Legal Issues Regarding Census Data for Reapportionment and Redistricting

name redacted
Legislative Attorney

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Summary

This report provides an overview of selected issues regarding census data that have arisen during recent decennial censuses, including use of sampling or other estimation techniques and counting U.S. citizens residing abroad. The Constitution requires that state representation in the House of Representatives be based on a population census conducted at least once every 10 years. The Constitution does not expressly require use of official federal decennial census data for intrastate redistricting, but courts have found that states must use the best data available, which may or may not be official census data. Currently, all 50 states, the District of Columbia, and Puerto Rico receive census data for reapportionment and redistricting via the census program conducted pursuant to P.L. 94-171.

Under the Constitution and census statutes, the federal government has broad authority over how the census is conducted. The Supreme Court has found that federal law bars using sampling data to adjust the decennial census for House of Representatives reapportionment but that hot-deck imputation, an estimation technique, is permissible. Adjusting census data for other purposes, such as intrastate redistricting, is also not prohibited. In addition, the Secretary of Commerce has authority over whether it is feasible to release adjusted data for intrastate redistricting purposes.

The Supreme Court has held that the Secretary of Commerce has discretion whether to include overseas federal personnel in the apportionment census. It has also found that the Secretary of Commerce can include U.S. military and civilian federal government overseas employees in the apportionment census while excluding other expatriate U.S. citizens. Because Congress has authority to legislate census methodology with regard to treatment of expatriates, several bills have been introduced in the 112th Congress addressing the inclusion of expatriates and categories of expatriates.

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Background

The Constitution requires that members of the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed," and to this end an "actual Enumeration shall be made ... within every subsequent Term of ten Years, in such manner as [Congress] shall by Law direct."[2] The framers of the Constitution provided for a simple population headcount and made no provision for counts by sex, age, or address.[3] The census was to provide figures to adjust periodically apportionment of representatives among the states. It was also originally intended to provide figures for determining proportionate shares of direct taxes for states. Congress has established and authorized the U.S. Census Bureau, an agency within the Department of Commerce, to administer the decennial population census and other surveys.[4]

In addition to determining the apportionment of Representatives among the states, decennial population census data fulfills several purposes:

- provides state and local governments a basis for establishing district boundaries for congressional, state legislative, and local representative bodies, because the data is generally considered to be the best available, although its use is not expressly mandated;
- determines allocation of electoral votes among states for presidential elections;[5]
- determines allocations and/or triggers federal and state funding for a variety of public benefits and assistance programs; and
- triggers certain voting rights, such as identifying when the 10,000 single-language-minority citizens of voting age threshold is reached for the bilingual balloting provisions of the Voting Rights Act of 1965.[6]

With regard to intrastate redistricting, all 50 states, the District of Columbia, and Puerto Rico currently receive census data for reapportionment and redistricting via the P.L. 94-171 census program.[7] Under this program, the Census Bureau provides states decennial census figures for

[1] The issue of excluding unauthorized aliens in the federal decennial census for reapportionment of the House of Representatives and intra-state redistricting is addressed in CRS Report R41048, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes*, by (name redacted) and (name redacted).

[2] U.S. Const. art. I, §2, cl. 3, as amended by U.S. Const. amend. XIV, §2.

[3] H. Alterman, *Counting People* 193 (1969). Kutner, *Our Extraconstitutional Census*, 68 U. of Detroit L. Rev. 117, 118 (1991).

[4] 13 U.S.C. §2; the Census Act is codified as amended at 13 U.S.C. §§1 *et seq*.

[5] U.S. Const. art II, §1, cl. 2. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...."

[6] 42 U.S.C. §1973aa-1a(b)(2)(A)(i)(II).

[7] This statutory authority for the state redistricting data is codified at 13 U.S.C. §141.

state-identified geographic areas and election precincts to use for intrastate redistricting activities prior to April 1 of the year following the decennial census.[8] In addition, the President transmits figures for House of Representatives apportionment to Congress and each state by the end of the first week of the regular congressional session following the decennial census.[9]

State Redistricting and the Best Available Data

The Constitution requires Congress to use census data to apportion Representatives among the states but does not expressly require states to use census data for intrastate congressional and state legislative redistricting. Courts, however, have held that states must use the best data available, regardless of whether it is census apportionment data.

