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"Let Me Count the Ways"!: Is There a Constitutional Basis for Telling the Secretary of Commerce to Make an Upward Statistical Revision in the Census?

by Jay E. Grenig

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ISSUE
Is the decision of the United States Secretary of Commerce not to undertake a statistical adjustment of the 1990 census constitutional?

FACTS
Each decennial census has inevitably contained errors resulting from, among other things, nonreturned census forms and the lack of success of other methods employed to produce an accurate count of the nation’s population. In other words, in each census, some persons are not counted at all, while nonexistent persons are counted and others are counted more than once. It is apparent, therefore, that the census, no matter how conducted, provides only an estimate of the nation’s “true” population.

The census has been found to undercount members of ethnic and racial minority groups more severely than members of other demographic groups. This phenomenon, known as the differential undercount, has occurred with every census since at least 1940, the year in which the United States Bureau of the Census (the “Bureau”) began measuring the differential undercount.

In preparation for the 1980 census, the Bureau, an agency of the United States Department of Commerce (the “Commerce Department” or the “DOC”), hoped that a combination of outreach efforts and attempts to focus energy on improving the count in areas such as the inner cities, where the differential undercount was thought to be particularly great, would lead to a reduction of both the overall undercount and the differential undercount. When those efforts failed, the Bureau decided to create a program for the 1990 census that would address the problem through other techniques.

By 1984, the Bureau had developed an internal research plan to aid it in deciding whether or not the 1990 census should be statistically adjusted in order to reduce the differential undercount. The Bureau created an Undercount Steering Committee and an Undercount Research Staff to

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Docket Nos. 94-1614, 94-1631, 94-1985, Consolidated

Argument Date: January 10, 1996
From: The Second Circuit

Several states and cities sued the United States Secretary of Commerce, seeking to compel the Secretary to undertake statistical estimation procedures designed to correct anticipated errors in the 1990 census. In 1991, the Secretary refused to substitute statistically estimated population totals for the 1990 census, despite claims that the 1990 census undercounted racial and ethnic minority groups. Now the Supreme Court is called on to determine if the Secretary will be required to justify the nonadjustment decision.
consider the problem and sought advice from outside experts and organizations such as the American Statistical Association and the National Academy of Science. The Bureau also consulted state and local governments, planned an extensive advertising campaign, designed a more ethnically inclusive census questionnaire, and developed an automated geographic control system to help assure accurate and timely maps and geographic files for the 1990 census.

In due course, the Bureau decided that the post-enumeration survey (the "PES") method was the best available tool for adjusting the initial census figures. Accordingly, the initial census enumeration would be followed by a second measurement, the PES, which would attempt to measure that rate at which people were omitted or erroneously counted by the initial census in order to determine the net undercount rate. The net undercount rate would indicate the appropriate amount by which the census should be adjusted.

A major threat to the accuracy of the census occurs when individuals who have different probabilities of being counted are placed in a single category. The Bureau addresses this problem by using the technique of "poststratification," a technique in which highly specific categories are created and all individuals with a similar likelihood of being counted are placed in a specific category. These categories, or poststrata, are defined by age, sex, race, Hispanic origin, housing tenure, type of environment, and geographic region. For the 1990 census, application of the technique resulted in a total of 1,392 exhaustive and mutually-exclusive poststrata to be applied to the number of households and individuals composing the PES.

In the event that the PES yielded anomalous results from a statistical perspective, the Bureau decided to apply a statistical technique known as "smoothing." Statistical smoothing is a procedure designed to minimize the effects of sampling error by reducing the difference between the results produced by the PES and the results that would be obtained if the entire population were surveyed.

By May 1987, the Bureau determined that an adjustment of the 1990 census using the above-described statistical procedures would be feasible and should be undertaken in the forthcoming census. However, high ranking Commerce Department officials decided against any adjustment in the 1990 census. On October 30, 1987, the DOC announced its decision that the 1990 census would not be statistically adjusted.

That decision prompted a federal lawsuit filed in 1988 by the City and State of New York and a host of others (the "New York Forces"). Named as defendants were the Bureau and the Commerce Department, and a number of other Executive Branch officials (collectively, the "Government"). The States of Wisconsin and Oklahoma entered the lawsuit in support of the Government.

