Approved: 4-2-99
Date

MINUTES OF THE SENATE ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairman Senator Janice Hardenburger at 1:30 p.m. on March 17, 1999, in Room 529-S of the Capitol.

All members were present:

Committee staff present: Dennis Hodgins, Legislative Research Department
Mike Heim, Legislative Research Department
Ken Wilke, Revisor of Statutes
Graceanna Wood, Committee Secretary

Conferees appearing before the committee: None

Others attending: See attached list

Chairman Hardenburger opened hearings on **SB 351 concerning legislative and congressional redistricting; relating to population data used.**

Staff advised the Committee that this bill was introduced by the Committee on Federal and State Affairs, at the request of the Redistricting Advisory Group. The issue of what census numbers to use in redistricting have become more of an issue this year than they have in the past because Congress and the administration are in disagreement as to how the census should be conducted. The most recent information that we have about the Census Bureau is it plans to release two sets of figures, one set would be an actual enumeration that will be the result of people sending back their census questionnaires, and the other will be a set of numbers that will be adjusted to correct the undercount of the population and in particular to undercount certain segments of the population.

Information was discussed by the Committee that was a recent press release from the Director of the Bureau of the Census that discussed the history of the results of the 1990 census. The Census Bureau was charged to design a more modern census, one that would reduce the number of Americans who are missed–either because they cannot enumerate them or because they won't cooperate. That design, however, quickly became mired in political disputes, was litigated, and a month ago was set aside by the Supreme Court. (Attachment #1)

Staff stated that the bill amends the current law requiring the Secretary of State, for purposes of making the adjustments that it must make under the Constitution for legislature redistricting, would use the data from the actual U. S. Bureau of Census enumeration for state adjustments as mandated under the Kansas Constitution. The Secretary of State would not be able to use numbers that have been derived by other means including the use of statistical sampling.

The second section of the bill would require the Secretary to use the actual data from the U. S. Census to determine congressional redistricting.

Chairman Hardenburger stated that in 1990 redistricting in Kansas was based on the federal enumeration with the state adjusted census and the undercount numbers that were from the post enumeration survey were not a part of those final numbers. Staff stated this issue came very close to the same issue 10 years ago when the bureau did a post enumeration survey for its quality control check. Based on the post enumeration survey the bureau produced a second set of numbers that were adjusted to account for the undercount which is present in each census. Those numbers were not released quite in time for this legislature to use them in its process of redistricting and probably in some ways was a good thing that the legislature did not have to go through the discussion which data base to use, but as it ended up there was a problem in calculating that adjustment.

Chairman Hardenburger distributed a chart showing the 1990 undercount from the post enumeration survey. (Attachment #2)

Chairman Hardenburger asked, if it is necessary to use the other set of numbers, how does that complicate the time frame and complicate software capability? Staff advised that, Congress still has not completely decided the issue of publishing two sets of numbers. Congress will be making a further determination in this regard The complicating factor for the legislature and Secretary of State, if the legislature does make a decision and doesn't tell the Secretary of State one way or another what numbers to use, in reality he would have to adjust both sets. Therefore, both sets would be available to you. This would be complicated for the Secretary of State because of more calculations. The issue becomes more complicated if a decision is not made on which set of numbers to adjust and, therefore, the Secretary of State will have to adjust two sets of calculations.

Senator Becker asked regardless of what set of numbers are to be used, will they be used only for congressional districts, or for legislative and senatorial districts? Staff advised the bill speaks to the numbers that would be used for legislative and congressional districts.

Chairman Hardenburger informed the Committee that the state adjusted census will still be used because the House defeated that bill that would have removed the requirement for adjustment, therefore, we will be dealing with one set of numbers when we are finished with state adjusted census, but are actually dealing with two sets of numbers because we will be required to do the redistricting for the congressional, just on the federal enumeration number. As a result of the Supreme Court decision which is not totally clear, we would base the redistricting of congressional seats on the federal enumeration numbers. This bill would declare that we would also base our House of Representative and our State Senate redistricting on those federal enumeration numbers.

