

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BARBARA FRANKLIN, SECRETARY OF
COMMERCE, ET AL., Appellants

v.

MASSACHUSETTS, ET AL.

CASE NO. 91-1502

PLACE: Washington, D.C.

DATE: Tuesday, April 21, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BARBARA FRANKLIN, SECRETARY :

4 OF COMMERCE, ET AL., :

5 Appellants : No. 91-1502

6 v. :

7 MASSACHUSETTS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, April 21, 1992

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:11 a.m.

14 APPEARANCES:

15 JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of

17 the Appellants.

18 DWIGHT GOLANN, ESQ., Assistant Attorney General of

19 Massachusetts, Boston, Massachusetts; on behalf of

20 the Appellees.

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1 PROCEEDINGS

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 this morning in No. 91-1502, Barbara Franklin, Secretary
5 of Commerce v. Massachusetts.

6 Mr. Roberts.

7 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

8 ON BEHALF OF THE APPELLANTS

9 MR. ROBERTS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case is here from the United States
12 District Court for the District of Massachusetts. That
13 court ruled that the Secretary of Commerce could,
14 consistent with the Constitution and the Census Act,
15 include Federal personnel stationed abroad, primarily
16 servicemen and servicewomen, in the State-by-State
17 apportionment count on which the allocation of
18 representatives is based. The court went on, however, to
19 hold that the Secretary's method for doing so with respect
20 to the 1990 census was arbitrary and capricious, in
21 violation of the Administrative Procedure Act.

22 The Secretary relied primarily on home of record
23 data in Defense Department files, as had been done in
24 1970. Home of record is a serviceman's actual home at
25 time of enlistment and it is where the military will

1 return him when he is discharged.

2 Based on --

3 QUESTION: Mr. Roberts, may I interrupt you at
4 this point. I think you have made the point clear, but it
5 doesn't seem to be clear throughout the briefs. I take
6 it, it is correct that when a person enlists, that person
7 has no choice of which State to list his home of record.
8 It has got to be the State in which the person then
9 legally resides?

10 MR. ROBERTS: The instructions say you must list
11 your permanent home or actual home at time of enlistment.

12 QUESTION: So that the suggestion that somebody
13 could simply list a State whose tax laws he found
14 attractive is not true?

15 MR. ROBERTS: That is not true. Taxation is
16 treated with a different concept, legal residence.
17 Someone can have a home State in one State and declare a
18 legal residence for tax purposes elsewhere. But the
19 suggestion that home of record is subject to manipulation
20 for tax purposes is not true. I would refer the Court to
21 the joint appendix, page 151 where that is clarified.

22 Now, based on its finding of a violation, the
23 district court ordered the executive branch defendants not
24 to count the nearly 1 million Federal personnel stationed
25 abroad in the apportionment count at all. It ordered that

1 a new statement be sent to Congress specifying the number
2 of representatives to which each State is entitled, and it
3 ordered the clerk of the House to send to the governors
4 new certificates telling them how many representatives
5 their States were entitled to. If allowed to stand, the
6 decision below will shift a representative from the State
7 of Washington to Massachusetts, only the second time in
8 the 200-year history of the census that any such relief
9 has been ordered. The first time was last fall with the
10 district court's decision in the Montana case which this
11 Court reversed last month.

12 The decision here should meet the same fate:
13 first, because judicial review is unavailable under the
14 APA; second, even if review is available, the Secretary's
15 decision to allocate personnel abroad to their home of
16 record is not arbitrary and capricious; and third, even if
17 there is a violation of the APA, the appropriate remedy is
18 a remand to the Secretary, not judicial reapportionment of
19 the House of Representatives.

20 QUESTION: Mr. Roberts, as I understand the
21 respondents in their briefs, they also make a claim that
22 the Constitution itself is violated, and I suppose that
23 would have to be resolved apart from any APA claim.

24 MR. ROBERTS: We believe, Your Honor, that the
25 constitutional claims are also barred by the commitment of

1 this matter to the Secretary's discretion. We recognize
2 that this Court in Webster against Doe indicated that
3 there may be a higher level that needs to be shown. But
4 in Webster, the constitutional claim was a personal right,
5 extrinsic if you will, from the matter that Congress had
6 insulated from judicial review. Here, that is not the
7 case. The constitutional claim and the statutory claim
8 are in large part indistinguishable.

9 QUESTION: Well, what does the Constitution mean
10 in requiring an enumeration and in referring to the whole
11 number of persons? What do you suppose that meaning is?

12 MR. ROBERTS: Well, assuming there is review, an
13 enumeration is exactly what took place in this case. The
14 Secretary didn't estimate the number of servicepeople
15 abroad. It didn't take a sample and then extrapolate from
16 that. The Secretary counted them, 918,810, not 809 and
17 not 811.

18 Now, the Secretary counted them from forms, but
19 that is how the census is conducted by and large. When
20 you get a census form in the mail, it asks you to fill it
21 out, or the head of the household, and state how many
22 people are living at that home. You list yourself, a
23 spouse, three children, the form is returned. The Census
24 Bureau counts from that form, but that is still an actual
25 enumeration. And indeed, historically, it was considered

1 sufficient, for example in the case of a prison, to ask
2 the warden how many prisoners were there, or
3 significantly, in the case of a military base, to rely on
4 data provided by the commander. And even if, in the
5 normal case, if the Census Bureau has trouble reaching
6 someone, they will go and ask the neighbors, who lives
7 there, how many people? It is still an actual
8 enumeration. It is not an estimate.

9 The other constitutional provision to which you
10 referred, the original clause, the respective numbers of
11 the States, the Fourteenth Amendment in each State, I
12 think both sides agree that what the framers are referring
13 to are inhabitants. And the question is, is it rational
14 to conclude, using the words of the first Census Act and
15 the Census Clause, that servicemen abroad can still be
16 considered as belonging to the respective numbers of their
17 home States.

18 I think the answer to that is clear. Madison
19 knew what an inhabitant was. He was involved in drafting
20 the Census Act, and he said it includes someone who is
21 absent for a considerable period on public business,
22 certainly an apt description of our troops abroad. It was
23 tested in the case of Minister Forsythe in 1824, our
24 minister to Spain who was elected from Georgia to the
25 House. His election was challenged. It said, you are not

1 an inhabitant of Georgia. You have been in Spain, and the
2 House said, his absence abroad on public business did not
3 deprive him of the status of an inhabitant, and the same
4 should be true of a private serving overseas in Korea.

5 The review of both the constitutional claims and
6 the administrative law claims is barred by the Census Act.
7 The APA says that if a matter is committed to agency
8 discretion by law, there is no review.

9 QUESTION: Well, what if the Secretary were to
10 do some wholly arbitrary act like counting people who live
11 in Massachusetts as part of the population of the State of
12 Washington?

13 MR. ROBERTS: I think in any case in which the
14 argument is that judicial review is precluded, you can
15 come up with hypotheticals that seem to call for
16 corrective action.

17 QUESTION: Yes --

18 MR. ROBERTS: But that is not enough to
19 establish that the exception to review doesn't apply or
20 otherwise it would never apply. For example, there is an
21 exception to judicial review this Court recognized in
22 Webster. Now if the director of the CIA decided that
23 every left-handed person was a threat to national security
24 and dismissed them, that would be absurd, but it still
25 would not be subject to review.

