Statement of

Kathleen Campbell Walker

on behalf of the

American Immigration Lawyers Association

concerning

Securing the Vote

before the

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Committee on House Administration
Committee Field Hearing

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Chairman Ehlers, Ranking Member Millender-McDonald, and distinguished Members of the Committee, I am Kathleen Campbell Walker, National President-Elect of the American Immigration Lawyers Association (AILA). I am honored to have the opportunity to appear before you today concerning the intersection of our current immigration laws with voting rights and identity related issues.

AILA is the immigration bar association of almost 10,000 members who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is affiliated with the American Bar Association (ABA). AILA members represent tens of thousands of: U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States (U.S.); U.S. businesses, universities, colleges, and industries that sponsor highly skilled foreign professionals seeking to enter the U.S. on a temporary basis or, having proved the unavailability of U.S. workers when required, on a permanent basis; applicants for naturalization; applicants for derivative citizenship as well as those qualifying for automatic citizenship; and healthcare workers, asylum seekers, often on a pro bono basis, as well as athletes, entertainers, exchange visitors, artists, and foreign students. AILA members have assisted in contributing ideas to increased port of entry inspection efficiencies, database integration, and technology oversight, and continue to work through our national liaison activities with federal agencies engaged in the administration and enforcement of our immigration laws to identify ways to improve adjudicative processes and procedures.

Being from El Paso and practicing immigration law there for over 20 years, my practice has focused on consular processing, admissions, business-based cross border immigration issues, naturalization, citizenship, and family-based cases. I previously served as the president for four years of the El Paso Foreign Trade Association, which was incorporated in 1985; a member of the Texas Comptroller's Border Advisory Council; a member of the board of the Border Trade Alliance; and a member of the executive committee of the Texas Border Infrastructure Coalition for the city of El Paso. This experience has provided me with many opportunities to participate in and observe border infrastructure improvements as well as Department of State (DOS) and Homeland Security (DHS) projects related to security, including U.S. VISIT.

Summary

Current U.S. immigration law and federal criminal law provides for severe criminal penalties as discussed below as to foreign nationals claiming U.S. citizenship in order to vote or voting in elections, which include being removed from the U.S. Although the importance of preserving the force of a citizen's vote cannot be understated neither can the risk of voter suppression of those who do not have the means to obtain documentation of citizenship status if the extension of the Voting Rights Act was indeed meant to preserve the fundamental precepts set forth in that law, an evaluation of the ability of the poor, elderly, and disabled to present citizenship documentation must be weighed against the potential fraud risk alleged here. If foreign nationals knew the severe consequences of voter registration and the action of voting in the U.S. via notice provided by registrars and others, I doubt many would choose to lose their right to remain in the U.S. I know that the American Immigration Lawyers Association would be willing to work on such notice language to reduce this exposure to the uninformed. In addition, there is a glaring paucity of documentation of fraud conducted by non-citizens registering to vote or voting in U.S. elections. Even so, we all agree that we must

preserve the ability of U.S. citizens to exercise their right to vote, and we must not implement any measures to place difficult barriers in their way.

Background

The issues this hearing raises concerning the confirmation of identity permeate the area of U.S. immigration law, most especially post the tragedy of September 11 for just cause. Immigration status has been raised in a number of areas including the application for driver's licenses, federal and state benefits, and employment eligibility; in addition to the normal context of applications for admission to the U.S. The ability to document immigration status is not simple and the forms establishing lawful status are myriad in numbers. The reason to raise this point is that the ability to prove even U.S. citizenship is difficult at best for the vast majority of U.S. citizens, who do not possess a U.S. passport much less a birth certificate issued by a central state office. In addition, the process just to obtain a passport can be lengthy as well as costly (current base adult fee $97.00). Please refer to http://www.travel.state.gov/passport/get/first/first_830.html for the passport application process.

A. Employment Verification

Establishing lawful immigration status that would authorize a person to legally work in the U.S. received focused attention in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603. IRCA required employers to verify the identity and employment eligibility of employees. The I-9 form used for determining employment eligibility by employers (see attached form) requires both proof of identity and employment eligibility via numerous documentary options. The List A documents set forth on the I-9 form on their face provide proof of both the person's identity as well as work eligibility. These documents include a U.S. passport, Certificate of U.S. Citizenship (N-560 or N-561), and a Certificate of Naturalization (N-550 or N-570), which all serve as proof that the person is a U.S. citizen. Section 1 of the I-9 form also requires an employee to attest if they are a U.S. citizen or national, a U.S. lawful permanent resident, or an alien authorized to work.