The Committee discussed at length how the adjustments will be made and staff stated there will be sample surveys.

Chairman Hardenburger informed the Committee that Kansas does not have that much undercount when the post enumeration is completed. The States that will benefit from that are California, Arizona, Texas and Florida. In the 1990 post enumeration survey, they concluded that only 17,000 people were undercounted in Kansas. Adding 17,000 people across the state and spreading them out does not justify our having to use a second set of numbers, and having to wait for them, because we have the problem of the Secretary of State adjusting that number from the census bureau. There is a deadline for redistricting or it will go into the court. It just complicates the process if we are going to have to use an extra set of numbers which does not have that profound an effect on Kansas.

Staff advised the calculated error rate is not the same for all parts of the country, and is not the same for all demographic groups in the population. The error rate for minorities is much higher than it is for Caucasian and the error rate in urban areas is much higher than it is in rural areas. In general, this little strip of states that we are a part of, has the relatively high response rate for the census.

Senator Petty asked if the legislature goes with the initial numbers that we get from the census bureau, knowing there is a lower error rate in this area, are we still accepting the fact that the error rate would be in favor of the rural and Caucasian population, even if it is a small state or a homogeneous state, the disadvantage would be to urban areas.

Chairman Hardenburger stated that the contradictory part of this is that we will have to do some redistricting in congressional seats on those first numbers, the federal enumeration numbers.

Staff informed the Committee, that the other issue is that the census figures are used distribution of other kinds of benefits that come from the government. However, this does not come to bear on the

bill you have before you, that is an issue of how the Federal Government spreads the money among the stated. Chairman Hardenburger said that Kansas is in a unique situation we are the only state in the union that is going to be adjusting the federal census, so it complicates the process of getting redistricting process going and completed. This is two years down the road, but if we can make a statement and whether or not this would hold up in Court, that Kansas is not going to use any other figures except the actual federal enumeration.

Staff advised the Committee that bringing this up early, if there is going to be dissension in the legislature over which survey to use, it might be well to discuss this problem before trying to draw district lines.

Chairman Hardenburger advised the Committee that the federal enumeration would use enumeration for redistricting and whatever the federal government does, we have no control over.

Chairman Hardenburger advised the Committee that it really complicates the process, setting up computers and buy software when using all these different numbers. We will have to use the federal count for the Congressional redistricting, and then with Kansas House and Senate redistricting, will use the federal count, with the possibility of having that other count with statistical sampling, plus we will have to adjust both of those counts. To supply it, so we do not have this question before us when we are in the mid of creating redistricting. If we can make this decision now and simplify that, we can start working on some plans now.

Senator Huelskamp asked what was the sample count in 1990, and staff advised it was possibly around 2000. The census argue that 350,000 household sample for the country will be adequate to make the kinds of adjustments necessary to complete the count. The initial adjustment prior to the Supreme Court decision would have used a much larger sample. The funding will be decided by Congress. The bureau right now has improved the count of the actual enumerations, but it would be more costly because it would require more census takers. They are funded for it currently, it was in the President's budget, so Congress will be discussing it.

Chairman Hardenburger closed hearings on **SB 351.**

Senator Becker moved the bill be passed out favorably, seconded by Senator Lawrence. Motion carried.

Meeting was adjourned at 2:20 p.m. Next meeting is scheduled for March 18, 1999.

ELECTIONS & LOCAL GOVERNMENT COMMITTEE
GUEST LIST

DATE: MARCH 17, 1999

NAME	REPRESENTING
Brad Bryant	Sec. of State

Statement
Dr. Kenneth Prewitt
Director
U.S. Bureau of the Census
National Press Club
Wednesday, February 24, 1999

I will make a few general observations and then take your questions.