1 One point that is important to consider in
2 discussing this is how likely is it that the absurd or
3 extreme case will go uncorrected. We think that this is a
4 situation in which that is extremely unlikely. Congress
5 pays attention to the conduct of the census very
6 carefully, too carefully I think according to my brother,
7 and they certainly pay attention to the reapportionment of
8 the House of Representatives. This is a situation where
9 the political branches can be expected to correct for
10 extreme cases of the sort you hypothesized.

11 QUESTION: But under your theory of the case, it
12 is not necessary to do so, but what do you think the
13 agency action would be here?

14 MR. ROBERTS: Well, I am not sure. The only
15 conceivable final agency action is the Secretary's report
16 to the President of the tabulation of population by
17 States, which certainly doesn't provide a suitable case
18 for judicial review. All that is required is a document
19 stating Massachusetts has 15 million people --

20 QUESTION: And in your view, is the President
21 authorized to correct that?

22 MR. ROBERTS: Absolutely; he has the obligation
23 to take care that the law be faithfully executed. He
24 could decide, he could be, say I have always believed that
25 the usual residence rule should never be departed from and

1 I disagree. Send me some statistics without apportioning
2 servicemen abroad. He has that obligation.

3 QUESTION: So then I guess the next possibility
4 is the President's transmittal of the data to Congress as
5 the agency act?

6 MR. ROBERTS: Yes, except that the President is
7 not an agency subject to suit under the APA, and I don't
8 understand Massachusetts to challenge that submission
9 here.

10 The next step would be Congress, and that is how
11 the process has traditionally operated. The President
12 submits his statement. Congress has a period in which it
13 can consider that statement and take legislative action if
14 it wishes. It did not decide to take any action in this
15 case. The action they took years ago in the Census Act
16 was to specify that the conduct of the census, the
17 Secretary will conduct the census in such form and content
18 as he may determine, pursuant to the constitutional grant
19 to Congress to conduct the census in such manner as they
20 shall by law direct.

21 QUESTION: Mr. Roberts, I know the President is
22 not covered by the Administrative Procedure Act, but do
23 you really think that that means that there is no review
24 whatever of Presidential actions? I mean, can the
25 President do anything at all and you say it is not

1 reviewable because the APA doesn't cover him?

2 MR. ROBERTS: Well, he --

3 QUESTION: I agree, he is not reviewable under
4 the APA, but might he not be reviewable in some other
5 fashion?

6 MR. ROBERTS: Theoretically, in a purely
7 ministerial task, by mandamus, but this is not a purely
8 ministerial task, and there is no suggestion that there is
9 any other basis for suit here, other than the APA.

10 So his part in this process, which is key, the
11 Secretary's statement doesn't entitle a State to anything.
12 It is the President's statement by law which entitles a
13 State to that number of representatives unless changed by
14 Congress.

15 QUESTION: When the APA refers to agency action,
16 don't you think it means action binding upon private
17 individuals somehow? I always thought that is what it
18 meant. Can it be the filing of a report with somebody
19 else, even the filing of a report by the President with
20 Congress, does that constitute agency action?

21 MR. ROBERTS: Not in the sense, for example, as
22 the Court discussed in the Luhan case, it does have to
23 have an effect. The Secretary's report of population
24 doesn't affect legal rights of any individuals or of the
25 States. It is the President's statement that gives the

1 States an entitlement to a certain number of
2 representatives, and yet that is insulated from review
3 under the APA.

4 Now the district --

5 QUESTION: I am a little puzzled by it; how far
6 can the President depart from what the Secretary's report
7 would show? Could he just say, I think I will give
8 Massachusetts three extra seats without any factual basis
9 or anything, just I think that is a good State and they
10 ought to have three more seats.

11 MR. ROBERTS: The law directs him to apply, of
12 course, a particular mathematical formula to the
13 population figures he receives, but I don't think there is
14 a limit on his exercise of authority to direct the
15 Secretary of Commerce to conduct the census in a
16 particular manner. It would be unlawful, maybe not
17 subject to judicial review, but unlawful just to say,
18 these are the figures, they are right, but I am going to
19 submit a different statement. But he can certainly direct
20 the Secretary in the conduct of the census.

21 QUESTION: But would he have to remand it in
22 effect to the Secretary or could he say, well, I have had
23 somebody over at the FBI making some checks for me and
24 they tell me there are really more people in
25 Massachusetts, so I am going to give them extra seats.

1 MR. ROBERTS: I think under the law he is
2 supposed to base his calculation on the figures submitted
3 by the Secretary.

4 QUESTION: But what if he didn't, what if he did
5 what I said?

6 MR. ROBERTS: Well, again, the manner of review
7 is established in the statute. His statement goes to
8 Congress where it stays until Congress by subsequent
9 statute changes the entitlement in his statement, that is
10 spelled out in the law, and that indicates that that is
11 the mechanism for review, not judicial review of any of
12 the thousands upon thousands of judgments that went into
13 the underlying census figures.

14 Now the district --

15 QUESTION: If by law the President's action were
16 final, would that be reviewable?

17 MR. ROBERTS: No, it would not because he is
18 not an agency subject to review under the APA.

19 QUESTION: But the President can't seize the
20 steel mills or withhold tapes either, but his actions are
21 subject to review in those instances.

22 MR. ROBERTS: But not pursuant to the
23 Administrative Procedures Act, pursuant to another --

24 QUESTION: Well, but your position, he is not
25 subject to review at all.

1 MR. ROBERTS: I think that is right, because the
2 statutory scheme which indicates his statement is to go
3 before Congress --

4 QUESTION: But my hypothetical was that his
5 action was conclusive.

6 MR. ROBERTS: It is conclusive unless reviewed
7 by Congress, and my submission is that by providing for a
8 special mechanism for congressional review, and the
9 historical fact that that is how Congress has reviewed it,
10 indicates an intent to preclude review of that interim
11 step in the transmission process.

12 Now, the district court in this case relied
13 heavily on the usual residence concept for its law to
14 apply, the concept that people should be counted for
15 purposes of the census where they live and sleep most of
16 the time as of census day. Historically, there have been
17 exceptions to that principle time and time again.
18 Boarding school students are not counted where they live
19 and sleep most of the time, they are counted at their
20 family home. The same was true for college students from
21 1900 to 1940 --

22 QUESTION: Before you get -- just one more thing
23 about this series from the census to the President to the
24 Congress. You say if Congress doesn't like what the
25 President gives them, the Congress doesn't have to accept

1 it. Is there any way that Congress can not accept it
2 except by passing a new law?

3 MR. ROBERTS: No, the requirement is for them to
4 pass a new law.

5 QUESTION: Both houses, plus the concurrence of
6 the President?

7 MR. ROBERTS: Right. Now that is a way, of
8 course, that Congress can change anything, by passing a
9 law.

10 QUESTION: Right.

11 MR. ROBERTS: However, they have specifically
12 provided in the census and in the Apportionment Act for a
13 mechanism, and it is a historical mechanism, for this to
14 lie in Congress and to be addressed in a particular period
15 so that they can take action.

16 QUESTION: But no single house of Congress can
17 just look at this stuff from the President and say this is
18 junk, and we are not going to proceed on this basis.

