

Constitutional Implications of Mexicans' Voting Abroad

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The discussion about Mexican citizens being able to vote abroad has particularly emphasized the technical side, while the most important issue, that of dual citizenship, has been neglected. Different solutions to the problems in ensuring honest balloting abroad have been carefully reviewed, but other considerations have not.

Today, nations increasingly tend to allow their citizens to vote abroad; although a still only relatively limited number of countries permit it, the practice seems to be on the rise. It should be emphasized, however, that no country which allows it is similar to Mexico.

Mexico became part of this general trend when it amended Article 36 of its Constitution and existing electoral legislation allowed for the possibility of Mexicans abroad voting in presidential elections. These reforms came into effect in October 1996. Article 32 of the constitution was then amended in March 1998 to allow for dual citizenship.

This is where both moral and technical problems arise that have still not been resolved by those who defend the proposed change. I will refrain from going into the moral questions in order to deal in more depth with the legal, technical issues.

What is involved is not merely a matter of procedure or guaranteeing transparency: since March 1998, not only would Mexican citizens be able to vote abroad, but the change in Article 32 of the Constitution opens up the possibility for millions of people who hold both Mexican and U.S. citizenship to vote in Mexican elections. What this means is that

millions of U.S. citizens could participate in the election of the president of Mexico.

How many Mexicans currently residing in the United States will opt for U.S. citizenship? No one knows or can predict how many. But, on the other hand, the second transitory article of the amendment to Article 32 stipulates that all Mexicans who prior to 1998 had voluntarily acquired another nationality will recover their Mexican nationality through the retroactive application of Fraction A of that amendment which states that "no Mexican by birth may be stripped of his or her nationality."

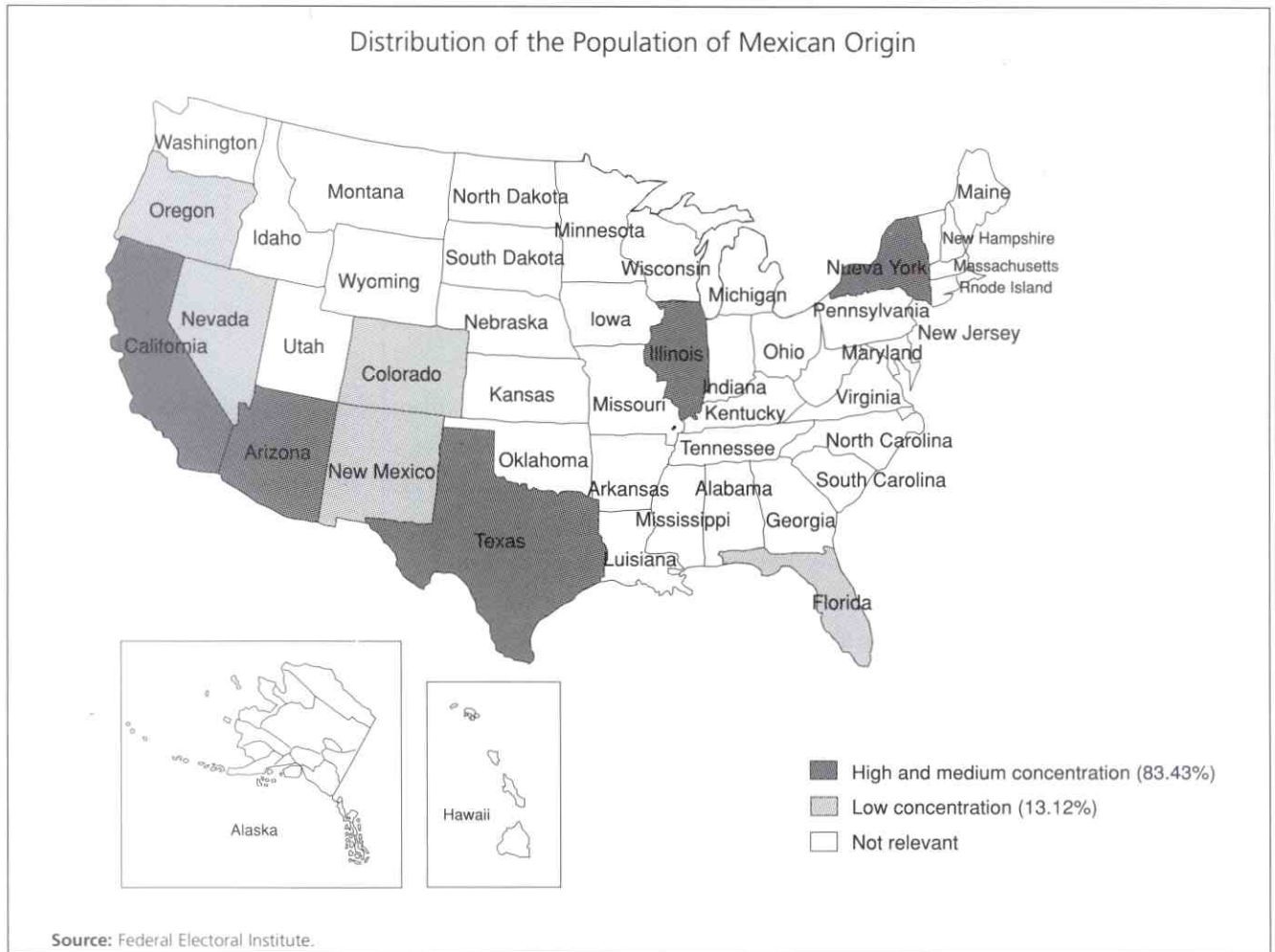
This brings out a new dimension to the problem since nationality implies citizenship if all requirements are met.¹ Neither legal nor moral arguments exist to deny citizenship to Mexicans who are also U.S., Japanese or Spanish citizens. This takes us into the topic of dual citizenship, which has not been appropriately dealt with. The central discussion is not whether someone of a

