

The Myth of Widespread Non-Citizen Voting

A Response to the Heritage Foundation

August 20, 2008

Table of Contents

I. Introduction	2
II. Von Spakovsky’s Argument and Skewed Evidence	3
A. Egregious Misreading of GAO Study	3
B. Unsubstantiated Examples of Illegitimate Election Results	5
C. Administrative Errors Often Explain Allegations	6
III. Deterrents to Non-Citizen Voting	7
A. Criminal Penalties	7
B. NVRA	8
IV. Actual Threats to Our Voting Systems	9
A. Voter Caging	10
B. Poll Workers’ Perceptions of Latino Voters	11
C. Voter Intimidation	12
D. The Scope of Actual Threats to Democracy	13
V. Conflating Non-Citizen Voting with Voter Fraud	14
VI. Von Spakovsky’s Flawed Proposals	14
A. Proof of Citizenship Laws	15
B. Increased Prosecution	16
C. Misuse of E-Verify System	17
VII. Conclusion	18

I. Introduction

In a recent segment, CNN anchor Lou Dobbs told viewers that substantial evidence suggests that large numbers of non-citizens, including undocumented immigrants, are voting in federal elections and could be the deciding factor in November's elections. The story primarily cites a recent report published by the Heritage Foundation. The report is written by former recess-appointed FEC Commissioner Hans von Spakovsky, whose troubling record on voting rights caused him to withdraw his name from consideration for a permanent FEC seat. Von Spakovsky's report contains gross distortions and represents an attempt to support a policy agenda that would disenfranchise many U.S. citizens.

Less than a minute into the CNN report, Lou Dobbs makes a statement that summarizes the prevailing theme of von Spakovsky's report:

There's startling new evidence tonight that our democracy is at risk on a number of fronts, including a new study showing that non-citizens, including illegal aliens, are voting in our elections . . . If this year's presidential election remains as close as it appears to be now, this election could in fact be decided by fraud.¹

Reality, however, does not accord with this analysis. Far from being a problem that could swing elections, non-citizen voting is virtually non-existent and allegations of it are peddled by anti-immigrant groups and others bent on promoting a discriminatory, anti-democratic agenda.

First, this ***Truth in Immigration*** report will scrutinize von Spakovsky's cited examples of non-citizen voting in order to dispel the notion that non-citizens regularly vote. Second, this report will address how non-citizens have strong incentives not to vote

¹ *Lou Dobbs Tonight* (CNN Broadcast, June 16, 2008) available at <http://www.cnn.com/video/#/video/bestoftv/2008/07/16/ldt.wian.non.citizen.voting.cnn>.

in federal elections. After addressing the virtual non-existence of non-citizen voting, this report will discuss legitimate threats to U.S. voting systems that von Spakovsky ignores. Fourth, we will examine von Spakovsky's harmful policy recommendations. Finally, this report will briefly speculate as to why von Spakovsky would become so preoccupied in the first place with a threat that is virtually non-existent.

II. Von Spakovsky's Argument and Skewed Evidence

Von Spakovsky's claims about widespread non-citizen voting unravel upon close examination. Regarding it as an "enduring problem," von Spakovsky portrays non-citizen voting as endemic to our electoral system:

*The evidence is indisputable that aliens, both legal and illegal, are registering and voting in federal, state, and local elections.*²

Instead of substantiating this claim with significant and compelling evidence, however, von Spakovsky relies upon speculation and skewed evidence to deliver a message that harms our democracy.

A. Egregious Misreading of GAO Study

Von Spakovsky starts his report by citing a 2005 Government Accountability Office (GAO) report that he suggests finds "that up to 3 percent of 30,000 individuals called for jury duty from voter registration rolls over a two-year period in just one U.S. district were not U.S. citizens."³ Arguing that up to 3 percent of 30,000 voters (900 voters) would be enough to affect election results, von Spakovsky suggests that the GAO study demonstrates a major impact on U.S. elections from widespread non-citizen voting.

