

“We the People” Does Not Include Foreign Nationals

Testimony of

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Against the Trump Administration’s Unconstitutional Attacks”

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## “We the People” Does Not Include Foreign Nationals

By John C. Eastman

Good morning, Chairwoman Maloney, Ranking Member Comer, and the other members of the House Committee on Oversight and Reform. Thank you for inviting me to participate in this important oversight hearing addressing President Trump’s recent directive to exclude illegal aliens from the apportionment base following the 2020 Census. I should state at the outset that the title of this hearing, “Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration’s Unconstitutional Attacks,” assumes the very thing that ought to be under consideration, namely, whether President Trump’s directive is indeed unconstitutional because it does not “coun[t] every person.” I believe it is not and, further, that the asserted obligation to “coun[t] every person” is demonstratively false, from the text of the Constitution, the political theory underlying it, historical practice, and judicial precedent.

Let me start first with the political theory, as I am strongly of the view that it must inform our interpretation of the Constitution’s text. That theory is set out most eloquently and definitively in the Declaration of Independence. At the very outset of that document, our Founders announced to the world that “one people”—the American people—were “dissolv[ing] the political bands” that had previously “connected them with another” people and “assum[ing] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” Decl. of Ind. ¶ 1. They then articulated a set of principles that, though universal in their reach, provided the rationale for that particular “one people” legitimately to declare independence and to institute a new Government that they believed would be more conducive to their safety and happiness. The key to their philosophic claim was the

self-evident truth of human equality, and the corollary truth which flows from it, namely, that governments derive “their just powers from the consent of the governed.” *Id.*, ¶ 2.

Let me put it a different way. The Declaration asserts as a universal and self-evident truth that all men, all human beings, are created equal, Decl. of Ind. ¶ 2, but that universal truth was to be given effect in a particular political regime, where it had “becom[e] necessary for *one people* to dissolve the political bands which [had] connected them with another.” *Id.* ¶ 1 (emphasis added). The Declaration also espouses the further universal principle that all human beings are “endowed by their Creator with certain unalienable rights,” but then likewise moves to the particular application, asserting “That to secure these rights, Governments are instituted *among Men*, deriving their just powers from the *consent of the governed*.” *Id.* ¶ 2 (emphasis added).

These statements embody the political theory of representative government, namely, that representatives are to be chosen to exercise the powers given to government by the consent of *the people* that are to be governed thereby. That people—that distinct body of people who form the body politic—provide the necessary consent for *their* government, “laying its foundation on such principles and organizing its powers in such form, as *to them* shall seem most likely to effect *their* Safety and Happiness.” *Id.* (emphasis added). Other peoples in other places in the world might choose to adopt different forms of government as they determine best suited for their safety and happiness; such is equally their universal right. But the requirement of consent that flows from the self-evident truth of human equality no more permits other peoples to determine how (or by whom) the people of the United States will govern themselves than for the people of the United States to determine how others shall govern themselves.

This political theory is manifest in the text of the Constitution as well. That document begins with “We the People of the United States,” not “We the People of the World” or “We the People of any and all foreign nations who happen to be present in the United States when a census is taken.” U.S. Const., Preamble. That particular application of “People” is repeated in Article I, Section 2, which specifies in Clause 1 that “The House of Representatives shall be composed of Members chosen every second Year by the *People of the several States*....” *Id.*, Art. I, § 2, cl. 1 (emphasis added). And it is certainly implied later in that same section, which (as amended by the Fourteenth Amendment after the abolition of slavery), provides that “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.” Art. I, § 2, cl. 3, as amended by Amend. XIV, § 2. These were to be the “representatives” chosen by the “People of the several States” specified in Clause 1, part of “We the People of the United States” specified in the Preamble. They were to be apportioned among the several States based on the States’ “respective numbers,” which is to say, numbers of the people who were to be represented. The phrase, “persons in each State,” contained in clause 3 is therefore to be understood as referring back to the “people” specified in clause 1 and in the Preamble. Such a reading is the only one that comports with the underlying theory of representative government. And it is also consistent with the text of the clause as originally proposed, which referred to “inhabitants” rather than “persons.” “Inhabitants” at the time meant “domiciled,” which is to say, legally and permanently present, part of the body politic. The change in phraseology from “inhabitants” to “persons” was made by the Committee on Style, which had no authority to, and hence did not, alter the substance of the draft Constitution. 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 566, 590 (rev. ed. 1966).<sup>3</sup> And it is consistent with the exception for