The New York Forces contended that the announcement of the Secretary of the Commerce Department (the "Secretary") not to adjust the 1990 census violated the Constitution. Complaining principally of an anticipated loss in congressional representation and an anticipated deprivation of funds to be distributed under federal programs that use census figures, the New York Forces challenged the methodology to be used in the 1990 census and sought to enjoin the census — that is, to keep it from going forward — unless the initial census was subject to adjustment, if an adjustment proved necessary.

Not surprisingly, both sides engaged in strategic and not-so-strategic maneuvering which included the Government's unsuccessful attempt to have the case dismissed. In permitting the case to go forward, the New York district court hearing the case ruled that it would review the Secretary's decision against statistically adjusting the preliminary census figure (the "nonadjustment decision") under the arbitrary-or-capricious standard of the Administrative Procedure Act. 5 U.S.C § 706(2)(A) (1988) (The Administrative Procedure Act provides for judicial review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ..." 5 U.S.C. § 702. The Bureau and the other federal entities sued in these cases are agencies under the Act. 5 U.S.C. § 701.)

The parties then entered into a stipulation under which the New York Forces withdrew their motion to enjoin the 1990 census and the Secretary would reconsider the decision against adjusting the 1990 census. The stipulation required the Government to conduct a PES of not fewer than 150,000 households. Between the time the New York Forces sued in 1988 and the date of the stipulation in July 1989, a new Secretary, Robert Mosbacher, had been appointed. Accordingly, the stipulation required that the new Secretary would reconsider the earlier non-adjustment decision "with an open mind, without any prejudgment."

The stipulation also called for the Secretary's assessment of any proposed adjustment to be in accordance with a set of published guidelines to be developed promptly by the DOC, articulating the relevant technical and nontechnical statistical and policy grounds for
any decision on whether or not to adjust the initial 1990 decennial census enumeration.

The Commerce Department also was required to appoint and fund an eight-member Special Advisory Panel made up of statistical and demographic experts who would advise the DOC with respect to achieving an accurate final census. In particular, the Special Advisory Panel would advise the DOC on the need for any adjustment and, if needed, would assist in developing appropriate methods of adjustment. If the Secretary eventually decided against an adjustment to the census, the decision was to be accompanied by a detailed explanatory statement. Following the 1989 stipulation, the Commerce Department appointed the Special Advisory Panel.

As provided by the stipulation, the DOC also developed, published, and received comments on its guidelines for conducting the 1990 census, which were promulgated in March 1990. Among other things, the guidelines provided that the census would be deemed the most accurate count of the population unless an adjusted count is shown to be more accurate than the initial census enumeration. They provided that the 1990 census could be adjusted if the adjusted counts were consistent and complete across all jurisdictional levels, federal, state, and local. The guidelines provided that any adjustment of the 1990 census should take into account the effects an adjustment might have on future census efforts. In addition, no adjustment of the 1990 census could be made if it would violate the Constitution or applicable federal statutes.

In April 1990, the New York Forces challenged the Government's guidelines, contending that they violated the 1989 stipulation because they were vague and manifestly biased against any adjustment to the 1990 census. The New York Forces were successful in obtaining a judgment from the district court that a statistical adjustment to the census would not violate the Constitution or any federal statutes. But as to the things that really mattered to the New York Forces, the district court ruled that while the Guidelines were vague and while some of them "lend themselves easily to abuse, they satisfied the Government's obligations under the stipulation and were not unduly biased against adjustment. 739 F. Supp. 761, 770 (E.D.N.Y. 1990).

In conducting the 1990 census, the Bureau used a four-step process for the initial population enumeration. First, the Bureau compiled a list of every household in the nation, each one of which would receive a census questionnaire. Second, census questionnaires were mailed in conjunction with an advertising campaign encouraging participation. Third, the Bureau undertook a follow-up mailing to households that had failed to return the census questionnaire. Finally, the Bureau conducted largely in-person interviews in households that had not responded to the earlier mailings.

The Bureau also implemented the PES as required by the 1989 stipulation. In preparation for the PES, the Bureau selected approximately 5,000 blocks to achieve what it deemed an appropriate sample size for each of the 1,392 poststrata previously developed. Bureau employees visited each sample block and recorded all the housing units, a total of 170,000.

