



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
House of Representatives of the 116th United States Congress

The Honorable Jamie Raskin
Chairman
Subcommittee on Civil Rights and Civil Liberties
House of Representatives of the 116th United States Congress
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Cummings and Chairman Raskin:

We are in receipt of your letter of April 29, 2019 in which you demand compliance with the committee's March 28, 2019 request for documents relating to an effort by the State of Texas to combat election fraud, and a matter in which this office served as trial counsel and engaged in privileged and confidential communications with its client agencies. We have two responses, as explained below. First, we applaud your concern about election fraud as a civil rights issue. It is a crucial one because each fraudulent vote undermines the civil right of voting that citizens possess. Second, Congress lacks authority to force a sovereign state to produce privileged and confidential documents, particularly those relating to active law enforcement efforts and litigation. Your letter points to the Committee's oversight power to investigate "any matter" at "any time" as a basis for treating the State of Texas as it would an administrative agency of the federal government or a private party. Your letter fails to acknowledge several incontrovertible facts about the American system of government that prove fatal to the Committee's argument.

I. ELECTION FRAUD UNDERMINES THE KEY CIVIL RIGHT OF VOTING.

You show concern about the potential to suppress voting. All of us should be mindful of that concern and vigilant to protect the rights of lawful voters. Consistent with that concern, we also should be concerned about unlawful fraudulent votes. Because the right to vote is one of our most important civil rights, a fraudulent vote not only offsets a valid one but also undermines the integrity of the election altogether. If we truly believe in civil rights, we cannot let election fraud stand.

Some believe it does not exist. That head-in-the-sand approach does not protect the civil right of voting. Our office's vantage point comes from working with a very small group of law

enforcement officers and prosecutors who handle state level voter fraud prosecutions.¹ These are actual criminal investigations and prosecutions with real defendants, alleging violations of Texas criminal election laws. Due to our office's limited resources, many of these cases remain pending, awaiting further investigation and prosecution. Any previously undisclosed documents associated with those investigations remains privileged and confidential.

As all agree, only citizens can vote. To confirm the citizenship of voters, Texas relies on an honor system by having voters check a box affirming that they are a citizen. The honor system does not work 100 percent of the time. When it fails, this office must pursue violators in order to ensure the integrity of our elections.

In 2017, our office obtained the conviction of a Tarrant County resident.² That person was a noncitizen who illegally voted for over ten years. The jury didn't believe she made an innocent mistake. Maybe the jury believed her statement to our state driver's license office about her noncitizen status so she could obtain a driver's license. Maybe they believed her statement to the voter registrar after she moved that she knew she wasn't a citizen but wanted to vote anyway and demanded the registrar send her another voter registration. Or maybe the jury believed her confession to law enforcement that she knew she wasn't eligible but lied and voted anyway. Regardless, the jury convicted her of illegal voting. Voter fraud exists.

In 2018, our office indicted a noncitizen in Montgomery County for voter impersonation and ineligible voting.³ The indictment showed that the noncitizen stole the identity of a citizen and cast ballots in three elections under that identity. The noncitizen subsequently pled guilty to stealing the identity of a U.S. citizen and impersonating that voter. Voter fraud exists.

In Texas, if someone called for jury duty excuses themselves because they are a noncitizen, a notification is supposed to go to the voter registrar in case that person registered to vote. Our office disclosed the results of a brief investigative survey indicating that in the previous 24 months, there were 165 unlawfully registered noncitizen voters who had been removed from the rolls with this process in just four of Texas's 254 counties.⁴ These 165 noncitizens had cast 100 illegal votes in Texas elections. Voter fraud exists.

Voter fraud is hardly limited to noncitizen voting. Just last month, we arrested the mayor of Edinburg and his wife for running an illegal voting scheme.⁵ They had numerous voters change

¹ The Office of the Attorney General shares responsibility for local election fraud prosecutions with local prosecutors and does not handle federal election fraud prosecutions.

² AG Paxton: Court of Appeals Upholds Voter Fraud Conviction of Rosa Ortega, Office of the Attorney General, Nov. 27, 2018, at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-court-appeals-upholds-voter-fraud-conviction-rosa-ortega>.

