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Will Hitchcock [00:00:03] Hello, I'm Will Hitchcock.

Siva Vaidhyanathan [00:00:04] And I'm Siva Vaidhyanathan.

Will Hitchcock [00:00:06] And from the University of Virginia's Deliberative Media Lab, this is Democracy in Danger.

Siva Vaidhyanathan [00:00:12] Will, if there is one thing that defines every functioning democracy, it is the right to vote. The people must be allowed to express their opinions, their desires, their will through the polls, or else you can't claim to have anything close to a democracy.

Will Hitchcock [00:00:31] Well, that sounds pretty good, but the devil is in the details. And as one of our guests, the historian Carol Anderson, told us in an earlier episode, states have erected barriers to voting with breathtaking, I mean, almost Machiavellian ingenuity. You know, in the old days, the tactics were pretty blunt. You know, poll taxes, literacy tests, downright physical intimidation and violence. And the goal was no secret: to keep black people and poor people especially away from the polls. Well, today, things are a little more subtle. We have voter ID cards. We have fewer polling places, especially in minority neighborhoods. We've got folks who are out there attacking early voting or mail in voting. And actually mass incarceration, which is so common in America, also really affects minority voters disproportionately.

Siva Vaidhyanathan [00:01:23] And, you know, there's an even bigger structural plan afoot in America to deny people their right to vote. And that's embedded in the US Census. Right. The process of counting how many people live in America, if people are not counted accurately, fully, and then it's as if they don't exist. And the places they live, their neighborhoods, their cities are counties. Their congressional districts lose political power as a result.

Will Hitchcock [00:01:53] Yeah, I mean, I use the word Machiavellian before, but this is an outright dastardly plan and here with us today to talk through it all, how this happened and what's going on in the census and in voting rights in general is Dale Ho. He's the director of the American Civil Liberties Union Voting Rights Project. Dale, welcome to Democracy in Danger.

Dale Ho [00:02:13] Thank you so much for having me on.

Will Hitchcock [00:02:15] Well, Dale, as the leader within the ACLU, you are, I think, very well positioned as well as anyone to kind of just take stock of where our democracy is right now. We are the name of our podcast, of course, is Democracy in Danger. And we feel like we've come through a very, very difficult time. You know, some commentators have even gone so far as to say there's something kind of fundamentally broken in our democracy today. But how does it look to you? I mean, is democracy broken in America? Has it ever really functioned fully or did we just go through a period when it showed that it's actually resilient, that for all of its flaws, it still works?

Dale Ho [00:02:57] You know, I think there are two different stories you can tell about how democracy is working in America right now, looking at the last year and maybe even taking a step back in the last decade. And at first they seem contradictory. But I think when you

put them together, they actually complement each other. So one story that you can tell is you can look at last year's election and you can say we had more Americans voting in a presidential election than in any presidential election in our history. We had a turnout rate that was higher than we had seen in decades. We had all of this in the midst of a global pandemic, one of the worst that the world has seen in a century when the effects of that pandemic through people's lives and plans are out of whack. Huge problems for elections administrators. And notwithstanding all of that, Americans overcame that and participated in such record numbers. And that that's a triumph for democracy. But then there's this other story. And the other story is that in the face of all of that participation we have seen over the last decade, unrelenting efforts to make voting harder, unlike anything this country has seen in decades. If you look back to, say, 15 years ago, we weren't really having much of a conversation about voter suppression because it wasn't as much of an issue. We didn't have states passing laws that made it harder to register to vote. That shortened windows for early voting, that put new requirements in place for voting in person on Election Day, that put new restrictions on voter registration drives. All of that activity that you were referring to is of a relatively recent vintage. And then if you look at sort of the response in some quarters to the results of the election, the sort of fact free belief that because their side lost the presidential contest, there must have been some kind of fraud, even if there's absolutely no evidence of it. That's that's really disturbing, because if you don't have a shared set of facts, it becomes very, very difficult to have a democracy at all. And it's certainly difficult to have public faith in the legitimacy of our democratic institutions. Now, why do I say when you put all these things together, it actually seems complementary? I think it's because that effort to restrict voting, that's a reaction to the levels of civic engagement and participation that we're seeing as a country. We saw an initial burst of this after Barack Obama was elected in 2008. You know, in the wake of record levels of participation by young voters and voters of color, higher turnout rates than we had seen in a little bit over a decade. That's really what I think was the triggering event of a lot of this voter suppression activity. And now the renewed push that we're seeing after this election, I think is a response to the patterns we saw in the 2020 presidential election. And that's been the history of voting in America since the founding. It's not just a linear sort of expansion of democracy. It's progress met by reaction, progress met by reaction we've see over and over again. And we're in another one of those moments.