I start with a word on recent history. The results of the 1990 census did not please the Census Bureau, or the Bush administration, or the Congress, or governors, mayors, and other state and local officials, or a large number of private and public sector data users, or the American public. It was a costly census; it was less accurate than what the country has a right to expect. The Census Bureau was charged to design a more modern census, one that would reduce the number of Americans who are missed -- either because we cannot find them or because they won't cooperate. It did so. That design, however, quickly became mired in political disputes, was litigated, and a month ago was set aside by the Supreme Court.

The Census Bureau had, of course, planned for that possibility. It had presented an alternative design to the Administration and the Congress in mid-January, before the Court ruling. Based on our recently completed evaluation of our Dress Rehearsal experience, we have further refined that plan. Its principle features are the subject of this press conference.

The Dress Rehearsal tells us two things.

First, however hard we try and whatever the level of resources available, Census 2000 will not count everyone. Moreover, this "undercount" will not be equally distributed across demographic groups. There is what we refer to as a differential undercount. For instance, in 1990 we counted nearly all white Americans, but only approximately 95 percent of African-Americans and Hispanics, and an even lower rate of Native American Indians. Insofar as these less well counted groups are concentrated in some states, not others; in some cities, not others; in some neighborhoods, not others those states, cities, neighborhoods do not get their fair share of either the political or economic benefits allocated on the basis of census numbers.

Second, the Census Bureau's design should include a procedure described in the updated summary as the Accuracy and Coverage Evaluation (ACE) that will identify the magnitude and distribution of the differential account, and correct for it. The Dress Rehearsal confirms the statistical soundness of this procedure. Consequently, I have today informed the Secretary of Commerce and the Congress that it is feasible for Census 2000 to include this procedure, and that by doing so we will produce a more accurate and complete census than would otherwise be the case.

Because the Supreme Court ruled that this more accurate number is not to be used for apportionment purposes, our design also includes a major, labor intensive (and expensive) effort to find and enumerate as many Americans as is humanly possible in the time-frame available. In pursuit of this goal, our first and most important effort is to put a census form in the hands of every single household in America. Census 2000 features many improvements and technical innovations not available in 1990 for example, a completely re-engineered Master Address File, the most comprehensive ever constructed in U.S. history; first-ever use of paid advertising; intensified partnerships with tens of thousands local governments, tribal organizations, private groups and non-profit organizations nationally and locally, a census-in-the-schools initiative.

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Attachment: # 1-1
Date: 3-17-99

This plan is operationally robust, and will be conducted with complete dedication by the Census Bureau professionals. This said, the apportionment counts are not likely to be an improvement on the 1990 accuracy levels. How can this be? How can you spend more money, mount improved operations, and yet not increase accuracy? Because all the factors that made it difficult to count Americans in prior censuses are today even more present. In more American families, both parents work, making it difficult to find anyone at home. Transient lifestyles are on the rise. People are busy. More people live in irregular housing. Greater numbers of people are linguistically isolated. Large immigrant populations avoid government officials. Census forms must compete with huge flows of junk mail. More persons are cynical about or actively hostile to any of the works of government. Census 2000 must overcome decreased levels of civic engagement by the American people. In short, the Census Bureau has to work harder to stay in place. We will produce the best apportionment counts that we can; they will not include everyone.

Allow me to summarize the points just covered, so as to leave no ambiguity. Between the 1st of April and the 31st of December, the Census Bureau will count (and assign to an address) everyone it possibly can. The results of this effort will meet our obligation to present apportionment counts without the use of modern statistical methods. But the work will not then be finished. Census 2000 will continue its work with an Accuracy and Coverage Evaluation in order to produce more complete and accurate numbers, which will be ready prior to April 1, 2001. It is the task of the Census Bureau to produce the best numbers possible, not to decide how they will be used. The more complete census counts will be made available in a form that allows them to be used, if it is so decided, for redistricting purposes, for determining the allocation of federal funds, and for ongoing statistical and program purposes. Some may describe this as a "two-number census," but it in fact is a census that is progressively more complete, more accurate.

