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Margo Anderson

Stephen E. Fienberg

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THE 2000 CENSUS: LITIGATION, RESULTS, AND IMPLICATIONS

MARGO ANDERSON*
STEPHEN E. FIENBERG**

I. INTRODUCTION

The United States took its twenty-second decennial census in April 2000, amid much patriotic hoopla, a barrage of media coverage, and some very sharp political criticism.¹ April 1, 2000, was the official census date.² Delivery of the census forms to the nation's households had already occurred in March.³ Census officials exhorted Americans to fill out the forms and send them in promptly, although they knew from previous experience that many would not do so.⁴ For budget and planning, officials conservatively projected a mail response rate from this phase of the enumeration of 61%, which was down from a 65% response rate in 1990.⁵ From late April to late June, the Census Bureau dispatched the largest peacetime workforce ever assembled in the history of the country.⁶ To count the rest of the nation, the Bureau planned to deploy a workforce of 500,000 temporary enumerators.⁷ With turnover, about 900,000 people worked to count the population.⁸

This massive \$6.5 billion effort is an essential element of the American political system and must be seen as fair and equitable to the variety of political, regional, and demographic communities of the nation.⁹ If it is

* Margo Anderson is currently a professor in the Department of History and the director of Urban Studies Programs at the University of Wisconsin-Milwaukee. She received a Ph.D. in History (1978) and a M.A. in History (1972) from Rutgers University and a B.A. in History (1967) from Bucknell University, Lewisburg, Pennsylvania.

** Stephen Fienberg is currently a professor in the Department of Statistics & Center for Automated Learning and Discovery at Carnegie Mellon University in Pittsburgh, Pennsylvania. He received a Ph.D. in Statistics (1968) and an A.M. in Statistics (1965) from Harvard University and a B.Sc. in Mathematics and Statistics (1964) from the University of Toronto.

1. MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS?: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 293 (1999) [hereinafter WHO COUNTS].

2. *Id.*

3. *Id.*

4. *Id.* at 294.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 2.

deemed “unfair” to a particular group, the census cannot successfully fulfill its political functions of distributing political power and money, especially if people are uncouned, double counted, or counted in the wrong location.¹⁰

In 1990 for example, the political officials who oversaw the census claimed that the census accurately counted 98.4% of the residents of the United States.¹¹ The reality is that one in ten people in the country were not properly counted, with the omissions in some locations being “balanced” by erroneous enumerations and other errors elsewhere.¹² The burden of being missed in the census fell disproportionately on members of minority groups—Blacks, Hispanics, Asian Americans, and American Indians.¹³

II. THE CONSTITUTION AND AMERICAN DEMOGRAPHIC HISTORY AS PROLOGUE

In 1787, the framers of the Constitution mandated a decennial census of the population to apportion seats among the states in the House of Representatives.¹⁴ They did so to solve one of the more vexing questions facing them, particularly how to apportion political power among the disparate elements of the population.¹⁵ The framers had debated and discussed the grounds of political sovereignty and the responsibilities and goals of the existing political entities, the states; the protection of property throughout the new country; and the popular sovereignty of “the people.”¹⁶ Ultimately they decided that we the people of the United States create the national government and are responsible for running and paying for it.¹⁷ The resulting census apportioning political power among the states,

10. *Id.*

11. *Id.* at 4.

12. *Id.* at 129.

13. *Id.* For recent analyses of the legal issues surrounding the census, see Shane T. Stansbury, *Making Sense of the Census: The Decennial Census Debate and Its Meaning for America's Ethnic and Racial Minorities*, 31 COLUM. HUM. RTS. L. REV. 403, 441 (2000); Jennifer M. Safavian, *Down for the Count: The Constitutional, Political and Policy Related Problems of Census Sampling*, 8 GEO. MASON L. REV. 477 (2000); Note, *Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, 114 HARV. L. REV. 2502, 2525 (2001); Nathaniel Persily, *The Right to Be Counted*, 53 STAN. L. REV. 1077, 1113 (2001) (reviewing PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000)); Margo Anderson & Stephen E. Fienberg, *Census 2000: Politics and Statistics*, 32 U. TOL. L. REV. 19, 19-28 (2000); Robert B. Hill, *Counting and Undercounting Diversity in the 21st Century*, 32 U. TOL. L. REV. 29, 29-34 (2000).

14. MARGO ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 7 (1988) [hereinafter *SOCIAL HISTORY*].

15. *Id.* at 8-9.

16. *Id.*

17. *Id.* at 6.

“according to their respective numbers,” was a fundamental new instrument of republican government.¹⁸

Periodic elections provided the primary mechanism to adjust the shares of power among the elements of the population.¹⁹ The framers also recognized, though, that the states were of very disparate sizes and populations and that the various regions of the country grew at differing rates.²⁰ The framers needed another mechanism, one which recognized both that states deserved different allocations in Congress and the Electoral College, and that such allocations needed to be adjusted periodically.²¹ They designed the census, a periodic count of the population, to trigger a redistribution of House seats to reflect the relative sizes of the populations of the states.²²

The framers realized that counting the population would be difficult.²³ Even in the eighteenth century the country was big, diverse, and growing rapidly.²⁴ The count needed to be done using uniform national procedures that were fair to everyone because, like those who lose elections, losers in the population growth game have to concede to shift power to the winners.²⁵ The census did not need to be done too frequently. While House members would be elected every two years, the president every four years, and senators every six years, the census was put on a ten-year cycle.²⁶

Over the history of the republic, new land and new people were incorporated into the polity.²⁷ The country grew from 13 to 50 states, from 3.9 million to 281.4 million people, and from 65 to 435 seats in the House.²⁸ There have been periodic census controversies, which primarily reflect the differential demographic development of the nation.²⁹ When the demographic changes became congruent with partisan alignments, full-fledged political controversies ensued.³⁰ Those controversies involved challenges to the administration and procedures of the census itself, legislative controversies over the enabling legislation for the census, and

18. *Id.*

19. *Id.* at 11.

20. *Id.*

21. *Id.*

22. *Id.* at 10.

23. *Id.*

24. *Id.* at 11.

25. *Id.* at 10.

26. *Id.* at 11. For background on census history and procedure as well as detail on the narrative which follows here, see generally *id.*, *ENCYCLOPEDIA OF THE U.S. CENSUS* (Margo J. Anderson ed., 2000), and *WHO COUNTS*, *supra* note 1.

27. *SOCIAL HISTORY*, *supra* note 14, at 2.

28. *Id.* at 241-46.

29. *Id.* at 3.

30. *WHO COUNTS*, *supra* note 1, at 2.

charges that the constitutional intent of the framers has been violated.³¹ The debates and litigation surrounding the 2000 census are the latest of such controversies.³²

III. UNDERCOUNT LITIGATION AS PROLOGUE

Each decade the Census Bureau faces a variety of challenges in counting the population, including what questions to ask, how to conduct the census, how much to pay for the effort, and what to report.³³ Constituencies unhappy with any of these procedures have protested politically or have resorted to court challenges to the census.³⁴ In 2000, for example, there was controversy and commentary over the changes in the classification of race, and the new question which allowed respondents to select more than one racial category.³⁵ Local political leaders, unhappy with their reported counts, have protested that the census takers must have missed people.³⁶ Thus, the Census Bureau expects a certain amount of controversy and litigation to emerge during and after each census.³⁷

For example, it is legal to fine someone who does not fill out the census form.³⁸ The Census Bureau can include the overseas military in the apportionment count if such inclusion would shift a seat in Congress.³⁹ Judges have generally been loath to second guess the administrative decisions of census officials or the political decisions made in Congress, so plaintiffs tend to lose these cases.⁴⁰ The Census Bureau may quietly adjust its procedures to minimize further challenges, but rarely does such litigation fundamentally alter the procedures and design of the next count.⁴¹

31. *Id.* at 1-3.

32. *Id.* at 2.

33. SOCIAL HISTORY, *supra* note 14, at 4-5.

34. *See, e.g.*, WHO COUNTS, *supra* note 1, at 2 (showing New York City's lawsuit against the U.S. Census Bureau for the 1990 census undercount).