² Hans A. von Spakovsky, *The Threat of Non-Citizen Voting*, Legal Memorandum No. 28, The Heritage Foundation, available at <http://www.heritage.org/Research/LegalIssues/lm28.cfm>.

³ *Id.* at 1.

The GAO study as a whole belies von Spakovsky's assertion, however. The 2005 report features data from 14 U.S. district courts. GAO researchers asked staff associated with these courts for information about the number of individuals who were called for jury service and responded that they were non-citizens.⁴ These researchers found that the "AOUSC officials and federal jury administrators we spoke with generally did not have exact data on the number of people called for jury service that responded that they were non-citizens."⁵ Due to the lack of concrete data, 6 of the 14 gave no information to the GAO. Of the remaining 8 jurisdictions, *4 of them had never witnessed non-citizens who had been called to serve on a jury.*⁶ Ten of the 14 district courts surveyed, then, could offer no evidence whatsoever of non-citizens in jury pools. Ignoring this, von Spakovsky presents isolated data from just one of these fourteen jurisdictions. Further, 3 of the 4 courts that did report non-citizens in their jury pools estimated that non-citizens comprised, respectively, approximately 1%, 0.158%, and 0.01% of the jury pool.⁷ Von Spakovsky, in his attempt to manufacture concern about a nonexistent crisis, simply ignores key elements of the GAO report that do not support his hypothesis that non-citizens threaten the integrity of U.S. elections.

It should be noted, furthermore, that being called to jury duty is not the same thing as voting fraudulently in an election (despite Von Spakovsky's suggestion that jury pools are proxies for voter participation). As noted in the GAO report, several of the district courts' jury pools contained names drawn from state identification or driver's license records in addition to voter registration lists. Even assuming that non-citizens in

⁴ Government Accountability Office, Report to Congressional Requesters: *Additional Data Could Help State and Local Elections Officials Maintain Voter Registration Lists*, GAO-05-478, at 4 (June 2005).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Federal jury administrators in the different districts provided monthly or yearly percentages.

jury pools appear on voter registration rolls, that wouldn't establish that a) these voters have ever voted in federal elections or b) that these voters voted while knowing they were ineligible (i.e., voted fraudulently). Even von Spakovsky's skewed evidence is only significant if one makes these unsupported assumptions.

B. Unsubstantiated Examples of Illegitimate Election Results

As one of his primary examples of non-citizen voters influencing U.S. elections, von Spakovsky cites the 1996 Congressional race in California between Republican Bob Dornan and Democrat Loretta Sanchez. Sanchez prevailed in this election by fewer than 1,000 votes, and Dornan contested the results. The House of Representatives then investigated whether invalid voters won the election for Sanchez. Von Spakovsky notes that the House Committee on Oversight and Government Reform ultimately dismissed the case, but suggests that the Committee did so only because it revealed just 624 non-citizen votes and 124 invalid absentee ballots. Von Spakovsky essentially ignores the Committee's conclusion that the Sanchez/Dornan race was not compromised and that non-citizens did not vote in significant numbers. Instead, he speculates, without offering supporting evidence, that votes from undocumented immigrants probably accounted for the remaining votes.⁸ What he fails to note, moreover, is that 372 of the disputed non-citizen votes *were cast by individuals who were officially sworn in as U.S. citizens before Election Day.*⁹

Most allegations of non-citizen voting, upon closer examination, likewise do not yield evidence of non-citizen voting. In the state of Washington in 2005, for instance, a

⁸ Von Spakovsky, *supra* n. 2, art 3.