19 MR. ROBERTS: No, it has to be, as the statute
20 says, a subsequent statute that has to be enacted. I was
21 indicating the numerous exceptions to the usual residence
22 rule. Six censuses, from 1870 to 1920, seafarers, not
23 matter how long they were absent, counted at the land
24 home. The military in 1900 counted at their family home
25 even if stationed as the instruction said, at home or

1 abroad. Members of Congress are counted at their home
2 district, even though they live and sleep most of the time
3 in the District of Columbia. From 1910 to 1940, the
4 instructions said, if there is an American citizen in your
5 family abroad, he should be counted at your family home,
6 and it said, it does not matter how long the absence may
7 continue.

8 In other words, the usual residence concept
9 cannot provide law to apply in considering this case,
10 because this is a departure and modification of the usual
11 residence rule, as has been historically done in a variety
12 of circumstances including, of course, most prominently in
13 1970 when again, Federal personnel abroad were apportioned
14 among the States based on home of record.

15 Now turning to the merits, the district court
16 concluded that the Secretary's decision to apportion the
17 personnel overseas was not arbitrary and capricious in
18 itself, and it was not. The record indicates the reasons
19 for the Secretary's action. These personnel are away from
20 home temporarily and involuntarily in the service of their
21 country. They still consider themselves usual residents
22 of the United States, although they are overseas. The
23 Secretary noted the bipartisan congressional support for
24 apportioning the overseas population, and in turn, that
25 support noted these personnel vote in the United States,

1 they pay taxes in the United States.

2 Now, the Secretary did note in his decision
3 memorandum that the Defense Department was going to
4 undertake a survey, an actual survey of its personnel
5 overseas, but contrary to the view of Massachusetts, that
6 was not a condition of his decision.

7 If the Court would look at the joint appendix on
8 page 122, it spells out exactly what the condition is.
9 This is the decision memorandum approved by the Secretary.
10 It says: I recommend that you count them, provided that
11 there is timely receipt of acceptable data from the
12 Defense Department.

13 Now, when the Defense Department cancelled its
14 survey, that question became pertinent. Is there
15 acceptable data that can be provided? And the Secretary
16 determined that home of record, supplemented and improved,
17 did provide acceptable data.

18 QUESTION: Mr. Roberts, is your argument
19 undercut by the colloquy that Massachusetts sets out on
20 pages 12 and 13 of its brief, which as I read it indicates
21 that counsel for the Government, counsel for your side are
22 saying that the only so-called justification to remove the
23 decision to count based on home of record from the realm
24 of the arbitrary and capricious is the mere fact that Mr.
25 Mossbacher had made a commitment to Congress to count

1 them. Which seems to say that regardless of the -- we are
2 not claiming that it is the substantial accuracy of the
3 home of record data that rescue us; it is simply the
4 principle that we ought to keep our word.

5 MR. ROBERTS: I don't think that undercuts our
6 position. First of course, representations or statements
7 of counsel are not part of the administrative record, and
8 what needs to be reviewed is the administrative record.

9 But secondly, all that the counsel was saying is
10 that the Secretary had made a commitment. He had made a
11 decision, the commitment referred to is simply the
12 decision in the administrative record. Yes, we are going
13 to apportion the overseas personnel if, if there is
14 acceptable data. So the commitment that the counsel in
15 the trial was referring to is no different than that in
16 the decision memorandum in the record.

17 Now, is home of record acceptable data? The
18 Secretary, who has the discretion to conduct the census in
19 the form and content he may determine, determined that it
20 was. The technical staff of the Census Bureau said it
21 comes closest to usual residence. It is the last place
22 that a serviceman or woman chooses to reside. The
23 Congressional Research Service, whose study was in the
24 record, indicated that it is closest to a serviceman's own
25 concept of his usual residence, an important point, since

1 much of the census is self-selecting.

2 Now, in the course of reaching that decision,
3 concerns were raised about the data. This is not a
4 sanitized, pre-cooked administrative record. It is not
5 an administrative record at all in the usual sense of a
6 discrete proceeding leading to a decision. It is part of
7 the Census Bureau's business over the past years, but
8 every one of the concerns that Massachusetts raises, every
9 one of the concerns cited by the district court was
10 addressed and answered in the record.

11 Let's take them: First, the Department of
12 Defense testified in 1989 that none of its data met a
13 reasonable test of validity for apportionment purposes.
14 Answer: joint appendix, page 161, the data will be
15 supplemented and improved by methodologies devised by the
16 technical experts who designed the overseas enumeration.

17 Second, there was a gap in home of record. Up
18 to 10 percent of servicemen did not have a home of record.
19 Answer: joint appendix, page 158 and 162, the Defense
20 Manpower Data Center would use its automated records to
21 complete, fill in the gap, to the extent that it will be
22 negligible. It went from 7 percent to 0.2 percent.

23 The Census Bureau itself said that the data was
24 of unknown reliability because it could be used to choose
25 a low or no income tax State. Answer: joint appendix,

1 page 151, it is legal residence that determines where you
2 are taxed, not home of record.

3 The Pentagon opined that last duty station would
4 be closest to the concept of home of record.

5 Answer: joint appendix, page 162, the Census Bureau
6 disagreed. It noted, for example, if your last duty
7 station was the Pentagon, you would show up as living in
8 D.C., and you may have lived in Virginia or Maryland.

9 And finally, the point that we hear most
10 frequently, the Census Bureau itself said that it would
11 be, quote, arbitrary, end quote, to rely on the Defense
12 Department data to apportion Federal personnel overseas.

13 Answer: joint appendix, page 210, that same study relying
14 on legal opinions in 1949 and 1969 noted that the decision
15 whether to include Federal personnel overseas was
16 discretionary. So they were obviously not using arbitrary
17 in an APA sense, but simply in the general sense that any
18 categorical determination is arbitrary.

19 Now the question is not -- Massachusetts may not
20 agree with these answers, but the question is not whether
21 they were right or wrong. The question under this Court's
22 precedence, assuming there is judicial review, is whether
23 the relevant concerns were considered and if the Secretary
24 committed a clear error of judgment.

25 The record establishes that the concerns were

1 addressed, were considered, and it seems clear that there
2 was not a clear error of judgment in allocating the
3 personnel overseas to their home of record.

4 If there are no further questions, I would like
5 to reserve the remainder of my time.

6 QUESTION: You have a lot of time. I have one
7 more question. When you say that the President's action
8 is -- is it that the President's actions are not
9 reviewable or that you simply cannot bring a suit directly
10 against the President? Suppose I am in jail by direct
11 order of the President. You don't mean that I can't get
12 habeas corpus simply because the action of the President
13 is not reviewable, do you?

14 MR. ROBERTS: No, you can file a suit for habeas
15 corpus against the prison warden.

16 QUESTION: Against the prison warden. The
17 action would have to be against the warden, but the
18 President's action would be reviewable.

19 MR. ROBERTS: Would be reviewable to the extent
20 it is the warden's action, yes. But the only point I am
21 making is that there is no action against the President
22 under the Administrative Procedure Act, that is the
23 District of Columbia court of appeals, the Federal court
24 of appeals held recently, and as I said, I don't
25 understand Massachusetts to challenge that. And since

1 there is no review of the President's action under the
2 APA, there is no review of his action in this case, and
3 since his action is indispensable to harm to
4 Massachusetts, the case is not justiciable.

