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IN THE SUPREME COURT OF THE UNITED STATES

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UTAH, ET AL., :

Petitioners :

v. : No. 01 -714

DONALD L. EVANS, SECRETARY OF :

COMMERCE, ET AL. :

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Washington, D.C.

Wednesday, March 27, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 a.m.

APPEARANCES:

THOMAS R. LEE, ESQ., Provo, Utah; on behalf of the Appellants.

WALTER E. DELLINGER, Washington, D.C.; on behalf of the North Carolina Appellees.

GEN. THEODORE B. OLSON, Solicitor General, Department of Justice, Washington, D.C.; for the Federal Appellees.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 01-714, Utah vs. Donald L. Evans, Secretary of Commerce. Mr. Lee.

ORAL ARGUMENT OF THOMAS R. LEE, ESQ.

ON BEHALF OF THE APPELLANTS

MR. LEE: Mr. Chief Justice and may it please the Court: for most of the history of the census of the American population, that census has been conducted by means of an actual count unaltered by any methods of statistical estimation. At the time of the first census of 1790, James Madison noted that this was the way required by the Constitution and ever since then, that requirement has been implemented by Congress in the Census Act. The question presented in this case is whether the Census Bureau acted unlawfully in departing from that longstanding historical tradition by using the method of estimation called hot-deck imputation in the 2000 apportionment count. 99.6 percent of the 2000 apportionment count was comprised of actual data compiled by census enumerators in two phases. First, a mailing sent to all addresses on a master address file, and second, as many as six follow-up visits.

1 Imputation added an additional .4 percent to that
2 count, 1.2 million statistically generated persons were
3 added to the apportionment count by means of a statistical
4 estimate. The basic essence of the estimate was to say
5 the 620,000 addresses that the Census Bureau was unable to
6 enumerate are assumed to have estimated to have the same
7 number of occupants as their next door neighbors.

8 QUESTION: Mr. Lee, I would like to ask you to
9 address early on whether this injury that Utah alleges to
10 have suffered is redressable in any fashion. Things have
11 happened since the census was taken. North Carolina
12 presumably has drawn districts and has gone quite far down
13 the road in reliance on the census. The President has
14 turned over the numbers and so forth. How can this be
15 redressed, do you think, now?

16 MR. LEE: I suppose, Justice O'Connor, that
17 there are two aspects of your question if I'm
18 understanding it. One of them would be a redressability
19 standing question. That's a question as the Solicitor
20 General notes that has already been decided by this Court
21 both in Franklin and in Montana with regard to --

22 QUESTION: Well, there is jurisdiction,
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1 but I don't know that we have really addressed the
2 redressability issue fully in prior cases. When could
3 Utah have made its challenge? When is the earliest time
4 Utah could have challenged this imputation business?

5 MR. LEE: It would have been impossible, Justice
6 O'Connor, for Utah to have brought a challenge prior to
7 the census. As North Carolina indicated --

8 QUESTION: Well, why is that? I mean, you knew,
9 did you, that the Census Bureau planned to use it?

10 MR. LEE: Yes. We certainly had constructive
11 knowledge.

12 QUESTION: But you wouldn't have had an injury.

13 MR. LEE: We wouldn't have had an injury, and in
14 fact as the Census Bureau itself indicates, there would
15 have been no way even to have anticipated that imputation
16 would have had this effect.

17 QUESTION: Well, you have no incentive to bring
18 a challenge until you know that you are losing a
19 congressional seat, I suppose.

20 MR. LEE: That's exactly right. And that was
21 one of the problems. It took us some time to get

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1 the numbers from the Census Bureau, specific state by
2 state numbers, in order to be able to determine whether in
3 fact this was a method that impacted Utah, and as soon as
4 we got those numbers, we brought this suit within a few
5 days.

6 QUESTION: Well, was there a window of time
7 between completion of the census and the submission of the
8 numbers to the President where you could have sued? How
9 long was that period of time?

10 MR. LEE: That was, the time line is that the
11 Secretary must submit the numbers by the end of the
12 calendar year to the President, and then the President
13 must submit those numbers within seven days after the
14 first day of the Congress. The problem, Justice Kennedy,
15 was that we didn't have those numbers at that time. The
16 Census Bureau had not released again state by state
17 imputation numbers until well into March of 2001, and it
18 was within a few days after that that we brought this
19 suit.

20 QUESTION: Well, if you prevail, what's supposed
21 to happen?

22 MR. LEE: The remedy that we are asking for,
23 Justice Kennedy, is simply a declaration and an injunction
24 to the Secretary of Commerce directing the Secretary to
25 issue a new apportionment count free of

1 the statistical estimates that we believe are unlawful
2 under the Census Act and under the Census Clause of the
3 Constitution.

4 QUESTION: Well, what's supposed to happen under
5 the Act? I mean, I went back and read the Act last night.
6 And that's geared to certain automatic apportionment, and
7 that in turn is geared to the delivery of the numbers by
8 the date specified. So let's assume the Secretary and
9 then the President comes with different numbers. The Act
10 doesn't have any provision in effect for self-adjustment,
11 does it?

12 MR. LEE: And I think, Justice Souter, that's
13 effectively North Carolina's argument. That there are
14 time deadlines set forth in the Census Act that somehow
15 stand in the way of reviewability here. That is an
16 argument that was raised and rejected in Franklin. The
17 Franklin opinions, Justice O'Connor's opinion for a four
18 justice plurality on that point, says that if this Court
19 agrees with the Plaintiffs in this case, we may presume
20 that the President of the United States will conform to
21 our decision and will in fact issue a new apportionment
22 count that is consistent with the law as we clarify it.
23 By the same token --

24 QUESTION: I will presume that, too, but

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1 that was four justices, and there wasn't a specific
2 discussion of what is supposed to happen under the
3 statute, even assuming the President sort of takes counsel
4 from our opinion.

5 MR. LEE: And the other opinion in that case,
6 Justice Souter, that also addresses this issue was Justice
7 Stevens' concurring opinion, for a separate four-justice
8 concurrence on this issue, and his analysis was in fact
9 that the statute would require the President to conform to
10 a revised count that the Secretary might present in
11 conformity to a decision of this Court.

12 QUESTION: Well, that's what he said and as you
13 know, I joined his opinion. But that didn't have a
14 majority, either. So isn't it incumbent upon you to tell
15 us whether in fact the position that some of us took that
16 first time is in fact correct? Why will they, I mean, it
17 seemed so to me at the time but it's a real issue in this
18 case, as to whether the statute which is geared to
19 delivery of information at certain times can in effect
20 reverse itself.

21 MR. LEE: The other point that Justice Stevens
22 made in his concurring opinion, Justice Souter, which I
23 think is critical on this issue, is that the time lines
24 under the statute can be

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1 understood only to trigger, only with regard to the issue
2 of ripeness. In other words, it makes no sense to think
3 that a time deadline for executive action under a statute
4 means that you, you must -- it makes no sense to think
5 that those deadlines are a bar to judicial review. In
6 fact, what we usually think of when we look at a statute
7 that has deadlines is that once those deadlines have
8 passed, then executive action is at an end, there is a
9 ripe claim that may be brought and then it's appropriate
10 for the federal courts to step in.

11 QUESTION: But those are not cases where after,
12 after the deadline provisions, you have a, a basic change
13 in, in the court's role, that after the deadline in this
14 case, you are going to have to, the court is going to have
15 to issue an opinion that purports to bind the President.
16 Which is, you know, a significant step.

17 MR. LEE: Yes. I think that the opinion does
18 not need to purport to bind the President, and as the
19 Court indicated in Franklin, there is no need for the
20 order to go to that point.

21 QUESTION: Well, but I mean that's, that's even
22 worse. You want us to decide something on the ground that
23 some good may come out of it. But I just
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1 don't know what your closest case is for the proposition
2 that this satisfies the redressability requirement.

3 Let's assume that the President, were interested
4 in implementing our orders. We send something to
5 Congress, and maybe that's the end of it there. Can we
6 force the Congress to act?

7 MR. LEE: Well, the, the order would go to the
8 Secretary. The Secretary would submit a new apportionment
9 count to the President that would be free of the
10 estimations and the question then is what would the
11 President do. And the President under two alternative,
12 but not necessarily inconsistent theories, of eight
13 justices in the Franklin case would certainly conform and
14 would present those same numbers, that same revised
15 apportionment count.