⁹ Justin Levitt, *The Truth about Voter Fraud*, Brennan Center for Justice at NYU School of Law, 2007, at 19-20, available at <http://truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf>.

private citizen asked county officials to investigate 1,668 registered voters who had seemingly foreign names. To this day, none of these voters have turned out to be non-citizens.¹⁰ In 2001, Milwaukee journalists conducted a review of 370,000 voting records between 1992 to 2000. The journalists found only four cases of possible non-citizen voting, but it has never been established whether even these four voters cast invalid ballots.¹¹

These examples reflect broader trends. Certainly, isolated incidents of non-fraudulent voting by non-citizens do occur, if infrequently. In one well known case, for example, non-citizens engaged in the naturalization process had passed interviews with federal authorities and had received letters that started with the following message: “Congratulations, your application for citizenship has been approved.”¹² After receiving these letters, it appears that the non-citizen voters thought they could then vote even though they had not yet had an official naturalization ceremony.¹³ Isolated incidents such as this, however, are blown out of proportion and then become grist for complaints of widespread non-citizen voting. They do not reflect concerted efforts to improperly influence elections, and they simply do not threaten the integrity of our election systems.

C. Administrative Errors Often Explain Allegations

Concrete data shows that clerical errors and errors in data-collection occur more often than non-citizen voting. Poll books and registration rolls are often riddled with inaccurate information. Sometimes errors are simple, featuring misspelled names

¹⁰ *Id.* at 19.

¹¹ *Id.* at 19.

¹² Michael G. Wagner and Nancy Cleeland, *D.A. Drops Voter Probe after Indictments Rejected*, L.A. Times, Dec. 20, 1997, at A1, available at <http://articles.latimes.com/1997/dec/20/news/mn-526>.

¹³ Justin Levitt, *supra* n. 9, at 18.

resulting in voters on one roll appearing on another roll.¹⁴ Such errors have sometimes fueled unwarranted allegations of non-citizen voting.¹⁵ These kinds of mistakes obviously should not occur, but they do not serve as an appropriate basis for asserting false allegations of illegitimate voting.

Allegations of non-citizen voting also stem from ‘bad matching.’ Matching is the process by which voter registration rolls in different jurisdictions are compared to catch forms of invalid voting. Unfortunately, matching can be inaccurate or inconsequential. In addition to erroneous data compilation, partial matches may be mistaken for complete matches (e.g., equating Joe A. Smith and Joe B. Smith). In addition, even complete matches may be irrelevant when, for example, individuals share the same name and date of birth.¹⁶ As with clerical errors, incorrect matching also accounts for a number of false allegations of non-citizen voting.¹⁷

III. Deterrents to Non-Citizen Voting

A. Criminal Penalties

Von Spakovsky ignores the fact that non-citizens lack a compelling reason to vote and risk severe criminal penalties under current law. Particularly in the case of undocumented immigrants, registering with the federal government to vote simply does not make sense. Federal law mandates strict penalties for those who register while knowing they are ineligible to vote in federal elections.¹⁸ Premeditated attempts to commit voter fraud carry with them serious penalties—including a fine up to \$10,000 and

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 18.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 42 U.S.C. § 1973(gg)-10 (2008).

up to 10 years in prison—that non-citizens do not want to risk. Violation of federal election law, moreover, could lead to the deportation of non-citizens—including legal permanent residents. As will be discussed below, moreover, non-citizen voting is not synonymous with voter fraud, but the point is that non-citizens would be wary of doing anything that could lead to lengthy legal investigations, criminal penalties, and possible deportation.

B. NVRA

Federal law currently mandates ways for election authorities to prevent human error that may lead to charges of non-citizen voting. States are required by the Help America Vote Act of 2002 (HAVA) to create efficient, accurate computerized databases of registered voters.¹⁹ Implementing these improved databases mandated by federal law will help election officials catch many of the errors that currently affect registration rolls.

In addition to HAVA, the National Voter Registration Act of 1993 (NVRA) also provides election authorities with tools to run better elections. By improving the accessibility and ease of voter registration, NVRA ensures that eligible voters have their opportunity to become engaged in the voting process. NVRA also mandates that states improve their registration databases by purging voters who have moved to another jurisdiction or who have otherwise become ineligible to vote within a particular location.²⁰ In his study, von Spakovsky targets NVRA, arguing that the law's mechanisms for improving voter registration help non-citizens vote.²¹ He singles out Section 5 of the Act, known informally as the Motor Voter provision, which allows

¹⁹ 42 U.S.C. § 15483 (2007).