Siva Vaidhyanathan [00:06:14] Well, Dale, the ACLU is classically and necessarily nonpartisan, right. It's it's not supposed to be doing work that favors one of our two major political parties over another. And yet the parties themselves seem to have chosen sides on this question of voting rights. So can you tell us how the ACLU Voting Rights Project is managing this bind? And what's the story of the Voting Rights Project and how old is it? What kind of work are you doing and how are you navigating this really weird time?

Dale Ho [00:06:51] It is a very weird time, and it does make things challenging right now when these issues have broken down in a partisan way, when I think the right to vote and having free and fair elections ought not be a partisan issue. The Voting Rights Act was founded in 1965. It's the same the same year that the federal Voting Rights Act was passed in the wake of the Selma to Montgomery march. Its initial mission was to enforce the VRA in the South to help do away with literacy tests and other things that were making it impossible for black Americans to register and participate. The project was originally based in Atlanta at the time. That was kind of the ACLU's beachhead for civil rights work in the South, and it continued to do that kind of work over the next few years. In ensuing decades, a lot of its work was not about can people register and can people vote? But is the structure of elections at the local level fair? One thing that's I think lost from the public discourse on voting rights is that, you know, after the Voting Rights Act was passed within

five years, you had black registration and turnout kind of skyrocketed in the South. But because of the way that elections were structured, you didn't actually immediately get a lot of change in terms of who was elected. You still had largely all white local governments, the same segregationists who were in power in the 60s were in power in the 70s. And the ACLU's Voting Rights Project was really geared towards trying to make sure that votes translated into seats and political power. And this was a period when we had a bipartisan consensus that everyone ought to be able to vote. The key provisions of the Voting Rights Act were always things that had to be renewed periodically by Congress, and they were reauthorized first by President Nixon, again by President Ford, again by President Reagan. In 1982, he signed a twenty five year reauthorization of those parts of the Voting Rights Act. He called it the crown jewel of American civil rights protections. They came up for reauthorization again in 2006. It passed the bill for that authorization, passed ninety eight to nothing in the Senate. Hard to think when you think about the Senate these days, anything passing like that. George W. Bush signed it into law. So we had this bipartisan consensus that we ought to be making voting easier. We ought to be bringing more Americans into the political process. And that, I think, really broke down, as I alluded to before, when Barack Obama was elected in 2008. And we saw record levels of participation by voters of color and young voters. And what we've been witnessing since then has been the backlash to that. And it has broken down.

Siva Vaidhyanathan [00:09:38] Well, what about what about the census? What's the relationship between these voting restrictions and the census? I mean, the census is about so many things, right? It's about the distribution of resources and it's about just understanding who we are as Americans. It's about seeing large social trends. What does it have to do with voting rights?

