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Legal Sidebar

Federal District Court Holds That 18 U.S.C. § 611, the Federal Bar on Alien Voting, Is Unconstitutional

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In October 2026, the Department of Justice (DOJ) made several announcements that it had charged aliens in multiple states with election-related federal crimes, including unlawfully casting votes in U.S. elections in violation of 18 U.S.C. § 611 (Section 611). This statute makes it "unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate" in federal elections. Those indicted by the government included unlawfully present aliens and aliens admitted for lawful permanent residence.

DOJ also cited Section 611 as the basis for a complaint it filed against the State of California on October 15, 2026, in which it alleged that the state failed to take action to address a list of persons that the federal government "believes are likely noncitizens who were sent a vote-by-mail ballot from California to participate in the federal election." According to the federal government, California's failure to act amounted to "knowingly imposing an obstacle on the United States' ability to enforce 18 U.S.C. § 611 by facilitating unlawful voting rather than working with the Federal Government to prevent it," in violation of the Supremacy Clause of the U.S. Constitution. In denying the United States' request for a temporary restraining order requiring California to take action, the district court found, among other things, that the United States failed to show sufficiently that (1) it had standing to bring suit against the state, (2) Section 611 preempts California election law, and (3) the actions demanded by the United States were consistent with federal law. A majority of a panel of the U.S. Court of Appeals for the Ninth Circuit then determined on appeal that the district court had not abused its discretion and upheld the denial of the temporary restraining order. The United States applied to the Supreme Court for an injunction against California pending its appeal of the lower court orders, but that application was denied without noted dissent. DOJ voluntarily dismissed that case on November 6, 2026.

On October 1, 2026, a district judge in the U.S. District Court for the Southern District of Florida issued an opinion in *United States v. Cox* concluding, as a matter of nationwide first impression, that Congress did not have the constitutional authority to enact Section 611. The government has appealed that decision, and its appeal is pending before the U.S. Court of Appeals for the Eleventh Circuit. After the district court's decision issued, a magistrate judge in the Western District of Wisconsin reached the same conclusion in dismissing two other criminal cases, using much the same reasoning as the district court.

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Those dismissals have been appealed to the relevant district court. Additionally, a district court judge in the Northern District of Texas summarily rejected the *Cox* opinion as a basis for a similar challenge made on the eve of a trial for violation of Section 611.

The decisions concluding that Section 611 is unconstitutional are particularly notable in light of DOJ's recent enforcement efforts. The question of the statute's constitutionality may therefore play a prominent role in the federal government's current and future enforcement of the statute and related litigation. Because of the depth of the district court's opinion in *Cox* and the prospect of it yielding the first appellate court opinion on this question, this Legal Sidebar outlines its reasoning in finding Section 611 to be outside of the scope of congressional authority.

The Federal Bar on Alien Voting

As the district court in *Cox* recounted, "since our earliest days as a republic," states have had different legal regimes "allowing (or forbidding) non-citizen voting," but states have "largely prohibited non-citizen voting since 1926." Congress enacted Section 611 in 1996; under Section 611(a), it is "unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner." This prohibition does not apply if an election "is held partly for some other purpose" and "aliens are authorized to vote for such other purpose under a state constitution or statute or a local ordinance." Some jurisdictions do afford aliens voting opportunities in local elections. In such circumstances, Section 611(a)(3) mandates that the method of voting must be such that "an alien . . . [does] not [have] an opportunity to vote for a candidate for any one or more of" the listed federal offices. Section 611(c) additionally provides that an alien is not subject to its prohibition if, among other criteria, the alien "reasonably believed at the time of voting . . . that he or she was a citizen of the United States."

An alien found to have violated the statute may be fined and imprisoned for up to one year. There are also potential immigration consequences for violation of the statute.