The other documents accepted to establish identity alone include a driver's license containing a photograph or other biographic data, a voter's registration card, a Native American tribal document, and a federal, state, or local government ID card among others. A U.S. social security card does not establish identity or for that matter U.S. citizenship. Original or certified copies of a birth certificate issued by a state, county, municipal authority or outlying possession of the U.S. bearing an official seal also do not establish both identity and work eligibility. The complexity of verifying work eligibility and identity is the rationale for many current legislative proposals that do away with the I-9 and replace it with mandatory verification of social security numbers through the Social Security Administration (SSA) to verify work eligibility. Yet, the DHS database used by SSA now to attempt to verify status is not by a long shot a fail-safe source for timely and accurate verification of immigration status.

B. US VISIT

As another example of the difficulty to enforce laws related to the verification of immigration status and identity is DHS' efforts to track the entry and exit of foreign nationals to the U.S. via the US VISIT program. US VISIT is the current brand name for

the section 110 entry/exit program mandate of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208. About **ten** years ago, Congress directed the Attorney General to develop an automated entry/exit system that would collect records of arrival and departure from every foreign national entering and leaving the U.S. Full implementation (meaning entry/exit tracking at all ports of entry) of the US VISIT mandate assumes a foundation in infrastructure, staffing, biometrics, database interconnectivity, intelligence, and enforcement capabilities, all of which do not now exist. The reason for the long delay in implementing the section 110 mandate can be found in the absence of this foundation and years of failure by federal agencies to properly implement the system as well as inadequate funding from Congress. One of the main reasons for the failure of the implementation has been prohibitive costs and the risks of severely decreasing commerce and tourism. Ample testimony has been provided in numerous hearings providing concrete examples of the potential harm to our economy with theoretical full implementation of entry/exit control. In addition, due to the lack of documentation of U.S. and Canadian citizens of their citizenship status, their exemptions are preserved from entry and exit control. To their credit, those managing the US VISIT program have attempted to listen to these implications and elected not to "throw out the baby with the bath water" by implementing the program to the severe detriment of our economy.

C. Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (WHTI) provides an even more practical example of the difficulties in documenting immigration status, in particular, U.S. citizenship. For years, U.S. and Canadian citizens have crossed the northern and southern border using documents such as drivers' licenses or birth certificates. In 2005, an estimated 13 million U.S. citizens crossed the northern border. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, requires the Secretary of Homeland Security in consultation with the Secretary of State to develop a plan that requires a passport or other document or combination of documents that the Secretary of Homeland Security deems sufficient to show identity and citizenship for U.S. citizens and citizens of Bermuda, Canada, and Mexico when entering the U.S. from certain countries in North, Central, and South America. The plan is supposed to be implemented by January 2008.

In reviewing the Data Management Improvement Act Task Force's First Annual Report to Congress submitted in December of 2002, the Report notes that of the 100,018,285 northern border inspections in fiscal year 2001, 39,153,057 inspections were made of U.S. citizens. As to the southern border, of the 314,346,554 inspections made, 93,111,738 inspections were made of U.S. citizens. The vast majority of these U.S. citizens do not possess a passport. Recently, in July 2006, the U.S. Senate passed the Department of Homeland Security Appropriations Bill, which extended the deadline to implement WHTI to June 1, 2009.

This extension reflects the tremendous challenge involved with the timely issuance of passports or some acceptable substitute document to millions of U.S. citizens, who cross our northern and southern borders. As noted in the May 25, 2006 GAO report on "Observations on Efforts to Implement the Western Hemisphere Travel Initiative on the U.S. Border with Canada," DHS and the Department of State (DOS) have a "long way to go to implement their proposed plans, and the time to get the job done is slipping by. The many challenges they face mirror the complexities and nuances involved in

developing a border security program that is a major cultural change in the way that individuals and commerce cross the U.S.-Canadian border."

Although this example does not involve the sanctity of the exercise of the right to vote, certainly in the case of providing for our national security, the federal government is having a very difficult time in being able to provide documentation of U.S. citizenship status to such a large population. This population of users is larger than the overall number of people voting in the November 2004 presidential election according the numbers stated by the U.S. Census Bureau in its March 2006 report entitled, "Voting and Registration in the Election of November of 2004."

Thus, it is critical to understand the impact and practical implications of trying to force a requirement of proof of citizenship on such a large population. The magnitude of this task caused the WHTI initiative to be subject to ongoing delays.

Consequences of Unlawful Registration or Voting

The consequences of knowingly making a false claim to U.S. citizenship to vote in any Federal, State, or local election are already severe under section 1015 to Title 18 of the United States Code (USC), which makes this action a felony punishable by a fine or up to five years imprisonment or both. In addition, section 611 of Title 18 of the USC provides that it is a criminal act for an alien to vote in an election for President, Vice President, Presidential elector, Member of the House or Senate of the U.S., Delegate from the District of Columbia, or Resident Commissioner. A violation of this section of Title 18 is punishable by a fine or up to one year imprisonment or both. These changes were made in the law by provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208.

