Census 2000: Legal Issues re: Data for Reapportionment and Redistricting

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Summary

The release of the 2000 Census data for the apportionment of the House of Representatives among the states and the release of the state redistricting data to the states as required by P.L. 94-171 has renewed the decennial debate over several issues. First, the debate over the use of sampling to adjust the decennial population census data was not completely resolved by the U.S. Supreme Court decision that a federal statute prohibits the use of sampling to adjust the decennial census for the purposes of apportionment of the House of Representatives among the states. The Court did not hold that the adjustment of census data for other purposes, such as intrastate redistricting, was prohibited. Additionally, last year, the Census Bureau indicated that it would likely release both adjusted and unadjusted sets of data.

In the wake of these developments, there were legislative efforts in many states to specify which data are to be used in intrastate redistricting. Controversy surrounded preclearance under the Voting Rights Act for some state laws. Meanwhile, the transition between Administrations resulted in a policy change concerning the release of adjusted census data for redistricting. Last year, the Secretary of Commerce promulgated a rule which delegated the decision to adjust the official decennial census figures to the Director of the Census Bureau and required the release of adjusted figures where the Secretary chose not to release them as the official redistricting data despite the recommendation of the Executive Steering Committee for Accuracy and Coverage Evaluation Policy (ESCAP) to adjust the data. This year, the Secretary of Commerce under the new Administration rescinded that rule and took back the authority to decide to adjust state redistricting census data. The City of Los Angeles, joined by other municipalities, filed a suit challenging the anticipated change in policy on the grounds that proper rule-making procedures were not followed. The suit relied on the assumption that the ESCAP would recommend to adjust. However, on March 1, 2001, the Acting Director of the Census Bureau and ESCAP recommended not to adjust redistricting data; accordingly, on March 6, 2001, the Secretary announced the release of the unadjusted data. Since this appeared to render the Los Angeles suit moot, the City Attorney for Los Angeles announced that he would amend the complaint to add new allegations that the Secretary's decision is arbitrary and capricious and violates the Census Act, which requires the Secretary to use statistical sampling, where he considers it feasible, for purposes of the census other than apportionment of the House of Representatives. Congress has the constitutional authority to determine issues of census methodology, including whether or not the release of adjusted data suitable for intrastate redistricting purposes is feasible.

Second, Utah has filed a suit challenging the apportionment of the House of Representatives on the grounds that expatriate Utahans, specifically missionaries for the Church of Jesus Christ of the Latter-Day Saints, should have been included in the population count for Utah. Such an inclusion would have meant that Utah would have gained a congressional seat which went to North Carolina instead. Although the U.S. Supreme Court held previously that the Secretary of Commerce had the discretion to include overseas federal personnel in the apportionment census, it did not address the issue of whether other expatriates should be included as well, once the decision was made to include one segment of the expatriate population. Congress, however, has the authority to legislate census methodology with regard to the inclusion or exclusion of expatriates and categories of expatriates.

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The release of the 2000 Census data for the apportionment of the House of Representatives among the states and the release of the state redistricting data to the states as required by P.L. 94-171 has renewed the decennial debate over several census-related issues. First, the perennial statistical adjustment issue, although decided by the United States Supreme Court with regard to the apportionment of the House of Representatives among the states, remains active with regard to intrastate redistricting census data. The decision of the Secretary of Commerce to release unadjusted 2000 census data for intrastate redistricting purposes was seen as an unequivocal victory by opponents of statistical adjustment,[1] but does not seem to have quelled the determination of proponents of statistical adjustment to obtain release of adjusted data.[2] Second, Utah has brought a lawsuit challenging the apportionment, alleging that expatriate missionaries for the Church of Jesus Christ of the Latter-Day Saints should have been included in the population count for Utah.

Release and Use of State Redistricting Census Data

Background

On January 25, 1999, in *Department of Commerce v. U.S. House of Representatives*,[3] the United States Supreme Court held that the Census Act[4] prohibits sampling in the census for the apportionment of the House of Representatives, but declined to decide whether sampling would also be a violation of the census clause of the U.S. Constitution. This decision was the culmination of two lawsuits which had been brought to challenge the plans of the Census Bureau to use sampling in the 2000 census. Opponents of sampling claimed victory and promised to focus on improving the traditional headcount through methods such as expanded outreach to undercounted groups and the use of administrative records. But proponents of sampling, including the Clinton Administration, noted that the decision did not determine the constitutionality of sampling and also did not hold that sampling was prohibited for purposes other than apportionment of the House of Representatives among the states. Because the Court stated in one part of its opinion that section 195 of the Census Act "requires [the use of] statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census,"[5] supporters of adjustment argued that sampling techniques were not only permissible, but were required, in the taking of the census for the purposes of intrastate redistricting and federal funding allocations. They indicated an intention to seek the use of sampling techniques in population counts used for intrastate redistricting and funding allocation formulas.