5 Thank you.

6 QUESTION: Very well, Mr. Roberts.

7 Mr. Golann, we will hear from you.

8 ORAL ARGUMENT OF DWIGHT GOLANN

9 ON BEHALF OF THE APPELLEES

10 MR. GOLANN: Mr. Chief Justice, and may it
11 please the Court:

12 The Secretary has argued that he has virtually
13 unbridled discretion to conduct the decennial census
14 without review by any court. We disagree. The
15 apportionment census is carried out pursuant to specific
16 constitutional and statutory mandates.

17 The Constitution and the statutes which mirror
18 its language require three things of the apportionment
19 census. First, it requires an actual enumeration. That
20 is, the Secretary must actually count the population on a
21 State-by-State basis.

22 Second, it must be a decennial census. The
23 Constitution requires that the census be repeated every 10
24 years, so the Congress has a current, up-to-date statement
25 of the distribution of the population among the States on

1 which to base apportionment decisions, and finally, as I
2 think the parties agree, the apportionment census must be
3 based solely upon the number of inhabitants living in each
4 State. The possibility of considering citizenship, voting
5 population and other criteria was explicitly considered
6 but rejected.

7 All of these criteria -- actual enumeration,
8 decenniality, inhabitancy -- must be met for an
9 apportionment census to comply with the Constitution.

10 QUESTION: Well, do you think the word actual in
11 the Constitution changes the meaning of enumeration and
12 gives that noun a meaning it wouldn't otherwise have if
13 the word actual weren't in front of it?

14 MR. GOLANN: We believe so, Your Honor. We
15 believe that enumeration has been historically understood
16 and applied consistently except for overseas employees in
17 1970 and 1990 to require, as the Seventh Circuit recently
18 observed, a head count of the population, not a
19 statistical sampling or estimation. I would note --

20 QUESTION: Well, but if you take the language
21 leading up to it in Article 1, section 2, and it talks
22 about representatives and direct taxes shall be
23 apportioned among the several States which may be included
24 within this Union according to the respective numbers
25 which shall be determined -- determined at -- and this is

1 the actual enumeration -- it seems to me you can use the
2 word -- read the word actual as simply indicating when it
3 actually comes to enumerating rather than modifying the
4 word enumeration the way you say it.

5 MR. GOLANN: I believe, Your Honor, that was
6 required, that there be an enumeration within 3 years and
7 then each term of 10 years afterwards, and that it would
8 be an actual enumeration seems to have been understood by
9 the contemporaneous interpretation of the framers, who in
10 fact mandated that there be a head count, and dis --

11 QUESTION: How did they mandate that there be a
12 head count?

13 MR. GOLANN: Through the first Census Act of
14 1790 passed by the First Congress in March 1790, which was
15 implemented by a head count, actual census-taking of the
16 entire population.

17 QUESTION: And you say because that was the
18 First Congress they probably reflected what the
19 Constitution intended.

20 MR. GOLANN: We believe so, Your Honor, and we
21 note that that was continued decade after decade. It has
22 been a head count, as the courts of appeal have noted,
23 ever since then except 1870 as to overseas employees and
24 1890 as to overseas employees.

25 QUESTION: In what respect is this not a head

1 count? This isn't an estimate. They are using actual --

2 MR. GOLANN: Well, we believe, Your Honor, that
3 it is an estimate as to where people are residing, which
4 is the point of an apportionment census.

5 QUESTION: It's where they said -- they said
6 they resided on the basis of the last information we had.

7 MR. GOLANN: Your Honor, we believe that the
8 requirement of a decennial census requires an update every
9 10 years. We believe, and I might answer Justice Souter's
10 question next, that the Defense Department, the
11 stipulations, and the court's opinion, all say that
12 that -- this home of record data might be a place where
13 the employee had not resided for many years and in some
14 cases had not resided at all, so it was not an accurate
15 statement.

16 The entire rest of the United States population
17 in 1990 was asked, who resides at this address? Who lives
18 here most of the time? That question was never asked of
19 overseas Federal employees. They were not allowed the
20 answer that question. The parties have stipulated that if
21 they did answer it, they would have answered that their
22 usual residence is their overseas post, circulation --

23 QUESTION: Well, on that theory, then, I cannot
24 be counted as a resident of New Hampshire if they happen
25 to take the census during the term of this Court.

1 MR. GOLANN: Well, Your Honor, from the first
2 days -- in fact --

3 QUESTION: Do you take it that far? I mean,
4 unless somebody is sort of literally there and they can
5 see --

6 MR. GOLANN: No, Your Honor.

7 QUESTION: Okay. How far do you go from
8 literalism, then?

9 MR. GOLANN: Someone should be counted at their
10 usual place of abode, was what the First Congress said,
11 and if they are temporarily absent they should be counted
12 at the place they usually reside. Most of the population
13 and the particular overseas employees we have stipulated
14 resided at their overseas post.

15 There is a subset of the population that splits
16 their time between two residences. Seafarers, for
17 example, have a home ashore and a berth aboard ship.
18 College students are another example. They're saying, as
19 the First Congress said, you must be apportioned at your
20 usual residence, doesn't answer the question of which of
21 two places that you live is your usual residence. That
22 requires line-drawing. I would emphasize there was no
23 line-drawing in this case.

24 QUESTION: Well, what exactly was it -- what is
25 the actual language used by the First Congress on which

1 you're relying?

2 MR. GOLANN: Your Honor, I believe that is set
3 forth in the joint appendix. Let me find the quotation.

4 QUESTION: Is that the grey -- the grey volume.

5 MR. GOLANN: No, Your Honor, in the joint
6 appendix --

7 QUESTION: The brown volume.

8 MR. GOLANN: I believe there is a direct
9 quotation. Actually, Your Honor, it is also quoted in the
10 lower court's opinion in the jurisdictional statement at
11 59(a) -- jurisdictional statement appendix -- that every
12 person whose usual place of abode shall be in any family
13 on aforesaid first Monday in August next shall be returned
14 of such family, and below it says every person
15 occasionally absent, for example on business with the
16 Court, Mr. Justice Souter, at the time of the enumeration
17 shall be returned as belonging to that place in which he
18 usually resides in the United States.

19 So usual residence, the parties have stipulated,
20 has been the guiding principle now for 200 years, and
21 usual residence we have stipulated is the place where a
22 person is living and sleeping most of the time. That was
23 in fact line 1 of the census instructions for 1990, as
24 they appear in the joint appendix.

25 QUESTION: Yes, but that all depends upon what

1 you mean by occasionally absent.

2 QUESTION: Yes.

3 MR. GOLANN: That is true, Your Honor.

4 QUESTION: If occasionally absent includes
5 absence of years, then most of the time means most of the
6 time when he's not absent, and that could mean many years
7 ago, couldn't it?

8 MR. GOLANN: Yes, Your Honor. In the age of
9 sail or horse, journeys were, of course, much longer than
10 they are today. The criteria that has been consistently
11 applied is, if someone is away on a trip and they haven't
12 established a dwelling any place else, then even if
13 they're gone for a long time, they have one dwelling that
14 is at their home.