“Indians not taxed,” who though physically present “in the State” were not part of the State’s political community. As the Supreme Court noted in *Elk v. Wilkins*, “Indians not taxed are . . . excluded from the count, for the reason that they are not citizens.” 112 U.S. 94, 102 (1884). By contrast, Indians who “were taxed to support the government”—that is, were part of the body politic—“should be counted for representation.” *United States v. Kagama*, 118 U.S. 375, 378 (1886).

The theory and textual interpretation outlined above is also fully consistent with historical practice on both sides of the “persons *in each State*” side of the coin. Since the beginning, the census has not counted every person physically present “in each State” at the time the census was conducted. Visitors (whether from foreign countries or from other states) and diplomats who were “in” a State have routinely been *omitted* from the State’s “Numbers,” for example. *See, e.g.*, “Residence Rule and Residence Situations for the 2010 Census,” United States Census 2010 (“***Citizens of foreign countries who are visiting the U.S. on Thursday, April 1, 2010 (Census Day), such as on a vacation or a business trip*** - Not counted in the census”);<sup>2</sup> *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 567 (D.D.C. 1980) (noting that foreign diplomats and foreign tourists have not been counted). And citizens who were abroad at the time of the Census have at times been *included* even though not “in” the State at the relevant time. *See, e.g.*, Act of Mar. 1, 1790, § 5, 1 Stat. 103 (“every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he usually resides in the United States”). Both decisions are in full accord with the theory of representative government by consent espoused in the Declaration and manifested in the Constitution’s phrases, “We the People of the United States” and “People of the several States,” even if some might view them as

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<sup>2</sup> Available at [https://www.census.gov/population/www/cen2010/resid\\_rules/resid\\_rules.html#FIVE](https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html#FIVE).

somewhat at odds with a hypertechnical textual interpretation of the phrase, “persons in each State.”

Finally, this unifying explication of the various phrases in the Constitution is in accord with Supreme Court precedent. In *Franklin v. Massachusetts*, for example, the Supreme Court noted that the phrase, “in each State,” “can mean more than mere physical presence, and has been used broadly enough to include *some element of allegiance* or enduring tie to a place.” 505 U.S. 788, 804 (1992) (emphasis added). That case involved a challenge to the Secretary of Commerce’s decision to count overseas military in the census count of their “home of record” even though they were not physically present “in the state” at the time of the census, but the “element of allegiance” also applies in the obverse situation as well, to *not count* those who are physically present in a state but not allegiant to it. As was noted by Representative Bailey during the 1824 debate over the qualification of John Forsythe to serve in Congress (under the related requirement in Article I, Section 2, Clause 2 that a representative must be “an Inhabitant of that State in which he shall be chosen”), if “the mere living in a place constituted inhabitancy,” the residency requirement would “exclude sitting members of this House.” M. Clarke & D. Hall, *Cases of Contested Elections in Congress* 497 (1834) (quoted in *Franklin*, 505 U.S. at 805).

The Court’s decision in *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964), is likewise fully in accord with the interpretation offered above. Although that case dealt with the requirements of the Fourteenth Amendment’s Equal Protection Clause rather than the apportionment clause, its extensive focus on “citizens” was key to its holding. “[A]chieving of fair and effective representation for all *citizens* is concededly the basic aim of legislative apportionment,” it noted. *Id.* at 565-66 (emphasis added). Repeatedly throughout the opinion, the Court focused on the equal rights of voters and citizens, rather than simply persons. “Undeniably the Constitution of

the United States protects the right of all qualified citizens to vote,” it stated. *Id.*, at 554 (emphasis added). It referred to “all qualified voters.” *Id.* It spoke of the “right to vote freely” as “the essence of a democratic society. *Id.*, at 555. And it reaffirmed its holding in *Baker v. Carr*, 369 U.S. 186 (1962), that a claim “that the right to vote of certain citizens was effectively impaired since debased and diluted” “presented a justiciable controversy.” *Id.*, at 556 (emphasis added).