Bureau interviewers visited each address in the sample blocks to obtain information regarding the residency status of household members. The Bureau then compared the data obtained in the PES visits with the information collected in the initial enumeration of the sample blocks. From this comparison, the Bureau estimated rates of omission and rates of erroneous overcounting and calculated a net rate for each poststratum. The Bureau used these results to develop an adjustment factor for each of the 1,392 previously developed poststrata. The adjustment factor, when multiplied by the population count as indicated by the initial enumeration, would reflect the variations found in the PES.

After applying a variety of statistical manipulations, the Bureau concluded that the overall national population had been undercounted by 2.1 percent, or some 5.3 million persons out of a total population of some 255 million persons. The national undercount figure was reduced later to 1.6 percent.

The undercount rate, however, was greater for racial and ethnic minorities within the population. Hispanics were undercounted by an estimated 5.2 percent, Native Americans by an estimated 5.0 percent, African Americans by an estimated 4.8 percent, and Asian-Pacific Islanders by 3.1 percent. These undercount estimates compared to an estimated 1.7 percent undercount rate for non-African Americans and an estimated 1.2 percent undercount rate for non-Hispanic whites.

The impact of the differential undercount was greater in those areas in which racial and ethnic minorities were concentrated. If the census were adjusted by the PES undercount rates, Arizona and California would each gain a seat in the House of Representatives; Pennsylvania and Wisconsin would each lose a seat.

The Secretary decided not to adjust the 1990 census to reflect the undercounting estimates from the PES, in part because there was no consensus among the Secretary's advisors as to

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the soundness of the PES estimates, including a lack of consensus regarding the statistical manipulations applied to the PES data. Accordingly, the population count reported to the President by the Secretary was 249,632,692 rather than the 254,902,609 indicated by the PES-supplemented enumeration.

The Secretary’s decision was issued on July 15, 1991, in a 178-page document. The Secretary acknowledged that the enumeration “was lower than average among certain segments of our population,” but stated that if “we change the counts by a computerized statistical process, we abandon a 200-year tradition of how we actually count people.”

The Secretary acknowledged that the PES-indicated adjustments would appear to make the aggregate national count more accurate, reflecting more accurately both the total population of the country and ethnic subpopulations. However, he concluded that statistical analyses performed by the Bureau, although of uncertain reliability, supported the superior accuracy of the unadjusted census when distributive accuracy is considered, i.e., accuracy at the state and local levels. The Secretary defined distributive accuracy as “getting most nearly correct the proportions of people in different areas.”

The Secretary declined to make any adjustment because distributive accuracy would be not increased. For purposes of state representation in Congress, distributive accuracy was considered paramount because it bore directly on the total number of Representatives allocated to the states.

The New York Forces renewed their challenges to the census, but this time they were joined by a contingent of new opponents led by City of Atlanta and the Florida House of Representatives, both of which filed lawsuits. The three lawsuits were consolidated and a 13-day trial held before the New York federal district court which had been hearing the suit brought by the New York Forces.

Finding that “for most purposes the PES resulted in a more accurate count — or to be statistically fashionable, a less inaccurate count — than the original census, the district court nonetheless upheld the Secretary’s nonadjustment decision because it was not arbitrary or capricious. 822 F. Supp. 906 (E.D.N.Y. 1993).

The Second Circuit, by a two-to-one vote, reversed, holding that the Secretary had not made a good faith effort secure an accurate population count and, thus, failed to achieve the “Constitution’s plain objective of equal representation for equal numbers of people.” 34 F.3d 1114, 1129 (2d Cir. 1994). Because the Secretary had not made the requisite good faith effort, the court concluded that his nonadjustment decision could not be upheld unless the decision was essential to achieve a legitimate governmental objective. 34 F.3d at 1131.

The Second Circuit majority explained its decision by noting that “both the nature of the right and the nature of the affected classes are factors that traditionally require that the Government’s action be given heightened scrutiny: the right to have one’s vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups.” 34 F.3d at 1130. The court returned the case to the district court to enable the Secretary to identify a legitimate interest and to show that his nonadjustment decision was essential to advance that interest.

