Losing Control of the Nation's Future

Part One: The Census and Illegal Aliens

by Charles Wood

The federal government's current practice of counting illegal aliens in the census is causing serious political harm to America. Legitimate citizen majorities in areas throughout the United States are losing their rightful share of power over the making and enforcement of law and other operations of government – a key element in the determination of the nation's future. The practice is also causing serious non-political harm. Changing the practice should be among the highest-priority goals for Congress and anyone else seeking what is best for the country.

The prevailing interpretation of the Constitution is that illegal-alien residents *must* be counted. But this reading has never been confirmed by the Supreme Court and is likely wrong. A more reasonable and historically well-founded view is that the Constitution neither requires nor prohibits the counting of illegal aliens – and current practice could be changed by federal statute.

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I. COUNTING ILLEGAL ALIENS IN THE CENSUS CAUSES SERIOUS HARM.

Undemocratic reduction of the political representation of many Americans; threat to majority rule

The most serious harm relates to political power and self-determination. Counting illegal aliens in the census makes it possible for areas with many illegal aliens to elect more federal and state representatives than areas with a higher population of citizens and lawful residents, but few illegal aliens.

The number of members of the House of Representatives is fixed at 435. The result of providing additional representatives for areas of the country with many illegal aliens is that some areas of the country with a relatively small number of them will have fewer representatives. As a result of the counting of illegal aliens in the 2000 census, California gained 3 members of the House and 3 electoral votes for President, and North Carolina gained 1. Four other states each lost 1: Indiana, Michigan, Mississippi, and Montana. *See* Dudley L. Poston, Jr., Steven A. Camarota, and Amanda K. Baumle, "Remaking the Political Landscape: The Impact of Illegal and Legal Immigration on Congressional Apportionment," Center for Immigration Studies, *Backgrounder,* 14-03, October 2003.

[http://www.cis.org/articles/2003/ back1403.html].

In addition, the illegal-alien population is considered in the distribution of state and federal legislators *within* most states. Therefore, even in states with relatively many illegal aliens, some lawful residents are likely to have lost representatives because of the current policy, regardless of the effect on the state as a whole.

It is a distortion of democratic principles to increase the number of representatives for one area of the country at the expense of other areas, unless there is a relative increase in the constituency whose interests such representatives should actually serve – the area's lawful residents.

Another result of the current policy is that congressional districts with many illegal aliens will have fewer citizens casting votes for their representatives than districts with many such aliens. Thus, each citizen-voter in the district with many illegal aliens will have a greater voice in selecting a representative. For example, about 100,000 votes were required to win a Congressional election in one of the states that lost a seat because of the counting of illegals, but less than 35,000 votes in two districts in California. *(See* the Center for Immigration Studies, *Backgrounder,* previously cited.) This, too, is undemocratic. And here too, the difference occurs *within* states as well as between them.

Perverse incentives for government officials

There is a risk that some legislators from areas receiving enhanced representation because of a disproportionate number of illegal aliens may find it in their political interest to support policies that encourage such aliens to reside in their areas. Because the allegiances, values, and circumstances of illegal aliens may be very different from that of most Americans, some of the policies they favor (for example, lax enforcement of the immigration laws, public benefits for illegals, and high levels of immigration) will not be in the interests of a majority of citizens. Similar incentives may cause other public officials to ignore immigration violations or refuse to cooperate with federal immigration officers.

Unrealistic 10-year apportionment

The apportionment impact of counting illegal aliens in a particular census lasts a full decade, even though the continued presence of an illegal alien in the U.S. is presumably much more uncertain than that of a citizen or lawful permanent immigrant. And it is likely that the uncertainty will rise. An illegal is always potentially deportable and in the future is likely to find it increasingly hard to live here because both work and welfare will become more difficult for illegals to obtain – as greater efforts are made to control illegal immigration.

II. COUNTER-ARGUMENT, WITH REBUTTAL

Population-related impacts are the same.