I conclude by reminding us all that the census clock ticks -- relentlessly, ceaselessly. In just 372 days the first Census 2000 forms get delivered. Given the lateness of the hour, we must acknowledge the hard reality that we no longer have the luxury of debates about alternative designs, or substitute procedures. No matter how well intentioned, we cannot now take a chance on untested operations or late additions. The largest peacetime mobilization in U.S. history must go forward based on the considered professional judgement of the career scientific and operational experts at the Census Bureau, who stand with me here today. We are up to the task, but only if we are allowed to do the task.

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Order Code RL20047

CRS Report for Congress

Sampling for Census 2000: *Department of Commerce v. United States House of Representatives* and its Ramifications

February 3, 1999

(Voice) 72579 (Fax)
Margaret Mikyung Lee
Legislative Attorney
American Law Division

CRS

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ABSTRACT

On January 25, 1999, the United States Supreme Court held that the Census Act 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 Administration, noted that the decision did not determine the constitutionality of sampling and did not hold that sampling was prohibited for purposes other than apportionment of the House of Representatives, and indicated that they intended to seek the use of sampling techniques in population counts used for intrastate redistricting and funding allocation formulas. This report will summarize the Court's opinion, its ramifications, and reactions in the wake of the decision. For background of these law suits, see CRS Report 87-871.

Sampling for Census 2000: *Department of Commerce v. United States House of Representatives* and its Ramifications

Summary

On January 25, 1999, the United States Supreme Court held that the Census Act 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 Administration, noted that the decision did not determine the constitutionality of sampling and did not hold that sampling was prohibited for purposes other than apportionment of the House of Representatives, and indicated that they intended to seek the use of sampling techniques in population counts used for intrastate redistricting and funding allocation formulas. This report will summarize the Court's opinion, its ramifications, and reactions in the wake of the decision.

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Sampling for Census 2000: *Department of Commerce v. United States House of Representatives* and its Ramifications

Introduction

On January 25, 1999, the United States Supreme Court held that the Census Act 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 Administration, noted that the decision did not determine the constitutionality of sampling and did not hold that sampling was prohibited for purposes other than apportionment of the House of Representatives, and indicated that they intended to seek the use of sampling techniques in population counts used for intrastate redistricting and funding allocation formulas. This report will summarize the Court's opinion, its ramifications, and reactions in the wake of the decision.

The Supreme Court Decision

On January 25, 1999, the United States Supreme Court handed down its decision in *Department of Commerce v. U.S. House of Representatives*, ___ U.S. ___, No. 98-404, slip opinion (U.S. Jan. 25, 1999), together with *Clinton v. Glavin*, No. 98-564. The former lawsuit had been brought by the House of Representatives as an institution, while the latter had been brought by a group of private plaintiffs, both challenging the plans of the Census Bureau to use sampling in the 2000 census as a violation of section 195 of the Census Act[1] and as a violation of the census clause of the Constitution.[2] Both of the three-judge district court panels in the two cases had

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[1] Codified at 13 U.S.C. § 195, this section provides that "[e]xcept 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 statistical method known as 'sampling' in carrying out the provisions of this title."

[2] Article I, § 2, cl. 3, as amended by the Fourteenth Amendment, provides that the "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state excluding Indians not taxed . .

(continued...)

granted summary judgment to the plaintiffs and held that the plaintiffs had standing to bring the suits and that the use of sampling in the census for the apportionment of the House of Representatives violated section 195 of the Census Act, and each declined to decide the constitutional issue since the statutory interpretation was dispositive of the sampling issue.[3] In a 5-4 decision, the Supreme Court held that the private plaintiffs in *Clinton v. Glavin* had standing to bring the suit and that section 195 of the Census Act prohibited the use of sampling techniques in the census for the apportionment of the House of Representatives among the States, thus affirming the decision of the lower courts. The Court then dismissed the *House of Representatives* case, since it presented the same issues as those in the *Glavin* case and was controlled by the decision in that case. Although the Supreme Court also declined to decide the constitutional issue, Justice Scalia discussed the constitutional issue in dicta in his concurrence, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, and Justice Stevens also discussed the constitutional issue in his dissent, joined by Justices Souter, Ginsburg, and Breyer.