Adjustments to Census Data

Federal court findings that states are not required to use federal census data for redistricting but must use the best data available has raised questions over whether the Census Bureau must provide states with adjusted census data in addition to census apportionment data. Courts have generally found that the Census Bureau is not required to provide such adjusted data

The best available data principle was set forth in the 1969 Supreme Court decision *Kirkpatrick v. Preisler.*[10] In this case, the Supreme Court invalidated Missouri's congressional redistricting plan but indicated that Missouri's use of projected population figures was not *per se* invalid *if* such data would have a higher degree of accuracy than other available data. However, the *Kirkpatrick* Court stated that, in the instant case, the federal decennial census data were the best data available.[11]

In *Senate of the State of California v. Mosbacher*,[12] the Ninth Circuit addressed whether the Census Bureau was required to provide states adjusted census data for state intrastate redistricting activities. In *California,* the California state senate sued the Secretary of Commerce to release adjusted data after the Census Bureau decided not to adjust the official 1990 census data. In reaching its decision, 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.[13] The Ninth Circuit found, however, that the Secretary of Commerce had no affirmative duty under the Census Clause of the Federal Constitution (Art. 1, §2, cl. 3) or federal law to provide states adjusted census data.[14] Similarly, in *City of Los Angeles*

[8] 13 U.S.C. §141(c).

[9] 2 U.S.C. §2a.

[10] 4 U.S. 526 (1969).

[11] 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).

[12] 8 F.2d 974 (9th Cir. 1992).

[13] 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).

[14] 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).

v. U.S. Dep't. of Commerce,[15] the Ninth Circuit held that the Secretary of Commerce had no obligation under 13 U.S.C. §195 to adjust the official 2000 decennial census figures for intrastate redistricting purposes.

The circuits are divided on whether adjusted census data must be released under the Freedom of Information Act. In *Assembly of the State of California v. U.S. Department of Commerce*,[16] the same court affirmed a lower court's decision requiring the Department of Commerce to release computer tapes containing statistically adjusted data from the 1990 census to the Assembly under the Freedom of Information Act, noting that "states are not obliged to use official census data when drawing their state legislative or congressional districts."[17] However, *Florida House of Representatives v. U.S. Department of Commerce*,[18] 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.

While states may use non-apportionment census data for redistricting purposes, such adjusted data must be able to withstand scrutiny. For example, in *Young v. Klutznick*, the city of Detroit sued the Department of Commerce regarding an adjustment to an alleged undercount in the 1980 census data. In dicta, the Sixth Circuit stated that the state legislature is not required by the federal Constitution to use Census Bureau data for congressional redistricting, but could use adjusted population figures when redistricting between decennial censuses, as long as any adjustment is thoroughly documented and applied systematically.[19]

Similarly, in *City of Detroit v. Franklin*,[20] the city sought to adjust an alleged undercount in the 1990 census data, arguing that *Young* had been overruled by *Karcher v. Daggett*.[21] The city argued that in *Karcher* the U.S. Supreme Court had held that the apportionment clause imposes an obligation on states to use only the official population count as determined by the Census Bureau in redistricting. This argument was probably based on the sentence in *Karcher* that "[a]dopting any standard other than population equality, using the best census data available ... would subtly erode the Constitution's ideal of equal representation"[22] and the fact that the *Karcher* Court considered the census data the only reliable indication of the districts' relative population levels.[23] In *City of Detroit*, the District Court held, however, that the plaintiffs misconstrued *Karcher* and that it did not require states to use census figures in redistricting or overrule *Young*. Rather, the Supreme Court had "merely reiterated a well-established rule of constitutional law: states are

[15] 307 F.3d 859 (9th Cir. 2002). 13 U.S.C. §195 states that "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title."

[16] 968 F.2d 916 (9th Cir. 1992). In *Carter v. U.S. Dep't. of Commerce*, 307 F. 3d 1084 (9th Cir. 2002), the U.S. Court of Appeals for the Ninth Circuit cited this decision in upholding the district court's order for the release of adjusted 2000 decennial census data by the U.S. Department of Commerce pursuant to the Freedom of Information Act.

[17] 968 F.2d at 918, n. 1, citing *Burns v. Richardson* and *Young v. Klutznick*, discussed below.

[18] 961 F.2d 941 (11th Cir. 1992).

[19] 652 F.2d 617, 624 (6th Cir. 1981).

[20] 800 F. Supp. 539 (E.D. Mich. 1992).

[21] 462 U.S. 725 (1983).

[22] 462 U.S. at 731 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969)).

[23] 462 U.S. at 738.

required to use the 'best census data available' or 'the best population data available' in their attempts to effect proportionate political representation."[24]

Departures from Use of Total Population Figures

Federal courts have also examined whether state legislatures are required to use total population data for redistricting activities. In these cases, courts have found that the best available data standard does not necessarily require use of total population figures.