Defenders of current practice argue that the illegal-alien residents are in a practical sense just as much a part of an area's population as anyone else, since they have a similar impact on the community. For example, it is argued, illegal aliens contribute to the economy and to tax revenue, and they use the area's housing, government services, and public resources such as roads and parks. It follows, in this view, that the area's representation in the House should reflect their presence so that the interests of all the area's residents, including its lawful residents, can be appropriately protected.

Rebuttal – This view is not consistent with the traditional American conception of democracy. Additional representation is not given to wealthier areas because their residents may contribute more to the economy or pay more taxes, and it is not given to poorer areas because their residents may have a greater need for certain government services. Furthermore, the presence of a large group of individuals in a given area on census day, for example because of a convention or rally – a presence that has a significant impact on the area's tax revenue or use of government services – has never been thought a sufficient reason to count them in that area's population for apportionment, even if it is characteristic of the area to have such a group present.

III. CURRENT CENSUS PRACTICE MAY CONSTITUTIONALLY BE CHANGED BY STATUTE.

Census Clause requires interpretation.

The controlling language in the Fourteenth Amendment states:

> 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.

The Census Bureau believes that this language requires that all persons whose "usual residence" is in a state be counted.

But neither "resident" nor "residence" appears in the constitutional language. The agency's position is based on the view, the correct view, that an understanding of the Census Clause requires *interpretation* – not a literal reading of the single phrase "counting the whole number of persons in each

State" taken out of context.

It is true that interpretation is required, but the Census Bureau's interpretation is not the only one possible. Nor is it the most reasonable one. The language can, and should, be read more narrowly, to require a more likely long-term presence in a state.

The appropriate context for interpreting the phrase "counting the whole number of persons" is the entire provision, especially the words *"their* [the states'] respective numbers." Given the purpose of the census – to determine relative state population totals that will be the basis for apportioning representatives for the subsequent full decade – this latter phrase is most reasonably interpreted as calling for a presence in the state which is likely to last for some time.

Nor was the phrase "whole number" understood by the framers to require otherwise. It was included to emphasize the change from the original Constitution, which required that only three-fifths of the number of slaves be counted.

The Census Bureau has never attempted to count every person physically in a state during the census. Current exceptions include tourists and other short-term visitors, seasonal residents, diplomats, members of Congress, and certain students, even when they actually live in the state for most of the year.

Furthermore, the agency's own application of its "usual residence" standard has occasionally changed. For example, U.S. citizens residing on military bases abroad have sometimes been counted in a state's apportionment, and sometimes have not. Thus, the Census Bureau itself has recognized that the determination of whether particular persons should be included in a state's population is not a mechanical process. Rather, some judgment is required concerning whether persons in particular circumstances have a sufficient connection to the state.

This Article does not claim that the Census Bureau's interpretation is unreasonable or that the policy based on it is unconstitutional. It argues that another reading is even more reasonable – and has greater historical support.

The Framers understood the Census Clause to mean that only the "inhabitants" of a state would be counted – and believed that in order for a person to be an "inhabitant" of a state there had to be a likelihood that the person would have long-term presence in the state, which was not necessary for a person to be a "resident."

Because the Census Clause is ambiguous, the process of interpreting its meaning should include an effort to determine how the framers themselves understood the language they adopted. I have found no evidence that the framers of the Fourteenth Amendment understood the phrase "their [the states'] respective numbers" (which was also contained in the original Constitution of 1789) any differently than the original framers, or that their changes to the rest of the clause altered its meaning except in relation to direct taxation and counting slaves. Thus, the original framers' understanding of this phrase should be considered.

