



# Who Represents Illegal Aliens?

A Report by Jack Martin, Director of Special Projects

## EXECUTIVE SUMMARY

Most Americans do not realize that illegal immigrants are also represented by members of the U.S. House of Representatives. How can that be? It is because by interpretation of statute<sup>1</sup> the constituency of Representatives is based not just on the number of citizens but also on non-citizen foreigners residing in the United States, including illegal alien residents. This practice results in granting illegal aliens and other non-citizens equal weight with citizens in their electoral representation.

Rather than apportioning congressional seats among the states on the basis of the full count of the decennial Census, a more logical distribution would be on the basis of the number of native-born and naturalized U.S. citizens. If this were done, states with large numbers of illegal aliens and other non-citizens would lose seats to states that have a higher share of citizens.

## REPRESENTING ILLEGAL ALIENS

The interests of illegal aliens are not only represented in Congress. Mexico and other countries aggressively assert the right to represent their nationals illegally residing in the United States. Through the petition of Mexico, the International Court of Justice has asserted a right to weigh in on the rights of illegal immigrants in the United States. A plethora of national and community-based organizations across the country regularly defend the presence of illegal aliens and work for laws to offer them various protections including amnesty. In addition, our legal system provides access to counsel for indigent illegal aliens in criminal proceedings.

## CURRENT APPORTIONMENT PRACTICE

As a result of the current apportionment system, a representative from an area of the country with very few illegal aliens represents many more U.S. citizens than a representative from a metropolitan area with a large number of illegal aliens. Thereby, U.S. citizens in the low-illegal alien areas have a diminished share of representation than their counterparts in the high-illegal alien districts. For example, in the Dover metropolitan area, the residents in 2000 were 98 percent either U.S. citizens by birth or naturalization. In the San Diego metropoli-

tan area, 87.3 percent of the residents were U.S. citizens. The share of citizens was even lower (84%) in El Paso County, Texas in 2000. This is a form of unequal representation of U.S. citizens.<sup>2</sup>

However, the law governing the composition of congressional districts does not say that all residents of the United States will be the basis for determining the size of congressional districts.<sup>3</sup> Excluded from the representation system are, "...indians not taxed." This exclusion is analogous to the exclusion from U.S. citizenship governed by the 14th Amendment that specifies that all persons, "...subject to the jurisdiction..." of the United States acquire our citizenship when born in the United States. That phrase, "...subject to the jurisdiction..." excluded Indians living in tribal nations among others.

Whether it was the intent of the framers of the Constitution or subsequent Amendments to provide representation of illegal aliens in the U.S. House of Representatives would make an interesting legal discussion. Nevertheless, it is clear that changing the current system to remove the unequal representation of U.S. citizens in that body is a political issue that needs to be pursued in the political arena. Regardless of whether that change should be launched by amending the current statute governing apportionment or through a Constitutional amendment, it should be pursued.

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**DISTRIBUTION OF NON-CITIZENS IN THE 2000 CENSUS**

FAIR's analysis of the 2000 Census data upon which the 2000 apportionment of congressional seats was based, found that:

*If the seats in the House of Representative were reapportioned based on the distribution of U.S. citizens, the big loser of seats would be California, losing 6 seats. Three other states with large immigrant populations both legal and illegal would also lose one seat each, i.e., Texas, New York and Florida. The winners in this reallocation of congressional representation would be the residents of Indiana, Kentucky, Michigan, Mississippi, Ohio, Oklahoma, Pennsylvania, South Carolina and Wisconsin. Those states each would gain one additional representative.<sup>4</sup>*

Since the 2000 Census, both legal and illegal immigrants as well as other nonimmigrant residents have continued to pour into the country. In 2000, one in every eleven residents in the country was foreign-born. Today the share is one in every eight residents is foreign born. As a result, even though there has also been an increase in the number of immigrants gaining U.S. citizenship, representation of U.S. citizens in Congress will be even further distorted if the 2010 Census is used for apportionment in the same way that the 2000 Census was used.

In 2000, there were 31.1 million foreign-born residents in the country. Of these, 12.54 million (40.3% of the foreign-born) were naturalized U.S. citizens. If the 18.57 million non-citizens were excluded from the apportionment, the above described results would have changed not only apportionment in Congress, but also the composition of the Electoral College that elects the President, because that is based in part on the composition of the House of Representatives.

In the 2004 presidential election, based on the 2000 Census apportionment, the Electoral College awarded reelection to President Bush by a vote of 286 to 251. If the apportionment had been made on the basis of U.S. citizens and the above described changes in apportionment had occurred, President Bush would have received an additional five Electoral College votes.<sup>5</sup>

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**A GREATER DISTORTION IN 2010?**

The influx of legal and illegal immigrants and other foreign nonresidents has continued and has increased since 2000. The Census Bureau estimates on the basis of the American Community Survey (ACS) that in 2006 the foreign-born population of the country had increased to 37.55 million residents — an increase of 20.7 percent. This contrasts with a 4.6 percent increase in the native-born population. The 2006 ACS data also shows that the naturalized foreign-born population had increased since the 2000 Census by 25.7 percent. Nevertheless, despite the increase in naturalizations, the number of non-U.S. citizen residents also increased — by 3.2 million persons, 17.3 percent.