For example, in *Burns v. Richardson*,[25] 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 had been careful to leave open the question of the appropriate population basis for redistricting activities, even though total population figures were, in fact, the basis for determining whether the Equal Protection Clause of the Constitution had been violated in several cases.

In *Burns*, 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."[26] Hawaii was found to have a unique situation, wherein significant numbers of tourists, military personnel, and other transient population segments distorted the distribution of actual state citizens. The redistricting plan that would have resulted from using the total population would not have reflected the true state population distribution as accurately as one based on state citizenship. Since a registered voter population basis was the closest approximation of the state citizen population, use of the registered voter population was deemed consistent with the Equal Protection Clause. However, the Court was careful to note that *Burns* did not establish the validity of its unique redistricting population basis for all time or circumstances.[27] Although federal decennial census figures need not be used as the basis for redistricting, any alternate data must be shown to be the best available or justified by particular circumstances that will result in a more accurate redistricting plan than one based on total population figures from the federal decennial census.

The Supreme Court has not addressed the constitutionality or propriety of using total population as opposed to voting population for intrastate redistricting when use of total population would produce a disparity in voter strength between districts with equal total populations. In *Garza v.*

[24] 800 F. Supp. at 543 (quoting also from *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969) ("the best population data available")).

[25] 384 U.S. 73, 91 (1966).

[26] 384 U.S. at 93.

[27] *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).

County of Los Angeles,[28] the County of Los Angeles disputed a court-ordered redistricting plan that used total population. The U.S. Court of Appeals for the Ninth Circuit rejected the County's arguments to hold that redistricting based on voting populations instead of the total population would be unconstitutional. Justice Thomas, however, in his dissent from a denial of a writ of certiorari in *Chen v. City of Houston*,[29] contrasted the Ninth Circuit decision in *Garza* with Fourth and Fifth Circuit decisions holding that whether to use total population as opposed to voting population for redistricting within a state should be determined through the legislative and political process.[30]

Although most states prescribe state legislative redistricting procedures through statute, many do not have a statutory procedure for congressional redistricting. In such states, state legislatures conduct congressional redistricting 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 use of official federal decennial census data for intrastate redistricting, the state is free to use any other data.

Use of Official Census Data

Even if a State's laws require use of official federal decennial census data, it is unclear what this means if the Federal Government releases two official sets of data. This issue was considered during oral arguments in the census sampling cases.[31] If the Secretary of Commerce transmits an official adjusted data set, that data arguably could be considered official federal decennial census data even if it is not the data used to apportion the House of Representatives. One should note, however, 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 references to official federal decennial census data to refer to apportionment data.[32] At the time *Department of Commerce v. U.S. House of Representatives* was decided, there had been a flurry of state legislative activity concerning the type of federal decennial census data to be used in intrastate redistricting because of the absence of sufficiently clear and explicit statutory guidelines on the appropriate data under such circumstances.[33]

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[28] 918 F.2d 763, 773-776 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

[29] 532 U.S. 1046 (2001).

[30] *Id.* (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000)(looking to Supreme Court precedent, *Burns v. Richardson*, 384 U.S. 73, 92 (1966), for the proposition that "the choice between measurements 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'"); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996)(finding "[t]here is no reason to believe that voting-age population is significantly better than total population in achieving the goal of one person, one vote" and until the Supreme Court speaks clearly on this issue, any actions by the courts "[should be] tempered by the overriding theme in the Court's prior apportionment cases weighing against judicial involvement.")).

[31] 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).

[32] 525 U.S. at 332-4, 119 S. Ct. at 774-5. A summary of the decision in this case is found below at "Sampling and Estimation Adjustment."

[33] *See, e.g.*, the following legislation enacted in Alaska, Arizona, Colorado, Kansas, and Virginia. 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 (continued...)

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, provides that the Members of the House of Representatives shall be chosen by the People and Art. I, §4, cl. 1, gives Congress authority to determine the times, places and manner of holding elections for Members of Congress. While it is not clear that one data set is more accurate than the other and the constitutional goal of equal representation is not implicated, Congress arguably could require that a particular type of data (e.g., limited to citizens or including citizens and aliens) be used in congressional redistricting. However, it could not do so with regard to redrawing state legislative or municipal districts, which remain state prerogatives as long as no constitutional voting rights are violated.

Sampling and Estimation Adjustment

Historically sampling and estimation techniques have been controversial, particularly, as discussed above, with regard to data released to or used by states in intrastate redistricting efforts. Therefore, a brief overview of the most recent U.S. Supreme Court cases may be useful.