According to the available evidence, the understanding of the framers of the original provision of 1789 was that apportionment would be based on the relative number of "inhabitants" of the states. The drafts of the apportionment provision, including the version initially *approved* by the Constitutional Convention, used this term rather than "persons" or "residents." The Committee of *Style* replaced the phrase "citizens and inhabitants, of every age, sex and condition" with the single word "persons" in the description of how the states' "numbers" were to be counted. I have found no evidence suggesting that the change was believed to broaden the scope of the provision or otherwise to be more than stylistic. In addition, both James Madison in the Federalist Papers and the original census statute refer to "inhabitants" as the subject of the census and the basis of apportionment.

What did the word "inhabitant" mean at that time?

Contemporary dictionaries show that an "inhabitant" of a place was understood to have a long-term presence there. Some of the definitions have even suggested that a kind of lawful status was required. For example, Webster's 1828 dictionary, the first and for many years the authoritative American dictionary, defines "inhabitant" as a

> dweller; one who dwells or resides *permanently* in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. …One who has a *legal settlement* in a town, city or parish. The conditions or qualifications which constitute a person an inhabitant of a town or parish, *so as to subject the town or parish to support him, if*

> *a pauper*, are defined by the statutes of different governments or states. (Emphasis added.)

In this passage, note the reference to "legal settlement" and to a town's obligation to support one of its inhabitants "if a pauper" – and consider that not only is the presence of illegal aliens unlawful, but they are disqualified from receiving most forms of need-based public assistance.

The dictionary defines "Inhabit" as "[t]o live or dwell in; to occupy as a place of *settled residence."* (Emphasis added.) The definition of "dwell" is "[t]o abide as a *permanent resident,* or to inhabit for a time; to live in a place; to have a habitation for *some time or permanence* .... Dwell imports a residence of *some continuance."* (Emphasis added.)

Samuel Johnson's 1755 Dictionary defines "inhabitant" and related terms in a similar manner. So does the Oxford English Dictionary, as published over a number of years in the late 19th and early 20th Centuries (1884-!928, 1933). Its definition of "inhabitant" refers to Article I, Section 2 of the Constitution, which states that "[n]o person shall be a representative who shall not … be an inhabitant of that State in which he shall be chosen." "[I]nhabitant" was substituted for "resident" during the drafting of that provision partly because, according to James Madison, it was less "vague" and it related to a person's *long-term connection* to a state: it "would not exclude persons absent occasionally for a considerable time on public or private business."

The Oxford English Dictionary definition also contains a reference to a disputed congressional election resolved by the House of Representatives in 1824. This case was described in a report of the House Committee on Elections. The report states that the change from "resident" was made because "inhabitant" was "a *stronger term,* intended more clearly to express [the convention's] intention that the persons to be elected should be *completely identified with the State* in which they were to be chosen." (Emphasis added.) The Report also states that "inhabitant" referred to *"bona fide* members of the state, subject to all the requisitions of its laws, and *entitled to all the privileges and advantages which they confer."* (Emphasis added.)

Thus, there is strong historical evidence that the framers of the original census provision believed that for a person to be part of a state's "number," their presence in the state must be likely to be long-term. The Fourteenth Amendment changed the original 1789 provision by omitting the reference to taxes and the three-fifths rule for counting slaves. I found no evidence that the phrase "their respective numbers" in the new language was understood to have other than the original meaning.

Congress has authority to determine that illegal aliens lack sufficient likelihood of long-term presence in a state to be considered part of a state's number for apportionment.

The Constitution does not define the kind of connection to a state which a person must have before the person may, or must, be counted.

The Constitution grants to the legislative branch authority to act in this area. Congress may (1) direct by law the "[m]anner" in which the census is conducted; (2) "enforce" provisions of the Fourteenth Amendment; and (3) make all laws that are "necessary and proper for carrying into [e]xecution" its specifically enumerated powers. These provisions appear to provide ample authority for Congress to make the necessary determination, within reason, of whether or not any particular set of circumstances shows insufficient likelihood of long-term presence in a state for a person to be counted as part of a state's "number" for apportionment purposes.