given nationality should be allowed to vote when abroad. What has absolutely no political or legal basis is for people who vote in elections of other countries to also be allowed to vote in Mexican elections. Article 37 of the Mexican Constitution stipulates the conditions under which citizenship may be lost. The one which may most affect Mexican-U.S. citizens in the future is the prohibition of "voluntarily providing official services to a foreign government without the permission of the Federal Congress or its Permanent Commission." Millions of American citizens in the armed forces, for example, would not come under this limitation in the Mexican Constitution

and therefore would be allowed to vote in our elections: here, the concept of sovereignty, so maligned of late, becomes crucial.

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Voting can be defined as an act of sovereignty. Therefore, when foreign citizens participate in balloting to elect members of one of the branches of government, clearly Mexican sovereignty will from that time rest in the Mexican people and part of the American people. This is a contradiction which destroys the concept of sovereignty itself: sovereignty either resides exclusively in one people, or, by definition, it ceases to be sovereignty.

We all know that the concept of “a people” is very problematic. However, Hans Kelsen offers us a useful definition: he says it is “the unit of regulatory, legal ordering of the conduct of men.”² For legal purposes, therefore, a people is a unit whose decisions emanate from a normative order which regulates the action of each of its members as well as the whole. This is the case, at least, in a system in which the people continue to be sovereign. The contractual nature of Kelsen’s thesis is clear, understandably, because only contract theory can provide the conceptual basis for democracy.

However, there is something more: in the terms of Article 39 of our Constitution, the people have “at all times the inalienable right to alter or change the form of government.” “Form of government” is understood here not only as the organization of power, but also as the entire set of social relations and economic functions that the Constitution regulates. Therefore, an indeterminate number of U.S. citizens who also hold Mexican citizenship will be able to alter or change our form of government through the votes they cast.

This is the case, for example, of the proposals made by some parties that we write a new Constitution or legalize referenda. If the referendum were established as the mechanism for approving constitutional amendments, which criteria would be applicable? Would residents abroad be excluded, or would the same logic apply as for presidential elections, in which they would have the right to vote? If the latter were the case, we would find ourselves in a situation in which citizens of foreign countries would participate direct-

ly in Mexico's constitutional process; otherwise we would be establishing a very strange distinction because we would consider the same people we hold eligible to elect the president of our country ineligible to contribute to the definition of our legal system. This contradiction is very difficult to disregard.

Let us also examine another matter under debate: the issue of establishing a second round of voting in the presidential race. Since voters abroad will not participate in congressional elections, the disproportion that normally occurs between the congressional and presidential majorities in electoral systems with second rounds of voting would be considerably accentuated. This is in addition to the problem that one of Mexico's most respected constitutionalists, Jorge Carpizo, has already pointed out in the sense that in a close election, even without a run-off, the deciding votes might well be cast by dual citizens. If run-off elections were instituted, their influence would be even greater.

This would force our presidential candidates to do two things: first, they would have to ask U.S. migration officials for permission to carry out their campaigns inside the United States; and secondly, they would have to take care that their campaign issues and proposals not be alien to the interests of U.S. citizens nor opposed to those held by the U.S. government. For example, could a Mexican presidential hopeful disagree with the bombing of Afghanistan or the blockade of Cuba, or—to give examples from other times—with the occupation of the Dominican Republic, Panama or Grenada?

Contrary to what has been said, therefore, not only are there political but also strictly legal arguments against instituting voting abroad. Strong political arguments firmly based in the Constitution have also been invoked by different people, among them myself, over the last few months.