As of April 1, 1997, section 347(a) of IIRAIRA created section 212(a)(10)(D) of the Immigration and Nationality Act (INA) by making any alien who "has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation" inadmissible to the U.S. Section 347(b) of IIRAIRA also resulted in the addition of section 237(a)(6) to the INA, which makes the same actions just outlined above a removable offense from the U.S. These provisions applied to unlawful voting occurring before, on, or after the enactment, and a conviction for unlawful voting is not required to trigger the penalties of these provisions. Note that in the May 5, 1997 wire #23 to the Immigration and Naturalization Service (INS) Management sent by the INS Assistant Commissioner at the time on the enforcement of these provisions, Mr. Aytes noted that if an alien acquired citizenship through naturalization subsequent to voting, "it is required that revocation be pursued in the appropriate venue." (See copy of wire attached)

The relevance of this penalty information is that after spending years to acquire legal permanent resident status, foreign nationals desire to preserve their hard fought right to live and work in the U.S. We all view the right to vote as a fundamental privilege and cherished opportunity in our nation, the beacon of such opportunity; non-citizens view their opportunity and ability to remain in the U.S. in the same light.

Whether the risk of a non-U.S. citizen voting in a Federal, State, or local election is documentable as infinitesimal or not, and the material I note below suggests it is infinitesimal, those who register voters or check-in the voting population at an election booth would perform a great service by posting information that would educate the public

about voting eligibility and the consequences for non-citizens of voting in elections. Many members of the U.S. public either do not know what U.S. legal permanent resident status is or they believe that such status is the same as U.S. citizenship. Thus, it is not a surprise to find U.S. legal permanent residents who are not yet fluent in English believing that they are eligible or are required to sign up to vote. If the true concern here is to respond appropriately to a perceived abuse of the privilege of voting by foreign nationals, it is incumbent to initiate an educational campaign that would be less costly and less likely to result in voter suppression.

In a case proceeding in Arizona against certain non-citizen residents for registering to vote, it is instructive to note that one of the individuals charged related that they were offered a voter registration form at the same time they registered for Selective Service. Thus, they believed they were allowed to register. Such a fact pattern is not uncommon.

Proposition 200, H.R. 4844, H.R. 5913

Arizona's Proposition 200, Representative Hyde's Federal Election Integrity Act of 2006, and Representative Tancredo's Voter Integrity Protection Act of 2006 all profess to protect the priceless vote of U.S. citizens in this country by requiring proof of citizenship in some manner. On a superficial level, one can understand and empathize with the desire to ensure that someone is entitled to exercise the right to vote. With the recent enactment into law of the Voting Rights Act by the President and the paucity of empirical evidence regarding false claims by non-citizens to the right to vote in U.S. elections, the pointed question of whether such proposals will achieve intended results or result in voter disenfranchisement must be answered.

Both Representatives Hyde and Tancredo's proposals refer to the need to provide proof of U.S. citizenship. Whose definition of this standard will obtain?

Currently, 8 U.S.C. §1185(b), INA §215(b) provides that it is unlawful for any U.S. citizen to depart from or enter the U.S., without a valid passport, unless otherwise provided by the President of the U.S. Part 53 of the Department of State (DOS) regulations outlines the exceptions to this rule, which include travel by a U.S. citizen within parts of the U.S., which encompasses the continental states of the U.S, Hawaii, the Commonwealth of Puerto Rico, American Samoa, Guam, the Canal Zone, and any other islands or territory over which the U.S. exercises jurisdiction. In addition, for example, a U.S. citizen is not required to present a U.S. passport when traveling between the U.S. and any country, territory, or island adjacent thereto in North, South, or Central America, excluding Cuba; if the travel to such countries does not have a duration of longer than 60 days after departure from the U.S. The upcoming deadline for the start of the WHTI will basically do away with these exceptions.