Dale Ho [00:09:59] Well, the census is kind of a fundamental pillar of our democracy. It's one of the few functions of the federal government that's actually spelled out and required in the Constitution. We have a total population count of everyone living in the United States every ten years, and that forms the basis for the allocation of seats in Congress and votes in the Electoral College. And it's kind of one of these institutions of the federal government that until recently was relatively free of political interference. But we've had an administration that politicizes the NOAA and the weather, the postal service, the CDC. And so the politicization of the census is just one iteration of formerly purely professional, nonpartisan institutions being corrupted by the last administration. The last administration tried to engage in a number of methods, schemes to try to undercount immigrant communities. But the connection that I see is this. The restrictions on voting that we're seeing, they don't affect everyone equally. Right. A strict ID requirement doesn't stop most people, doesn't cause a problem for most people in getting to the polls. It's only a particular segment of society for whom that restriction makes life harder. The same is true for restrictions on voter registration drives. I didn't register at a voter registration drive. I filled out a form by myself. But if you look at the demographics of who uses voter registration drives, there are big racial disparities. When I litigated a case in Florida, you know, about three times as many black and Latino voters registered through a registration drive as compared to white voters in Florida. The restrictions that we're seeing don't hit the electorate evenly. They seem almost, almost designed to target exactly those segments of the electorate that are emerging over the last decade or so. The census controversies are a piece of that because efforts to reduce the participation of immigrants or not count them entirely in the census, you know, that's not going to hit the country evenly. It's going to hit parts of the country more that are more diverse. So states that have larger immigrant communities, areas within states, urban areas that tend to be more diverse, those are the areas that would have been undercounted under the Trump administration's various

schemes under the census, and that would have resulted in shifting the balance of political power ever so slightly. But with things so close in this country right now, I mean, it makes a meaningful difference.

Will Hitchcock [00:12:41] Well, let me just ask you to elaborate a little bit on this. And let me ask the devil's advocate question, which I'm sure that you've heard a million times in court, and that is, aren't we talking about undocumented immigrants here? Not just immigrants generally, but people who may have come into the United States without proper approvals or documentation. Why should they be counted in the census if to count them will augment the political power of the regions in which they reside? Isn't that, in a sense, kind of unfairly tilting the balance towards places that have welcomed or sheltered people who don't have documentation?

Dale Ho [00:13:20] Well, Congress considered this, the founders considered this, and then Congress has considered it a couple of times since the founding. What the Constitution says is that states receive representation in Congress in accordance with their total populations, and that's without regard to immigration status, to documented status. And the theory basically is that states are responsible for everyone who lives within their borders. They have the obligation of ensuring sort of the health and welfare of everyone who lives within their borders. And they're entitled to representation in the national legislature based on those numbers. That was what the framers decided. There were some conversations about whether or not they should limit representation in Congress to the number of voters in each state. And then, of course, if you go back to the founding, that obviously would have excluded women entirely. Right. Those kinds of proposals came up again when these issues were revisited after the Civil War. And, you know, that was a time of a lot of immigration. A lot of states in the north had large immigrant populations. You didn't have comprehensive federal immigration laws at that point. But a number of states like Massachusetts and New York had certain kinds of immigration exclusions and really essentially deportation practices. And there was a debate that was had at that time. Should those immigrants, some of whom Massachusetts and New York, do not even want within their borders, should they have representation? And what Congress decided when it ratified the 14th Amendment after the Civil War was, yes, the rule has been states get representation based on all of the human beings in their borders, and we're not going to change that. So it's something that is a part of our founding document. I understand there are policy arguments that some people have for why we might want to exclude some populations. People are free to make those policy arguments. I disagree with them. But the first problem for them is the Constitution requires that everyone be counted. And if someone wants to change that, you got to change the Constitution.

Will Hitchcock [00:15:26] It almost sounds like the strict constructionists should be in favor of a full and robust census counting. I'm sure. I'm sure that's how it lines up. Right.

Dale Ho [00:15:36] Well, you know, going up to the Supreme Court, you know, this the case about this that I argued in November of last year, it was one of the first big cases after Amy Coney Barrett was confirmed to the court. And, you know, the new balance on the court has a lot of people concerned about whether or not civil rights and civil liberties issues are going to fare well. And I will say going up on this issue in particular, and I can't speak for the broad range of issues that the ACLU and other civil rights organizations work on. But I felt very confident going up on this particular issue because people who take tech seriously, people who take history seriously, it's very, very difficult to accept any kind of authorization for the federal government to exclude immigrants or even undocumented immigrants from the census.

