.

As we will hear today, this Amendment is a management nightmare. It requires that the Census Bureau first count everyone, then for the first time in our nation's history ask everyone for proof they are a citizen, only for the purpose of going back and removing people from the count.

That will be a huge cost in time and taxpayer money. Imagine when proponents of this amendment demand that residents show proof of citizenship. The end result will be a National ID card. And let's not sugar coat the effects of this amendment: it will discriminate.

It will disproportionately exclude Hispanics – who make up the lion's share of our most recent immigrants – to politically manipulate the count and generate undercounts in border states to benefit interior states is discrimination.

Some our friends on the other side of the aisle profess to prefer a limited federal government. So why would they propose a big-government, expensive, time consuming, invasive and, last but certainly not least, discriminatory amendment to our Constitution?

It's simple: this amendment is about shifting power by artificially altering the population in certain areas. The consequence, of course, is an inaccurate, insincere census count, a government that sends its resources to the wrong places, skewed representation and a loss of faith in leadership.

This is about sacrificing 210 years of Constitutional practice and history, merely to increase short-term power – at the expense of millions of Americans and those that will soon be Americans.

Mr. TURNER. Mrs. Maloney, I want to thank you for your participation today. You have made valuable contributions to this committee, and I appreciate your viewpoint.

Today, this hearing, as we look forward, is informational, and I do believe that many are not aware of how apportionment is accomplished; and your viewpoint is going to be valuable as we educate people of the processes and perhaps the impacts of this constitutional amendment.

Mrs. MALONEY. I appreciate it is educational and not—thank you.

Mr. TURNER. I next would like to recognize our vice chair, Charlie Dent.

Mr. DENT. Thanks, Mr. Chairman, and thank you for holding this very important hearing to examine the possible impact of Congresswoman Miller's proposed joint resolution to amend the Constitution to mandate that only U.S. citizens be counted in census data for apportionment purposes. It is crucial that we review and evaluate this proposed legislation in that it would have a widespread impact on the Census Bureau, Electoral College, number of seats in the House, and basic weight of an individual's vote.

While I deeply respect the Congresswoman's initiative in attempting to illuminate and correct the problem of dilution of U.S. citizens' votes, I think it is also crucial that we take a realistic look at the possible difficulties and costs that may arise as a result of implementing H.J. Res. 53. I look forward to the testimony of my esteemed colleague, Representative Miller, as well as the other witnesses today.

Thanks, Chairman Turner, for holding this hearing.

Mr. TURNER. Thank you. Now it is my honor to recognize for her testimony the Honorable Congresswoman Candice Miller.

STATEMENT OF HON. CANDICE S. MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mrs. MILLER. Thank you. Thank so much, Mr. Chairman and Representative Maloney, Vice Chair Representative Dent as well. I appreciate the fact that you all come with an open mind to this issue, and I certainly appreciate your having a hearing on a piece of legislation that I think is very important to protect the integrity of our democratic system, quite frankly.

Mr. Chairman, over the last several decades our Nation has had a rather dramatic shift in the population, and as a result of that, a shift in the congressional representation as well, principally from the Northeast and the Midwest, to the southern and western regions of our Nation. There are, of course, a number of reasons for population shifts.

Many people just prefer warmer climates and they might retire into some of those areas permanently. Some people are looking for job opportunities, and they may move to cities to pursue them. There are certainly many legitimate reasons for people to move to the South and West, and I strongly believe in the concept of representational democracy, so it is entirely appropriate for congressional seats to move along with the population shifts so that Americans are properly represented in the halls of Congress.

But as I examined this issue, I came across what I thought was a rather surprising thing, quite startling actually. The fact is that illegal immigration or people who are in our country illegally or are not legal citizens of our Nation are being counted and apportioned congressional representation just the same as every legal American citizen.

Let us examine how this can possibly be happening. Our Constitution, of course, requires the government to undertake a census every 10 years. One of the many purposes of the census is to distribute seats in the Congress amongst the various States. Those with greater population receive more seats than those with less. Simple concept. This reapportionment of seats is meant to balance as close as is practical the concept of one man, one vote.

The 14th amendment of our Constitution states that in the census that all persons must be counted. All persons, of course, include every man, every woman, rich, poor, Black, White, every person. However, many people would be surprised to know that it also means citizens and noncitizens, including illegal immigrants.

In fulfilling its constitutional obligation, the U.S. Census Bureau counts every person whether they are in this country legally or not. Those same numbers, which include both legal and illegal immigrants, are then used to determine congressional representation. So even if you broke the laws of our country to come here, we give you as much representation to impact our laws as any legal American.

So for all practical purposes, when we are voting in Congress about issues like national security or border security or illegal immigration, we allow illegal immigrants to influence the outcome of those votes. We disenfranchise our own American citizens by allowing illegal immigrants to be counted for the purposes of congressional representation in the same identical way that we count legal citizens.

Just allow me to illustrate my point by comparing three different congressional districts, and let me start with the 10th District of Michigan, which I am very proud to represent. According to the 2000 census, in the 10th District of Michigan, the census says 97 percent of the residents that live in my district are American citizens; 3 percent are not.

If you look at the entire State of Montana, that has only one congressional district, the census is saying there that 99 percent of the people in Montana are citizens, less than 1 percent are not.

Let us now consider the congressional district, the 31st District of California. According to the census, 60 percent of the residents there are citizens, 40 percent of the residents in this district are not American citizens, and yet all three, the 10th District of Michigan, the entire State of Montana, and the 31st District of California have the same vote in the U.S. Congress.

Mr. Chairman, as you know, I was a secretary of State in Michigan before I came to Congress. My principal responsibility there was as an election official, so I do perhaps look at election results a little more closely than some. And it was while I was looking at some of the election numbers that this became apparent to me.

There were nearly three times as many voters in my district during the last election cycle as there were in California's 31st. So a House candidate in California's 31st District only needs 56,000

votes to win a seat in Congress, and yet in my district a winning candidate would need a minimum of 166,000 votes in order to become a Member of Congress, nearly 50 percent more than the entire vote in California's 31st.

I think that fundamental fairness suggests that each congressional district should have roughly the same number of citizens since only citizens are able to vote. A district that has tens or hundred of thousands of illegal immigrants dilutes the voice of American citizens in other areas of the Nation, and in my opinion, that is simply not fair.

Another effect of these congressional seats shifting to States with larger noncitizen populations is that recipient States have a larger voice in Congress and, in fact, throughout the entire Federal Government. By having an inflated population, a greater number of Representatives in the House, it opens doors for increased Federal funding in those States. It might actually give some of these States an incentive to encourage illegal immigration.

If only citizens had been counted for the purposes of reapportionment, CRS estimates show that it would have had an impact on how nine congressional seats were allocated during the last congressional reallocation. By the Census Bureau's estimate, California is home to an estimated 5.4 million noncitizens. The State of California would have been allocated six fewer seats in the House of Representatives. Three other States would have had one less seat: Florida, New York and Texas.

Nine States would have picked up those seats. Those States are Indiana, Kentucky, Michigan, Mississippi, Montana, Oklahoma, Pennsylvania, Wisconsin and Utah. In fact, if you think about the six additional congressional seats that have been given to California just because of its illegal immigrant or its noncitizen, however you want to categorize it, population, it also gives those noncitizens an equal or greater voice in the Electoral College and, thus, the Presidential race than States that have six or less Members of Congress.

Those States that have less to say than illegal immigrants are Alaska, Delaware, Arkansas, the District of Columbia, Hawaii, Idaho, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia and Wyoming. Fully 20 States and the District of Columbia have less to say, who is elected the President of the United States, than do the illegal immigrants that live in the State of California, most of whom, many of them, broke laws to get into our Nation.

Mr. Chairman, there are a number of people who you will hear from shortly in the next panel who will tell this committee not to concern itself with this, that we are a compassionate nation and we need to protect everybody and need to allow this to continue. I do not believe that we should. And for those reasons I have introduced House Joint Resolution 53. This is a constitutional amendment that specifies that the congressional representation shall be apportioned based on the number of citizens, not persons, a really simple change to the 14th amendment.

The right to vote is certainly one of our most cherished freedoms. We should not allow that right to be diluted for any reason. Unfor-

tunately, our porous border and lax enforcement of immigration laws are doing just that. Citizens in States with fewer immigrants, legal and illegal, are disadvantaged. This is about fundamental fairness and, again, the American ideal: One man, or maybe one woman, one vote.

I don't want anyone to take away the impression that I am anti-immigration. I am a first-generation Scot, and in my district and in my entire State we have immigrants that came from across the globe to seek a better life for themselves. And I will tell you that my constituents who have followed the laws to become American citizens are the first people that think that this is outrageous and want to see it changed. They cherish their citizenship so deeply and the blessing it bestows on them that they more than any others do not want to have their voice diluted.

I appreciate your interest in this issue, Mr. Chairman and members of the subcommittee, and I look forward to your questions. Thank you.

[The prepared statement of Hon. Candice S. Miller follows:]

Opening Testimony 1
Subcommittee on Federalism and the Census
Congresswoman Candice Miller (MI-10)
5 December 2005

Thank you Mr. Chairman, Ranking Member Clay, and Members of the Subcommittee for the opportunity to appear before you today. I certainly appreciate your having a hearing on a piece of legislation that I think is very important to protect the integrity of our Democratic system.

Mr. Chairman, over the last several decades, our nation has had a rather dramatic shift of population and – as a result – Congressional representation from the Northeast and Midwest to the southern and western regions of the United States. As a Michigander, this concerns me as I have seen Michigan lose 4 seats in the last 30 years even though our population has grown, just not as fast as states in other parts of the nation. Other states have lost even more seats. The growth in Northern states is simply not keeping pace with the growth in states like California, Texas, or Florida.

There are of course, a number of reasons for this shift. Many people prefer warmer climates and retire to those areas permanently. Some people move to cities such as Las Vegas, Dallas, or Phoenix to pursue new job opportunities. There are many legitimate reasons for people to move to the South and the West. And I strongly believe in the concept of representational democracy, so it is entirely appropriate for Congressional seats to move along with population shifts so that Americans are properly represented in the halls of Congress.

But as I examined this issue, I came across a surprising issue that is happening as a result of this shift in population – the fact that illegal immigration or people who are in our country illegally or are not legal citizens of our nation are being counted, and apportioned Congressional Representation just the same as every legal American Citizen.

Let's examine how this can possibly be happening. Our Constitution requires the government to undertake a census every ten years. One of the many purposes of the census is to distribute seats in the Congress among the various states.

Those with greater population receive more seats than those with less. This reapportionment of seats is meant to balance as close as is practicable the concept of one man – one vote.

The 14th Amendment to the Constitution states that in the census that all persons must be counted. All persons include men and women, rich and poor, black and white, every person. However, many would be surprised to know it also means citizens and non-citizens – including illegal immigrants. In fulfilling its Constitutional obligation, the U.S. Census Bureau counts every person weather they are in this county legally or not. Those same numbers which include both legal and illegal immigrants are then used to determine Congressional representation.

So even if you broke the laws of our nation to come here, we give you as much representation to impact our laws as any legal American. So for all practical purposes, when we are voting in Congress about issues like national security, border security or illegal immigration, we allow illegal immigrants to influence the outcome.

We disenfranchise our own American citizens by allowing illegal immigrants to be counted for the purposes of Congressional Representation in the same identical way that we count legal citizens.

Allow me to illustrate my point by comparing three congressional districts.

The 10th District of Michigan, which I am proud to represent in this House, according to the 2000 Census is home to 662,510 individuals. Of those 645,888 are citizens according the Census estimates, and 16,622 non-citizens. So. According to the Census Bureau 97% of the residents of my district are American citizens, 3% are not.

The entire state of Montana has just one congressional district. It has a total population of 902,195 individuals. 895,281 of those are citizens, and 6,914 are non-citizens. Over 99% of the people in Montana are citizens, and less than 1% are not.

Now let us consider the 31st District of California. According to the Census, this district is home to 639,248 individuals.

Only 377,191 are citizens and 262,057 are non-citizens. This means that about 60% are citizens and that over 40% of the residents in this district are not American citizens.

This means my district is home to 268,697 more Americans than the 31st District of California. And it means that the state of Montana is home to an astounding 518,090 more Americans than is California 31.

Yet all 3 examples have the same vote in Congress.

Mr. Chairman, as a former Secretary of State, with principal responsibility for serving as my states chief election official, I probably look at election results a bit more closely than some. And it was while I was looking at election numbers for Congress around the nation that this huge discrepancy occurred to me.

In the 2004 election for in my district, 331,868 votes were cast. In the state of Montana 444,230 votes were cast. In California's 31st District, only 111,411 votes were cast.

There were nearly 3 times as many voters in my district as there were in California's 31st. Thus, a House candidate in California's 31st district need only win 56,000 votes to secure a seat in Congress. In my district, a winning candidate would need a minimum of 166,000 votes to secure a seat, nearly 50% more than the entire vote in California 31. In California 31, an individual voter has much greater influence than does one in Michigan's 10th Congressional District.

Fundamental fairness suggests that each Congressional district should have roughly the same number of citizens since only citizens are able to vote. A district which has tens or hundreds of thousands of illegal immigrants dilutes the voice of citizens in other areas of the nation and enhances that of those who live in such areas. In my opinion that is simply not fair.

Another effect of these Congressional seats shifting to states with larger non-citizen populations is that recipient states have a larger voice in Congress, and throughout the entire federal government. Having an inflated population, and thus a greater number of representatives in this House, opens doors for increased federal funding for those states. In a very twisted way, it also gives states an incentive – that may or may not be acted upon – to create a situation where illegal immigration is tolerated, accepted or even encouraged.

If only citizens had been counted for purposes of re-apportionment, Congressional Research Service estimates show it would have had an impact on how nine congressional seats were allocated. The state of California, home to an estimated 5.4 million non-citizens, would have been allocated six fewer seats in the House of Representatives. Three other states would have been awarded one less seat including Florida, New York and Texas. The nine states which would have been awarded one seat include Indiana, Kentucky, Michigan, Mississippi, Montana, Oklahoma, Pennsylvania, Wisconsin and Utah.

In fact, the six additional Congressional seats given to California because of its large non-citizen population, gives those non-citizens an equal or greater voice in the Electoral College, and thus the Presidential race, than do states that have 6 or less Congressional members. This includes the states of Alaska, Arkansas, Delaware, the District of Columbia, Hawaii, Idaho, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia and Wyoming. Fully 20 states and the District of Columbia, have less to say about who is elected as President of the United States, than do the illegal immigrants in just the state of California, most of whom broke our laws to get here.

Mr. Chairman, there are people, some of whom you will here from shortly, who may tell this committee not to concern itself with this, that this is not really a problem, and that we have to make sure that a compassionate country like America should allow this to continue, but I do not.

For these reasons, I have introduced House Joint Resolution 53. This Constitutional amendment specifies that Congressional representation shall be apportioned based on the number of citizens not persons in each state. A really simple change in the 14th amendment, simply changing the words persons to citizens.

Section 2 of the 14th Amendment reads in part, "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State..." Because the authors of the 14th Amendment chose the word "persons" instead of "citizens", we have arrived at the situation we have today. While the Constitution should only be amended in the most essential circumstances, it is my understanding that a constitutional amendment is the only way to effect this change without endless litigation.

Opening Testimony 10
Subcommittee on Federalism and the Census
Congresswoman Candice Miller (MI-10)
5 December 2005

The right to vote is one of our most cherished freedoms. We should not allow that right to be diluted for any reason. Unfortunately, our porous border and lax enforcement of immigration laws are doing just that. Citizens who live in states with few immigrants, legal and illegal, are disadvantaged. This is about fundamental fairness and the American ideal of "One Man; One Vote."

I don't want anyone to take away the impression that because I have introduced this amendment that I am anti-immigrant. I am not. In fact my district is home to countless immigrants from across the globe including many from Eastern Europe and the Middle East. I believe in immigration – legal immigration.

As I have traveled my district and discussed this issue with so many of my constituents, I have found that those who are the most supportive are those who have followed the rules and adopted this country their own. They cherish their citizenship so deeply and the blessings it bestows on them that they more than any others do not wish to have their voice diluted.

Thank you again for the opportunity to appear before you to discuss this issue, and I look forward to any questions you may have.

Mr. TURNER. Congresswoman Miller, I appreciate the fact that you have highlighted this issue. I think we are all aware that when the constitutional convention came together there was much heated discussion that resulted in the structure that we have today of the House and the Senate and the allocation of Representatives by State based upon the discussion of how do we balance the issue of influence of large States versus small States. There was a grave concern that those in small States would have less of a voice or representation in Congress and have perhaps their interests overridden.

With your illustration of the fact that noncitizens in California representing six additional electors both in the Electoral College that elects our President, and Representatives, your illustration that 20 States have either less or equal representation on the national level to those seats gives a great illustration that this is an issue that goes to the heart of the discussion of the constitutional convention of the balance of States and their power.

I certainly think that your comments do not sound anti-immigrant; they sound citizen versus noncitizen as an issue of allocating the vote. It certainly doesn't address the issue of whether or not anyone is welcome, but as you address the issue of balancing of power between the States—something that was very important in structuring our government—it becomes part of that discussion.

Prior to serving in Congress you served as secretary of State and had responsibility for administration of the electoral system in Michigan. One of the criticisms that we hear of this proposal—obviously, one is the issue of cost, which I don't find too compelling because, obviously, if we are trying to bolster the rights of citizens, cost is certainly not something that would be a compelling argument.

But the nightmare of the administration of the process, I think, is one that does need to be addressed: How would we accomplish the determination of someone's status as citizen or noncitizen? In the testimony that you have and the testimony that we have from most of the witnesses, they make references to the number of citizens or noncitizens that are currently counted in the system. Someone obviously has taken an effort from the data that we have had to ascertain where citizens or noncitizens are located.

Could you speak for a moment to what you have learned and your thoughts on the processes of how we might be able to then be successful in doing a census which is under the jurisdiction of this committee and determine citizenship and noncitizenship?

Mrs. MILLER. Yes, Mr. Chairman. I obviously don't work for the Census Bureau, so I couldn't tell you what the entire impact would be, but I do not believe that this resolution that I am putting forward should really be viewed numerically in the terms of what the costs actually are. As you say, it is about fairness and protecting our citizens' rights.

However, right now, the Census Bureau is already estimating without verifying how many citizens and how many noncitizens. In fact, CRS prepared a report for me, detailing for every congressional district in the entire Nation the numbers based on the last census of total population, native born, naturalized citizens, their

total, the percentage of resident population, noncitizen population, and then the total vote cast in the 2002 general election.

The Census Bureau is already doing much of this work without verification. If they just started with the information that they already have, I don't know why that would be a problem for them.

I do think though, it is very important that we do count every person. I am not suggesting that we stop counting everybody here. It is important for us to try to get a handle on what our population is, citizens, noncitizens, etc. I am only speaking to the process of congressional representation, so I am not suggesting that the Census Bureau change their processes not to count illegal immigrants or noncitizens. Those categories must be counted and have to be taken into consideration for a number of other reasons.

I am also not suggesting that my proposal go to States or local municipalities. This is only about Federal congressional representation. The States would be allowed to continue as they want.

I would like to mention the REAL ID Act that the Congress has recently passed. I was very involved in that particular piece of legislation. Not only as former secretary of state in Michigan did I have election responsibilities, I also had responsibilities with issuing drivers' licenses. We were 1 of 10 States that continued to issue driver's license and State identification cards to known illegal immigrants; even though we knew they were in the country illegally, we had to keep giving them a driver's license, which I believe is very counterintuitive with the kinds of challenges that are facing our Nation today.

But the REAL ID Act is going to address that. Now legal presence will be required and every State, even before the REAL ID card, the DMVs and secretaries of state are required to ask for your Social Security number before they issue you a driver's license or State identification card.

So I do think that some of this verification technology is going to be in place and I would speculate that it will be an assist to the Census Bureau as they look into what the costs actually would be.

Mr. TURNER. Congresswoman Miller, you have proposed this change by constitutional amendment versus statute.

Is it that you believe that a statute would not be sufficient in order to be able to effect this change?

Mrs. MILLER. You know, I would prefer to do it by statute because obviously a constitutional amendment is quite a laborious process; and again, I appreciate the hearing on the issue. Of course, it requires two-thirds of each body and then three-fifths or three-quarters of the States for a constitutional amendment, and we should not change the Constitution by whim; so I recognize the seriousness of what I am proposing here. However, as we researched this issue, we came across a Harvard Journal of Law and Public Policy, this was in the Spring of 1999, entitled, "Losing Control of America's Future: The Census, Birthright, Citizenship and Illegal Aliens." They went through this entire process, and at the very end it said that the thesis of this article is that needed changes can be accomplished by statute.

They do believe that it could be accomplished by statute. If, however, either change cannot be made in this way without significant delay because the President, Congress or even the Supreme Court

believes the Constitution precludes it, then a constitutional amendment should be pursued until ratification is achieved.

Essentially, I came to the same conclusion because I do believe if we tried to do this by statute, even if we were successful in passing it, we would be facing endless litigation, and so I thought a constitutional amendment would be the most prudent course.

Mr. TURNER. Thank you so much.

Mrs. Maloney.

Mrs. MALONEY. Thank you very much for your testimony today, Congresswoman.

As a Member of Congress, can you describe how your proposal benefits your State of Michigan?

Mrs. MILLER. Yes. As I mentioned in my testimony, we actually would probably not have lost one of our seats. Previous to the last census, Michigan had 16 congressional seats. Currently we have 15, and we are looking in the next census at the distinct possibility of losing an additional seat. This is not because we have not grown in population. Many States just like your own of New York, we have actually had an increase in our population but not at the same rapid expansion that is happening in the South—Florida, Arizona, New Mexico, Texas, California, what have you—particularly when you factor in the illegal immigration.

Mrs. MALONEY. I have no further questions.

Mr. TURNER. Mr. Dent.

Mr. DENT. Thank you, Mr. Chairman.

Like you, Congresswoman Miller, I come from a State that has not grown at a very great rate. In fact, according to the data, in 1960 my State had 27 Members of Congress; today we have 19. Back in the 1930's I know we were over 30 Members of Congress. So really since the 1930's our representation has been nearly cut in half.

I would be curious to know how many seats my State has lost due to noncitizens being counted over these several decades, and maybe you know what the answer is to Michigan.

According to the data provided to me, my State would pick up a seat. I would be curious to see how many seats we might not have lost had noncitizens not been counted. I don't know if you have any thoughts on that.

Mrs. MILLER. I have some thoughts. I think it is very unfair what has happened to all of us.

I am sorry, I don't have the numbers for your particular State, but you can see a common element here. And I understand, as I said at the outset, that we all absolutely believe in representing the people, the American citizens. That is why we require citizenship to vote.

I mean, if you took this to its logical conclusion, why even require citizenship in order to vote? Again, as a former chief elections officer, if we want to protect the rights of illegal immigrants, why do we even require people to have citizenship to vote? They are already really voting on the floor of the House.

But I do think that we understand why people and population shifts are occurring. That being said, I have no problem with seats in the House being apportioned based on population, but I certainly do have a distinct distaste for the fact that American citizens', legal

citizens of America, vote is being diluted because as the population is shifting and illegal immigration is increasing in some of these border States.

Mr. DENT. Thank you.

Mr. TURNER. We thank Congresswoman Miller. We thank you for your testimony as panel one, and if you would, please now join us as we turn to Panel Two. We have two panels that would continue our discussion of the counting of U.S. citizens and how it impacts our elected Representatives and what would be the effect if we only, in that process, counted U.S. citizens.

On panel two we have Mr. Clark Bensen, consultant and publisher, Polidata Co.; Mr. Steven Camarota, director of research, Center for Immigration Studies; Mr. Lawrence Gonzalez, Washington director of National Association of Latino Elected and Appointed Officials.

If you would come forward.

Gentlemen, we will begin by swearing in the witnesses of our second panel. We will swear in the witnesses for the second and the third panels. Witnesses will notice that there is a timer light at the witness table. The green light indicates that you should begin your prepared remarks and the red light indicates that your time has expired. The yellow light indicates when you will have 1 minute left to conclude your remarks. Each of you will be asked to summarize your previously submitted written testimony into a 5-minute presentation.

It is the policy of this committee that the witnesses be sworn in before they testify. You would please rise and raise your right hands.

[Witnesses sworn.]

Mr. TURNER. Please let the record show that all witnesses have responded in the affirmative.

I want to thank each of you for the time that you have taken to prepare for your testimony here today. We look forward to your comments and we will begin with Mr. Bensen.

STATEMENTS OF CLARK BENSEN, CONSULTANT AND PUBLISHER, POLIDATA CO.; STEVEN CAMAROTA, DIRECTOR OF RESEARCH, CENTER FOR IMMIGRATION STUDIES; AND LAWRENCE GONZALEZ, WASHINGTON DIRECTOR, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS

STATEMENT OF CLARK BENSEN

Mr. BENSEN. Thank you, Mr. Chairman. I appreciate the opportunity to address the possible impacts, mostly the political impacts, of a noncitizen apportionment.

Mr. TURNER. Can I ask you to move closer to your mic. That way we can hear you better.

Mr. BENSEN. In addition to the written remarks, there are maps and tablets on my Web site, Polidata.organization, Polidata.org, and there were just too many different scenarios to provide all sorts of handouts here.

Let me first start off by summarizing some of what Congresswoman Miller addressed, which is, the 2000 census actually was

the culmination of a 6-decades-long shift of the political power in the country from the Northeast and the Midwest to the South and the West. This is clearly a trend that is continuing, and in fact, projections on the 2010 apportionment would indicate that an additional 11 seats would shift from the Northeast to the South and the West.

At the same time, of course, the noncitizens, as we measured them in the census, have risen dramatically from, in 1980, about 3 percent to, in 2000, over 6 percent. The distribution, however, of the noncitizens is not very randomly distributed as it were, and in fact with the handout over here there are two maps, one of which is a county-based map, which is this one, which does in fact indicate that a lot of the distribution of the noncitizens is in the border areas. And it is because of this uneven distribution of the noncitizens, again, as we determine them from the census that in fact this is a Robin Hood kind of proposal in the sense that we take from the few and give to the many.

And in fact the first aspect I looked at here was the actual apportionments that have been made over the last few decades and projected out to 2010. And in 1980, 1990 and 2000 it was the same general trend, which is, very few States—basically, four or five States——would have lost seats had the apportionment been based upon noncitizens. And in 2010 it would basically be the same impact.

Before my time runs out, I want to address a couple of issues. A lot of the issues we will hear several times today, but one of the impacts, of course, is just briefly the Electoral College. Yes, noncitizens do vote in California because of this, but the overall impact would be basically not as big a shift because some of the other States, of course, are Republicans or Democrats, and so in a sense would have been four extra votes for Bush in 2000 and 2004.

But the other aspect goes to the redistricting elements of it, and Congresswoman Miller addressed this to some degree. In actuality, her example is correct even though in reality you should look at one State at a time. And in California it is a similar situation, in which case I look at the Presidential results by congressional district.

And this is a project that Polidata has been working on every 4 years for 2 decades, and we look at the total votes in the Presidential election and compare that; and in California it is the same kind of scenario, which is, you have districts where the average vote in the Presidential election is three times what the vote is in the districts that have the smallest number of votes.

Let me summarize by saying that also the overall result for the House is that if you add up all the districts based upon the Presidential votes, 50 percent of the Members are elected by 42 percent of the voters in the country.

The other element I want to address is again the accuracy of the data and the impact upon the Bureau. And as we know, it would be a short-form item now; and I am concerned about not only the accuracy of the responses, but the fact we may have nonresponse followup, which is a very costly element of the entire process.

And more importantly, since I represent people who actually do the redistricting, we need good data, and I see this as a potential

problem from not only the Bureau standpoint of their reputation, but also the inevitable litigation over the whole process.

And the more important question from a redistricting standpoint is, if we in fact exclude citizens for apportionment, what happens at the State and local level? There is some rationale that in fact whatever is used for apportionment at the local level must basically follow the census, but that is because that has always been determined to be that it is basically based on population.

I believe some of the other panelists, the scholars panel, I guess, will address this to some degree as well. Thank you.

[The prepared statement of Mr. Bensen follows:]

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COMMENTS

THE IMPACT OF CITIZEN APPORTIONMENT
Prepared for the U.S. House Committee on Government Reform

December 6, 2005

CLARK BENSEN[1]
POLIDATA ® Political Data Analysis

The following comments relate to the bill calling for a constitutional amendment relating to apportionment[2]. Specifically, the proposed amendment would require the exclusion of non-citizens from the numbers used for the apportionment of the U.S. House of Representatives. My comments focus on the impact such a proposal could have on the results of apportionment and on the operations of the U.S. Bureau of the Census.

The bill is sponsored by the member from Michigan, Representative Miller, who represents a state in a region of the nation that has consistently lost population, and hence, political power over the past few decades. In fact, the 2000 Census was the culmination of a decades-long shift of political power from the East and Midwest to the South and West. Following the 1940 Census the East and Midwest were apportioned a combined 251 members with the South and West apportioned a combined 184 members. Following the 2000 Census the combined number of members for the East and Midwest dropped to 183 and the combined number of members for the South and West rose to 252[3].

I will address two areas of concern.

1) Impact on Apportionment. If such a proposal were to be adopted as a constitutional amendment, there are several phases of the apportionment process in our political system that would see an impact. First is the obvious shift of a few seats among the states. Second is the impact that this shift would have on the presidential elections held under the Electoral College. Third is the redistricting phase of the apportionment process.

2) Impact on the Census Bureau. The Bureau does a good job at attempting to physically count every person who is resident in the United States on Census Day. However, an enumeration for an apportionment based upon citizenship raises some different issues.

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[1] *Clark H. Bensen, B.A., J.D., consulting data analyst and attorney doing business as POLIDATA ® Polidata Data Analysis and a publisher of data volumes operating as POLIDATA ® Demographic and Political Guides. POLIDATA is a demographic and political research firm located outside Washington, D.C.*

[2] "Representatives shall be apportioned among the several States according to their respective numbers, which shall be determined by counting the number of persons in each State who are citizens of the United States." H. J. RES. 53, 109th Congress, 1st Session.

[3] This situation of political turnover is nothing new. Even French writer and political observer Alexis de Tocqueville recognized the impact of political shifts during his tour of the country in the 1830s. See DEMOCRACY IN AMERICA, Library of America, New York (2004), volume no. 147, at 441-442.

Impact on Apportionment of the House. First, let me review the impact on the apportionment of seats for the U.S. House. I have reviewed the apportionments for the past three decades and projections for the 2010 census as well.

The rate of non-citizens counted in the census has risen dramatically in the past few decades. The 1980 Census counted a total of nearly 7 million non-citizens out of the 226.5 million persons counted in that census; this represents a non-citizen rate of 3.1%. The 1990 Census counted a total of nearly 12 million non-citizens out of the 248.8 million persons counted; this represents a non-citizen rate of 4.7%. The 2000 Census counted a total of just over 18 million non-citizens out of the 281.4 million persons counted; this represents a non-citizen rate of 6.6%. The overall population increased in this time period 24% yet the non-citizens increased by 166%.

To assess the impact for each apportionment, I used the apportionment population and deducted the non-citizens to determine a modified apportionment number for each state[4]. I then applied each state's modified population to the method of equal proportions, the method used for the apportionment of the U.S. House since the 1940 apportionment. The seat shifts I list below are a comparison of an apportionment based upon non-citizen exclusion with the apportionment for that decade.

1980. Had the non-citizens been excluded from the 1980 apportionment, there would have been a shift of 6 seats affecting 9 states. The three states losing seats would have been California with a loss of 3 seats; New York with a loss of 2 seats; and Florida with a loss of 1 seat. The six states gaining, all gaining one seat each, would have been Alabama; Arkansas; Georgia; Indiana; Missouri; and North Carolina[5].

1990. Had the non-citizens been excluded from the 1990 apportionment, there would have been a shift of 8 seats affecting 12 states. The four states losing seats would have been California with a loss of 5 seats; with Florida, New York and Texas losing 1 seat each. The eight states gaining, all gaining one seat each, would have been Georgia; Kansas; Kentucky; Louisiana; Michigan; Montana; Ohio; and Pennsylvania[6].

2000. Had the non-citizens been excluded from the 2000 apportionment, there would have been a shift of 9 seats affecting 13 states. The four states losing seats would have been the same as in 1990 with California losing 6 seats; and Florida, New York and Texas losing 1 seat each. The nine states gaining, all gaining one seat each, would have been Indiana; Kentucky; Michigan; Mississippi; Montana; Oklahoma; Pennsylvania; Utah and Wisconsin[7].