Granting petitions for writs of certiorari filed by the State of Wisconsin, the State of Oklahoma, and the Commerce Department, the Supreme Court consolidated the cases for argument and decision. 16 S. Ct. 38 (1995).

CASE ANALYSIS

The Constitution requires a census of the population every 10 years, providing that the members of the House of Representatives shall be apportioned among the states “according to their respective numbers.” U.S. CONST. art. I, § 2. The apportionment of Representatives among the states also determines the allocation of votes to the states for the election of the President. U.S. CONST. art. II, § 1.

In addition to these constitutional purposes, states use census data to draw boundaries for congressional and state legislative districts. The data are also used by local governments to establish districts for other representative bodies such as city councils and county boards of supervisors. In addition, census data often provide the basis of allocating federal and state funding and services.

The Constitution provides that the decennial census be conducted “in such Manner as [Congress] shall by law direct.” U.S. CONST. art. I, § 2. Congress has designated the Bureau as the federal agency to conduct the census and has provided that the decennial census shall be conducted by the Secretary of Commerce “in such form and content as he may determine, including the use of sampling procedures and special surveys.” 13 U.S.C. § 141(a) (1988).

Congress, however, has made it clear that the Secretary cannot use “the statistical method known as ‘sampling’” when determining the population for purposes of reappror-
tionment of Representatives.
13 U.S.C. § 195. When a census is used for purposes other than apportionment, sampling is permissible.
13 U.S.C. § 141. In other words, with respect to the reapportionment of Representatives, the census must reflect an actual, not a sample-derived, count of the population.

In addition to the Second Circuit's decision at issue in this case, two other federal courts of appeals have recently considered census-related matters. In City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), the Sixth Circuit held that the decision by the Secretary not to adjust census data to account for racially differentiated undercount was not arbitrary or capricious. The Seventh Circuit held that individuals did not have standing to litigate alleged minority undercounting in the 1990 census. Tucker v. United States Dept. of Commerce, 958 F.2d 1411 (7th Cir. 1992). The Seventh Circuit commented that the plaintiffs were not asking the court to decree equality; they were asking the court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." The Supreme Court declined to review either decision.

The Supreme Court also has considered census-related cases. In Franklin v. Massachusetts, 505 U.S. 788 (1992), the Court held that census decisions affecting the apportionment of Congress will be reviewed for consistency with the language of the Constitution and the constitutional goal of equal representation. In United States Department of Commerce v. Montana, 503 U.S. 442 (1992), the Court recognized Congress' broad authority in reapportionment among the states and recognized that the standard of complete equality for each voter announced in Wesberry v. Sanders, 376 U.S. 1 (1964), had little usefulness beyond drawing district lines within a state.

Contending that the constitutional purpose of the census is to allocate rights of political representation based on the distribution of the population among and within the states, the Government asserts that absent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's nonadjustment decision.

The Government asserts that the Secretary's emphasis on distributive, rather than numeric, accuracy and his determination that the unadjusted figures would be deemed the more accurate absent a contrary showing were consistent with the constitutional language and the constitutional goal of equal representation. Moreover, the Government stresses that the 1990 census was among the most accurate in the nation's 200-year census-taking history. When viewed in light of the lack of consensus among the statisticians and demographers advising the Secretary, the Government insists that the Secretary made a good faith effort to achieve an accurate population count and that the Second Circuit erred in holding to the contrary. This is not to suggest, however, that the Government accepts the good faith standard as the proper legal test of the Secretary's nonadjustment decision.

According to the Government, the arbitrary-or-capricious standard adopted by the district court is the proper standard and that the facts clearly establish that the Secretary's nonadjustment decision was neither arbitrary nor capricious.

The Government maintains that it was permissible for the Secretary to require proof that the adjusted pop-

ulation estimates were more accurate before abandoning the 200-year practice of using unadjusted figures. In particular, the Government argues that when, as in this case, the procedures selected for taking the census do not represent a retreat from past efforts to take an accurate census, the Constitution does not create an entitlement to specific, previously untried, census innovations. According to the Government, the Secretary's acknowledgment that an adjustment would have increased numeric accuracy at the national level does not evidence a lack of effort to allocate Representatives accurately among the states, since only distributive accuracy is relevant to the reapportionment process.