15 On the other hand, as we have stipulated,
16 overseas employees had a dwelling, a place where they
17 usually resided, and it was their overseas post. That is
18 why, for example, the domestic military are counted where
19 they are.

20 QUESTION: Why is their overseas post their
21 dwelling any more than the Spanish Ambassador's residence
22 was his dwelling? I don't understand why that's the
23 dwelling.

24 MR. GOLANN: First, Your Honor --

25 QUESTION: They're assigned there, just as the

1 Spanish Ambassador is assigned there. They have to be
2 there, and when they're out of the Army they expect to go
3 back to where they reside -- to New Hampshire or wherever.

4 MR. GOLANN: First, Your Honor, because that is
5 where they are living and sleeping most of the time.
6 Secondly because we have stipulated that that is their
7 dwelling.

8 As to ambassadors, there is a special term of
9 art. The actual ambassador residence is deemed to be
10 territory of the United States just as the French
11 Ambassador's residence here is deemed to be territory of
12 France.

13 QUESTION: Oh, so all we have to do is call U.S.
14 bases abroad -- we can deem them to be territory of the
15 United States and you'll be happy.

16 MR. GOLANN: No, Your Honor, because I believe
17 that would violate the guiding principle of usual
18 residence.

19 QUESTION: Well, I mean that's a fiction.
20 Surely it has nothing to do with the meaning of the
21 Constitution.

22 QUESTION: Also, we grant certiorari in cases to
23 review undecided questions of law. We don't regard
24 ourselves as bound by any sort of a stipulation that could
25 affect a question of law.

1 MR. GOLANN: Well, Your Honor, I would suggest
2 that the Court has said, for example, in the Universal
3 Camera case that it may rely on the findings of the
4 district court, and the district court in this case may
5 find --

6 QUESTION: Yes, but you have constantly talked
7 about stipulations. If you're talking about a finding of
8 the district court which we would not upset unless it's
9 clearly erroneous, that may be something different.

10 MR. GOLANN: Excuse me, Mr. Chief Justice, the
11 reason that I referred to it is because it is the facts
12 which the Justice Department and the Massachusetts
13 Attorney General agreed would provide a record for the
14 Court to make a decision, and so we have relied on them.
15 Some of those stipulations differ, for example, from some
16 of the statements in the briefs, and so we would ask the
17 Court to at least review the stipulations which we
18 submitted is the basis for a decision in this case -- we
19 jointly submitted. Let me --

20 QUESTION: May I ask you one other question
21 about the 1790 act? It doesn't just say the place in
22 which he usually resides. It's the place in which he
23 usually resides in the United States.

24 MR. GOLANN: That's correct, Your Honor.

25 QUESTION: Are you saying that language applies

1 even though he doesn't usually reside in the United
2 States?

3 MR. GOLANN: Your Honor, I would suggest that if
4 someone is absent on a journey, as I am in Washington
5 today, and if it were the census date today -- my usual
6 residence is in Massachusetts --

7 QUESTION: Right.

8 MR. GOLANN: But if I am living abroad, I've
9 rented out my home or sold my home and I have --

10 QUESTION: I understand your argument, but I
11 just don't think it is supported by the language, usually
12 resides in the United States.

13 QUESTION: Well, Your Honor, I believe that this
14 was designed for people who are occasionally absent on a
15 journey and that is the way it has been interpreted for
16 200 years.

17 That is the way, for example, the Census Bureau
18 interpreted in 1990 in its official instructions where it
19 had said that you should count people that are usually
20 living in the residence but not people that are
21 temporarily on a journey, on a vacation, in the hospital,
22 on a business trip.

23 That has been the consistent interpretation of
24 this usually -- occasionally absent language. The issue
25 is whether or not they establish a dwelling at the place

1 where they travel on their journey and give up their
2 dwelling where they were living before.

3 MR. GOLANN: Let me note that there is also
4 statutory law to apply in this case for purposes of
5 reviewability. Constitutional language is mirrored in
6 statutes. The Apportionment Act particularly requires
7 that there be a census, it be carried out on a decennial
8 basis, and that quote -- it provide, quote, a statement
9 showing the whole number of persons in each State, end
10 quote, mirroring the language of the 14th Amendment.

11 Now, I should note that the lower court never
12 actually ruled on the constitutional issue or the
13 statutory issue because it found the Secretary's action
14 arbitrary and capricious. The final decree contains no
15 finding on a ruling as to constitutionality.

16 In 1990, the entire resident population of the
17 United States, including the domestic military, I might
18 add, was apportioned based on questionnaires asking them
19 where do you live most of the time? Overseas Federal
20 employees were not apportioned on a basis consistent with
21 the entire rest of the United States population. Instead,
22 they were apportioned to States based on this home of
23 record file data.

24 As noted, the Census Bureau concluded in 1987
25 when formulating official rules for the census that using

1 file data would be, quote, arbitrary, end quote, and the
2 Department of Defense said in 1989 to Congress that
3 neither home of record nor any of its other file data,
4 quote, meets a reasonable test of validity for
5 apportionment purposes.

6 The problems with home of record which were
7 identified by the lower court are also what create the
8 constitutional violation in this case. Home of record is
9 the State listed, for whatever motive, by an employee when
10 he or she first enters the military. The Department of
11 Defense prohibits the employee from ever changing their
12 home of record while they remain in service, regardless of
13 how their family circumstances, personal circumstances may
14 change.

15 The data may be years or decades old, much more
16 than 10 years old. The Department of Defense testified to
17 Congress in August 1, 1989, that the home of record may be
18 a place where the employee lived many years ago, and in
19 some cases a place where the employee never lived at all,
20 and that was the testimony of the Department of Defense.
21 Mr. Roberts is correct as to the rule or the question that
22 was asked, but the answers, as the Department of Defense
23 testified, varied quite a bit, and people were apportioned
24 where they had never lived.

25 When the Secretary decided to change historic

1 practice and apportion --

2 QUESTION: Excuse me, and you say that's not
3 constitutional? That is not constitutional --

4 MR. GOLANN: That's correct, Your Honor.

5 QUESTION: Because I've never lived there.
6 Suppose I'm a college student and my parents moved their
7 residence while I am in college, and right after college I
8 go abroad for several years, and I list my residence as my
9 parents' new residence. Is that unconstitutional? Could
10 I not be allocated to that new residence, although I've
11 never lived there?

12 MR. GOLANN: I understand, Your Honor. The test
13 of inhabitancy is where you live and sleep most of the
14 time. Where that student in your hypothetical had never
15 lived or slept at that place -- might intend to reside
16 there in the future but had not ever resided there and was
17 not residing there on the census date, so he could not be
18 apportioned to that State under the test set forth by the
19 Census Bureau.

20 I might note that when the Secretary did decide
21 for the first -- second time to apportion overseas
22 employees back to States, his sole factual basis for doing
23 so was the Department of Defense promised an actual
24 enumeration, but the Department of Defense cancelled that
25 promise. At that point, the lower court said the

1 Secretary had a legal obligation to at least consider an
2 important alternative.

3 The alternative -- that requirement, rather, the
4 court said, comes from this Court's decision in Motor
5 Vehicle Manufacturers, both the majority and concurring
6 opinions. The primary important alternative that the
7 Court said the Secretary ought to have considered was
8 returning to the historic practice, which was to count
9 overseas employees as Americans, but not apportion them
10 back to States where they were not living.