²⁰ 42 U.S.C. § 1973gg (2008).

²¹ Von Spakovsky, *supra* n. 2, at 8-9.

individuals to register to vote at the same time they acquire a driver's license.²² He argues that numerous non-citizens, including undocumented individuals, become registered voters when they get driver's licenses in states that grant them to non-citizens. In the end, however, von Spakovsky's assertion is unsupported by evidence. He merely speculates about the effects upon registration in Maryland and cites a mere 14 non-citizens in Utah who have registered to vote and have obtained a driver's license.²³ As such, von Spakovsky has hardly proven why NVRA's alleged "loopholes" could swing November's elections.

NVRA actually currently includes provisions that, if appropriately implemented, would address any threat presented by any non-citizens who may wish to vote. NVRA, for example, imposes strict penalties for those who commit voter fraud.²⁴ In light of this, it's not surprising that one prominent report has found that states' complaints about NVRA primarily focus on a lack of funding—not specific concerns about voter fraud or non-citizen voting.²⁵

IV. Actual Threats to Our Voting Systems

As discussed above, clerical/typographical errors and inaccurate matching account for a number of false allegations of non-citizen voting. Von Spakovsky does not acknowledge these systematic problems. Indeed, he displayed the narrowness of his focus at a recent hearing about lessons learned from the 2004 elections. Instead of giving actual testimony, von Spakovsky merely provided three articles. One of them, an article

²² 42 U.S.C. § 1973gg-3 (2008)

²³ Von Spakovsky, *supra* n. 2, at 9.

²⁴ 42 U.S.C. § 1973gg-10 (2008).

²⁵ *Securing the Vote*, Demos: A Network for Ideas and Action, 2003, at 25, available at http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf.

about meeting the needs of military voters, reflects a noble cause but the other two addressed the supposed “threat” of non-citizen voting. Von Spakovsky, consequently, ignored the serious problems with our voting systems discussed below.

A. Voter Caging

Voter caging is a concrete problem, substantiated by actual data that von Spakovsky fails to acknowledge. Voter caging is the “practice of sending non-forwardable direct mail to registered voters and using the returned mail to compile lists of voters, called ‘caging lists,’ for the purpose of challenging their eligibility to vote.”²⁶ Voter caging efforts have occurred in many elections. In recent years, voter caging operations have targeted thousands and, in some cases, hundreds of thousands of voters in various states.²⁷ When individuals who did not return the direct mail eventually voted, opponents asserted that fraud had occurred. Few of these voters, however, turned out to be illegitimate.²⁸ This is not surprising in light of the fact that undelivered mail does not always mean that the intended recipient does not live at a certain address. As one example of this, Postal officials successfully hand-delivered 1.8 million surveys for the 1990 Census that initially got returned as undeliverable.²⁹ A more recent 2007 report found that 84,000 errors marred mailing information Chicago Postal workers used to deliver government records.³⁰ These examples indicate that returned mail may be perfectly deliverable and may not necessarily reflect evidence of ineligible voters.

Furthermore, federal law explicitly prohibits invalidation of voter registration

²⁶ Teresa James, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters*, Project Vote, Sept. 2007, at 3.

²⁷ *Id.* at 16-25.

²⁸ *Id.*

²⁹ Justin Levitt, *supra* n. 9, at 11.

³⁰ *Id.*

merely because mail has not been returned. Except for certain exceptions,³¹ the National Voter Registration Act (NVRA) states that a voter cannot be removed from a registration roll unless (1) the voter establishes in writing that he or she has moved out of a particular jurisdiction and (2) the voter does not respond to mail from *election officials* and then does not vote in two successive federal elections.³²

As the November elections approach, voter caging presents a greater threat to U.S. democracy than non-citizen voting. Kris Kobach, the current leader of the Kansas Republican Party, wrote in a 2007 e-mail: “To date, the Kansas GOP has identified and caged more voters in the last 11 months than the previous two years!”³³ The fact that the current head of a state political party recently boasted about his success in voter caging is deeply troubling, yet von Spakovsky ignores this in favor of an exclusive focus on unsupported claims of widespread non-citizen voting.³⁴