Among these arguments is the fact that U.S.-Mexican citizens, in addition to enjoying dual nationality and dual citizenship, would also in many cases have dual partisan affiliation. This means that they would be subject to the influence of so-called [political] "bosses," or vote manipulators, well known in the United States, which would violate Article 9 of the Constitution that prohibits foreigners from gathering to take part in the country's political affairs. If this constitutional stipulation were not

changed, the law which allows foreign citizens to associate to vote in Mexican elections—in this case the Federal Code of Electoral Institutions and Procedures (COFIPE)—could be considered unconstitutional.

Clearly, for dual citizens, the simple fact of identifying themselves electorally with a U.S. political party would imply a degree of influence with regard to certain particularly sensitive topics which we cannot overlook and which could turn Mexicans there into powerful enemies of Mexicans here.

For example, U.S. energy policy will continue to generate pressure for Mexican oil to cease being part of the country's patrimony. Once we have been stripped of our sovereign decision-making ability in the political realm, what arguments would we have to retain it in matters of patrimony?

But there is still more. One of the greatest problems we face in the future with the United States is migration. And it is here where dual citizens will either have to vote for the discriminatory policies restricting Mexican immigration proposed by both U.S. parties or for the reasonable attention demanded by Mexicans. This could provoke serious tension.

The most paradoxical and deplorable development would be that the Americans themselves solve these problems for us. The U.S. Congress has already legislated to deprive any American who has voted in elections outside the United States of his or her citizenship. This was controversial legislation and was declared unconstitutional by the U.S. courts in the case of *Afroyim v. Rusk* in 1967. The court reasoned that, according to the 24th amendment to the Constitution, American citizenship could only be lost through its voluntary renunciation, but not through legislation.

We Mexicans should not confuse things. We are not only discussing whether Mexicans can or cannot vote while abroad, but whether foreigners can vote in our elections. I am sure that if a comparative study is made of the problems involved in dual citizenship throughout the world, very different conclusions would be reached than those that have come out of only examining the technical problems of voting abroad. I am also certain that many distinguished Mexicans who have argued for establishing the right for Mexicans to vote abroad would not support that right for dual citizens.

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We have advanced greatly with the United States in reaching reasonable understandings, but if we open the door to new forms of intervention and dependency, the tensions between the two countries, partially overcome, will increase.

The argument made in this article presupposes no animosity toward the United States as a sovereign nation, much less toward the millions of Mexicans who live there and in many cases contribute significantly to the well being of those here. Mexico must think and act in their benefit, but not at the price of endangering the essence of our sovereignty. We will be able to do very little for them when so little is left to ourselves.

The vote is an extremely sensitive issue and it must be dealt with in the best possible way given the circumstances. The demo-

cratic advances in Mexico are many and should be even greater in the future. I do not think that dual citizenship contributes to the consolidation of democracy, but rather to dependency. Let us not turn hypothetical advances into real retreats. Democracy is not only a system of guarantees for freedoms inside the country, but also for independence externally. It is democracy based on the sovereignty of the people that allows us to defend our interests, our rights and, above all, our dignity. ■■■

NOTES

¹ Mexico's Constitution stipulates that native born Mexican nationals become citizens only when they come of age and if they have an honest form of livelihood. [Editor's Note.]

² Hans Kelsen, *Esencia y valor de la democracia* (1974), p. 31.

Mexicans Eligible to Vote

By the time of the 2000 elections, approximately 70.158 million Mexicans will be eligible to vote both inside the country and in foreign countries: 85.88 percent (60.254 million) will be residing in Mexico; 14.12 percent (9.904 million) will be residing abroad.

DISTRIBUTION OF VOTERS ABROAD

In the United States: 98.95 percent of all Mexicans residing abroad (9.80 million) live in the United States: only 420 persons (less than one percent) are part of the Mexican foreign service; 7.126 million (72.71 percent) are immigrants born in Mexico; 2.674 million (27.28 percent) were born in the United States of either a Mexican father or mother.

In countries other than the United States: 104,000 Mexicans (1.05 percent of all Mexicans residing abroad) live in countries other than the U.S.: 740 are in the diplomatic service; 76,000 are immigrants born in Mexico, and 27,000 were born abroad but of a Mexican father and/or mother.

Total projected Mexican voters abroad: 10.787 million persons, including both those who reside abroad and those who are temporarily out of the country on election day. (It is estimated that one out of four of the 10.787 million Mexicans of voting age in the United States will have some sort of irregular migratory status at the time of the election.)

GEOGRAPHICAL DISTRIBUTION

OF MEXICAN RESIDENTS IN THE UNITED STATES

Eighty-four percent of Mexicans of voting age born in Mexico reside in five states: 46.3 percent in California; 21.3 percent in Texas; 6.6 percent in Arizona; 6.3 percent in Illinois; and 3 percent in New York.

Florida, Oregon, Colorado, New Mexico and Nevada also have significant Mexican communities. Almost 90 percent of all Mexicans resident in the United States are concentrated in 11 states of the union.

Specialists indicate that there is no clear correlation between the concentration of Mexicans and the availability of consular services.