Siva Vaidhyanathan [00:16:22] So the Trump administration tried a number of ways to limit the census. Right. And we've talked about how they tried to limit it by excluding people who were undocumented, but they also tried underfunding it, delaying it. Right. A number of tactics that would have ultimately frustrated the execution of the census. How many of those tactics were reasons to pursue legal action and short of that, what sort of legal support should the census have going forward? Like what would you like to see Congress do to ensure that future administrations don't undermine the census for short term payoff?

Dale Ho [00:17:13] That's a terrific question, because I think before now, groups like mine and other organizations that work on census advocacy didn't really think that hard about legal protections for the census because it was one of those nonpartisan, professionalized institutions that historically have been relatively free from political interference. I mean, we saw, you know, even going back before the issue that I was talking about, the case about excluding undocumented immigrants from the census an effort by the administration to add a citizenship question to the census, something that we haven't done in 70 years because the bureau has and other statistical professionals have recommended against it because it would deter participation in the census. People would be afraid of participating if there were an inquiry into their citizenship status. We saw efforts to delay the census, as you alluded to, and to cut short the period of time for census operations. When the covid pandemic hit it obviously disrupted a lot of in-person activities and the census was one of them. The government usually sends out census forms at the beginning of the year and when people don't respond, it engages actually in the largest peacetime mobilization of federal employees, sending people out into the field to follow up with the households that don't respond or don't respond completely to that questionnaire. Well, all of that was supposed to happen right when the pandemic first really hit us and huge swaths of the country were going into complete lockdown. Those efforts were completely derailed for a time. And then the Census Bureau asked for more time to engage in those efforts. The administration initially approved that, asked Congress for authorization for that which it had to do because there are strict deadlines that Congress imposes with respect to the census and then did a sudden about face and tried to cut the period for census outreach two months short, which was really, really, really shocking. That was challenged in court. All of these things that I mentioned where were challenged in court, the census outreach period was extended for some time, but not the full amount of time that the Census Bureau had originally wanted. The first thing that I think Congress could do right now for this particular census is to pass a law that would authorize the Census Bureau to turn in the results of the census a little bit late. It's going to need that time to finish the processing of the data, which is very time consuming and labor intensive. And they just need that authorization from Congress because federal law requires the data to come in at a deadline, which is really not feasible at this point. I think we need to look at future censuses and think about trying to put more power in the hands of the professionals in the Census Bureau and maybe less in the hands of the political actors who have an incentive to interfere with standard processes there.

Will Hitchcock [00:20:10] Is there anything that the Biden team can do right away that will fix the problems that the Trump administration were deliberately putting in the path of the census? Or is the Census Bureau kind of like, you know, like the US Postal Service, which has been thoroughly politicized in its personnel and which will take at least a couple of years before there's substantial turnover in the leadership positions?

Dale Ho [00:20:33] Well, the good news is that on day one, President Biden signed an executive order with respect to the census, which reversed some of the Trump administration's policies on immigration data and the census. It reversed the policy of excluding undocumented immigrants from the count used to divvy up the House of Representatives. It stopped all work on a data product that the Census Bureau was putting together on citizenship. There was a real big concern that some states or local jurisdictions might use to try to exclude non-citizens from their own individual redistricting maps. So I think the Biden administration is in a good place and we'll see what happens there.

Siva Vaidhyanathan [00:21:16] Wrapping it all up, though, what is our 2020 census going to be like? Did they ultimately succeed in a systematic undercounting? Is the 2020 census going to accurately reflect the makeup of the United States? Is it going to have any of the consequences that the Trump administration had hoped to create?