Justice O'Connor's Opinion for the Court

In her opinion for the Court, Justice O'Connor found standing for the *Glavin* plaintiffs. She noted that to establish standing, "'[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief [cites omitted].'" Slip opinion at 10. Also, "a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits" in order to prevail on a motion for summary judgment. Slip opinion at 11. Although the lower court did not consider whether there was a genuine issue of material fact, Justice O'Connor affirmed the finding of standing because of ample evidence in the record supporting the plaintiffs' position. She found standing on two grounds. First, the Indiana plaintiff had shown an injury, vote dilution which would result from the virtually certain loss by Indiana of a congressional seat if sampling were used in the census for apportionment, and this injury was concrete and imminent, not conjectural or hypothetical. This injury was traceable to the use of sampling, and the requested relief, the injunction against the use of sampling, would redress the alleged injury. The second ground for standing was the "expected effects of the use of sampling in the 2000 census on intrastate redistricting." Slip opinion at 15. Some of the private plaintiffs would suffer vote dilution in state and local elections from the use of sampling. Many state laws required the use of federal decennial census data for state legislative redistricting. States also use this data for federal congressional redistricting "'because the census count represents the 'best population data available,' . . . [and] it is the only basis for good-faith attempts to achieve population equality.'" Slip opinion at 16, citing to *Karcher v. Daggett*, 462 U.S. 725, 738 (1983), citing in turn to *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969).

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[2](...continued)
. . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

[3] The background of these lawsuits is covered more fully in CRS Report 97-871, *Sampling for Census 2000: A Legal Overview*, by Margaret Mikyung Lee.

On the merits, Justice O'Connor, writing for the Court, found that section 195 of the Census Act prohibited the use of sampling in the census for apportionment. She examined the historical context, noting that until relatively recently, the census statutes had always required personal visits to every household counted. This was changed in 1964 to enable the mail-out census methodology used for the first time in the 1970 census. Justice O'Connor viewed section 195 as a restriction on the general authority to use sampling found in section 141(a) of the Census Act. She observed that until the Administration decided in 1994 to use sampling methodology in the 2000 census, it had previously always taken the position that sampling was statutorily and constitutionally prohibited. Finally, Justice O'Connor found that although the 1976 amendments to section 195 did not alter its originally enacted prohibition on the use of sampling, those amendments served to change the authority to use sampling in all other aspects of the census from permissive to mandatory. She also rejected Justice Breyer's interpretation of section 195, which would have permitted the use of sampling as a supplement to, but not a substitute for, the traditional enumeration methods. The Court declined to reach the constitutional issues and dismissed the *House of Representatives* case. Justice Scalia dissented from part III-B of Justice O'Connor's opinion, which referred to the silence in the legislative history for the 1976 amendments to section 195 as a basis for the Court's finding that the prohibition on sampling remained intact, the opinion reasoning that such a radical departure from traditional enumeration methods would not have been accompanied by silence.