Constitutional Authorities

Elections for federal office in the United States are governed by various constitutional provisions that allocate specific authorities between the states and the federal government. As detailed below, these authorities address the qualifications necessary for voting in federal elections and the way in which federal elections are carried out. Congress also has independent constitutional authority over immigration in the United States, and, in the exercise of this authority, it may preempt state laws related to aliens.

Constitutional Authorities of the States Regarding Elections

Three provisions of the Constitution set forth state authorities for establishing the qualifications of voters in elections for Congress and the President. Article I, Section 2, clause 1, of the U.S. Constitution provides that, for elections to the House of Representatives, voters "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Voters in Senate elections, under the Seventeenth Amendment to the Constitution, "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." With respect to the President, electors are, under Article II, Section 1, clause 2, appointed by each state "in such Manner as the Legislature thereof may direct."

Constitutional Authorities of Congress Related to Elections and Immigration

Congress has two primary constitutional authorities that the United States has urged in litigation pertain to the prohibition against aliens voting in federal elections. First, the Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." This authority permits states (or Congress, if it chooses to act) "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

Second, Congress has "plenary power" to regulate immigration, powers that the Supreme Court has identified as deriving from both certain constitutional provisions and the nature of the sovereignty of the government.

United States v. Cox (S.D. Fl.)

In *Cox*, the United States charged, through a one-count information, an alien with "knowingly voting in a federal election" in 2020 while "fully aware that she was not a United States citizen," in violation of Section 611. The defendant moved to dismiss the information on the ground that Section 611 is an unconstitutional attempt by Congress to pass a voter qualification law for federal elections, a power that the defendant argued the Constitution instead reserves for states by conferring on them the sole authority to set qualifications for such elections under the provisions discussed above.

The district court concluded that "the text, structure, and original public meaning of the Constitution show that Congress does not have the constitutional power to enact" Section 611. In doing so, the court (1) rejected the government's contention that Supreme Court precedent required it to uphold the statute, (2) held that only states are empowered by the Constitution to set voter qualifications, including qualifications related to citizenship status, and (3) further held that no other provision of the Constitution empowered Congress to pass Section 611. As part of its analysis, it noted that there was little dispute from the parties that Section 611 functions as a voter qualification law, insofar as it "dictates *who may vote* in federal elections."

Applicability of Supreme Court Precedent

The government argued in *Cox* that the Supreme Court's decision in *Oregon v. Mitchell*, which upheld a law setting the minimum voting age to 18 in federal elections, demonstrated that Congress was empowered to set voter qualifications in federal elections, including on the basis of citizenship.

The district court acknowledged that, to the extent *Mitchell* was binding, Section 611 would be constitutional. It did not consider application of *Mitchell* so straightforward, however. The district court explained that, in *Mitchell*, the Justices agreed on a result—Congress could set an age-based voter qualification in federal elections—but could not agree on what constitutional authority lay behind that result. The district court pointed out that five Justices "*rejected* the view that the Elections Clause empowered Congress to regulate voter qualifications in federal elections." It also pointed out that five Justices "also *rejected* the view that the Fourteenth Amendment empowered Congress to lower the voting age." Faced with this set of divergent rationales, the district court concluded that it was bound by Supreme Court and circuit precedent to view *Mitchell* as establishing only that "Congress can regulate voting-age qualifications in federal elections," and therefore could not control questions concerning other types of voting qualifications. It further found that subsequent precedent "further diminish[ed] *Mitchell*'s force." In particular, the district court recited the Supreme Court's statement in *Arizona v. Inter Tribal*

Council of Arizona (*ITCA*), that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." The district court conceded that this statement was dicta, but "the kind of dicta that merits careful attention from the lower courts," and, when considered alongside other precedent, further reason to believe that *Mitchell* did not control.