2010. For the 2010 apportionment, there were several methodological considerations. These involved the determination as to the projections for the population base, the timing of these projections, the addition of military or overseas personnel and the rate of non-citizens to apply to the population base.

The Bureau does infrequently release population projections and did release some information earlier in 2005 which projected state populations out several decades. The record date for the

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[4] For the 1990 and 2000 apportionments, military and overseas personnel were included in the apportionment numbers. There were no such additions to the 1980 apportionment. I left them out of the equation for the 2010 projections.

[5] Of course, some seats were close to the cutoff point, for 1980: Arkansas, North Carolina and New York for its second seat loss.

[6] Of course, some seats were close to the cutoff point, for 1990: Kansas, Massachusetts and Maryland.

[7] Of course, some seats were close to the cutoff point, for 2000: Utah, South Carolina and New Jersey.

projections is generally as of July 1 in each year and the census record date is April. As this was just a projection several years out, I did not consider the date difference in the population base.

For a similar reason I did not include any military or overseas personnel in the population base. I have no way of estimating what the overseas posture of the United States might be five years from now and it seemed more equitable to leave it out than to use the results from the 2000 census administrative records approach.

The estimate of the rate of non-citizens could be determined in several fashions. Basically, use the same rate as reported for the 2000 Census or consider some way to consider the increase over time. The easiest way to undertake the latter would be to use the increase in the rate between censuses. For example, the non-citizen percentage in California was 15% in 1990 and 16% in 2000 so a small increase might be expected for 2010. However, in many states, the increase from 1990 to 2000 was a large increase as a percentage. For example, Alabama went from 0.55% non-citizen to 1.25% in 2000. This is a huge percentage increase which would undoubtedly skew the results in the states that had a small percentage in 1990. For a similar reason that was applied to the other considerations, I chose to stick with the rate of non-citizens reported for the 2000 Census.

Applying these factors to the projected apportionment for 2010, if the non-citizens were to be excluded from the apportionment, the result would be a shift of 10 seats affecting 15 states. The five states losing include the four from the previous decade shifts and a new one: New Jersey. California would lose 6 seats and Florida, New Jersey, New York and Texas would lose one seat each. The ten states gaining over the projected apportionment would all gain one seat each: Alabama; Indiana; Missouri; Montana; North Carolina; Ohio; Pennsylvania; South Carolina; Virginia; and Wisconsin[8].

All of these shifts are estimates based upon the non-citizen data reported for each census. Of course, these are sample data collected from the long-form and are subject to some error.

Impact on the Electoral College. The primary indirect political effect of the apportionment of the House is on the Electoral College. Aside from the two electoral votes for each United States Senator, each state receives electoral votes based upon the counts from the actual enumeration. This means two things for this discussion. First, under the current census methodology of counting all inhabitants, non-citizens already have an impact on the presidential election. While they can not register to vote, let alone show up at the polls and cast a ballot, the winner of the state does get some extra seats by the fact that they were found by the Census Bureau during the census. Second, any shifts of seats due to non-citizen exclusion could affect, to some degree, the outcome of the presidential election.

A review of the six previous elections held under the apportionments of 1980, 1990 and 2000 indicates that the shift of seats, detailed above, would have affected the margin of the electoral votes in five of the last six presidential elections. Even though California would be the biggest loser with an apportionment based upon non-citizen exclusion, the effect is minimized to some degree by the distribution of the other states that gain or lose. For both the 2004 and 2000 elections, the Bush column would have been increased by 4 Electoral College votes. For 2004, this would have meant a Bush margin of 42 votes versus 34; for 2000 this would have meant a Bush margin of 12 votes versus 4 votes[9].

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[8] Congresswoman Miller's home state of Michigan would see an increase in its priority for a 16th seat but it would still fail to gain one based upon these numbers. Indiana and Wisconsin would be just barely above the cutoff and several states would be just below the cutoff (Florida, California, Iowa and Mississippi).

[9] These calculations ascribe the unfaithful electors to the Democrats and disregard any changes in strategy.

The previous elections indicate a smaller shift of seats due to non-citizen exclusion. For 1996, the Clinton column would have lost 2 Electoral College votes. For 1992, the Clinton column would have gained 1 vote. For 1988, the George H.W. Bush column would have increased by 2 votes. There would have been no change in the 1984 Electoral College vote totals.

Impact on the Redistricting Phase of the Apportionment Process. First, the question presents itself as to whether the non-citizens would automatically be excluded from being assigned to a congressional district. Second, a similar question is presented with respect to apportionment and districting for state legislatures and local political bodies. Third, the question arises as to the relative inequality of all the votes cast at the ballot box.

If non-citizens are to be excluded from the census counts for apportionment, they must be excluded at the level of the census block. The current citizenship data we now have is based upon sampling from the long-form information[10]. As we learned from the Supreme Court decisions of the past decade[11], sampling is not an option for the purposes of apportionment. In order to implement apportionment based upon non-citizen exclusion the question will need to be on the short form.

The implementation of the American Community Survey (ACS) for the 2010 Census means that the short form will be the only census form distributed. Given the perceptual disincentive for the respondent to indicate that they are not a citizen, there is an increased likelihood that two things will occur. First, the accuracy of the citizenship status is likely to be suspect and the numbers are likely to overstate the number of citizens. Second, the likelihood of non-response increases for the entire form. In the past, such a missing question could be filled-in by imputation.

As to the overstatement of citizens, respondents frequently respond in the most favorable light to questions that imply some minimal concept of social or political mores. For example, the Current Population Survey (CPS) generally reports on registration and voting behavior of Americans each election. Survey sampling error aside, the number of respondents reporting that they registered or voted is usually a bit higher than the official numbers indicate. So too, given the perception that being a citizen is a preferred status, respondents are more likely to overstate their true status. Moreover, it is not the role of the Bureau to verify this information, even if they could.

As for those respondents who skip over the question, if an apportionment based upon non-citizen exclusion takes place, the importance of the missing question, or missing form, becomes more of a problem. Non-response follow-up is an expensive operation for the Bureau. Any increased expenditure on the part of the Census Bureau to track down non-respondents detracts the Bureau from other critical operations, e.g., coverage improvement, or post-census local review, that enable the Bureau to make the best count possible.

As to the block level requirement, first, there is a distinction between the count of inhabitants and the military in comparison to the count of non-citizens for exclusion. While the result of the actual enumeration my be that some persons are missed and some persons are double counted, the Bureau makes its best effort to physically count each person and then makes it best effort to

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[10] "The data on citizenship were derived from answers to long-form questionnaire Item 13 which was asked of a sample of the population. On the stateside questionnaire, respondents were asked to select one of five categories: (1) born in the United States, (2) born in Puerto Rico or a U.S. Island Area (such as Guam), (3) born abroad of American parent(s), (4) naturalized citizen, (5) not a citizen."

[11] See *Department of Commerce v. U. S. House of Representatives* and *Clinton v. Glavin* 525 U.S. 316 (1999); and *Utah v. Evans,* 2001 U.S. 714 (2003).

accurately process the records for each person to assign them to a census block. For the military and federal personnel, these are based largely upon administrative records from agencies that have a high incentive to know the general whereabouts of their staff posted overseas but have little incentive to accurately assign these persons to a census block stateside. In either case, for the actual count or for the military, there is little room for subjective assessment or inaccurate response. The person is either found or not. On the other hand, for the non-citizen exclusion, there is a high degree of subjectivity involved in the response. It seems highly unlikely that all non-citizens will accurately report their non-citizenship status.

Moreover, the military personnel are not included in the redistricting phase of apportionment because the geographic precision that is required (i.e., assignment to a census block) is often unavailable. However, it would be required for the exclusion of non-citizens[12] even if non-citizens were to be excluded only at the state level.

Redistricting stakeholders are a small subset of all users of census data. However, they are the largest user of the census information distributed at the level of census geography known as the census block. The census block is the building block for the entire census. If problems exist with data at the census block, problems exist at every other level of census geography, be it census tract, city, state or nation. If non-response becomes a problem it must be addressed by the scarce resources available to the Bureau. These data are the cornerstone for the drafting of not only the districts in the U.S. House but for approximately seven thousand state legislative districts and countless thousands of districts for local governmental bodies around the nation.

Impact of Non-citizens on Districts. As mentioned above, non-citizens, though they can not register to vote, still play a role in the political process of districting. Since the Reapportionment Revolution of the 1960s, all political districts are to be drawn with equality of population as the touchstone. While in some cases this has been deliberately ignored[13], the general goal is to minimize the differences in overall population amongst all districts in the political body, e.g., the state legislature or the state delegation to the U.S. House. This concept is frequently encapsulated in the phrase "one-person, one-vote".

However, census persons are not necessarily voters. Even with equipopulous districting, there may be a wide disparity in the potential number of voters amongst districts. This is largely due to demographic factors of the various subsets of American residents.

One of the projects that Polidata undertakes after each Presidential Election is the determination of the presidential vote in each congressional district. Using this value for each district provides a more meaningful representation of the voter turnout as it tends to minimize the effect that the congressional races had on turnout, especially in uncontested or non-competitive districts. A review of these results for several districts within a few selected states points out the inequality of the voting weight.

For example, in California, the average for all districts was 233,971 total votes cast for President. In the five districts with the smallest vote totals for President, the average was 121,304 total votes. However, in the five districts with the highest overall vote totals for President, the average was 324,147. Each district had the same number of persons in 2000, (639,087 or 639,088), yet the percentage of these persons casting ballots varied greatly. To no small degree, this is due to the presence of non-citizens who are assigned to the district but are ineligible to vote. For example,

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[12] This also raises some issues relating to privacy concerns. Many census blocks have only a few persons. Identification as to the citizenship status of some persons may be possible.

[13] See *Mahan v. Howell*, 410 U.S. 315 (1973) and *Larios v. Cox*, 542 U.S. ___ (2004) for differing viewpoints.

three of the five districts with the smallest vote totals have non-citizenship rates estimated at over 33%. Yet, each district elects one member of the U.S. House. Each person is represented equally across all districts in the state. However, the weight of one citizen's vote in some districts is worth much more than the vote of another citizen in another district. If the real goal of districting is to enable the equality of voting[14] then some balancing of the population to reflect voters would seem to be a critical consideration. Based upon the total votes cast in the 2004 election for President, 50% of the U.S. House was elected by only 42% of the voters.

The question that needs to be addressed here is the extent to which voting weights can be equalized across all districts. Merely using the voting age population as a secondary consideration in drafting districts could go along way to reduce this inequality. Even so, the inclusion of non-citizens in the population base will inevitably alter the equality to some degree.

Summary. I believe I understand some of the frustration that persons from the East and Midwest sense as their impact on national politics is weakened bit-by-bit as a result of the decennial apportionment. However, even if the country decides, by adoption of the amendment, that non-citizens should be excluded from the count for apportionment, I still see operational problems such that the end result is likely to be a prolonged period of litigation following the census that sees the first implementation. The result of litigation, of course, could be a new apportionment which would, quite obviously, result in a complete upheaval of the political structure of the U.S. House at the time.

1) I believe it is not possible that the data collected will meet the high threshold of accuracy that is required for the apportionment process. Bear in mind that the apportionment formula is very sensitive to small shifts in population. Citizenship data as we now have it is based upon sampling from the long-form information. Even what we 'know' is based upon some degree of uncertainty. The likelihood that the information collected from every census respondent would be accurate is small. For non-citizens there will be a perceptual disincentive for the respondent to indicate that they are not a citizen. The numbers are quite likely to overstate the number of citizens.

2) Moreover, the citizenship question would need to be on the short form. Confusion, hesitation, or fear about answering the question will result not in just another question left empty (and subject to imputation in the pre-ACS censuses) but another census form becoming a non-response subject to follow-up by the Bureau. Follow-up for non-response is a very expensive factor in increased costs of the census.

3) Largely due to the inability of getting an accurate count of citizens, I believe the implementation of this amendment would be putting the Census Bureau into a position where the most likely result is failure. Counting every inhabitant is difficult enough without adding any extra burdens. Adding a factor which is inherently subject to inaccurate responses may leave the entire count in question and subject the Bureau to a degradation of the overall reputation it has earned so diligently over the decades.

I hope these comments provide some useful information to the Committee in its deliberations. Additional supporting material may be found via the internet at www.polidata.org/comments.

[M:\polidata\COMMENTS\el06_ush_citizen_apportionment\wcom_el06a.doc-12/1/2005 2:26:00 PM]

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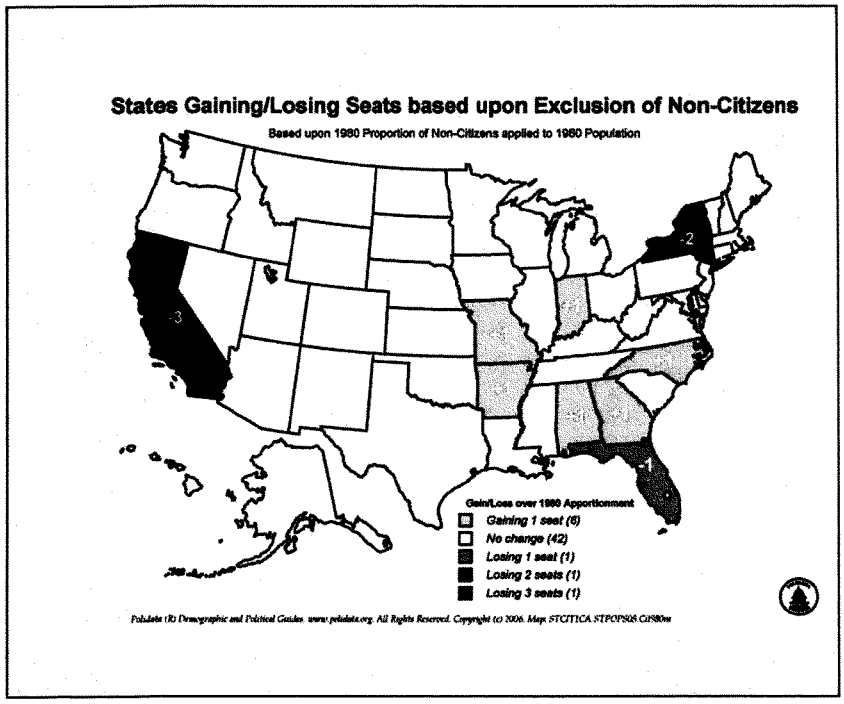
[14] This "means that as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1 (1964) at 7-8, 18. See also: *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990).


States Gaining/Losing Seats based upon Exclusion of Non-Citizens
Based upon 1980 Proportion of Non-Citizens applied to 1980 Population
2
3
1
Gain/Loss over 1980 Apportionment
Gaining 1 seat (6)
No change (42)
Losing 1 seat (1)
Losing 2 seats (1)
Losing 3 seats (1)
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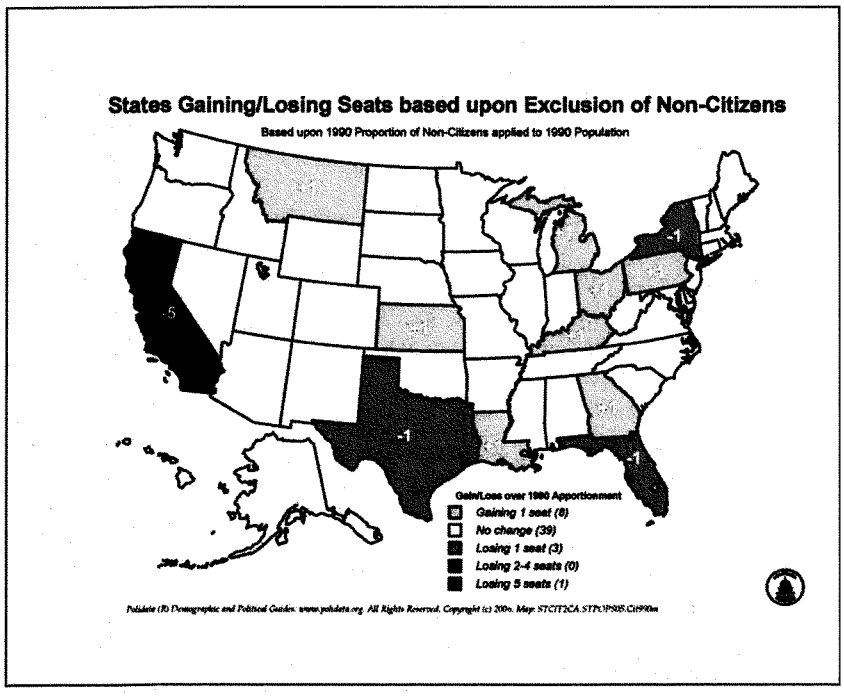
States Gaining/Losing Seats based upon Exclusion of Non-Citizens
Based upon 1990 Proportion of Non-Citizens applied to 1990 Population
1
5
1
1
Gain/Loss over 1990 Apportionment
Gaining 1 seat (8)
No change (39)
Losing 1 seat (3)
Losing 2-4 seats (0)
Losing 5 seats (1)
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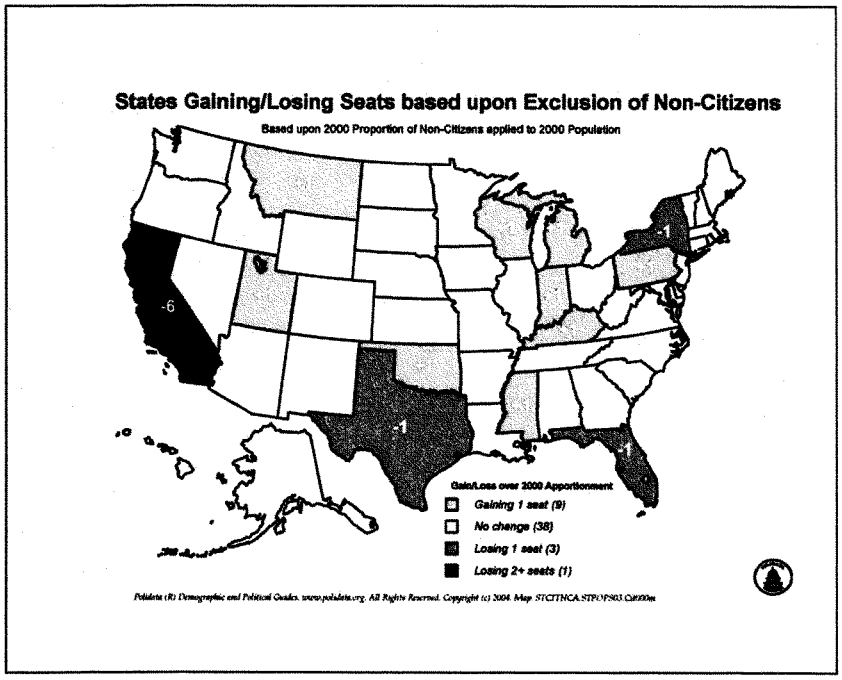
States Gaining/Losing Seats based upon Exclusion of Non-Citizens
Based upon 2000 Proportion of Non-Citizens applied to 2000 Population
-6
-1
-1
-1
Gain/Loss over 2000 Apportionment
Gaining 1 seat (9)
No change (38)
Losing 1 seat (3)
Losing 2+ seats (1)
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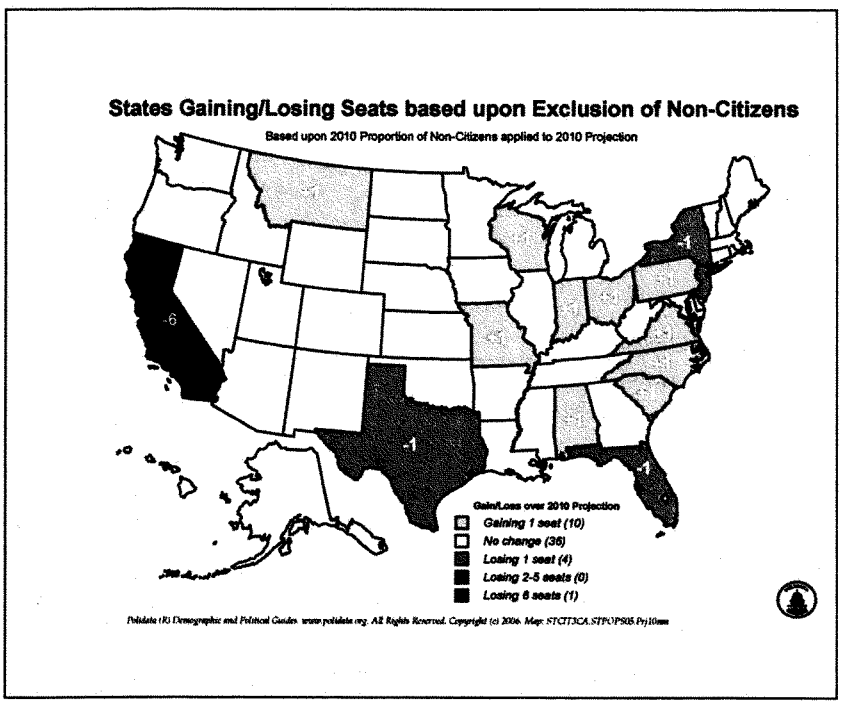
States Gaining/Losing Seats based upon Exclusion of Non-Citizens
Based upon 2010 Proportion of Non-Citizens applied to 2010 Projection
-6
-1
-1
-1
Gain/Loss over 2010 Projection
Gaining 1 seat (10)
No change (36)
Losing 1 seat (4)
Losing 2-5 seats (0)
Losing 6 seats (1)
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NON-CITIZENS, as % of All Persons

First variable listed is NON-CITIZENS, AS % OF ALL PERSONS. Value for nation is 6.6.
Second variable listed is NON-CITIZENS, NUMBER OF PERSONS. Value for nation is 18,565,263.

Demographic Ranks-States/Census Regions & Divisions/D.C. & P.R.

1	15.9	5,390,989	-California	21	5.6	189,700	-Connecticut	37	2.2	117,528	-Wisconsin
2	13.4	6,041,975	Div-PACIFIC		5.6	192,321	-Oregon	38	2.1	61,134	-Iowa
3	11.4	7,220,913	Reg-WEST	22	5.4	5,389,575	Reg-SOUTH	39	2.0	250,952	-Pennsylvania
4	11.0	2,084,389	-New York		5.4	283,604	-Maryland	40	1.9	51,635	-Arkansas
5	10.0	199,807	-Nevada		5.4	97,503	-New Mexico		1.9	115,551	-Indiana
6	9.5	1,985,316	-Texas	23	5.3	743,785	Div-NEW ENGLAND		1.9	105,819	-Tennessee
7	9.4	794,023	-New Jersey	24	5.0	408,041	-Georgia	41	1.8	72,995	-South Carolina
8	9.2	1,463,326	-Florida	25	4.9	110,486	-Utah		1.8	10,794	-Vermont
9	9.0	462,239	-Arizona	26	4.8	337,512	-Virginia	42	1.7	63,285	-Puerto Rico
	9.0	51,511	-District of Columbia	27	3.9	317,178	-North Carolina	43	1.6	89,410	-Missouri
10	7.9	3,129,364	Div-MIDDLE ATLANTIC	28	3.6	1,612,234	Div-EAST NORTH CENTRAL	44	1.5	169,984	-Ohio
11	7.5	925,537	-Illinois	29	3.3	25,846	-Delaware	45	1.4	237,903	Div-EAST SOUTH CENTRAL
12	7.2	3,873,149	Reg-NORTHEAST		3.3	42,877	-Idaho	46	1.3	52,702	-Kentucky
13	7.0	84,697	-Hawaii		3.3	89,972	-Kansas		1.3	59,783	-Louisiana
14	6.9	2,182,715	Div-WEST SOUTH CENTRAL		3.3	163,155	-Minnesota		1.3	16,439	-Maine
	6.9	435,366	-Massachusetts	30	3.2	2,081,626	Reg-MIDWEST	47	1.2	55,572	-Alabama
15	6.6	18,565,263	****NATION	31	3.0	50,720	-Nebraska		1.2	6,084	-Wyoming
16	6.5	1,178,938	Div-MOUNTAIN	32	2.9	283,634	-Michigan	48	1.1	6,958	-North Dakota
17	6.1	356,809	-Washington	33	2.7	17,159	-Alaska		1.1	8,043	-South Dakota
18	6.0	63,093	-Rhode Island	34	2.5	85,981	-Oklahoma	49	0.8	23,810	-Mississippi
19	5.9	253,028	-Colorado	35	2.4	469,392	Div-WEST NORTH CENTRAL		0.8	6,914	-Montana
20	5.7	2,968,957	Div-SOUTH ATLANTIC	36	2.3	28,393	-New Hampshire	50	0.5	8,944	-West Virginia

Demographic Ranks-Top Counties/Places over 75,000

1	41.0	92,925	FL---Hialeah city	19	23.0	235	ID-Clark County	31	20.4	28,557	TX---Brownsville city
2	40.8	137,664	CA---Santa Ana city	20	22.6	10,703	TX-Maverick County	32	20.2	7,769	AZ-Santa Cruz County
3	35.8	44,546	CA---East Los Angeles CDP	21	22.5	2,137,689	CA-Los Angeles County		20.2	38,300	VA-Arlington County
4	34.8	126,012	FL---Miami city		22.5	137,221	NJ-Hudson County	33	20.1	26,899	CA---Pasadena city
5	34.7	40,289	CA---El Monte city	22	22.2	22,637	CA---Santa Clara city		20.1	9,909	WA-Franklin County
6	27.9	33,630	NJ---Elizabeth city	23	22.0	22,736	CA---Norwalk city	34	20.0	337,178	CA-Santa Clara County
	27.9	2,035	TX-Presidio County	24	21.7	34,186	CA---Ontario city		20.0	47,945	NJ--Jersey City city
7	27.7	54,096	CA---Glendale city	25	21.2	23,057	CA---Costa Mesa city	35	19.9	491,796	NY-Kings County
8	27.2	612,685	FL-Miami-Dade County		21.2	21,935	CA---Daly City city		19.9	1,592,345	NY---New York city
9	27.1	1,002,879	CA---Los Angeles city		21.2	189,215	CA---San Jose city	36	19.8	234,829	TX---Dallas city
10	26.7	40,292	CA---Salinas city		21.2	4,763	KS-Seward County	37	19.6	27,841	CA-Imperial County
11	26.5	34,923	CA---Sunnyvale city		21.2	31,661	NJ--Paterson city	38	19.4	379,633	TX---Houston city
12	26.2	85,851	CA---Anaheim city	26	21.1	29,573	CA---Hayward city	39	19.3	20,684	CA---Downey city
13	25.7	38,476	CA---Pomona city		21.1	40,434	TX---Irving city	40	19.2	37,162	TX-Webb County
14	25.2	561,731	NY-Queens County	27	21.0	3,955	CA-Colusa County	41	19.0	21,914	NV---North Las Vegas city
15	25.1	13,468	TX-Starr County		21.0	119,741	TX-Hidalgo County	42	18.8	25,150	CA---Escondido city
16	25.0	41,442	CA---Garden Grove city	28	20.9	23,546	CA---Inglewood city	43	18.7	86,455	CA---Long Beach city
17	24.6	42,040	CA---Oxnard city	29	20.7	83,029	CA-Monterey County		18.7	6,784	FL-Hendry County
18	23.9	799	TX-Hudspeth County	30	20.5	41,739	CA---Fremont city		18.7	33,113	TX---Laredo city

Demographic Ranks-Bottom Counties/Places over 75,000

214	0.0	0	WV-Tucker County		0.0	0	ND-Oliver County		0.0	2	MS-Benton County
	0.0	7	WV-Lincoln County		0.0	1	ND-Bowman County		0.0	3	LA-Catahoula Parish
	0.0	0	WV-Clay County		0.0	0	NE-Wheeler County		0.0	4	KY-Rockcastle County
	0.0	4	WV-Braxton County		0.0	0	NE-Thomas County		0.0	0	KY-Martin County
	0.0	0	VA-Clifton Forge city		0.0	0	NE-McPherson County		0.0	5	KY-Magoffin County
	0.0	0	VA-Highland County		0.0	0	NE-Logan County		0.0	2	KY-Hickman County
	0.0	7	VA-Dickenson County		0.0	0	NE-Keya Paha County		0.0	0	KY-Fulton County
	0.0	0	TX-Loving County		0.0	0	NE-Hooker County		0.0	6	KY-Fleming County
	0.0	2	TN-Hancock County		0.0	1	NE-Harlan County		0.0	0	KY-Elliott County
	0.0	0	SD-Miner County		0.0	0	NE-Boyd County		0.0	0	KS-Woodson County
	0.0	0	SD-Jones County		0.0	0	NE-Blaine County		0.0	0	KS-Rush County
	0.0	0	SD-Jerauld County		0.0	0	MT-Prairie County		0.0	2	KS-Rooks County
	0.0	0	SD-Hyde County		0.0	0	MT-Petroleum County		0.0	0	IA-Adams County
	0.0	0	SD-Douglas County		0.0	0	MO-Worth County		0.0	0	IN-Ohio County
	0.0	0	SD-Buie County		0.0	0	MO-Putnam County		0.0	1	IN-Crawford County
	0.0	2	SC-McCormick County		0.0	2	MO-Knox County		0.0	0	GA-Glascock County
	0.0	2	OH-Vinton County		0.0	4	MO-Carroll County		0.0	8	AL-Washington County
	0.0	0	ND-Slope County		0.0	2	MS-Wilkinson County		0.0	7	AL-Hale County
	0.0	0	ND-Sheridan County		0.0	3	MS-Franklin County	213	0.1	24	WV-Wyoming County

For Selected Area of NEW YORK CITY, Rank is 35, Value is 19.9.

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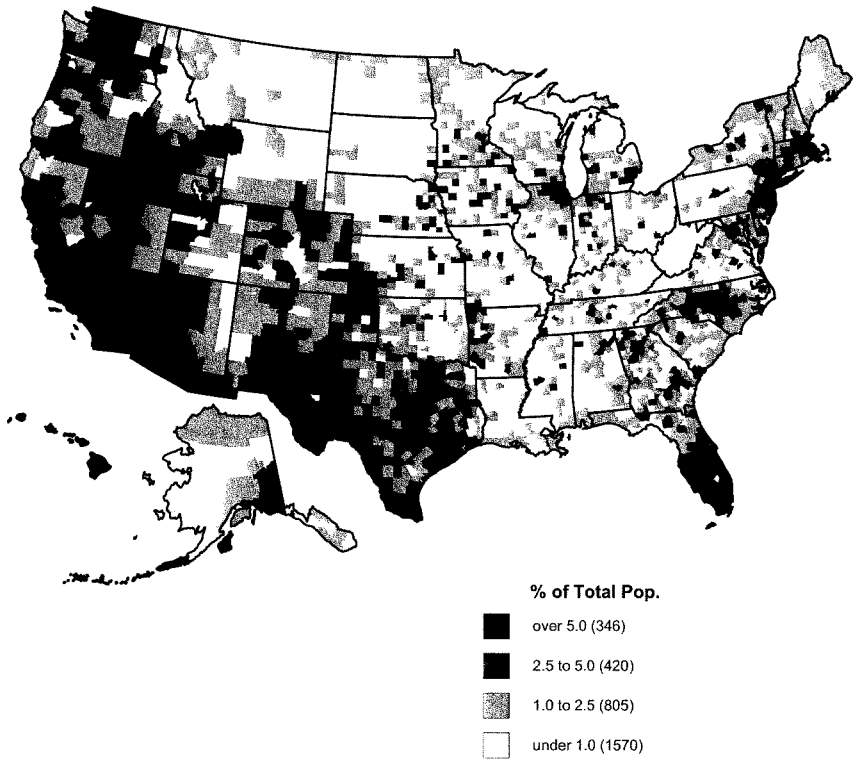
1. Selected Ranks based upon ranking of data item listed for all areas. Identical values are assigned identical ranks; therefore, maximum rank (*) may not be equal to number of units.
2. All ranks and calculations derived by Polidata from Census Bureau datasets. Many ranks are based upon the relative value of the percentage to illustrate geographic presence.
3. An associated value, normally the raw data value, may follow percentage values. This table ranked on NONCITPTP (SF3-P021); associated item is NONCITNUM.
4. Hyphens before area name indicate level of geography: (-)County, (--)County Subdivision, or (---)Place.