Concurring and Dissenting Opinions

Justice Scalia began his opinion with his dissent from the Court's reliance on the silence in the legislative history of section 195 with regard to any authorized use of sampling for the apportionment census. After painstakingly refuting certain points of Justice Stevens' interpretation of section 195 as permitting sampling in the apportionment census, Justice Scalia stated that "I think it must be acknowledged that the statutory intent to permit use of sampling for apportionment purposes is *at least* not clear. In these circumstances, it is our practice to construe the text in such fashion as to avoid serious constitutional doubt [cites omitted]. It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling." Concurring opinion of Scalia, J., at 3. Justice Scalia continued by discussing the definitions of "enumerate" and "enumeration" that were roughly contemporaneous with the drafting of the Constitution. He noted that the early Congresses required personal visits in the early Census Acts, although estimation techniques were not unknown at that time, indicating that the Framers of the Constitution understood "enumeration" to exclude estimation techniques. Justice Scalia agreed with Justice Stevens' observation that the constitutional goal of equal representation is best served by a census taken in the most complete and accurate manner, but then added that this observation is conditional upon every estimation methodology being more accurate than the headcount and upon Congress' being reliable in permitting only more accurate methods. Since Justice Scalia believes the choice of estimation or sampling techniques is subject to political manipulation, he believes that the headcount, although not necessarily the most accurate census method available, is the most accurate method with minimal possibility of partisan manipulation. In light of the strong argument that can be made that "an apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution

requires," Justice Scalia would not find that the Census Act permits sampling for apportionment of the House of Representatives.

The dissenters from the Court's opinion expressed themselves in three opinions authored respectively by Justices Breyer, Stevens, and Ginsburg. As discussed above, Justice Breyer would have found that section 195 of the Census Act did not bar the use of sampling in the apportionment census because the reasonable interpretation of section 195, in light of the historical context, is that sampling to supplement the apportionment census is permissible, and only the substitution of a sample for the headcount is prohibited. To Justice Breyer, the relevant legislative history showed that section 195 was meant to focus on and enable the use of sampling as a replacement for enumeration with regard to many types of demographic information collected by the census. Therefore, the exception of the apportionment census was also focusing on prohibiting substitution, not supplementation. Justice Breyer also noted the use of imputation techniques and of corrections in past censuses to refute the argument that only enumeration is permitted. Although apparently finding Integrated Coverage Measurement (ICM) of the undercount more easily justified under his interpretation, Justice Breyer also would have upheld, as a permissible supplement, the Census Bureau's use of sampling for non-response follow-up, which would have been used to determine the final 10 percent of the population.

Justice Stevens would have found that section 195 of the Census Act does not prohibit sampling, but for reasons different from those of Justice Breyer. He would have found that section 141(a) is a general authority to use sampling and that the 1976 amendments had the effect of transforming section 195 into a limited mandate to use sampling where feasible for non-apportionment aspects of the census. Therefore, sampling is neither required not prohibited for the apportionment census; it is left to the discretion of the Secretary of Commerce. Justice Stevens was joined by Justices Souter and Ginsburg in this view. He would have found that sampling is constitutional, because the "actual Enumeration" language did not limit the authority of Congress to direct the manner in which the census should be taken, but simply required an actual population count rather than projections or speculation or bare estimates. He agreed with the view that the Constitutional Convention contained no substantive discussion of census methodology. Finally, the standard for census methodology is whether the constitutional goal of equal representation is served and Justice Stevens believed that the goal would be served best by a manner which is most likely to be complete and accurate, noting that past innovations in the census have improved accuracy. Justice Stevens, joined only by Justice Breyer, would have also upheld standing for the House of Representatives as an institution in the dismissed case, and would have reversed the lower court in that case on the merits.

Justice Ginsburg, joined by Justice Souter, agreed with the Court that the Indiana plaintiff in *Glavin* had standing on the grounds that Indiana would lose a Representative in Congress under the proposed sampling plan, and also agreed with the dismissal of the *House of Representatives* case. However, she would not have decided whether the other plaintiffs in the *Glavin* case had standing on the basis of the expected effects of the sampling plan on intrastate redistricting.

Ramifications and Reactions

Sampling in Intrastate Redistricting

Almost immediately after the Supreme Court issued its decision, the opponents of sampling were claiming victory, but at the same time, the supporters of sampling were downplaying the impact of the decision, by emphasizing the narrowness of the holding. The Court held that the census statute prohibited the use of sampling for the apportionment of the House of Representatives, but declined to reach the constitutional question. The Court had even stated that section 195 *required* the use of sampling for purposes other than apportionment. Slip opinion at 23. The proponents of sampling viewed this as supporting the position 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.[4] However, a closer examination of other parts of the Court's opinion indicates that it did not interpret those other purposes as necessarily including, at least, intrastate redistricting. It refers to these other purposes, noting that the census serves as the "linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country [cites omitted]." Slip opinion at 24.