35. Margo Anderson & Stephen E. Fienberg, *Race and Ethnicity and the Controversy Over the U.S. Census*, CURRENT SOCIOLOGY, Nov. 1, 2000, at 87-110 [hereinafter CURRENT SOCIOLOGY]; Margo Anderson & Stephen E. Fienberg, *Census 2000 and the Politics of Census Taking*, TRANSACTION SOCIAL SCIENCE AND MODERN SOCIETY, Nov./Dec. 2001, at 21 [hereinafter SOCIETY].

36. WHO COUNTS, *supra* note 1, at 2.

37. *Id.*

38. *United States v. Rickenbacker*, 309 F.2d 462, 464 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).

39. *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992).

40. WHO COUNTS, *supra* note 1, at 52; *see also* *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1108 (S.D.N.Y. 1987); *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 931 (E.D.N.Y. 1993).

41. WHO COUNTS, *supra* note 1, at 48.

Since the 1970s, the differential undercount and its resulting litigation have been of a different magnitude than such “routine” challenges and have been the main political problem facing the census.⁴² The census misses more minority, younger, and urban residents than it does majority, older, and suburban residents.⁴³ In the 1940s and 1950s, the Census Bureau began a systematic evaluation of census accuracy and started publishing estimates of the proportion of the population and demographic subgroups missed in the decennial census.⁴⁴ Table 1, below, shows the estimated net undercount from 1940 to 1990.

Table 1: Estimated Net Census Undercount from 1940 to 1990 as Measured by Demographic Analysis⁴⁵ (Revised 1990 Estimates)

Year	Black	Non-Black	Difference	Overall Net Undercount
1940	8.4%	5.0%	3.4%	5.4%
1950	7.5%	3.8%	3.8%	4.1%
1960	6.6%	2.7%	3.9%	3.1%
1970	6.5%	2.2%	4.3%	2.7%
1980	4.5%	0.8%	3.7%	1.2%
1990	5.7%	1.3%	4.4%	1.8%

At the time, the discussion of these patterns was totally “methodological”—of interest to demographers, statisticians, and survey researchers concerned with improving surveys, but not to Congressmen, policymakers, or the undercounted communities.⁴⁶

In the 1960s, several trends merged to propel the census undercount onto the political stage.⁴⁷ First, Congress developed a grant-in-aid system relying on population-based formulas to allocate revenue to state and local governments for programs in areas such as vocational education, highway construction, agricultural extension, and public health.⁴⁸ The extensive programs of the postwar era, including urban renewal, the interstate highway system, and hospital construction subsidies, used the grant-in-aid

42. *Id.* at 33.

43. *Id.* at 29-31.

44. *Id.*; see also Table 1 for the estimates of the undercount by race.

45. Gregory Robinson et al., *Estimation of Population Coverage in the 1990 United States Census Based on Demographic Analysis* (with discussion), 88 J. AM. STAT. ASS'N 1061 (1993); see also WHO COUNTS, *supra* note 1, at 122.

46. WHO COUNTS, *supra* note 1, at 31.

47. *Id.* at 32-33.

48. *Id.* at 32.

system.⁴⁹ In 1960 federal aid comprised 15% of state and local spending.⁵⁰ Congress depended on census data when formulating allocation of funds to particular jurisdictions.⁵¹

Second, the Supreme Court's ruling in 1962 that malapportioned state legislatures were unconstitutional opened the door for a decade of lawsuits that brought about the "reapportionment revolution" of the sixties.⁵² Until this ruling, the Supreme Court had not ruled on an apportionment case in forty years.⁵³ Its argument had been that the legislature should make apportionment decisions.⁵⁴ The Supreme Court reversed itself in 1962 and ruled in *Baker v. Carr*⁵⁵ that the Tennessee legislature must be reapportioned.⁵⁶ A series of cases followed that found apportionments in other legislatures and in Congress unconstitutional.⁵⁷ The new principle of legislative apportionment came to be defined as "one man, one vote."⁵⁸ It became important that census data be accurate for small geographic areas.⁵⁹ The apportionment cases that ensued over the following decades suggested that the Census Bureau had a strict constitutional duty under the Equal Protection Clause of the Fourteenth Amendment to count everyone, and the census counts were treated as if they were accurate at the level of the census block.⁶⁰

Third, the Civil Rights movement of the 1950s and 1960s focused on the undercount to make arguments about minorities being underrepresented, facilitating job discrimination and hindering community participation and access to housing.⁶¹ Activists and their attorneys used the census data to make their arguments.⁶² They argued that if, for example, a local labor market was 30% black, then blacks should hold 30% of the jobs in that market.⁶³

49. *Id.*

50. *Id.*

51. *Id.*

52. *Baker v. Carr*, 369 U.S. 186, 188 (1962).

53. SOCIAL HISTORY, *supra* note 14, at 208.

54. *Id.*

55. 369 U.S. 186 (1962).

56. *Baker*, 369 U.S. at 188.

57. *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970); *Avery v. Midland County*, 390 U.S. 474, 485-86 (1968).

58. WHO COUNTS, *supra* note 1, at 32.

59. *Id.*

60. *Wesberry*, 376 U.S. at 5; *Reynolds*, 377 U.S. at 557-58; *Hadley*, 397 U.S. at 52-53; *Avery*, 390 U.S. at 475-76.

61. WHO COUNTS, *supra* note 1, at 32.

62. *Id.*

63. *Id.*

Congress responded to the Civil Rights movement by passing major civil rights legislation, which relied on census data for implementation and administration.⁶⁴ The Voting Rights Act of 1965 enforced the Fifteenth Amendment to the Constitution which states that the "right . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."⁶⁵ Jurisdictions had to show they were complying with constitutional voting rights by meeting strict numerical tests.⁶⁶ For instance, if a state used a literacy test for voter registration, and less than 50% of the voter population either registered or voted, the law would presume that the jurisdiction was in violation of the Fifteenth Amendment.⁶⁷ The literacy tests would be suspended, and the Justice Department could send election observers and federal registrars to monitor subsequent elections.⁶⁸ If the jurisdiction wanted to issue new voting qualifications, the qualifications would have to be "precleared" with the U.S. Attorney General.⁶⁹ The rules affected six southern states and counties in several other states.⁷⁰ Census data were used to determine the voting population and thus became part of a highly charged political issue.⁷¹

At the 1967 conference on "Social Statistics and the City," participants articulated the constitutional principle that made eliminating the differential undercount imperative.⁷² "[W]here a group defined by racial or ethnic terms, and concentrated in special political jurisdictions," wrote David Heer in the conference report, "is significantly undercounted in relation to other groups, then individual members of that group are thereby deprived of the constitutional right to equal representation in the House of Representatives and, by inference, in other legislative bodies."⁷³ Additionally, they were "deprived of their entitlement to partake in federal and other programs designed for areas and populations with their characteristics."⁷⁴ In other words, miscounting the population could unconstitutionally deny minorities

64. *Id.* at 32-33.

65. *Id.* at 33.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973c (1994)) ("An Act To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.").

72. DAVID HEER, JOINT CENTER FOR URBAN STUDIES OF THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY AND HARVARD UNIVERSITY, SOCIAL STATISTICS AND THE CITY, INTRODUCTION 11 (David Heer ed., 1967).

73. *Id.*; see also WHO COUNTS, *supra* note 1, at 33.

74. HEER, *supra* note 72, at 11.

political representation or protection under the Voting Rights Act.⁷⁵ It could also deny local jurisdictions grant funds from federal programs.⁷⁶

Initially, the differential undercount was a technical problem for the Census Bureau.⁷⁷ The political organizations pressing for its correction fell on one side of the regional and demographic divides in the society: urban/suburban, poor/middle class, or minority/majority.⁷⁸ But because those who advocated correction were not necessarily of any one political stripe, our two-party political system did not provide an easy venue to press the issue.⁷⁹ These advocates turned to the courts and sued the Census Bureau under a Fourteenth Amendment claim of equal protection.⁸⁰ A few suits were filed after the 1970 census, with more than fifty lawsuits filed after the 1980 census.⁸¹

The undercount debates and litigation of the 1970s and 1980s were primarily about forcing the Census Bureau to acknowledge the problem and devote resources to finding a remedy.⁸² Some commentators raised questions of whether it would be legal or constitutional to correct the census for undercount, but at the time, those claims were submerged in the technical issues.⁸³ The Census Bureau and the Commerce Department prevailed in the suits because they could demonstrate that there was no known way to correct for the undercount.⁸⁴ The courts also found, however, that expert statisticians claimed it would be possible to correct for the undercount if a serious research effort was made to do so.⁸⁵ These decisions implied that the Census Bureau would be liable for discrimination claims under the Administrative Procedures Act if such research was not forthcoming.⁸⁶ The Census Bureau did indeed launch such a research effort, and it worked closely with a panel at the National Research Council to monitor its progress.⁸⁷

75. WHO COUNTS, *supra* note 1, at 33-34.

76. HEER, *supra* note 72, at 11.

77. WHO COUNTS, *supra* note 1, at 29-31.

78. SOCIAL HISTORY, *supra* note 14, at 206.

79. *Id.* at 208.