B. Poll Workers’ Perceptions of Latino Voters

Von Spakovsky’s misleading study and Dobbs’s equally misleading report could cause poll workers to perceive a threat of non-citizen voting. This would be very unfortunate because, overall, the 1.4 million poll workers in the country provide essential assistance to our electoral process. Creating unsubstantiated fears of non-citizen voting could compound current problems poll workers face. Jonah Goldman, Director for the

³¹ These exceptions concern convicted felons, dead individuals, and the mentally challenged.

³² 42 U.S.C. 1973gg 6(d)

³³ Posting of KU Blue to Blue Tide Rising, Kobach admits top coordinated voter suppression, <http://bluetiderising.blogspot.com/2007/12/kobach-admits-to-coordinated-voter.html> (Dec. 20, 2007, 5:43PM).

³⁴ It is worth noting that Kobach is also closely associated with the Immigration Reform Law Institute (IRLI). The IRLI is the legal arm of the DC-based Federation for American Immigration Reform (FAIR), a prominent anti-immigrant organization that has been designated as a “hate group” by the Southern Poverty Law Center, an organization that the FBI cites as a credible source on hate groups and hate crimes. *See* <http://www.splcenter.org/intel/map/type.jsp?DT=27> (last visited Aug. 8, 2008); <http://www.fbi.gov/hq/cid/civilrights/hate.htm>.

National Campaign for Fair Elections at the Lawyers' Committee for Civil Rights, testified in May, 2008 about such obstacles: "In every state we [the National Campaign] ran a program during this cycle and in every program we have run in the past, [the National Campaign] uncover[ed] voters who were turned away because poll workers did not know the rules."³⁵ Instead of helping poll workers focus on election rules, von Spakovsky fosters unfounded fears in the legitimacy of our elections. Further, if poll workers choose to scrutinize national origin minorities particularly closely and prevent eligible voters from voting, they may violate federal laws against discrimination in elections.

C. Voter Intimidation

Unlike allegations of non-citizen voting, which are largely unsupported, there have been recent concrete cases of extreme voter intimidation of Latinos and others at the polls. Vigilantes and others have systematically targeted voters because of their race, ethnicity or other traits. Thanks to von Spakovsky and Dobbs's hyperbolic reports of non-citizen voting, these groups may now think that they have grounds for a repeat performance of their past discrimination.

The Mexican American Legal Defense and Educational Fund (MALDEF) has chronicled incidents in which voters have been unfairly and unlawfully harassed and threatened on Election Day. In testimony before the Senate Judiciary Committee in June, 2007, MALDEF President John Trasviña recounted such incidents.³⁶ In 2006, for

³⁵ *Protecting the Constitutional Right to Vote for All Americans Before the S. Judiciary Comm.*, 110th Cong. (2008) (statement of Jonah Goldberg, Director, National Campaign for Fair Elections, Lawyers' Committee for Civil Rights) available at <http://judiciary.senate.gov/hearing.cfm?id=3368>.

³⁶ *Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S.453 Before the S. Judiciary Comm.*, 110th Cong. (2008) (statement by John Trasviña, President of MALDEF) available at http://judiciary.senate.gov/testimony.cfm?id=2798&wit_id=6514.

instance, MALDEF attorneys watched vigilantes single-out Latinos in Tucson, Arizona. These vigilantes, one of whom carried a firearm, “asked Latino voters pointed questions about their political views, wrote down Latino voters’ personal information, and videotaped them as they went to cast their vote.”³⁷ MALDEF has also documented intimidating, misleading letters sent by the campaign for a major party congressional candidate to Latinos in Orange County, California in 2006.³⁸ By raising the specter of non-citizen voting, von Spakovsky not only misleads the public about the problems that affect our voting systems. His report could also provide fuel for discrimination and intimidation as we approach the November elections.