Other case law arguably supports the use of figures other than the official data for apportionment of the House of Representatives among the states. The Federal Constitution does not require the

[1] *See* press releases of the Chairman of the House Subcommittee on the Census, Rep. Dan Miller, *Game. Set. Match.* at http://www.house.gov/danmiller/census/mar1_01.html (last visited March 8, 2001) and *Miller Applauds Secretary's Final Decision* at http://www.house.gov/danmiller/census/mar6_01.html (last visited March 8, 2001).

[2] Mae M. Cheng, *Despite Undercount, Census Data to Stand; Adjustment advocates vow legal challenges*, NEWSDAY, March 7, 2001, at A6.

[3] 5 U.S. 316, 119 S.Ct. 765 (1999).

[4] Codified as amended at 13 U.S.C. §§ 1 *et seq*.

[5] 5 U.S. at 339, 119 S.Ct. at 777.

use of federal decennial census data for intrastate congressional and state legislative redistricting; it only provides for the use of census data for apportionment among the states, not for redistricting and reapportionment within them. Federal courts have held that states are not required to use federal census data, adjusted or unadjusted, for redistricting, and therefore the Bureau of the Census itself has no duty or requirement to provide the states with adjusted data for redistricting purposes. In the 1969 Supreme Court decision in *Kirkpatrick v. Preisler*[6] involving Missouri's congressional redistricting plan, the Supreme Court, while invalidating the plan, nevertheless indicated that the use of projected population figures was not *per se* unconstitutional and that states may properly consider such statistical data *if* such data would have a high degree of accuracy (however, the Court also stated that the federal decennial census data were the best data available).[7]

In *Senate of the State of California v. Mosbacher*,[8] in which the state senate was suing for the release of adjusted data after the Bureau decided not to adjust the official 1990 census data, the U.S. Court of Appeals for the Ninth Circuit noted that if a state knows that census data is underrepresentative of the population, it can and should utilize non-census data, in addition to the official count, for redistricting,[9] but the court also held that the Secretary of Commerce had no affirmative duty under the Census Clause of the Federal Constitution (Art. 1, § 2, cl. 3) and the federal census statutes to assist the state by providing adjusted census data.[10] However, in *Assembly of the State of California v. U.S. Department of Commerce*,[11] the same court affirmed a lower court's decision requiring that computer tapes containing statistically adjusted data from the 1990 census be released to the Assembly under the Freedom of Information Act and noted that the "states are not obliged to use official census data when drawing their state legislative or congressional districts."[12] In a similar case, *Florida House of Representatives v. U.S. Department of Commerce*,[13] the U.S. Court of Appeals for the Eleventh Circuit held that the statistically adjusted data was exempt from disclosure under the Freedom of Information Act.

In *Young v. Klutznick*, a suit by the city of Detroit to get an adjustment of the alleged undercount in the 1980 census data, in dicta, the appeals court stated that the state legislature is not required by the federal Constitution to use census data supplied by the Bureau for congressional redistricting, but could use adjusted population figures when redistricting between decennial censuses, as long as the adjustment is thoroughly documented and applied in a systematic manner.[14]

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[6] 4 U.S. 526 (1969).

[7] See also *Dixon v. Hassler*, 412 F.Supp. 1036, 1040-41 (W.D. Tenn 1976), *aff'd sub nom. Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976); *Exon v. Tiemann*, 279 F. Supp. 601, 608 (D. Neb. 1967).

[8] 8 F.2d 974 (9th Cir. 1992).

[9] 8 F.2d at 979, citing *Garza v. County of Los Angeles*, 918 F.2d 763, 772-73 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

[10] 968 F.2d at 979 (but Judge Pregerson, dissenting, argued that by refusing to disclose the adjusted data, the Secretary may have impermissibly interfered with the state senate's duty to redistrict under the Federal Constitution and the Voting Rights Act).

[11] 968 F.2d 916 (9th Cir. 1992).

[12] 968 F.2d at 918, n. 1, citing *Burns v. Richardson* and *Young v. Klutznick*, discussed below.

[13] 961 F.2d 941 (11th Cir. 1992).

[14] 652 F.2d 617, 624 (6th Cir. 1981).