NON-CITIZENS

2000 Census of Population and Housing, Counties & Equivalents



Value for Nation: 6.6

See Ranked Listing 215

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Map: US0215BA.Mr215

Mr. TURNER. Mr. Camarota.

STATEMENT OF STEVEN CAMAROTA

Mr. CAMAROTA. Thank you, Mr. Chairman and members of the committee. I would like to thank you for having me testify on immigration and reapportionment or apportionment.

The United States, of course, is currently experiencing the largest sustained wave of immigration with 1½ million legal and illegal immigrants settling here. The total foreign-born was 31 million in the 2000 census, including both citizens and noncitizens. Data from 2005 show that it has probably reached about 36 million.

Now, there is an unfortunate tendency to see this immigration and see immigrants one-dimensionally, as only workers or as only users of public services and welfare. But immigrants are much more than this; they are human beings. As a result, they have wide-ranging economic, cultural, demographic, national security and political effects on our country.

If you take nothing else away from my testimony, it should be that allowing in large numbers of people, even as guest workers or just tolerating widespread illegal immigration, has broad-ranging effects on our society that go well beyond the usual discussion about jobs and welfare and so forth. And one of those impacts is on the reapportionment of House seats.

Let me give you some of the overall numbers quickly. The 2000 census showed roughly 19 million noncitizens. Most estimates suggest that 7 or 8 million of these noncitizens were illegal aliens and roughly 1 million were on long-term temporary visas. All of these noncitizens have consequences for apportionment because, as we have already discussed, seats are apportioned to each State in the House based on its total population, and counting the noncitizens and, of course, noncitizens are not evenly distributed throughout the United States.

Let me give you one statistic. In the 2000 census, half of all noncitizens lived in just three States. Now, in a report published by the Center for Immigration Studies, we calculated the impact, as others have talked about here as well; the report is available over on the table. My weather-beaten table over here that didn't survive the trip to Capitol Hill shows the States that lost. We will run through them briefly.

The inclusion of noncitizens in the census caused Indiana, Michigan, Oklahoma, Pennsylvania and Wisconsin each lost a seat that they had prior to 2000, while Montana, Kentucky and Utah each failed to gain a seat they otherwise would have had. We also found that of these nine seats, four were redistributed by the illegal aliens. Indiana, Michigan, Mississippi, and Montana each had one fewer seat because of the inclusion of illegal aliens in the census. The big winner, of course, is California.

Now, because of family relationships and existing cultural ties, immigrants will tend to remain concentrated for some time. They will slowly spread out in the country. Now, that fact along with the fact that immigration levels remain so high means that the noncitizen population is going to also remain high for some time, assuming we don't change U.S. immigration policy or begin to enforce our immigration laws.

Now, a 2002 report, for example, found that if all noncitizens who are eligible to naturalize, that is, to become citizens, were naturalized tomorrow, there would still be 15 million noncitizens in the United States. Now, one of the key controversies associated with apportionment caused by noncitizens, or reapportionment caused by the presence of noncitizens, is this fact: It clearly takes away representation from States composed largely of citizens.

Of the nine States that lost seats because of the presence of noncitizens in other States, only 1 in 50 residents was a noncitizen in 2000; in contrast, 1 in 7 residents is a noncitizen in California, the big winner. As a result, as we have already talked about, it often takes relatively few votes to win some of these noncitizen heavy districts. In fact, it only took about 68,000 votes to win the average California district in 2002, where it took over 100,000 votes to win the average district in the States that lost seats.

Now, I will leave the constitutional issues to others. Let me touch on some of the practical issues with excluding noncitizens. To exclude them would require the census to move the citizenship question from the long form, which only about 15 percent of the population receive, or one-sixth of the population, to the short form which everyone gets. Now, it takes a long time to implement that kind of change, so we need to think about that. And there is also the question of accuracy.

Let me conclude by saying, it should be obvious a large noncitizen population is an unavoidable product of large-scale legal immigration and widespread toleration of illegal immigration. If you want to avoid this situation, it seems the obvious thing to do is change immigration policy. Thank you.

[The prepared statement of Mr. Camarota follows:]

The Impact of Non-Citizens on Congressional Apportionment

Testimony Prepared for the House Subcommittee On Federalism and the Census
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by Steven A. Camarota
Director of Research
Center for Immigration Studies
1522 K St. NW, Suite 820
Washington, DC 20005
Phone: (202) 466-8185
fax: (202) 466-8076
center@cis.org
www.cis.org

Introduction

The United States is currently experiencing the largest sustained wave of immigration in its history, with 1.5 million legal and illegal immigrants settling in the country each year. The foreign born or immigrant population stood at over 31 million in the 2000 Census, and the total has grown to 36 million by the end of 2005.[1] There is an unfortunate tendency to view this immigration one dimensionally. Some see immigrants only as workers, other see them as a potential voters, or only the fiscal problem they may create, still others see only possible terrorists. All of these perspectives capture some aspect of immigration. But immigrants are much more than this. Immigrants are not simply things, they are human beings. As a result, their presence in the United States has wide ranging economic, cultural, demographic, national security, and political effects on our country. Whether one thinks the effects of immigration is on balance a net gain or a net loss to the country, the fact remains its impact is very broad and not confined to one area.

This hearing is going to discuss one of the most often overlooked, but nonetheless important, effects they have: on political representation. If you take nothing else away from my testimony, it should be that allowing in people, even as guest workers or just tolerating illegal immigration, has board ranging effects. These effects include such things as the redistribution of House seats. For example, if we take the 11 million illegals already here and grant them temporary status, the Census in 2010 will still count them, and seats will still be apportioned to states based on their presence. On the other hand, if we enforce the law and make most illegals go home, this too will have apportionment

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[1]This is based on my analysis of the Annual Social and Economic Supplement of the Current Population Survey done by the Census Bureau in March of 2005, and subsequent Current Population Surveys done with out the March supplement.

consequences in 2010. In our discussion of immigration, therefore, we should not compartmentalize its various impacts; instead, we must recognize the broad implications of immigration on virtually every aspect of American life, including apportionment.

Overall Numbers

Number of Non-Citizens in 2000. The 2000 Census showed 18.6 million or almost 60 percent of the foreign born were not U.S. citizens.[2] It should be noted that figures for the foreign born, including those for citizenship, are from the Census long form, which only about one-sixth percent of the nation's population receives. Of the more than 18 million non-citizens who responded to the Census in 2000, there is widespread agreement that 7 or 8 million were illegal aliens, and 1 to 1.5 million were on long-term temporary visa, such as guest workers and foreign students.[3] Non-citizens comprised 6.6 percent of the nation's total population in 2000.

Growth in Non-Citizen Population. Overall, growth in the non-citizen population is the product of new immigration, but this is offset by those green card holders who choose to naturalize, those non-citizens who die, and those who return home. In 1990, there were 11.8 million non-citizens, up from 7 million in the 1980 Census. Thus, during the 1990s the number of non-citizens grew by some 680,000 a year. As a share of the total population, non-citizens increased from 3.1 percent in 1980 to 4.7 percent in 1990 to 6.6 percent in 2000. Data collected by the Census Bureau since 2000 shows that growth in the number of non-citizens has continued to increase. In March of 2005 there were

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[2]There is some evidence that Hispanic immigrants in particular tend to overstate there citizenship. It is also important to note that although the number of non-citizens in the Census was 18.6, the number in the population used for apportionment was closer to 18.5 million. This is because the population of the District of Columbia and persons overseas are not included in apportionment calculations.

[3]The INS report estimating 7 million illegals in 2000 with an annual increase of about 500,000 can be found at uscis.gov/graphics/shared/statistics/publications/Ill_Report_1211.pdf. The Census Bureau estimate of 8 million illegals in 2000 report can be found at www.census.gov/dmd/www/ReportRec2.htm (Appendix A of Report 1 contains the estimates).

21.7 million non-citizens in the country and they comprised 7.4 percent of the total population.[4] Again, this growth reflects continued high rates of new immigration.

Non-citizens over Age 18. For purposes of reapportionment, the Census counts all persons, including those too young to vote. However, in terms of the number of voters per district or per state, the share of the voting-age population that is non-citizen is also relevant. In 2000, some 7.6 percent of the nation's adult population (18 and over) were non-citizen, higher than the 6.6 percent of the total population. In 2005, of the over-18 population, 8.7 percent are not citizens. Most immigrants come as adults, and all children born to immigrants in the United States (even those born to illegal immigrants) are automatically citizens, thus non-citizens comprise a larger share of the 18-and-over population than of the total population. In other words, there are relatively few immigrant children because most children in immigrant families were born here. This means that vote counts in high immigration states and districts will be even lower than one might suspect given the share of the total population that is non-citizen.

Impact On Congressional Apportionment

Non-citizens Have Large Impact. Immigration has a significant effect on the distribution of seats in the U.S. House of Representatives for three reasons. First, seats are apportioned based on each state's total population relative to the rest of the country, including illegal aliens and other non-citizens. This, of course, is the issue at the center of Congresswomen Miller's proposal.

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[4]This is based my analysis of the Annual Social and Economic Supplement of the Current Population Survey done by the Census Bureau in March of 2005.

Second, congress has chosen to allow in a large number of legal immigrants and to tolerate wide spread illegal immigration. After the 2000 Census, the average congressional district had roughly 650,000 people. Thus, the more than 18 million non-citizens in the 2000 Census were equal to nearly 29 congressional seats. The third reason is that non-citizens are not evenly distributed throughout the country. In 2000, half of all non-citizens lived in just three states and almost 70 percent live in just six states. States with a large non-citizen population will gain at the expense of states comprised mostly of citizens.

Impact of Non-Citizens on Apportionment In a report entitled, "Remaking the Political Landscape: The Impact of Illegal and Legal Immigration on Congressional Apportionment," published by the Center for Immigration Studies in October of 2003, we calculated the impact of non-citizens on the distribution of seats in the House.[5] Overall we found that the presence of non-citizens caused a total of nine seats to change hands. Indiana, Michigan, Mississippi, Oklahoma, Pennsylvania, and Wisconsin each lost a seat that they had prior to the 2000 Census while Montana, Kentucky and Utah each failed to gain a seat they other wise would have gained, but for the presences non-citizens in other states. Of the nine seats redistributed by non-citizens, 6 went to California, while Texas, New York and Florida each gained a seat and New York retained a seat it otherwise would have lost. Analysis of this kind is very straightforward, involving a simple calculation of the apportionment of seats to states with non-citizens included and then without them. Other researchers have come to the same conclusion.[6]

Impact of Illegal Aliens In our 2003 apportionment study we also tried to estimate the impact of illegal aliens by themselves. The former INS has estimated the size and state distribution of illegals who responded to the Census, and we used those figures to

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[5]Those wanting a more detailed explanation of our methodology should read the entire report which can be found at www.cis.org/articles/2003/back1403.html.

[6]These results are the same as those obtained by Marta Tienda in her 2002 article in *Demography* entitled "Demography and the Social Contract," pages 587-616.

estimate their impact on the distribution of House seats. We found that of the nine states that lost seats due to non-citizens, four were the result of illegals. This makes perfect sense because 40 to 45 percent of non-citizens are illegal aliens. Indiana, Michigan, and Mississippi each lost one seat in the House and Montana failed to gain a seat it otherwise would have gained because of illegal aliens in other states.

Impact on Electoral College Immigration and the resulting non-citizen population not only redistributes seats in the House, it has the same effect on presidential elections because the apportionment of the Electoral College is based on the same basic calculations as congressional delegations. Thus immigration policy and the resulting large non-citizen population it produces impacts the distribution of political influence both in Congress and in the Executive.

States That Lost Did Not Decline in Population One common mistake is to think of the states that lost seats as losing population. It is very important to understand that the states that lost a seat due to the presence of non-citizens in other states are not declining in population. The population of the four states that lost seats due to illegals increased 1.6 million in the 1990s, and the population of the five states that lost a seat because of other non-citizens increased 2 million. However, immigration caused the population of other states to grow even faster.

States and Districts With Many Non-citizens

Immigrant-induced Reapportionment One way in which immigrant-induced reapportionment is different from reapportionment caused when natives relocate to other states is that immigration takes away representation from states composed almost entirely of U.S. citizens so that new districts can be created in states with large numbers of non-citizens. Again, I think this is the central concern behind Congresswoman Miller proposal. In the 9 states that lost a seat because of the presences of non-citizens, only 1 in 50 residents was not a U.S. citizens in 2000. In contrast, one in seven residents is a

non-citizen in California, which picked up six of the nine seats redistributed by non-citizens. And 1 in 10 residents is a non-citizen in New York, Texas and Florida.

As a result, it often takes relatively few votes to win a district in some high immigration states. Our study of reapportionment found that in 2002, it took 101,000 votes to win the typical House race in the nine states that lost a seat because of non-citizens; in contrast it took only 68,000 votes to win the average district in California, and 67,000 to win the average district in Texas, and just 81,000 votes to win the typical district in New York. The political distortions created by non-citizens are even more pronounced in some districts. For example, 43 percent of the population in California's immigrant-heavy 31st district are not U.S. citizens, and in the 34th district, its 38 percent. In Florida's 21st district 28 percent of the population are not American citizens; in New York's 12th district it's 23 percent; and in Texas' 29th district its 22 percent.[7] The large number of non-citizens would seem to create real tension with the principle of "one man one vote" because it now takes so few votes to win a congressional seat in many high immigration states. As already indicated, it takes about 100,000 voters to win the typical congressional race in the states that lost a seat due to the non-citizens. In contrast, it took less than 33,000 votes to win the 34rd district in California and only 34,000 to win the 31st district in 2002. The 12th district of New York took only 42,000 votes to win. Allowing in enormous numbers of immigrants has created a situation in which the votes of American citizens living in low-immigration states and districts count much less than that the votes of citizens living in high immigration districts.

Practical Issues to Consider

Can Non-citizens Be Excluded? Putting aside the legal and constitutional issues surrounding non-citizens and apportionment, which I will leave to others, there are practical issues to consider. For one thing, if we are to exclude non-citizens it would

[7]These figures come from the Census Bureau's American Community survey collected in 2002. The results can be found at/www.census.gov/acs/www/Products/index.htm.

require Congress to instruct the Census Bureau to significantly change the way the Census itself is administered. The citizenship question is part of the Census "long form" that is received by only one-sixth of the population. This question would have to move to the short form in order to exclude non-citizens. There is also the question of how accurate respondents fill out the Census. Accuracy may become a much larger issue if persons are going to be excluded from apportionment counts based on their answers, which is not the case now. It should be noted that while there is some evidence that immigrants sometimes say they are citizens when in fact they are not, the overall number of citizens seems to be relatively accurate in the Census, though for some groups of immigrants this is less true.

Can Illegal Aliens Be Excluded? Excluding only illegal aliens from apportionment while perhaps politically popular and appealing from a fairness point of view, would be dramatically more difficult than excluding all non-citizens. The INS and Census Bureau and other outside researchers estimate the number of illegal aliens by comparing the demographic characteristics of those responding to the Census with administrative data on legal admissions. While such methods produce reasonably accurate estimates of the illegal population overall, they do not definitively identify individual illegal aliens in the Census. Any effort to pick out specific individuals are only highly educated guesses, that while useful to demographers and even policy makers, would almost certainly not pass constitutional muster. It is possible to simply ask all respondents if they are illegal aliens. While some may answer honestly, it seems certain that many if not most illegals would probably not identify themselves as such.

Encouraging Naturalization Is Helpful, But No Solution. One potential solution to the problem of citizens losing representation is to encourage those who are eligible for citizenship to naturalize. Of course, such efforts would not change the fact that low immigration states are losing political power. Moreover, even the most optimistic assumption about the impact of efforts to increase citizenship would still leave an enormous number of non-citizens. Illegal aliens are not eligible for citizenship, nor are

persons on long-term temporary visa. As long as one million or more new legal immigrants are allowed to enter each year, the non-citizen population will continue to be very large. One study found that if every single eligible immigrant naturalized, there would still be roughly 15 million non-citizens (illegal aliens, legal immigrants, and long-term visitors) in 2002.[8] As long as the level of legal and illegal immigration remain at record levels, American citizens in low immigration areas and states will continue to lose representation, even if naturalization rates increased dramatically.

Non-citizen and Apportionment Is Part of The Immigration Debate

It should be obvious that a large non-citizen population is an unavoidable product of large scale legal immigration (both permanent and temporary) and widespread toleration of illegal immigration. Because family relationships and existing cultural ties determine where immigrants go, changes in immigrant settlement pattern happen only slowly. Thus non-citizens will continue to cause a significant redistribution of seats in the House. While outside our discussion here, non-citizens have the same impact at the state and local level as well.

Rather than focus on just the impact of non-citizens on apportionment, it would

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[8]A report from the Urban Institute found that in 2002 there were an estimated 11 naturalized citizens and 8 million additional individuals who were eligible to naturalized out of the total foreign born population estimated by the Institute at 34 million. The entire report can be found at www.urban.org/UploadedPDF/310847_trends_in_naturalization.pdf.

make more sense to incorporate this issue into the overall immigration debate. Thus when thinking about a guestworker program, for example, advocates of allowing illegals to stay need to understand that this decision will have a significant impact on apportionment in 2010. This fact by itself does not mean that a guestworker program is necessarily a bad or good idea. But it does mean that a guestworker program has consequences that can only be seen with if we look beyond immigrants simply as workers. Whatever one may think of the overall costs and benefits of immigration, it should be obvious that our decisions about immigration need to take account of many issues, including, apportionment and political representation.

Mr. TURNER. Mr. Gonzalez.

STATEMENT OF LAWRENCE GONZALEZ

Mr. GONZALEZ. Thank you, Mr. Chairman and distinguished members of the subcommittee. Thank you for your invitation to testify regarding House Joint Resolution 53.

Our fund is a nonprofit, nonpartisan organization that empowers Latinos to participate fully in the American political process from citizenship to public service. It includes more than 6,000 Latino elected and appointed officials nationwide.

Because of our longstanding work on promoting a full enumeration of the census, we were recently appointed by the U.S. Secretary of Commerce to serve as a member of the 2010 Census Advisory Committee. Member organizations of the 2010 CAC play a critical role in advising the Census Bureau on how it can effectively and effectively accomplish the goals and objectives. It is from our extensive experience that I discuss with you today what we believe would be the detrimental impacts of H.J. Res. 53 on the efforts to fully integrate the second largest population group into our political system.

The passage of this resolution would serve to isolate segments of society and send a message that only U.S. citizens have a right to be heard by our government and elected officials. Omitting noncitizens from the traditional census count contradicts the body of the U.S. Constitution, as well as the 14th amendment which specifically requires that States not discriminate against persons in their jurisdictions.

Congress does not just represent citizens. Our Federal elected officials represent all persons, particularly children, who have not yet reached the age to vote, and women, who did not have the right to vote until passage of the 19th amendment and countless other groups of residents of the United States.

Congress also represents the thousands of our American soldiers offering their lives to protect our Nation who are not yet citizens but are lawful, permanent residents. Surely these men and women in uniform are entitled to be represented by the country for which they are willing to sacrifice their lives.

This is dangerous ground when we decide to classify slaves as not being whole persons, but three-fifths of a person. This amendment would determine that members of our society who are not yet citizens are also not persons in the eyes of the law. This is fundamentally contrary to our values as Americans.

Congress has considered such changes to the Constitution before and has rejected them each time, deciding instead to embrace the principles established by the Framers of the Constitution that the U.S. House of Representatives represents all persons residing in this country, not just a few with rights.

In listening to the discussions and the presentations of research surrounding the introduction of H.J. Res. 53 much of the debate is focused on the number of undocumented immigrants and their impact on political representation. It focuses on winners and losers in political terms.

For example, an analysis by the Congressional Research Service from May 2005 indicates that if only citizens were counted in the

2000 census, California, Texas, New York and Florida would have lost congressional representation rather than gained. Because of the large undocumented population, so the debate goes, and all persons rather than citizens were counted, several other States lost representation. A discussion about counting only citizens is particularly disheartening when viewed in the context of potential Latino political progress.

Let me offer the members of this subcommittee another perspective, a perspective that seems to get lost in the emotional debate about illegal immigration and one that our organization cares very deeply about. Last year our organization completed an analysis of the population estimates of legal permanent residents eligible for citizenship, that was produced by the Urban Institute demographer Dr. Jeffrey Passel. These estimates reveal that one out of two of the Nation's legal permanent residents eligible for U.S. citizenship were Latino, 4.2 million. Estimates were produced for Latino legal permanent residents and all legal permanent residents, which totaled 7.7 million eligible to become citizens.

Since much of Dr. Passel's estimates are based on Census 2000 data, we believe the overall number of LPRs eligible for citizenship may now be approaching 10 million, with nearly half of those being Latino. According to our analysis, most of the eligible Latino legal permanent residents are in States that are traditional Latino population centers. About 77 percent of the Nation's total live in California, Texas, New York, Florida, Illinois, New Jersey or Arizona. This is important to note in light of the CRS analysis.

While we do not dispute the fact that there are large undocumented populations in these States, our analysis shows that there are also many immigrants poised to become citizens. If the goal of H.J. Res. 53 is to shift political power away from States that have large concentrations of undocumented immigrants, the reality is these States also have hundreds of thousands of immigrants who are law-abiding citizens who have played by the rules and are preparing to become full participants in this Nation.

In conclusion, we agree with Representative Miller's public statement that H.J. Res. 53 and this discussion today is about the concept of one person, one vote. If you are a person in this country, you should be counted. While the Latino community continues on its path to full political engagement and representation, we have not yet reached that goal, and we will not reach it without the continued counting of all persons that reside within the United States.

Thank you.

[The prepared statement of Mr. Gonzales follows:]

Testimony

by

Lawrence Gonzalez, Washington Office Director
National Association of Latino Elected and Appointed Officials
(NALEO) Educational Fund

submitted to

the United States House of Representatives
Subcommittee on
Federalism and the Census

"Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning our Elected Representatives?"

Washington, D.C.
December 6, 2005

Mr. Chairman and distinguished members of the Subcommittee, thank you for the invitation to testify regarding House Joint Resolution 53, which proposes an amendment to the Constitution of the United States to prohibit the counting of all non-citizens in the decennial census for the purpose of apportionment of the House of Representatives.

I am Larry Gonzalez, Washington Office Director of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund. The NALEO Educational Fund is a non-profit, non-partisan organization that empowers Latinos to participate fully in the American political process, from citizenship to public service. We carry out this mission by developing and implementing programs that promote the integration of Latino immigrants into American society, developing future leaders among Latino youth, providing training and technical assistance to the nation's Latino elected officials, and conducting policy analysis and research on Latino civic participation. The NALEO Educational Fund's constituency includes the more than 6,000 Latino elected and appointed officials nationwide.

Because of our long standing work on promoting a full enumeration in the Census, we were recently appointed by the United States Secretary of Commerce, Carlos Gutierrez, to serve as a member of the 2010 Census Advisory Committee. Member organizations of the 2010 CAC play a critical role in advising the Census Bureau on how it can effectively and efficiently accomplish its decennial goals and objectives. The NALEO Educational Fund has extensive experience working with the Latino community on Census outreach and a record of active and effective participation on the Decennial Census Advisory Committee (DCAC), the predecessor of the 2010 CAC.

As background, I would like this committee to note that the NALEO Educational Fund has also always played a non-partisan role in federal, state and local elections. From assisting Latinos in becoming citizens and encouraging citizens to cast their ballots, throughout the years, our efforts have included programs to educate Latinos about voting and participation in the civic life of their neighborhoods and communities.

It is from our extensive experience that I discuss with you today what we believe would be the detrimental impact of HJR 53 on the efforts to fully integrate the nation's second largest population group into our society and political system. The passage of this resolution would only serve to isolate segments of society and send a message that only U.S. citizens have a right to be heard by our government and elected officials. Omitting non citizens from the traditional census count contradicts the body of the U.S. Constitution, as well as the 14th Amendment which specifically requires that States not discriminate against persons in their jurisdictions.

Congress does not just represent citizens, our federal elected officials represent all persons, children, who have not yet reached the age to vote; women, who did not have the right to vote until passage of the 19th Amendment; and countless other groups of residents of the United States. Congress also represents the thousands of our American soldiers, offering their lives to protect our nation, who are not yet citizens, but are lawful permanent residents. Surely, these men and women in uniform are entitled to be represented by the country for which they are willing to sacrifice their lives. This is dangerous ground that our nation has tread before when it decided to classify slaves as not being whole persons, but 3/5th's of a person. This amendment would determine that members of our society who are not yet citizens are also not "persons" in the eyes of the law. This is fundamentally contrary to our values as Americans. Congress has considered such changes to the Constitution before, and has rejected them each time, deciding instead to embrace the principles established by the framers of the Constitution that the U.S. House of Representatives represents all persons residing in this country, not just a few with rights.

In listening to the discussions and the presentation of research surrounding the introduction of HJR 53, much of the debate has focused on the number of undocumented immigrants and their impact on political representation. It focuses on winners and losers in political terms. For example, an analysis by the Congressional Research Service from May 11, 2005 indicates that if only citizens were counted in the 2000 Census, California,

Texas, New York and Florida, would have lost congressional representation rather than gained. Because of the large undocumented population, so the debate goes, and all "persons" rather than "citizens" were counted, several other states "lost" representation.

A discussion about counting only "citizens" is particularly disheartening when viewed in the context of potential Latino political progress. Let me offer the members of this subcommittee another perspective; a perspective that always gets lost in the emotional debate about illegal immigration and one that our organization cares deeply about. Last year, the NALEO Educational Fund completed an analysis of the population estimates of legal permanent residents eligible for citizenship produced by Urban Institute demographer, Dr. Jeffrey Passel. These estimates revealed that one out of two of the nation's legal permanent residents eligible for U.S. citizenship were Latino - 4.2 million. Estimates were produced for Latino legal permanent residents and all legal permanent residents which totaled 7.7 million eligible to become citizens. Since much of Dr. Passel's estimates are based on Census 2000 data, we believe that the overall number of legal permanent residents eligible for citizenship may now be approaching 10 million, with nearly half being Latino.

According to our analysis, most of the eligible Latino legal permanent residents are in states that are the traditional Latino population centers – about 77% of the nation's total live in California, Texas, New York, Florida, Illinois, New Jersey or Arizona. This is important to note in light of the CRS analysis. While we do not dispute the fact that there are large undocumented populations in these states, our analysis shows that there are also many immigrants poised to become citizens. If the goal of HJR 53 is to shift political power away from states that have large concentrations of undocumented immigrants, the reality is that these states also have hundreds of thousands of immigrants who are law abiding citizens, have played by the rules and are preparing to become full participants in this nation.

In fact, there are also a significant number of legal permanent residents in regions with emerging Latino communities, including the Northeast (Massachusetts), the

Washington, D.C. metropolitan area (Maryland and Virginia), the Midwest (Michigan and Ohio), and the Deep South (Georgia). I have attached for the record, the NALEO Educational Fund analysis of the top 15 states with Latino legal permanent residents (LPRs) eligible to naturalize.

In conclusion, we agree with Representative Miller's public statement that HJR 53 and this discussion today is about the concept of one person, one vote. If you are a person in this country, you should be counted.

Mr. Chairman, while the Latino community continues on its path to full political engagement and representation, we have not yet reached that goal, and we will not reach it without the continued counting of all persons that reside within the United States. Thank you.

Mr. TURNER. We will begin our questioning of this panel with Congresswoman Miller.

Mrs. MILLER. Thank you. Thank you, Mr. Chairman; I will be brief. Again, I can't tell you how much I appreciate your holding a hearing on this, because I do think it is such an important issue. I would first start with Mr. Bensen of the Polidata Co. You have a political perspective, I think, on what all this means.

And I do appreciate that, because it will have certainly an impact, but I do not think this can be viewed in a partisan way. From a political standpoint, I do think that the shift should be to shift political power from noncitizens to citizens.

But you also mentioned what would happen if we were to do this and how it would impact the States, and as you mentioned, historically, it has been the practice of the States to apportion based on sort of taking the ratcheting off of what is happening at the Federal level.

Do you have any comments whether you think it would be inappropriate for the States to apportion their State senate seats and State house seats based on citizenship as well?

Mr. BENSEN. Well, there is some precedent for using something other than population as a basis for apportionment in legislatures. For instance, Hawaii at one time used registered voters. The State of Vermont used registered voters at one time, as well; and several States—at least Kansas, I know; I believe another State now—also excludes military and students from their apportionment base. But again the degree to which this has been addressed by the courts, and the Supreme Court in particular, has largely rested upon the assumption that population is the touchstone. Regardless, whatever basis the State uses should track the Federal census.

But again the trick there is whether that is because it's the Federal census and it has done the best or because its population base is kind of a mixed bag, but it's more of the latter.

The question really is whether or not that can be done because the accuracy of the data requires at the Federal level that block level data reflect noncitizen status. Redistricting people are unique in the census user community, shall we say, in the sense that they are really the only users of the block level data. When we look at the military—and in fact in 1990 and 2000 the military were added on to the States' resident population for apportionment of the U.S. House. They were then excluded from the actual districting process because there is no geographic precision as to where these people live.

That is not going to be the case with the noncitizen aspect. We would need to know exactly each block, which again raises a privacy issue to some degree as well because a census block could be two, three or four people, not just a city block with 100 houses or something. So there is some question as to whether that could be done.

I am not saying it can't be, but the question really more so in that regard is whether or not the States are going to have an apportionment base that gives them that operation.

Mrs. MILLER. I appreciate that. I think the operative phrase here is that they do have the option. I am a big supporter of State's rights, and I think it is important that every citizen is counted. As

you said, some of them are looking at registered voters. Well, what about people 18 or younger or convicted felons; they are still citizens of this Nation. I think they need to be counted certainly for these purposes.

I would also make a comment that I think if you are a noncitizen serving in the armed services, which does happen now—and we obviously salute everybody that wears a uniform for America—in those cases, I think it would be very appropriate for us as a Nation to expedite their citizenship process, and this is something that we need to pursue as well.

Mr. Gonzalez, I was trying to take notes as you were talking there. You did testify that the passage of the resolution would send a message that only U.S. citizens would have a right to be heard by our government and elected officials. Do you think it is the purpose of representative democracy to represent citizens or be responsive to every person that is in the country, even though those that are here illegally, do you think it would be appropriate then for us to allow the right to vote to people who are here illegally?

Mr. GONZALEZ. No, absolutely not. I do think that they should have a level of representation according to the Constitution that all persons should be represented, but in terms of undocumented aliens voting, absolutely not.

Mrs. MILLER. I appreciate that. And so, in my mind, I guess my thought process would be, if they already really have the right to vote based on our current system, based on what is happening with congressional representation, as I have mentioned and gone over these statistics, you have the illegal immigrants or noncitizen population in California that has more impact on the Presidential election than it does in 20 States and the District of Columbia.

Again, when we are voting on issues like border security, what have you, and illegal immigrants already have essentially the right to vote—because they are impacting legislation, that is happening. You have no problem with that, though?

Mr. GONZALEZ. I wouldn't say I have a problem with it. I just think there are other decisions being made by Members of Congress and elected officials that do impact the way the broader society views immigrants in general, and I don't know that necessarily our society differentiates.

I think it is very similar to this overall immigration reform debate, where it is fine to talk about border security and all of that, but often from the Hispanic perspective what people hear is anti-Hispanic. So there's not this real differentiation. They look, see Hispanic, you must be illegal, you might be. We don't know, all we know is, we are against this. And that is the message being sent and that is our concern more than anything.

Mrs. MILLER. I appreciate that. We certainly do not want to send that message. I know I do not.

As I mentioned to you, in southeast Michigan, principally because of the auto jobs, almost every ethnic group around the planet has come and has been a wonderful part of the fabric of our society there. And that is so with Hispanics and almost every ethnic group that you can think of. I think we have the highest Arabic population in the Nation, and it makes for a wonderful culture there and we do not want to send a message of anti-immigration.

I think we all need to make certain that we continue to welcome immigrants to this Nation. It really is what has been the backbone of our Nation, makes us strong. I do not believe that this resolution would change that in any way.

Thank you very much, Mr. Chairman.

Mr. TURNER. Mrs. Maloney.

Mrs. MALONEY. Thank you, Mr. Chairman, and I thank all of the panelists for your testimony.

Mr. Bensen, on page 6, point one of your testimony, you testified that it would, in fact, be very difficult to count only citizens in the decennial census and would likely result in a failed census. And I quote from your testimony: I believe it is not possible that the data collected will meet the high threshold of accuracy that is required for the apportionment process.