As discussed above, Justice O'Connor based her standing analysis, at least in part, on the "expected effects of the use of sampling in the 2000 census on intrastate redistricting." Slip opinion at 14. Her discussion of these expected effects appears to indicate that the Court assumed that the federal decennial census figures for apportionment would be the figures used by the States for congressional redistricting and, in many cases, for state legislative redistricting. The Court seems to think that the references to the federal decennial census data in state legislative redistricting statutes and state constitutional provisions are references to the data for apportionment of the House of Representatives. Otherwise, the threatened injury to the plaintiffs would not be redressed by the Court's decision. Certainly, the position of sampling proponents, if officially adopted and carried out, would mean that the threatened injury to voters in state and local elections had not been eliminated by the Court's decision. The issue of redressability and the possibility of a two-number census was raised during oral argument.[5] However, the analysis in this part of the Court's decision deals with standing and not with the merits, therefore, technically, the position of sampling proponents, that sampling in intrastate redistricting is required, is not inconsistent with the Court's holdings on the merits, but is arguably inconsistent with the apparent assumptions and larger scheme underlying the holdings. Another indication of the implications of the Court's standing analysis is the fact that

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[4] Since the required taking of a traditional headcount for apportionment of the House of Representatives would make the non-response follow-up sampling moot, presumably any contemplated sampling for intrastate redistricting and funding allocation data would be similar in concept to the ICM for the undercount or the Post Enumeration Survey conducted after the 1990 Census.

[5] 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).

Justice Ginsburg would have declined to base standing in *Glavin* on the expected effect of the sampling plan on intrastate redistricting.

Other case law arguably supports the use of figures other than the official data for apportionment. The Federal Constitution does not require the use of federal decennial census data for intrastate redistricting and federal courts have held that States are not required to use census data, adjusted or unadjusted, for redistricting. 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 court, citing *Tucker*, 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, but the court also held that the Secretary of Commerce had no affirmative duty to assist the State by providing adjusted census data.[9] 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.

✳ 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 simply 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

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[6] 394 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] 968 F.2d 974 (9th Cir. 1992).

[9] 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).

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.[10] 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. Again, one should note that the Court's holding on standing for the *Glavin* plaintiffs indicates that a majority of the Court considers the references to official federal decennial census data to be a reference to the apportionment data.

In any case, statements from the Administration in the wake of the decision focused on the narrow, statutory nature of the ruling and possibility of using sampling in the census for other purposes including intrastate redistricting and funding allocations,[11] leading to reports that there would be a two-number census.[12] Far from settling the census sampling issue, the Supreme Court's decision appears to have merely triggered a new round of maneuvering, with the battles looming once again during the budget and appropriations process,[13] and also with new battles emerging in the state governments over intrastate redistricting.[14]

The Administration's Budget Proposal

Because there was not enough time to revise the proposed budget for the 2000 decennial census operations, the Administration's budget proposal for fiscal year 2000, issued February 1, 1999, included a request based on the use of sampling methodology.[15] This request was for $2.79 billion, not including the $4 million requested for the activities of the Census Monitoring Board. The Census Bureau is working on a revised plan which takes into account the requirements of the Supreme

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[10] 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).

[11] *National Journal's Congress Daily* for January 25, 1999, at http://www.cloakroom.com/pubs/congressdaily/dj990125.htm; Press Statement by Commerce Secretary William M. Daley on the Supreme Court's Decision on the Census, for January 25, 1999, at http://www.doc.gov/Opa/Speeches/census125.htm; Press Briefing by Joe Lockhart on January 25, 1999, at http:/library.whitehouse.gov/ThisWeek.cgi?/type=b&date=2& briefing=5.