In *City of Detroit v. Franklin*,[15] the city sought an adjustment of the alleged undercount in the 1990 census data and argued that the causation analysis by the Court of Appeals in the case involving the 1980 census had been overruled by the holding in *Karcher v. Daggett*.[16] The city argued that in *Karcher* the U.S. Supreme Court held that the apportionment clause imposes an obligation on states to use only the official population count as determined by the Bureau in redistricting. This argument is probably based on the sentence "[a]dopting any standard other than population equality, using the best census data available ... would subtly erode the Constitution's ideal of equal representation"[17] and the fact that the Court considered the census data the only reliable indication of the districts' relative population levels.[18] The District Court in *City of Detroit* held that the plaintiffs misconstrued *Karcher* and that it did not hold that states must use census figures in redistricting and did not overrule *Young*. Rather, the Supreme Court had "merely reiterated a well-established rule of constitutional law: states are required to use the `best census data available' or `the best population data available' in their attempts to effect proportionate political representation."[19]

In the cases above, except for *Kirkpatrick v. Preisler*, where the courts held that the states were not required to use federal census data for intrastate redistricting activities, the plaintiff states had chosen to use the total population based on federal census figures as the basis for redistricting activities and sued to obtain the census data as adjusted by the Census Bureau. Federal courts have also considered cases where state legislatures did not use federal decennial census data or even total population data as the basis for redistricting activities. In *Kirkpatrick*, the state legislature apparently performed rather haphazard adjustments and projections based on total population and the Court found that the legislature had not justified its methodology. In *Burns v. Richardson*,[20] the Supreme Court held that in state legislative redistricting cases the Constitution "does not require the states to use total population figures derived from the federal census as the standard" of measurement. The Court noted that in earlier cases it was careful to leave open the question of what population basis was appropriate in redistricting activities, even though in several cases total population figures were in fact the basis for comparison when determining whether the Equal Protection Clause of the Constitution had been violated. The Court recognized that in a particular case, total population might not be the appropriate basis for redistricting plans. In the *Burns* case, Hawaii had used the number of registered voters as the basis for redistricting the state senate. The Court found that the redistricting plan "satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[21] Hawaii was found to have a unique situation, wherein the significant number of tourists, military personnel, and other transient population segments distorted the distribution of actual state citizens. The redistricting plan that would have resulted from a total population basis would not have reflected the true state population distribution as accurately as a state citizen population basis. Since a registered voter population basis was the closest approximation of a state citizen population basis, the use of the registered voter population basis was deemed

[15] 800 F. Supp. 539 (E.D. Mich. 1992).

[16] 462 U.S. 725 (1983).

[17] 462 U.S. at 731 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969)).

[18] 462 U.S. at 738.

[19] 800 F. Supp. at 543 (quoting also from *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969) ("the best population data available")).

[20] 384 U.S. 73, 91 (1966).

[21] 384 U.S. at 93.

consistent with the Equal Protection Clause. However, the Court was careful to note that the ruling in the *Burns* case did not establish the validity of the unique redistricting population basis for all time or circumstances.[22] Although the federal decennial census figures need not be used as the basis for redistricting activities, any alternate figures used must be shown to be the best data available or to be justified by particular circumstances as resulting in a more accurate redistricting plan than one based on federal decennial census total population figures.

Since, under the Federal Constitution, the states arguably can and should use data other than the official apportionment census data in their own redistricting process if they know the other data to be the best available data, one must look at each State's laws to determine whether the states themselves require the use of official federal decennial census data in the redistricting processes. Although most states prescribe a redistricting procedure by statute for state legislative redistricting, many do not have a statutory procedure for congressional redistricting. The state legislatures in such states conduct the congressional redistricting as they decide on an *ad hoc* basis after a federal decennial census. This means that often in such states there is no explicit statutory requirement to use official federal decennial census data for congressional redistricting, although there may be such an explicit requirement for state legislative redistricting. To the extent that a State's own laws do not explicitly require the use of official federal decennial census data for intrastate redistricting, the state is free to use any other data. Even if a State's laws require the use of official federal decennial census data, it is unclear what a reference to official federal decennial census data would mean, if the Federal Government released two official sets of data. This issue was also considered during the oral arguments in the census sampling cases.[23] If the Secretary of Commerce transmits an official, second, adjusted data set, that data arguably could still be considered official federal decennial census data, even if it is not the data used for apportionment of the House of Representatives. One should note that the Court's holding on standing for the plaintiffs in *Department of Commerce v. U.S. House of Representatives* indicates that a majority of the Court considers the references to official federal decennial census data to be a reference to the apportionment data.[24]

Because of the absence of sufficiently clear and explicit statutory guidelines concerning the appropriate data to be used in intrastate congressional and state legislative redistricting activities at the time of the decision in *Department of Commerce v. U.S. House of Representatives*, in the wake of that decision there was a flurry of state legislative activity concerning the type of federal decennial census data to be used in intrastate redistricting. Although there has been no congressional activity concerning state redistricting census data as yet, there is a potential role for Congress in determining what data will likely be used by the states.