³ AG Paxton's Election Fraud Unit Obtains Jail Sentence, Deportation for Non-Citizen Charged with Voter Impersonation and Voter Fraud, September 13, 2018, at <https://www.texasattorneygeneral.gov/news/releases/ag-paxtons-election-fraud-unit-obtains-jail-sentence-deportation-non-citizen-charged-voter>.

⁴ AG Paxton Announces Significant Voter Fraud Initiative and Offers Assistance in Addressing Starr County Voter Fraud, Office of the Attorney General, Feb. 2, 2018, at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-significant-voter-fraud-initiative-and-offers-assistance-addressing-starr-county>.

⁵ Edinburg Mayor, Wife Arrested in Organized Illegal Voting Scheme, Office of the Attorney General, Apr. 25, 2019, at <https://www.texasattorneygeneral.gov/news/releases/edinburg-mayor-wife-arrested-organized-illegal-voting-scheme>.

their addresses to places they didn't reside—including an apartment complex the mayor owns—for the purpose of securing votes in the November 2017 election. In all, 18 people have been arrested in connection with that illegal scheme. Voter fraud exists.

Unfortunately, voter fraud seems more prevalent now than ever. From 2005–2017, the Attorney General's office prosecuted 97 defendants for numerous voter fraud violations. In fiscal year 2018 alone, our office prosecuted 33 defendants for a total of 97 election fraud violations. We currently have 75 active election fraud investigations, along with 63 counts of election crimes pending prosecution. Voter fraud exists, and it is a crucial civil rights issue that warrants our collective attention. In light of your records request, enclosed please find a sampling of the non-privileged, non-confidential indictments in our voter fraud cases.

II. YOU LACK THE POWER TO COMPEL STATES TO DISCLOSE PRIVILEGED INFORMATION.

Turning to your renewed demand for privileged and confidential documents requested in your March 28, 2019 letter, Congress lacks constitutional authority to compel those documents from a sovereign state.⁶ This is so for at least three reasons.

First and most importantly, your letter fails to recognize that Texas is not a subdivision of the federal government or a private citizen. Texas does not draw its authority from the United States or the United States Constitution, but from its status as a dual sovereign within the Union.⁷ The Constitution grants some powers to the national government, but reserves to the individual states “a residuary and inviolable sovereignty.”⁸

Far from being entities that exercise “oversight” of the core functions of State governments, “each of the principal branches of the federal government [owes] its existence more or less to the favor of the State governments.”⁹ That being the case, the Supreme Court has recognized that preserving comity between the dual sovereigns that make up our union is a core value of our Constitution.¹⁰ This comity demands “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that

⁶ As I previously noted in my letter of April 11, 2019, Congress may request records from this office under the Texas Public Information Act (“PIA”). Indeed, we previously produced records to you pursuant to your March 28, 2019 request as required by the PIA. We likewise will treat your April 29 letter as a supplemental PIA request, and provide a supplemental production of documents with this letter.

⁷ See *Printz v. United States*, 521 U.S. 898, 918–19 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

⁸ THE FEDERALIST NO. 39 (James Madison). As the Supreme Court has recognized “the Framers rejected the concept of a central government that would at upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent jurisdiction *over the people—who were, in Hamilton’s Words, ‘the only proper objects of the government.’*” *Printz*, 521 U.S. at 920 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)) (emphasis added). In other words, as the Court has previously held “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York*, 505 U.S. at 166. And this structure makes sense. After all, the States created the federal government. *Cf.* Romans 9:20 (“Shall what is formed say to the one who formed it, ‘Why did you make me like this?’”).

⁹ THE FEDERALIST NO. 45 (James Madison).