The Government also claims that the Second Circuit majority erred in suggesting that equal protection principles required heightened scrutiny of the Secretary's decision, contending that the New York Forces have not alleged, and the courts have not found, that either the Secretary or any other federal official acted for the purpose of reducing the electoral power of minority residents or of otherwise disadvantaging them. Here, the Government points out that there is never an equal protection violation without discriminatory intent, which, it notes, is absent in this case.

The New York Forces counter that the Government's reliance on the distinction between overall accuracy and distributive accuracy is of no constitutional significance because, in fact, an adjustment would have increased the distributive accuracy of census figures for locations that contain two-thirds of the nation's population. This fact, they argue, clearly impacts reapportionment of Representatives and it is this impact that establishes the constitutional
violation. Refusing to adjust the census in light of this evidence, suggests that the Secretary's nonadjustment decision fails even the arbitrary-or-capricious test.

The New York Forces, however, insist that the Secretary's nonadjustment decision must be given a heightened level of judicial scrutiny because the decision effectively permits racial and ethnic undercounting to go uncorrected. This, in turn, affects the reapportionment of Representatives and the drawing of congressional and state legislative districts in ways that compromise the voting strength of minority groups. The New York Forces insist that such a direct assault on equal protection and the right to vote can never be tested by the arbitrary-or-capricious standard, a standard that is entirely too deferential where, as here, official action strikes directly at fundamental constitutional rights.

SIGNIFICANCE
These consolidated cases are among the most significant cases before the Supreme Court this Term. A decision for the Government preserves the status quo until the next census at the turn of the century. In addition, a decision for the Government could be crafted in such a way as to remove the adjustment issue from future censuses.

A decision for the New York Forces likely would prompt a slew of lawsuits between the states as they square off to claim each other's Representatives. The spectacle of states descending on federal courts to fight each other for Representatives might strike some as unseemly and could prompt the Court to hold that the suit presents the type of purely political question that federal courts are not empowered to decide. See Tucker, 958 F.2d at 1419 (Ripple, J., concurring) (Constitution squarely places sole responsibility for reapportionment on Congress).

ATTORNEYS OF THE PARTIES
For the State of Wisconsin (Peter C. Anderson, Assistant Attorney General of the State of Wisconsin; (608) 266-9595).

For the State of Oklahoma (Don G. Holladay; Andrews Davis Legg Bixler Milstein & Price; (405) 272-9241).

For the United States Department of Commerce, Ronald H. Brown, as Secretary of the United States Department of Commerce, Everett Ehrlich, as Under Secretary for Economic Affairs of the United States Department of Commerce, Bureau of the Census, William J. Clinton, as President of the United States, Dan Glickman, as Secretary of Agriculture, Donna E. Shalala, as Secretary of Health and Human Services, Henry Cisneros, as Secretary of Housing and Urban Development, Robert B. Reich, as Secretary of Labor, Federico Pena, as Secretary of Transportation, Richard W. Riley, as Secretary of Education (Drew S. Days, III, Solicitor General; Department of Justice; (202) 514-2217).

For the City of New York (Paul A. Crotty, Corporation Counsel of the City of New York; (212) 788-0800).

AMICUS BRIEFS
In support of the State of Wisconsin, the State of Oklahoma, and the United States Department of Commerce et al.

Joint brief of United States Senators Herb Kohl, Arlen Specter, and Russell Feingold (Counsel of Record: Brady C. Williamson; LaFollette & Sinykin; (608) 257-3911);
The Commonwealth of Pennsylvania (Counsel of Record: John G. Knoor, III, Chief Deputy Attorney General of the Commonwealth of Pennsylvania; (717) 783-1471).

In support of the City of New York et al.
The City of Detroit, Michigan (Counsel of Record: Linda D. Fegins, Principal Assistant Corporation Counsel of the City of Detroit, Michigan; (313) 224-4550);
Joint brief of the Lawyers’ Committee for Civil Rights Under Law, American Civil Liberties Union, American Jewish Committee, NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union, and the Puerto Rican Legal Defense and Education Fund, Inc. (Counsel of Record: Jonathan L. Greenblatt; Shearman & Sterling; (212) 848-4000).