11 The Secretary did not consider any alternatives.
12 As indicated, he treated the issue as solely one of
13 choosing among three kinds of file data, all of which had
14 been condemned by both the Census Bureau and the
15 Department of Defense within the last year or two. The
16 lower court properly held --

17 QUESTION: Are you saying that the three -- what
18 I would call three alternatives. They're not three
19 alternatives.

20 MR. GOLANN: Well, they are three alternatives,
21 Your Honor, but they miss one very important alternative,
22 which is not to use file data at all.

23 QUESTION: So the duty under the seat belt case
24 is not to consider an alternative but to consider all
25 alternatives.

1 MR. GOLANN: Or at least all the important
2 alternatives, and the obvious other alternative was
3 returning to the historic practice, which was, as I say,
4 to count them as Americans -- in fact, apportion them the
5 same way as the domestic military, where they were living
6 on the date of the census and not where they had lived
7 years or decades before.

8 The lower court concluded that this complete and
9 unexplained failure to consider an important alternative
10 violated the standard of Motor Vehicle Manufacturers and
11 was arbitrary and capricious.

12 I should note that this Court should not be
13 concerned with some of the undesirable results that have
14 been suggested in the Secretary's brief. For example,
15 that every State will file suit in every decennial census
16 if -- or nearly all the States if this decision were
17 upheld.

18 The key to this case is that Washington received
19 the 435th and last seat awarded in the apportionment.
20 Massachusetts would have received the 436th seat. As a
21 result, Massachusetts, but not other States, was able to
22 show causation and standing resulting from this reversal
23 of historic practice. In any particular decade, there
24 might be a handful of States close enough to qualifying
25 for that last seat awarded to be able to make out standing

1 to sue. We would also argue that --

2 QUESTION: Mr. Golann, how about any number of
3 other entities such as counties or school districts which
4 may depend on census data for Federal funding? I mean, I
5 don't think it would have to just be a controversy over
6 the apportionment seats.

7 MR. GOLANN: Mr. Chief Justice, we would
8 emphasize that this case involves only the constitutional
9 apportionment census. It is true that the Secretary
10 conducts many other censuses, for example for Federal
11 funds. He does not apply the apportionment standards to
12 those censuses, nor need he.

13 For example, in 1970, when overseas employees
14 were apportioned back for State apportionment purposes,
15 their numbers were not included in the Federal figures
16 used to allocate aid to municipalities. We see no reason
17 why the Secretary would have to do that for the
18 nonconstitutional, entirely discretionary --

19 QUESTION: Can we reasonably differentiate,
20 though, the kind of census you're talking about from the
21 other kinds of census that these other groups justifiably
22 rely on?

23 MR. GOLANN: I believe so, Your Honor, and the
24 reason is that the Apportionment Act, which contains the
25 three standards I've articulated, only applies to the

1 apportionment census. It does not apply to all these
2 other discretionary censuses. In fact, some of them say
3 they should be conducted without regard to the
4 apportionment census.

5 QUESTION: You're saying that nothing but the
6 apportionment of the House of Representatives depends on
7 the Apportionment Act census?

8 MR. GOLANN: That, and votes in the Electoral
9 College, Your Honor. Those are the two purposes of the
10 apportionment census. In 1950 --

11 QUESTION: It's not used, then, for any other
12 purposes, for allocating any sort of funds at all?

13 MR. GOLANN: The Secretary might have discretion
14 if he wishes to use it. I note that in the population
15 totals for States, published in 1990, there are different
16 numbers. There is a resident population, and then there
17 is a total population which includes overseas employees,
18 and they are different populations for the same State, and
19 the Secretary, at least in 1970, did not include overseas
20 employees in the resident populations used to allocate
21 municipal aid.

22 That was what was at issue, Your Honor, in
23 Borough of Bethel Park v. Stans, and the Third Circuit
24 held he need not, so we don't see any connection between
25 the Constitutional census and all of the other surveys

1 that the Secretary has conducted and as to which he enjoys
2 very wide discretion, perhaps unreviewable discretion.

3 QUESTION: May I ask one other question? You
4 said that only Massachusetts has standing because it's the
5 436th seat and it'll take a seat from Washington, but why
6 couldn't the error, if it be an error, affect five or six
7 States?

8 MR. GOLANN: It is conceivable that there might
9 be some sort of earthquake in the census. It would have
10 to be an illegal earthquake. It would have to be
11 exceedingly widespread in order to affect States that are
12 many, many places away from qualifying for the last seat.
13 Under the very discretionary --

14 QUESTION: Why do you say that? I don't think
15 the figures are that clear. Maybe they were on this
16 particular allocation, but it would seem to me it would be
17 entirely possible for three or four States to be affected
18 by an adjustment of the kind you think might be necessary.

19 MR. GOLANN: The universe might be, I would
20 suggest, perhaps five or six or half-dozen. For example,
21 Montana was the 441st, I believe, but they had to advocate
22 a formula that had never been used in the history of the
23 United States in order to make out a case of standing,
24 find a formula that would produce entitlement to that
25 seat.

1 QUESTION: Well, they had two formulas that
2 would have worked.

3 MR. GOLANN: Well, I don't believe either one
4 had ever been used, and that illustrates the problems when
5 you are very far away from qualifying for the last seat.
6 The legal theory has to be increasingly unusual. We
7 simply don't see any reasonable likelihood that a case
8 could make out a case of standing.

9 QUESTION: Mr. Golann, suppose I disagree with
10 you that somebody residing abroad can't be counted so long
11 as he intends to return to the United States and intends
12 to return to a particular place. Assume that I disagree
13 with that, but assume also that I am concerned that this
14 data is pretty stale, that they said they were going to
15 return to this place 20 years ago.

16 It may be pretty bad data, but it may be better
17 than any other data that we have. I mean, why is it
18 arbitrary to say, it's all we got? It's certainly going
19 to be more accurate than not counting these people at all.
20 It may be wrong two times out of five, but if you don't
21 count them at all, you're going to be wrong more than
22 that.

23 MR. GOLANN: Your Honor, I would have two
24 concerns. One is that the Constitution specifically
25 requires an updating every 10 years. Under the theory

1 that the Secretary applied to overseas employees, he could
2 cancel the entire 1990 census, say we'll use 1980 data,
3 it's better than nothing, we'll adjust it 5 percent, and
4 that will be our apportionment count. That would clearly
5 not be a decennial census, and that is essentially what
6 happened for overseas employees in this case.

7 QUESTION: Well, it's -- you mean there are no
8 estimates made in the census at all? The census-takers
9 goes and they lay their hands on shoulder by shoulder?
10 Don't they ask people, how many people in the house,
11 things of that sort?

12 MR. GOLANN: They do, Your Honor, and they ask
13 very specific questions, and they check the forms against
14 each other, as you will find in the official forms. It's
15 really quite precise. They do not do an overcount or
16 undercount or a statistical adjustment. At least, no
17 court has ever ordered the Secretary to do so. It is a
18 head count. It is done not by touching shoulders but
19 by --

20 QUESTION: How long does the process take?

21 MR. GOLANN: I believe it occurs over a few days
22 in April of 1990. At least, that's what the instructions
23 say in the joint appendix.