16 QUESTION: Mr. Lee --

17 QUESTION: Let me just -- what's your closest
18 case to show that a declaration of this kind satisfies the
19 requirement of redressability?

20 MR. LEE: Well, I believe it's Franklin, Justice
21 Kennedy.

22 QUESTION: Excuse me. Other than Franklin.
23 Because Franklin was a fractured opinion.

24 MR. LEE: Well, one understanding
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1 consistent with Justice O'Connor's opinion in Franklin
2 would be that of a declaratory judgment. It does not in
3 and of itself bind the parties. It rather declares the
4 law. It is not a, it is not a, a binding order in the
5 sense of ordering parties to do anything.

6 QUESTION: Well, it does bind the parties in a
7 certain extent. It's just, there is no action required as
8 a result of it. There is no mandate saying you must do
9 this.

10 MR. LEE: That's right, Mr. Chief Justice, and I
11 think that that's consistent again with Justice O'Connor's
12 plurality opinion in Franklin.

13 QUESTION: We have never held that a declaratory
14 judgment will issue where the Court has no power to compel
15 the action that the declaratory judgment describes. I
16 mean, you cannot get jurisdiction by saying well, you
17 know, we have no power to, over this person to compel any
18 action, but we are just going to declare what the law is
19 because this person, you know, might follow it. I don't
20 think that's a basis for jurisdiction.

21 MR. LEE: Well, Justice Scalia, but I think
22 there are two alternative theories. One is Justice
23 O'Connor's approach and the other is Justice
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1 Stevens' approach in Franklin, and Justice Stevens'
2 approach in Franklin in fact, is in fact that the
3 President is required to conform with revised numbers.
4 But the Secretary might represent --

5 QUESTION: But you are actually taking a
6 position also that whether or not the President would
7 respond, at least the Secretary would have a duty to do
8 something in response to our order.

9 MR. LEE: That's exactly right.

10 QUESTION: Is it quite common that in suits the
11 President is not named, and the Secretary is. But I
12 wanted to go back to a question -- the President has
13 acted, but Congress has not. Am I correct? Congress is
14 waiting on what this court does?

15 MR. LEE: The final step, Justice Ginsburg, in
16 this process, is for the clerk of the House of
17 Representatives to forward to the states a certificate
18 that shows how many seats in the House of Representatives
19 they are entitled to after clerk receives the revised
20 numbers from the President. And this Court in Franklin
21 indicated clearly that that duty is a ministerial duty and
22 that we can absolutely expect that the clerk of the House
23 will follow suit. So the only question is with regard to
24 the President,

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1 and either under Justice O'Connor's approach or under
2 Justice Stevens' approach in the Franklin opinions, we can
3 and should expect that the President will in fact conform
4 to this Court's order.

5 QUESTION: You only have a certain amount of
6 time, Mr. Lee. I want to ask you a question about the
7 merits of the case. Are you saying in effect that there
8 has to be a specific, something more than just a little
9 bit of educated guesswork with respect to every house in
10 the country?

11 MR. LEE: Well, the actual enumeration clause of
12 the Constitution would require an actual count, and --

13 QUESTION: Okay. But what, supposing that the
14 census people have, they see a house, and they see a car
15 in the driveway, but they can never find anybody home, and
16 then someone sees lights on late at night. They do their
17 best. Do they have to say nobody lives there?

18 MR. LEE: Yes, they do, Mr. Chief Justice, and
19 one of the reasons is that the mere fact that there are
20 lights on and cars there doesn't tell us that this is
21 anyone's usual place of residence. It may be a seasonal
22 vacation home.

23 QUESTION: It doesn't confirm it, but
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1 isn't it a permissible inference for the census takers?

2 MR. LEE: Well, at some point a census taker may
3 make a conclusion, if it's based on information specific
4 to an individual household, may make a conclusion that a
5 household is in fact occupied. Our position is that what
6 the Census Act requires, Section 195, is -- what the
7 Census Act prohibits, rather, is the use of information
8 specific not to that individual household but specific to
9 an entirely different household for the purpose of drawing
10 an inference.

11 QUESTION: Okay. Would you, on that theory,
12 would you agree that although they may not impute a number
13 beyond one, it would be fair for them at least to count it
14 as one? Because they start out as I understand it with a,
15 in effect a report from the post office saying, you know,
16 this is a house at which somebody lives. So isn't that
17 kind of hearsay just as good as, let's say, the next door
18 neighbor's hearsay at least to the extent of saying
19 somebody lives there and they can count one person?

20 MR. LEE: Justice Souter, they don't start out
21 with the proposition that this is a house and somebody
22 lives there. They start out with the

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1 proposition that this is an address.

2 QUESTION: Well, doesn't an address usually mean
3 somebody lives there, at least if we can establish that
4 it's a residential neighborhood?

5 MR. LEE: Not necessarily, for a number of
6 reasons. Number one, you have got the seasonal home
7 problem. It may be no one's personal, no one's usual
8 place of residence.

9 Number two, you have got the problem that some
10 things that look like homes and that are in residential
11 areas actually turn out to be businesses.

12 QUESTION: What percentage of homes in the
13 United States when they take the census turn out to be
14 vacation or second homes?

15 MR. LEE: I don't have that number handy off the
16 top of my head, Justice O'Connor. I believe that it is in
17 the record, but I'm not aware of that. The total number
18 of imputations was with regard to 620,000 unrelated --

19 QUESTION: But the imputation techniques
20 apparently treat all the dwellings that are identified as
21 residences to be counted? They don't discount for a
22 percentage that are vacation homes?

23 MR. LEE: No. They do not. And that's part of
24 the problem. Part of the problem here is

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1 that imputation assigns occupancy not only to units,
2 Justice Souter, that are known to be houses.

3 QUESTION: That's saying that they are doing it
4 bad. We have to assume they are doing it good. I mean,
5 suppose they have learned with experience that an old age
6 home that has two bedrooms in each apartment and that has
7 a sign out in front that says "full," has two people. One
8 in each bedroom. And now they learn something about this
9 house. It's an old age home. It has two bedrooms. And
10 the sign in front says full.

11 Now, can they make the assumption that this too
12 has two people in it?

13 MR. LEE: I think not.

14 QUESTION: Not. Now, why not? Can they make an
15 assumption that if the pizza man delivers pizza to the
16 place and people eat the pizza, i.e., at least it
17 disappears, that there is someone in the house? Can they
18 make that assumption?

19 MR. LEE: They cannot, Justice Breyer.

20 QUESTION: They cannot make the assumption about
21 the pizza man. They deliver it to the door and the food
22 disappears and the lights are on and off. They can't make
23 that assumption?

24 MR. LEE: No. People in businesses eat
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1 pizza and people who are living, staying temporarily in a
2 vacation home eat pizza.

3 QUESTION: And by the way, there is a sign in
4 front that says this is not a vacation home.

5 (Laughter.)

6 MR. LEE: Then I suppose -- I suppose under
7 those circumstances, then we'd have information. But --

8 QUESTION: Fine. Once you are down, once you
9 are down that road, then you are then -- then I can easily
10 construct examples where the imputation is absolutely as
11 strong. I mean, I just did that with my old age home. So
12 you are not against imputations, you are against weak
13 imputations.

14 MR. LEE: No. I'm against sampling because
15 that's what the statute prohibits.

16 QUESTION: You have to take that position.

17 MR. LEE: I think it's important, though, to
18 answer your question, Justice Breyer, to go back to the
19 baseline of the House of Representatives decision. It
20 holds that a method proposed by the Census Bureau in 1997
21 is a method of sampling. We know that much, and so there
22 is really a narrow statutory question presented here and
23 it is, is this particular method meaningfully different?
24 And the

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1 answer is that it is not.

2 It is not under the statistical understanding of
3 the term sampling. It also is not because the definition
4 that the appellees are proposing here is a definition that
5 would nullify this Court's decision in the House of
6 Representatives because the two methods simply are not
7 distinguishable. Let me talk about the appellees'
8 definitions and explain why that's true.

9 The definitions that they propose say that
10 sampling is limited to methods that are employed as a last
11 resort, only after an initial effort to enumerate the
12 whole population. Under that definition, in fact, both,
13 neither one of the methods that's at issue here would
14 follow sampling, and so that effectively is an argument
15 that the Court got it wrong in House of Representatives
16 and that that case ought to effectively be nullified. And
17 here's why.