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[22] *See also MacGovern v. Connolly*, 673 F. Supp. 111 (D. Mass. 1986) (court upheld state redistricting scheme which entailed use of data from a decennial state census held every 10 years beginning in 1975 and refused to order a new scheme based on "inapposite" 1980 federal census data); *Klahr v. Williams*, 313 F. Supp. 148 (D. Ariz. 1970) (court held invalid congressional and state legislative redistricting plans based, *inter alia*, on a population estimate formula "converting 1968 voter registration to 1960 census on a proportionate basis" which did not truly represent the population, but ordered the plan used anyway because no better alternative was feasible before the next election).

[23] Oral Argument Transcript, found at 1998 WL 827383 on Westlaw (oral argument of Michael A. Carvin on behalf of the appellees in No. 98-564).

[24] 525 U.S. at 332-4, 119 S. Ct. at 774-5.

State Legislative Activity

Since the 1999 Supreme Court decision concerning sampling, a majority of the states have considered legislation concerning the type of data to be used for intrastate redistricting. So far, four states—Alaska, Arizona, Colorado, Kansas, and Virginia[25]—have actually enacted legislation requiring that unadjusted federal decennial census data be used as the basis for redistricting activities. No states have enacted legislation requiring the use of adjusted data for redistricting. The vast majority of state legislative activity appears to have been in the form of resolutions noting the apportionment purpose of the census, the Supreme Court decision, and the possible unconstitutionality of using adjusted figures for intrastate redistricting; calling on the Census Bureau to conduct the census in a manner consistent with the Supreme Court ruling, that is, without sampling; opposing the use of adjusted data for state redistricting; requesting or demanding the transmission of unadjusted data for state redistricting; and urging Congress to take any necessary steps to ensure a fair and legal census. A few states had resolutions urging the Federal Government to use modern, scientific techniques, that is, sampling, in providing the states with P.L. 94-171 redistricting data. There appears to have been very little state legislation which would *require* the use of adjusted data in the redistricting process.

Currently, under the Voting Rights Act of 1965 and its regulations,[26] all or parts of sixteen states are considered "covered jurisdictions" required to submit any proposed changes in voting, election or redistricting laws to either the U.S. Attorney General/Department of Justice or to the U.S. District Court for the District of Columbia [District Court] for preclearance through an administrative finding or declaratory judgment, respectively.[27] Alaska, Arizona, and Virginia are among those sixteen states. Alaska and Arizona submitted their laws to the Department of Justice [DOJ] for preclearance in 1999. Virginia submitted its law to the District Court for preclearance in 2000. Under the act and its regulations, the DOJ has sixty days to respond to a submission. If it requests further information, a new sixty-day period starts when it receives the new information from the State. Further requests do not restart the clock. If the state receives a notice of preclearance or no response from the DOJ within the sixty-day period, the law is considered precleared. If the DOJ finds either that the law negatively impacts voting rights or that it is unclear whether there is a negative impact, it is supposed to notify the state of an objection to preclearance. Either way, the decision of the DOJ regarding preclearance is unreviewable. However, a declaratory judgment can still be sought from the District Court. Neither the administrative finding of the DOJ nor the declaratory judgment of the District Court regarding preclearance precludes litigation challenging the constitutionality of the law being considered. Preclearance simply constitutes a preliminary finding permitting the law to be implemented or to take effect in the first place.

The preclearance process for all three states was delayed until the release of the 2000 census redistricting data. The DOJ requested further information from both Alaska and Arizona, but decided not to issue any decision, pending the release of the data. The DOJ apparently did not

[25] In Alaska, S.B. 99, Ch. 18 of the 1999 Acts, was enacted on May 11, 1999. In Arizona, H.B. 2698, Ch. 47 of the 1999 Laws, was enacted on April 22, 1999. In Colorado, S.B. 206, Ch. 170 of the 1999 Laws, was enacted on May 7, 1999. In Kansas, S.B. 351, Ch. 148 of the 1999 Laws, was enacted on May 12, 1999. In Virginia, H.B. 1486, ch. 884 of the 2000 Acts, was enacted on April 9, 2000.

