



MEMORANDUM

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Subject: Analysis of Whether Unauthorized Aliens Must be Included in the Census

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This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum provides a brief analysis of whether unauthorized aliens must be included in the decennial census required by Article 1, section 2, clause 3 of the Constitution,¹ as amended by the Fourteenth Amendment.² The Constitution requires the census determine the “actual enumeration” of the “whole number of persons” in the United States, with the data used to apportion House seats and direct taxes among the states. The apportionment calculation is based on the states’ total resident population, with individuals (both citizens and noncitizens) counted at their “usual residence.”³

It appears the term “persons” in the original Apportionment Clause and Fourteenth Amendment was intended to have a broad interpretation, and it is likely broad enough to include unauthorized aliens. It seems clear “persons” is not limited to “citizens” as the Framers would have likely used that term instead had it been their intent. The Constitution uses both the terms “persons/people” and “citizens of the United States,” and the terms do not seem intended to be interpreted identically --- “citizens of the United States” appears to be a subset of “persons/people.”⁴ Courts have generally held that noncitizens, including unauthorized aliens, are “persons” in the context of other constitutional provisions, including other parts

¹ U.S. CONST. Art. 1, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this 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 actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct ...”).

² U.S. CONST. Amend. XIV, § 2, cl. 1 (“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.”).

³ See U.S. Census Bureau, Population Division, *Census 2000: Plans and Rules for Taking the Census*, available at [http://www.census.gov/population/www/censusdata/resid_rules.html]. Some have argued that the Census Bureau could use a stricter standard than “usual residence,” which could then impact the numbers of unauthorized aliens counted. See Charles Wood, *Losing Control of America’s Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465 (1999)(arguing the Constitution permits a stricter test for residence than the Census Bureau’s “usual residence” standard and does not require the counting of unauthorized aliens because they would not have the requisite stable inhabitancy in a state); *but see Note: A Territorial Approach to Representation for Illegal Aliens*, 80 MICH. L. REV. 1342 (1981-82)(arguing the Constitution, as evidenced by its language and history, requires unauthorized aliens be included).

⁴ See, e.g., U.S. CONST. Art. I, § 2, cl. 2. (“No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”).

of the Fourteenth Amendment.⁵ While it does not appear that any court has decided the meaning of the term “persons” for apportionment purposes,⁶ a federal district court did state in dicta that the term clearly includes unauthorized aliens.⁷

It could be argued that unauthorized aliens should not be included in the category of “persons” for purposes of apportionment because of their legal or voting status. On the other hand, historically, those without the right to vote or with inferior legal status, including women, children,⁸ and convicts, have been included.⁹ Furthermore, the fact that slaves were to be partially counted when they enjoyed few rights seems to suggest the Apportionment Clause language was intended to be broadly inclusive.¹⁰ Similarly, the fact that the Framers felt compelled to specify the exclusion of “Indians not taxed” may suggest “persons” was understood to otherwise include individuals residing within a state, regardless of legal status.¹¹ Thus, it can be argued that “[b]y making express provisions for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive.”¹²

The debates surrounding the original Apportionment Clause and the Fourteenth Amendment add further support for the conclusion that the term “persons” was intended to be broadly interpreted. The Framers adopted without comment or debate the term “persons” in place of the phrase “free citizens and inhabitants” as the basis for the apportionment of the House,¹³ thus suggesting the term “persons” includes free citizens and any other individuals who would be considered “inhabitants.” According to James Madison, apportionment was to be “founded on the aggregate number of [the states’] inhabitants.”¹⁴ During the debate on the Fourteenth Amendment, Congress specifically considered whether the count was to be limited to persons, citizens, or voters.¹⁵ The term “persons” was used instead

⁵ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”). This does not mean that noncitizens must be afforded the same benefits as citizens. See *Matthew v. Diaz*, 426 U.S. 67, 78-79 (1976).

⁶ While several cases have been brought challenging the inclusion of unauthorized aliens, courts have found the plaintiffs lacked standing to bring suit. See *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Penn. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge panel).

⁷ See *FAIR*, 486 F. Supp. at 576 (“The language of the Constitution is not ambiguous. It requires the counting of the ‘whole number of persons’ for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly ‘persons.’”).

⁸ It could be argued that the treatment of women and children should not be compared to that of unauthorized aliens who are violating the laws of the United States. On the other hand, if the purpose of the census is understood to be counting all those individuals who are actually inhabitants of the United States, then the comparison would be appropriate.

⁹ Some states have permitted noncitizens to vote under certain circumstances. Article I, § 2, cl. 1 provides that the voter qualifications in each state for those electing Representatives shall be the qualifications required by state laws for voters electing the most numerous branch of the State legislatures. Historically, some states extended the franchise for electing the most numerous branch of the state legislatures to lawful aliens for all elections. See *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 108-17 283, fn. 1220 and accompanying text (2002); Jamin B. Raskin, *Legal Aliens, Local Citizens: the Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993). Although today no state extends the franchise to aliens generally, some states do permit lawful permanent residents to vote in certain local elections, such as school board elections. The rationale appears to be that lawful residents have all the obligations of local residents, such as local property tax payments, and may have children attending local schools who are either lawful permanent residents or U.S. citizens themselves; therefore, they should be permitted to vote in certain local elections.

¹⁰ See Note, *supra* note 3, at 1354.

¹¹ See *id.* at 1354-55.

¹² See *FAIR*, 486 F. Supp. at 576.

¹³ See M. Farrand, *The Records of the Federal Convention of 1787*, vol. 2, at 571, 590-91.

¹⁴ See *FAIR*, 486 F. Supp. at 576 (citing *The Federalist*, No. 54, at 369 (J. Cooke ed. 1961)).