Could you elaborate for us in more detail of why you believe that the data collected for a citizen-only census would not be accurate enough for apportionment purposes?

Mr. BENSEN. Sure. First off, most of what we know about noncitizen aspects—and it is certainly, most of everything I talked about noncitizen aspects is from the census and from the not short form but the long form—it is sample data. And if there is anything that those of us working in redistricting have learned over the last decade, we can't use sample data for the purposes of apportionment.

So, right away, there is a problem. We can't rely upon the current information we have. And all of these estimates are based upon that sample data.

The other aspect is the inherent bias in a respondent of anyone to a survey, in essence a census, as to the kind of social and political mores. It seems better to say you are a citizen, so many people will say they are a citizen when they are not. Or, on the other hand, they may feel a chilling effect in it and not answer at all. If they—in the old days, 1990 or 2000, had they not answered that question, in all likelihood, it would have been filled in by imputation because it was a long-form question. It was not a critical data element. By transmogrifying the status of it from an informational piece of information into the legal aspect of whether or not it is going to have an impact on apportionment, it changes the whole character of it.

And I think it has an inherent bias. It has a tendency to be nonresponsive, and therefore, the Bureau would have to spend more money to go and find out whether in fact these people were citizens. And then, again, it is not the Bureau's job to determine whether or not they are citizens. Everything the census form collects and everything that we know from the census is self-response data. There is no showing your passport to anyone. It is what you fill out. The same thing with all the race and ethnic data. It is what you put down as to whether you are from the Ukraine or whatever. It is not a thing that the Bureau can verify, and I don't think they have the resources or should be asked to verify.

Mrs. MALONEY. Thank you for your statement.

We have talked a great deal today about apportionment. But the census really is a picture of America. And it is used for many, many purposes; research, allocation of resources. And I believe that is why our founding fathers had it based on people, the amount of

people. There are areas where there are people on the road to becoming citizens and so forth. Counting them accurately is very important, not only for business—business relies very heavily on census data for projections—and certainly city governments and State governments for purposes of services, needs, infrastructure, schools, hospitals. All of this is very important data that I would just like to open it up to any of you to answer.

What would be the impact if you started excluding large swaths of population and saying, they're not going to be counted? Then you are not going to have the data that gives us an accurate picture of who we are as a Nation, where our needs are, where the trends are, where we are going, certainly who is in the country, what their ages are. So I would like to open it up for anyone to comment on that.

Mr. BENSEN. I will be brief about it and move on here. First off, we have to remember that the constitutional purpose of the census is for apportionment. And for most of the history of the census, there really were no other questions asked, all the other fun socioeconomic data that we get we didn't have before.

But the other thing really is it goes back to the question I was talking about with with Congresswoman Miller which is, what will the Bureau provide to the States? If the Bureau says that since its subjective purpose is to count people for apportionment, and the constitutional amendment says you will only count citizens, there is no reason for the Bureau to provide us with that other information for noncitizens.

On the other hand, there is no prohibition, I suppose, in the sense that they could count citizens, count noncitizens and provide separate sets of data for both. But that is a whole bigger question as to operational capabilities.

Mr. CAMAROTA. On the specific question of, if we moved the specific question of citizenship from the long form to the short form, it probably wouldn't have that much impact, if any, on response rates just by itself to simply ask people if they are citizens. Now but that assumes that the current regime, if we were to actually begin to enforce our immigration laws, and then people were to get a survey asking them whether they were citizens, then maybe that could have an impact.

Research generally shows very little reluctance on the part of illegals generally. We think that—and this is based on work done at the Urban Institute and the Census Bureau—we think 90 percent-plus of the illegal aliens, respond not only to the census but other surveys like the current population survey. That is how we get demographic information on illegals. The INS has also done estimates on how many illegals are in the census. And again, it looks like 90 percent-plus.

So, right now, asking citizenship—and that is, again, all from surveys that ask whether you are a citizen—it doesn't appear that people are reluctant to give us that information. But, again, if we try to enforce the law and people got that question, then there might be some impact.

Mrs. MALONEY. But what you are saying, how in the world would the Bureau distinguish between a citizen and noncitizen? Obvi-

ously, many people will say they are citizens whether they are or not. So, how would the Bureau distinguish?

Mr. CAMAROTA. I think, right now, just like we take everyone's word if you say you are a particular race or an ethnicity, even though we know from prior research that people give different answers to that question sometimes—the Census Bureau has found it can't even get respondents to get the same answer on the race and ethnicity question the same way each time it asks. But we just accept it, whatever anyone says. So you can just accept the census question on citizenship.

Now, people who have tried to look at the actual number of citizens trying to look at administrative data and figure out how many citizens there are find that, in general, most groups—it is not very slated—among Hispanic immigrants there is a tendency to overstate citizenship, particularly among Mexican immigrants who may be legal residents but confuse that with citizenship, we are not sure exactly what is going on. But, in general, the 18 or 19 million noncitizens in the 2000 census isn't that far off.

And, again, there are lots of other questions that we use where we just take people's word for it when they say their race. And, again, that stuff is not set in stone, so you could just ask and be done with it that way.

Mr. GONZALEZ. The other thing I would add, I think it raises some privacy issues, and we've been down that road with the Census Bureau. When you start to ask people mathematical outcome status, you know, you send out messages that information that is received by the census is private. I think we saw a situation not too long ago with Arab Americans where data was released. So I think it raises that issue as well.

Mrs. MALONEY. I do also, Mr. Gonzalez, know that, in my office, there are numerous legal immigrants on the road to citizenship. And there are many hurdles they have to go through. And would this proposal disenfranchise that group that is on the road to citizenship?

Mr. GONZALEZ. I think folks clearly understand the difference between being illegal and being a U.S. citizen and whether or not they are not legal, particularly from a Latino perspective.

Mr. BENSEN. Could I add one clarification? We have talked mathematical outcome short form/long form again. I think we have to have a mind shift here which is—someone can correct me if I'm wrong—but my understanding is that the current budgetary situation is, we will in fact have an ACS for the coming years. We will not have a long form.

So the only census form that will come out in 2010 will be, in essence, the short form. So whatever happens here if this, in fact, is adopted and takes effect before then, it would have to be on the short form, which does address some of the privacy concerns that were mentioned here and I addressed earlier as well.

But I think we have to get a mindset here which is, right now, we will have all this information from noncitizens from ACS, and we will have it every year, which is, in a sense, from the standpoint of the shift in the population more interesting.

Mrs. MALONEY. That is an important contribution, but as you said in your testimony, it will not answer the accuracy question.

Mr. BENSEN. I was just trying to clarify——

Mrs. MALONEY. The accuracy question is the question. And as you pointed out in your testimony, it is a huge problem, huge challenge. And if you can't be accurate, what do you have?

Mr. BENSEN. We could not use the ACS data for apportionment. That would only solve the informational aspects of it.

Mr. TURNER. Thank you. As I stated in my opening comments, the purposes of this hearing is informational, to let people know that this is the manner in which apportionment is done and to have an understanding of the possible impacts subject to passage of the constitutional amendment proposed by Congresswoman Miller.

With that, I have basically five things that I am hoping we can leave this hearing with, and I am going to go through four of them and ask the panelists to see if I can get consensus that we all agree on at least these topics. And basically, it doesn't matter what side of the issue you are on. It doesn't matter if you think we should only count the citizens or if you think we should, in 2010, count persons or it is a good thing that we count persons. Here is a mathematical equation and a mathematical outcome, so it is not relatively subjective as to its impact.

So I would like to go over some of those. The first one is to followup on Congresswoman Miller's question to Mr. Gonzalez, and that I want to ask the other two witnesses, and that is, your belief that noncitizens should not be allowed to vote. Would you confirm that your belief is similar to Mr. Gonzalez?

Mr. BENSEN. Well, certainly, yes, my position is——

Mr. TURNER. This is an easy one.

Mr. BENSEN. My position is perhaps more adamant than that. I have always had a problem with the fact that noncitizens indirectly vote for Presidents.

Mr. TURNER. We are going to get there. But on a straight direct vote, your answer would be no?

Mr. BENSEN. Yes.

Mr. CAMAROTA. My answer would be as well. Voting should be reserved for citizens.

Mr. TURNER. The second issue—this is a mathematical one and not a value statement—is that the counting of noncitizens dilutes the vote of citizens. We have the maps here that show that coming up—and I will use my State—in 2010, Ohio is slated to lose two Members of Congress. If the constitutional amendment was passed, Ohio would, in 2010, by current projections, gain a Congressman—no?

Mr. BENSEN. It would only lose one.

Mr. TURNER. It says plus one. So we are going to lose one?

Mr. BENSEN. Now, this is in comparison to whether the citizens were in or not. So in other words, Ohio would only lose one seat.

Mr. TURNER. So then we are to subtract these two, not add them together. So Ohio would be ahead by not having lost one?

Mr. BENSEN. Correct.

Mr. TURNER. Having lost another one. So the fact that we would go from losing two to losing one shows that, as a State, that our vote in Congress and Ohio is diluted by the fact that noncitizens

are counted in other congressional districts and congressional representation in seats move.

So the question is, do you agree that counting noncitizens for the purposes of apportionment dilutes the votes of citizens? Mr. Bensen.

Mr. BENSEN. Yes.

Mr. CAMAROTA. Mathematically, the case, yes, especially in a low-immigration State like Ohio.

Mr. GONZALEZ. No.

Mr. TURNER. That is why I was hoping to go through these in that how, could you explain to me if my State is going to lose votes in Congress—that means less chairmanships, less members on committees and less votes—and other States are going to gain votes in Congress, based on counting noncitizens; how is it that the counting of noncitizens doesn't dilute the voting?

Mr. GONZALEZ. Other States simply have larger—to compare a State like Ohio and a State like California I think is comparing apples and oranges, or to compare a State like Ohio with a State like Texas just in terms of the sheer size of those kinds of States, regardless of the undocumented population, they would still have a larger vote and a voice. I mean, every citizen in the United States has a vote and a voice the day that they walk into a polling place and cast their ballot.

Mr. TURNER. But their allocation to congressional districts are diminished by the counting of noncitizens. We have the charts here that shows in the States that are listed that, as a result of the counting of noncitizens, in Congress, the citizens that live in those States have less representation here. That means, when a matter comes to the floor, their State has less of a vote because of the counting of noncitizens.

In my view, that dilutes the vote of the citizens. Whether you are for that or against that, I would think that you would mathematically have to agree that is occurring.

Mr. GONZALEZ. OK, I will go there with you. I will go down that road with you.

Mr. TURNER. So you would agree then that it does dilute their vote in Congress?

Mr. GONZALEZ. In Congress, yes.

Mr. TURNER. The third thing is that because that allocation also has an impact on the allocation of the Electoral College, it has the potential to impact the outcome of Presidential elections by counting noncitizens for allocation of the Electoral College. Mr. Bensen, do you agree?

Mr. BENSEN. Definitely, yes.

Mr. CAMAROTA. Undeniably the case, yes.

Mr. GONZALEZ. Yes.

Mr. TURNER. Because of two and three that we just went through, it seems to me that goes to the inherent issue in the constitutional convention in that it impacts the balance of power between the States. Some States have greater influence in Congress than other States as a result of the counting of noncitizen populations within their borders. Mr. Bensen.

Mr. BENSEN. Yes.

Mr. CAMAROTA. Yes.

Mr. GONZALEZ. Yes.

Mr. TURNER. I am going to give one more discussion on what I consider the fifth topic or my fifth goal for this hearing, and that is the issue of, how would—if this constitutional amendment were to pass, how would it be implemented? And we have heard some of the discussion of the difficulties of accomplishing that. And I want to give each of you an open opportunity to express your opinions and your views on, if the constitutional amendment passed, how it would have an impact on the administration of the census and the impact it would have on communities as we attempt to determine citizenship. We will start with Mr. Bensen.

Mr. BENSEN. Well, I don't see much good from the standpoint of the likely impact of it, aside from the point which I addressed which is, the operational aspects of the Bureau even trying to determine this and process the returns when they can't verify anything, going out and following up on the people who have not responded to the form, the entire form now, because they decide not to answer that question.

Now let's assume time-wise it is implemented for the 2010 apportionment, and it goes in. There will inevitably be litigation over it. However, there will have already been an apportionment. There will have already been districts drawn for the 2011 and 2012 elections around the country. Those elections will be entirely put at jeopardy, and our peaceful transition of political power may be just totally upside down.

Mr. TURNER. Mr. Camarota.

Mr. CAMAROTA. Well, every reapportionment involves litigation. If we were worried about litigation, I would say, we just can't have any reapportionment. But on the question of moving one question from the long form to the short form, Congresswoman Miller's proposal is not that unreasonable. It has one big advantage. One of the problems that the Census Bureau—and I do work for them—that they face is it is very hard to estimate immigration. We don't know how many people leave and come and go and that sort of thing. If we have that question on the short form, in other words, everyone was asked every 10 years, it would probably be very helpful in terms of our migration estimates so that, in between the census, it is conceivable that will actually improve our estimates for things like the current population survey and the American community survey which we are not sure how to weight right now because, quite frankly, we are not sure how many people are coming and going, especially illegal. The census, by asking everyone that citizen question, would allow us to identify the foreign born every 10 years. And it might improve the quality of our data between the census. But it may also have the effect of discouraging some people from responding.

There isn't much evidence right now that asking that question is a problem. In my work for the Census Bureau, I interview people who actually survey immigrants for their American community survey. And the citizenship question sometimes causes some confusion. There is sometimes some reluctance. But, in general, people seem willing to answer it right now. And I think that would probably be the case if we moved it to the short form. But if we actually began to enforce our immigration laws, then that might change.

Then people might not be. I think that is a question that we are not sure.

But I don't see it as quite this terribly onerous thing. I think it can be done. And then we just take people at their word, just like we take people at their word about their race, even though we know from prior research people don't always give the same answer on race and ethnicity. We just take them at their word. That's the way I think it could work.

Mr. GONZALEZ. The only thing I would add, Representative, is—I'll let the professionals at the Census Bureau answer as far as operationally. I would just go back to the privacy issue. I think from the work that we do on the census, particularly census 2000 and 1990, I think it would discourage people. There would be issues on, you know, what exactly—why are they asking these kinds of questions, what it means, so there would be a much larger outreach effort that needs to be done in terms of trying to get at the answers that they would be requesting.

Mr. TURNER. Thank you.

Mr. Dent.

Mr. DENT. Thank you, Mr. Chairman.

Mr. Bensen, I think I will direct my question to you. I was reading through your data, and in my State of Pennsylvania, we often talk about the term brain drain, that we have a hard time retaining citizens who are between the ages of about 21 to 39, the second largest elderly population in the Nation as a percentage of the population after Florida.

And I guess what I am trying to understand is, how much of the loss of congressional representation in States like Pennsylvania and Ohio and Michigan, for example, is caused by that brain drain and simple population migration from the northeast, Midwest and to the south and west versus noncitizens being counted over these many decades. As I said, my State, probably 1930's, had well over 30 Congressmen. In 1960, it was 27, I believe. And today, it is 19. And I am trying to get a sense, historically, why did we lose all these seats, and how much of it is attributable to noncitizens being counted in these high-growth States?

Mr. BENSEN. Pennsylvania, I would have to double check, but it is unique in the sense it has lost at least a seat in Congress in each of the last——

Mr. DENT. We lost two in 2000, two in 1990 and probably in 1980 as well.

Mr. BENSEN. Historically, for several decades, it has always lost one or two seats.

Mr. DENT. And the good news, according to this data, we are only going to lose one.

Mr. BENSEN. First off, remember that a lot of the noncitizen stuff we have really—again, since 1980, it was only 3 percent of the population that were noncitizens. So a lot of that, historically, was not related to that at all. For Pennsylvania, it is not the predominant factor. The predominant factor is the brain drain. It is just people leaving the entire region, not necessarily Pennsylvania but just leaving the region. This is kind of like another little insult. We are having trouble already, but now we are going to lose this as well.

Mr. DENT. And I guess the question is, as you know, there is discussion in this building about the guest-worker programs. Do you think that, if we did have a guest-worker program in the United States, that those guest workers would disproportionately reside in States with large noncitizen populations like those in California and Texas and elsewhere?

Mr. BENSEN. I am certainly not an expert on that, but certainly that would seem to be the case.

Mr. CAMAROTA. Sure, certain States are attracting immigrants. There is no reason to expect a change in that in the immediate future. Though, over the long-term, all the evidence would project that over the next 50, 100 years, immigrants and their descendants will spread out. But if we were to turn all the illegal aliens in the United States into guest workers somehow tomorrow, they would continue to likely reside, and there would be some movement thereafter, and it is important to note they almost certainly would be counted in the census.

Mr. DENT. You believe, if we did have a guest-worker program, they would be counted in the census as people?

Mr. CAMAROTA. In the last census, we counted over a million people who were guest workers and foreign students by everyone's estimates, Urban Institute's, Census Bureau, INS, and in addition to that, we counted 7 or 8 million illegal aliens. So if we turned them into guest workers—and that population is now probably about 11 million illegal aliens, maybe 12—we can expect that some 90 percent of these newly legalized or guest-workerized illegal aliens will also respond to the census. Congressional seats will then be drawn for them, but of course, they can't vote, and all the issues come up. And that is an important thing to always keep in mind, that even a guest-worker program has profound consequences for the United States, including political representation outside of the work force.

Mr. BENSEN. One other thought, just to clarify what he is saying about the 100 years out, in each of the four censuses that I looked at, the 1980, 1990, 2000 and projection for 2010, not only the number of seats that were affected but the number of States that were affected has risen a lot. And in fact, I did a couple of different scenarios for 2010, and I had even more States being affected. So the fact is, as we know, since many of the noncitizens are Mexicans or of Hispanic origin, Hispanic-origin people, unlike African-Americans, are scattered all around the country.

There are a lot of African-American communities, obviously largely in the south and the urban core and northeast and such, but Hispanics are really spread out much more. And that is part of the problem, from the standpoint of the impact on the number of States. The number of States that are likely to be affected, again, only one seat, will definitely increase from the standpoint of where the current trends are because Hispanics comprise the largest portion of noncitizens who are scattered all around the country.

Mr. CAMAROTA. I agree. Absent a change in the U.S. immigration policy, the impact will grow on a State like Pennsylvania, but in the very long term, we could expect that immigrants will become—and their descendants—more evenly distributed. But that is decades from now.

Mr. DENT. Mr. Gonzalez, do you have any thoughts on this?

Mr. GONZALEZ. I would disagree. If you look at where the largest growth is, North Carolina, Georgia, States like that, that was basically the news of the census 2000 that the Hispanic community was no longer just in these urban areas; we had moved to suburban and rural areas.

Mr. DENT. In my congressional district in Pennsylvania, we have a large Latino population, primarily Puerto Rican, and in eastern Pennsylvania, we have seen a large growth in the Hispanic population. But, again, it is, I guess probably not as many noncitizens because Puerto Ricans are, of course, American citizens. Well, thank you for your insights. It is very helpful to me.

Yield back.

Mr. TURNER. Mrs. Maloney.

Mrs. MALONEY. I was not here when Mr. Turner asked the question, but I understand he had some questions about noncitizens diluting the votes of citizens in other States. Well, I would like to ask the panelists a question.

With regard to the Electoral College, is it not true that the votes of people in smaller States are worth far more than those of larger States given the value of the two senators in their State representation? And isn't my vote diluted, being from New York, compared to someone in Rhode Island? And do the panelists think we should do away with the Senate because this dilutes the votes of people?

Mr. TURNER. Which they may be for for other reasons.

Mrs. MALONEY. So I would like to start with Mr. Bensen and have each one of you answer.

Mr. BENSEN. Well, the question was not exclusive. It was more a question, would this be vote dilution? Yes, your scenario would be that, yes, my home State of Vermont is obviously far more powerful in the U.S. Congress than your home State of New York.

Mr. CAMAROTA. Yes. The answer is obviously, big States are penalized in the Senate, so that there are ways in which votes get diluted in our system that are not related to the presence of noncitizens in other States. But nonetheless, the presence of noncitizens in other States is maybe something we can fix, assuming we think the Senate is OK the way it is.

Mrs. MALONEY. Well, if you are concerned about diluting the votes, then maybe we should do away with the Senate, too, if that is your concern.

Mr. Gonzalez.

Mr. GONZALEZ. I would agree with you, again, under that scenario, I know that a number of our members in New Mexico very much enjoy the focus that has been placed upon them over the last few election cycles with their whopping four electoral votes. Absolutely.

Mrs. MALONEY. Thank you. No further questions.

Mr. TURNER. Thank you.

We will turn to our third panel. We will thank each of you for participating, for your preparation and your time today.

Our third panel includes Dr. Ken Prewitt, professor of public affairs, School of International and Public Affairs, Columbia University; Mr. Johnny Killian, senior specialist in constitutional law, American Law Division, Congressional Research Service; Mr. James Gimpel, professor of government, University of Maryland;

Mr. Andrew Spiropoulos, professor of law, Oklahoma City University School of Law; Ms. Nina Perales, Southwestern regional counsel, Mexican American Legal Defense and Educational Fund.

I want to thank each of our members of the third panel. They have prepared written testimony which has been submitted to the members of the subcommittee. They have been asked then to provide an oral summary of their testimony, which the witnesses will notice that there is a timer light on the witness table. The green light indicates you should begin your prepared remarks, and the red light indicates the time has expired. The yellow light will indicate when you have 1 minute left to conclude your remarks. Your oral testimony presentation will constitute a time period of 5 minutes. It is the policy of this committee that all witnesses be sworn in before they testify. If you would please rise and raise your right hands.

[Witnesses sworn.]

Mr. TURNER. Please let the record show that all witnesses responded in the affirmative.

And we will begin with Dr. Prewitt.

STATEMENTS OF KENNETH PREWITT, CARNEGIE PROFESSOR OF PUBLIC AFFAIRS, SCHOOL OF INTERNATIONAL AND PUBLIC AFFAIRS, COLUMBIA UNIVERSITY; JOHNNY H. KILLIAN, SENIOR SPECIALIST, AMERICAN CONSTITUTIONAL LAW, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE; JAMES G. GIMPEL, PROFESSOR OF GOVERNMENT, UNIVERSITY OF MARYLAND, COLLEGE PARK; ANDREW C. SPIROPOULOS, PROFESSOR OF LAW, OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW; AND NINA PERALES, SOUTHWESTERN REGIONAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

STATEMENT OF KENNETH PREWITT

Mr. PREWITT. Thank you, Mr. Chairman.

Drawing on my experience as the director of the Census Bureau and a number of studies that I've conducted on the census since, I would offer cautionary comments about the amendment under four headings: Census Accuracy; A Census Endangered; A Civics Opportunity Lost; The Census and Fairness.

I also believe, before I get to those topics, that the amendment runs counter to a fundamental principle that has guided how census-taking and democracy co-evolved starting in 1790. This principle is deliberately, carefully placed into the Constitution by the Nation's Founders. The Founders were mindful that numbers were political, especially in a representative democracy. And because of this, they designed the decennial census to be the apolitical, nonpartisan starting point whose end points were appropriately political and partisan.

This was their genius, to keep the taking of the census out of politics so that the results of the census could be used in politics. It is this principle that is at risk should this amendment be adopted.

It will be widely portrayed as a political instruction to the Census Bureau to count in such a way that one set of partisan interests are advanced and another retarded. Whether this is the intent

of the sponsors is not at issue. Motivations do not interest me. Consequences do.

It is inevitable that the extensive and heated public debate over this amendment will endlessly repeat that partisan interests are behind the change in how the census is taken. This will erode a basic principle that was clearly of importance to the Founders and has served the Nation for more than two centuries.

I urge the sponsors to reflect deeply before taking this step. There will be no turning back.

Let me then turn to census accuracy. The proposed amendment will lead to a less complete and less accurate census. A significant number of noncitizens will not respond to the decennial census. Many members of the public, citizens and noncitizens alike, are wary about the census. I remind you of the privacy debate that erupted in 2000. Many political leaders were quick to denounce the census as a violation of privacy. The decennial census came to symbolize an invasive Federal Government.

One Member of Congress said, "I am happy to voluntarily cooperate with the government in areas where I decide it makes sense. Beyond that, it starts to meet the definition of intrusive."

A Senate leader advised the public to "just fill out what you need to fill out and [not] anything you feel uncomfortable with." The Senate passed a nonbinding resolution urging that no American be prosecuted, fined or in any way harassed by the Federal Government for not answering questions on the census form.

The privacy debate in 2000 underscores the general wariness in our public about what is viewed as government intrusiveness. The proposed amendment plays into this wariness by highlighting that the government has some need on a block-by-block basis to distinguish citizens from noncitizens. The nuanced reasons for this, well expressed by those who testify in support of this amendment, will be lost to the millions upon millions of Americans. This question will be treated with suspicion.

Taking their cue from national leaders who, in 2000, said, "skip the questions you don't like or find intrusive," many American citizens as well as noncitizens will do just that, and accuracy will suffer.

In addition, the huge partnership program that was mounted in 2000 to solicit census cooperation rested upon an argument that if you are not counted, you are not represented. Many of those partners will simply not step forward if this amendment is passed, especially, I believe, the Catholic Church.

A Census Endangered: The Congress, if endorsed in this case by three-fourths of the States, can absorb, I think, some deterioration in quality and decide that is a worthwhile tradeoff to realize the purposes of the amendment.

If, however, the Congress were to instruct the Census Bureau to validate the citizen status of census respondents, much more of the data quality is at stake. There is nothing in terms of the amendment to suggest that this is what anyone has in mind. But it is foolish to expect that census-taking is immune from anxieties that surround such issues as undocumented aliens, immigration enforcement and so forth.

I can promise you that, if the conversation moves from census citizen to noncitizen, to aid illegals and legals, that this concern will be magnified in the Congress or in the country.

Finally, I would like to say this is an opportunity lost. Under the new terms of the census, we have a marvelous opportunity to teach the American public a civics lesson. I have in mind that promotion and advertising can emphasize the connection between population numbers and political representation. Such a message will increase public understanding of how our democracy works. The sequence from population distribution to apportionment and redistricting, and from there to elections, from elections to public policy is not well understood by the general public.

A mobilization campaign of the scope used in 2000 could be a civics lesson. More ambitiously, it could be designed as a civics ceremony. Imagine 535 Members of Congress completing their census forms at the Jefferson Memorial on census day.

The census is, in fact, the only such civics ceremony available to the American public. Our national holidays no longer perform this service. The census has the merit of being inclusive. Everyone is to be counted. It is hopefully nonpartisan. It has consequences for the fundamental workings of our democracy at the national, State and local levels.

It is certainly the only civic event that has its origins in the Constitution. The civics lesson, of course, would be foregone if the census is not viewed as the nonpartisan starting point of political representation. And I think this amendment will derail that principle.

There is also the issue of fairness; no taxation without representation. That argument will once again be heard. It will be the Boston Tea Party all over. This is clearly a no taxation without representation. The amendment is also a military service without representation, of course.

What is special about the census is its reputation for advancing principles of fairness in American political life. This reputation rests on the deep principle that representation is allocated to a portion of the population size, not the counts to distinguish property owners from nonproperty owners, the educated from the uneducated, the voters from nonvoters, citizens from noncitizens. These distinctions have a place in public policy but not in the fundamental starting point from which all public policy springs.

In conclusion, representative democracy has come a long way since 1790 when a handful of Senators and Representatives assembled to start the great experiment in self-government. Census-taking has come a long way since 1790. As anticipated by the Constitution, the census has carried the heavy weight assigned to it in what can rightly be described as America's longest continuous scientific undertaking.

Census accuracy and fairness matter to this story. However, let us grant that a less accurate and less fair census can still carry the weight assigned to it by the Constitution.

Mr. TURNER. Mr. Prewitt, you need to conclude.

Mr. PREWITT. We can still redistrict. And perhaps this is the price that we should pay. But I am less confident about the future of the census if it is thought by millions upon millions of Americans to have been designed to advance partisan interests, even if this in-

tent is absent among the amendment sponsors. A census so understood will cease to command the respect and confidence that we rely upon. I urge the Congress to respect the genius of the Founders who take great care to separate how the census is taken from the political uses to which the numbers are applied. We undo their craftsmanship at our peril. Thank you.

[The prepared statement of Mr. Prewitt follows:]

Statement of

Kenneth Prewitt
Carnegie Professor of Public Affairs
School of International and Public Affairs
Columbia University

Subcommittee on Federalism and the Census
U.S. House of Representatives

Rayburn HOB 2247
December 6, 2005

Mr. Chairman and Honorable Members of Congress, my name is Kenneth Prewitt. I presently teach in the School of International and Public Affairs, Columbia University, where I serve as the Carnegie Professor of Public Affairs and chairman of the Department of International and Public Affairs. I have also taught political science in other universities, including the University of Chicago and Stanford University, from which I earned a Ph D in political science in 1963. Other career positions relevant to my testimony include the Directorship of the National Opinion Research Center, the Presidency of the Social Science Research Council, and Senior Vice-President of the Rockefeller Foundation.

I served as Director of the U. S. Census Bureau, 1998-2000, where my primary responsibility was overseeing the 2000 Decennial Census. In that capacity, I had the privilege of testifying before the House Subcommittee on the Census eighteen times, and other House and Senate Committees another half-dozen times. Since leaving my position with the government, I have written and lectured widely on census matters – including the preparation of a brief monograph titled *Politics and Science in Census Taking* and, as co-author, *The Hard Count: The Challenge of Census Mobilization*. This latter study is an extensive analysis of the major census mobilization effort, generously funded by the Congress, that successfully reversed a three decade long decline in public cooperation with the decennial census. On both sides of the aisle, the 2000 census is generally recognized as one of the most successful in census history – and it is a pleasure to return to the Congress and to offer my personal thank you for the indispensable role you and your colleagues played in this achievement.

Drawing on my experience as Director of the Census Bureau and the studies with which I have been associated since, I offer cautionary comments on the proposed modification to the 14th Amendment of the Constitution. I address four issues: Census Accuracy; A Census Endangered; A Civics Opportunity Lost; The Census and Fairness.

Before taking up these topics, and now speaking as an academic political scientist, I briefly state my primary reason for opposing the Amendment. It runs counter to a fundamental principle that has guided how census-taking and democracy co-evolved starting in 1790. This principle was deliberately, carefully placed into the Constitution by the nation's founders, and was amplified in the nation's early statutes guiding census taking. The founders were mindful that numbers were political, and of course had used colonial censuses to effective political purpose during the War for Independence and as they fashioned governing system. Political arithmetic as it was called was no less central to America's earliest civic life than it is at present.

Because the founders fully understood the pervasive political use of numbers, especially in a representative democracy, they designed the decennial census to be an apolitical, nonpartisan starting point to a process whose end points are inevitably and appropriately political and partisan. This was their genius: *to keep the taking of the census out of politics so that the results of the census could be used in politics.* It is this principle that is at risk should the Constitution be amended as proposed.

The Amendment cannot but be widely portrayed as a political instruction to the Census Bureau to count in such a way that one set of partisan interests are advanced and another retarded. Whether this is the intent of its sponsors is not at issue. Motivations don't interest me, consequences do. It is inevitable that extensive and heated public debate over the Amendment will endlessly repeat that partisan interests are behind change in how the census is taken. This will erode a basic principle that was clearly of central importance to the Founders, and has served the nation for more than two centuries. I urge the Amendment's sponsors to reflect deeply before taking this step. There will be no turning back.

If time permits, I will return to this line of reasoning in my concluding comments. But first I turn to issues related to my experience directing Census 2000.

Census Accuracy.

The proposed Amendment will lead to a less complete and less accurate census.

Under the terms of the Amendment, a significant number of non-citizens will not respond to the decennial census. Many members of the public, citizens and non-citizens alike, are wary about the census. I remind you of the privacy debate that erupted in 2000 when the census long-form reached one-sixth of America's households.

The debate was noisy and ill-informed, but wide-spread. It started with talk show hosts and editorial writers. Late night comics were quick to chime in. Political leaders, from small town mayors to a presidential candidate, added their views. President Bush, then a candidate, told the press that he understood "why people don't want to give over that information to the government. If I had the long form, I'm not so sure I would do it either." Many leaders were quick to denounce the census as a violation of privacy. The decennial census came to symbolize an "invasive federal government". One member of

Congress, who received the long form, said he found some questions "too nosy." Saying he would not answer all of them, he added: "I'm happy to voluntarily cooperate with the government in areas where I decide it makes sense. Beyond that, it starts to meet the definition of intrusive." Another Representative said he was "appalled and outraged by the intrusiveness" of the long-form questions. A Senate leader urged constituents to skip any questions they felt violated their privacy; and another similarly advised the public to, "just fill out what you need to fill out, and [not] anything you don't feel comfortable with." The U.S. Senate passed a nonbinding resolution urging that "no American be prosecuted, fined, or in any way harassed by the federal government" for not answering questions on the census long form.