In 1999, the U.S. Supreme Court held in *Department of Commerce v. U.S. House of Representatives*[34] that the Census Act[35] prohibits sampling in the census for apportionment of the House of Representatives. The Court, however, declined to decide whether sampling would also violate the census clause of the U.S. Constitution. The Court's decision was the culmination of two lawsuits challenging the Census Bureau's plans to use sampling in the 2000 census and two decades of litigation arising from attempts to use sampling and adjustment techniques for decennial census apportionment and redistricting data. Opponents of sampling claimed victory and promised to focus on improving the traditional headcount through methods such as expanded outreach to undercounted groups and use of administrative records. But proponents of sampling, including the Clinton Administration, noted that the decision did not determine sampling's constitutionality and did not prohibit sampling for purposes other than apportionment of the House of Representatives. Because the Court stated 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,"[36] supporters of adjustment argued that sampling techniques were not only permissible, but were required, in taking the census for purposes of intrastate redistricting and federal funding allocations.

In 2002, the U.S. Supreme Court upheld in *Utah v. Evans*[37] the use of hot-deck imputation, an estimation technique[38] used in the 2000 census, against a challenge by Utah after Utah lost a

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enacted on April 9, 2000.

[34] 525 U.S. 316, 119 S.Ct. 765 (1999).

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

[36] 525 U.S. at 339, 119 S.Ct. at 777. 13 U.S.C. §195 states that "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

[37] 536 U.S. 452 (2002).

[38] *Utah v. Evans*, 536 U.S. 452, 457-458 (U.S. 2002):

"Hot-deck imputation" refers to the way in which the Census Bureau, when conducting the year

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congressional seat to North Carolina. The Court held that hot-deck imputation does not violate the Census Clause or the 13 U.S.C. §195 prohibition on census data sampling for apportionment of the House of Representatives on the grounds that imputation was an estimation technique distinct from sampling. The Census Bureau had interpreted the Census Act to permit hot-deck imputation and had used it for many decennial censuses with no intervention from Congress. In fact, Congress had amended the Census Act after the Census Bureau had started using the technique and could have clarified the sampling prohibition to prohibit other estimation techniques. Significantly, the Court held that the term "actual enumeration" in the Census Clause distinguished subsequent apportionments of the House of Representatives from the one for the first Congress, which was based on conjecture and estimation before the first census could be conducted. It further found that the Census Clause and the Census Act broadly authorized Congress and the Census Bureau, respectively, to determine the methods and manner for conducting the census.

While Congress could revise or clarify the statutory guidelines as to the permissible types of estimation and sampling techniques, no such legislation is currently pending in Congress. Federal case law is based on statutory interpretation rather than an interpretation of the Census Clause of the U.S. Constitution. 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.

Counting of Overseas Citizens

In November 2001, the U.S. Supreme Court affirmed a federal district court opinion upholding the Secretary of Commerce's decision to not include expatriate U.S. citizens, other than U.S. military and civilian federal government personnel, in the 2000 census data for reapportionment of the House of Representatives. U.S. military and federal civilian employees abroad have been included in census data used for apportionment of the House of Representatives in 1970, 1990, 2000, and 2010.[39] The Census Bureau did not include such persons in the apportionment data for

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> 2000 census, filled in certain gaps in its information and resolved certain conflicts in the data. The Bureau derives most census information through reference to what is, in effect, a nationwide list of addresses. It sends forms by mail to each of those addresses. If no one writes back or if the information supplied is confusing, contradictory, or incomplete, it follows up with several personal visits by Bureau employees (who may also obtain information on addresses not listed). Occasionally, despite the visits, the Bureau will find that it still lacks adequate information or that information provided by those in the field has somehow not been integrated into the master list.... And the Bureau may then decide "imputation" represents the most practical way to resolve remaining informational uncertainties.
>
> The Bureau refers to different kinds of "imputation" depending upon the nature of the missing or confusing information.... In each case, however, the Bureau proceeds in a somewhat similar way: It imputes the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a "nearby sample or 'donor'" address or unit.... Because the Bureau derives its information about the known address or unit from the current 2000 census rather than from prior censuses, it refers to its imputation as "hot-deck," rather than "cold-deck," imputation.

[39] U.S. General Accounting Office, *2010 Census: Overseas Enumeration Test Raises Need for Clear Policy Direction*, GAO-04-470, at 6-7, May 2004.

the 1980 census and was apparently not intending to include them in the 1990 apportionment data, but did so in response to pending legislative activity in the late 1980s.[40]

In 1992, in *Franklin v. Massachusetts*,[41] the United States Supreme Court upheld the Secretary of Commerce's decision to include and allocate overseas federal employees in the 1990 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 (APA) 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.[42] 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.