[26] The act is codified as amended at 42 U.S.C. §§ 1971, 1973 – 1973bb-1; its regulations are at 28 C.F.R. part 51.

[27] These sixteen states are Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia.

explicitly communicate such a policy to Arizona which, after a longer than usual time period for an initial preclearance decision had elapsed, chose to withdraw its law from the preclearance process in February 2000, which means that the law cannot take effect. In July 2000, the DOJ informed Alaska in writing that, until the release of redistricting data, it could not evaluate whether the Alaskan statute would negatively effect the voting rights of minority voters in future redistricting plans and so could not make a preclearance decision. In *Virginia v. Reno*,[28] its suit for declaratory judgment of preclearance, Virginia claimed—(1) that its new law does not require preclearance because federal law requires the use of unadjusted figures anyway and the new law continuing the *status quo* does not constitute a change in redistricting laws and practices requiring preclearance; (2) that the new law does not have the purpose nor will have the effect of abridging the right to vote of minority voters; and (3) that the Attorney General's plans to use adjusted figures in evaluations of redistricting plans violates federal law (another claim dealt with a part of the law unrelated to redistricting census data). A three-judge panel of the District Court granted a motion by the defendants to dismiss the claims as not ripe for review, ruling that none of these claims was ripe, since no final Administrative decision concerning the release of adjusted figures had yet occurred. The court noted that if only unadjusted figures were released, any ruling regarding the need for preclearance would be a prohibited advisory opinion. It could not evaluate any negative effect on voting rights unless and until adjusted figures were released so that it could compare the results of using one data set versus the other. Finally, until a Census Bureau decision concerning the release of data was made, there could be no plans by the Attorney General to use a particular data set for preclearance evaluations of redistricting plans.[29]

On March 6, Secretary of Commerce Donald L. Evans announced that he had decided to send the actual 2000 census enumeration data, unadjusted by statistical methods, to the states for the purpose of redistricting, in accordance with the recommendation of the Acting Director of the Census Bureau, William G. Barron, and the Executive Steering Committee for Accuracy and Coverage Evaluation Policy (ESCAP).[30] As mentioned above, the District Court ruling on the Virginia statute noted that if only unadjusted figures were released, any ruling regarding the need for preclearance would be a prohibited advisory opinion. Since unadjusted data will be the official P.L. 94-171 redistricting data, the remaining issues in the *Virginia* case are moot. Presumably, the DOJ will likely grant preclearance to the Alaskan statute, since the officially released data and the data required by the statute will be the same, although the decision of the Secretary appears to have rendered all the state statutes mandating use of unadjusted data superfluous. Nevertheless, proponents of adjustment still seek the release of adjusted data, apparently for redistricting as well as federal funding allocation purposes.[31]

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[28] 117 F. Supp. 2d 46 (D.D.C. 2000); *aff'd*, 531 U.S. ___ (U.S. Jan. 8, 2001) (No. 00-862).

[29] The Attorney General announced that the DOJ would evaluate redistricting plans according to data released pursuant to the P.L. 94-171 program, even if these data were not used in drawing the plan. Use of other data in the plan would not be *per se* invalid, but unless other data was shown to be more accurate and reliable, the DOJ would consider P.L. 94-171 data to be the population measure for preclearance purposes. 66 Fed. Reg. 4900, 5413 (Jan. 18, 2001).

[30] *See* press release of the Secretary at http://www.census.gov/Press-Release/www/date.html(last visited March 8, 2001); and recommendation of the Acting Director of the Census Bureau and ESCAP at 66 Fed. Reg. 14004 (March 8, 2001) and also at http://www.census.gov/dmd/www/EscapRep.html (last visited March 8, 2001).

[31] Mae M. Cheng, *Despite Undercount, Census Data to Stand; Adjustment advocates vow legal challenges*, NEWSDAY, March 7, 2001, at A6.

Administrative Activity

As noted above, on March 1, 2001, the ESCAP made a recommendation not to adjust the census redistricting data and the Secretary of Commerce made the final decision not to adjust on March 6, 2001. The ESCAP report indicated that the ESCAP was not yet able to resolve to its satisfaction certain discrepancies between the data resulting from the adjustment sampling survey and other accuracy analyses and needed more time to study the matter. Pursuant to 13 U.S.C. § 141 (commonly referred to as P.L. 94-171), the Administration is required to provide decennial census figures for intrastate redistricting activities to the states participating in the P.L. 94-171 program prior to April 1, 2001. Given the statutory deadline, the ESCAP could not recommend adjustment of the data. Last year the Clinton Administration had announced the intention of releasing two sets of figures, unadjusted and adjusted.[32]