In testimony before the U.S. Senate Relations Committee, Subcommittee on Western Hemisphere, Peace Corps and Narcotics Affairs on June 9, 2005, Deputy Assistant Secretary for Consular Affairs, Frank E. Moss, noted that, "...we expect to face significant resource shortfalls as we implement WHTI" based on projected growth in passport demand. Due to the cost and lack of resources and complaints from many border communities and private sector groups, both DHS and DOS are in the process of trying to develop alternative ways to document U.S. citizenship status for cross border travel purposes. The relevance of this point in the voting context is that the federal agencies responsible for this issue have acknowledged that they are backlogged in

trying to address the anticipated demand by U.S. citizens in the context of WHTI. To add capacity demand from those wishing to vote in U.S. elections would create an even larger critical demand on inadequate resources. Other documentation of U.S. citizenship status such as a Certificate of Citizenship can takes months for issuance by DHS via an N-600 at a cost of $255.00 currently. Another practical example is that for those who have lost their Naturalization Certificate, an N-565 replacement form must be filed at a cost of $220.00 and the person can again wait for months before receiving the replacement.

Proposition 200 provides that proof of citizenship can be provided by a legible photocopy of the applicant's birth certificate that verifies citizenship to the "satisfaction of the county recorder." Such a birth certificate would not establish identity or work eligibility under the current federal employment verification regulations. A standard of "satisfaction" to a county employee is not an invitation to consistency or predictability, which should be imperative in any proposal to truly address citizenship verification. Thus, the proposals appear to be optical placebos, which do not reflect an appreciation for the rights reaffirmed by the recent extension of the Voting Rights Act.

Anecdotes on Fraud

This Committee has done a very thorough review of the impact of voter identification risks and benefits. I found the comments made by Mr. Wendy Noren, the county clerk for Boone County, Missouri, at the hearing on June 22, 2006 before this committee very instructive from someone on the ground with almost 30 years of experience as an election official. Mr. Boone stated the following as to voter ID legislation:

Although Missouri has had its share of fraud over the past twenty-eight years, we have followed the national pattern that the fraud comes from three areas – absentee ballot fraud, voter intimidation and vote buying schemes. The more sensational examples are duplicate registrations across jurisdiction lines. The famous examples of fraudulent registrations submitted in 2001 prior to a St Louis City municipal primary were actually caught by the election board before the election ever occurred. The implementation of a photo id requirement does not in fact address the areas where we have real fraud.

In short, the instances of people showing up in person at a polling place and either impersonating a legitimate voter or casting a ballot under a fictional name are at best extremely rare and at worst completely anecdotal. The institution of a photo id requirement will have little or no impact on my ability to detect or prevent fraud. If it did not provide an obstacle to any voter we would see that it neither helps nor hurt me keep my balance on the election high wire act.

As I stated originally, the fraud this is designed to protect, if it exists, is at best miniscule. The number of voters denied participation in my community will far exceed any possible fraudulent schemes. The incredible irony of Missouri's law is that because it covers only those who show up at a polling place, it will push many more voters to vote absentee – the method most susceptible to fraudulent voting, vote buying schemes and voter intimidation. Rather than protecting against fraud, it will expand the pool of targets for fraudulent balloting.

On that same day, the Committee also heard from Mr. Spencer Overton, a tenured professor at the George Washington University School of Law and commissioner on the 2005 Carter-Baker Commission on Federal Election Reform. Mr. Overton noted that:

No systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date, but the best existing data suggests that a photo identification requirement would do more harm than good. An estimated 6 to 10 percent of voting-age Americans do not possess a state-issued photo identification card, and in states such as

Wisconsin 78 percent of African-American men ages 18-24 lack a driver's license. By comparison, a study of 2.8 million ballots cast in 2004 in Washington State showed only 0.0009 percent of the ballots involved double voting or voting in the name of deceased individuals.] If further study confirms that photo identification requirements would deter over 6,700 legitimate votes for every single fraudulent vote prevented, a photo identification requirement would increase the likelihood of erroneous election outcomes.

While anecdotes about fraud are rhetorically persuasive because people without specialized knowledge can understand stories, the narratives often contain false information, omit critical facts, or focus on wrongdoing that a photo identification requirement would not prevent. Even when true, anecdotes do not reveal the frequency of similar instances of voter fraud.

If the standard to be applied to be allowed to register to vote is proof of citizenship acceptable to federal enforcement agencies, such a deterrent/voter suppression result would logically be exponentially increased due to the difficulty of obtaining such documentation and the related costs.

Conclusion

The right to vote must be zealously guarded as sacrosanct. The potential impact of the imposition of identity requirements must be cautiously weighed against voter suppression. Documentation of the problems associated with requiring proof of citizenship abound in the immigration field, and the pivotal concern in the imposition of any identity related requirement must be to preserve and encourage U.S. citizens to exercise their right to vote. Fraudulent claims to U.S. citizenship are already addressed in U.S. immigration and criminal law. Imposition of a citizenship evidentiary standard in the exercise of voting rights will serve to further discourage voter participation due to costs, bureaucratic delays, and the practical incapacities of the federal agencies to issue such documentation of status effectively at this time.