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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: WISCONSIN, Petitioner v. CITY OF NEW YORK, ET  
AL.; OKLAHOMA, Petitioner v. CITY OF NEW YORK,  
ET AL.; DEPARTMENT OF COMMERCE, ET AL.,  
Petitioners v. CITY OF NEW YORK, ET AL.

CASE NOS: 94-1614, 94-1631, 94-1985

PLACE: Washington, D.C.

DATE: Wednesday, January 10, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X  
3 WISCONSIN, :  
4 Petitioner :  
5 v. : No. 94-1614

6 CITY OF NEW YORK, ET AL.; :  
7 - - - - - X  
8 OKLAHOMA, :  
9 Petitioner :

10 v. : No. 94-1631  
11 CITY OF NEW YORK, ET AL.; :  
12 - - - - - X  
13 DEPARTMENT OF COMMERCE, ET AL., :

14 Petitioners :  
15 v. : No. 94-1985  
16 CITY OF NEW YORK, ET AL. :  
17 - - - - - X

18 Washington, D.C.  
19 Wednesday, January 10, 1996

20 The above-entitled matter came on for oral  
21 argument before the Supreme Court of the United States at  
22 10:01 a.m.

1 APPEARANCES:

2 DREW S. DAYS, III, ESQ., Solicitor General, Department of  
3 Justice, Washington, D.C.; on behalf of the Federal  
4 Petitioners.

5 JAMES E. DOYLE, ESQ., Attorney General of Wisconsin,  
6 Madison, Wisconsin; on behalf of the State  
7 Petitioners.

8 ROBERT S. RIFKIND, ESQ., New York, New York; on behalf of  
9 the Respondents.

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5	JAMES E. DOYLE, ESQ.	
6	On behalf of the State Petitioners	20
7	ROBERT S. RIFKIND, ESQ.	
8	On behalf of the Respondents	29
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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first in No. 94-1614, Wisconsin v. the City of New York,  
5 Oklahoma v. the City of New York, Department of Commerce  
6 v. the City of New York.

7 General Days.

8 ORAL ARGUMENT OF DREW S. DAYS, III

9 ON BEHALF OF THE FEDERAL PETITIONERS

10 GENERAL DAYS: Thank you, Mr. Chief Justice, and  
11 may it please the Court:

12 The true total population of the United States  
13 is unknown and perhaps unknowable. At every 10 years for  
14 the last 200, the United States Government has been making  
15 the best effort possible to count every person it could in  
16 compliance with Article I, section 2, clause 3 of the  
17 Constitution.

18 The 1990 census was no exception. By all  
19 accounts, it was the most well organized and most thorough  
20 census in history, accounting for 98.4 percent of the  
21 population.

22 Since at least 1790, people informed about the  
23 census-taking process --

24 QUESTION: If the true population is unknown,  
25 how can one be sure that the most recent census accounted

1 for 98.4 percent?

2 (Laughter.)

3 GENERAL DAYS: Well, it's an estimation, Mr.  
4 Chief Justice. It's the best we can. I think everybody  
5 has recognized that there's no such thing as a 100 percent  
6 accurate census, and that's very much bound up in this  
7 case.

8 Since at least 1790, people familiar with the  
9 census-taking process have realized that the process does  
10 not locate everyone in the country. In fact, in 1790  
11 George Washington and Thomas Jefferson were convinced that  
12 the population of the new nation would be 4 million, and  
13 they were not persuaded otherwise when the census came in  
14 at 3,890,000.

15 But since at least 1940, the Census Bureau has  
16 recognized that there's something called a differential  
17 undercount, that is, that certain minority groups, certain  
18 racial groups are undercounted, not captured by the census  
19 to the same degree as non-minority groups.

20 In this case the responses -- the respondents  
21 contend that a statistically adjusted alternative to the  
22 actual count should have been adopted by the Secretary of  
23 the Commerce because of its alleged superior ability to  
24 correct for this differential undercount.

25 The Secretary, however, declined to do that,

1 relying upon the actual count because he believed that it  
2 provided a more reliable basis for apportioning  
3 Representatives among the States, which after all is the  
4 primary purpose of the census, and he did not believe it  
5 promised to cure the differential undercount in any event.

6 The district court upheld the Secretary's  
7 decision.

8 On appeal, however, the court of appeals  
9 determined that the Secretary, by failing to adopt the  
10 statistically adjusted alternative, did not make -- and I  
11 quote -- a good faith effort to achieve the objective of  
12 equal representation for equal population and remanded the  
13 case to the district court where the Secretary was going  
14 to be required to show that his decision was essential to  
15 the achievement of a legitimate governmental objective in  
16 order to avoid a declaration of unconstitutionality.