24 This data, I might note, was not -- the
25 selection wasn't made until July of 1990, and our concern,

1 for example, if there were no reviewability, is that a
2 future Secretary could sit down, having received the
3 census results, knowing what they show, choosing among
4 three forms of file data that he or she would know would
5 throw a seat to one State or to another State and might
6 succumb to partisan political concerns to move a seat, and
7 under the Government's theory, as I understand it, that
8 would not be reviewable by any court, and that is very
9 troubling.

10 I should note that, Your Honor, one other
11 concern raised in the briefs were that Americans would be
12 thrown out of the census counts, and I'd like to emphasize
13 that these Americans were counted as citizens. They were
14 counted in the same way that the domestic -- or should
15 have been counted, would be counted under the court's
16 order in the same way domestic military were counted --
17 that is, at the base where they are serving, and not
18 apportioned back to where they lived before they joined
19 military service. They would be apportioned in the same
20 way as residents of the District of Columbia, of Guam, and
21 other dependencies.

22 QUESTION: Mr. Golann, would Massachusetts count
23 for purposes of allowing them to vote military personnel
24 with a home of record in Massachusetts?

25 MR. GOLANN: The standards, Your Honor -- they

1 might or might not. The standards under the Absentee
2 Voting Act are inconsistent with the standards the
3 Secretary used in this case. That is, the standards in
4 the Absentee Voting Act are -- there are various
5 standards. One is domicile, and so it is quite possible,
6 and we think undoubted, that some people were apportioned
7 to States different than the States in which they had
8 voted and --

9 QUESTION: But also, I suppose, true that some
10 people with a home of record in Massachusetts would be
11 allowed to vote there --

12 MR. GOLANN: Yes, Your Honor.

13 QUESTION: Even though Massachusetts is here
14 saying you can't count them for apportionment purposes.

15 MR. GOLANN: That, Your Honor, was decided by
16 this Court in Carrington v. Rash. In that case, the State
17 of Texas said you are inflexibly allocated to the State
18 you indicate when you enter military service.

19 Sergeant Carrington was told that because he had
20 indicated a certain residence 17 years before, he couldn't
21 vote in Texas even though his domicile was there. This
22 Court held that allocating inflexibly people to States
23 based on, I think it was home of record in that case, was
24 irrational and violated the equal protection clause. That
25 does not directly control this case, but we find it a

1 useful analogy, because it indicates the problems with
2 this data and the problems with an inflexible application
3 of stale data, in that case 17-year-old data.

4 Your Honor, I would note again that this issue
5 of decenniality, as we call it, is very important. The
6 framers made a conscious decision to have a census recount
7 every 10 years. They saw the example of the English
8 parliament, which had so-called rotten boroughs where
9 there was not a recount, stale data, and the population
10 moved greatly, and they wanted an up-to-date, in effect a
11 snapshot of the American population as of April 1st.

12 Home of record doesn't give that snapshot. As
13 we say, it shows at most where people lived years before,
14 and in some cases where they didn't live at all. It
15 violates the Court requirement of a decennial census.

16 QUESTION: Well, it would be rare that military
17 people have that kind of staleness.

18 MR. GOLANN: Your Honor --

19 QUESTION: Military people ordinarily don't stay
20 overseas forever.

21 MR. GOLANN: No, Your Honor, but they move
22 around, and in this voluntary Army --

23 QUESTION: Well, you think a very high
24 percentage of military people stay out of the United
25 States for 15 years?

1 MR. GOLANN: No, but they move from one --

2 QUESTION: All right. They may move around
3 overseas, but how long do you think they -- on the average
4 they would be overseas out of this country?

5 MR. GOLANN: Your Honor, I don't know, and I'd
6 have to refer to personal experience, which I don't wish
7 to.

8 QUESTION: Well, when they come back they're
9 going to be counted where they live.

10 MR. GOLANN: That's right. If they are --

11 QUESTION: They won't be any longer any problem
12 about them, but when they're overseas for 4 years, what's
13 wrong with the home of record?

14 MR. GOLANN: The problem with home of record
15 is --

16 QUESTION: Certainly it won't be staleness, will
17 it?

18 MR. GOLANN: Well, Your Honor, the record --

19 QUESTION: Well, will it, or not?

20 MR. GOLANN: Yes, it will, Your Honor.

21 QUESTION: What, 4 years stale, is that it?

22 MR. GOLANN: No, because it's a record -- it's
23 not where they lived just before they left the United
24 States.

25 QUESTION: Well, that isn't staleness. That

1 isn't the problem about staleness.

2 MR. GOLANN: Your Honor, I believe --

3 QUESTION: That's just plain inaccuracy.

4 MR. GOLANN: It is where they lived when they
5 first entered the military, and if they entered the
6 military 10 or 15 years before, it's where they lived 10
7 or 15 years before, not the last place they lived in the
8 United States before going overseas, not the place they're
9 going to go back to, and when they return, Your Honor,
10 again the --

11 QUESTION: You think a military person who
12 enters and has a home of record, and he might have
13 established a domicile while he's in the service in some
14 other State --

15 MR. GOLANN: That's correct, Your Honor.

16 QUESTION: And he would still be counted if he
17 went overseas as being in the State of his home of record.

18 MR. GOLANN: Indeed, he would have to be,
19 because he could not change the home of record until he
20 broke military service, left the military for at least one
21 day and then after being out of the military, if he
22 reenlisted he could name again, but otherwise not.

23 QUESTION: So he might have been counted a
24 couple of times in some other State while he was in the
25 military in this country.

1 MR. GOLANN: If he were in this --

2 QUESTION: He might have been counted in a
3 couple of --

4 MR. GOLANN: No.

5 QUESTION: States other than his home of record.

6 MR. GOLANN: Your Honor, if he were in the
7 domestic military --

8 QUESTION: Yes.

9 MR. GOLANN: That's correct. If a person from
10 Massachusetts enlisted in the military is sent to Fort
11 Benning, he will be counted in Georgia as an inhabitant of
12 Georgia. If he's sent to Wiesbaden, Germany under this
13 ruling he's counted to his home of record. If it's
14 Massachusetts, it's Massachusetts. If he decided he
15 wanted to move to Hawaii when he left the service, it
16 would be Hawaii, whatever he listed, and he could not
17 change it.

18 I should -- I will simply state in conclusion
19 that there are really two ways to look at this case. The
20 Secretary argues that this is a mere choice of data, that
21 if the Court accepts this characterization it should find
22 for the Secretary.

23 We believe this case arises with constitutional
24 and statutory claims that involve issues of enumeration,
25 decenniality, and inhabitancy, none of which were

1 satisfied by the use of stale and outdated file data. We
2 also believe, as the lower court found, that the Secretary
3 refused to consider important alternatives, such as
4 returning to historic practice.

5 These troops should have been counted the same
6 way the domestic military were counted. They should have
7 been counted where they were, where they were living, and
8 not in States which they weren't residing. If there are
9 no further questions, Mr. Chief Justice, we submit.

10 QUESTION: What if I think they should have been
11 counted where they intended to reside when they came back
12 to the United States? Then what should the Secretary have
13 done?