18 QUESTION: Are you suggesting, Mr. Lee, that the
19 Census Bureau goes about this thing in a way, say,
20 supposing you have a lake in northern Wisconsin where the
21 temperatures get down to about 40 below in the winter. So
22 you know it's not a year-round, you see a bunch of houses
23 around the lake. The census people come along and do you
24 think

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1 if they could find somebody there, they would just
2 automatically say yes, that person counts? Without
3 inquiring as to whether it's a vacation home or not?

4 MR. LEE: Well, if they know that there is
5 somebody who is living there, they have to find out
6 whether the somebody who is living there lives there as
7 his usual place of residence, or that person doesn't count
8 in the apportionment count. But what's going on --

9 QUESTION: But under the imputation method as I
10 understand it, the assumption is made that if a house is
11 there, that it is a residence, and a second assumption is
12 made that the number of occupants will be that in a
13 general geographic area of other homes. Is that right?

14 MR. LEE: That's right. And that's exactly the
15 sense in which this particular method of imputation is a
16 method of sampling. The Census Bureau took a sample of
17 620,000 addresses. They called them donor housing units
18 in the 2000 census. It used that sample of 620,000
19 addresses or housing units as a representative sample of
20 the 620,000 addresses that they never were able to count
21 on the theory that they were representative, knowing that
22 next door neighbors are not always the same, but that

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1 generally across the board, if you take the 620,000 sample
2 or donor units and use them to estimate the 620,000
3 addresses about which we know nothing, generally across
4 the board it will average out and it will be
5 representative. And that's sampling. Sampling is taking
6 information about the parts to make an inference about the
7 whole.

8 QUESTION: I'm curious both in your argument
9 here this morning and in the brief, I think both parties
10 seem to assume that the key question is whether or not
11 this is sampling. Do you take the position that other
12 statistical methods of adjustment are permitted just so
13 long as they are not called sampling?

14 MR. LEE: Our position is, Justice Kennedy, that
15 any method that takes information from a part of the
16 population to make an inference about the whole is a
17 method of sampling and is prohibited. Now, there are
18 methods, statistical methods that the Bureau uses that
19 don't amount to sampling that are permitted. Let me give
20 you one example.

21 QUESTION: Go ahead.

22 MR. LEE: It's called the method of quality
23 assurance, and the quality assurance phase, what the
24 Bureau does is to randomly send out

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1 enumerators to given census tracts to try to find the
2 tracts where there are a large number of errors, where the
3 enumerators may have made a lot of mistakes.

4 But the response to that is to send out an
5 additional army of enumerators to those problematic tracts
6 to sort out the problem to get the new information. Now,
7 that's an actual count. That's not sampling but it's a
8 statistical method. And so that's an example.

9 QUESTION: What about a house where they have
10 not been able to find anybody to talk to, no returns sent
11 back, so they go to the people next door and they say is
12 there anybody living in that house and the person next
13 door says yes, there are two people. Now, is that
14 permissible under your theory?

15 MR. LEE: That is permissible under our theory.
16 That's the use of proxy data that the Bureau currently
17 engages in and Mr. Chief Justice, that would be
18 permissible.

19 QUESTION: But the Act refers both to sampling
20 and to other methods of statistical adjustment. It seems
21 to me sampling is a way to gather the data, and what we
22 are talking about here are statistical assumptions made to
23 evaluate the

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1 data, and I'm not sure why you have to concede that you
2 lose if we say this isn't sampling.

3 MR. LEE: Well, there may be another way to get
4 there, Justice Kennedy, but my understanding under the
5 statute is that Section 195 prohibits the statistical
6 method known as sampling. That may suggest that there are
7 other statistical methods that are not, that don't amount
8 to sampling, and the quality assurance example that I gave
9 I think is one of those examples that would be permitted
10 under the statute.

11 But all methods that take information from a
12 part, from these 620,000 addresses that are occupied, to
13 make an inference about the rest of the population, the
14 620,000 addresses that we don't know anything about, those
15 are methods of sampling and again you really cannot
16 distinguish this method in any meaningful way from the
17 method that was struck down in 1997. The principal
18 difference is that instead of 620,000 addresses about
19 which we know nothing, under the 1997 plan, the Bureau
20 anticipated that there may be many more.

21 QUESTION: Yes. But there is one significant
22 difference and that is in the technique that was struck
23 down before, a number of inferences

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1 are being drawn from the so-called sample. In this case,
2 only one inference is being drawn from a sample of one,
3 and that is at least a tremendous difference in degree,
4 and I suppose it's a difference in degree that would be
5 likely to have an effect on accuracy.

6 MR. LEE: In fact, Justice Souter, that is not a
7 distinction. The fact that there is an imputation being
8 made one individual housing unit at a time, again, does
9 not distinguish this method from the method struck down in
10 the House of Representatives case.

11 QUESTION: Well, it wouldn't in a literal sense
12 if you were simply making one imputation at a time, but
13 you were making a long series of imputations from the one
14 sample, in this case, the one house. But this is simply
15 one imputation made one time, and it involves not so much
16 a, a principle of selection, or let's put it this way.
17 You can characterize it not only as based on a principle
18 of selection, but you can, you can characterize it on, on
19 a rule of probability, like birds of a feather flock
20 together. People who live next door tend to be much
21 alike.

22 So it seems to me that there is a qualitative
23 difference and a quantitative difference.

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1 MR. LEE: But Justice Souter, once you pool all of
2 the individual housing units together, the 627 -- 620,000,
3 rather, of these housing units that were used to estimate
4 the 620,000 addresses that we know nothing about after six
5 follow-up visits, that's your sample. That's your group.

6 QUESTION: No. Your sample isn't 620 to tell
7 you about just any random 620. It's, it's a selection of
8 one to tell you about one more which is right next to it.
9 So it seems to me that it sort of masks the issue to talk
10 about 620 and 620 as opposed to one and one.

11 MR. LEE: Mathematically it seems to me, though,
12 Justice Souter, we get to the same end. This is an
13 intermediate step, even though it happens on a household
14 by household basis. It's an intermediate step for the
15 clear purpose of making an ultimate inference about the
16 population as a whole. If, for example, there are three
17 --

18 QUESTION: Yes, but that, I mean that would be
19 true about any inferential conclusion. I mean, strictly
20 it would be true I suppose even if accepting the hearsay
21 conclusion is true. And there is an awful lot of
22 inference that does not fall within anyone's notion of
23 what is a sample or what is

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1 in a technical sense a statistical method.

2 MR. LEE: It is also true, however, Justice
3 Souter, of the method struck down by this Court in the
4 House of Representatives case. And I probably didn't make
5 this clear enough the first time I mentioned it so let me
6 just make it one more quick time.

7 Under the 1997 plan, it's clear that the Census
8 Bureau proposed to estimate the roughly 10 percent of the
9 population that it was not going to enumerate one
10 individual housing unit at a time. As is indicated in the
11 administrative record in this case at page 1647, it was
12 precisely the nearest neighbor assumption that the Bureau
13 had in mind under the 1997 plan. So that truly is not a
14 distinction between this particular method and the method
15 at issue in the House of Representatives case, and thus
16 the argument that's being proposed here really is an
17 argument that would effect an end run around the House of
18 Representatives decision.

19 QUESTION: Mr. Lee, as I understand it, the
20 imputation method that was actually used after the 2000
21 census has the effect of counting non-households as
22 households in some instances?

23 MR. LEE: That's correct, Justice

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25

1 O'Connor.

2 QUESTION: And it counts one household several
3 times in some instances.

4 MR. LEE: That's correct, because some of these
5 are different --

6 QUESTION: And, all right. And the imputation
7 is not based on the nearest neighbor. I mean, there is a
8 big block of homes, and the assumption about who lives on
9 it is not based on a nearest neighbor.

10 MR. LEE: Ordinarily, as I understand it, it is
11 the nearest neighbor address that's used to estimate or
12 impute the address about which we know nothing.

13 QUESTION: That's not my understanding, but we
14 can explore that with the other side. But I was concerned
15 because it seems to be a method that does amount to what
16 we said couldn't be done, in House of Representatives, on
17 a much smaller scale.

18 MR. LEE: That's exactly right and of course the
19 scale of the practice is beside the point.

20 QUESTION: Well, they say it isn't beside the
21 point. I take it that their argument is basically in
22 House of Representatives, what the census was trying to do
23 was to use a special kind of

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1 inferential method to determine the population of an
2 entire area.