I remind us of the privacy debate not to suggest that it will reoccur in 2010, which is unlikely given that the long-form will not be part of the decennial (having been replaced by the American Community Survey). The privacy debate in 2000 does, however, underscore the general wariness in our public about what is viewed as "government intrusiveness." Based on extensive analysis of survey data on participation in the 2000 census, I have suggested in writings and lectures that the bond of trust between the public and the government is fragile. One essay, published in SCIENCE magazine, is titled "What if We Give a Census and No One Comes?" Although that title exaggerates the conditions before us, it is no exaggeration to state that the decennial census is vulnerable to a gradual withdrawal of public cooperation.

The proposed Amendment plays into this growing wariness by highlighting that the government has some need, block by block, to distinguish citizens from non-citizens. The nuanced reasons for the question, well-expressed by those who are testifying in support of the Amendment, will of course be lost to millions upon millions of Americans. The question will be treated with suspicion. Taking their cue from national leaders who, in 2000, said "skip the questions you don't like or find intrusive," many Americans, and not limited to non-citizens, will do just that. Census accuracy will suffer.

Further contributing to a decline in census cooperation will be a reduced effort by civic organizations and religious groups that in Census 2000 so successfully mobilized the communities that have traditionally hesitated or even refused to cooperate with the census. The success of the promotion effort in 2000 has been well documented by the GAO, by the Census Bureau's internal evaluations, and by independent analysis (see *The Hard Count,* cited above). Time and again the appeal in the census partnership program stressed one central message -- "If you are not counted you are not represented." In the Southwest, for example, the Catholic Church, reversing its stand-aside policy in previous decennials, energetically urged that everyone step forward and be counted in the census. The 2000 success in reaching the hard-to-locate and hard-to-count owes much to thousands of civic and religious organizations stepping forward on behalf of a full and accurate count. If we now tell these organizations that non-citizens are to be denied representation, the 2000 experience will not repeat and census coverage will be measurably less than what was achieved in that decennial.

There is also the prospect of fraudulent responses. Non-citizens, mistrustful of the government's promise that their answers to a census question can never be used against them, will misrepresent themselves on the census form. If the Congress were to instruct the Census Bureau to validate responses to a citizenship question, the entire census enterprise would be endangered.

A Census Endangered.

The Census Bureau, as the country's premier statistical agency, will adjust, if unhappily, to the deterioration in census coverage and data quality that is inevitable if a citizenship question is placed on the census form. Many factors make census-taking an imperfect science, and while it is unfortunate to add to that list Congress, if endorsed in the issue at hand by three-fourths of the States, can decide that some deterioration in quality is a worthwhile trade-off to realize the purposes of the Amendment.

If, however, Congress were to instruct the Census Bureau to validate the citizenship status of census respondents, much more than data quality is at stake. There is nothing in the terms of the Amendment to indicate that anyone has this in mind. But it is foolish to expect that census-taking is immune from anxieties that surround such issues as undocumented aliens, immigration enforcement, terrorism prevention, national identity cards, total information awareness, and a sharp increase in surveillance generally.

Everyone in this room understands the distinction between statistical information and individually identifiable data necessary to numerous legitimate government programs, and not just in the security arena. But this distinction is not well understood by the general public. Approximately half the public, for example, discounts the government's pledge of confidentiality regarding census and other statistical information.

The Census Bureau cannot become a quasi investigatory agency and still perform its basic responsibilities as a statistical agency. Responses to a citizenship question cannot be validated on a case-by-case basis. Although the bureau may devise ways to estimate the magnitude of misrepresentation in responses to a citizenship question at the national level, such an estimate would not likely be robust enough to be used in state-level counts – let alone at the smaller levels of geography relevant to congressional districting, state legislatures, and local government. Litigation over the accuracy of the count separating citizens and non-citizens is certainly a possibility.

(Obviously, if attention shifted from the distinction between citizens and non-citizens to the distinction between documented and undocumented or legal and illegal aliens, the concerns voiced in the preceding paragraphs are many times magnified.)

I urge the Amendment's sponsors to write accompanying legislation that strongly protects the Census Bureau from even the hint that it should validate responses to a citizenship question.

A Census Opportunity Lost

In Census 2000, the broad and successful promotion effort on behalf of census participation centered on the following message: "This [the census form itself] is your future. Don't leave it blank." The future was portrayed as less crowded schools, improved social services, and fairer distribution of federal funds. Promotional material emphasized that one's community would benefit from a more complete count, with "community" sometimes indicated as the neighborhood and sometimes as a racial or ethnic community. Although not directly emphasized, these community benefits in large part stem from information provided in the census long-form.

Some residue of this message can be applied to a short-form only decennial census, which is the designed planned for 2010 and future censuses. In fact, the terms short-form and long-form now belong to history. But the new decennial census offers an opportunity for a differently presented promotion campaign. There is an opportunity for a profoundly important civic lesson for the country. This will happen if census advertising and promotion emphasizes the connection between population numbers and political representation. Such a message will increase public understanding of how our democracy works, not an insignificant lesson. Currently, the sequence from population distribution to apportionment and redistricting and from there to elections and from elections to public policy is not well understood by the general public. A mobilization campaign of the scope used in 2000 could be a civics lesson on the numerical underpinnings of representative democracy.

More ambitiously, the census can be designed as a civic ceremony – imagine 535 members of Congress completing their census form at the Jefferson Memorial on Census Day. The census is in fact the only such civic ceremony available to American political life. Our national holidays no longer bring us together as they once did. The census has the merit of being inclusive – everyone is to be counted; it is (hopefully) nonpartisan; it has consequences for the fundamental workings of our democracy at national, state, and local levels. It is certainly the only civic event which has its origins in the Constitution itself.

The census as a civic ceremony can build on what the public already acknowledges. Nearly three of every five Americans agree that "it is our civic responsibility to fill out the census" and more than half (56 percent) recognize that congress is reapportioned on the basis of the census numbers. This is a base on which to build a strong civics lesson into the census experience. This will be both more relevant and easier to accomplish in the new (short-form only) census design. The constitutional basis and purpose for the decennial census can be emphasized once it is no longer necessary to motivate millions of households to complete the long form.

This civics lesson works, of course, only if the census is viewed as the *nonpartisan* starting point of *partisan* political representation. As suggested above, the proposed Amendment threatens to derail this principle. If, as is likely, our respective political parties stake out conflicting positions on the Amendment, the promise of a census-based

civics lesson is lost. Instead, the lesson, however unintended, is that partisan interests determine who is counted and for what purposes.

The Census and Fairness

The Boston Tea Party was a defining moment in the founding of our remarkable system of representative democracy. Its rallying cry – no taxation without representation – is known to generations of school children as the political argument that launched the War for Independence, and led to the form of government we enjoy today. Sadly, as the proposed Amendment is debated across the country, "no taxation without representation" will be heard again – but this time in opposition not to the British crown but to an amendment to our revered Constitution. Lawful members of our society who pay income, property, and sales taxes, as well as for your and my social security, will ask why they are being denied the earliest and most basic right of our democracy – political representation. No taxation without representation will describe their plight.

These non-citizens do more than pay taxes; they are actively recruited into military service. Should it not trouble us to ask loyal Americans, who happen not to be citizens, to risk injury and death to extend democratic rights to Iraq that would now be taken away from them? Something doesn't compute here.

What is special about the census is its reputation for advancing principles of fairness in American political life. This reputation rests on the deep principle that representation is allocated proportionate to population size -- not to census counts that distinguish property owners from the property less, well-educated from the less educated, voters from non-voters, or citizens from non-citizens. These distinctions have a place in public policy, but not in the fundamental starting point from which all policy-making springs. That constitutionally established starting point, we know, is representation proportionate to the number of lawful, tax-paying persons who make up our population.

Conclusions

Representative democracy has come a long way since 1790, when a handful of Senators and Representatives assembled to start the great experiment in self-government. Census taking has come a long way since 1790, when a handful of federal marshals rode into the countryside to enumerate our population. As anticipated by the Constitution, the census has carried the heavy weight assigned to it – in what can rightly be described as America's longest, continuous scientific undertaking. Census accuracy and fairness matter in this story. Both will be compromised if the Constitution is amended along the lines now proposed. However let us grant that even a less accurate and a less fair census can still carry the weight assigned to it by the Constitution. We can still apportion; we can still redistrict; we can still allocate federal funds. These processes will rest on less accurate numbers than the Census Bureau has the expertise to provide, but perhaps that is a price the Amendment's sponsors believe we should pay.

I am less confident about the future if the census is thought by millions upon millions of Americans to have been designed to advance partisan interests – even if this intent is absent among the Amendment's sponsors. A census so understood will cease to command the confidence and respect that we rely upon. The decennial census is the bedrock of the nation's number system, which in turn supplies information basic to our economy as well as our polity. I urge the Congress to respect the genius of the Founders, who took great care to separate how the census is taken from the political uses to which census numbers are applied. We undo their craftsmanship at our peril.

Mr. TURNER. Mr. Killian.

STATEMENT OF JOHNNY H. KILLIAN

Mr. KILLIAN. Mr. Chairman, members of the committee, as an employee of the Congressional Research Service, I am of course obligated to give Members of Congress objective and nonpartisan advice and information.

As a consequence, I cannot address the merits of this proposal and say yea or nay with regard to whether it should be adopted, whether it should be defeated or what not. My purpose, as I understand it, in appearing before the committee is to talk about several aspects, the constitutional amending process, the basis in the Constitution of using the total numbers of the population for purposes of apportionment, and, if there may be some questions regarding that that would be raised if the amendment were adopted.

In the first place, I think we need to notice, with regard to the original Constitution, and the Constitution amended by the 14th amendment, that with regard to the use of the total population for apportionment, there are two significant provisions in the Constitution. One is that the States determine the qualifications of the voters in each State. That is, the Constitution provides that voting qualifications for Members of the House and consequently the Senate and the electors and the Electoral College is based on the qualifications that each State of electors for the more populous House of the legislature.

Second, there is a time, place and manner clause which gives the States the power to determine how and what manner the full details of election of Representatives and Senators, but it also gives the Congress the power to displace any or all of those regulations so that a lot of the questions that might be raised by the amendment, by the change from total population, citizen population, would of course raise questions under these two.

Second, I think we need to take a look at some of the constitutional amendment problems that have arisen in the past. There is no prospect, I think, of Congress addressing most of those in the amendment, in the text of the amendment. The question simply is to evaluate how there might be questions.

We have a prospective of time limitations for instance. The time limitation in this proposal is 7 years, as in previous amendments. It is in the proposing resolution, not in the text of the amendment itself. It used to be in the text of the amendment itself. Congress changed that when scholars began saying, why are you cluttering up the Constitution with things like time limitations? So it put in a resolution. That created a serious debate with respect to the Equal Rights Amendment. As you are all aware, the Equal Rights Amendment, as the time for ratification began to run, ratification was not completed, Congress debated and then adopted a resolution extending the time period to 10 years, adding on another 3 years. The assertion was that because it was not in the text of the amendment itself on which the States had acted, the Congress had the power.

We don't know the correct answer to this. The expiration of the time limitation meant that it was never resolved by the Supreme Court or another body. It should, however, I think be of interest

to the committee, to Members of Congress generally, in considering where the present time limitation is.

Last, there is a question with regard to what other interpretive problems adoption of the amendment might raise. If the amendment were adopted and apportionment is based on citizen population, would States that do the districting be limited as well to total citizen population, or could they continue to do total population including noncitizens?

Obviously, Congress might, by using the time, place and manner clause, regulate distance to some extent. Otherwise we are going to have court decisions running through this. Congress does not have to resolve this issue, but should be aware that, in terms of the present language of the proposal, that this would be raised.

I thank you.

[The prepared statement of Mr. Killian follows:]

Memorandum December 2, 2005

TO: House Government Reform Subcommittee on Federalism and the Census

FROM: Johnny H. Killian
Senior Specialist, American Constitutional Law
American Law Division

SUBJECT: Proposed Constitutional Amendment Basing House Apportionment on Citizenship

This memorandum provides the text of my presentation to the Subcommittee for a hearing scheduled for December 6, 2005, at 10 am. The purpose of the hearing is to conduct oversight with respect to H. J. Res. 53, proposing an amendment to the United States Constitution. The proposal would alter the Constitution so as to provide that the apportionment to the States of Members in the House of Representatives would be based upon the Census count of the number of persons in each State who are citizens of the United States.

The Subcommittee has requested that I appear to discuss the process of constitutional amendment permitting an assessment of the prospects of the proposal. Additionally, I was asked to treat insofar as it is possible for me to do so the actual proposal itself. Inasmuch as employees of the Congressional Research Service are mandated to offer nonpartisan information and analysis to Congress, I am unable to treat the merits of the proposal, but there are certain interpretive questions that I can touch on for the Committee.

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The Framers provided in the original Constitution for apportionment of Representatives to be based upon total population. Article I, § 2, cl. 3. "Representatives . . . shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons." The clause further provides that the determination is to be made through a Census every ten years.

The three-fifths provision was, of course, a compromise between the slave-holding States and the free States. Those States in which slavery existed wanted to count each slave as a full person to maximize the representation of those States in the House and in the electoral college for the election of the President; those States which did not allow slavery did not want to count slaves at all because the weight to be given that number was artificial in view of the condition of slaves as chattels belonging to other people. Neither side intending to yield to the other, the three-fifths provision was adopted as the necessary compromise to obtain the Constitution. Following the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, which, *inter alia*, did away with the provision, in light of the abolition of slavery by the Thirteenth Amendment. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." (In this connection, there are no longer in the United States any "Indians not taxed").

The Framers did not leave behind any express rationale for the decision to count the whole number of persons in each State and to base House apportionment on that count. The decision to include noncitizens in the count and the basis, noncitizens not being permitted to vote, might be seen as a simple recognition that large numbers of other persons, a majority no doubt, who were included in the calculation for apportionment could not vote either. In Article I, § 2, cl. 1, it was provided that the electors of Representatives would be those who, in each State, met the qualifications required to be able to vote for the most numerous branch of the state legislature. Congress, in other words, had no authority to fix the qualifications, and the qualifications varied State by State. In general, at that time and for some years afterward, only white males of a certain minimum age (practically always 21), who owned property of varying values could vote. Gradually over the years the right of suffrage was enlarged, all white males above a certain age, women in more and more States through the Nineteenth Century, African-Americans similarly. Following the Civil War, many States to the West, in order to encourage migration into those States, permitted lawful aliens to vote, provided only that those persons executed an oath that they intended to apply for citizenship as soon as they were eligible.

Therefore, it seems, although it cannot be decisively established, that eligibility to vote or ineligibility to vote played little if any role in the Framers' decision to count the whole number of all persons for purposes of apportionment.

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The process of amending the Constitution, as set out in Article V, is intentionally arduous. There are two methods for proposing amendments and two methods for ratifying them. In terms of proposing, the method used in all the amendments so far proposed and ratified has been passage by Congress by a two-thirds vote of each House present and voting (provided the existence of a quorum). The second method, never successfully used, is for two-thirds of the States to petition Congress for a national convention to be convened to propose amendments, and Congress is thus obligated to act. In terms of ratification, Congress must choose at the time of proposing whether action is to be taken by the legislatures of the States or will be the responsibility of conventions to meet in each State. In any event, three-fourths of the States must affirmatively act. Of the twenty-seven amendments that have been ratified, twenty-six were ratified by state legislatures, and only one, the Twenty-First,

repealing the Prohibition Eighteenth Amendment, was approved by state conventions. Six proposed amendments have failed of ratification.

There are many issues, major and minor, involved in the amending process. I will only touch briefly on several at this point, but I will be happy to attempt to respond to specific questions that Members may have. Occasionally opponents of a proposal, either while it is being considered or in litigation following its ratification, have attempted to divine restraints upon the power of amendment and to contend that some proposal is unconstitutional. On two occasions, the Supreme Court has been confronted with the argument, and it has quickly rebuffed it. A properly ratified amendment becomes a part of the Constitution, and it cannot be seriously contended that it is unconstitutional. Now, this leaves open the question of what might detract from a "proper ratification." It has from time to time been brought forward the assertion that the Fourteenth and Fifteenth Amendments were not validly ratified, because the Reconstruction Congress coerced certain States to act by conditioning readmission to the Union upon ratification. That argument has never been made in the Supreme Court, but it has been made in lower federal courts, all of which have summarily ruled against it.

A related argument concerning those two Amendments are whether a State that has ratified a proposal may rescind the ratification, or, contrarily, whether a State that has once refused to ratify may then reconsider and ratify on a second occasion. Some States took one or the other action with regard to either the Fourteenth or Fifteenth Amendment. Congress and the executive branch officer responsible for certifying ratifications in both instances counted all the States, choosing to permit reconsideration after rejection but refusing to recognize rescissions. The courts have never adjudicated the issue. The matter arose again during consideration of the Equal Rights Amendment, there being several rescissions, but the proposal was never finally ratified and there was consequently no occasion to take the issue to court.

An argument that has frequently arisen concerns the timeliness of ratification. The early proposals did not contain a time limitation for ratification, so that amendments not adopted in the early days were presumably still open for state action. Indeed, this precise occasion arose. Congress had in the First Congress proposed twelve amendments, ten of which were ratified, becoming the Bill of Rights. Two were not ratified, but in 1992 enough States acted to ratify one of those proposals, the Twenty-Seventh Amendment, a provision relating to congressional pay. Both Congress and the executive branch official endorsed the validity of the timeliness of the ratification. Of course, no occasion for invoking the Amendment has arisen, so that no test case has been possible.

But questions of timeliness have arisen on other occasions. No Amendment previous to the Eighteenth Amendment contained any time limitation. Congress included one in the Eighteenth, because a case came to the Supreme Court questioning whether a State could ratify a child labor amendment years after it had been proposed. The Court held, as best as can be determined from a confusing set of opinions, that the question of timeliness was a "political question" not suitable for a judicial resolution. Since the Eighteenth, save for the Nineteenth Amendment, Congress has included a seven-year ratification period (as the proposed H. J. Res. 53 does), and the Court has indicated that it is proper for Congress to do so.

One final issue may interest us. Congress had included a seven-year period in the proposed Equal Rights Amendment. When the end of the period came near, without an adequate number of ratifications, a debate arose in Congress whether Congress should and could extend the time without seeking action again by the States that had already ratified it. The earlier time periods had been included in the actual text of the proposals and it was conceded that Congress could not have extended those periods inasmuch as they were part of what States had ratified. But later time periods were included in the resolution of the proposal on which the States had not acted. Because the Equal Rights Amendment period was included in the resolution, as it is in H. J. Res. 53, it was permissible, as it was argued, for Congress to extend it. Congress so voted a three-year extension. A federal district court held the extension invalid, and the Supreme Court granted review. But the extended time-period ran out before the Court acted, and without enough ratifications, so the case was mooted. We received no definitive answer. The Subcommittee may wish to consider where the time limitation in this proposal should be placed.

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Some consideration might be given to the effects on state action of a constitutional amendment that requires a citizen basis as the standard for apportionment. Would it have any impact on state choices of districting for congressional and state-legislative districts? If a State receives a number of congressional seats computed on the basis of citizen population, would that State be obligated to draw district lines based on citizen population? Would its discretion be larger with respect to drawing state-legislative districts? If a State did choose to use citizen population for such districting, would that action fail to pass the constitutional test of "one person, one vote?"

In practically all the cases, the Supreme Court has used total population figures for purposes of computing variations between and among districts. In *Burns v. Richardson*, 384 U.S. 73 (1966), the use of eligible voter population as the basis for apportioning in the context of a State (Hawaii) with a large transient military population was approved, but with the caution that such a basis would be permissible only so long as the results did not diverge significantly from that obtained by using a total population base. And see *Davis v. Mann*, 377 U.S. 678, 691 (1964). The case law is too sparse to permit much of a judgment, but it certainly appears to be an issue meriting consideration.

It should be observed that with respect to congressional districting in the States, the "times, places, and manner" clause of Article I, § 4, cl, would empower Congress either to mandate that the States use citizen population for congressional districting or to draw the lines itself. Most of the exercises of congressional power under this clause since the 1840s has involved regulation of congressional districting. See *Smiley v. Holm*, 285 U.S. 355 (1932).

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I stand ready to respond to your inquiries.

Mr. TURNER. Thank you, Mr. Killian.
Mr. Gimpel.

STATEMENT OF JAMES G. GIMPEL

Mr. GIMPEL. Thank you, Mr. Chairman, for inviting me. I appreciate your effort to tackle a troubling issue. I have learned a lot from the other panelists already here this morning.

As the other testimony at the hearing makes clear, re-apportionment and redistricting based on noncitizen settlement patterns are profoundly affecting Congress and America's political process in unanticipated ways.

Clearly, today's congressional districts are not equal in critical respects that matter greatly to the operation of our government. Consider what it takes to get elected to a seat where there were only 60,000 voters compared to one where there are eight or nine times that many to be reached in the course of an election campaign.

Consider the fundraising burden alone, for example, and how unequal that is. Consider also the unequal workloads of the Members of Congress who represent these very highly unequal districts. Survey data have shown decisively that citizens are far more demanding of Members of Congress than noncitizens, even after we consider the casework associated with naturalization and citizenship.

As a consequence of representing a large share of noncitizens, one Member may have to chase only a small fraction of the Social Security checks that another does. One Member must respond to only half the amount of constituent mail. To be sure, noncitizens and nonvoters also contact congressional offices, but they do so far less frequently than citizens, hence even if Members of Congress do respond to noncitizen requests for assistance, the work loads are still highly unequal. One Member of the U.S. House should not have to spread her staff more thinly to cover her constituents' demands than another simply because of the presence of noncitizens in the apportionment base.

Real examples are out there. So we don't have to confine ourselves to hypotheticals. Consider several of the immigrant-heavy southern California congressional districts. We might consider the 31st, as Representative Miller did in her remarks, the 33rd or perhaps the 37th. In 2004, a year of record high turnout around the Nation, only 110,460 votes were cast in the 33rd district contest, and the incumbent was re-elected with 74½ percent of the vote. In 2002, the same incumbent was re-elected by a similar margin in a contest that saw a mere 65,800 votes cast. In 2002, the incumbent in the 37th district was re-elected in a contest that saw only 88,000 votes cast. And in 2004, this Member ran unopposed.

Now let's pull out two districts from Michigan and Ohio. Lots of districts would make the comparison, but we will pick two for the sake of illustration. Take the 12th District of Michigan and the 17th District of Ohio. Either one or both of these seats could be reconfigured or lost entirely in the 2010 reapportionment simply because their constituents happen to be unlucky enough to be born in this country. There is something about our moral intuitions that just doesn't gibe with that outcome.

Now both of those Members, Representative Ryan and Representative Levin were re-elected by solid margins, similar to those of their colleagues in California, but the task of representation and of running for re-election is very different from what the California Members face. Because the California districts contain thousands of noncitizens and the Michigan and Ohio districts rather few, the Midwestern districts may disappear in 2010 because the constituents of these two Members were unlucky enough to be citizens.

A Member of Congress who receives 200,000 votes will be thrown out, and the one who has received only 50,000 will be retained only because of noncitizens in the apportionment phase.

Folks, the perverse moral of the current system is clear: The greater the proportion of citizens in a State, the fewer congressional seats that State receives. You can actually quantify the current penalty of citizenship on congressional apportionment, and the precise relationship is shown in figure 1 in my testimony. I had it on a Power Point, but we couldn't get it up there today. But you can see it if you turn to figure 1 on page 6.

Figure 1 indicates that, for every 1 percent increase in percentage of citizens in the State in 2000, there is a 1.7 drop—we could round to 2—in the number of congressional seats the State received in the decennial reapportionment. Now, naturally this relationship is an artifact of where noncitizens flow, that is to the more populous States, but it is still very striking and provides a concrete estimate of the impact of the geographic concentration of noncitizens on a political system. Could it some day be the case that a congressional district is created that has literally no citizens inside it? None? Completely hollow?

Theoretically, this is clearly possible, although a State legislature would surely be sensible enough to stop short of this. Nearly hollow districts do exist though, and the proliferation of such districts does tax the citizenship status of all Americans.

Solutions. Well, we can pass Representative Miller's amendment and, you know, tough out the consequences with respect to census administration. I might add, by the way, that the census has been changed many, many times, and we have toughed it out in the past.

Another solution, well, let everybody vote; let's do away with citizenship as a pathway to voting, give everyone the right to vote and forget about citizenship as a means toward obtaining voting rights. You know, good luck passing that. I don't think that is very viable.

One thing we could do, I suppose, that Steve Camarota recommended in his testimony, would be to reduce immigration levels. That would certainly mitigate the impact at least over time.

Mr. TURNER. Mr. Gimpel, you're going to have to conclude your remarks.

Mr. GIMPEL. Or we could leave things as they are, of course, which is probably the most likely scenario I think. But I will just finish up by saying, until we decide how to address this serious vote-dilution problem, American voters will suffer from unequal representation. Congress and the executive branch should work together to restore fairness and integrity to the electoral process.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gimpel follows:]

Statement of

James G. Gimpel
Professor of Government
University of Maryland, College Park
at the

Subcommittee on Federalism and the Census

Rayburn HOB 2247

December 6, 2005

MR. CHAIRMAN: As the other testimony at this hearing makes clear, reapportionment and redistricting based on noncitizen settlement patterns are profoundly affecting Congress and America's political process in unanticipated ways. Since 1960, the Northeastern and Midwestern states have had to forfeit representation to the faster-growing South and West. For example, in 1960, New York had forty-one U.S. House seats, today it has 29. Pennsylvania had twenty-seven, but today it has 19; Ohio has dropped from 24 to 18.

Florida, California and Texas have gained seats with every new census. The redistribution of seats occurring in 1970 and 1980 was almost completely the result of internal migration, citizens moving from state to state. Beginning in 1990, however, and continuing today with increasing intensity, immigration has been driving reapportionment.

Counting noncitizens for purposes of apportionment raises some thorny issues about equality of representation. In a series of well-known 1960s cases, the Supreme Court dictated that congressional and state legislative districts had to be approximately equal in population. Since the Court's decision in *Wesberry v. Sanders* (1964), states have had to draw their congressional district boundaries based strictly on population distribution. In this case and several related ones, the Justices struck down state plans that crated grossly unequal districts that gave rural voters disproportionate influence compared to urban voters. In *Wesberry*, Justice Hugo Black, writing for the majority, argued that the disparities in Georgia's congressional districts mean that votes in some parts of the state were weighted at two or three times the value of votes in other parts of the state. The Court said that a vote worth more in one district than in another runs counter to fundamental American ideas of democratic representative government. In a similar case, *Reynolds v. Sims* (1964), the court stated, "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." Because malapportioned districts were ruled to be in violation of the Equal Protection Clause of the Fourteenth Amendment, these states were forced to reapportion.

Immigration-induced reapportionment is now introducing a different kind of vote dilution than the one the Court ruled against in the reapportionment

cases, but it is dilution nonetheless. Because immigrants tend to concentrate geographically in just a few states – 75 percent have settled in only six states since 1970 -- some congressional districts wind up encompassing large noncitizen populations that cannot vote. In California, for example, several such districts exist today. These districts contain less than half the citizens – and less than half the number of eligible voters – that one finds in typical districts in interior states. This means that citizens in the high immigration districts share their representatives with relatively few other eligible voters compared with those in interior states. The voters in the immigrant-heavy locations enjoy enhanced voting power, while those in low immigration districts have their votes diluted, raising fundamental questions of equality and voting rights.

Districts may be approximately equal in population size, but if they are substantially dissimilar in electoral size, serious inequities result. If two districts are home to 1,000 people, one voter may share a representative with 980 citizens, while another shares a representative with 400 or fewer citizens. This violates the principles of equality of representation embodied in Constitutional law, diluting the representation of those in the district with more citizen constituents. If everyone were eligible to vote; all persons, without respect to age or citizenship, then perhaps this kind of inequity would not be troublesome. But since we have long held that only citizens over age 18 have voting rights, it is

problematic that some of these citizens have their votes diluted as a coincidence of where they happen to live.

Clearly today's congressional districts are not equal in critical respects that matter greatly to the operation of our government. Consider what it takes to get elected to a seat where there are only 50,000 voters, compared to one where there are eight or nine times that many who need to be reached during the course of an election campaign.

Consider also the unequal workloads of the members of Congress who represent these highly unequal districts. Survey data have shown that citizens are far more demanding of members of Congress than noncitizens, even after we consider the casework associated with naturalization and citizenship. As a consequence of representing a large share of noncitizens, one member may have to chase only a small fraction of the Social Security checks than another does. One member must respond to only half the amount of constituent mail. To be sure, noncitizens and nonvoters also contact congressional offices, but they do so far less frequently than citizens. Hence even if members of Congress do respond to noncitizen requests for assistance, the workloads are still likely to be highly unequal. One member of the U.S. House should not have to spread her staff more thinly to cover her constituent's demands than another simply because of the presence of noncitizens in the apportionment base.

5

Real examples are out there, so we need not confine ourselves to hypotheticals. Consider several of the immigrant-heavy Southern California congressional districts. Specifically, we might consider California's immigrant heavy 33rd district, or perhaps the 37th district. In 2004, a year of record-high turnout around the nation, only 110,460 votes were cast in the 33rd district contest and the incumbent was reelected with 74.5 percent of the vote. In 2002, the same incumbent was reelected by a similar margin in a contest that saw a mere 65,800 votes cast. In 2002, the incumbent in the 37th district was reelected in a contest that saw only 88,000 votes cast and in 2004, this member ran unopposed.

Now consider two districts in Michigan and Ohio -- many would be suitable comparisons, but we will pick out only two for the sake of illustration; the 12th district of Sander Levin, in Michigan, and the Ohio 17th district currently represented by Tim Ryan. Either one, or both, of these districts could be reconfigured or lost entirely in the 2010 reapportionment. In their 2004 reelections, 304,000 votes were cast in the Michigan district, and 275,000 in the Ohio 17th. Now both of these Members of Congress were reelected by solid margins similar to those of their colleagues in California, but the task of representation, and of running for reelection, is very different from what the California members face. Because the California districts contain thousands of noncitizens, and the Michigan and Ohio districts rather few, the Midwestern

districts may disappear in 2010 because the constituents of these two members just happen to have been born in this country! A member of Congress who received 200,000 votes would be thrown out, and the one who received 50,000 would be retained, all because of immigrants, both illegal and legal.

The perverse moral of the current system is clear: the greater the proportion of citizens in a state, the fewer congressional seats that state receives. We can actually quantify the current penalty of citizenship on congressional apportionment, and the precise relationship is shown below:

Figure 1. The Citizenship Penalty in Congressional Apportionment, 2000

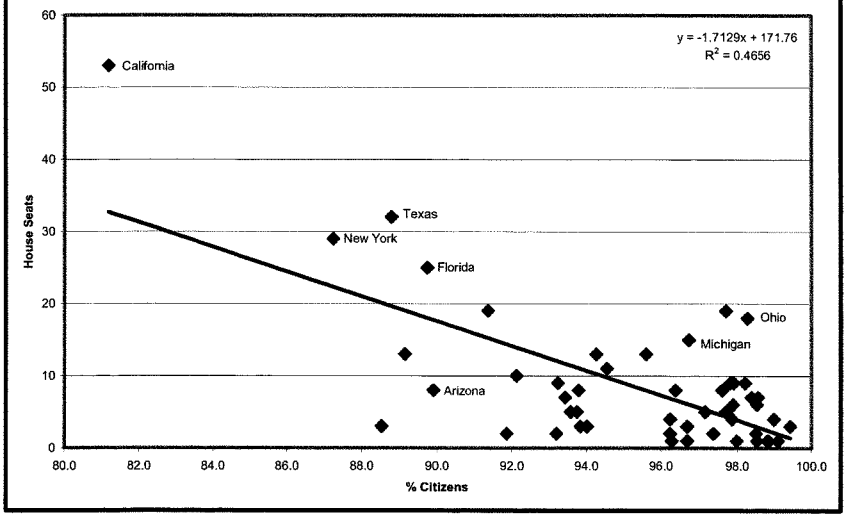


Figure 1 indicates that for *each one percent increase in the percentage of citizens in a state in 2000 there is a 1.7 drop* in the number of congressional seats the state received from this decennial reapportionment.[1] Naturally, this relationship is a function of the fact that noncitizens flow to more populous states, but Figure 1 is still striking and provides a concrete estimate of the impact of the geographic concentration of immigrants on our political system. Could it someday be the case that a congressional district is created that has *literally no citizens* inside it? Theoretically this is clearly possible, though state legislatures would surely be sensible enough to stop short of this. Nearly hollow districts certainly do exist, and the proliferation of such districts taxes the citizenship status of all Americans.