[12] Barbara Vobejda, *Census Plans To Release Two Sets of Numbers*, Washington Post, January 27, 1999, at A2.

[13] Press Briefing by Joe Lockhart on January 25, 1999, at http:/library.whitehouse.gov/ThisWeek.cgi?/type=b&date=2&briefing=5.

[14] James Dao, *Census Ruling Reignites a Partisan Battle*, N.Y. Times, January 27, 1999, at A17, col. 1; James Dao, *Split Decision Sets Stage for State and Local Battles*, N.Y. Times, January 26, 1999, at A20, col. 2; B. Drummond Ayres, Jr. *Small Strides for Democrats Could Be Big After Census*, N.Y. Times, November 5, 1998.

[15] Office of Management and Budget, *Budget of the United States Government for Fiscal Year 2000* , Appendix, 198-199 (February 1, 1999).

Court's decision and which will certainly propose a much higher budget, given the extensive personal outreach and contact effort which will be necessary for traditional enumeration methods.[16]

Legislative Activity

There will likely be a great deal of activity with regard to the release of funding for the 2000 decennial census programs for the second half of fiscal year 1999 and for fiscal year 2000, since the Administration seems to be seriously considering the release of two sets of numbers or some type of determination or correction of the undercount, while congressional opponents of sampling intend to expend more funds to improve a headcount rather than funding sampling programs. One possible scenario is that the opponents of sampling could agree to funding a sample adequate to conduct a post-enumeration quality check, since such a check has been conducted for at least the past several censuses, but inadequate to adjust the figures for each State. That is, the minimum sample size required for an effective evaluation of the national totals might be funded, but the larger sample required to evaluate the accuracy of the count on a State-by-State basis might not be funded. In a more extreme scenario in which the expenditure of funds on sampling programs would be prohibited, it is conceivable that States or municipalities could provide funds toward a recount or adjustment, since the Census Act authorizes the Census Bureau to conduct surveys for state and local governments which pay for them.

Some proposals for improving the traditional enumeration in a cost-effective manner include the use of administrative records and Americorps workers in conducting the census. The latter is part of the America Counts Today initiative proposed by Congressman Dan Miller, the Chairman of the House Census Subcommittee to improve the accuracy and coverage of the traditional enumeration methods by (1) creating community awareness; (2) increasing the involvement of community leaders; (3) reinforcing community-based enumeration; and (4) strengthening the Census Bureau's commitment to community-based enumeration.[17]

There have been some proposals to amend section 195 of the Census Act, but these would likely be controversial and timely passage would be doubtful. The only legislation introduced in the 106th Congress with regard to the census sampling issue as of the date of this report is S. 166, introduced on January 19, 1999, by Senator Moynihan. This bill would require the Secretary of Commerce to determine any surpluses or shortfalls in certain grant amounts made available to the States by reason of an undercount in the most recent decennial census conducted by the Census Bureau.

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[16] *Remarks by Deputy Secretary of Commerce Robert Mallett, Budget Press Conference*, February 1, 1999, at http://204.193.243.2/public.nsf/docs/fy2000-unveiling-speech.

[17] *Statement of Chairman Dan Miller of the Subcommittee on the Census at the United States Conference of Mayors*, January 27, 1999, at http://www.house.gov/danmiller/census/jan27b_99.html.

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1990 UNDERCOUNT JUSTIFIED BY THE POST ENUMERATION SURVEY

California accounted for about 20% of the adjusted population.

Four states bordering Mexico accounted for over 1/3 of the adjusted population (CA, AZ, NM and TX).

Two states which accounted for the largest adjusted population

California - 838,000

Texas - 486,000

The largest net undercounts in 1990 occurred in the southern and western sections of the country.

Kansas had an undercount of 17,188 or .007% of total population of 2,477,574.

Senate Elections & Local Government
Attachment: # 2-1
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