3 Well, here they are using an inferential method
4 to determine the population of an individual house. Now,
5 if you don't make that distinction, and you say that
6 distinction is irrelevant, we are left with your
7 distinction which seems as Justice Souter just pointed out
8 to be the same as all inference. In other words, I infer
9 that when you deliver pizza and it disappears, someone is
10 in the house, because of the set of similar to pizza type
11 cases that I have seen in the past. Or, you know, that's
12 I think what Justice Souter was bringing out, they have a
13 different distinction. Now how do I deal with the
14 problem?

15 MR. LEE: Well, Justice Breyer, let me mention
16 two reasons why that distinction doesn't get them
17 anywhere. It doesn't get them anywhere number one because
18 it simply isn't borne out in the statistical understanding
19 of methods of sampling, in two senses.

20 Number one, the statistical understanding of
21 sampling says generally, what statisticians understand to
22 be encompassed within the general category of sampling is
23 taking information from a

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1 part to make a statistical definition.

2 QUESTION: You have the statistical definition,
3 but my question was directed at a particular problem that,
4 if I take your approach I can't get myself out of. That
5 is, that your definition applies to all inference. Their
6 definition distinguishes among kinds of inference and they
7 have their statistical support.

8 MR. LEE: The problem with the distinction is,
9 another problem with the distinction is that it's clear
10 that it would permit the Census Bureau to replicate the
11 1997 plan. If you buy that distinction, the Bureau can
12 get back exactly to where it wanted to go in 1997 merely
13 by scaling back its nonresponse follow-up efforts.

14 QUESTION: I don't understand the pizza man.
15 Does the pizza man, does that inference consist of
16 imputing something from the part to the whole? I mean, I
17 would think that's your answer to the pizza man example.
18 It is an inference.

19 QUESTION: No, no. It goes from the whole to
20 the parts.

21 QUESTION: But it's not the same kind of
22 inference that is done by what you say is sampling,
23 mainly, imputing information that belongs to a part
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1 to the whole. That's not what's going on in the pizza man
2 case.

3 MR. LEE: Maybe, Justice Scalia and Justice
4 Breyer, maybe I missed the pizza man example, but that may
5 well, that may well be a distinction.

6 QUESTION: I didn't think the imputation
7 involved any actual things like looking at, when pizza was
8 delivered. It involves looking at what houses returned,
9 take a big block in the district they are serving. It
10 involves looking at the houses that returned the form,
11 looking at the houses where they reach people in a
12 follow-up visit, and there are some they may might still
13 be missing and so they impute the map.

14 They don't go see if there is a car in the
15 garage or look at the pizza delivery. They arbitrarily
16 say we are going to impute from the data we have that
17 there are X number of additional houses and that X number
18 of houses are occupied at a certain level of occupancy.
19 That's what's going on.

20 MR. LEE: That's exactly right. That's
21 precisely right, Justice O'Connor. The pizza man knows
22 how many people live there. He is a proxy and he can give
23 that information to a census enumerator. But the end run
24 problem is illustrated by this

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1 distinction; if the Census Bureau can use any methods that
2 fall within the definition that's now being proposed, the
3 Bureau can simply scale back slightly its nonresponse
4 follow-up effort and estimate increasing percentages of
5 the population, up to and even exceeding the 10 percent
6 that was proposed in 1997.

7 QUESTION: Mr. Lee, didn't it prove out that,
8 after, that in the majority of these cases, something like
9 75 percent, that they know for sure that these were houses
10 where people lived?

11 MR. LEE: Actually not, Justice Ginsburg. The
12 75 percent figure is misleading and completely unhelpful.
13 At page 445 of the joint appendix the memorandum that's at
14 issue there simply says that in 75 percent of the status
15 imputed cases, status imputation was done with regard to
16 enumerator returns or respondent returns. In other words,
17 these were not mail-back returns.

18 QUESTION: But you don't have a negative
19 showing, either, that it wasn't accurate? And there was
20 something Justice O'Connor said, and I'm not sure whether
21 I fully understand it. I thought that this imputation was
22 made for people who didn't respond to the mailing, that
23 the like comparison was with the

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1 group of people that were eventually counted, but that
2 they were nonrespondents the first time around.

3 MR. LEE: That's right. I think if understand
4 your question, Justice Ginsburg, I think that's right.
5 They took information from initial nonresponding
6 households, used those as a sample of those who never
7 responded, and some of those may well not have been homes,
8 Justice O'Connor, some of those may well have been
9 duplicates, etc. If there are no further questions, Mr.
10 Chief Justice, I'd like to reserve the remainder of my
11 time for rebuttal.

12 QUESTION: Very well, Mr. Lee. Mr. Dellinger,
13 we'll hear from you.

14 ORAL ARGUMENT OF WALTER E. DELLINGER
15 ON BEHALF OF THE NORTH CAROLINA APPELLEES.

16 MR. DELLINGER: May it please the Court, because
17 North Carolina believes very strongly that the right time
18 to challenge the Census Bureau's planned use of a
19 statistical method is before rather than after the census
20 is completed, let me begin by --

21 QUESTION: Well, how could the challenge have
22 been brought before Utah knew that the imputation figures
23 caused this problem?

24 MR. DELLINGER: Under your decision in
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1 House of Representatives, I think on page 332, you note
2 that citizens of Utah, you didn't specify the state, but
3 citizens who anticipate that the use of a method like
4 imputation, as suburbanites might, would dilute their in
5 intrastate districting representation, are specifically
6 said in House of Representatives to have authority to
7 bring that suit. So I think that there would have been
8 parties able to litigate it. In response --

9 QUESTION: Well, you can't bring a suit before
10 you know about what's going on.

11 MR. DELLINGER: Yes, you can, Mr. Chief Justice.
12 It is true, as you noted, that there might not be a
13 special incentive on Utah's part, but they don't know they
14 are going to be the loser. They might have come out
15 better or worse with or without imputation. But every
16 governor, attorney general, states and cities are
17 carefully watching this. Many as you know sued in 1997.
18 So the suit could have been brought that, by any resident
19 of a suburb could have had an expert allege that they are
20 going to be diluted if you impute households because it's
21 rural areas where the files are often damaged or --

22 QUESTION: But Mr. Dellinger, a state can't, you
23 suggest there are suburban people, city

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1 people, a state can't, until it knows what the result is
2 going to be, and Congress used the words any aggrieved
3 person. The state, you are saying is the state can never
4 bring such a suit, because it is not aggrieved before. It
5 can't predict that it's going to be aggrieved. It will
6 know only when the returns are in, so in effect, you are
7 saying this is not a question that the state has come too
8 late. It's not sooner or later, it's a never question for
9 the state. You're saying Congress simply did not authorize
10 the states to bring this kind of case.

11 MR. DELLINGER: Justice Ginsburg, that is
12 correct, if a state is unable to show, does not have the
13 experts about a forthcoming census that is unable to
14 demonstrate that it will be aggrieved. How much we should
15 worry about a nonaggrieved party not being able to obtain
16 judicial review is --

17 QUESTION: They are aggrieved at the end of the
18 line.

19 MR. DELLINGER: They are now, but my point is
20 that if Utah had been watching this carefully, and as you
21 know, many states were involved in the '97 litigation as
22 amici and otherwise. Surely the Governor could have found
23 many citizens of the State of Utah who, and this suit
24 itself includes individual

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1 voters, some of whom may very well, the plaintiffs --

2 QUESTION: The governor had no incentive to do
3 so.

4 MR. DELLINGER: I understand that.

5 QUESTION: He could have gotten a stalking horse
6 to, some suburbanite to bring the suit but he had no
7 notion that there was any reason to do that.

8 MR. DELLINGER: It seems to me that that is
9 exactly correct, but that it's exactly why any governor,
10 major city mayor or others, these citizens, those who
11 brought suit in 1997 and did not include this,
12 suburbanites are going to hurt, would want to sue, could
13 bring the suit, but in any event, they could also
14 participate in the Bureau's process. Utah never made this
15 objection.

16 Now, here's why that's so unfair. It's simply
17 this. The, it is, we don't know who would have gained
18 this seat if Utah had bought its objections to the Census
19 Bureau before the census was conducted.

20 QUESTION: Is there a statutory time period for
21 people to challenge the Census Bureau proposed techniques
22 before the census is taken? Is there some provision
23 whereby that challenge can be made?