Mitigating the penalty imposed on citizenship is a challenge, but several possibilities come to mind. The Supreme Court has favored counting both citizens and noncitizens in apportionment, so a Constitutional amendment of the kind proposed by Representative Miller will probably be required to effect this change.

The case for constitutional change can certainly be made on equal-protection grounds, as it was by Judge Alex Kozinski of the Ninth Circuit Court of Appeals in 1990. In a California case, *Garza v. County of Los Angeles,* Kozinski

[1] The penalty was even higher after the 1990 round of apportionment, when for every one percent increase in the size of their citizen population, states lost 2.2 U.S. House seats.

wrote a dissenting opinion pointing out that apportionment by population can result in unequally weighted votes and that assuring equality in voting power might well call for districts of unequal population size. He suggested that counting noncitizens, who cannot vote, in apportioning voting districts clearly dilutes citizens' votes. Kozinski concluded, "If, as I suggest, one person, one vote, protects a right uniquely held by citizens, it would be a dilution of that right to allow noncitizens to share therein." Kozinski's opinion in this case is consistent with the notion that only citizens may vote, as a benefit of citizenship, and therefore only citizens' residence should count in apportioning political representation. At a minimum, *illegal* immigrants certainly should not count in apportioning representation.

Another solution is to promote citizenship and naturalization more aggressively. Some policymakers want to streamline and shorten the naturalization process, but this is likely to make it less rigorous and meaningful. The process has already been watered down significantly in the past two decades, with test questions more along the lines of Trivial Pursuit than American Government 101. The naturalization process today hardly ascertains one's genuine understanding of and attachment to America's history, ideals and founding principles. New citizens are supposed to have a command of English, but here, too, the naturalization system imposes only minimal requirements.

9

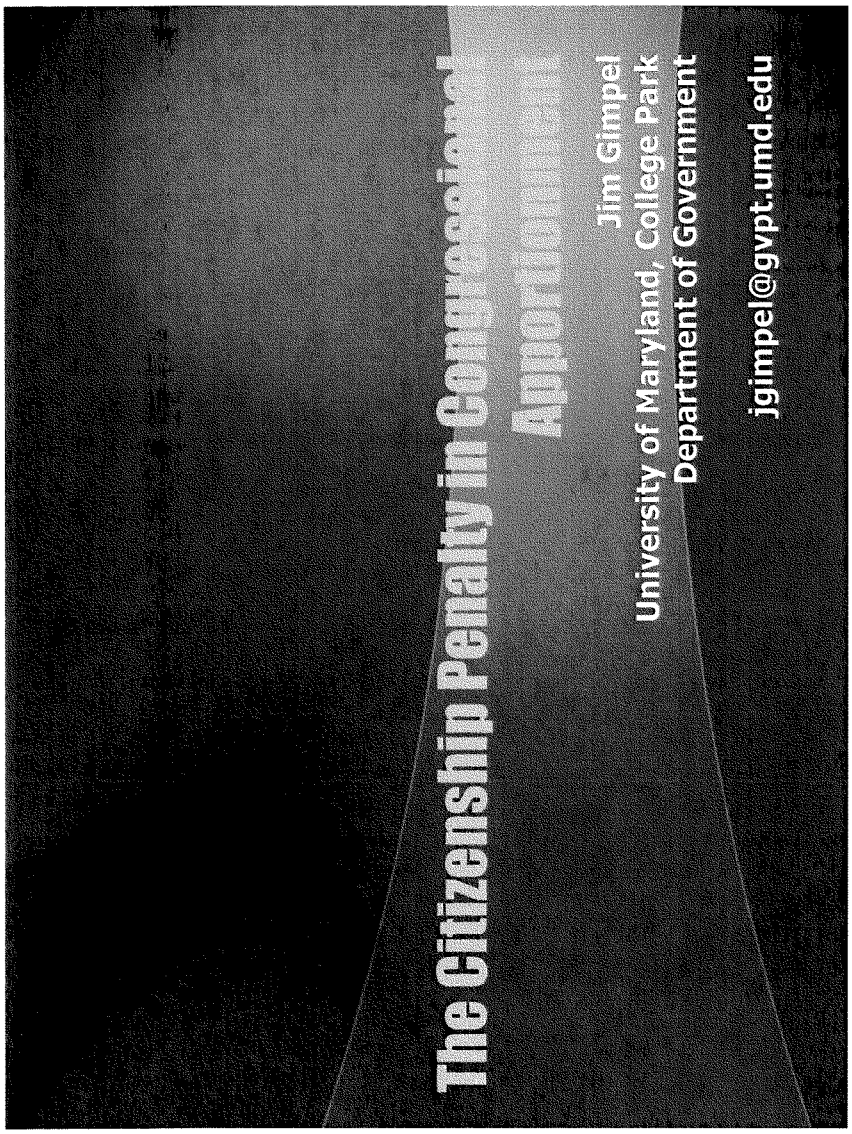
Many who naturalize cannot carry on a simple conversation in English, and this fact is painfully evident to BCIS (Bureau of Citizenship and Immigration Services) testers. Citizenship should once again be a privilege, something an individual must strive to achieve. Further "streamlining" the naturalization process would probably cheapen citizenship to the point of no return.

Cutting overall immigration levels, of course, would be another way to reduce the impact of noncitizens on citizens' votes. Modestly reducing immigration levels would increase the likelihood that those immigrants who were admitted would assimilate, because it would be more difficult for them to find their way into a large immigrant enclave, where isolation from the dominant culture slows the acquisition of skills and delays upward mobility.

Let me also make a plea to the congressional leadership for additional information about congressional contact with constituents, and the amount of casework performed by each staff. Currently the Clerk of the House does track the amount of franked mail leaving each office, and has done so since 1996. I would suggest that the Clerk of the House produce annual reports on the amount of incoming mail to each office, as well as gather reports on the amount of casework performed in each congressional office. This information would help us to evaluate more completely the variability in the workload across congressional districts. I am not proposing just another bureaucratic procedure,

but requesting a critical piece of information needed to study member activity in greater detail.

Meanwhile, until we decide how to address the vote-dilution problem caused by both legal and illegal immigration, American voters will suffer from unequal representation. Congress and the Executive Branch should work together to restore fairness and integrity to the electoral process.


The Citizenship Penalty in Congressional Apportionment
Jim Gimpel
University of Maryland, College Park
Department of Government
jgimpel@gvpt.umd.edu

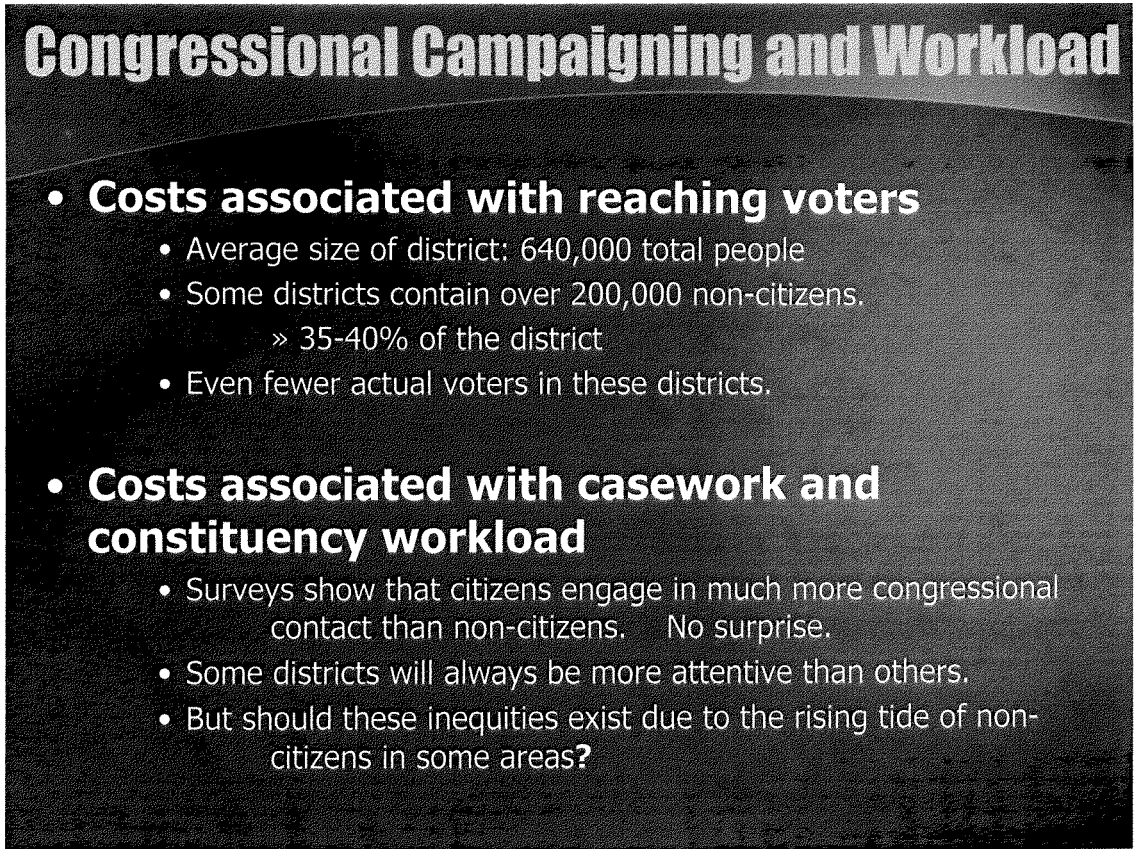
Loss of House Seats Due to Immigration

- **Most of U.S. population growth is being driven by immigration, the addition of non-citizens and non-voters to state populations.**

- **Because apportionment is determined by "persons," and not "citizens," losses have been heavy in slower growth states:**
  - Michigan: 19 in 1960, 15 today
  - Ohio: 24 in 1960, 18 today
  - Pennsylvania: 27 in 1960, 19 today

A New Kind of Vote Dilution Problem

- **Some Congressional districts now encompass huge non-citizen, non-voting populations.**
  - Examples: CA 33rd; CA 37th
- **Citizens in these districts enjoy enhanced representation compared with those in states receiving fewer newcomers.**
- **Citizens in interior states have their voting rights diluted as a coincidence of where they happen to live.**


Congressional Campaigning and Workload
• Costs associated with reaching voters
• Average size of district: 640,000 total people
• Some districts contain over 200,000 non-citizens.
» 35-40% of the district
• Even fewer actual voters in these districts.
• Costs associated with casework and constituency workload
• Surveys show that citizens engage in much more congressional contact than non-citizens. No surprise.
• Some districts will always be more attentive than others.
• But should these inequities exist due to the rising tide of non-citizens in some areas?

Calculating the Citizenship Penalty

- There is a penalty paid by states with more citizens when it comes to apportionment
- 2000: For every 1 percent increase in the proportion of citizens in a state, that state had 1.7 fewer House seats.
- See Figure 1

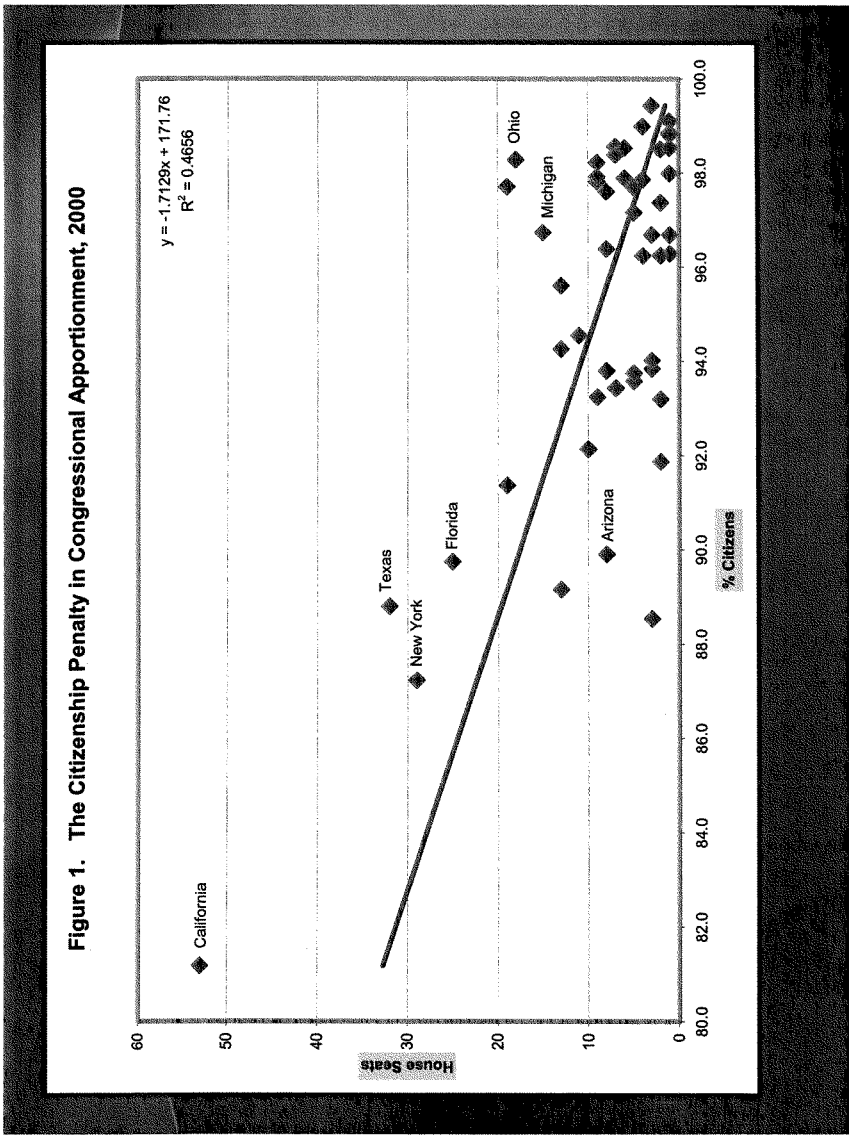
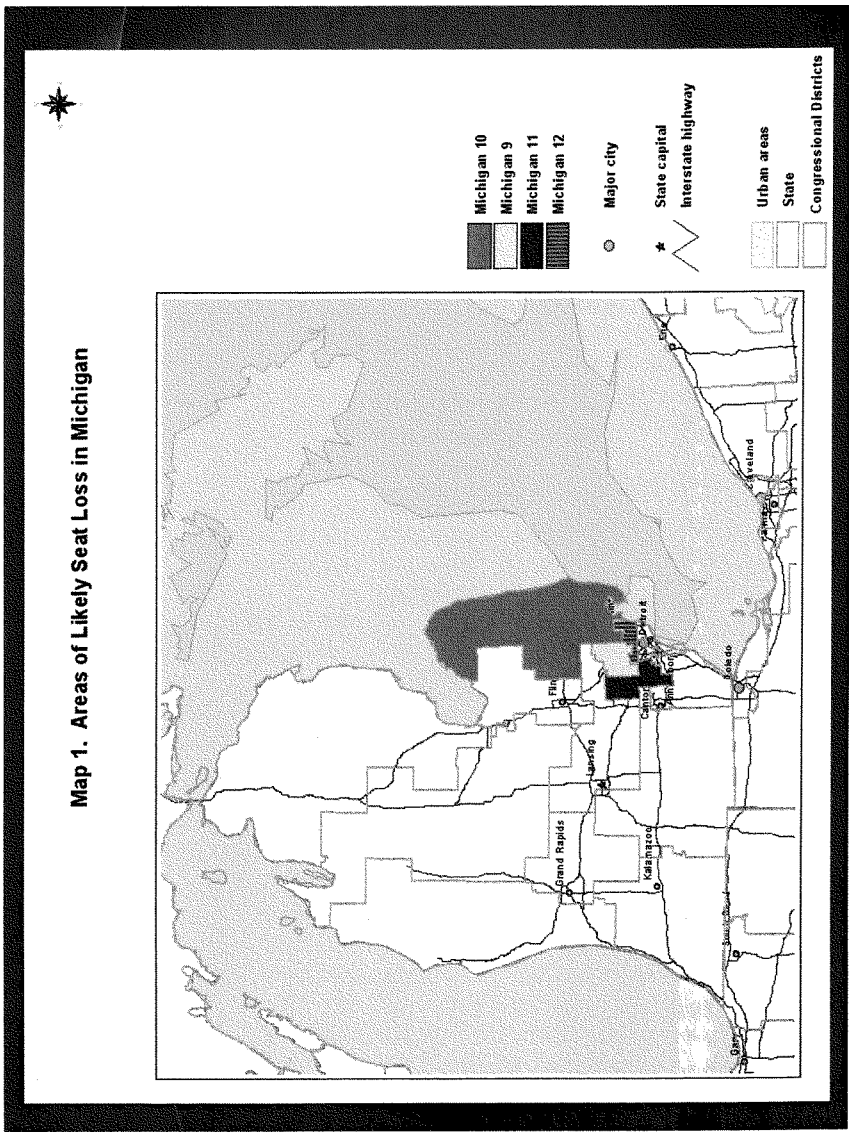
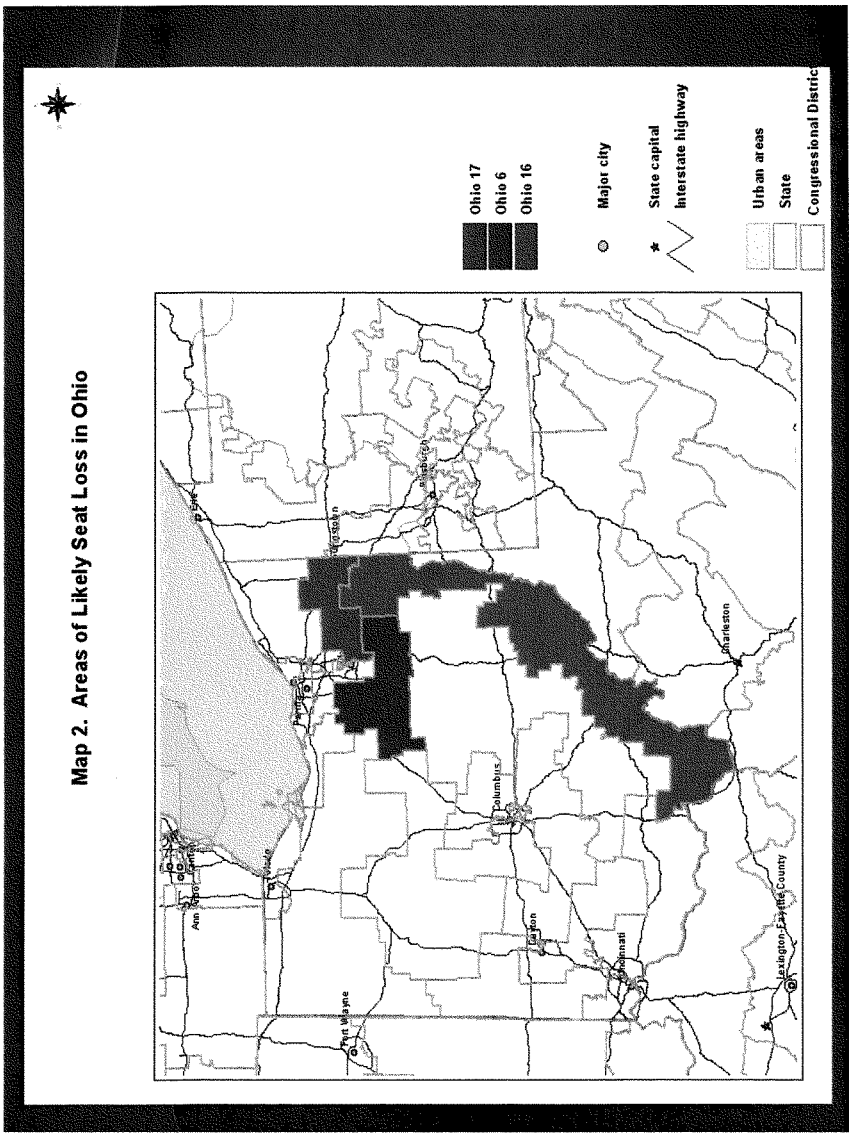
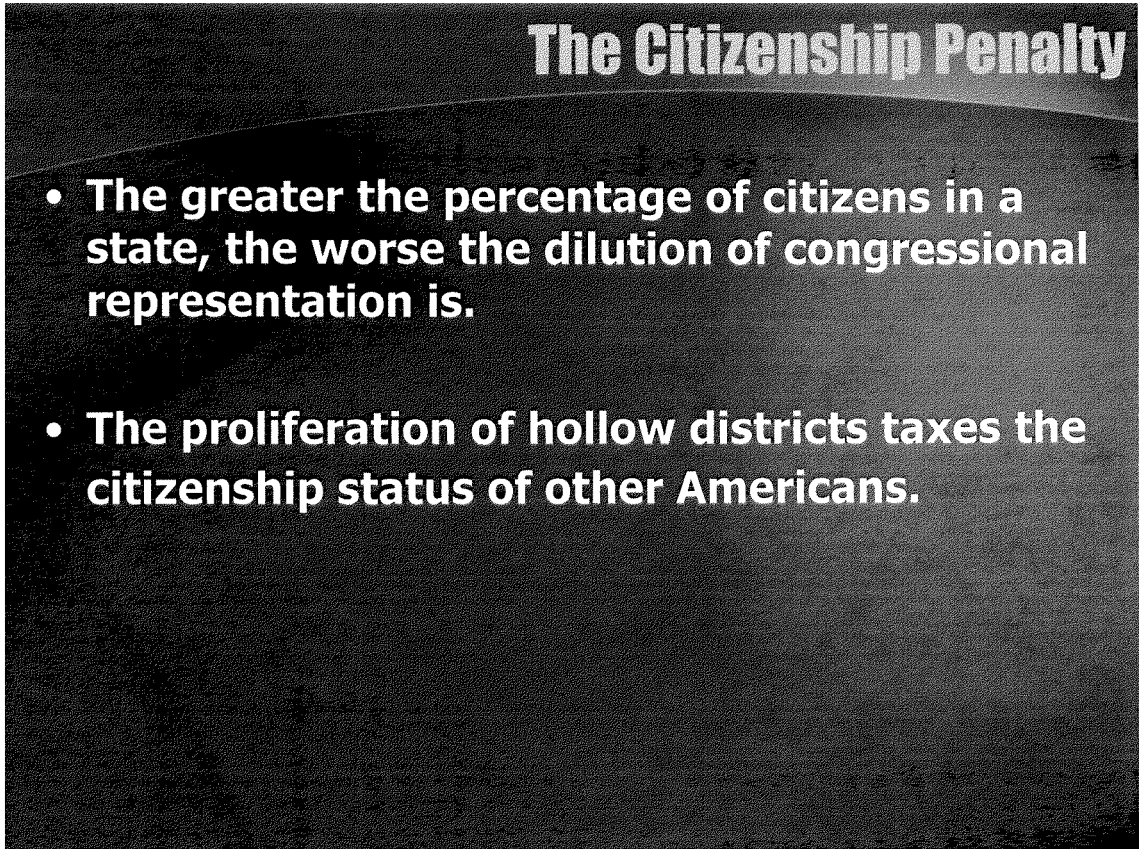


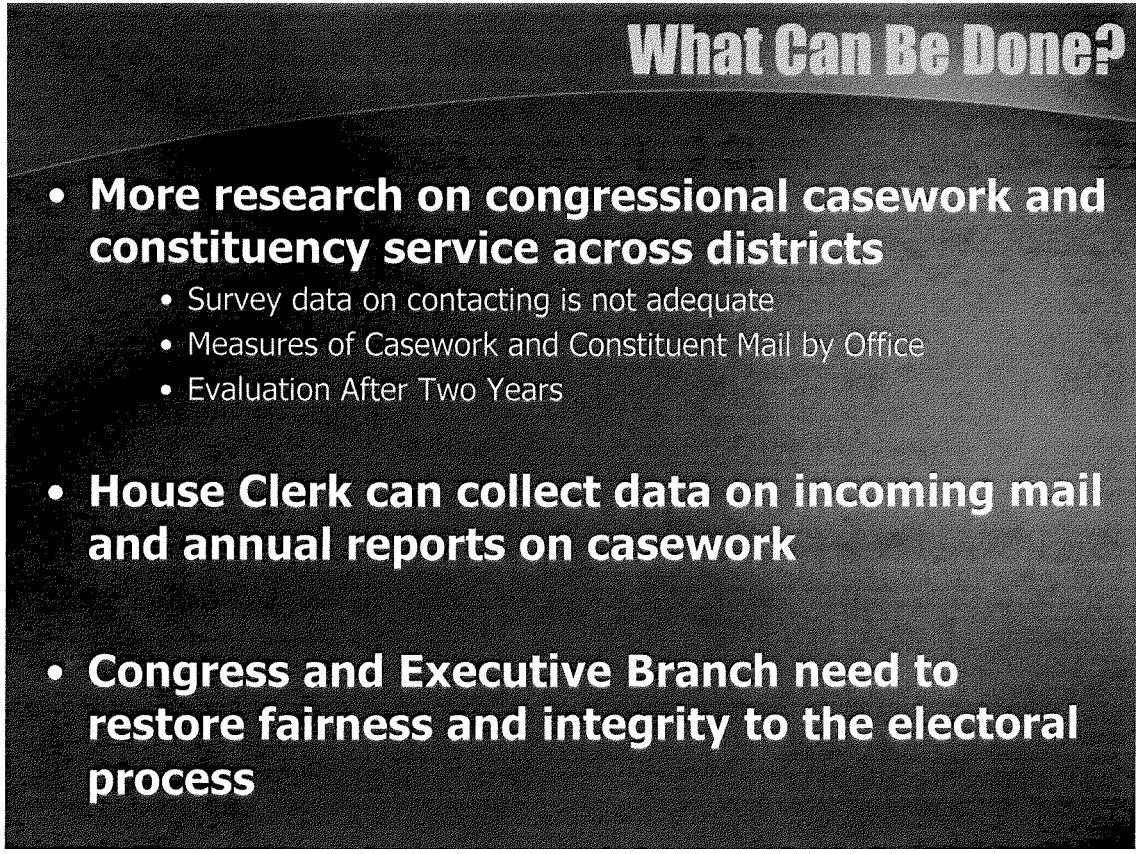
Figure 1. The Citizenship Penalty in Congressional Apportionment, 2000
y = -1.7129x + 171.76
R² = 0.4656
California
Texas
New York
Florida
Ohio
Michigan
Arizona
House Seats
% Citizens
60
50
40
30
20
10
0
80.0
82.0
84.0
86.0
88.0
90.0
92.0
94.0
96.0
98.0
100.0


Map 1. Areas of Likely Seat Loss in Michigan
Michigan 10
Michigan 9
Michigan 11
Michigan 12
Major city
State capital
Interstate highway
Urban areas
State
Congressional Districts
Lansing
Grand Rapids
Kalamazoo


Map 2. Areas of Likely Seat Loss in Ohio
Ohio 17
Ohio 6
Ohio 16
Major city
State capital
Interstate highway
Urban areas
State
Congressional District
Toledo
Columbus
Cincinnati
Dayton
Charleston
Lexington-Fayette County
Fort Wayne


The Citizenship Penalty
• The greater the percentage of citizens in a state, the worse the dilution of congressional representation is.
• The proliferation of hollow districts taxes the citizenship status of other Americans.

What Can Be Done?
• Constitutional Amendment to change apportionment
• Reduce legal immigration levels modestly
• Get control of illegal immigration
• Make citizenship easier; convert non-citizens into citizens


What Can Be Done?
• More research on congressional casework and constituency service across districts
• Survey data on contacting is not adequate
• Measures of Casework and Constituent Mail by Office
• Evaluation After Two Years
• House Clerk can collect data on incoming mail and annual reports on casework
• Congress and Executive Branch need to restore fairness and integrity to the electoral process

Mr. TURNER. Mr. Spiropoulos.

STATEMENT OF ANDREW C. SPIROPOULOS

Mr. SPIROPOULOS. Thank you, Mr. Chairman, and I thank the committee for inviting me.

The central legal question regarding H.J. Res. 53 is whether such an amendment is necessary or whether such a change may be made by statute.

In order to answer this question with regard to aliens residing in the United States, one must consider legal and illegal aliens separately. It is my opinion that section 2 of the 14th amendment stating that apportionment must be based on the whole number of persons in each State rather than citizenship requires that aliens legally residing in the United States be counted toward the number of persons used for apportionment purposes.

The Constitution therefore must be amended if legal aliens are to be excluded from the number of persons counted for apportion purposes. The Constitution does provide, however, the national government some discretion to determine who is truly an inhabitant of a State for the purposes of apportionment.

It is my opinion that it is within the legitimate discretion of Congress to instruct the Census Bureau by statute to exclude illegal aliens from the census conducted for apportionment purposes. In addition to evidence gleaned from the records of the framing and ratification of both the Constitution in 1787 and the 14th amendment, this interpretation is confirmed by the unbroken practice of the national government. With regard to legal aliens, the government has always sought to count all inhabitants, not only citizens. It has never been disputed, either by members of the government or legal commentators that legal aliens taking up legal residence in the United States are inhabitants of the State in which they reside. They pay taxes, may consume the full range of government services and, as demonstrated by the level of protection afforded them under the equal protection clause, are, except for the privileges directly flowing from citizenship, established members of society. This longstanding practice and understanding not only constitute evidence of the original meaning of the provisions, they should lead a reasonable court to presume that legal and political institutions and practices have been established upon the reasonable expectation that such practices, absent extraordinary circumstances, will continue.

The question of whether the Constitution requires that aliens residing illegally in the United States be counted is far more difficult. Whether illegal aliens are necessarily included in "the whole number of persons in each State" is not clearly resolved by either the original meaning of the text or the intent of the drafters. The Framers of the provisions at issue did not know of or contemplate the problem of illegal immigration. We do know, however, that the Framers' understanding of "persons in each State" was based on the notion that such a person was a demonstrated inhabitant of that jurisdiction. This concept of "inhabitant" is not self-defining. The legislature and the executive operating subject to that legislature's authority must define it. The census-taking authorities in the past have exercised discretion regarding, for example, U.S.

Military and diplomatic personnel residing overseas, foreign tourists and foreign diplomatic personnel residing in the United States. This past practice demonstrates that the national government has always exercised some discretion regarding who qualifies as an inhabitant for the purpose of census-taking.

Unlike with legal aliens, one cannot conclude that illegal aliens must be considered inhabitants of a State. Given their liability to expeditious deportation, the limited constitutional protections afforded to them, their necessary avoidance of the regular interaction between residents and government entities and, perhaps most importantly, their refusal to consent to the fundamental laws and norms of this society, it cannot be said that the Constitution mandates that illegal aliens are sufficiently connected to a particular State to be considered an inhabitant of it.

It is certainly true that the national government has, without exception, chosen to this point to include illegal aliens in that definition. I do not offer any opinion as to the wisdom of this choice or a different one. My contention is that, just as the government may decide that illegal aliens are inhabitants, so it may decide that they are not. Therefore, it is my opinion that the Congress may, by statute, instruct the Census Bureau to exclude illegal aliens from the census conducted for apportionment purposes.

Thank you.

[The prepared statement of Mr. Spiropoulos follows:]

TESTIMONY OF ANDREW C. SPIROPOULOS

Offered before the House Government Reform Subcommittee on Federalism and the Census, December 6, 2005

I am Andrew C. Spiropoulos, Professor of Law at the Oklahoma City University School of Law, and I offer the following testimony regarding House Joint Resolution 53. (H.J. Res. 453) My expertise is in constitutional law and the legal aspects of the legislative process; I will confine my remarks to these areas.