80. *Id.* at 212.

81. *Id.* at 230.

82. *Id.* at 213-20.

83. *Id.* at 229.

84. WHO COUNTS, *supra* note 1, at 52-53.

85. *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1098 (S.D.N.Y. 1987).

86. WHO COUNTS, *supra* note 1, at 52-53.

87. See generally THE BICENTENNIAL CENSUS: NEW DIRECTIONS FOR METHODOLOGY IN 1990 (Constance F. Citro & Michael L. Cohen eds., 1985); see also letter from Benjamin King, to John G. Keane, Census Director, (May 26, 1987) (Plaintiff's Admitted Trial Exhibit No. 5, *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993)).

In 1987 the Census Bureau cautiously announced that it had solved the technical problems and was planning new methods in order to correct the 1990 census for the differential undercount.⁸⁸ This announcement brought the second phase of the controversy to the forefront: whether correction was legal and/or constitutional.⁸⁹ Additionally, at that point, the issue became overtly partisan, as key Republican Party officials took a stand against correction for the differential undercount and key Democratic Party officials supported it.⁹⁰

Officials in the Commerce Department refused to implement these new methods for 1990.⁹¹ In late 1988, the Democratic administration of New York City and other plaintiffs sued the Republican Commerce Department in the Reagan and later the Bush Administrations to force implementation of the new methods.⁹² In 1989 the parties to the suit signed a stipulation agreement implementing the new methods, but postponing a decision on their use until July 1991 in order to assure that they were feasible.⁹³ The Commerce Secretary declined to adjust the census for undercount in July 1991, and New York returned to court.⁹⁴ A district court trial was held in 1992.⁹⁵ The judge ruled against the plaintiffs in 1993, but that decision was reversed on appeal in 1994.⁹⁶ The Supreme Court reversed the appeals court in 1996, holding that the secretary's decision not to adjust was within his discretion.⁹⁷

IV. PLANNING AND IMPLEMENTING CENSUS 2000

By the time of the planning process for the 2000 count, the Census Bureau was faced with a legacy of thirty years of lawsuits over its counting procedures, and a partisan divide over how best to count the population.⁹⁸ In addition, the national government was divided into bitter partisan camps.⁹⁹ In the 1980s and early 1990s, a Republican executive branch

88. WHO COUNTS, *supra* note 1, at 82-83.

89. *Id.* at 46-48.

90. *Id.* at 85-86.

91. *Id.*

92. *Id.* at 92.

93. *Id.* at 94.

94. *Id.* at 127, 129.

95. See generally *City of New York v. Dep't of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993).

96. *City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1116 (2d Cir. 1994).

97. *Wisconsin v. City of New York*, 517 U.S. 1, 13, 20 (1996). See WHO COUNTS, *supra* note 1, at 82-94 for a detailed description of the events surrounding the 1990 census litigation and the legal proceedings.

98. SOCIETY, *supra* note 35, at 17.

99. *Id.*

faced a disagreeable Democratic Congress.¹⁰⁰ For a brief period in 1993 and 1994, the Democrats controlled the presidency and both houses of Congress.¹⁰¹ After 1994, as planning for the 2000 census moved into high gear, a Democratic executive branch faced an obstreperous Republican Congress.¹⁰² Census planning had to take place in the shadow of other partisan disputes, such as the push for the Contract with America, the government shutdowns, and the Clinton scandals.¹⁰³

It was in this context that the Census Bureau attempted to design a 2000 census to correct for the differential undercount and make other innovations in counting.¹⁰⁴ Since 1995, Congress opposed many of these measures and used the appropriations process to try to change them.¹⁰⁵ The issue culminated in the spring of 1997 when Congress passed legislation, which the President vetoed, mandating changes in census procedures.¹⁰⁶ Neither side was able to win decisively.¹⁰⁷ As a result, the two sides added compromised language to the 1998 appropriations bill in order to try to resolve the dispute.¹⁰⁸ They created an eight-member Census Monitoring Board to oversee the count, with four members appointed by the White House and the congressional Democrats and four by congressional Republicans.¹⁰⁹ They also permitted members of Congress and private citizens to sue the executive branch before the count to force a court decision on the legality and/or constitutionality of the proposed methods.¹¹⁰ The law permitted expedited review of such suits so that they would reach final determination before the census.¹¹¹

A. THE REPUBLICANS FILE SUIT

The Census Bureau continued with its plan to introduce what it called a "one number census" which would employ sampling for follow-up on households that did not promptly mail back their census forms and for a post-enumeration survey with dual systems estimation to measure and

100. WHO COUNTS, *supra* note 1, at 89-91.

101. *Id.* at 158.

102. *Id.* at 196.

103. *Id.* at 211.

104. *Id.*

105. *Id.*

106. *Id.* at 207-08.

107. *Id.*

108. *Id.* at 211-12.

109. *Id.* at 212.

110. *Id.*

111. *Id.*

correct for undercounts and overcounts.¹¹² In February 1998, the Southeastern Legal Foundation and House Speaker Newt Gingrich filed separate suits against the President and the Commerce Department asking the courts to ban the use of sampling in determining the population results for reapportioning seats in Congress and for determining district boundaries of those seats.¹¹³ The suits were heard in the summer of 1998, and the courts found against the Clinton Administration.¹¹⁴ The Justice Department appealed to the Supreme Court.¹¹⁵ In January 1999, the Court ruled that the current language of Title 13 of the U.S. Code, the federal law governing census taking, required that sampled data could not be used for the apportionment of seats in the House of Representatives.¹¹⁶ The Court also ruled that Title 13 required the Census Bureau to produce the most accurate data for all other purposes.¹¹⁷

The Court's ruling required the Census Bureau to modify its original design for Census 2000.¹¹⁸ The 100% mail-out, mail-back enumeration component of the design was unaffected.¹¹⁹ The ruling affected two separate sampling operations.¹²⁰ First, the Census Bureau had originally planned to sample during the last phase of non-response follow-up as a cost saving method, but it replaced the sampling plan with 100% follow-up of non-responding households.¹²¹ Second, the Census Bureau interpreted the decision to require the administration of a sample post-enumeration survey and the production of corrected data; if the Bureau deemed the corrected results more accurate, they would publish adjusted results which could be used for the purpose of drawing legislative districts.¹²² The survey was redesigned and renamed the Accuracy and Coverage Evaluation (A.C.E.) program.¹²³ Since direct state estimates of adjusted population were not required to be provided for congressional apportionment, the Census

112. *Id.* at 196. Dual systems estimation is a form of systematic double counting based on the idea that using two sources of information will provide a more accurate estimate of the population. Stephen E. Fienberg, *Capture-Recapture Methods*, in *ENCYCLOPEDIA OF THE U.S. CENSUS* 49-54 (Margo J. Anderson ed., 2000).

113. WHO COUNTS, *supra* note 1, at 214.

114. *Id.*

115. *Id.* at 214-15.

116. *Id.* at 230-31.

117. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342-43 (1999); *see also* *Glavin v. Clinton*, 19 F. Supp. 2d 543, 552 (E.D. Va. 1998).

118. *Dep't of Commerce*, 525 U.S. at 342-43.