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1 MR. DELLINGER: Yes. The public law which was the
2 basis for the suit in 1997 is a permanent law, and that
3 suit allows aggrieved parties to bring suit when the
4 census produces its plan. So it's certainly at least --

5 QUESTION: But is it a fact that somebody is
6 aggrieved when you are at the stage of the Census Bureau
7 just saying this is what I plan to do?

8 MR. DELLINGER: Yes. The law involved, the
9 public law, that was a basis of the '97 suit makes it
10 clear that if you could say if they do that plan, that's
11 exactly how it works in House of Representatives, if you
12 do that plan, we expect that our district will be diluted.

13 QUESTION: Well, does the law provide for some
14 sort of administrative hearing before the Census Bureau,
15 some sort of an exhaustion requirement? I thought that's
16 what you were suggesting. If Utah had just brought this
17 to the attention of the Census Bureau. Is there some
18 structure for doing that?

19 MR. DELLINGER: Yes. The Census Bureau does
20 have a structure for doing this. I'm not saying that they
21 are foreclosed because they didn't participate in the
22 administrative process, but the Bureau was open to hear
23 these objections and the

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1 courts were open to hear them.

2 QUESTION: But, you say now the Bureau, is that
3 well publicized? Is there some person you can go to in the
4 Bureau and say I don't like what you are doing?

5 MR. DELLINGER: Yes. And that is the exact
6 process that is followed with every -- that's why they
7 publish the plan for the census. Now, if --

8 QUESTION: It seems unfair to Utah, though, to
9 say that they are supposed to bring a suit before they
10 know they have been hurt and why. How -- what are they
11 supposed to do? Of course they wouldn't come in ahead of
12 time. For all they know, the system would benefit them.

13 MR. DELLINGER: Justice Breyer, those who sued
14 in the House of Representatives litigation had a very thin
15 basis for knowing that they would be adversely affected.
16 Indiana maybe wrong in thinking that --

17 QUESTION: Well, of course, sometimes you could
18 guess in advance, but a lot of times you couldn't, and
19 it's important that there be a fair method that treats
20 states fairly. So why, why would it be fair, any way, to
21 cut off those states that don't know they have been
22 treated unfairly and hurt,

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1 until they find out later?

2 MR. DELLINGER: And here's why. Here's why it's
3 not unfair. Because the unfairness is so great for the
4 disruption on the other side.

5 If it had been determined by the Bureau itself
6 or through litigation that imputation could not be used in
7 2000, the Census Bureau absolutely would have used some
8 means other than imputation to ascertain the enumeration
9 of those established residential addresses whose records
10 were damaged, missing or incomplete.

11 There are in North Carolina approximately 16,000
12 households that are established residential addresses on
13 the carefully pruned master address list. Those houses
14 often were visited by an enumerator in the, often the
15 houses were added where it was status imputation by a
16 field enumerator during the enumeration process. But the
17 new form, because it wasn't on the master address list
18 before being added, never caught up with the master
19 address list. So you have no residential addresses, and,
20 and the Bureau absolutely would have had another method.

21 I mean, even now theoretically they could go
22 back and start again and say what are we going to do about
23 620,000 established residential addresses

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1 for which we don't have input numbers, because at the end
2 of this massive process, now, this is a process that
3 involves 500,000 enumerators, 120 million households, one
4 and a half billion pieces of paper, imputation occurs at
5 the end of that process when all the records are
6 centralized. It began in 1960, five censuses ago because
7 that's when computers were able to process these cards.

8 Damaged cards, now forms, can't be read. The
9 data is discrepant or missing. It doesn't mean that these
10 are households that were visited six times.

11 QUESTION: Mr. Dellinger, you have recognized
12 that your argument is, as stated, that the position of
13 Utah that can't project what the returns will be, does not
14 have, does not qualify as an aggrieved person at the only
15 moment in time when it can say that it's aggrieved. I
16 think you had another justiciability issue, did you not?
17 Because time is running and I think we grasp your position
18 that it's too bad they are not aggrieved because they have
19 to come in in the beginning and not at the end.

20 MR. DELLINGER: Yes. Justice Ginsburg, we are
21 not suggesting that these issues are immune from judicial
22 review. I believe someone could challenge

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1 imputation and would.

2 QUESTION: Are you sure they were not aggrieved
3 at the beginning? I'm surprised that you -- I mean, is it
4 not an aggrievement for the State of Utah or for any state
5 that its districts are distorted? Even if it doesn't lose,
6 you know, congressmen to another state, isn't the
7 distortation of the districts within that state a
8 grievance of that state?

9 MR. DELLINGER: That is a very helpful answer,
10 and that is not -- a very helpful suggestion. And that
11 has not been by any means ruled out, nor has it been ruled
12 out in my view that a state could say we believe we are
13 entitled to have a fair process determine our
14 representation. This process isn't fair. We don't know
15 how it's going to come out. But this process is loony.

16 Now, you would also see there's just a matter on
17 the merits. Congress has said in Title II, Section 2 that
18 the President's determination shall be final and the
19 states are entitled to that for the next period of time
20 until the next apportionment unless Congress itself acts,
21 which they specifically provide for. That's surely
22 constitutional because the Constitution itself in
23 providing that the census

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1 need be done only every 10 years puts a great stake in
2 permanency.

3 Now, turning to the merits, it's striking the
4 extent to which the issues in this case are anticipated by
5 the Court's decision in the Wisconsin case. At page 22 in
6 Wisconsin --

7 QUESTION: Before you go on to the merits, you
8 have nothing else to say then about justiciability? I
9 mean, let's suppose they can file a suit. What's the
10 remedy going to be at the end of the day at this stage?

11 MR. DELLINGER: Oh, at this stage?

12 QUESTION: Yes.

13 MR. DELLINGER: Justice O'Connor, that is a very
14 good question. Utah seems to assume that if the case went
15 back to the District Court, overturning the District
16 Court's ruling that imputation is satisfactory on the
17 statute and the Constitution, that you would simply take
18 out those occupancy figures for 620,000 households
19 nationwide.

20 It seems to me that the, that what ought to be
21 done is you return that to the Bureau and say now there
22 may be time to match up the missing forms that were added
23 late in the enumeration process. There may be other ways
24 to recover that data. Ways

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1 that certainly would have been done if it were brought
2 before the census might still be brought now. So that we
3 don't, it seems utterly unfair to treat all of those as
4 zero when some of them are houses that, an enumerator
5 comes to 212 Elm Street, it's not on his list, he goes in,
6 interviews Ozzie, Harriet, the kids, sends in the form and
7 it was corrupted or it didn't get matched up at the time,
8 faced with that time deadline. It may now be available.
9 We don't know who would prevail on that.

10 On the statutory issue I think if you look at
11 page 22, the Court itself creates statistical adjustments
12 as done in '70 and '80, and as they were done here --

13 QUESTION: Page 22 of what?

14 MR. DELLINGER: I'm sorry, Justice Rehnquist. I
15 referred earlier to the decision of Wisconsin vs. the City
16 of New York, the unanimous opinion. On the statutory
17 issue, the Court says that the statistical adjustments in
18 1970 and 1980 which were imputation, hot-deck imputation,
19 were an entirely different type than the adjustment
20 considered here, and they took place on a dramatically
21 smaller scale.

22 The Court also treats actual enumeration
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1 in the Wisconsin case and speaks of actual enumeration at
2 page 6 in the Wisconsin case as having been something that
3 the Bureau has never, or the country has never actually
4 achieved actual enumeration. It's never been wholly
5 successful. Treating it clearly as the end result of the
6 process, the right number and not as a method.

7 Now, let me go right to one point. We do not
8 believe that there are no constitutional limits on how
9 Congress can conduct the census. Wisconsin says that
10 there is virtually unlimited deference to Congress, but
11 they also set a standard that the congressional goal must
12 be related to representation according to the respective
13 numbers.

14 The way I read that is this. A proposed census
15 as designed is not reasonably calculated to produce
16 distributive accuracy among the states is constitutionally
17 suspect, because it will not produce an apportionment
18 according to the respective numbers. And that would be a
19 fatal flaw.