SUMMARY

The central legal question regarding H. J. Res. 453, which seeks to amend the Constitution in order to base Congressional apportionment on the number of citizens rather than persons, is whether such an amendment is necessary or whether such a change may be made by statute. In order to answer this question with regard to aliens residing in the United States, one must consider legal and illegal aliens separately. It is my opinion that Section 2 of the Fourteenth Amendment, stating that apportionment must be based on the "whole number of persons in each State", rather than citizenship, requires that aliens legally residing in the United States be counted toward the number of persons used for apportionment purposes. The Constitution, therefore, must be amended if legal aliens are to be excluded from the number of persons counted for apportionment purposes. The Constitution, however, as demonstrated by the original understanding both of the original provision governing apportionment contained in the third clause of Article I, section 2 and section 2 of the Fourteenth Amendment, does provide the national government some discretion to determine who is truly an inhabitant of a state for the purpose of apportionment. It is my opinion that it is within the legitimate discretion of Congress to

instruct the Census Bureau, by statute, to exclude illegal aliens from the census conducted for apportionment purposes.

In addition to evidence gleaned from the records of the framing and ratification of both the Constitution of 1787 and the Fourteenth Amendment, this interpretation is confirmed by the unbroken practice of the national government. With regard to legal aliens, the government has always sought to count all inhabitants, not only citizens. It is has never been disputed, either by members of government or legal commentators, that legal aliens, taking up legal residence in the United States, are inhabitants of the state in which they reside. They pay taxes, may consume the full range of government services, and, as demonstrated by the level protection afforded them under the Equal Protection Clause, are, except for the privileges directly flowing from citizenship, are established members of society. This longstanding practice and understanding not only constitute evidence of the original meaning of the provisions; they should lead a reasonable court to presume that legal and political institutions and practices have been established upon the reasonable expectation that such practices, absent extraordinary circumstances, will continue.

The question of whether the Constitution requires that aliens residing illegally in the United States be counted is far more difficult. Whether illegal aliens are necessarily included in "the whole number of persons in each State" is not clearly resolved by either the original meaning of the text or the intent of the drafters. The framers of the provisions at issue did not know of or contemplate the problem of illegal immigration. We do know, however, that the framers' understanding of "persons in each State" was based on the notion that such a person was a demonstrated inhabitant of that jurisdiction.

This concept of "inhabitant" is not self defining; the legislature and the executive, operating subject to that legislature's authority, must define it. The census taking authorities, in the past, have exercised discretion regarding, for example, U.S. military and diplomatic personnel residing overseas, foreign tourists, and foreign diplomatic personnel residing in the United States. This past practice demonstrates that the national government has always exercised some discretion regarding who qualifies as an inhabitant for the purpose of census taking.

Unlike with legal aliens, one cannot conclude that illegal aliens must be considered inhabitants of a state. Given their liability to expeditious deportation, the limited constitutional protections afforded to them, their necessary avoidance of the regular interaction between residents and government entities, and, perhaps most importantly, their refusal to consent to the fundamental laws and norms of this society, it is cannot be said that the Constitution mandates that illegal aliens are sufficiently connected to a particular state to be considered an inhabitant of it. It is certainly true that the national government has, without exception, chosen to this point to include illegal aliens in that definition. I do not offer any opinion as to the wisdom of this choice or a different one. My contention is that just as the government may decide that illegal aliens are inhabitants so it may decide that they are not. Therefore, it is my opinion that the Congress may, by statute, instruct the Census Bureau to exclude illegal aliens from the census conducted for apportionment purposes.

SUPPORTING ARGUMENTS AND AUTHORITIES

The original Constitution, in the third clause of Article I, section 2, states that representatives shall be apportioned among the several States "according to their

respective numbers, which shall be determined by adding to the whole number of free Persons . . . excluding Indians not taxed, three fifths of all other Persons." This provision was amended by section 2 of the Fourteenth Amendment which states that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . ." The Congressional debates regarding the Fourteenth Amendment demonstrate that the framers of that amendment meant only to revise the apportionment clause to eliminate the infamous three fifths language, preserving the existing meaning of the rest of the clause. [1] Thus, one must, in seeking the original meaning of the clause, look to the framers of the original Constitution.[2]

The evidence regarding the drafting and ratification of the original apportionment clause demonstrates that the framers intended the word "persons" to be understood as "inhabitants" of the state in question. The original language of the provision, as adopted by the Committee on Detail at the Constitutional Convention of 1787, stated both that the number of representatives shall be determined "by the number of inhabitants" and that the proportion of direct taxation "shall be regulated by the whole number of white and other free inhabitants." The final form of the language emerged from the Committee on Style; there is no evidence that any substantive revision was intended when "inhabitants" was replaced with "persons." James Madison, in Federalist No. 54, in discussing this clause,

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[1] One of the leading members of the Congress that drafted the Fourteenth Amendment, Rep. Roscoe Conkling, commenting on this issue, stated "the committee has adhered to the Constitution as it is, proposing to add to it only as much is necessary to meet the point aimed at." Cong. Globe, 39th Cong., 1st Sess. 359 (1866).

[2] Excellent discussions of these questions may be found in Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1989); Jim Slattery & Howard Bauleke, *"The Right to Govern is Reserved to Citizens:" Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227 (1988); and Denniis L. Murphy, Note, *The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969 (1991).

also stated that the apportionment rule is "founded on the aggregate number of inhabitants." Madison, further, in the debate during the first Congress on the first census bill, referred to "the enumeration of the inhabitants." Contemporary dictionaries make clear that, to the framing generation, "inhabitant" carried the meaning of someone with a fixed, not transitory, residence, a person settled in the community.

The determination of whether a person is an inhabitant, a settled member of the community (in this case, the state) is not self-evident. Congress, both under its power under Article I to make all laws necessary and proper for carrying its powers, including that of providing for the census, and its power under section 5 of the Fourteenth Amendment to enforce the provisions of that amendment, must possess the authority to give meaning to the concept of inhabitant. Indeed, the discretion of Congress to determine the meaning of "inhabitant" in doubtful cases is illustrated by the discretion the Census Bureau has historically exercised, subject to their statutory authority, in carrying out its functions. The Bureau has determined, at one time or another, that U.S. military personnel serving overseas (and their families), foreign tourists, and foreign diplomatic personnel stationed in the United States should not be counted in the census. Clearly, then, the national government possesses some discretion to decide who should be counted in the census for apportionment purposes.

Congress should particularly possess this discretion when it comes to the treatment of illegal aliens under the clause. From the time of the framing until the enactment of the first immigration statute in 1875, the legal concept of an illegal alien did not exist. Consequently, neither the framers of the original Constitution nor of the Fourteenth Amendment could have manifested any intent regarding how illegal aliens

should be treated under the apportionment clause. Given no clear answer from the Constitution or its framers, one must look to the authority of Congress.

The extent of legislative discretion under the clause should depend upon whether excluding the group in question is consistent with the purposes of the framers in drafting the apportionment clause. Justice Joseph Story, in his Commentaries on the Constitution, stated that, at the time of the framing, there was a "considerable diversity of judgment" regarding the appropriate principle for determining the apportionment of representatives. Some of the framers believed representatives ought to be distributed on the basis of relative wealth, with wealthy states receiving more representatives. Others believed that representation should be based on the natural right of individuals to preserve their public rights and liberties and, thus, representation should be based purely on population. Framers of both views agreed to use the number of inhabitants for apportionment. Those chiefly concerned with property supported the measure because the number of inhabitants was thought the most accurate measure of the wealth of the state. Those of the individual rights perspective believed each member of the community, whether or a citizen or not, was entitled to be counted for the purpose of determining political representation. Both of these rationales support why legal aliens must be considered "inhabitants." They work, pay taxes, and thus contribute to the relative wealth of a state. In addition, they are members of the community in which they live, possessing fundamental rights and liberties that may not be abridged.

Inclusion or exclusion of illegal aliens, on the other hand, may be justified under either rationale. One could argue that, no different than legal aliens, many illegal aliens pay taxes, generate wealth, and are persons entitled to legal protections. On the other

hand, one may argue that, as they must avoid government authorities as much as possible, illegal aliens cannot and do not pay their fair share of taxes and thus do not proportionately contribute to the wealth generated by a state. One may also contend that they, by definition, do not consent to the laws and norms of our nation (and, consequently, are not afforded the same constitutional protections as other persons) and are therefore not sufficiently rooted members of the community to be entitled to even indirect representation.

In sum, Congress possesses the discretion to determine if illegal aliens are inhabitants of a state and thus must be counted for purposes of apportionment.[3] I venture no opinion on whether Congress ought to exercise this discretion by excluding illegal aliens from the apportionment base. It may be, for example, that there is no practical way to exclude illegal aliens without jeopardizing the accuracy of the census by, for example, causing legal aliens, fearing intrusive questions, to avoid the census. It is up to Congress to decide whether the benefits of this exclusion would be worth the logistical and political difficulties it will cause.

[3] In addition, because the presence of large numbers of illegal aliens in some states may dilute the worth of votes in states with small numbers of illegal aliens, it may be argued that Congress possesses the authority under section 5 of the Fourteenth Amendment to redress this imbalance by excluding illegal aliens from the census.

Mr. TURNER. Ms. Perales.

STATEMENT OF NINA PERALES

Ms. PERALES. Chairman Turner and members of the House Government Reform Subcommittee on Federalism and the Census, I am Nina Perales, Southwest regional counsel of the Mexican American Legal Defense and Educational Fund [MALDEF]. We are a nonpartisan organization founded in Texas in 1968 to defend and protect Latino civil rights, including voting rights.

Thank you for inviting me to testify regarding House Joint Resolution 53.

Restricting apportionment to citizens as H.J. Res. 53 proposes contravenes the intent of the Framers of the 14th amendment. Section 2, clause one of the 14th amendment, which was adopted to override the infamous three-fifths rule by which slaves were not counted as full persons for the purposes of apportionment, has never restricted congressional representation to citizens only.

The Framers of the 14th amendment could have restricted representation by limiting the numbers used for apportionment by a variety of factors, including race, gender or nationality. Instead, they chose to apportion the seats in the House of Representatives based upon total population, despite the existence of a substantial foreign-born population in the United States in the 1860's, a foreign-born population larger than that in the United States today.

Ensuring that congressional representation flows to all people equally is sound public policy. Each individual, regardless of whether he or she can currently exercise the franchise, should receive the benefits of representation by their elected officials.

A congressional representative serves as more than just the voice of the people who can vote or of those people who voted for him or her during the last election. Congressional representatives serve all individuals in their districts, including children and other nonvoters, by bringing critical resources to the district and representing the economic and social interests of all who live in the district.

The primary effect of H.J. Res. 53 will be to strip representation from U.S. citizens. It will shift congressional seats away from high-population States that are composed overwhelmingly of U.S. citizens but which also contain higher numbers of noncitizens than other States. Texas, my State, is one such State. If apportionment were conducted today based on total population, Texas would receive an additional congressional seat, and each Member of Congress from Texas would represent approximately 664,000 people. H.J. Res. 53 would deny Texas that congressional seat, forcing an extra 20,000 people into the district of each member of the Texas delegation. In effect, 19.6 million U.S. citizens living in Texas would have less representation in Congress.

Furthermore, stripping representation from States with noncitizens necessarily has a disparate impact upon Latino U.S. citizens. More than one-half of legal immigration is family based. And among legal immigrants who come to the United States to be with their family, most are from Mexico. Because many of these legal immigrants are living and working today in predominately Latino communities across the United States, this measure will serve to shift representation away from States containing more Latino citi-

zens and permanent legal residents to other States with higher citizen populations and fewer Latinos.

Arizona, California, Florida, Nevada, New York and Texas all have in common substantial Latino populations, and all would be worse off with a restrictive apportionment scheme in which noncitizens are excluded. Those who want to restrict apportionment suggest that the number of voters in an election is primarily determined by the number of citizens in the congressional district. In truth, voter registration and turnout is by far the great determinant of the weight of a voter's vote, not the number of citizens residing in an electoral district. It is utterly groundless to suggest that noncitizenship is responsible for the voter turnout levels of U.S. citizens.

The 14th amendment, which declared the quality of all persons under the law, should not be changed to restrict congressional representation of citizens, particularly racial minority citizens, based on the State in which they happen to live. H.J. Res. 53 serves no other legitimate policy purpose and places unwarranted burdens upon the congressional representatives in disfavored States.

I want to add on a personal note that I am offended by the interchangeable use of noncitizen and undocumented immigrant in this hearing. To conflate those two terms suggests that all immigrants in the United States are criminal aliens and law breakers. It is offensive to me, and it is offensive to the Latino community. I strongly urge you to reject House Joint Resolution 53.

Thank you very much.

[The prepared statement of Ms. Perales follows:]

MALDEF
Mexican American Legal Defense and Educational Fund

Testimony of Nina Perales, MALDEF Southwestern Regional Counsel, Regarding House Joint Resolution 53

December 6, 2005

Chairman Turner and Members of the House Government Reform Subcommittee on Federalism and the Census, I am Nina Perales, Southwest Regional Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). We are a nonpartisan organization founded in Texas in 1968 to defend and protect Latino civil rights, including voting rights. Thank you for inviting me here today to testify regarding House Joint Resolution 53.

Elected officials make decisions every day that impact the lives of all who live in their districts. In performing their official duties, elected officials do not only serve citizens. Immigrants, both documented and undocumented, are a sector of society that should not be ignored. Immigrants pay taxes, buy goods and services, pay rent, buy homes, earn educations, and participate in the community as citizens do. Elected officials have a duty to their constituents to consider the full impact of their decisions; therefore, election districts should be apportioned considering all persons affected by official decisions.

Restricting apportionment to citizens contravenes the intent of the framers of the Fourteenth Amendment. Section 2, Clause 1 of the 14th Amendment provides for apportionment of seats for the U.S. House of Representatives based on persons, not citizens, and has never restricted congressional representation to only to citizens. Section 2 was adopted to override the infamous "three-fifths" rule by which slaves were not counted as full persons for the purpose of apportionment. In 1860, the foreign born population of the United States was 13%.[1] Today, foreign born persons comprise 11.7% of the U.S. population – a smaller proportion than when the 14th Amendment was ratified.[2] Within this context, the framers of the 14th Amendment could have restricted representation by limiting the numbers used for apportionment by a variety of factors, including race, gender or nativity. Instead, they chose to apportion the seats in the House of Representatives based upon total population.

The Fourteenth Amendment uses both terms – "citizen" and "person." For example, the Fourteenth Amendment discusses the right to vote as one belonging to U.S. citizens, and states that persons born or naturalized in the U.S. are citizens. However, the

[1] U.S. Census, "Nativity of the Population and Place of Birth of the Native Population: 1850 to 1990," found at http://www.census.gov/population/www/documentation/twps0029/tab01.html
[2] U.S. Census, "The Foreign-born Population in the United States: 2003," found at http://www.census.gov/prod/2004pubs/p20-551.pdf

Fourteenth Amendment also explicitly protects all "persons" from deprivations of life, liberty, property and from denial of the equal protection of the laws and provides that representation, through apportionment, flows to all "persons," regardless of whether or not they hold the franchise. It is beyond dispute that non-citizens are "persons" within the meaning of the 14th Amendment to the Constitution. See *Plyler* v. *Doe*, 457 U. S. 202, 210 (1982); *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596-598, and n. 5 (1953); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886); *Wong Wing* v. *United States,* 163 U. S. 228, 238 (1896). The framers of the 14th Amendment clearly intended congressional representation to benefit "the whole number of persons" in each state. See *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

Ensuring that congressional representation flows to all persons equally is also sound public policy. Each individual, regardless of whether he or she can exercise the franchise, should receive the benefits of representation by elected officials. A congressional representative serves as more than just the voice of the people who turn out to vote, or who voted for him or her during the last congressional election. Congressional representatives serve all individuals in their district, including children and other non-voters by bringing critical resources to the district, representing the economic and social interests of everyone living in the districts' cities and towns, and advocating for public policies that will benefit all of the districts' population.

H.J. Res. 53 would restrict representation by narrowing the apportionment base in a way that the Constitution's framers never intended. According to the U.S. Census, there are approximately 31 million foreign born people living in the United States. Over one-third of these, or 12.5 million people, have become U.S. citizens. Another 18.5 million are not citizens. It takes time to become a U.S. citizen. In general, legal permanent residents who immigrated to the U.S. in recent years must wait either three or five years to file their naturalization papers. In some cities, like Houston and Seattle, it can take two to three years from the filing of a naturalization application to taking the oath of citizenship. In the meantime, millions of legal permanent residents and other immigrants legally present in the United States work, attend school, pay taxes, register for the selective service (a substantial number serve in the military), buy property, invest their earnings and serve their communities as firefighters, police and civil servants. H.J. Res. 53 would unfairly penalize this population.

H.J. Res. 53 would also strip representation from high-population states that are composed overwhelmingly of U.S. citizens but which also contain higher numbers of non-citizens. There is no state in the U.S. where non-citizens comprise the majority of residents. Texas is one example of a state comprised primarily of U.S. citizens that would suffer from a policy of restrictive representation. If apportionment were conducted today based on total population, Texas would receive a 33rd congressional seat and each member of congress from Texas would represent approximately 664,000

people.[3] H.J. Res. 53 would deny Texas that congressional seat, forcing an extra 20,000 people into the district of each member of the Texas delegation. And 19.6 million U.S. citizen Texans would have less representation in Congress.[4]

In California, the effects would be even worse. H.J. Res. 53 would force approximately 54,000 additional people into each California congressional district. [5] As a result, 29.6 million U.S. citizen Californians will suffer a loss of congressional representation and will, in effect, be penalized because they live in a diverse state. The examples of Texas and California illustrate that the effects of H.J. Res. 53 will fall most harshly upon U.S. citizens, the group purportedly intended to benefit under the Resolution.

Furthermore, stripping representation from states with non-citizens necessarily has a disparate impact on Latino U.S. citizens. More than one-half of legal immigration is family-based. Among this group of legal immigrants, who come to the United States commonly to live near their relatives, the largest number of people was born in Mexico. Because many are living and working today in Latino communities across the U.S., H.J. Res. 53 will serve to shift representation away from states containing Latino citizens and permanent legal residents to other states with higher citizen populations and fewer Latinos. Estimates of a citizen-only based distribution of congressional seats demonstrate that states with relatively larger Latino populations lose representation under H.J. Res. 53. Arizona, California, Florida, Nevada, New York and Texas all have in common substantial Latino populations and all would be worse off under a restrictive apportionment scheme in which non-citizens are ignored.

Including non-citizens in congressional apportionment does not dilute representation of those in low non-citizenship states because, under to the Constitution, representation is a concept that benefits all persons -- not only citizens, or only adults, or only people living stateside, or only the mentally competent. Representation does not accrue only to the benefit of those citizens who register, or vote, or vote for the winning candidate in a congressional election. The argument that including non-citizens in the apportionment count "dilutes representation" presumes, incorrectly, that representation belongs only to citizens. Voting rights lawyers know the term "dilution" as one that applies to voting, not representation. [6] Dilution simply does not apply when representation flows to individuals and the apportionment system allocates representatives based on population.

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[3] According to the U.S. Census American Community Survey, Texas had a population in 2004 of 21,912,164.

[4] In 2000, the U.S. Census estimated that approximately 2 million Texans were non-citizens.

[5] According to the U.S. Census American Community Survey, California had a population in 2004 of 35,055,227. With 53 congressional seats, each district ideal population is 661,419. With only 49 seats, each California congressional district would have 715,412 people in it. The difference is 53,993.

[6] For example, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the U.S. Supreme Court held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state."

In support of their effort to restrict representation, critics of population-based apportionment mischaracterize, as a function of the number of citizens residing in an electoral district, the number of voters that choose to turn out and vote in any particular election. In truth, voter registration and turnout is by far the greatest determinant of the "weight" of a voter's vote than the number of citizens residing in the electoral district. For example, California's 34th congressional district is located within Los Angeles County, where for a variety of historical and socioeconomic reasons, registration and turnout among eligible persons is low. For example, in the 2002 general election, only 32% of eligible voters in the county turned out and cast their vote. Low voter turnout necessarily reduces the number of votes cast in the election and the number of votes required to win the election. To suggest that the number of votes cast in that or any other District 34 election was affected more by the citizenship rate than voter turnout is misleading and untrue.

To substantially alter the 14th Amendment to impose an exclusion on representation that the original framers did not intend would violate the spirit of this important constitutional provision and would be a disservice to citizens and non-citizens alike. To punish millions of residents of states with higher numbers of non-citizen residents serves no legitimate policy purpose and places unwarranted burdens upon the congressional representatives in these states. I strongly urge you to reject House Joint Resolution 53.

Mr. TURNER. Thank you.

And when I began my opening comments as the chairman of this committee, Federalism and the Census, census having the obligation for actually the count that results in apportionment, I made clear that this is an informational hearing, that the issues that we wanted to discuss related to the impact of the proposed constitutional amendment, but also because I truly believe that most citizens aren't aware of how the current apportionment process works and its impact on the fact that the Constitution and its application currently looks to persons instead of citizens.

This is an important function that has nothing to do with the issue of policy. Policy is whether or not we should do this or should not do this, and the impacts that it would have.

It includes the discussion of the historical perspective: Why did our Founding Fathers do this? What was the intent? What was the expectation? Was it intended? But the realty is that, on a nonpolicy perspective, that most of what we are talking about is a straight, mathematical application. The information aspect of what happens as a result of counting noncitizens versus counting merely citizens is not an issue that goes to policy. It is a mathematical outcome of which we should all be aware, whether we are for or against the changing of that application.

So going to those purposes I am going to go through this panel in this like manner that I did the other to make certain that we have a narrowing of the issues because policy is very important and that is something that will really go beyond this hearing. The purpose of the hearing is to inform as to the application of the current method of apportionment.

My first question goes to the issue to make certain that no one has any belief that there is any underlying sinister purpose here, and that goes to the question of asking each of the members of the panel whether or not they believe that noncitizens should be allowed to vote, my expectation being that we will all share the value that noncitizens should not be allowed to vote.

I will begin with you, Dr. Prewitt.

Mr. PREWITT. Correct.

Mr. TURNER. Mr. Killian.

Mr. KILLIAN. With one reservation, I would say. There was——

Mr. TURNER. Would you take the mic, please.

Mr. KILLIAN. Excuse me. There was the historical practice after the Civil War and extending into the first part of the 20th century of a number of States, primarily Western States which wanted to encourage immigration into them, of allowing noncitizens to vote provided that they swore an oath——

Mr. TURNER. I'm not asking from a historical perspective, I am asking from your personal belief. You personally believe noncitizens should not be allowed to vote.

Mr. KILLIAN. As a general matter I do not believe that.

Mr. TURNER. Mr. Gimpel.

Mr. GIMPEL. I agree.

Mr. SPIROPOULOS. Yes.

Mr. TURNER. Ms. Perales.

Ms. PERALES. MALDEF takes the same position but also recognizes that certain States and localities have exercised the option to enfranchise noncitizens.

Mr. TURNER. The purpose—so no one becomes confused—of this hearing is to discuss voting by noncitizens.

A second issue, counting of noncitizens in the apportionment of congressional district results in the dilution of the votes of citizens in Congress. Doctor Prewitt.

Mr. PREWITT. Yes, just as the noncounting of felons dilutes the vote of those who are felon districts, the noncounting of the young rewards those districts which have more elderly than the young.

Mr. TURNER. We count the young. You were good on the other one.

Mr. PREWITT. No, no, no.

Mr. TURNER. In the census for citizenship.

Mr. PREWITT. I'm saying that a district which happens to be composed of the elderly has its vote diluted compared to a district with a higher percentage of young people in.

Mr. TURNER. I understand now what you are saying.

We have limited time.

Mr. Killian.

Mr. KILLIAN. I would agree with that.

Mr. TURNER. Mr. Gimpel.

Mr. GIMPEL. Yes.

Mr. SPIROPOULOS. Sure.

Mr. TURNER. Ms. Perales.

Ms. PERALES. No, the statement is not correct.

Mr. TURNER. We will get back to that then because the issue is a mathematical one here. If you count only citizens, first count citizens and noncitizens, mathematically it would have to be a dilution because you are spreading representation over a larger number. So it's mathematical, it's not a policy issue, not a value system, Ms. Perales. Would you still say that it does not dilute the vote of citizens—I'm sorry, does not dilute the representation of citizens in Congress?

Ms. PERALES. Respectfully, Representative Turner, Mr. Chairman, it is with respect to representation and not the vote.

Mr. TURNER. I misstated it when I restated it to you but my first question was representation of citizens in Congress. Would you agree with that?

Ms. PERALES. We would disagree because representation flows to all individuals, not only to voters, and thus counting all persons——

Mr. TURNER. I asked whether mathematically the counting of noncitizens does or does not dilute the votes of citizens in Congress?

Ms. PERALES. It does not dilute the votes of citizens.

Mr. TURNER. Thank you for your answer.

Going to the third question then, because the appropriation process impacts the allocation of electoral votes, the counting of noncitizens has a potential for the impact of the outcome of Presidential elections.

Doctor Prewitt.

Mr. PREWITT. Just like in the noncounting of anyone will have that impact. Of course, by definition.

Mr. TURNER. Mathematical.

Mr. PREWITT. Vote dilution is an incredibly important issue and I am glad we are discussing it. There are costs to trying to manage it.

Mr. TURNER. That's question No. 5. Only on this one. Mr. Killian.

Mr. KILLIAN. Yes, with that qualification.

Mr. TURNER. Mr. Gimpel.

Mr. GIMPEL. Yes.

Mr. TURNER. Mr. Spiropoulos.

Mr. SPIROPOULOS. Yes.

Mr. TURNER. Ms. Perales.

Ms. PERALES. Yes. If I understand the question I'm answering.

Mr. TURNER. The fourth thing is that the counting of noncitizens having an impact on apportionment and representation then in Congress has an impact on the balance of power between the States in Congress.

Mr. Prewitt.

Mr. PREWITT. Yes.

Mr. TURNER. Mr. Killian.

Mr. KILLIAN. Yes.

Mr. TURNER. Mr. Gimpel.

Mr. GIMPEL. Yes.

Mr. SPIROPOULOS. Yes.

Mr. TURNER. Ms. Perales.

Ms. PERALES. Yes.

Mr. TURNER. The fifth is an open question to give you the opportunity to discuss what you have been wanting to discuss. Dr. Prewitt; briefly, if we could give each of you an opportunity to talk on the issue of the impacts. This is if we were to do this, what would be the impacts. You can talk about the impacts on populations and individuals, you can talk about the purity of the census as it is currently viewed. But if each of you would take a moment on that then we will turn to Mrs. Maloney.

Mr. PREWITT. Yes. It would be repetitious. It will have an impact on quality, impact on fairness. It simply will have that impact. That's empirical, factual; mathematical, if you will, in your vocabulary. I also think it will have a big impact upon the reception of the census in our body politic today and I think that has a down side that this committee really ought to consider.

Mr. TURNER. Mr. Killian.

Mr. KILLIAN. In light of the restraints on me by my service, I don't think I can answer that question.

Mr. TURNER. We'll accept that.

Mr. Gimpel.

Mr. GIMPEL. I think it would strengthen the value of citizenship and incidentally also stimulate a pretty rapid move toward naturalization. It would provide quite an incentive to naturalize, I think. Just off the top of my head those are two things that would come of it.

Mr. TURNER. Mr. Spiropoulos.

Mr. SPIROPOULOS. Speaking with regard to the constitutional amendment as opposed to the statute that I had discussed, I think

if you did the constitutional amendment you would be shifting the basis of representation in the original Constitution the way the framers envisioned it. That would be the underlying change if you exclude legal aliens. The other sets of impacts discussed earlier would be on the census. I think you might have great damage to the census if you were to tie census taking to questions regarding immigration.

Mr. TURNER. Ms. Perales.

Ms. PERALES. Because the exercise of the franchise is analytically distinct from congressional representation which flows to all persons through total count in apportionment, the effect of the proposed measure would be more to shift representation away from the States that I described in my testimony and would have little to no impact on the exercise of the franchise or what is referred to as vote dilution. Those are really separate effects, one of which is great and the other which is small.

Mr. TURNER. Mrs. Maloney.

Mrs. MALONEY. Thank you very much. I would like to ask Dr. Prewitt and I'd like you to respond to this notion that if we exclude some subset of the population in the census for apportionment purposes, what other groups might be considered for exclusion down the road? I would like everyone to answer. What other groups besides——

Mr. PREWITT. Well, I would worry that felons might be considered excludable as a category that we obviously don't let vote in many of our States. I mean ex-felons, not necessarily those in prison but ex-felons who have done their time would be excluded. That would be a candidate group. I have no idea what we would finally decide about those psychologically incapable of exercising a vote because of their mental processes. There have been times in this society when we have worried about excluding the so-called insane. I am not predicting that would happen but there are categories of our population simply less well integrated than other categories and I would worry if we start down this road of making distinctions at this starting point of the representational process, that it opens the opportunity to make distinctions along other lines.

Mrs. MALONEY. Does anyone else have ideas of who might be excluded. Would you think they might want to exclude the homeless, possibly those that are in hospitals? Can you think of any other subset that might be considered to be excluded, Mr. Killian?

Mr. KILLIAN. The matter of ex-felons, convicted persons who are felons confined in prison is something of a problem in some States because prisons generally are constructed in rural areas of the State so that the counting of the prison population within that county enlarges the county's representation, so that might enter into some of this.

Mrs. MALONEY. Mr. Gimpel, can you think of other subsets?

Mr. GIMPEL. I think, Representative Maloney, you made a very perceptive point in response to the first panel when you called our attention to the fact that there are different types of vote dilution and I think that what we would have to do as these cases come up, if someone says votes are being diluted for this reason or that is take them on a case by case basis as we are in this particular instance, discuss it, see where it goes. But I think you are right,

there are different types of vote dilution. Do we want to change the Senate scheme of apportionment. Well, remember that the Founding Fathers with respect to the U.S. Senate thought that States needed to be represented in the Federal system as administrative units. So they deserve representation as units of government administration, but certainly that's a case, as you pointed out in response to the first panel, of a kind of vote dilution. That does trouble some people. That should be taken up in a series of hearings too, perhaps.

Mrs. MALONEY. Mr. Spiropoulos.

Mr. SPIROPOULOS. I think it's important not to confuse issues here. I think it is important to focus really on the underlying problem that is motivating all this, which is the question of illegal immigration. There is no one who seriously wants to exclude any group of our society from participation of voting or being represented. The question here is to focus on the problem, very difficult problem and hard to deal with and I think that's what we need to focus on.

The second thing is that the national government has always exercised discretion in administering the census and determining who an inhabitant is. You cannot get away from the fact that you have to make choices, the administration will have to make decisions on how to define the key terms that underlie the scheme that you are administering.

Mrs. MALONEY. Well, I agree with you that we have to exercise discretion. That's why I'm asking this question. Maybe we would like to exercise discretion in other categories. But I would differ with your first statement that the hearing is about immigration. This hearing is about apportionment and representation and possibly the dilution of a vote.

I would like to ask Ms. Perales, in your testimony you mentioned that at one time the Census Bureau counted Blacks as three-fifths of a person, is that correct?

Ms. PERALES. No, apportionment. Slaves.

Mrs. MALONEY. Counted slaves as three-fifths of a person, is that correct?

Ms. PERALES. That is correct.

Mrs. MALONEY. Do you think that possibly we could consider counting women less since they are paid $0.79 to the dollar. That's a Bureau of Labor Statistics point that they are paid $0.79 to the dollar for like work. Do you think that a woman could be counted less in the census as a discretionary movement?

Ms. PERALES. Once you unhook representation from the people, all persons, as required by the Constitution, once you unlink those concepts the extremes are without limit in terms of how you would take away representation from groups of people.

To answer the previous question, the largest structural group of nonvoters obviously is children. Why not exclude children from apportionment? They cannot vote. We will catch up to them later after they turn 18. Why not exclude——

Mrs. MALONEY. So we have gotten felons, prisoners, the insane, and those in insane asylums, now possibly children, since they can't vote, maybe we shouldn't count children for apportionment. Can you think of any other area?

Ms. PERALES. Yes, the most frightening extreme is that one carries the idea of voting or the exercise of the franchise all the way to become synonymous with representation, meaning that you don't get counted for apportionment unless you're a registered voter or don't get counted unless you turned out in the last election or, God forbid, that you voted for the decumbent.

Mrs. MALONEY. What about Alzheimer's? Do you think they would put that in there? One of my good friends, she's 61 years old, she has just come down with Alzheimer's. Maybe she shouldn't be counted because she really has some challenges now. Do you think Alzheimer's could go into that list too?