119. WHO COUNTS, *supra* note 1, at 292.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

Bureau was able to reduce the A.C.E. survey size from 750,000 to just over 300,000 households.¹²⁴ The effect of the court's decision was that census officials asked Congress for additional funds, amounting to \$1.7 billion, for enumerators.¹²⁵ Congress not only appropriated additional funds for the extra enumerators, it also provided for a new lavish advertising campaign, which had the aim of encouraging people to voluntarily participate in the count.¹²⁶

B. THE ADVERTISING CAMPAIGN

All stakeholders in the census agreed that it was important to encourage voluntary participation in the count, and the Bureau undertook a multi-pronged approach to increasing participation.¹²⁷ Census Bureau Director Kenneth Prewitt embarked on a grueling schedule of public appearances designed to get the public to see the census as a measure of "civic participation."¹²⁸ In January 2000, for example, Prewitt launched the census in Alaska and was photographed in a dog sled "delivering" census forms to a remote village.¹²⁹ During March and April 2000, the Census Bureau web site provided a daily update of census response rates at the national, state, and local government level, along with comparison data for 1990.¹³⁰ Third, the Census hired, for the first time, a private advertising company to promote the census.¹³¹ Young & Rubicam was contracted for \$167 million and saturated the media to make people more aware of the census.¹³² The mail enumeration response rate was 78% in 1970 and had dropped to 65% in 1990.¹³³ The public relations campaign focused on raising that response rate by encouraging, exhorting, and cajoling householders to voluntarily complete the form and promptly mail it in.¹³⁴

C. CENSUS 2000 IN PROCESS

The census forms were mailed to households across the nation in mid-March of 2000, in anticipation of the census officially beginning April 1,

124. *Id.*

125. *Id.*

126. *Id.* The Census Bureau contracted with a private advertising company for \$167 million, for the advertising campaign. *Id.* at 292-93.

127. *Id.*

128. *Id.* at 293.

129. *Id.*

130. *Id.*

131. *Id.* at 292-93.

132. *Id.*

133. *Id.* at 293.

134. *Id.*

2000.¹³⁵ The “short form,” containing six questions on each person living in the household and one question on whether the home was owned or rented, went to most households.¹³⁶ The “long form,” more detailed with questions about housing, employment, commuting, disability, citizenship, and education, went to about one-sixth of the households.¹³⁷ The early mail response rate of more than 67% was attributed to the media campaign, but by early March that success was threatened by the public’s understanding and reaction to the debate over statistical sampling.¹³⁸

In late February and early March 2000, radio talk shows and conservative commentators asserted that the long form questions invaded individual privacy.¹³⁹ For instance, they asserted that the government had no right to ask householders how many bathrooms they had.¹⁴⁰ The commentators argued that income, race, and disability status were inappropriate questions for the census.¹⁴¹

This reaction was a surprise to the Census Bureau because the census questions have been essentially the same for decades; most of the questions are required by law.¹⁴² In addition, the long form only goes to about one household in six, not to every household.¹⁴³ Congress had approved the subject matter of the questions on both forms three years earlier in 1997; it approved the actual questions two years earlier in 1998.¹⁴⁴ The Census Bureau assured the public that it had strong procedures in place to protect the confidentiality of the completed census forms.¹⁴⁵

However, critics were not reassured.¹⁴⁶ Republican presidential candidate George W. Bush and Senate majority leader Trent Lott agreed that the questions were too intrusive, and both stated that they were against prosecuting people who did not answer the questions.¹⁴⁷ The Senate even passed a non-binding resolution to end the penalties for leaving census questions unanswered.¹⁴⁸ Census Bureau officials warned that the criticism of the census would mean lower response rates and lead to poor quality census

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 293-94.

140. *Id.* at 294.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 293.

147. *Id.* at 294.

148. *Id.*

data.¹⁴⁹ Political officials agreed with the Census Bureau and told Americans to complete the basic questions on the form and mail it in.¹⁵⁰

By late April, the time for the nonresponse follow-up phase to begin, the response rate was 65% for the short forms.¹⁵¹ After the nonresponse follow-up phase began, the response rate rose another 2%.¹⁵² The pre-census estimate was exceeded by 6%, and the response rate was 2% higher than the rate for 1990.¹⁵³ However, the response rate for the long form was only 55%.¹⁵⁴ The gap between the response rates of the two forms was 6% in 1990, and in 2000 it had grown to 12%.¹⁵⁵

The nonresponse follow-up phase began in late April when the Census Bureau dispatched temporary enumerators to count the rest of those who did not fill out one of the forms.¹⁵⁶ The enumerators would visit all households that did not fill out one of the forms.¹⁵⁷ If no one was home, the enumerators were instructed to go back six times before “closing out” a case.¹⁵⁸ The nonresponse follow-up phase of the census was completed on June 27, 2000.¹⁵⁹ The Census Bureau had mailed out 120 million forms, and they were all accounted for; the Census Bureau either had information on residents as of April 1 or a showing that the house was vacant.¹⁶⁰ This phase of the census was in fact completed a week ahead of schedule.¹⁶¹ The Census Bureau attributed its success to hiring its enumerators rapidly and paying them well.¹⁶²

Even as Census Director Kenneth Prewitt lauded the completion of “the good census,” the Census Bureau’s opponents were not pleased.¹⁶³ Prewitt announced to Congress and the public that the plan of the census was on schedule, that the forms were still being checked for “quality,” but otherwise the enumeration was essentially completed.¹⁶⁴ Nevertheless, there were news reports from various parts of the country claiming that, in

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 295.

162. *Id.*

163. *Id.*

164. *Id.*

the rush to complete the nonresponse follow-up, enumerators had been asked to cut corners on official procedures, take information from neighbors, and hurry the work.¹⁶⁵

On July 24, the chairman of the House Census Oversight Committee, Rep. Dan Miller (R-FL), announced that his staff's investigations of these charges had led them to believe that the operations in 15 of the Bureau's 520 local offices should be rechecked because "improper or fraudulent procedures may have been employed."¹⁶⁶ He also complained about "a rush to finish at the expense of quality."¹⁶⁷ The Census Bureau quickly responded.¹⁶⁸ Director Prewitt reviewed the work in these fifteen offices and announced that he found no further action was needed.¹⁶⁹ The implication of Miller's challenge was that the Census Bureau purposely cut corners to make the enumeration poor and give itself further grounds to implement a sample-based adjustment of the census counts.¹⁷⁰

D. SAMPLING FOR COVERAGE EVALUATION

At the end of June, the Census Bureau launched the next phase of the census, the Accuracy and Coverage Evaluation (A.C.E.) survey.¹⁷¹ The Bureau re-canvassed a random sample of blocks nationwide and re-examined the 314,000 housing units contained in them.¹⁷² The survey results were then matched back to those collected during the mail-out, mail-back stage in April and during the nonresponse follow-up to determine the level of error in the basic enumeration count.¹⁷³ On one level, the A.C.E. resembled in form the 1990 Post-Enumeration Survey, which was based on a sample of about 165,000 households.¹⁷⁴ But the doubling of the sample size for the A.C.E. had major implications for the accuracy of sample-adjusted counts, both reducing the sampling error and allowing for a post-stratification scheme—the creation of demographic sub-groups—that provided for a variety of improvements over 1990.¹⁷⁵

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 295-96.

172. *Id.* at 295.

173. *Id.*

174. *Id.*

175. SOCIETY, *supra* note 35, at 19.

The A.C.E. design included some enhancements intended to control non-sampling error:

1. changes to the matching process, including new automated matching systems, changes in the treatment of people who had moved since census day that simplify the matching for these movers, and the use of extended search areas; new computer processing controls for software validation and verification that protect against computer errors;
2. field operations to minimize the occurrence of missing data; and
3. the use of telephone interviewing and computer-assisted personal interviewing (CAPI), which should not only result in improved efficiency and data quality but should also shorten the elapsed time between the census enumeration and the ACE interviews.¹⁷⁶

These changes from 1990 to 2000 in the methods for sampling and sample-based adjustments were far from cosmetic.¹⁷⁷ The adjustment process for 2000 was spelled out and documented in advance to prevent ad hoc decisions and manipulation—the allegation constantly raised by Republican political officials.¹⁷⁸ The adjustment methodology is not without flaws and problems, and it has been subject to strong criticisms by those in the statistical community.¹⁷⁹ Errors of matching, heterogeneity, and correlation bias all were of major concern in 1990, and they were included in the Bureau's 1991 assessments on the accuracy of adjustment.¹⁸⁰ Critics point to these and other methodology problems and marshal elaborate loss function analyses to support their position,¹⁸¹ and

176. *Id.*

177. *Id.* at 20.