This issue was raised in January 2001, when 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 (LDS) in violation of the Census Clause, the Free Exercise Clause of the First Amendment; of the Administrative Procedure Act (APA, 5 U.S.C. §§701 *et seq.*); of the Religious Freedom Restoration Act (RIFRA, 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.*).[43] The inclusion of such overseas missionaries would have meant that Utah would have gained a congressional seat which went to North Carolina instead.

A three-judge panel[44] upheld the Secretary of Commerce's decision,[45] citing *Franklin v. Massachusetts* in finding that the President's report of apportionment data and calculations was the final act in apportionment rather than the Secretary's conduct of the census, and that, therefore, the APA did not apply. It further concluded that RIFRA and the Free Exercise Clause were not violated because there was no evidence that the exclusion of religious missionaries from the apportionment count burdened or in any way affected their right to exercise their religion. Finally, the court, citing *Franklin v. Massachusetts* with regard to the Census Clause and Census Act assertions, concluded that the Secretary's decision to include federal employees and military personnel overseas in the census apportionment data, while excluding other expatriates, was "a rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes."[46] The court noted, among other things, that there was no clear remedy for including LDS missionaries while excluding other private citizens or for including all U.S. expatriates. Inclusion of U.S. military and federal civilian personnel was based on factors such as the federal government's possession of reliable

[40] See Franklin v. Massachusetts, 505 U.S. 788, 793 (1992).

[41] 505 U.S. 788 (1992).

[42] 505 U.S. at 796-806.

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

[44] Pursuant to 28 U.S.C. §2284(a), a three-judge panel is convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."

[45] Utah v. Evans, 143 F. Supp. 2d 1290 (D. Utah 2001); affirmed without opinion by the U.S. Supreme Court at Utah v. Evans, 534 U.S. 1038 (2001).

[46] 143 F. Supp. 2d at 1301.

records maintained according to its guidelines, guidelines for determining home state residence, and the involuntary nature of such expatriates residence abroad.

In 2004, the Government Accountability Office (GAO) conducted a couple of studies and presented testimony in congressional hearings regarding the feasibility and cost of counting all expatriate U.S. citizens, not just U.S. military and federal civilian employees, and evaluated a 2004 test expatriate census conducted by the Census Bureau in Kuwait, France, and Mexico.[47] The GAO concluded that including other expatriate groups would not be feasible or cost-effective, and would require clearer congressional guidance regarding the methodology to be used for data collection. Several bills (S. 677 and H.R. 868) have been introduced in the 112th Congress to mandate the inclusion of all expatriate U.S. citizens in the decennial census in accordance with specific guidelines but none have been enacted legislation yet.[48]

Additional Reading

CRS Report R41048, *Constitutionality of Excluding Aliens from the Census for Apportionment and Redistricting Purposes*, by (name redacted) and (name redacted).

CRS Report R40551, *The 2010 Decennial Census: Background and Issues*, by (name redact ed).

CRS Report R41584, *House Apportionment 2010: States Gaining, Losing, and on the Margin*, by (name redacted).

CRS Report R41382, *The House of Representatives Apportionment Formula: An Analysis of Proposals for Change and Their Impact on States*, by (name redacted).

CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by (name redacted).

[47] U.S. Government Accountability Office, *2010 Census: Counting Americans Overseas as Part of the Census Would Not Be Feasible*, GAO-04-1077T, September 14, 2004; U.S. Government Accountability Office, *2010 Census: Counting Americans Overseas as Part of the Decennial Census Would Not Be Cost-Effective*, GAO-04-898, August 2004; U.S. General Accounting Office, *2010 Census: Overseas Enumeration Test Raises Need for Clear Policy Direction*, GAO-04-470, May 2004.

[48] *E.g.*, S. 677 and H.R. 868 in the 112th Congress would require the Secretary of Commerce to take measures to ensure that, beginning with the 2020 decennial census, the tabulation for apportionment of the House of Representatives among the states includes a full and accurate count of all U.S. citizens residing abroad and proper attribution to their respective states. Bills in past Congresses that provided for the counting of selected expatriate groups or all expatriates in census data for apportionment of the House and/or for related issues such as feasibility studies included H.R. 3013 and Section 240 of H.R. 2410 as passed by the House in the 111th Congress; H.Res. 1262 in the 110th Congress; H.R. 1619/S. 1682 in the 108th Congress; H.R. 680/S. 1260, H.R. 1745, H.R. 2171, and S. 1784 in the 107th Congress; and S.Con.Res. 38 and H.Con.Res. 129 in the 106th Congress.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....