20 Here, every imputed occupant and household is to
21 an established residential address with a precise
22 geographical location. It was an effort to enumerate
23 every household in the country by using the best
24 information available on known household

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1 addresses. This is historically consistent with what we
2 did when the neighbors are asked for their opinion, the
3 postal worker is asked for his opinion. You use proxy
4 information. Here you take --

5 QUESTION: Mr. Dellinger, this isn't really a
6 use of proxy information. This isn't going to a neighbor
7 who lives next door, this is using a statistical method to
8 make assumptions, isn't it?

9 MR. DELLINGER: Yes, it is.

10 QUESTION: I think you have to be realistic
11 about that.

12 MR. DELLINGER: Yes, it is a statistical method
13 by which you take, when you have a known established
14 household address, the information from that, basically
15 the next door neighbor, somewhat refined, Justice
16 O'Connor, the next door neighbor that was a nonresponding
17 household of a similar type and they found over the years
18 that that information is more reliable than zero.

19 Utah's position is that the Constitution
20 requires when you have an address known to be occupied, if
21 you put down that it's occupied by zero people, that's not
22 an actual enumeration, that is literally a counterfactual
23 enumeration from what one knows to be the case. This is a
24 process where you

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1 use one unit's characteristics to supply to another.

2 QUESTION: That's just part of it. It also, it
3 also imputes nonhouseholds as households. I mean, it does
4 a lot of things.

5 MR. DELLINGER: It imputes only to known
6 addresses. Thank you.

7 QUESTION: Thank you, Mr. Dellinger. General
8 Olson, we'll hear from you.

9 ORAL ARGUMENT OF THEODORE B. OLSON
10 SOLICITOR GENERAL, DEPARTMENT OF JUSTICE
11 ON BEHALF OF THE FEDERAL APPELLEES

12 GENERAL OLSON: Mr. Chief Justice and may it
13 please the Court: The Census Bureau has consistently
14 utilized the imputation technique for drawing inferences
15 about a tiny fraction of damaged, discrepant or missing
16 population data for the past five censuses.

17 QUESTION: Do you agree that that's a
18 statistical methodology or is it just a method of making
19 deductions from circumstantial evidence?

20 GENERAL OLSON: We agree that it is a
21 statistical methodology, Justice Kennedy, and it's very
22 important in that context to focus on the words of the
23 statute. The words of the statute are that the
24 statistical method known as sampling is the one

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1 that's prohibited with respect to the apportionment.

2 That statement in the statute suggests that
3 other statistical methods are not prohibited by the
4 statuted, and that one particular statistical method, that
5 is the one that is known as sampling, which is in quotes
6 in the statute, which imports that it's a term of art that
7 was known by Congress to be a term of art. It was a
8 phrase that was suggested by the Secretary himself in
9 1957, when that statute was added, that exact phrase came
10 from the Secretary. The Secretary was presumed to know
11 what that phrase meant. It is a term of art that
12 statisticians know what it is. Furthermore --

13 QUESTION: Well, I thought the statute also said
14 that statistical adjustments pose a risk.

15 GENERAL OLSON: It does not say that. In fact,
16 the import of the statute, Justice Kennedy, is that
17 statistical adjustments, and I will refer to what my
18 colleague Mr. Dellinger just referred to, at page 22 in
19 the Wisconsin decision which was unanimous decision by
20 this Court just six years ago, distinguishing the sampling
21 method that the Court was talking about in that case from
22 statistical adjustments known as imputation, which is
23 described on pages 4 and 5 of the Respondent's brief,
24 referred

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1 to on those pages of the Supreme Court, this Court's
2 unanimous decision just six years ago as being an entirely
3 different thing.

4 We would go back also to the fact that this
5 Court unanimously held in that case that the Constitution
6 vests virtually unlimited discretion in Congress
7 respecting the manner in which the census shall be
8 conducted, and that Congress has delegated its broad
9 authority to the Secretary to take the census in such form
10 and content as he shall direct. Now, the Congress has
11 exercised that discretion by passing it on to the
12 Secretary with the one limitation with respect, with
13 respect to one statistical method known as sampling.

14 Now, at the same time, the Secretary was
15 proposing the prohibition of the sampling method; with
16 respect to the apportionment of the census in 1957, the
17 Secretary was planning the 1960 census, which was the
18 first computerized census and the first time that the
19 imputation method which we are talking about today was
20 used. So it's obvious that the Secretary did not believe
21 that hot-deck imputation was sampling, because the very
22 next census three years later imputation was being used in
23 that census. And it was used again in 1970, 1980, 1990,
24 and 2000.

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1 And with respect to 1970, and 1980, it was actually
2 considered by this Court in connection with the Wisconsin
3 case.

4 It is widely understood in the industry that
5 sampling is a collection of, a collection technique
6 whereby a sample, a fraction of the whole population is
7 used to deduct -- deduce the actual whole population.

8 It seemed to me that a metaphor that might be
9 considered outside the context of population gathering
10 would be if the Court asked the library of this Court to
11 ascertain the number of books, to conduct the number of
12 books in the Court's library, and the, but sampling was
13 not permitted to do that, so that the librarian could not
14 go to every third shelf, multiply, count the books,
15 multiply by three and get the census. But if the
16 librarian went to those shelves and counted every
17 particular volume and found that there was a space here on
18 that shelf, a space this big on the next shelf, and a
19 space this big on another shelf, for example, the
20 imputation would be saying well, all the books or the
21 books right next to this are this size, and therefore that
22 space a book is missing, so we know we have a book, and we
23 will impute one book to that space or two

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1 books to this space. So that the sampling technique is
2 completely discrete from the imputation technique.

3 We know that because the Secretary has always
4 regarded it that way. The Congress has given the
5 authority to this expert agency which has been conducting
6 the census for years and years and has drawn various
7 different types of inferences which is what imputations
8 are.

9 QUESTION: Why, just out of curiosity. I mean,
10 I'd like to understand this better. In the library, you
11 look and see that everything around the book is a history
12 book and so then you impute the characteristic of being a
13 history book to the one that's missing. That's your
14 analogy of what goes on here, is that right?

15 GENERAL OLSON: Well, yes, I think that's an
16 extension of it. In the example that I was giving you
17 look at the space and impute the size of the space by the
18 book that is immediately next to it.

19 QUESTION: Okay. Why is it called statistical?
20 Why isn't that just ordinary inference? Why -- you said we
21 do it statistically? What's statistical about it?

22 GENERAL OLSON: Well, I'm not sure. That's a
23 good question. I don't know the answer to

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1 why it should be called statistics, because in my thinking
2 of it, it is drawing logical inferences from the data
3 available. Now Justice O'Connor, it is not creating
4 phantom homes. Most of these cases in, the statistics
5 indicated that with respect to one of the forms of the
6 imputation, and this is in the record at the joint
7 appendix, the information may be found in pages 445
8 through 448 of the joint appendix, that 98 percent of the
9 household size imputation forms were enumerator forms with
10 the status of occupied homes.

11 Now, the problem is that with respect to any,
12 and the statistics are different, but in 93 percent with
13 respect to occupancy imputation, 75 percent with respect
14 to status imputation. Each of these are attempting to
15 find actual people drawing from the closest comparable
16 unit and it's one unit for each inference. It's not
17 extrapolating from one unit to the whole population.

18 The problem with the census is that there are
19 billions of pieces of paper as Mr. Dellinger indicated.
20 Some people refuse to return the forms and their known
21 addresses. Some people fill out the forms incorrectly.
22 They may say occupied but zero. The enumerators might get
23 bad information.

24 In 1850, a substantial portion of the
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1 entire State of California the returns were actually
2 burned, and the Census Bureau in 1850 actually used a
3 process to replace the 70,000 people that were not there.
4 And one of the questions indicated, neighbors have been
5 used as proxies. Heads of households have been used as
6 proxies. Postal service has been used as proxies. These
7 are all means by which the postal, the Census Bureau
8 attempts to develop the most accurate count it possibly
9 can.

10 QUESTION: When you say heads of households have
11 been used as proxies. Does that mean you go to the head
12 of the household who appears at the door and ask him how
13 many other people live in the house?

14 GENERAL OLSON: That's correct, Mr. Chief
15 Justice, and that was the way it was done in 1790.

16 QUESTION: That doesn't seem too statistical.

17 GENERAL OLSON: Well, it's not necessarily
18 statistical. And I guess that, the fact is that as far as
19 the statute is concerned, there is only one technique
20 that's prohibited. The technique of drawing inferences
21 through sampling is prohibited. It's prohibited probably
22 because Congress feels that it might be subject to
23 manipulation.