Concerns about insulating the decision on whether to adjust the redistricting census figures from the "taint" of partisan politics led the Commerce Department, on June 13, 2000, to propose a rule (1) establishing a process by which a committee of senior career officials (ESCAP) of the Census Bureau would advise the Director of the Census Bureau regarding a decision to adjust census data and (2) delegating authority for this decision from the Secretary to the Director.[33]The Director made the decision to not adjust the census data by the end of that year. 45 Fed. Reg. 82872-82885 (Dec. 16, 1980). For the decision in 1990, *see* text accompanying notes 39-41. Additionally, if a decision were made to adjust the census data, the unadjusted data would also be released, simultaneously with the report of the adjusted data, in accordance with P.L. 105-119, § 209(j), 111 Stat. 2440, 2483 (1997). If a decision were made to not adjust, *despite the ESCAP recommendation to adjust*, the adjusted data would also be released. The regulation was silent with regard to releasing adjusted data if ESCAP recommended the release of unadjusted data. After the consideration of comments from opponents and proponents of statistical adjustment, on October 6, 2000, the final rule, 15 C.F.R. part 101, was issued.[34] Apparently in response to some of the comments, a new paragraph was added, 15 C.F.R. § 101.1(a)(5), which stated that:

> Nothing in this section diminishes the authority of the Secretary of Commerce to revoke or amend this delegation of authority or relieves the Secretary of Commerce of responsibility

[32] Notice in 65 Fed. Reg. 38374, 38394-5 (June 20, 2000) (statement issued by Kenneth Prewitt, then-Director of the Census Bureau, with a preliminary conclusion that adjustment is feasible and expected to be more accurate than unadjusted figures; statement adopted by then-Secretary of Commerce William M. Daley); *see also* statement of then-Secretary of Commerce Daley on plan for Census 2000, Wednesday, February 24, 1999, *at* http://www.doc.gov/Opa/Speeches/censusplan.htm (last visited Feb. 28, 2001).

[33] 65 Fed. Reg. 38370 (June 20, 2000). In 1980, the Secretary of Commerce apparently delegated the decision to the Director of the Census Bureau. In May 1980, then-Secretary Philip M. Klutznick directed then-Director Vincent Barabba to "take direct personal charge" of the process of examining the validity of adjustment methods and the desirability of making an adjustment:

> The culmination of this process should be a decision by the Director of the Census Bureau on whether and how any statistical adjustment should be made to 1980 census data.... Even if there were some basis for an adjustment of the population count to be used for apportionment of the House of Representatives, I do not believe that any adjustment can be made prior to the statutory deadline for the delivery of this information to the President. I do expect, however, that by the end of the calendar year, or shortly thereafter, you will be prepared to announce a decision on adjusting the census data for other uses. 45 Fed. Reg. 83110, 83117 (Dec. 17, 1980); 45 Fed. Reg. 69515, 69524 (Oct. 21, 1980).

[34] 65 Fed. Reg. 59713 (Oct. 6, 2000).

> for any decision made by the Director of the Census pursuant to this delegation. This section shall remain in effect unless or until amended or revoked by the Secretary of Commerce.

However, on February 16, 2001, Secretary of Commerce Donald L. Evans announced a new final rule revoking the delegation of authority to make the adjustment decision to the Director of the Census Bureau and the regulatory section concerning the release of two sets of numbers.[35] Proponents of adjustment viewed this as preparation for a decision to not adjust and to release only one set of numbers for redistricting, as in 1991. Accordingly, the City of Los Angeles, joined by other municipalities, filed a suit on February 21, 2001, indirectly challenging the anticipated policy by alleging that the new rule improperly revoked the previous rule in a manner inconsistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*[36] The plaintiffs alleged that the new rule was substantive and therefore subject to a notice and comment period before it could be promulgated; that the new rule results in a decision-making process governed by politics, not science; that the new rule could result in a prohibition on the release of adjusted census data; and that the plaintiffs would be irreparably harmed by all the above. The defendants argued, *inter alia*, that the revocation of the earlier rule was a procedural, not substantive, act and therefore not subject to notice and comment; that under the revoked rule, the decision was in the hands of the Director of the Census Bureau, who is a political appointee, as is the Secretary, and not a career Census Bureau professional; and that the plaintiffs' claims of irreparable harm were speculative and the claims of deprivation of access to adjusted data were not ripe, because no decision had been made concerning the release of adjusted data. The federal District Court for the Central District of California denied a temporary restraining order to the plaintiffs and set a hearing for March 5, 2001, concerning a preliminary injunction,[37] but in light of the recommendation of the Acting Census Director and the ESCAP report and recommendation, the hearing was cancelled, while Los Angeles city officials and statisticians pondered the ESCAP report.