Dale Ho [00:21:42] The unsatisfying answer that I have to give you is, I don't know. We haven't seen the data yet. The state population counts aren't going to be released until April. And the more granular, localized data isn't going to be released until August, and then even when that data is released, it's going to be hard to know how accurate it is because, you know, the census is considered kind of the definitive benchmark of demographic counts in America. And, you know, we won't have anything to compare it to other than estimates over the last few years. So it's very difficult to know. I know that a lot of people in my line of work are very concerned, particularly because the Census Bureau didn't get the amount of time that it wanted to do outreach in the field.

Will Hitchcock [00:22:29] And it was conducted during a pandemic which, leaving aside the malfeasance and deliberate, you know, rigging may have contributed to an undercount anyway.

Dale Ho [00:22:40] Right.

Will Hitchcock [00:22:41] Let me just swoop back up to the larger picture of voting in America. You know, the extraordinary political reality that we lived through in the last six months has been that the president who was running for reelection declared that the the process that the presidential election itself was rigged and that even before the votes were counted, he declared the process corrupted and rigged. And of course, he then spent the subsequent two and a half months after his defeat at the polls, declaring the whole thing to have been rigged and fraudulent. How do we restore confidence in the public in the voting process? I mean, how do you get the toothpaste back in the tube? It is now widely held among perhaps a third of the voting public in America that a presidential election that that unfolded was corrupted. And despite there being no evidence for that, people are going to hold to that view anyway. Is there is there a is there a cure for this problem?

Dale Ho [00:23:41] That is a terrific question and one that I I spent a lot of time thinking about. And every time I finish kind of thinking about it, I think to myself, wow we're in a lot of trouble as a country because, you know, you have to kind of laugh a little bit.

Will Hitchcock [00:24:03] Just what I guess may be a better question might be what do you what do you do as a as a professional to try to address these questions? Because obviously we all have this. The problem is, is all of ours, you know, how do we restore confidence? Well, there's not a magic wand.

Dale Ho [00:24:17] And so, you know, in the kind of narrow part of the field that I occupy, that is the courtroom, I feel good about my ability to defend the integrity of American elections. The president and his legal team, you know, they came out with these kind of very ridiculous lies about Hugo Chavez, like from the dead trying to manipulate the elections. And they got laughed out of court over and over and over again. The courtrooms are one place where facts really do still matter. And I feel confident about our ability to prevail there.

Will Hitchcock [00:24:55] And some of the more crazy theories, actually, correct me if I'm wrong, but some of President Trump's lawyers didn't actually give word to the to some of the crazier theories in the courtroom because they knew they could be held accountable if they lied in court.

Dale Ho [00:25:11] Right. And it seems like some of them may ultimately be - and there's defamation litigation happening right now by Dominion, the maker of those voting machines. But to your question, how do we deal with this in the public domain? Because I think that's what's more important here. Because we can win court cases but as long as the public loses its faith in the democratic process, we're in a lot of trouble. And there I don't have a great answer. I'm just a lawyer. I sue. You know, I go to court, how we how we fix this civic education problem. I mean, that is a big question that goes to social media and disinformation and conspiratorial thinking that I wish I knew the answers to.

Siva Vaidhyanathan [00:25:55] Well, Dale Ho, thank you for all of the work you're doing. And thank you for joining us today on Democracy in Danger.

Dale Ho [00:26:04] Thank you so much for having me on.

Siva Vaidhyanathan [00:26:12] That was Dale Ho, the director of the ACLU Voting Rights Project.

Will Hitchcock [00:26:16] Democracy in Danger is part of the Democracy Group podcast network visit democracygroup.com to find all our sister shows. We'll be right back.