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1 QUESTION: Yes. On the merits, I think we have to
2 know whether this so-called hot-deck imputation is a form
3 of sampling. Which it appears that it might well be. I
4 think that's the --

5 GENERAL OLSON: Well, Justice O'Connor, the
6 expert agency to which Congress delegated this broad
7 authority doesn't believe so. That seems to me that there
8 should be a substantial deference to the expertise of the
9 agency. Not only that, but Congress with full awareness
10 that hot-deck imputation has been used over the past --

11 QUESTION: Why do we call it hot-deck?

12 GENERAL OLSON: Hot-deck imputation is
13 distinguishable from cold-deck imputation in the sense
14 that information from the most current census and the
15 actual neighborhood, the most current available
16 information for the actual census that's being developed
17 is being used. Now where that term came from, I don't
18 know. But that's what it means. But this methodology has
19 been used with the knowledge of Congress, with the full
20 knowledge of Congress, for the past five censuses.

21 There was litigation over this matter, it's
22 referred to as the Orr case in the briefs, where a seat
23 may have been allocated to Indiana or Florida,

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1 depending upon how the imputation process came out. So
2 that litigation took place. Congress actually changed the
3 terminology, Section 141, which provides the Secretary
4 with the authority to conduct the census in a manner that
5 the Secretary thinks appropriate, in 1976. After
6 imputation had been used in two censuses already.

7 QUESTION: Of course, against all of that, and
8 I'm not sure why we should give deference to the agency
9 here. They didn't conduct a rulemaking. They didn't have
10 any adjudication on this subject. That's just what they
11 happened to do, right?

12 GENERAL OLSON: Well, as a matter of fact, in
13 the unanimous decision of this Court in the Wisconsin case
14 six years ago, the court said substantial deference should
15 be owed to the agency.

16 QUESTION: There's a lot of water over the dam
17 since six years ago.

18 GENERAL OLSON: But the reasoning of the Court,
19 I would submit, is --

20 QUESTION: I refer to Meade in particular.
21 And, but wouldn't the deference to the agency, even if
22 there is to be some, potentially be outweighed by a
23 constitutional doubt? If we thought that even if this
24 isn't sampling, it may well be not enumeration

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1 within the meaning of the constitutional requirement, and
2 given, given that constitutional doubt, we think the wise
3 course is to interpret the word sampling as including,
4 including this?

5 GENERAL OLSON: Justice Scalia, not only the
6 Wisconsin case, but the other decisions of this Court
7 which have considered census have suggested that the
8 framers of the Constitution by using the word enumeration
9 didn't mean a particular method by which the census would
10 be conducted, nor did it wish to constrain both the
11 Congress and whomever the Congress may delegate to --

12 QUESTION: Even sampling, presumably.

13 GENERAL OLSON: Presumably. Possibly.

14 QUESTION: Pretty accurate sampling, you know?

15 GENERAL OLSON: Possibly, Justice Scalia. But
16 that's nowhere close to that and this is not remotely
17 sampling.

18 QUESTION: Is this remotely estimation?

19 GENERAL OLSON: This is not remotely estimation.
20 This is drawing an inference with respect to one
21 particular piece of data. We would agree that the gross
22 estimation --

23 QUESTION: Why isn't it estimation? Why
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1 isn't it estimation? You estimate that there are so many
2 people in this house because the house next door to it has
3 that many people. You don't call that estimation?

4 GENERAL OLSON: In each of these cases, Justice
5 Scalia, the words can be changed and added to, but the
6 process by which the framers analyzed this in framing the
7 Constitution, the very first House of Representatives was
8 assigned according to an estimation, and the words actual
9 enumeration were used to compare an actual count, an
10 effort to find the actual number of people by indulging in
11 a process --

12 QUESTION: That's why I asked about estimation.
13 You say there is a difference in an estimation and a
14 deduction, I suppose.

15 GENERAL OLSON: What I think the Constitution
16 and courts with respect to the term actual enumeration, is
17 an effort to go out and find a count. We, we pointed out
18 that the, the enumeration can mean listing by particular
19 items as used in the Ninth Amendment, the enumerated
20 powers. It may be a process by which a count might be
21 taken or it might simply refer to a census, find the
22 population. We submit that the Capitation Clause as we
23 have referred

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1 to in our brief, which uses the word census and
2 enumeration indistinguishably as synonyms, and in fact the
3 Appellants in their brief, in their reply brief at page 15
4 acknowledge that the words enumeration and census are used
5 in the Constitution interchangeably.

6 Justice Scalia, it didn't seem, it does not seem
7 that the framers of the Constitution actually specified a
8 method. And in fact, what the Appellants were saying here
9 today and are saying in their briefs, every census
10 conducted by asking people who may have lived next door or
11 drawing inferences from other pieces of information would
12 not have been the individual by individual count that --

13 QUESTION: You think sampling --

14 QUESTION: Sampling would have been okay as far
15 as the Constitution is concerned? Real, real sampling?

16 GENERAL OLSON: I think --

17 QUESTION: We are going to do two-thirds of the
18 state and just guess that the other third is pretty much
19 like that.

20 GENERAL OLSON: Well, we are not remotely close
21 to that here. But with respect --

22 QUESTION: I understand. But your
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1 argument is that since enumeration doesn't mean anything
2 except census, sampling would be okay.

3 GENERAL OLSON: From the standpoint of the
4 Constitution, I think a reasonably good argument could be
5 made and the Government has in the past made it, that
6 sampling if it is consistent with the process of an
7 attempt to find an actual count utilizing sophisticated
8 accurate and nonmanipulatable techniques --

9 QUESTION: Surely the term actual, though,
10 before the word enumeration, narrows the idea that, what
11 might otherwise be an enumeration.

12 GENERAL OLSON: I believe it does and I think,
13 Chief Justice, the District Court in this case
14 distinguished actual enumeration from the conjectural
15 apportionment that actually occurred in the Constitution
16 itself with respect to the first House of Representatives.

17 What we are talking about here today, though, is
18 an effort to, an effort to produce extremely conscientious
19 and meticulous, to count all of the households in the
20 United States starting with a meticulously prepared master
21 address list. All of those people were submitted post
22 office forms which has been authorized by Congress for a
23 certain --

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1 QUESTION: That's not the issue. Can I ask you a
2 question about the standing issue? I know that you in your
3 brief do not, do not contest the standing. You say that
4 Franklin has decided it, because four justices thought
5 that there was standing on one basis, and four thought
6 there was standing on another basis. Which of those two
7 bases do you agree with?

8 GENERAL OLSON: Well, we --

9 QUESTION: Do, do, do, is it your position that
10 the President will have to do whatever, whatever, accept
11 whatever revised census figures are submitted to him by,
12 by the Secretary?

13 GENERAL OLSON: If this Court is to, determines
14 that the process by which the 2000 census was conducted
15 was inconsistent with the statute or inconsistent with the
16 Constitution and orders the Secretary to take out the
17 imputed numbers --

18 QUESTION: Right.

19 GENERAL OLSON: -- and deliver a different
20 piece of information to the President --

21 QUESTION: Right.

22 GENERAL OLSON: -- the President will transmit
23 that certificate or that certified, those certified
24 results to Congress for the process. In

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1 other words, in answer to your question, the President
2 will do what this Court assumed in those cases that the
3 President would do.

4 QUESTION: He has told you that that's what he
5 will do?

6 GENERAL OLSON: The President will --

7 QUESTION: You see, because, I sort of wouldn't
8 want to make the people of North Carolina mad by taking
9 away one of their representatives. And were I President,
10 I might well say, look at this judgment of the Court,
11 doesn't run against me. It runs against my Secretary,
12 everybody agrees, you know, that it's not binding upon me.
13 It's sort of like a declaratory judgment. And I just
14 think too much time has passed and it would upset things
15 too much and I don't want to take away a representative.

16 GENERAL OLSON: The President is willing to
17 accept the import, not only of the Franklin and the other
18 decision that we referred to, but also if this Court
19 decides that the process was unconstitutional or
20 inconsistent with the statute, the President will accept
21 that, this Court's judgment in that respect.

22 QUESTION: So if another, if the next President
23 comes along, we get another case like this,

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1 and the next President tells his Solicitor General, I will
2 not accept it, then we come out differently.