Secretary Evan's decision not to release adjusted data appeared to render the lawsuit moot since the original rule promulgated on October 6, 2000, did not require the release of adjusted data if the ESCAP recommended against it. The plaintiffs appeared to have no standing since they could not show they were injured by the Secretary's action in revoking the original rule. However, in the wake of Secretary Evan's decision, the City Attorney of Los Angeles, (name redacted), announced that he would pursue further legal action to obtain the adjusted census data by amending the complaint to add new allegations that the Secretary's decision is arbitrary and capricious and violates section 195 of the Census Act, 13 U.S.C. § 195, which requires the Secretary to use statistical sampling, "if he considers it feasible," for purposes of the census other than apportionment of the House of Representatives.[38]

In some ways, this seems like a repeat of litigation following the 1990 census. For the 1990 census, the Secretary originally decided to not adjust the census data.[39] After this decision resulted in lawsuits challenging the decision, the Secretary planned to make the adjustment

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[35] This rule was published and took effect on Feb. 23, 2001. 66 Fed. Reg. 11231 (Feb. 23, 2001).

[36] *City of Los Angeles v. Evans*, No. CV 01-01671GAP (MCX) (C.D. Cal.).

[37] Mae M. Cheng, *L.A. Loses Round in Census Case; But suit, which NYC may join, is still alive*, NEWSDAY, Feb. 25, 2001, at A14.

[38] *See* press release of the Los Angeles City Attorney, *Hahn declares that census legal fight will continue*, at http://cityofla.org/atty/pressrel.htm (last visited March 8, 2001).

[39] Clifford D. May, *U.S. Rejects Pleas to Adjust 1990 Census for Undercount*, NEW YORK TIMES, Oct. 31, 1987, at A1, col. 5.

decision personally according to guidelines pursuant to a court order in the main adjustment lawsuit at that time.[40] Ultimately, following a process pursuant to these guidelines, the Secretary decided to not adjust.[41] The litigation over this decision culminated in the U.S. Supreme Court decision in *Wisconsin v. City of New York*.[42] The Supreme Court held that the Secretary of Commerce had acted, within his broad powers over the census, in a manner consistent with the constitutional goal of equal representation in deciding not to adjust the 1990 census data, in light of the fact that there was no clear consensus among experts that the adjusted data were superior to the unadjusted data. Although the Supreme Court did consider the "goal of equal representation" to be important, it did not find that the goal was violated by the use of unadjusted data. In *Wisconsin*, the Court did not decide whether Congress had constrained the Secretary's authority to decide *not to adjust* the census since the issue was not raised by the parties to the case.[43] As noted above, in *Department of Commerce v. U.S. House of Representatives*, the Court found that section 195 of the Census Act required the Secretary to use statistical sampling techniques, *if he considered it feasible*, for purposes other than apportionment of the House of Representatives. Proponents of sampling interpret this as meaning that adjustment must be used for intrastate redistricting data, if feasible. The issue to be raised by the City of Los Angeles, that the Secretary refused to adjust although adjustment was feasible, has not been decided before, but the recommendation of the Acting Census Director and the ESCAP would seem to constitute a finding within the Census Bureau and the Commerce Department that adjustment, within the statutory timetable for reporting redistricting data, was not feasible.

Congressional Activity

Although the adjustment debate has moved to the state legislatures and the federal courts for the moment, there is a possible congressional role should Congress choose to intervene. Congress could legislatively require that the Census Bureau make adjusted data available, whether or not it is the official data transmitted through the P.L. 94-171 program, just as it has already required the release of unadjusted data under P.L. 105-119, as noted above. Although Congress has not explicitly required states to use federal decennial census data in congressional redistricting, it could arguably do so under the same constitutional powers which give Congress the authority to establish other redistricting guidelines if it chooses, Art. I, § 2, cl. 1, which provides that the Members of the House of Representatives shall be chosen by the People and Art. I, § 4, cl. 1, giving Congress the authority to determine the times, places and manner of holding elections for Members of Congress. Where it is not clear that one data set is more accurate than the other and the constitutional goal of equal representation is not implicated, arguably, Congress could require that a particular type of data, unadjusted or adjusted, be used in congressional redistricting. However, it could not do so with regard to the redrawing of state legislative or municipal districts, which remain the prerogative of the states as long as no constitutional voting rights are violated. H.R. 941, introduced by Representative James Clyburn on March 8, 2001, would require the use of adjusted census data in the administration of any law of the United States under which population or population characteristics is used to determine the amount of benefits received by

[40] *See* 55 Fed. Reg. 9838 (Mar. 15, 1990) (in response to a comment that the Secretary should delegate final decision-making authority about adjustment to the Director, as in 1980, the Commerce Department responded that the responsibility for the conduct of the census, under the law, belonged to the Secretary, who would exercise the responsibility as he deemed most appropriate); 54 Fed. Reg. 51002 (Dec. 11, 1989).