14 MR. GOLANN: He should not have used home of
15 record data.

16 QUESTION: I know that.

17 MR. GOLANN: He should have enumerated --

18 QUESTION: I know you believe that. What do you
19 believe he should have done?

20 MR. GOLANN: He should have conducted an actual
21 enumeration and asked the question Your Honor posed, where
22 do you plan to live when you come back?

23 QUESTION: What if there was no time to do that?

24 MR. GOLANN: If there is no time now, in that
25 case they should not be counted -- or not apportioned back

1 to States at all.

2 QUESTION: At all. Why is that preferable?

3 MR. GOLANN: That is preferable because the
4 decennial census is a snapshot, and a snapshot of the
5 population on April 1990, and that didn't happen.

6 QUESTION: Why is that snapshot closer to -- in
7 focus than the snapshot of using stale data but at least
8 some data?

9 MR. GOLANN: Because for one thing it involves
10 the problem -- and this was the reason for some other
11 variations from usual residence of double counting.
12 People would be counted one place in 1990, they'd be
13 counted a different place in 1992, and that would be one
14 problem. The other problem, I believe, Your Honor, would
15 be that as a practical matter it couldn't happen.

16 You will note in the record that when the
17 Secretary did conduct a minor enumeration of 60,000
18 civilian employees, only 20 percent of them ever returned
19 their questionnaires. Now that they have left the
20 military in Your Honor's hypothetical, I suspect the
21 response rate will be so low that it will simply not be an
22 enumeration.

23 QUESTION: So that no data except that gathered
24 on essentially an account made every 10 years will ever
25 suffice on your theory.

1 MR. GOLANN: That is correct, Your Honor. That
2 is, to us, the meaning of the decennial census.

3 QUESTION: Thank you, Mr. Golann. Mr. Roberts,
4 you have 5 minutes remaining.

5 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

6 ON BEHALF OF THE APPELLANTS

7 MR. ROBERTS: Thank you, Mr. Chief Justice. One
8 reason the Court should be hesitant to conclude that
9 judicial review is available is the consequences.

10 My brother says it's not going to be a big
11 problem, it's always just going to be between number 435
12 and number 436. That's not true at all. If your State is
13 number 440 on the list and you look, and you see if the
14 undercount litigation comes out one way, you move up to
15 438, and then if litigation about how foreign personnel
16 should be counted moves you up to 436, and then you need
17 to look very carefully at how many boarding schools you
18 have in your State to see if there are enough of those,
19 that's a departure from the usual residence rule to bring
20 you up to 435.

21 You have to file that lawsuit even though
22 another State the same day is going to file a lawsuit
23 against the Secretary for not counting American citizens
24 employed by private companies abroad, and that'll lower
25 you down again, and all of this litigation is going to be

1 going on while the States are redistricting, while
2 candidates are considering whether to run, while primaries
3 are taking place.

4 The point is that the conduct of the census and
5 the reapportionment is not suited to a case-by-case
6 judicial review of each one of the thousands upon
7 thousands of judgment calls that go into the census.
8 That's particularly true when you consider that it's done
9 in a limited time and on a limited budget.

10 The district court looked at one decision -- how
11 to allocate Federal personnel overseas -- and concluded
12 that an actual survey would have led to more accurate
13 data. That may or may not be true. The record is unclear
14 on that. But even assuming it's true, it would have led
15 to more accurate data only at a great increase in cost.
16 The Secretary determined that the additional accuracy, if
17 any, was not worth the cost. There's no standard --

18 QUESTION: Mr. Roberts, do you think we have to
19 vote this method of enumeration up or down to decide this
20 case?

21 MR. ROBERTS: Absolutely not. I think the Court
22 should conclude that the decision of the Secretary is
23 committed to his discretion by law and therefore not
24 subject to judicial review.

25 QUESTION: What if we don't agree with that?

1 Couldn't we say -- couldn't we decide this case by saying
2 that well, it may be all right, but the Secretary has not
3 done a very good job of telling us why, and then we would
4 just send it back.

5 MR. ROBERTS: Well, if you agree, if that is
6 your view, you should still reverse because this matter
7 was not remanded to the Secretary.

8 QUESTION: Yes, all right. All right. I know
9 the United States position is that it was the wrong
10 remedy --

11 MR. ROBERTS: Correct.

12 QUESTION: And it should have been remanded, but
13 we could remand without deciding whether this home of
14 record approach is correct.

15 MR. ROBERTS: You could remand to the Secretary,
16 yes, of course, but that is not what the district court
17 did, and if you disagree with us --

18 QUESTION: I understand that. I take it you
19 wouldn't be satisfied if we just did that. You'd rather
20 have some other decision than just --

21 MR. ROBERTS: Yes, we wouldn't consider that a
22 resounding victory.

23 (Laughter.)

24 MR. ROBERTS: We believe that the matter is not
25 subject to judicial review. The point I was making on the

1 cost is there's no standard -- there are no standards for
2 a judge to decide, is this additional accuracy worth the
3 cost, particularly since the additional funds that would
4 be devoted would be taken from some other enumeration
5 task, say an effort to increase the count of the homeless
6 or migrant workers. The district court's in no position
7 to decide whether the increase in accuracy of the overseas
8 count is more important than the decrease in the accuracy
9 of the count of migrant workers.

10 Now, Massachusetts has no trouble treating these
11 servicemen and women overseas as its own when it comes to
12 taxing them, and they don't say you have to have a
13 residence here before we can tax you, and it does allow
14 them to vote. They also should be permitted to be counted
15 for purposes of the census.

16 QUESTION: I think Mr. Golann is saying
17 inaccuracy in not counting is okay. If you don't want to
18 spend money, you don't count. So long as you don't put
19 any noses in there that you haven't counted, it's okay.
20 Do you know of any other instances where the Secretary
21 saves money by being a little inaccurate, by counting
22 noses that he shouldn't count?

23 MR. ROBERTS: I would say in every instance of
24 the census. We miss people. We miss people when we count
25 and go house by house.

1 QUESTION: Well, that's fine, but those are
2 noses you haven't counted. That's okay.

3 MR. ROBERTS: When we give you the census form
4 and it says list the people in your house, I mean, just as
5 on the answered home of record, maybe people lie. They
6 say well, I've got four children. Or maybe they list and
7 they've got four children including one who's off at
8 college, even though the rules say that person shouldn't
9 be counted.

10 There is inaccuracy inherent in a census of
11 250 million people. The Secretary does his best -- her
12 best to eliminate the inaccuracy, but is it a better
13 thing -- if there are, let's say an inaccuracy of
14 4 percent on the home of record data, is it better to
15 exclude it so you don't bring in that 4 percent error
16 while you're excluding 96 percent who should be counted?

17 QUESTION: The one thing about the home of
18 record, some of that data is more than 10 years old, and
19 how do you respond to the requirement of a census every 10
20 years, his argument there?

21 MR. ROBERTS: The home of record data is current
22 data. It is the judgment about the -- what approximates
23 the usual residence of that person today. It may have
24 been entered on the records in a prior year, but it is
25 current data.

1 Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

3 Roberts. The case is submitted.

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

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BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., Appellants v.

MASSACHUSETTS, ET AL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)