¹⁵ See CONG. GLOBE, 39th CONG., 1st Sess. 357-59, 2986-87 (1866).

of “citizens” due, in part, to concern that states with large alien populations would oppose the amendment since it would decrease their representation.¹⁶ Another concern with using the term “citizen” was that it “would narrow the basis of taxation and cause considerable inequalities in this respect”¹⁷ Congress may also have been influenced by the fact that aliens could vote in some states.¹⁸ Congress has subsequently considered excluding noncitizens from the apportionment calculation on several occasions,¹⁹ and at least some Members have indicated that any such exclusion would have to be done through constitutional amendment since the Constitution otherwise requires total population as the basis for apportionment.²⁰

The argument could be made that counting unauthorized aliens as “persons” for apportionment purposes dilutes the voting power of citizens in states without significant numbers of unauthorized aliens and, therefore, is inconsistent with the Supreme Court’s decision in *Wesberry v. Sanders*²¹ that requires congressional districts be drawn equal in population to the extent practicable (i.e., “one person, one vote”).²² However, *Wesberry* and its progeny involve intrastate, as opposed to interstate, disparities,²³ and the Court has indicated in another line of cases that the *Wesberry* standard does not apply to interstate apportionment.²⁴ Because each state must have at least one House district and a fixed number of Representatives must be allocated among all states, votes in states with populations less than the ideal district are “more valuable than the national average” and it is “virtually impossible to have the same size district in any pair of States, let alone in all 50.”²⁵ Therefore, while the goal of “complete equality for each voter” under the *Wesberry* standard is “realistic and appropriate for state districting decisions,” the Court

¹⁶ See *id.* at 359 (statement by Rep. Conkling); see also *id.* at 2986-87 (statement by Sen. Wilson).

¹⁷ *Id.* at 359 (statement by Rep. Conkling).

¹⁸ See Note, *supra* note 3, at 1356 (citing to James, *The Framing of the Fourteenth Amendment*, 37 ILL. STUD. SOC. SCI. 3, 195-96 (1956)).

¹⁹ See, e.g., H.J. Res. 20, 101, 263, 356, 484, 71st Cong. (1931); S. 2366, 96th Cong. (1980).

²⁰ See, e.g., 86 Cong. Rec. 4371-72 (1940)(remarks by Rep. Celler asserting that the term “persons” refers to all individuals, including aliens who are in the country unlawfully); *1980 Census: Counting Illegal Aliens, Hearings on S. 2366 Before the Subcomm. on Governmental Affairs*, 96th Cong. 12 (1980) (statement by Sen. Javits asserting that the Constitution requires counting all aliens for apportionment purposes).

²¹ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²² See Dennis L. Murphy, Note: *The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 Case W. Res. 969 (1991).

²³ This distinction is important because the Constitution only requires the use of census data for apportionment among the states, not for redistricting and reapportionment within them. Thus, states can determine what data shall be used for redistricting within a state. See e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (Court indicated in dicta that the use of projected population figures was not per se unconstitutional and that states may properly consider such statistical data if such data would have a high degree of accuracy); *Burns v. Richardson*, 384 U.S. 73 (1966) (Court recognized that, in a particular case, total population might not be the appropriate basis for redistricting plans, and permitted Hawaii to use the number of registered voters as the basis for redistricting the state senate because of the state’s unique circumstances); *Senate of the State of California v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992) (court noted that if a state knows that census data is underrepresentative of the population, it can and should utilize non-census data, in addition to the official count, for redistricting); *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981) (in dicta, the court stated that the state legislature is not required by the federal Constitution to use census data supplied by the Census Bureau for congressional redistricting, but could use adjusted population figures when redistricting between decennial censuses, as long as the adjustment is thoroughly documented and applied in a systematic manner); *City of Detroit v. Franklin*, 800 F. Supp. 539, 543 (E.D. Mich. 1992) (court held that an earlier Supreme Court case did not find that states must use census figures in redistricting; rather, the Supreme Court had “merely reiterated a well-established rule of constitutional law: states are required to use the ‘best census data available’ or ‘the best population data available’ in their attempts to effect proportionate political representation”).

²⁴ See *Wisconsin v. City of New York*, 517 U.S. 1, 13-15 (1996); *Dept. of Commerce v. Montana*, 503 U.S. 442, 461-63 (1992); see also *FAIR*, 486 F. Supp. at 577.

²⁵ *Dept. of Commerce*, 503 U.S. at 463.

has explained that it is “illusory for the Nation as a whole.”²⁶ While this second line of cases does not address the specific issue of whether illegal aliens must be counted for apportionment purposes, they seem to undermine the argument that *Wesberry* and its progeny require their exclusion.²⁷

Some have pointed to the fact that the census has historically included questions about citizenship, thus perhaps suggesting that a distinction has been made between citizens and noncitizens for purposes of counting individuals. It is true that at least two early censuses (1820 and 1830) included a category for foreigners not naturalized²⁸ and later censuses asked about place of birth.²⁹ However, such information was not used to exclude any noncitizens from the census count. Rather, it is clear that such individuals were included in the total count,³⁰ and it appears the data was collected for informational purposes (similar to how information was collected about age, occupation, etc). It does not appear that unauthorized aliens have been excluded from any census.

²⁶ *Id.*

²⁷ See *FAIR*, 486 F. Supp. at 577; see also *Note*, *supra* note 3, at 1358-63.

²⁸ See Carroll D. Wright, *History and Growth of the U.S. Census, Prepared for the Senate Committee on the Census*, Department of Labor (1900), at 133, 139.

²⁹ See, e.g., *id.* at 147, 154 (censuses of 1850, 1860, and 1870).

³⁰ See *id.* at 135, 140-41 (reprinting instructions to the Marshals for the 1820 and 1830 censuses).