3 GENERAL OLSON: Well, if, for that reason, if
4 Mr. Chief Justice, the Court decides that that is not the
5 kind of result that this Court can issue, because of that
6 possibility, we'll accept that result as well.

7 (Laughter.)

8 GENERAL OLSON: But we think -- we think it
9 is very unlikely for that to occur, because it is quite
10 clear that the Constitution intended to give considerable
11 flexibility, did not want to freeze in a system the
12 ability of the Government.

13 QUESTION: Mr. Olson, you are saying we can
14 presume the President will obey the law?

15 GENERAL OLSON: Yes, Justice Stevens.

16 QUESTION: What happens after that? He transmits
17 to the Congress, I take it the clerk of the Congress says
18 not certified, the House has not certified the results
19 yet?

20 GENERAL OLSON: I'm not sure of the answer to
21 that question. I guess the answer is that is correct. Or
22 no. That it has been certified and I would gather that it
23 would have to be a revised certification if that should
24 occur.

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1 QUESTION: You say you assume the President will
2 obey the law. So you are accepting the -- you are
3 accepting the position that the President must, even if he
4 didn't want to, that the law requires him to transmit
5 whatever the Secretary gives him, is that right?

6 GENERAL OLSON: What we are saying --

7 QUESTION: Just answer that question yes or no.
8 Do you take the position that the President must transmit
9 what the Secretary gives it to him, and he has no, no
10 objection?

11 GENERAL OLSON: I only can answer it this way,
12 Justice Scalia. If this Court determines that the process
13 before was unconstitutional or in violation of the statute
14 and the Secretary must redo it and if that information is
15 transmitted to the Secretary, he will transmit that.

16 QUESTION: That is not the question I asked.

17 GENERAL OLSON: Then I misunderstood your
18 question.

19 QUESTION: The question I asked is whether, you
20 say the President will obey the law. I take that to mean
21 that you feel the President is bound by law to transmit
22 whatever revised figures the
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1 Secretary takes, is that correct?

2 GENERAL OLSON: If it is based upon a decision
3 by this Court that the Court has the power to issue --

4 QUESTION: To tell the Secretary. Let's assume
5 we have the power to tell the Secretary. Does the
6 President acknowledge that he is bound by law to transmit
7 whatever figures the Secretary gives him?

8 GENERAL OLSON: I think that that would only
9 occur in the context of this Court's decision.

10 QUESTION: If not, he is not bound by law and I
11 don't think you are going to give that away.

12 GENERAL OLSON: I don't think we need to give
13 anything away, Justice Scalia. We would be talking about
14 a context in which this Court came to the conclusion it
15 could render a jurisprudentially binding decision in a
16 case in which there was redressability in that context.

17 QUESTION: Fine. But that's a far cry by saying
18 he is bound by law.

19 QUESTION: You seem to be accepting Marbury and
20 Madison.

21 (Laughter.)

22 GENERAL OLSON: Let me just summarize because my
23 time is about up. This Court's words

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1 again, that the Constitution gave virtually unlimited
2 discretion to the Congress with respect to the manner in
3 which the census would be --

4 QUESTION: Extend your time by two minutes.

5 I'll extend Mr. Lee's time by two minutes.

6 GENERAL OLSON: Thank you, Mr. Chief Justice.
7 There is no evidence that the framers of the Constitution
8 wanted to bind themselves to a particular method of
9 counting people. All of the evidence suggested that what
10 the framers wanted to do was to have a reasonably reliable
11 accurate, reasonably accurate count of the citizens in the
12 manner that the, that Congress would determine. Congress
13 in the words of this Court has delegated all of that broad
14 authority to the Census Bureau.

15 The Census Bureau, conscientiously using a
16 technique that they have been using consistently for 50
17 years with the awareness of Congress, the General
18 Accounting Office, oversight committees and the actual
19 awareness of this Court, as reflected in this 1996
20 decision, has demonstrated, developed a method that is
21 reasonably accurate, uses statistical methods other than
22 those known as sampling to get an accurate count. We urge
23 the Court to sustain that outcome.

24 QUESTION: Thank you, General Olson.

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1 Mr. Lee, you have five minutes remaining.

2 REBUTTAL ARGUMENT OF THOMAS R. LEE

3 ON BEHALF OF THE APPELLANTS.

4 MR. LEE: Thank you, Mr. Chief Justice. I have
5 just two or three quick points. The first is to clarify
6 briefly the record on an important issue. With all due
7 respect to the Solicitor General, the record does not
8 indicate that the majority of the imputations here were in
9 units known to be occupied.

10 The Bureau's memo at page 445 of the joint
11 appendix indicates that fully 69 percent of the units
12 subjected to imputation were the kinds of units that
13 Justice O'Connor's questions directed us to be concerned
14 about, units where after as many as six visits, census
15 enumerators were not able to determine whether the unit in
16 question was a valid occupied housing unit and not a
17 duplicate, not a seasonal home, not a home that happens
18 not to be occupied.

19 Second, I would point the Court to another
20 unanimous decision that this Court has handed down with
21 regard to the census, and it's the Montana decision, and
22 I'd like to read a brief quote from Montana and explain
23 how important I think it is here. This is from 503 U.S.
24 at 465.

25 "To the extent that the potentially

1 divisive and complex issues associated with apportionment
2 can be narrowed by the adoption of both procedural and
3 substantive rules that are consistently applied year after
4 year, the public is well served."

5 That is precisely the goal of both the Census
6 Act and the Census Clause. To give us rules that can be
7 consistently applied year after year, not rules that will
8 ebb and flow with debates among statisticians, and that's
9 where the Census Bureau is heading us here. The variable
10 standard that will be produced by a debate as to whether a
11 particular method of sampling is sufficiently premeditated
12 or follows a sufficiently premeditated intent to --

13 QUESTION: What about what we said in the
14 Wisconsin vs. New York case by your opponent, Mr.
15 Dellinger, where we referred to this very kind of action,
16 this imputation, and indicated that that was vastly
17 different from the broader statistical?

18 MR. LEE: I don't believe that was an issue in
19 that case, first of all, Justice O'Connor. Secondly,
20 there isn't any reason to give either deference to the
21 Secretary here or much less to congressional inaction for
22 a very important reason. Imputation simply has not been
23 on anyone's radar

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1 screen. It's been a nonentity because it's undisputed
2 that it impacted apportionment only once prior to this
3 case, in 1980. In 1960, in 1970, in 1990, it had no
4 impact. Congress reenacted the statute, amended the
5 statute in 1976.

6 At that point in time, imputation had never
7 affected apportionment to any degree whatsoever. There
8 was no reason for anyone even to be focusing on it and
9 therefore no reason to give any deference here.

10 I'd like to just close by saying a few brief
11 words about the constitutional question here. Mr. Chief
12 Justice, to go back to your question about the word
13 actual. The word actual is important, and it's important
14 because it's not just that the word enumeration is defined
15 to mean an actual count and not an estimate. It's that
16 this was a term of art. This phrase actual enumeration
17 was used consistently in the founding era, both in
18 colonial assessments of population when they reported
19 their populations to boards of trade, and also in Great
20 Britain throughout the 18th century. James Madison
21 himself referred to a distinction between an actual
22 enumeration and a mere estimate. John Adams similarly
23 said there is a difference between an authentic
24 enumeration and a

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1 mere estimate.

2 Not only that, but the framers of the
3 Constitution thought they were giving us a permanent,
4 fixed standard. That's what they said they were doing and
5 James Madison said not only is it permanent and fixed, it
6 is the way required by the Constitution and "which we are
7 obliged to perform." It was a methodology; they
8 understood it as such; and they understood also that it
9 had its shortcomings. They knew that it would result in
10 an undercount, that when you require a count, you are
11 going to leave some people out.

12 George Washington himself said look, we
13 understand at the time of the first census that the real
14 numbers will exceed greatly the official returns. Thomas
15 Jefferson similarly said we know that the omissions in the
16 census will be great. If they understood those
17 limitations, then why did they do it? The answer is clear.
18 They understood that that was a necessary price of a
19 permanent, fixed, precise standard that would not be
20 subject to manipulation, that would not be subject to the
21 vicissitudes of debates among not only politicians, but
22 statisticians from year to year. And the impulse, the
23 proper impulse of this Court's unanimous

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1 decision in Montana --

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

3 The case is submitted.

4 (Whereupon, at 11:28 a.m., the case in the
5 above-entitled matter was submitted.)

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