178. *Id.*

179. *Id.*

180. *Id.*

181. See generally Lawrence D. Brown et. al., *Statistical Controversies in Census 2000*, 39 JURIMETRICS J. 347 (1999); PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000); Thomas L. Brunell, *Using Statistical Sampling to Estimate the U.S. Population: The Methodological and Political Debate Over Census 2000*, 33 PS: POL. SCI. & POL. 775 (2000); KENNETH DARGA, FIXING THE CENSUS UNTIL IT BREAKS: AN ASSESSMENT OF THE UNDERCOUNT ADJUSTMENT PUZZLE (2001); Thomas R. Belin & John E. Rolph, *Can We Reach Consensus on Census Adjustment?*, 9 STAT. SCI. 486 (1994); Thomas R. Belin & John E. Rolph, *Can we Reach Consensus on Census Adjustment?: Rejoinder*, 9 STAT. SCI. 520 (1994) [hereinafter *Rejoinder*]; MICHAEL L. COHEN ET AL., MEASURING A CHANGING NATION: MODERN METHODS FOR THE 2000 CENSUS (1999); Margo Anderson & Stephen E. Fienberg, *Partisan Politics at Work: Sampling and the 2000 Census*, 33 PS: POL. SCI. & POL. 795 (2000) [hereinafter *Partisan Politics*]; Margo Anderson et al., *Sampling-Based Adjustment of*

other scholars have responded to these criticisms.¹⁸² In 1990 the Secretary of Commerce decreed that distributional accuracy should be the way by which the improvements from adjustment should be assessed, but in 2000, Census Director Prewitt noted:

The decennial census has two goals: numerical accuracy and distributive accuracy. Both goals can be reached only if everyone in the country is counted. This not being possible, the Census Bureau designs its procedures on the principle that its first task is to count as many people as possible, i.e., to improve numerical accuracy.

The bureau's critics, however have largely focused on distributional accuracy. They argue that if improving census methodology might distribute shares differently, the bureau should make no changes. . . . Where there are multiple distributional tasks, it is not possible to design a census that can maximize accuracy for each of these tasks. To improve the count in any given area for any given group necessarily rearranges the proportionate shares for all areas and all groups.¹⁸³

However, the bottom line for the 1990 adjustment was that not a single credible statistical analysis, whether based on numerical or distributive accuracy, showed that the original enumeration counts were superior to the adjusted counts, at any level of geography.¹⁸⁴ In a reassessment of the 1990 evaluations carried out in conjunction with a June 2000 report by Director Prewitt to the Secretary of Commerce, Census Bureau statisticians reaffirmed their expectation that sample-based adjusted counts would prove to be more accurate for 2000.¹⁸⁵

V. RESULTS FROM CENSUS 2000

The Census Bureau presented the first results of the 2000 census to the President on December 28, 2000; it presented the population totals for the

the 2000 Census—A Balanced Perspective 40 JURIMETRICS J. 341 (2000) [hereinafter *Balanced Perspective*].

182. See generally *Rejoinder*, *supra* note 181.

183. Kenneth Prewitt, *Political Science for Design of a Sensible Census*, 32 PS: POL. SCI. & POL. 139, 139 (2000).

184. *Balanced Perspective*, *supra* note 181, at 353.

185. KENNETH PREWITT, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ACCURACY AND COVERAGE EVALUATION: STATEMENT ON THE FEASIBILITY OF USING STATISTICAL METHODS TO IMPROVE THE ACCURACY OF CENSUS 2000, at 36-37 (2000) (reassessing the Committee on Adjustment of Postcensal Estimates (CAPE) report showing the expectation that errors for the 2000 census will be similar to errors for the 1990 census).

states, as those totals would be used for reapportioning for the House and the Electoral College.¹⁸⁶ The total population was reported at 281,424,177, which was an increase of around 33 million over the 1990 population.¹⁸⁷ The Census Bureau's estimate of total population was exceeded by 6.5 million people; it determined the population grew at a rate of 13.2%.¹⁸⁸

The results showed a continuation of the long-term trend of the population shifting from the Northeast and Midwest to the South and West.¹⁸⁹ The reapportionment showed that Connecticut, New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, and Wisconsin would all have fewer representatives in the House.¹⁹⁰ In other parts of the country, only Mississippi and Oklahoma lost representatives in the House.¹⁹¹ The states that gained representatives in the House were in the southern and western parts of the country.¹⁹² Georgia, Florida, Texas, Arizona, and California shared in a gain of nine seats.¹⁹³ North Carolina, Colorado, and Nevada also each gained a seat.¹⁹⁴

Census Director Kenneth Prewitt, Commerce Secretary Norman Mineta and Under Secretary Robert Shapiro released the first census results at a press conference held at the National Press Club.¹⁹⁵ The reporters asked questions about the racial distribution of the population, the accuracy of the results, and the size of the undercount.¹⁹⁶ The officials replied to the questions with little detail, explaining that the Census Bureau would present redistricting results from its A.C.E. program in April 2001.¹⁹⁷ However, by January 2001, the census results also raised questions about the level of gross error (sum of omissions and erroneous enumerations).¹⁹⁸ Was it reduced below the 1990 level? Was the level of erroneous enumerations for the 2000 census greater than in the 1990 census? Other questions related to these issues also arose. Were there significantly more immigrants in the

186. WHO COUNTS, *supra* note 1, at 303.

187. *Id.*

188. For the results of the census by state, see <http://www.census.gov> (last visited Jan. 27, 2002).

189. WHO COUNTS, *supra* note 1, at 303.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 303-04.

194. *Id.* at 304.

195. *Id.*

196. *Id.*

197. *Id.*

198. See generally Barbara Everitt Bryant, *Census Taking for a Litigious, Data-Driven Society*, CHANCE, 1993, at 44; Eugene Ericksen & Teresa Defonso, *Beyond the Net Undercount: How to Measure Census Error*, CHANCE, 1993, at 38.

country because of the prospering economy during the 1990s?¹⁹⁹ Did the 2000 census more successfully count the undocumented immigrants?²⁰⁰

A. RELEASE OF REDISTRICTING DATA AND THE DECISION NOT TO ADJUST

The election of George W. Bush to the White House in November 2000 resulted in changes for the Census Bureau.²⁰¹ Kenneth Prewitt, the Census Director who was appointed by Clinton, resigned when the new administration took over in late January 2001.²⁰² The consensus was that the Republicans would again oppose adjusting the census data and releasing that adjusted data.²⁰³ Title 13 requires that the states receive small area data by April 1, 2001; the data must include block counts by race, voting age, and Hispanic origin.²⁰⁴ The Census Bureau set March 1, 2001, as the date it would decide whether the April 1 figures would be adjusted or unadjusted data; the data is referred to as PL 94-171 data as mandated by a 1975 law.²⁰⁵

The Bureau was on a course of adjustment unless the raw census figures were determined to be superior; Census Bureau Director Kenneth Prewitt had issued a report in June 2000 showing that adjustment was operational and statistically feasible.²⁰⁶ The Executive Steering Committee for ACE Policy (ESCAP) was formed within the Census Bureau to evaluate whether the 2000 census data should be adjusted.²⁰⁷ The Clinton Administration Commerce Secretary, William Daley, promulgated a rule officially delegating the authority to make the adjustment decision to the Census Bureau Director.²⁰⁸

In late February 2001, the new Commerce Secretary, Donald Evans, signaled that he would not be bound by the policies and procedures of the previous administration.²⁰⁹ He rescinded the Daley rule and restored the decisionmaking to the Commerce Department.²¹⁰ Acting Director Bill

199. WHO COUNTS, *supra* note 1, at 304.

200. *Id.*

201. SOCIETY, *supra* note 35, at 24.

202. *Id.*

203. *Id.*

204. PREWITT, *supra* note 185, at 1.

205. *Id.* at 32.

206. *Id.* at 53.

207. SOCIETY, *supra* note 35, at 24.

208. *Partisan Politics*, *supra* note 181, at 798.

209. Report of Tabulations of Population to States and Localities Pursuant to 13 U.S.C. § 141(c) and Availability of Other Population Information; Revocation of Delegation of Authority, 66 Fed. Reg. 11,231, 11,231 (Feb. 23, 2001) (to be codified at 15 C.F.R. pt. 101).