Furthermore, it would be reasonable for Congress to exercise this authority by enacting legislation providing that illegal aliens' likelihood of long-term presence in a state is *per se* insufficient for them to be included in the state's apportionment base. Illegal aliens are continuously vulnerable to deportation, and are ineligible for employment and most public assistance programs. As a result, they may be compelled, by federal officers or out of practical necessity, to leave the United States at any time. Moreover, the probability that an illegal alien will be deported or unable to find work or welfare appears likely to increase in the next few years as efforts to control illegal immigration increase. If such an increase does occur, then so will the reasonableness of such a per se rule.

IV. COUNTER-ARGUMENT, WITH REBUTTAL

Plain language of the Census Clause

Proponents of the prevailing view argue that the "plain language" of the census provision – "whole number of persons in each State" – requires the counting of all illegal-alien residents of a state.

Rebuttal – The assertion that the "plain language" requires the counting of persons who reside in a state, much less the persons who satisfy the Census Bureau's "usual residence" standard, is simply incorrect. "Resident," "residence," or "reside" are not present in the provision, and the words that are present do not require this meaning. The Census Bureau's standard is no less an interpretation, rather than a literal reading of unambiguous language, than the standard proposed in this Article (and the latter is the more reasonable of the two interpretations, given the purpose of the census and the legislative history). Indeed, as pointed out previously, the Census Bureau itself has occasionally changed its policy concerning which persons will be counted in the population of a state.

Intended meaning of "persons"

Proponents of the prevailing interpretation argue that the framers of the original Constitution understood and intended the word "persons" to have a broad meaning, as shown by their rejection of arguably narrower terms such as "inhabitants" (which they did use in several other provisions).

Rebuttal – The use of a word with a potentially broad meaning, such as "persons," instead of a narrower but not incompatible term like "inhabitant" does not prove that the broader meaning was intended. That is why, for example, under any reasonable interpretation of the Constitution's apportionment language, including that of the Census Bureau, foreign tourists – who are obviously "persons" – should not be included in the apportionment base.

When the Committee of Style replaced the nine-word phrase "citizens and inhabitants, of every age, sex and condition," which had appeared in the draft *approved* by the Committee of Detail and by the Convention as a whole, with the single word "persons," the framers of the original Constitution would not have had any reason to believe that the meaning had changed in the absence of statements to the contrary by the Committee of Style or others. And no available evidence indicates that the change was intended (or understood) to be other than stylistic.

Meaning of "person" in the Due Process and Equal Protection Clauses

Proponents of the prevailing interpretation argue that it is unreasonable to interpret the word "person" to include illegal aliens when it is used in the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment, but not when it is used in the apportionment provision of Section 2.

*Rebutta*l – What must be interpreted in both Section 1 and Section 2 of the Fourteenth Amendment is not the single word "person" or "persons" or short phrases in which they appear, but rather the entire provisions. The Due Process Clause prohibits a state from depriving "any person" of life, liberty, or property without due process of law. The Equal Protection Clause prohibits a state from denying "any person within its jurisdiction" the equal protection of the laws.

There is nothing in either of these clauses of Section 1 which is comparable to the Census Clause language, "apportioned among the states according to *their* respective numbers" (emphasis added), language suggesting – given the purpose of the census – that only some persons physically present in a state are to be counted, namely those who have some minimum likelihood of long-term presence there and who are, therefore, among *its* number. In contrast, under the language of Section 1, due process and equal protection are owed to *all persons present* in a state, regardless of the degree of their connection to it. That is why foreign tourists, for example, are entitled to these protections.

Furthermore, the difference in scope of coverage between the Census Clause and these other two clauses is quite reasonable because the policy considerations that apply to them are entirely different. Apportionment is like a zero-sum game: a relative increase in the population of one state can result in an increase in the number of that state's representatives in the House and electoral-college votes for President, but if this happens, there must be a decrease in the number for one or more other states – a possibility which experts from the Census Bureau and elsewhere believe has already happened. *(See* the Center for Immigration Studies *Backgrounder* cited earlier in this article.) In contrast, equal protection and due process can be provided to additional persons in a state without a decrease in the protections afforded to other persons in the state or in other states.