D. The Scope of Actual Threats to Democracy

The ramifications of the problems described above—which hardly comprise a complete list of phenomena that may disenfranchise voters—should not be underestimated. One study conducted by the California Institute of Technology (CalTech) and the Massachusetts Institute of Technology (MIT), for instance, has estimated that the problems listed above resulted in *4-6 million* eligible voters being prevented from exercising their right in the 2000 general elections.³⁹ Von Spakovsky’s figures, many of which are purely speculative, pale in comparison to the number of voters who may have their vote lost by problems that have yet to be adequately fixed.

Our flawed voting systems do create substantial challenges to free and fair elections — just not the ones von Spakovsky highlights. From erroneous registration lists to overly restrictive voter identification requirements, America’s voting systems continue

³⁷ *Id.*

³⁸ *Id.*

³⁹ Press Release: *Cal-Tech team finds 4-6 million votes lost in the 2000 election; Nationwide reforms outlined in report*, July 16, 2001, available at http://www.vote.caltech.edu/press/MIT_7-16-01.pdf.

to face a variety of problems more pressing than non-citizen voting.

V. Conflating Non-Citizen Voting with Voter Fraud

Another problem with coverage of von Spakovsky’s report is that it conflates non-citizen voting with actual fraud. Dobbs’s also does this when he states that “[i]f this year’s presidential election remains as close as it appears to be now, this election could in fact be decided by fraud.”⁴⁰ The rare instances of non-citizen voting that do occur are not automatically fraudulent. To commit voter fraud, individuals must “cast ballots despite knowing that they are ineligible to vote, in an attempt to defraud the election system.”⁴¹ The crime of voting fraud, then, cannot be committed without a requisite intent. By using the strong label of ‘voter fraud,’ then, Dobbs makes an unwarranted generalization that all non-citizen voting constitutes voter fraud. Von Spakovsky, too, makes the same mistake by suggesting that authorities prosecute non-citizen voting—as if that very act in itself stands as a crime. In fact, the few documented instances of non-citizen voting typically result from innocent errors, not intentional acts of improper voting.

VI. Von Spakovsky’s Flawed Proposals

In light of his excessive speculation and narrow diagnosis of election problems, it is not surprising that von Spakovsky makes a number of flawed policy suggestions. These recommendations are not supported by facts. Three of his proposals deserve particular attention for their potential harm to U.S. election systems.

⁴⁰ *Lou Dobbs Tonight*, *supra* n. 1.

⁴¹ Justin Levitt, *supra* n. 9, at 4.

A. Proof of Citizenship Laws

Von Spakovsky recommends that all eligible voters provide proof of American citizenship when they register to vote.⁴² Von Spakovsky suggests that such a requirement should use the same standard as proof of employment.⁴³ He ignores the fact that citizenship documentation requirements are more effective at disenfranchising eligible U.S. citizen voters than preventing non-citizens from voting. Many voters do not always carry the requisite forms of identification that would be required to register through voter registration drives. Few people regularly carry, for example, their passport, and some voters may not even have one.

In addition, the burdens of proof-of-citizenship requirements, like poll taxes, fall disproportionately upon low-income and minority voters. A 2001 study by the Commission on Federal Election Reform found that 6 to 10 percent of voting-age Americans do not have any identification issued by the state and that most of these voters have limited funds.⁴⁴ Voting experts Tova Wang and Jonah Goldman have found that “[t]he citizens who do not have voter identification are mostly poor, minority, elderly, disabled, and young voters.”⁴⁵ In order to justify the excessive burden identification laws would place on eligible voters, proponents have to fall back on unsupported allegations of widespread voter fraud.

The burden placed on voters—and their overall disproportionate impact on particular communities—explains why voting rights laws have been a focal point of

⁴² Von Spakovsky, *supra* n. 2, at 25.

⁴³ *Id.*

⁴⁴ National Commission on Election Reform, To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform, Chapter 6 – Verification of Identity, at 4 (2001), *available at* http://www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap6_verification.pdf.