210. *Id.*

Barron announced on March 1, 2001, that the ESCAP "determined that they could not conclude that the data for legislative redistricting collected during Census 2000 would be improved by adjustment through the statistical method known as sampling."²¹¹

The April 2000 population was estimated at 284.7 million according to A.C.E. adjustment, 3.3 million higher than the total population figure reported in December 2000.²¹² Barron recommended the release of unadjusted data for redistricting.²¹³ In its recommendation, the ESCAP said it was "unable to conclude, based on the information available at this time, that the adjusted Census 2000 data are more accurate for redistricting."²¹⁴ The analysis of the results of the 2000 census and the A.C.E. post-enumeration survey are ongoing, and comparisons with 1990 are complicated because of changes in methodology.²¹⁵ The 2000 net census undercount was somewhat lower than in 1990, and the overall level of gross error appears to be down only a small amount from the 10% in 1990.²¹⁶ However, to the surprise of many observers, the Census Bureau was successful in reducing the differential net undercount of various minority groups by a substantial amount.²¹⁷ Work continues at the Census Bureau and elsewhere to understand whether the A.C.E.-adjusted results are demonstrably better than the census counts and should be used for various intercensal purposes.²¹⁸ It is unclear what criteria will ultimately be used in this decision.²¹⁹

The Census Bureau also reported that its estimate of the April 2000 population using demographic analysis was 279.6 million.²²⁰ Demographic analysis counts the population using the equation: Population = Births - Deaths + Immigration - Emigration.²²¹ In its ESCAP report, the Bureau

211. SOCIETY, *supra* note 35, at 24.

212. *Id.*

213. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, REPORT OF THE EXECUTIVE STEERING COMM. FOR ACCURACY AND COVERAGE EVALUATION POLICY, at i (2001) [hereinafter ESCAP Report].

214. *Id.*

215. *Id.*

216. Margo J. Anderson & Stephen E. Fienberg, Counting and Estimation: Methodology for Improving the Quality of Censuses: The U.S. 2000 Census Adjustment Decision, Presentation Before the International Conference on Quality in Official Statistics 3 (May 14-15, 2001), available at <http://www.stat.cmu.edu/tr746/tr746.html> (last visited Jan. 27, 2002) [hereinafter Counting and Estimation].

217. *Id.*

218. See generally THE 2000 CENSUS: INTERIM ASSESSMENT (Constance F. Citro et al. eds., 2001) [hereinafter INTERIM ASSESSMENT].

219. *Id.*

220. Counting and Estimation, *supra* note 216, at 13.

221. *Id.* at 12.

concluded that “[t]he inconsistency between the demographic analysis estimates and the ACE estimates raises the possibility of a currently undiscovered problem in the ACE or census methodology.”²²² But other demographers²²³ point out that the estimates of undocumented immigrants in demographic analysis are problematic.²²⁴ Using demographic analysis, Passel estimated the United State’s population in April 2000 at 282.3 million.²²⁵ Since the 1980 census, the Bureau has known about the inadequacies of its estimates for emigration and immigration, especially for undocumented aliens.²²⁶ These numbers have proven to be especially problematic for those of Hispanic origin. Demographic analysis had traditionally been used to measure the differential undercount of Blacks versus non-Blacks, but it provides no accurate direct measures of the differential undercount for other groups, such as Hispanics.²²⁷

B. DEMOGRAPHIC RESULTS

As of this writing, the Bureau’s release of demographic results was confined to the results from the short form questionnaire.²²⁸ Racial breakdowns indicated the population was 75.1% White, 12.3% Black or African American, 3.6% Asian, 0.9% American Indian or Alaska Native, and 0.1% Native Hawaiian or other Pacific Islander.²²⁹ A total of 6.8 million people (2.4% of the population) were identified as having two or more races in the census, while 15.4 million (5.5% of the population) claimed “Some other race.”²³⁰ The Hispanic population grew 58% during the 1990s, reaching 35.3 million.²³¹

The pattern of urban population change has been complex, with some older cities showing surprising growth and others continuing trends of

222. ESCAP Report, *supra* note 213, at ii.

223. See generally Jeffrey S. Passel, Comparison of Demographic Analysis, A.C.E., and Census 2000 Results by Race (Feb. 27, 2001) (unpublished memorandum prepared for the U.S. Census Monitoring Board Presidential Members) (on file with author); Jeffrey S. Passel, *Demographic Analysis: An Evaluation*, in U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS FINAL REPORT TO CONGRESS 86 (Sept. 1, 2001) available at http://www.cmbp.gov/reports/final_report/fin_sec4_demographics.pdf (last visited Jan. 28, 2002) [hereinafter *DA Evaluation*].

224. *DA Evaluation*, *supra* note 223, at 88.

225. *Id.* at 94.

226. *Id.* at 92.

227. For related commentary on demographic analysis and its accuracy for both 1990 and 2000, see generally *Balanced Perspective*, *supra* note 181 and INTERIM ASSESSMENT, *supra* note 218.

228. Census 2000 Summary File 1(SF1), available at <http://www.census.gov> (Jan. 28, 2002).

229. *Id.*

230. *Id.*

231. *Id.*

population decline.²³² New York City grew 9% and topped 8 million people for the first time, while Chicago grew 4%.²³³ Detroit, Philadelphia, Cleveland, Baltimore, and Milwaukee declined, while cities in the Sunbelt grew.²³⁴ The median age of the population was 35.3 years, the highest in history.²³⁵ Of the 105.4 million households in the U.S., 24.8 million are married couples with children under age 18.²³⁶ By way of comparison, there are 27.2 million single family households in the country.²³⁷

C. CONTINUING 2000 CENSUS LITIGATION

After the releases in late December of 2000 and the spring of 2001, several lawsuits were filed against the Commerce Department and Census Bureau. The State of Utah filed the first in January and challenged the procedures used to compile the apportionment population, in particular the inclusion of only the overseas military in the apportionment population.²³⁸ The other four suits involved the release and use of the adjusted census data. This section outlines the issues in each of these cases and indicates their current status.

In the first challenge to Census 2000, the State of Utah sued the Commerce Department, claiming that the Census Bureau improperly omitted people from the overseas populations added to the apportionment count.²³⁹ Utah charged that if overseas missionaries with Utah residency had been included in the apportionment count, a seat in Congress would shift from North Carolina to Utah.²⁴⁰ However, only the overseas military population was included in the population count.²⁴¹ On April 17, 2001, a three-judge federal district court panel ruled unanimously against Utah's claim that the Census Bureau should have counted Mormon missionaries serving overseas during the census.²⁴²

After the release of the redistricting data in March, and the technical documentation of census procedures, Utah also learned that the imputation procedures used in the 2000 census also caused Utah to lose a congressional

232. Compare, e.g., 1990 Summary Tape File 1 (STF1) with Census 2000 Summary File 1 (SF1), both available at <http://www.census.gov> (Jan 28, 2002).

233. *Id.*

234. *Id.*

235. Census 2000 Summary File 1 (SF1), available at <http://www.census.gov> (Jan 28, 2002).

236. *Id.*

237. *Id.*

238. *Utah v. Evans*, 143 F. Supp. 2d 1290, 1293 (D. Utah 2001).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* The Supreme Court agreed. *Utah v. Evans*, 122 S. Ct. 917 (2002).

seat to North Carolina.²⁴³ Utah filed a second lawsuit on April 25, 2001, claiming that the Census Bureau's use of a statistical procedure known as "imputation" cost it a fourth congressional district in violation of the U.S. Constitution's Apportionment Clause and federal law; it cited the 1999 Supreme Court decision which ruled that a provision of the Census Act, Title 13 of the United States Code, prohibits the use of sampling methods to derive the state population totals used for congressional apportionment.²⁴⁴

Imputation involves the use of statistical models to assign occupants (or vacancy status) to housing units for which census takers cannot gather any information, based on data from nearby households.²⁴⁵ The Census Bureau has said imputation added about 1.2 million people, or 0.2% of the population, to the state population totals used for apportionment in Census 2000; a much greater controversy exists over imputation due to claims that, in one form or another, over 8 million people were in fact imputed in the 2000 census records—close to a four-fold increase over 1990.²⁴⁶

Subsequent to the April filing, Utah charged that imputation is a form of sampling and that sampling was banned in the 1999 Supreme Court decision in *Dep't of Commerce v. House of Representatives*.²⁴⁷ In an earlier challenge to the Census Bureau imputation procedures by the State of Indiana after the 1980 census, federal courts deferred to Census Bureau authority to make operational decisions about methods.²⁴⁸ In that case, Indiana charged that Bureau procedures caused a seat to move from Indiana to Florida.²⁴⁹ The decision in the Utah imputation challenge was affirmed on appeal.²⁵⁰ On November 1, 2001, a three-judge panel ruled two-to-one against Utah's claim for summary judgment.²⁵¹ The court did not support

243. *Evans*, 143 F. Supp. 2d at 1293.