Finally, if it were correct that the persons covered

by these clauses are the same, then census practices ever since 1868 would have to be regarded as unconstitutional. Rights of due process and equal protection are owed to *all* "persons" present in a state, including nonresidents. But the Census Bureau has never sought to count everyone in a state.

Original intent to include all aliens

Proponents of the prevailing interpretation argue that the framers of the Fourteenth Amendment intended that aliens be counted for apportionment, and there is no indication that for this purpose they distinguished between illegal and legal aliens.

Rebuttal – The initial part of this argument is true. But the rest is misleading. First, the provision as understood by the framers is entirely consistent with (though it does not require) a distinction between legal and illegal aliens, based on the difference in the likelihood of their long-term presence in a state.

Furthermore, it is at least misleading to claim that illegal aliens existed when the Fourteenth Amendment was written, and that the failure to provide expressly for their exclusion shows that the framers understood the apportionment language to require that all illegal-alien residents be counted, no matter how unlikely their long-term presence may be.

Although certain aliens could not at the time be transported lawfully to this country, and others could not enter lawfully without permission, this did not mean that aliens who entered the United States in connection with a violation of such a law faced a significant risk of deportation. There was also no statute making it unlawful to employ them.

Thus, the presence in a state of the kind of aliens to which the advocates of the prevailing view refer does not appear to have been significantly less likely to be long-term than that of citizens or other aliens. I emphasize again that it is the significant risk of deportation, or departure after inability to obtain employment or public assistance, that makes it reasonable for Congress to conclude that under present and likely future circumstances, the presence of illegal aliens in a state is not sufficiently likely to be long-term for them to be included in its apportionment base.

Congressional acquiescence

Proponents of the prevailing view argue that for 200 years the census has aimed at counting every person whose "usual residence" was in a state during the census, including aliens – even illegal aliens, after that category came into existence. Congress's failure to require any substantial change, it is argued, supports the view that the policy is constitutionally required.

Rebuttal – Congressional acquiescence may be some evidence that an executive-branch agency's interpretation of a federal *statute* is correct, though not necessarily that it is the only correct interpretation. But no similar principle applies to the interpretation of the *Constitution* – except, perhaps, to the extent the acquiescing Congress is composed of the same individuals as the Congress that ratified the constitutional language. Because illegal aliens in the modern sense – with unlawful status and continuous liability to expulsion – did not exist in 1789 or 1868, or at any time close to those years, that possible exception could not apply.

V. CONCLUSION

The most serious harm caused by the current census practice, the harm that makes change so urgent, relates to political power, as stated previously. The practice of counting illegal aliens – especially when combined with the granting of U.S. citizenship to all their U.S.-born children – threatens the ability of the majority of Americans to ensure that political control at every level of government will always remain with them and their descendants, plus those persons, and only those persons, to whom they have given their consent to join the American political community.

If the policy is not changed soon, it will be too late for the next census. Congress will have decided, in effect, to continue for another decade the damaging effects of a practice that a majority of Americans surely oppose strongly, and that almost certainly would have been disfavored by the framers of both the original Constitution and the Fourteenth Amendment.

A maximum effort should be made now – not only to stop the serious damage that the practice is causing, but because the needed change is going to be increasingly difficult to accomplish, because of political conditions increasingly unfavorable to the reform – conditions that the practice itself promotes.

The thesis of this article is that Congress can decide through statute to count or not to count illegal aliens, depending on its judgment about whether they are likely to have a long-term presence in a state. But if the needed change cannot constitutionally be accomplished by statute, then a constitutional amendment should be pursued until ratification is achieved. ■