⁴⁵ Tova Andrea Wang and Jonah H. Goldman, *Photo ID Requirement Compromises Voter Rights*, The Press-Enterprise, Nov. 6, 2005, *available at* <http://www.tcf.org/print.asp?type=NC&pubid=1133>.

much civil rights litigation. Currently in Arizona, MALDEF is challenging a restrictive voting law that requires, among other things, proof of citizenship for voter registration. Von Spakovsky cites the Arizona law with approval, praising it for the fact that it has prevented over 31,000 individuals from registering to vote.⁴⁶ What he fails to acknowledge, however, is MALDEF has found (and is asserting in federal district court) that the Arizona law has in fact prevented eligible voters from registering. One plaintiff in MALDEF's case, for example, is an eligible voter who is a Vietnam veteran who fought for the freedoms that he is now being denied. So far, moreover, it has not been shown that any of the disqualified voters are non-citizens, let alone undocumented immigrants.

B. Increased Prosecution

Despite his legal background, von Spakovsky betrays an elementary mistake when he proposes the following: “Local district attorneys must be made to realize that registration and voting by non-citizens are offenses against the basic principles of our democratic system and that such cases must be prosecuted.”⁴⁷ Here, von Spakovsky makes the same mistake made by Lou Dobbs in his report on CNN. Non-citizen voting, when it does occur, does not automatically become a prosecutable offense. To be criminally punishable, the voter must have voted or registered to vote while knowing that he or she was ineligible to do so. Only with this requisite intent do a voter's actions constitute voter fraud.⁴⁸ Indeed, in most cases an act can be a crime only if the suspect maintained the state of mind to intentionally commit the act.

⁴⁶ Von Spakovsky, *supra* n. 2, at 7.

⁴⁷ Von Spakovsky, *supra* n. 2, at 10.

⁴⁸ Certain criminal acts that are treated under federal law as “strict liability” offenses—that is, acts that do not require a particular mental intent in order to be punishable. Voting fraud, however, is not a strict liability offense.

C. Misuse of E-Verify System

One of von Spakovsky's other suggestions concerns the government-run E-Verify program and features so many troubling assumptions that it should be quoted in full:

*The database, known as E-Verify, that is being used by U.S. employers to check the citizenship status of prospective employees should be made available to election officials and administrators of the statewide registration databases required by HAVA so that election officials can run database comparisons to identify registered voters who are not citizens.*⁴⁹

E-Verify is, essentially, an online version of the former Basic Pilot / Employment Eligibility Verification Program that verifies the employment eligibility of individuals. It does this by checking whether the information on a standard Social Security Card matches the information on a form of government-recognized identification. If the information doesn't match, employers receive a tentative nonconfirmation (TNC) letter acknowledging the mismatch. The employer is supposed to immediately tell the employee, who then has ten days to rectify the matter.

A common misperception of E-Verify, which von Spakovsky makes, is that it effectively checks citizenship and immigration status in general. As noted above, however, E-Verify merely checks whether the information on a standard Social Security Card matches the information on a form of identification recognized by the federal government. Matching the information verifies eligibility for employment, which is *not* the same thing as verification of citizenship. To substantiate this point one needs to look no further than an I-9 form itself, which is used to verify employee eligibility. The form states that “[t]he purpose of this form is to document that each new employee (both citizen *and non-citizen*) hired after November 6, 1986 [the date on which the President signed into law the Immigration Reform and Control Act of 1986] is authorized to work

⁴⁹ Von Spakovsky, *supra* n. 2, at 10.

in the United States.”⁵⁰ Millions of non-citizens are, of course, eligible to work in the United States under immigrant visas. Determining whether an individual is eligible to work, therefore, is quite different from determining citizenship and voter eligibility. Von Spakovsky clearly does not understand this when he proposes comparing E-Verify data with that on voter rolls.