Scope of State Authority over Voter Qualifications

Having identified no binding Supreme Court precedent resolving the case, the district court in *Cox* then held that "[t]he Constitution commits to the States, and the States alone, the general power to set voter qualifications in federal elections" as a matter of both its text and history. The court examined the clauses of the Constitution addressing election of Representatives, Senators, and the President, and concluded that they all reflected the same principle: "The States have sole authority to set voter qualifications." According to the court, the constitutional provisions addressing congressional elections establish that "voters' qualifications are a function of each State's rules" and the provision addressing presidential elections provides that "the States have the prerogative to establish whatever rules for selecting electors they see fit." This reading reflected a "foundational principle of our constitutional order," namely, a federal government of limited powers.

The district court identified further support for this reading of the text of the Constitution in the history surrounding its adoption and the adoption of subsequent amendments. As to the former, the court recounted that the framers of the Constitution considered and rejected "a proposal . . . that would have assigned the federal government the power to set voter qualifications for federal elections." As to the latter, the court recounted the rejection of a similar proposal during consideration of the Reconstruction Amendments and noted further that subsequent amendments addressing voting "[did] not alter the Framers' original design."

Scope of Congressional Authority over Voter Qualifications

The district court in *Cox* then rejected both congressional plenary power over immigration and congressional authority under the Elections Clause as adequate bases for Section 611.

The government characterized Section 611 as a means to address foreign interference in elections, placing it well within congressional authority over immigration and foreign affairs. The court in *Cox* agreed that congressional authority in this respect is "broad indeed," but was not convinced that Section 611 was a means of "legislat[ing] against foreign interference in federal elections." Textually, the district court focused on the statute's exception for state and local elections, finding that "[i]f Congress really intended the statute as an exercise of its plenary authority over aliens, there's no reason it would have cleaved off non-federal elections." It also found the generalized nature of congressional power over immigration and foreign affairs to cut against the ability of Congress to override the specific authorities concerning voting qualifications in federal elections that the Constitution textually commits to the states. It explained that these latter specific clauses reflected "a foundational limit on federal authority," and such "[f]oundational constitutional limits do not give way, even to capacious general provisions of enumerated congressional power."

The government also characterized Section 611 as a means to ensure the integrity of federal elections, thereby making it a legitimate exercise of congressional authority under the Elections Clause. Relying largely on *ITCA*, the district court held that Section 611 fell outside of that authority because the Elections Clause reflects "[t]he power to regulate the 'mechanics' of federal elections" and not "the power to decide who may vote" in federal elections. The court further determined that the government had offered no evidence that Section 611 was "designed to further" the purpose of preventing voter fraud.

Enforcement Consequences

In light of the exclusive authorities to set voter qualifications given by the Constitution to the states, and the concomitant lack of congressional authority to independently set voter qualifications, the district court in *Cox* held that Section 611 was unconstitutional as applied to the defendant. "To hold otherwise," it reasoned, "would allow Congress to establish and modify the parameters of *its own special electorate*, entirely divorced from what . . . any . . . State may decide," a "result [that] is *precisely* what our federal constitutional republic does not allow."

The district noted three further points related to its holding. First, it explained that the state in which the defendant voted "can and does" punish the same conduct. Second, it made clear that its opinion did not "address the Government's power to remove a non-U.S. citizen who engages in the same conduct." Third, while disclaiming any definitive conclusion, it suggested that a federal statute criminalizing voting in federal elections in violation of state law would present "very different" legal considerations.

Considerations for Congress

Because the district court in *Cox* considered only an as-applied challenge to Section 611 in the posture of a motion to dismiss, the effect of its constitutional holding is limited to the defendant. If, in the appeal to the U.S. Court of Appeals for the Eleventh Circuit, that court rejects the government's position and upholds the district court's decision, similarly situated aliens in that circuit may be able to rely on this precedent to claim that the statute is also unconstitutional as applied to them. Should that court or other appellate courts reach broadly applicable determinations that the statute is unconstitutional, several paths are available to Congress, including waiting for a definitive Supreme Court decision; repealing the statute in favor of state enforcement of state voter qualification laws; or amending the statute, as contemplated by the district court, to criminalize voting in federal elections in violation of state voter qualification laws.

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