Additionally, relying on its prior decision in *Gray v. Sanders*, the *Reynolds* Court referenced the constitutional command that, when exercising “the voting power,” “all who participate in the election are to have an equal vote. . . .” *Reynolds*, 377 U.S., at 557-58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963)). It repeated the passage from *Gray* noting that the “concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications,” again focusing on voters. And it reaffirmed that the “idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court’s] decisions.” *Id.*, at 557-58.

Similarly, relying on its prior decision in *Wesberry v. Sanders*, the *Reynolds* Court stated that “the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote . . . .” *Id.*, at 559 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964)). “[T]he constitutional prescription for election of members of the House of Representatives ‘by the People,’” it added, “means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” *Id.*, at 559. And it drew the conclusion from *Gray* and *Wesberry* that “one person’s vote must be counted equally with those of all other voters in a State.” *Id.*, at 560 (emphasis added).

This emphasis on “voters” and “citizens” has been reiterated time and again in subsequent decisions by the Supreme Court. For example, when “calculating the deviation among districts,” the Court noted in *Board of Estimate v. Morris*, “the relevant inquiry is whether ‘the vote of any citizen is approximately equal in weight to that of any other citizen.’” 489 U.S. 688, 701 (1989) (emphasis added, quoting *Reynolds*, 377 U.S., at 579). “The object of districting is to establish ‘fair and effective representation for all citizens.’” *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds*, 377 U.S., at 565-68). “[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.” *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). “[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and ... the concept of equal protection therefore requires that their votes be given equal weight.” *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977). *See also, Bush v. Gore*, 531 U.S. 98, 105 (2000) (“It must be remembered that ‘the right of suffrage can be denied by a debasement or *dilution of the weight of a citizen’s vote* just as effectively as by wholly prohibiting the free exercise of the franchise”) (emphasis added, quoting *Reynolds*, 377 U.S., at 555). In sum, the Supreme Court has repeatedly recognized that the protection afforded by the one-person, one-vote principle is for “groups constitutionally entitled to participate in the electoral process.” *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

To be sure, elsewhere in the *Reynolds* opinion, the Court spoke of “equal numbers of people.” *Reynolds*, 377 U.S., at 561. “Legislators represent people, not trees or acres,” it famously said. *Id.*, at 562. It described the constitutional mandate as “one of substantial equality of population,” noting that districts should be “apportioned substantially on a population basis”



and that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” *Id.*, at 559, 577.

But with these references, the Court was treating “people” synonymously with “citizens,” “voters,” and “constituents.” See *id.*, at 577 (“We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters”) (emphasis added); *id.*, at 562-63 (“the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical” to a scheme which gives some voters more votes than others); see also *Burns*, 384 U.S., at 91 (“At several points [in *Reynolds*], we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population”). This was undoubtedly due to the fact that, at the time, there was not a significant variation across districts between total population, citizen population, and voter population. See, e.g., *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that “a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State”), *aff’d*, 382 U.S. 4 (1965); cf. *Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (“Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa”).

More fundamentally, the Supreme Court in *Reynolds* described “equality of population” as a means to the end of equal voting power of citizens, not an end in and of itself. “[T]he overriding objective must be substantial equality of population among the various districts,” the Court held, “so that the vote of any citizen is approximately equal in weight to that of any other

citizen in the State.” *Id.*, at 579 (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 744 (1973); *Mahan v. Howell*, 410 U.S. 315, 322 (1973); *Burns*, 384 U.S., at 91 n. 20; *Connor v. Finch*, 431 U.S. 407, 416 (1977). It described “population” as “the starting point . . . in legislative apportionment controversies.” *Reynolds*, 377 U.S., at 568 (emphasis added). Although it also said that “population” was “the controlling criterion,” it immediately thereafter referred again to “[a] citizen, a qualified voter,” *id.*, and subsequently noted that its “discussion [in *Reynolds*] carefully left open the question what population was being referred to,” *Burns*, 384 U.S., at 91. Moreover, the *Reynolds* Court explicitly held that “The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens.” *Reynolds*, 377 U.S., at 568. “Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable,” the Court added. *Id.*, at 563. Indeed, the *Reynolds* Court found it hard to imagine that the Founders would have countenanced a districting system that afforded differential weight to the votes of some citizens at the expense of others:

We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . .

*Id.*, at 563-64 (quoting *Wesberry*, 376 U.S., at 8). And lest there be any confusion that by the word “inhabitants” the Court meant anything other than “citizens,” it included a quotation from James Wilson’s *Lectures on the Constitution*, in which Wilson described what was required for an election to be “equal”:

(A)ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

*Reynolds*, 377 U.S., at 564 n.41 (quoting *Wesberry*, 376 U.S., at 17, in turn quoting 2 The Works of James Wilson 15 (Andrews ed. 1896)).

In sum, by repeatedly focusing on “citizens” and “voters” as the object of the one-person, one-vote principle the Supreme Court has derived from the Equal Protection Clause, the logic *Reynolds* and its progeny requires that districts be fashioned based on an equal number of citizen-voters, not a broader understanding of “population” that includes non-citizens, particularly non-citizens who are not lawfully present in the United States. That is why, in *Burns*—the only case in which the Court was presented with factual circumstances where the distribution of total population and voting population differed significantly from one district to the next—the Court upheld a districting plan with wide divergence in total population across districts, because the districts were approximately equal in the number of registered voters (which, in that case, was a close proxy for the eligible voter/citizen population). As Judge Kozinski correctly noted, although “*Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so.” *Garza*, 918 F.2d, at 784 (Kozinski, J., concurring and dissenting in part).<sup>3</sup>

What all this demonstrates is that representation in the national government was not apportioned among the States based on the total number of people who happened to be present in the state at any given moment, but only on that part of the population which comprises or becomes part of the body politic. *Cf. Foley v. Connelie*, 435 U.S. 291, 295 (1978) (“A new

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<sup>3</sup> The Supreme Court’s recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), is not to the contrary. In that case, the Court held that Texas was not *required* to use voter population instead of total inhabitant population as the basis of intrastate districting. It did not hold that Texas was required to use total population, and its passing references to the apportionment clause of Article I, Section 2, sometimes mentioning “population,” sometimes “inhabitants,” was done without examining in any close detail the questions presented here.

citizen has become a member of a Nation, part of a people distinct from others” (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). Today, temporary sojourners, particularly those who are not lawfully present in the United States at all, stand in the same position with respect to representation in government as those “Indians not taxed” did at the time of the Founding. They owe allegiance to another sovereign, and are therefore no part of this body politic, no part of the “groups constitutionally entitled to participate in the electoral process” here. *Burns*, 384 U.S., at 92. To count them in the apportionment process, at least when they are unevenly distributed across districts, is necessarily to dilute the votes of some portion of the body politic—of the citizenry—at the expense of another portion. That would violate the principle of *Reynolds*, the same principle to which the Founders gave effect by including in their reapportionment calculus only members of the body politic.

President Trump’s directive is therefore not only permissible under the Constitution’s apportionment clause, it is fully in line with the Constitution’s related references to “We the People of the United States” and “People of the several States,” as well as the political theory underlying the entire edifice of representative government. And it is as much a valid exercise of the discretionary authority Congress has delegated to the executive to determine the manner and content of the census as was the decision by the Secretary of Commerce to include in the 1990 census count of those present “in the several States” members of the military who were residing abroad, a decision upheld by the Supreme Court in *Franklin v. Massachusetts*. Indeed, I would say that the President’s directive tying the census back to the people who form the body politic of the United States, thereby ensuring that our government is chosen by those who have given their consent to it, is long overdue. If anything, it should be expanded to include non-citizens more broadly, not just non-citizens who are unlawfully present in the United States.