244. *Utah v. Evans*, No. 2:01CV292G, mem. (D. Utah Apr. 25, 2001).

245. See generally 1 INCOMPLETE DATA IN SAMPLE SURVEYS: REPORT AND CASE STUDIES (William G. Madow et al. eds., 1983); 2 INCOMPLETE DATA IN SAMPLE SURVEYS: THEORY AND BIBLIOGRAPHIES (William G. Madow et al. eds., 1983); 3 INCOMPLETE DATA IN SAMPLE SURVEYS: PROCEEDINGS OF THE SYMPOSIUM (William G. Madow et al. eds., 1983).

246. Letter from the U.S. Census Monitoring Board Presidential Members, to Richard Cheney, President, U.S. Senate, and J. Dennis Hastert, Speaker, U.S. House of Representatives (Sept. 1, 2001) accompanying U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS FINAL REPORT TO CONGRESS (Sept. 1, 2001) available at <http://www.cmbp.gov> (last visited Jan. 31, 2002).

247. 525 U.S. 316 (1999).

248. *Orr v. Baldrige*, No. IP 81-603-C (S.D. Ind. July 1, 1985) (filed June 1981, decided by summary judgment for the defendants on July 1, 1985, by James E. Noland, District Judge); see also U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING, HISTORY, PART E, PHC80-R-2E, at 10-8 to 10-9 (1989).

249. *Orr*, No. IP81-603-C (S.D. Ind. July 1, 1985).

250. *Utah v. Evans*, 122 S. Ct. 612 (2001).

251. *Utah v. Evans*, No. 2:01CV292G, mem. at 33 (D. Utah Nov. 1, 2001).

Utah's contention that imputation was a form of sampling or that the constitutional requirement of an "actual enumeration"²⁵² precluded "the use of narrowly tailored statistical methodologies, such as hot deck imputation, for the purpose of improving the accuracy of the decennial census."²⁵³ The case was accepted for certiorari to the Supreme Court and was argued on March 27, 2002.²⁵⁴

Los Angeles filed the second major suit in February in 2001, seeking to overturn the Commerce Secretary's rescission of the delegation of decisionmaking authority to the Census Director.²⁵⁵ After the Secretary concurred with a Census Bureau recommendation to issue unadjusted data, Los Angeles amended its complaint, contending that the Secretary violated a provision of the Census Act governing the Census Bureau's use of sampling by not releasing the adjusted numbers.²⁵⁶ Los Angeles also filed a Freedom of Information Act request in January for the block-level adjusted data.²⁵⁷

On April 26, 2001, U.S. District Court Judge Gary A. Feess dismissed the Los Angeles claims, concluding that the Commerce Department actions were consistent "with a permissible construction of the statute."²⁵⁸ He came to his determination in favor of the Secretary after concluding that "the paramount objective of the Census Act is accuracy in counting population" and that "substantial evidence supports the Census Bureau's recommendation against adjustment."²⁵⁹ The judge noted in his opinion the Census Bureau's concerns about inconsistencies between the independent "demographic analysis" population estimate, the unadjusted census count, and the results of the A.C.E. survey, as well as its concern about "synthetic error" and "balancing error" associated with A.C.E.²⁶⁰ The case is currently on appeal.²⁶¹

252. UTAH CONST. art. 1, § 2, cl. 3.

253. *Utah v. Evans*, No. 2:01CV00292, mem. at 33 (D. Utah Nov. 1, 2001).

254. *Utah v. Evans*, 122 S.Ct. 1201 (2002); see also Elyse Hayes, *State to Appeal Census Ruling*, THE DESERT NEWS (Salt Lake City), Nov. 2, 2001, at B01; Charles Lane, *O'Connor Hints She May Side With Utah in Census Case*, WASH. POST, Mar. 28, 2002, at A13.

255. *City of Los Angeles v. Donald Evans*, No. CV 01-1671 (D.C.C.D. Cal. Apr. 26, 2001) (request for permanent injunction denied and case dismissed).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Oral arguments were heard in this case at the United States Court of Appeals for the Ninth Circuit on April 9, 2002. *Notice of Location of Hearing for the April Calendar*, U.S. Court of Appeals for the Ninth Circuit, available at <http://www.ca9.uscourts.gov> (April 8, 2002).

On May 10, 2001, Cameron County, Hidalgo County, and a number of municipalities filed the third suit in the Southern District of Texas.²⁶² The plaintiffs charged that the Secretary of Commerce's decision to restore the decision on adjustment to the Commerce Department and the subsequent refusal to release adjusted census data violated the Administrative Procedures Act.²⁶³ They also charged that since the census undercounted the Hispanic community, the use of unadjusted numbers would result in the loss of federal funds to areas with large numbers of Hispanics; thus the disparate treatment of the Hispanic community was "in violation of the Fourteenth Amendment and the Due Process and Equal Protection Clause of the Fifth Amendment."²⁶⁴ The plaintiffs asked the court to order the release of the statistically adjusted data and to order that such data would be "deemed official census data for federal funding purposes."²⁶⁵ The court found for the plaintiffs and ordered the release of the data on January 20, 2002.²⁶⁶

The fourth suit demanded the release of the adjusted census data and was filed by seven members of the House Government Reform Committee on May 21, 2001.²⁶⁷ Led by Representatives Henry A. Waxman (D-CA), Wm. Lacy Clay (D-MO), and Carolyn B. Maloney (D-NY), the members filed suit in federal court in Los Angeles against the Secretary of Commerce.²⁶⁸ The purpose of the lawsuit was to compel the Bush Administration to release the adjusted data from the 2000 census.²⁶⁹ The lawsuit had additional significance beyond the immediate census case.²⁷⁰ Representative Waxman and his colleagues sought the adjusted data under the "Seven Member Rule," a federal statute enacted in 1928 that gives any seven members of the House Committee on Government Reform special access to federal records.²⁷¹ The representatives prevailed in this suit, but the government has appealed the ruling.²⁷²

262. *Cameron & Hidalgo Counties, Texas v. Evans*, No. B-01-082 (S.D. Tex. May 10, 2001).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Cameron & Hidalgo Counties, Texas*, No. B-01-082 (S.D. Tex. Jan. 20, 2002).

267. *Waxman v. Evans*, No. 01-04530-1-LGB (C.D. Cal. May 21, 2001).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* This was the first suit to seek documents under this federal law *Id.*

272. *Waxman v. Evans*, No. 01-4530 (C.D. Cal. Jan. 18, 2002) (motion for reconsideration denied Mar. 21, 2002).

The fifth suit came from two Oregon state legislators seeking access to the adjusted Census 2000 data through the Freedom of Information Act (FOIA).²⁷³ Senator Margaret Carter (D-Portland) and Senator Susan Castillo (D-Eugene) filed a lawsuit in federal district court on June 11, 2001, against the Commerce Department after the Department declined to release the statistically adjusted numbers in response to the senators' FOIA request.²⁷⁴ The Department cited a FOIA exemption for information that is "predecisional and deliberative."²⁷⁵

Senator Castillo stated that the unadjusted numbers received from the Census Bureau in March for redistricting "continue historical patterns of undercounting," but "we won't really know how badly Oregonians are being shortchanged unless the Bureau releases the entire set of adjusted data."²⁷⁶ Senator Carter added that the adjusted census numbers "will ensure that Oregon and other states get what they deserve when it comes to the allocation of federal funds. . . . We need to right a wrong, not perpetuate one."²⁷⁷ The senators' attorney added that California was granted a FOIA request from the Ninth Circuit Court of Appeals following the 1990 census.²⁷⁸ Ultimately the senators prevailed in their suit when the court ruled that the Census Bureau had violated the FOIA by refusing to release the adjusted data.²⁷⁹

The final decisions have not been made on these suits. The Census Bureau continues its analysis of the accuracy of the 2000 census and announced in October 2001 that it would not incorporate adjusted data into the intercensal estimates.²⁸⁰ In the 1990s, the Census Bureau did not officially incorporate adjusted census numbers into the intercensal estimates, but statistical agencies, notably the Bureau of Labor Statistics, used adjusted population estimates to calculate the monthly unemployment figures after 1995.²⁸¹ Since the Census Bureau has concluded that the unadjusted data are more accurate, legal relief will be much harder to

273. *Carter v. United States*, No. CA 01-868-RE (D. Or. June 11, 2001).