Siva Vaidhyanathan [00:26:32] Will, you know, one of the things I was thinking about as I was listening to Dale Ho describe how the sort of political lines have changed so much so quickly in terms of voting rights, was that, yeah, there was consensus around voting rights, consensus around the idea that more people should be allowed to vote. We should make voting easier on people. And I and I remember that pretty, pretty strongly. I was a reporter in Texas in the 1980s and 90s. And, you know, Republican administrations in Texas boasted about their voter registration targets and their efforts of outreach, especially to Mexican-American Tejano communities. And, you know, it seemed to me like in those days, the very business centered Republican Party was doing its best, certainly in a quasi self-interested way, to make sure that places like Texas were fully represented, fully represented in the census and fully represented at the polls. And they and the Republican Party of Texas in those days was trying to compete with the Democratic Party for that growing segment of the electorate. So, you know, here in Virginia, we just chose - right. The voters of Virginia just chose to create an independent commission that will guide the drawing of congressional districts. And we're an outlier, one of the few states that's made that move. And it's going to be really interesting to see in the next few years whether the people of the state of Virginia are going to get to choose their representatives or whether the representatives are going to get to choose the people for their own districts.

Will Hitchcock [00:28:26] And that leads into a problem that I think knits together a couple of our conversations in this season. Ruth Ben-Ghiat talked about the ways in which strong men don't just govern at the top through executive orders. They actually corrupt the institutions and the bureaucracy. And they and they do it deliberately. They build out the institutions to reflect their interests and their hold on power. They staff the bureaucracy with loyalists all the way down to the bottom. And in the United States, we have a strong federal civil service that has generally been able to avoid that. We have laws on the books, but that's starting to erode. And what Dale Ho reminds us is that the courts are not necessarily going to stop it anymore. They have started to say, hey, look, if you want to politicize the bureaucracy, that's your business. The voters will hold you accountable after all. But in a gerrymandered world, what if the voters can't hold you accountable? So that's the problem we're facing.

Siva Vaidhyanathan [00:29:23] I mean, it's clear the Supreme Court over the last decade or decade and a half has taken the position that, you know, let's keep politics political. Right. Let's legalize as many overtly political actions as possible. And we've seen that in there, undermining of the corruption trial of our own governor, Bob McDonnell, who was convicted of bribery. And then later that conviction was overturned when the Supreme Court said, well, the trading he did was just politics as usual, which, you know, just goes to sort of, you know, spread a sense of cynicism.

Will Hitchcock [00:30:04] Well, and it's again, it's about the toothpaste in the tube once this kind of corruption and erosion of norms as is normal, will, then people say, well, that's just politics.

Will Hitchcock [00:30:20] That's all for today's show. Next time, we'll have anthropologist Jason Hickel with us from Goldsmiths, University of London, and he'll talk to us about a pretty radical idea that democracy cannot survive across the globe unless we address the problem of unbridled economic growth.

Jason Hickel [00:30:38] Capitalism is an economy that's organized around and dependent on perpetual expansion. And it's the first such economic system in human history that is organized in this way. And this is what makes it in ecological terms, a uniquely destructive economic arrangement.

Siva Vaidhyanathan [00:30:55] In the meantime, let us know what you think about voting rights, citizenship, the census or anything else you've heard on this show. Our Twitter handle is @DinDpodcast. That's at D I N D podcast. Or you can visit us on the Web and catch all of our past episodes there. Our home page is DinDanger.org.

Will Hitchcock [00:31:21] You can also go old school and email us at UVAMediaLab@Virginia.edu.

Siva Vaidhyanathan [00:31:27] Democracy in Danger is produced by Roberto Armengol with help from Jennifer Ludovici, our fabulous interns, our Denzel Mitchell and Jane Frankel.

Will Hitchcock [00:31:37] Support comes from the University of Virginia's Democracy Initiative and from the College of Arts and Sciences. The show is a project of UVA's Deliberative Media Lab. We're distributed by the Virginia Audio Collective, the podcast Network of WTJU Radio in Charlottesville. I'm Will Hitchcock.

Siva Vaidhyanathan [00:31:53] And I'm Siva Vaidhyanathan. Until next time.