¹⁰ See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”¹¹

In the present case, the Committee appears to make no allowance for such comity. As you accurately note, States and Congress do share authority to set the “time, place, and manner of holding Elections for [United States] Senators and Representatives.”¹² You also accurately note that Congress has authority to pass legislation to protect rights guaranteed to Americans by the Fourteenth and Fifteenth Amendments.¹³ None of those powers, however, controvert or override the inherent and reserved power of State constitutional officers to lawfully assure the integrity of that state’s own democratic elections through maintaining the voter rolls used in its own state elections, or to seek legal counsel from their own constitutionally-designated attorney when their efforts are challenged in court.¹⁴

Second, the committee does not acknowledge that, where Congress’s exercise of investigatory functions clashes with another constitutional protection, the legislative need must outweigh the burden placed on that constitutional protection for the legislative need to prevail.¹⁵ Although cases have traditionally turned on the rights of individuals, the same rationale applies with even more force to the Tenth Amendment’s guarantee of States’ core powers as necessary for maintaining a system of federalism. Granting Congress the power to exercise “oversight” over the constitutional officers of a state engaged in the lawful exercise of that state’s core authority would undermine the fabric of our system of dual sovereignty. In this case, that risk would be made particularly acute by the committee’s attempt to force the constitutionally-designated attorney for the State of Texas to divulge privileged and confidential communications with a client concerning the client’s enforcement of Texas law.

Third, the Committee fails to identify any valid legislative purpose for its inquiry. As the Supreme Court has rightly observed, Congress is not a law enforcement or trial agency,” nor can it investigate “solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated.”¹⁶ The House of Representatives’ own rules require inquiries to be “related to, and in furtherance of, a legitimate task of Congress.”¹⁷ The State of Texas is aware of no congressional power to grant or guarantee noncitizens the right to vote under Texas law.¹⁸ As the Committee seeks information related to state officers enforcing state laws that limit voter rolls to United States

¹¹ *Id.* It is worth noting that by attempting to exercise “oversight” of state executive-branch officers, Congress endangers separation of powers within the Federal government itself by seeking to force state officers to enact federal policies, thereby circumventing the President. *See Printz*, 521 U.S. at 922–23.

¹² U.S. CONST. art. I, § 4 (emphasis added).

¹³ U.S. CONST. amend. XIV, § 5; U.S. CONST. AMEND. XV, § 2.

¹⁴ *See* U.S. CONST. amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

¹⁵ *See Watkins v. United States*, 354 U.S. 178, 198 (1957).

¹⁶ *Id.* at 200–01.

¹⁷ U.S. House Rule X.

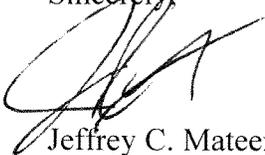
¹⁸ On the contrary, Congress itself has repeatedly enacted statutes with the clear and express purpose of preventing noncitizens from voting. *See, e.g.*, 18 U.S.C. § 611 (making noncitizen voting a federal offense punishable by up to one year in prison); 8 U.S.C. § 1227; 18 U.S.C. § 1015(f) (making it a criminal offense for a noncitizen to falsely claim citizenship for the purpose of voting); 42 U.S.C. § 1973gg-10(2) (providing that it is a criminal offense to make a false statement concerning an applicant’s citizenship status on a registration form submitted to election authorities); 8 U.S.C. § 911 (making it a criminal offense for a noncitizen to willfully claim to be a citizen).

Citizens, we fail to see how any federal legislation on the subject would be within the “few and defined” powers of the federal government.¹⁹

Because the Committee has no basis to exercise oversight authority of a State constitutional officer in the performance of lawful core functions of a State, nor has the committee cited any Texas law that would grant the committee the right to privileged and confidential information, we must respectfully inform the committee that we decline its request for such information.

That said, as a courtesy and to further our joint interest in preventing voter fraud while preserving the rights of lawful citizens to vote, I enclose with this letter an executed copy of the settlement agreement in the litigation arising from the Election Advisory that precipitated your March 28 letter, as well several non-privileged documents produced under our Public Information Act. The settlement outlines in great detail a mutually agreed process for the Secretary of State to identify potential noncitizen voters.

Sincerely,



Jeffrey C. Mateer
First Assistant Attorney General

cc: The Honorable Jim Jordan, Ranking Member
Committee on Oversight and Reform

The Honorable Chip Roy, Ranking Member
Subcommittee on Civil rights and Civil Liberties

¹⁹ THE FEDERALIST NO. 45 (James Madison).