274. *Id.*

275. *Id.*

276. *Congress Reviews American Community Survey Plans; Census Bureau to Release First National ACS Test Data*, Census 2000 Initiative News Alert Archive, available at <http://www.census2000.org> (July 6, 2001) [hereinafter *American Community Survey Plans*].

277. *Id.*

278. *Id.*

279. Betsy Hammond, *Judge Rules Adjusted Census is Public*, OREGONIAN, Nov. 15, 2001, at C5.

280. *American Community Survey Plans*, *supra* note 276.

281. Press Release, U.S. Department of Commerce News, Statement of Acting Census Bureau Director William Barron Regarding the Adjustment Decision (Oct. 17, 2001), available at <http://www.census.gov/pressrelease/www/2001/cb01cs08.html>.

obtain, especially since the arguments in a 1999 case were that the decisions on technical procedures should be left to experts at the Census Bureau.²⁸²

Waiting in the wings is a current panel from the National Research Council that has been monitoring statistical aspects of the conduct of Census 2000.²⁸³ In its interim report, the panel reviewed many dimensions of the conduct of the census, the A.C.E. survey, and the adjustment process.²⁸⁴ Thus far, the panel has found the Census Bureau decision-making on adjustment justifiable, but the panel has also urged the Census Bureau to continue research on the accuracy of the 2000 count because of the many unanswered questions about gross error in the census.²⁸⁵

VI. THE FUTURE

There were other innovations in method in Census 2000, as well as initiatives in Congress designed to shape census methods that may generate additional political controversy over census methods and/or further litigation.²⁸⁶ They include the changes in the race question to permit multiple racial identification and the Census Bureau's proposal to eliminate the long form from the census in 2010 and replace its data with an ongoing rolling sample survey called the American Community Survey.²⁸⁷

Concerns about the confidentiality of census data and the experience in other countries with census adjustment may also have an impact on census procedures and hence the controversies surrounding the census.²⁸⁸ In July 2001, for example, former director of the Census Bureau Kenneth Prewitt proposed that future population surveys no longer release data for geographical units such as street blocks.²⁸⁹ Prewitt wrote to Katherine Wallman, the Chief Statistician of the United States, pointing out that there was a high error rate in block-level data and releasing it in the PL-94-171 redistricting file has heightened the politically charged issue of whether the census count should be statistically adjusted through sample-based

282. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 336 (1999).

283. *INTERIM ASSESSMENT*, *supra* note 218.

284. *Id.*

285. *Id.*

286. *See, e.g.*, *Counting and Estimation*, *supra* note 216, at 25 (showing the research being done by the Census Bureau for the 2010 census).

287. We have written about some of these innovations and initiatives elsewhere. *See* WHO COUNTS, *supra* note 1; SOCIETY, *supra* note 35; *Counting and Estimation*, *supra* note 216.

288. *See, e.g.*, *Counting and Estimation*, *supra* note 216, at 26 (learning from other countries).

289. Drew Clark, *Ex-census Chief Proposes New Privacy Protection*, NA T'L J.'S TECHNOLOGY DAILY, July 9, 2001.

adjustments.²⁹⁰ “The debate [over sampling] does not disappear but might proceed more scientifically if the smallest geographic unit for reporting [the] 2010 decennial census was, for example, the census tract, said Prewitt.”²⁹¹ Tracts contain about 4000 people.²⁹² The Census Bureau web site currently reports the number of a given race and the number of people of voting age for all of the 8.26 million blocks in the United States.²⁹³ Therefore, on average each census block contains about thirty-four people, and “cannot but exacerbate public anxieties about confidentiality,” according to Prewitt.²⁹⁴ The Census Bureau has strict confidentiality rules, and it uses “data swapping” to modify publicly available block-level data to protect the confidentiality of individuals who otherwise would match a profile in such a small geographic area.²⁹⁵ However, such “disclosure avoidance” methods are not necessarily understood by the public.²⁹⁶

The experience of other nations also may have an affect on American practices.²⁹⁷ Other nations also confront the problems of the difficulties of counting a dynamic and diverse population, underenumeration, and the accuracy of the census results.²⁹⁸ Statisticians see the results of any set of counting procedures as estimates, which can be evaluated in terms of their relative accuracy, rather than as simple headcounts that must stand despite their known errors.²⁹⁹ Other nations, notably Australia, Canada, and the United Kingdom, which have different political environments within which to conduct censuses, have been able to incorporate or plan to incorporate statistical corrections into their enumeration results with very little public outcry.³⁰⁰

For example in Canada, Statistics Canada publishes “census population counts” (unadjusted for coverage error) about nine months after census

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. See, e.g., J.J. Brown et al., *A Methodological Strategy for a One-Number Census in the UK*, 162 STAT. IN SOC'Y 247, 247 (1999) (placing underenumeration as the top improvement sought for the 2001 census).

298. *Id.*

299. *Id.* at 262.

300. See generally C.Y. Choi et al., *Adjusting the 1986 Australian Census Count for Underenumeration*, 14 SURV. METHODOLOGY 173 (1988); J. Gambino & P. Dick, *Small Area Estimation Practice at Statistics Canada*, 4 STATS. IN TRANSITION 597 (2000); Brown et al., *supra* note 298; John Paice & David Steel, *Census Adjustment in Australia*, in 13 CHANCE 41 (Fall 2000); Ray L. Chambers & Marie Cruddas, *A One-Number Census for the United Kingdom*, 13 CHANCE 38 (Fall 2000).

day.³⁰¹ In September 2003, it will release separate "final population estimates" for 2001 that incorporate the census figures and adjustments for coverage error.³⁰² Until these figures are released, the official population estimates are derived from the 1996 census adjusted for net coverage error.³⁰³ In the 1990s, the Canadian Parliament amended the Federal-Provincial Fiscal Arrangements Act, which defines the population figures to be used in equalization payments to the provinces.³⁰⁴ The old language used the census counts in census years and the estimates in nonpopulation years.³⁰⁵ The current language uses the estimates in all years.³⁰⁶

At this writing, the final evaluations of the A.C.E. and adjustment are not in, and the litigation is still in progress.³⁰⁷ Nor is it possible to evaluate what the potential impact of adjusted data would have been on the legislative redistricting process.³⁰⁸ In the months and years ahead, additional data will become available.³⁰⁹ Redistricting of legislative boundaries will be complete by 2002.³¹⁰ Then it will be possible to evaluate the political implications of the demographic changes affecting the country and evaluate whether the controversies surrounding the accuracy and the functions of the census in the United States will abate or will continue to rage in the years ahead.³¹¹

301. Gambino & Dick, *supra* note 300.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Counting and Estimation, *supra* note 216, at 3; U.S. CENSUS MONITORING BOARD, CONGRESSIONAL MEMBERS, SUMMARY REPORT TO CONGRESS 12 (Sept. 1, 2001) *available at* <http://www.cmbp.gov>. (last visited Jan. 31, 2002); U.S. CENSUS MONITORING BOARD, CONGRESSIONAL MEMBERS REPORT TO CONGRESS, at I (Sept. 29, 2001), *available at* <http://www.cmbp.gov>. (last visited Jan. 31, 2002); U.S. CENSUS MONITORING BOARD, PRESIDENTIAL MEMBERS, FINAL REPORT TO CONGRESS § 3 tbl. 4 (Sept. 1, 2001), *available at* <http://www.cmbp.gov>. (last visited Jan. 31, 2002); *Census Bureau Facing Second Decision on Whether to Recommend Use of Adjusted Numbers*, Census 2000 Initiative News Alert Archive, *available at* <http://www.census2000.org> (Oct. 3, 2001) [hereinafter *Second Decision*].

308. *Second Decision*, *supra* note 307.

309. *See, e.g., American Community Survey Plans*, *supra* note 276.

310. WHO COUNTS, *supra* note 1, at 230-31.

311. *Id.* at 231.