Ms. PERALES. Certainly any limitation once you stop giving representation to the people is within the bounds of imagination and, by the way, would all have to be listed on the short form of the census.

Mrs. MALONEY. Thank you very much.

Mr. Killian, I would like to go back to your testimony on constitutional amendments. And I recall that in 1993 an amendment that began in the 1700's was finally ratified. And you talked about the time limits being very important. How many amendments have passed without a time limit and how many amendments have had a time limit? When did they start or when did Congress start a time limit?

Mr. KILLIAN. The first amendment with a time limit issue was the 18th amendment imposing prohibition, which was proposed and ratified roughly around 1920. The reason that time limitations began to come in was there was a debate with regard to whether amendments that had been proposed a long time ago were still alive and whether States could still act, and the idea was to begin placing time limitations in the amendment. Of course the old amendments did not have a time limitation. And with respect to the present 27th amendment, so-called Madison amendment which was 1 of the 12 amendments proposed by Congress in 1789, which 10 were ratified and became the Bill of Rights, that was still of interest to some people because it provided for a required layover between the time Congress voted for a pay increase, required intervening election before it would take effect.

And from time to time a State or two States ratified, and finally in 1992, 1993 enough States had ratified over the long period of time so that the amendment was ratified. The only question was: Was it validly ratified because of the amount of time that had run? And Congress, both Houses of Congress passed resolutions saying yes, it had been, and the executive branch official responsible for certifying it, the Archivist of the United States, certified it.

Mrs. MALONEY. I want to thank all of the panelists and your historic understanding is important. All of your testimony has really deepened my understanding. I think once you start down this road of disqualifying or not counting certain people, it certainly opens up the possibility that other people will not be counted, and I think it is a very, very serious question and personally I do not think that we should move away from our Founding Fathers, who directed this country so brilliantly, that everyone should be counted. Thank you.

Mr. TURNER. Mrs. Miller.

Mrs. MILLER. Thank you, Mr. Chairman. I might mention, and I appreciate the historical perspective that we have talked about today. I think this is really a very interesting debate and I am a person who believes in the goodness of the American people and that we will come to the right decision to ensure freedom, liberty, democracy, protection for all American citizens and has been stated here by a couple of our panelists, that we should honor the original intent of our Founding Fathers.

Actually, the original language, if we should honor the intent of our Founding Fathers, the original language said we were to count all free persons, including those bound to a term of service, minus Indians not taxed, plus three-fifths of other persons, meaning slaves. So I honor our Founding Fathers, although I don't honor that part of their thinking. So I think it is appropriate for us to amend the Constitution to protect all American citizens, and that is what I am proposing with this resolution.

I do not see this as a partisan issue in any way, perhaps a regional issue, but it is a nonpartisan issue in my mind. It is simply an issue of fairness, it is a fundamental caveat to our democracy, which is the one man, or one woman as I say, one vote. I think that is very important and I think this goes right to the heart of that. And Mr. Gimpel had mentioned that it was his observation that perhaps seeing this resolution pass and this amendment to our Constitution pass would actually be perhaps an impetus, give immigrants another incentive to become American citizens, and he had made that comment and I guess I would ask the rest of the panel if you feel that could be a consequence of passing this. Start with Dr. Prewitt.

Mr. PREWITT. Historically immigrant groups do naturalize at roughly a pace which I could describe historically in detail, but they do gradually naturalize, they learn English, they buy homes, they intermarry across the boundaries, as the Italians and Irish and Poles, so forth, as today the immigrants are, the Hispanics are and Asians and so forth. So I don't see this as an extra incentive whatsoever to the naturalization process. I think that will unfold in due course.

We have some 30,000 noncitizens now in the military, and I do think that because they are in the military and the President agrees we should hasten their citizenship, but we will take them even if they decide not to naturalize.

And I do worry about the no taxation without representation point. The Boston Tea Party is a part of our founding mythology, if you will, and it's odd at this time in our history we would go back to no taxation without representation.

So I guess I am not worried about the naturalization phenomenon. I just see it unfolding in due course as it always has. The second and third generation is very different from the first, and so forth.

So I see the opposite; that this will create an anxiety in this population at the current time and an anger at the Federal Government, especially among the Hispanic population, which I would hope we would take into consideration as we consider this amendment.

Mrs. MILLER. Thank you. Anyone else have a comment on that?

Mr. SPIROPOULOS. It would be an incentive to naturalization. I don't think it would be an internal incentive that you believe because you do not have representation that you needed to be naturalized. I think what you would have happen is a huge political organization in those districts that would lose out. They would organize people to become naturalized in order to make sure that their votes were counted and did not get diluted.

Mr. GIMPEL. I would say some of the immigrant advocacy groups that we have heard from today would likely turn their attention to bolstering the political advocacy of their grass roots constituencies. That would probably be a good thing. We have heard for 15 or 20 years about how civic engagement in the country has been in decline, with the 2004 election being an odd exception, a blip on the screen. Wouldn't it be nice if we saw a great stimulus to civic engagement as a result of adoption of this amendment?

Ms. PERALES. I believe that people naturalize for personal reasons, mainly out of a love for this country and the desire to take that final step to participate as a U.S. citizen. The relatively remote effects on apportionment would not necessarily be foremost in someone's mind as they begin the process of naturalization.

Certainly the groups that are committed to the Latino community strive today to increase naturalization as much as possible. I am not sure that such a change as the one proposed today would provide any greater resources toward that effort than are already going to that effort.

Mr. PREWITT. May I add a footnote to Congressman Miller's question?

Mrs. MILLER. Go ahead.

Mr. PREWITT. I did meet with leaders of the Catholic Church in preparation for the census 2000 and also MALDEF leaders. The question I put is why do you care so much about whether we count the noncitizens, and their explicit answer was we see that as a step toward naturalization because it makes them more comfortable dealing with the Federal Government and that is a very important step in the evolution of our constituency. So the Catholic Church, which for years had a standoff relationship to the census for fear it would be tainted with sort of government surveillance, and so forth, changed its mind in 2000 exactly on the argument you are making. I actually do believe this amendment would set that back rather than move it forward.

Mrs. MILLER. Mr. Chairman, I am not going to ask any more questions. I appreciate your time. When I had an opportunity to testify I think I laid out my reasoning for this resolution very clearly at that point and I know others may have some questions here but I do think that this again is an issue of basic fairness.

I really think, although there have been no polls that I am aware of, if you took a poll in our Nation right now about whether or not people agree that illegal immigrants should have the same representation in the U.S. Congress as American citizens, it would be about 90–10 in favor of this resolution. I honestly believe that. Again, I believe in the goodness of the American people and their ability to ferret out in very simplistic terms what is the appropriate course of action to strengthen our Nation and continue our course.

Thank you very much.

Mr. TURNER. I recognize Linda Sanchez from California.

Ms. SANCHEZ. Thank you, and I want to thank Chairman Turner for allowing me to join the Federalism and Census Subcommittee on today's hearing. I would also ask unanimous consent to submit some opening statement for the record and——

Mr. TURNER. Also make any comments.

Ms. SANCHEZ. If that is granted, I would like to ask questions.

Mr. TURNER. Please.

[The prepared statement of Hon. Linda T. Sanchez follows:]

Congresswoman Linda T. Sánchez

Opening Statement

Subcommittee on Federalism and the Census

"Counting the Vote: Should Only U. S. Citizens Be Included in Apportioning our Elected Representatives?"

2247 RHOB – 10:00 A.M.

December 6, 2005

Thank you, Chairman Turner and Ranking Member Clay, for allowing me to join the Federalism and Census Subcommittee for today's hearing on H.J.Res.53.

If H.J.Res.53 becomes law, it will write a retrogressive and discriminatory policy into the United States Constitution and also put many cherished American values at risk.

This resolution amends the Constitution so that only U.S. citizens are counted in Congressional apportionment. By doing so, millions of legal permanent residents will be left unrepresented by our government.

I want to be clear, we are not talking about the bane of anti-immigrant advocates existence: undocumented immigrants.

We're talking about legal permanent residents -- individuals who have entered this country legally, played by the rules, and are patiently waiting to become U.S. citizens.

I believe that H.J.Res.53 is discriminatory because it gives LPRs, who are disproportionately Latino, second class status. Latinos represent nearly half of the approximately 9 million LPRs currently awaiting their opportunity to become U.S. citizens.

This resolution strips LPRs of their political representation in the House of Representatives.

Who will this resolution impact? People who are performing some very valuable services, like many members of our armed forces, some who are currently serving in Iraq and Afghanistan.

It would be unconscionable and un-American to deny veterans of the war on terror legal representation in the House simply because they have yet to take the oath of citizenship. If these brave men and women can sacrifice their lives for the good of national security, they have certainly earned the right to have a representative in the people's House.

Finally, I want to also be clear that H.J.Res.53 will negatively impact U.S. citizens in places like my home state of California.

If this resolution becomes law, over 50,000 people will be added tc every Congressional district in the state – a severe dilution of congressional representation.

As a result, every U.S. citizen in California will be unfairly punished under this bill simply because they reside in a state with a diverse population.

Amending the Constitution to only count U.S. citizens for Congressional apportionment is too reminiscent of the shameful days in American history when African-Americans were counted as three-fifths of a person, and women were denied the franchise.

I hope that the House takes no action on this legislation and it is not reported out of Committee.

I yield back.

Ms. SANCHEZ. Thank you.

Ms. Perales, it seems to me that Latinos will be the ethnic group most harmed by House Joint Resolution 53. In your analysis of the resolution and its impact on apportionment do you agree that Latinos would be the most harmed if this language was added to the Constitution?

Ms. PERALES. Yes, I do agree.

Ms. SANCHEZ. What other groups might be harmed as well?

Ms. PERALES. Anglos or white Americans who happen to live in and among the Latino community; for example, in my State of Texas an Anglo person who lives in San Antonio or actually, frankly, because apportionment is done on a State by State, anybody who lives in Dallas or Waco or El Paso or Austin is also going to be disproportionately and negatively affected by this shift of representation.

Ms. SANCHEZ. Thank you. Now I know one of the hot topics currently in Congress is immigration reform, and part of the inflammatory language that we hear from anti-immigrant groups is about illegal immigrants and their harmful impact on communities, and I think some of that rhetoric has influenced the debate about congressional apportionment. That's my personal opinion.

Ms. Perales, will you please clarify for the record the distinction between illegal immigrants and legal permanent residents as these groups pertain to the joint resolution and to congressional apportionment.

Ms. PERALES. Well, certainly as worded the joint resolution says nothing about undocumented immigrants and in fact does not apply just to undocumented immigrants, so there is no connection at all between the proposal and what is referred to as illegal immigration.

As has been pointed out earlier, there are over 18 million noncitizens living in the United States, the majority of whom are lawful residents, either legal permanent residents or other types of lawful residents. Because the proposal ignores or excludes from apportionment all noncitizens, it is grossly overbroad and strikes at many people living lawfully in the United States today.

Ms. SANCHEZ. I am going to sort of hone in on that issue of legal permanent residents. Somebody on this panel said that this hearing was about protecting all American citizens and that it was an issue of basic fairness. Ms. Perales, are you aware that there are many legal permanent residents that serve in the U.S. Military?

Ms. PERALES. Yes, I am. They are in uniform and risking their lives every day for this Nation.

Ms. SANCHEZ. Some are currently deployed in Iraq and Afghanistan. Are you aware of that?

Ms. PERALES. Yes.

Ms. SANCHEZ. So if we are talking about protecting American citizens would you or would you not say it's a fair statement that there are legal permanent residents who protect all American citizens?

Ms. PERALES. There are many.

Ms. SANCHEZ. Would you say in your opinion would it be basic fairness to disallow a veteran who may be a legal permanent resident but not yet have taken the oath of citizenship, deny them

being counted for purposes of apportionment? Would that sound like basic fairness to you?

Ms. PERALES. It would be very unfair.

Ms. SANCHEZ. Thank you.

Also, Mr. Gimpel stated earlier in his testimony that districts potentially with more citizens get less services from their Member of Congress. Would you agree with that statement?

Ms. PERALES. No, I would not. No, I would not at all. Whether you are a noncitizen or citizen, you walk down the streets, you turn the lights on in your house, you have many needs and you do approach your Representative in Congress for services.

Ms. SANCHEZ. And I just want to hone in one last question on the issue of children. Children under 18 are not of age to vote and they receive services from their Federal Representatives, is that not correct?

Ms. PERALES. Absolutely.

Ms. SANCHEZ. I'm interested in knowing if you could just sum up. I'll end my questioning with the answer to this one last question. Earlier in the hearing the question was put to all of the panelists that the counting of noncitizens for apportionment dilutes the vote of citizens, and you disagreed with that and I would just like to give you an opportunity please to explain why you disagree with that.

Ms. PERALES. Thank you for the opportunity. Voting and the exercise of the franchise is limited to citizens. And if you look at the 14th amendment you can see it right there. It talks about citizens and it talks about the franchise and it talks about people and all persons, which is a much larger group than citizens. Noncitizens don't have a vote, noncitizens don't exercise the franchise in any way, and thus they cannot dilute the vote of those who are voting. It's not analytically possible. And it creates great confusion to mash together the concepts of voting and representation.

Representation flows to all people under the Constitution. Elected officials will certainly appreciate the fact that they represent the same number of people across a district within a State. That is a very different concept than who votes and who chooses to vote in any particular election.

Ms. SANCHEZ. Thank you, Ms. Perales. I think you have done an excellent job of educating on that, and I yield back.

Mrs. MALONEY. Could I add one question to her? I know that in New York and I have read that in court cases in other States the courts have upheld the responsibility of government to provide services to all people; education and health care. Could you elaborate on that?

Ms. PERALES. Well, the courts have interpreted the 14th amendment's reference to persons; for example, in the equal protection clause, as truly persons, as all human beings, not to just citizens. So for example since we all have the right to equal protection of the laws, that means that whether or not you are a citizen or even whether or not you are a documented or undocumented immigrant, you are entitled to the equal protection of the laws. And the 14th amendment similarly provides for apportionment based on all persons.

One has to read the 14th amendment to be consistent within itself in that all persons means exactly that, all persons. Undocumented immigrants are of course eligible for very few if any kind of government services, although there is widespread misinformation on that point.

So I think the most important thing to understand is that the 14th amendment guarantees them protections with respect to liberties and freedoms as well as protection of the laws flows to all persons.

Mrs. MALONEY. Thank you very much.

Mr. TURNER. Thank you. Ms. Sanchez, I appreciate your return to the issue of the dilution of the vote of citizens because actually for my followup questions, Ms. Perales, I need to return to your testimony. I have been discussing with staff and there is a lack of agreement on some of the content of your testimony and I want to clear that up.

We were talking about the mathematical impact of counting noncitizens for purposes of apportionment and I'd asked you the question as to whether or not the counting of noncitizens for purposes of apportionment diluted the votes of citizens, and you answered no, an answer which I agree and I believe is mathematically correct.

The subsequent question and clarification was a followup one that the counting of noncitizens for the purposes of apportionment deletes—let me try that again. Tongue-tied here—that the counting of noncitizens for purposes of apportionment dilutes the representative vote of citizens in Congress, and my recollection is that you had answered in the affirmative, which is in agreement with the other seven panelists.

Ms. PERALES. No, that is not correct. I'm not sure how you modify the word "vote" with the word "representative." It does not have a meaning to me.

Mr. TURNER. Let's discuss that for a moment. The question of whether or not it dilutes the votes of citizens, since only citizens are allowed to vote, noncitizens not appearing in the ballot box to vote, the pool of those counted are only citizens. When noncitizens are counted for the purposes of apportionment, the pool gets larger, and then as Representatives, which are a fixed number of Representatives, are then allocated across the sea of the individuals that are counted, both citizens and noncitizens, the impact vote on the representative vote of citizens, those in Congress, is diminished.

If you count a smaller group, only citizens, then the representative vote in Congress of citizens would increase. That is a mathematical equation of which all other seven members of the panels two and three agreed, and my recollection was that you had agreed in the affirmative with that.

Ms. PERALES. No, I do not agree the vote is diluted in any way.

Mr. TURNER. Would you please explain to me mathematically how by counting a larger group versus a smaller group dilution does not occur.

Ms. PERALES. Because apportionment is done based on total population. Representatives are distributed across the sea of people, as you put it, equally, meaning there are roughly equal numbers of

people in every congressional district. There are different proportions of citizens and noncitizens in each congressional district. Does total population-based apportionment mean that congressional districts are comprised of different numbers of citizens? Yes, of course, mathematically it does.

Mr. TURNER. So then you would have to agree that those citizens that live in a congressional district that has a higher percentage of citizens have a diluted representative vote in Congress versus a congressional district that has a less percentage of citizens when viewing it through the eyes of citizen representation only?

Ms. PERALES. No.

Mr. TURNER. How can that be?

Ms. PERALES. Because not everybody votes.

Mr. TURNER. It's representation of vote issue. If I have more citizens that live in my district versus Candice Miller having less citizens, then when I sit in this chair, go to the House floor and vote, my vote, which is one, and her vote, which is one, has behind it more citizens, and she would have less citizens. So her citizens are diluted with respect to versus—excuse me, mine are diluted than her citizens. My citizens having only one, her citizens being less, having only one.

Ms. PERALES. I cannot agree that the citizens are diluted. What it does mean, and I will agree with you, is that congressional districts might have more citizens in them and less citizens, more children in them and less children, more felons in them and less felons in them, but I do not agree that this has any substantial impacts on the weight of their vote, which is what vote dilution is.

Mr. TURNER. We're just going to have to disagree because the logical conclusion of your first statements to me seem to conclude that dilution, but I certainly understand. Do we have any other?

Mr. PREWITT. I do have to change my answer to that question because you actually changed the terms of it in your response.

Mr. TURNER. Your answer will stand to my original question you received. If you want to say how you now want to distinguish, but your original answer stands.

Mr. PREWITT. Representation and voting are simply different. There's no dilution of representation. I heard in this reframing of the question you're focused on representation, not voting.

Mr. TURNER. Their representation is their vote in Congress, which is the question that I asked you. To that you answered yes.

Mr. PREWITT. You cannot dilute representation insofar as representation is distributed across the entire population because that is the nature of the system. There is no concept by which you could dilute representation.

Mr. TURNER. By counting noncitizens there are congressional districts that have less citizens in them. You agreed with that?

Mr. PREWITT. Yes, yes.

Mr. TURNER. Therefore, their vote in Congress as citizens is greater than a district that has more citizens?

Mr. PREWITT. But not the representation.

Mr. TURNER. The vote is representation, sir.

Ms. PERALES. That's the problem of the way you framed the question. You have turned representation into the issue of voting.

Mr. TURNER. I will leave it with you of their votes in Congress, which was your answer then in the affirmative.

Ms. Perales, as a result of that discussion do you have any change to your answer?

Ms. PERALES. No. Only to point out that the framers recognized the distinction between representation and the vote within the 14th amendment when they created it.

Mr. TURNER. Vote in the ballot box versus vote in Congress. I would agree with you. Any closing comments or additional questions for any Members?

Ms. SANCHEZ. One quick followup question. If you accept the chairman's discussion that we just had about greater number of citizens, meaning less representation, I am using his terminology but that's the way he phrased it, would then it seem, Mr. Prewitt and Ms. Perales, an issue of basic fairness that somebody who was elected with a lower percentage of the total citizens of their district who voted, that they should get the same representation in terms of vote in the Congress as another Member who had a higher percentage of citizens who voted in their district?

Mr. PREWITT. That's exactly the issue of conflating voting with representation. The system of political representation that our founders created did not rest upon voter turnout, it did not rest upon distinctions of citizenship, it simply rested on no distinctions other than number of people. We presume in our system of political representation that you as an elected Representative of your district have a responsibility for all of the people in that district. That's what we presume. And so whether they vote—if only one person votes and it's you and you elect yourself, you still have a responsibility to represent another 649 or 73,000 people.

Ms. PERALES. I have nothing to add to that answer.

Ms. SANCHEZ. Fabulous. Thank you. I yield back.

Mr. TURNER. Any other questions or comments? If not, before I adjourn I would like to thank all of our members of the panel, our distinguished witnesses that have participated today. I appreciate your willingness to share your knowledge and thoughts with us and I would also like to thank my colleagues for their participation today. House Joint Resolution 53 is a very interesting proposal that gives food for thought. I would like to give special thanks to Congresswoman Candice Miller for her time and her testimony today.

In the event that there may be additional questions that we did not have time for today, the record shall remain open for 2 weeks for submitting questions and answers. Thank you all. We stand adjourned.

[Whereupon, at 12:38 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

PREPARED STATEMENT OF

CHARLES LOUIS KINCANNON
DIRECTOR
U.S. CENSUS BUREAU

Before the Subcommittee on Federalism and the Census
Committee on Government Reform
U.S. House of Representatives

6 December 2005

On behalf of the U.S. Census Bureau, I would like to thank the House Subcommittee on Federalism and the Census for inviting me to testify this morning.

Today's hearing focuses on the question of whether the decennial census should count, for purposes of apportionment, all inhabitants of the United States or more narrowly define its task to count only citizens. Our testimony this morning does not address the merits of the question, but focuses instead on the practical effects such a change might have on operational considerations and the accuracy of the census.

The Constitution and the Census Act of 1790

The census is one of our nation's oldest activities. It is constitutionally required and is used as the basis to apportion the U.S. House of Representatives and to delineate congressional districts within the states. Article I, Section 2 directs that an "actual enumeration" was to occur every ten years. The first census law, the Census Act of 1790, was written just two years after the Constitution was ratified. The Census Act of 1790 instructed "the marshals of the several districts of the United States shall be, and they are hereby authorized and required to cause the number of the inhabitants within their respective districts to be taken."

The basic instruction to count inhabitants living in the United States has not been changed by any subsequent census law. It is the foundation of the Census Bureau's decennial census task. Counting every inhabitant living in the United States defines the scope of our operations and prescribes the need for accuracy in the count. The Census Bureau has developed rational, operationally feasible procedures in order to count every person and does not separately count the number of citizens, legal residents, visitors on temporary visas, or illegal immigrants, although the citizenship issue is addressed in the American Community Survey sample. To make such distinctions for purposes of enumeration would not only require changes to the decennial census questionnaire itself but different procedures and methodologies to attempt to obtain accurate information about residency or citizenship status from all respondents.

Operational Issues

The decennial census is a complex and daunting task. It requires unparalleled cooperation in order to reach every state, county, city, town, neighborhood, and street, in order to count every household in America. It is the largest peacetime mobilization undertaken by the federal government, involving years of planning and testing; hundreds of thousands of enumerators; billions in federal expenditures; and the cooperation of every household in America. Securing this cooperation from each community, household, and person is difficult, but crucial to the accuracy of the census.

With each modern census, the Census Bureau has documented decreasing levels of cooperation and response rates. The mail response rate determines the non-response follow-up workload and is an important factor in the cost and overall success of the census. In 1970, the overall mail response rate was nearly 80 percent. In 1980, it fell to about 75 percent, and by 1990 it had fallen to 65 percent. Census 2000 held at nearly 65 percent and seems to suggest that the Census Bureau, with the help of unprecedented congressional and community support, as well as paid advertising, was able to hold this trend in check. But we know the American public is becoming increasingly wary of issues such as protection of privacy, identity theft and unwarranted government intrusion. For the 2010 Census, we project further declines in public cooperation, even if we repeat all the efforts undertaken in 2000. We believe some of our efforts to reengineer the 2010 Census, especially the use of a short-form only census, can mitigate this trend. However, asking about citizenship could negatively impact this trend and could impair the ability of the Census Bureau to conduct an accurate census.

The Census Bureau relies not only on individual cooperation but also on public support to maintain the high level of accuracy expected from the decennial census. Public support is built and demonstrated through media coverage, public endorsement, and word of mouth. In 2000, there was an unprecedented effort to engage help from members of Congress, local officials, community organizations, schools, and the media to encourage public support. We relied on these partners to help educate the public, especially hard-to-count communities, about the constitutional requirement and the uses of census data in the distribution of public resources, and to assuage fears about participating and the possible use of data against respondents.

Asking all respondents for additional information relating to citizenship might raise additional fears about responding to the census. Even U.S. citizens may be wary of answering questions about citizenship. Countering these concerns and fears could require additional efforts to secure public cooperation. Moreover, because the census is conducted through self-enumeration, the Census Bureau could not verify whether the responses were accurate. The mere act of asking about the residency status of an individual may confuse or discourage respondents, even legal residents and citizens, and could affect the overall accuracy of the census.

Conclusion

Accuracy is important because the census is used to apportion congressional seats, fulfilling the obligation as outlined in Article I of the Constitution. Mr. Chairman, thank you for this opportunity, and I hope that this information is informative and will help the Congress as it considers this issue. I would be happy to answer your questions and concerns.

CAROLYN B. MALONEY
14TH DISTRICT, NEW YORK

2331 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–3214
(202) 225–7944

COMMITTEES:
FINANCIAL SERVICES

GOVERNMENT REFORM

JOINT ECONOMIC COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515–3214

DISTRICT OFFICES:
1651 THIRD AVENUE
SUITE 311
NEW YORK, NY 10128
(212) 860–0606

28–11 ASTORIA BOULEVARD
ASTORIA, NY 11102
(718) 932–1804

WEBSITE: www.house.gov/maloney

Dr. Ken Prewitt
Carnegie Professor of Public Affairs
Columbia University
School of International and Public Affairs
IAB Room 1428
420 W 118th St.
New York, NY 10027

January 17, 2006

Dear Dr. Prewitt,

Once again, I want to thank you for testifying before the Government Reform Federalism and the Census Subcommittee on December 6, 2005. Your time and commitment to these issues will enable Congress to improve upon its oversight responsibilities and legislative efforts for both the 2010 Census and future censuses.

At this time, I would like to follow up on certain questions that I believe would benefit our panel and its insights into the inclusion of non-citizens in the decennial census. Your responses can be constructed as you wish, without regard to length or brevity. Since all Subcommittee witnesses are limited to five minutes in making an opening statement, and our hearing addressed many topics and issues, I believe this opportunity will afford you significant latitude in developing your responses. These responses will be included in the hearing record, and can be forwarded to both the majority and minority staffs once completed.

In the meantime, please do not hesitate to contact me or my staff with any questions you might have. Please send your responses to:

Chairman Michael R. Turner
Subcommittee on Federalism and the Census
Room B 349-A
Rayburn House Office Bldg.
Washington, DC 20515

PRINTED ON RECYCLED PAPER

Please cc a copy to:
Rep. Carolyn B. Maloney
2331 Rayburn House Office Building
Washington, DC 20515

Sincerely,

Carolyn B. Maloney

Carolyn B. Maloney
Member of Congress

Cc: Rep. Turner

Follow-up Questions for Panelists from Census Hearing 12/6/06

1. You said in the final comment to the subcommittee that even if Congressman Turner were to be elected with only one vote, his own, he would still be the representative of his entire district. Can you tell me what you had in mind in making this comment?

2. In your opinion do Members of Congress represent everyone who lives in their district or just the people who vote for them? For instance, do they represent the children and mentally ill persons who reside in their districts but cannot vote?

3. Is it your opinion that the votes of residents of large states like Michigan and New York in Congress are diluted compared to the votes of citizens of Rhode Island or Wyoming? Is that fair?

COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
DEPARTMENT OF INTERNATIONAL AND PUBLIC AFFAIRS

January 27, 2006

Chairman Michael R. Turner
Subcommittee on Federalism and the Census
Room B 349-A
Rayburn House Office Bldg.
Washington, DC 20515

Dear Chairman Turner:

Thank you for this opportunity to extend comments made at the Census Subcommittee hearing on December 6, 2005, as requested in a letter of 17 January 2006 from Representative Carolyn B. Maloney.

In response to your questions:

1. Dr. Prewitt: You said in the final comment to the subcommittee that even if Congressman Turner were to be elected with only one vote, his own, he would still be the representative of his entire District. Can you tell us what you had in mind in making this comment?"

Following the hearing, I prepared a short essay developing the point that the constitutional doctrine of representation rests on the principle that a Representative is presumed to represent everyone in his or her District. I submit the text of that essay in response to this question:

Immigration and a Wrong-Headed Constitutional Amendment

Congress this week held a hearing on a proposed constitutional Amendment that would exclude non-citizens from the census numbers used in apportioning congressional seats. Sponsored by Representative Candice Miller, with 29 co-sponsors, the Amendment is justified on grounds that "vote dilution" is unfair. Vote dilution occurs when a state with comparatively few non-citizens loses congressional seats and Electoral College votes to a state with many non-citizens. By this rationale, states with an unusually high percentage of children (non-voters all) or of felons and ex-felons (often denied the vote) are also unfairly advantaged. The disinclination by the sponsors of the Amendment to consider other sources of vote dilution suggests that the proposal is really targeted at immigrants, legal permanent residents as well as illegal aliens.

But even if primarily aimed at immigrants rather than vote dilution more generally, is there not a case to be made? Non-citizens cannot vote; why should they be included in

the apportionment counts? The Boston Tea Party points us in the right direction. Its rallying cry, "No taxation without representation," anticipated the fundamental principle of political representation written into the Constitution.

The idea is simple enough. In mandating that the census numbers for apportionment include all the people, *the Constitution established democracy on the principle that the right to be represented is more basic than the right to vote.* The Framers did not reach this understanding because they were unfamiliar with vote dilution – by including slaves in the apportionment numbers, the slave-holding states received twelve to fourteen extra seats in the House and votes in the Electoral College. This was serious vote dilution for the northern states, which, despite the 14th Amendment, lingered until the 1965 Voting Rights Act.

Every member of Congress seems intuitively to understand that the right to be represented is more basic than the right to vote. No one campaigns on the promise to represent only the "eligible voters of this great district." Campaign literature and congressional web sites refer endlessly to the "constituents" the "members," the "taxpayers," the "good people" of the district, and seldom just to the eligible voters of the district. Congresswoman Miller's web site, for example, offers members of her district the opportunity to have an American flag flown over the Capitol, with, as best I can tell, no requirement that they first prove they are citizens (or even legal residents).

My question to the sponsors of the Amendment: "If you were the only person to vote in your congressional election, and elected yourself, would you not still be the elected representative of all the people of your district?" I hope so; else the *people* of your district have no voice in Congress. Americans want Representatives who recognize an obligation to those who voted against them, as well as those who voted for them; to those who did not vote, as well as those who did; to those who cannot vote, as well as those who can.

If Congress does understand what the framers were driving at when they based representation on a census of the entire population, rather than on a count of the then eligible voters (white, male, property-owners), why more than two centuries later is it holding a hearing on a radical departure from the basic notion of democratic representation? Some believe that there is a partisan agenda – moving seats and Electoral College votes from high immigration to low immigration states is a net benefit to blue states. Others see the intent to erase any hint that those in the country illegally have a claim on political representation. Others fear that this is the opening wedge to an even more radical agenda – if non-citizens are taken out of the apportionment numbers, why stop there. Why not exclude any group ineligible to vote (the under-18, for instance), or, more radical yet, drop those who don't bother to vote. After all, a state with low turnout elects representatives with fewer votes than a state with high turnout, and thus dilutes the voting power of the latter.

I have no way to sort out the motivation of those behind this Amendment – and take at face value their commitment to fairness in our election system – but am certain about its

consequences. The Amendment shifts the constitutional logic of political representation from the people to the voters, and that is a dangerous place to be.

2. In your opinion do Members of Congress represent everyone who lives in their district or just the people who vote for them? For instance, do they represent the children and mentally ill persons who reside in their districts but can not vote?

I believe the Constitution extends the right to be represented to all persons, irrespective of age, mental condition, and eligibility to vote. The historical record shows quite clearly that the nation's first Representatives attempted to represent all the people in their districts, and not just white, male, property-owners – the then eligible voters.

3. Is it your opinion that the votes of residents of large states like Michigan and New York in congress are diluted compared to the vote of citizens of Rhode Island or Wyoming? Is that fair?

Vote dilution is unfair, but that is not the point of the apportionment count. The Framers were familiar with vote dilution, and in fact accepted it as part of the price of moving from the Articles of Confederation to the Constitution and the union it established. Since then, the nation has worked to eliminate vote dilution – most dramatically in the one person, one vote rulings. The appointment count, however, addresses a quite different issue – the basis on which a system of political representation should be established. To solve issues of vote dilution by undermining the basic principle of representation is bad law, bad policy and bad politics.

Sincerely,

Kenneth Prewitt

Kenneth Prewitt
Carnegie Professor of Public Affairs

cc: Rep. Carolyn B. Maloney

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