If the current system of equal proportion apportionment of congressional seats is maintained, the projected population in 2010 of about 313 million residents will result in the following states gaining seats:

- Arizona (2)
- Florida (2)
- Georgia
- Nevada
- Texas (4)
- Utah

The states that will lose those 11 seats are:

- Illinois
- Iowa
- Louisiana
- Massachusetts
- Michigan
- Missouri
- New York (2)
- Ohio (2)
- Pennsylvania

Note that the immigrant gateway states of California and New York do not stand to gain further seats from the immigrant influx — and New York in fact stands to lose representatives. This is because in this decade the flow of immigrants — both legal and illegal — has shifted to less immigrant-saturated states, and the wave of immigrants to these states has slowed.

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### RESULT OF THE CITIZEN-ONLY SCENARIO

However, if apportionment were done on the basis of equal proportion representation of U.S. citizens in 2010, the results would be very different. The states that would gain seats then would be:

- Indiana
- Iowa
- Louisiana
- Michigan
- Missouri
- Montana
- Ohio
- Oregon
- South Carolina

Those nine seats gained would be lost by the following states:

- Arizona
- California (4)
- Florida
- New Jersey
- Texas (2)

Note that the net swing is greatest in the states with major concentrations of illegal immigrants. Arizona instead of gaining two seats would lose one. California would lose four seats. Texas instead of gaining four seats would lose two — a net difference of six fewer seats. Florida instead of gaining two seats would lose one — a net reduction of three seats.

It should also be kept in mind that any change in the distribution of representation in the House of Representatives has an effect on the composition of the Electoral College. The question that flows from that observation is whether it is appropriate that illegal foreign residents should continue to be accorded weight in the selection of the U.S. President?

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### METHODOLOGY

To make the above calculations required the following projections:

- U.S. population in 2010 — 313,002,000 (The assumption is that the population will continue to grow at the same rate that it has between the 2000 Census and the population estimate of the U.S. Census Bureau based on the 2006 ACS.
- U.S. foreign-born population in 2010 — 42,776,000 (The assumption similarly is a continuation of the growth in the foreign-born population between 2000 and 2006).
- Naturalized U.S. citizens in 2010 — 17,918,000 (The assumption is that the average rate of naturalizations for fiscal years 2001-2007 continues through 2010. An alternative assumption is to continue the rate of change in the naturalized population between the 2000 Census and the 2006 ACS estimate. Both of these assumptions were applied to a calculation of the modified 2010 distribution of seats on the basis of U.S. citizenship, and the results

were identical. The projection for average change through 2006 in the ACS accounts for net change with departures or deaths of the foreign-born population partially offsetting newly naturalized immigrants. The ACS data on the estimated naturalized citizen population is a state-by-state estimate, and it reflects intra-state migration. The projection of the 2010 rate of naturalizations assumes that the trend will continue for the balance of the decade. The annual rate of naturalization is not constant, and a surge in naturalization applications resulted in a major increase in naturalization fees in 2007. However, it is assumed that this surge in applications will be balanced by a subsequent drop in naturalizations.<sup>6</sup>

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IMPACT WITHIN THE STATES

It should be noted that the distortion of representation of U.S. citizens described above applies as well within each of the states. This distortion results from using the same decennial Census Bureau count of all residents in creating the districts of state legislative delegates and senators. States, however, are not governed by the same federal apportionment laws, although it must be noted that the U.S. Supreme Court has ruled that states may not permit unequal representation.<sup>7</sup>

Just as some groups advocate that states should allow non-citizens to vote, others might argue that it is improper to give rep-

resentation to non-citizens in drawing up the districts of state elected officials.

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CONCLUSION

The distribution of political power in our federal system of government logically should rest on representation of U.S. citizens. Foreign nationals residing in our country, whether legally or illegally, are represented by their governments, many of which allow their citizens to vote and hold public office in their home country while residing in the United States.

Inertia and the lack of public awareness of the distortion to representation of U.S. citizens in the U.S. House of Representatives must be overcome if Congress is going to be motivated to take up this reform issue. It seems likely that a large majority of U.S. citizens would support such a change if they realized that the current system increasingly dilutes their representation in Congress with each additional arrival of an illegal alien or foreign guest worker.

The current system of apportioning congressional seats should be changed to reflect only the distribution of U.S. citizens. To do so would not require any change in the data collected by the U.S. Census, and such a change could leave unchanged the system of using Census data on all residents to allocate federal public assistance.

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ENDNOTES

- 1 2 USC 2a & 2b
- 2 The Census is used also to allocate federal funding. Although illegal immigrants, recent legal immigrants, and nonimmigrants are ineligible for public assistance programs, this use of a full count of all residents makes more sense because many non-citizen legal residents are eligible for public assistance and because Census data are not collected that would allow identifying that portion of the foreign-born population that is eligible for such programs.
- 3 The law governing the apportionment of seats for the House of Representatives would have been regulated by the first amendment to the Constitution, but it has never been ratified.
- 4 "Illegal Immigrants Distort Congressional Representation and Federal Programs," FAIR Issue Brief, March, 2007 at ([www.fairus.org](http://www.fairus.org)).
- 5 Electors in the Electoral College are not bound to vote for the candidate who won a majority of the votes in the popular election, but deviations from that practice are so rare that they may be discounted.
- 6 As long as new immigration exceeds naturalizations, the size of the non-citizen population will continue to grow. Immigrants are ineligible to apply for U.S. citizenship in most cases until they have lived in the United States for a number of years (five years, or three years in the case of a spouse or child of a U.S. citizen). Illegal immigrants and nonimmigrant residents are obviously not eligible to apply for U.S. citizenship, and many legal immigrants chose to live permanently in the United States without ever applying for U.S. citizenship.
- 7 Reynolds v. Sims, 377 U.S. 533, 1964.



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