[41] 56 Fed. Reg. 33582 (Jul. 22, 1991).

[42] 517 U.S. 1, 116 S.Ct. 1091 (1996).

[43] 517 U.S. at 19, note 11.

state or local governments, but would not use adjusted data for congressional redistricting or apportionment of the House of Representatives.

Utah v. Evans

On January 10, 2001, the state of Utah filed suit against the Secretary and Department of Commerce alleging that the defendants had unlawfully excluded overseas missionaries of the Church of Jesus Christ of the Latter-Day Saints in violation of the Census Clause (Art. I, § 2, cl. 3), the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment (Amend. XIV, § 2) of the Federal Constitution; of the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq.*); of the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*); of 2 U.S.C. § 2a; and of the Census Act (13 U.S.C. §§ 1 *et seq.*).[44] On March 5, 2001, District Court Judge Dee Benson issued an order denying the plaintiffs' request for a three-judge panel pursuant to 28 U.S.C. § 2284, finding that the suit did not involve a challenge to a redistricting statute. Thus, it may take longer for the suit to reach a final resolution, since a decision by a three-judge panel could have been appealed directly to the U.S. Supreme Court, whereas now a decision would have to be appealed to the U.S. Court of Appeals for the 10th Circuit before any potential hearing before the U.S. Supreme Court. The House has delayed certification of the disputed seat until after a District Court decision on March 20; North Carolina has joined the Federal Government in opposing the suit by Utah.

With regard to census methodology, the leading relevant decision is that of *Franklin v. Massachusetts*,[45] in which the United States Supreme Court upheld the decision of the Secretary of Commerce to include and allocate overseas federal employees in the census data for the apportionment of the House of Representatives, which resulted in a loss of one congressional seat for Massachusetts. The Court held that there was no final agency action reviewable under the Administrative Procedure Act and that the allocation of overseas federal employees to their home states was consistent with the "usual residence standard" of other censuses and furthered the constitutional goal of equal representation. However, the issue of distinguishing between overseas federal employees and other expatriate U.S. citizens by including the former in the census and excluding the latter was not before the Court and was not decided by it.

Congress could have a role by legislatively mandating the inclusion of all expatriate U.S. citizens in the decennial census. One bill has been introduced by Representative Maloney, H.R. 680, to provide funds for a special census of expatriates and to urge the Census Bureau to plan for the inclusion of expatriates in the 2010 census.[46] According to *Franklin v. Massachusetts*, the decision to include overseas federal employees in the 1990 census appears to have been in response to legislative activity in the late 1980s.

[44] *State of Utah v. Evans*, No. F-2-01-CV-23:B (D. Utah 2001).

[45] 505 U.S. 788 (1992).

[46] In the 106th Congress, S.Con.Res. 38 and H.Con.Res. 129, not adopted, expressed the sense of Congress that all expatriates should be included in the 2000 census.

Additional Reading

CRS Info Pack, IP537C, *Census 2000: background and issues*, updated as needed, by George Walser. Includes copies of the CRS Reports *Census 2000: New Legislative Proposals* (RS20123), *Census 2000: The Sampling Debate* (RL30284), and *House Apportionment Following the 2000 Census* (98-135).

CRS Report RL30182, *Census 2000: sampling as an appropriations issue in the 105th and 106th Congresses*, by (name redacted).

CRS Report RL30284, *Census 2000: the sampling debate*, by (name redacted).

CRS Report 93-1060 GOV, *Congressional redistricting: Federal law controls a State process*, by (name redacted).

CRS Report 94-89 GOV, *Decennial census coverage: the adjustment issue*, by (name redact ed).

CRS Report 97-871, *Sampling for Census 2000: A Legal Overview*, by (name redacted).

CRS Report RL30047, *Sampling for Census 2000: Department of Commerce v. United States House of Representatives and its ramifications*, by (name redacted).

CRS Report 91-736 A, *The Voting Rights Act of 1965: A Legal Overview*, by (name redacted).

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