Even being classified by E-Verify as ineligible to work, moreover, should not be viewed as determinative. The Social Security Administration admits that its database is full of many errors that concern actual U.S. citizens: the SSA Office of the Inspector General estimates that nearly 13 million out of 17 million errors in its database regard U.S. citizens.⁵¹ Clearly it would not be sound, as von Spakovsky wants, to compare information in a deeply flawed database with information in voter registration rolls. Such a recommendation would disenfranchise millions of citizens.

VII. Conclusion

Von Spakovsky has a history of advocating troubling approaches towards “voter fraud” and other goals associated with a partisan political agenda. Before von Spakovsky finally withdrew his name from consideration for a permanent seat on the FEC, numerous voting and civil rights groups denounced his partisanship and deemed him unfit to protect the most fundamental right of Americans: the right to vote.⁵²

⁵⁰ Federal I-9 Form (through June 30, 2009), *available at* <http://www.uscis.gov/files/form/I-9.pdf>. [Emphasis added].

⁵¹ *Congressional Response Report: Accuracy of the Social Security Administration’s Numident File*, Report No. A-08-06-26100, Dec. 2006, at Appendix C, *available at* <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>.

⁵² Letter from Barbara R. Arnwine, Executive Director for the Lawyers’ Committee for Civil Rights Under Law (Oct. 3, 2007) *available at* <http://www.truthaboutfraud.org/pdf/10-03-07%20LCCRUL%20Senate%20Letter.pdf>; *See also* Letter from Laura MacCleery, Director of Public Citizen’s Congress Watch, and Craig Hollman, Public Citizen Lobbyist, (Oct. 3, 2007) *available at* <http://www.truthaboutfraud.org/pdf/100307%20Public%20Citizen%20full%20Senate%20letter.pdf>

Perhaps the most damning criticism of von Spakovsky, however, has come from his former colleagues in the Voting Section of the Department of Justice's (DOJ) Civil Rights Division:

While he was at the Civil Rights Division, Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decision-making on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division's mandate to protect voting rights . . . Over the past five years, the priorities of the Voting Section have shifted from its historic mission to enforce the nation's civil rights laws without regard to politics, to pursuing an agenda which placed the highest priority on the partisan political goals of the political appointees who supervised the Section. We write to urge you not to reward one of the architects of that unprecedented and destructive change with another critical position [at the FEC] enforcing our country's election laws.⁵³

That former career professionals felt obligated to publicly criticize von Spakovsky speaks volumes about his unsettling record regarding voting rights.

Regardless of his troubling and partisan past, however, von Spakovsky's report suffers from a serious disconnect with the facts. As we approach an historic election, this nation deserves better. Viewers of Dobbs's story and readers of von Spakovsky's study may get an inflated sense of non-citizen voting and may lose faith in our democratic processes.

Even more seriously, von Spakovsky's recommendations, were they to be implemented, would effectively disenfranchise countless eligible U.S. citizen voters. In the context of debunking claims of widespread voter fraud in Ohio in 2004, James Sample of the Brennan Center at NYU makes the following point: "Americans are more

⁵³ Letter from Joseph D. Rich (former Chief of the Voting Section and Civil Rights Division Attorney) et al. (June 11, 2007) available at <http://www.truthaboutfraud.org/pdf/06-11-07%20Former%20Voting%20Section%20Staff%20Letter.pdf>; See also Letter from Joseph D. Rich (former Chief of the Voting Section and Civil Rights Division Attorney) et al. (June 18, 2007), available at: <http://www.truthaboutfraud.org/pdf/06-18-07%20Former%20Voting%20Section%20Staff%20Letter.pdf>.

likely to be struck by lightning [than to have committed voting fraud in Ohio]. Granted, lightning does strike, but we're not yet ready to pass legislation requiring a dome for the planet."⁵⁴ The same sentiment may be applied to allegations of non-citizen voting. Von Spakovsky might view himself as a pioneer on the forefront of election reforms, but he better resembles one who proudly battles a mirage.

⁵⁴ James Sample, *It's Not Fraud, It's Alienated Voters*, Politico.com, Nov. 11, 2007, available at http://www.brennancenter.org/content/resource/its_not_fraud_its_alienated_voters/.