17 We're here seeking reversal of the judgment of  
18 the court of appeals on remand with directions of entry of  
19 judgment for the petitioners because we submit that the  
20 Secretary's decision, following a 200-year tradition, was  
21 within the range of options afforded by the Constitution  
22 to the Secretary and that what the court of appeals did  
23 was failed to show the proper level of deference to the  
24 Secretary's decision that he is entitled to in carrying  
25 out his responsibilities with respect to the census.

1           One of the first things that the court of  
2 appeals failed to do was recognize the broad delegation  
3 that the Constitution gives to Congress and Congress in  
4 turn gives to the Secretary of Commerce in carrying out  
5 the census process. Article I, section 2, clause 3 says  
6 that the Congress shall conduct the census in such a  
7 manner as they shall, by law, direct. And Congress by  
8 statute says that the Secretary may conduct the census in  
9 such form and content as he may determine. These are very  
10 broad delegations to both the Congress and to the  
11 Secretary.

12           In conformity with his powers under statute and  
13 under the Constitution, the Secretary of Commerce made  
14 three decisions.

15           The first was to put distributive accuracy, that  
16 is, the ability to allocate population among the States so  
17 that apportionment of Representatives among the States can  
18 be carried out in a responsible fashion. He was going to  
19 use that as the principal focus of his analysis in  
20 comparing the actual count and the statistically adjusted  
21 count.

22           His second determination was that the  
23 statistical adjustment had to be shown to be superior with  
24 respect to distributive accuracy if he were going to use  
25 that instead of the actual count.

1           And the third was, after great deliberation and  
2 analysis, the Secretary decided that the adjusted count  
3 was not superior to the actual count and, therefore, he  
4 went with the tradition of 200 years and made the actual  
5 count the official census of the United States.

6           QUESTION: General Days, is it clear or does the  
7 Government concede that the use of statistical estimates  
8 is permissible, let alone that it's mandatory?

9           I mean, the --

10          GENERAL DAYS: Yes.

11          QUESTION: -- text of the Constitution, as I  
12 read it, doesn't -- does not say, you know, that there  
13 will be an estimate of the number of citizens. It talks  
14 about actual enumeration. It doesn't even use the word  
15 "census." It says actual enumeration. Do you think that  
16 that could be complied with by Congress saying, well, we  
17 think the population of the country overall has increased  
18 5 percent and, therefore, we think every State -- chances  
19 are every State has increased more or less 5 percent?  
20 Close enough for Government work. Could they do that?

21          (Laughter.)

22          GENERAL DAYS: Well, Justice Scalia, I think the  
23 approach that you were just describing was in fact what  
24 the Framers engaged in when they came up with Article I,  
25 section 2, clause 3. It was an estimate. And the

1 interpretation of actual enumeration --

2 QUESTION: Because they didn't have an actual  
3 enumeration, but what they called for was an actual  
4 enumeration.

5 GENERAL DAYS: That's true, but I think that  
6 what the term actual enumeration really suggests is that  
7 the Framers wanted to leave open to the Congress and later  
8 to the Secretary of Commerce the ability to rely upon  
9 developments with respect to nose-counting or head-  
10 counting.

11 But I think one can say about the term "actual  
12 enumeration" that there has to be a good faith effort by  
13 the Congress and by now the Secretary of Commerce to count  
14 bodies, to find people. And, therefore, a totally  
15 synthetic census I think would be contrary to the  
16 constitutional objective.

17 QUESTION: But going further, General Days, and  
18 using this PES adjustment, at least the district judge,  
19 McLaughlin, was confident that that was an appropriate  
20 way. He said, if I were free to decide on my own, that's  
21 what I would use.

22 And he had a footnote, and I wanted to ask you  
23 particularly about that. He said, in light of recent  
24 improvements in statistical tools, that the use of the  
25 adjustment in the next census is probably inevitable.

1           So, my question is, has the Government -- it's  
2 now 1996. There must be some planning for the next  
3 census.

4           GENERAL DAYS: Yes, there is, Justice Ginsburg.

5           QUESTION: So, what is the Government's current  
6 view on that, the propriety of such an adjustment?

7           GENERAL DAYS: Justice Ginsburg, I don't think  
8 any definitive decision has been made, but I don't think  
9 that there's any plan to conduct a synthetic census, that  
10 is, not going out, as has been the case for 200 years.

11          QUESTION: That wasn't my question. My question  
12 was after you do that.

13          GENERAL DAYS: After you do that. Well, I think  
14 that the plan is to use some sampling, but I don't think  
15 that there is any plan to use a PES approach at this  
16 point. I don't think there have been any final  
17 determinations.

18          QUESTION: But there was no sampling in 1990.  
19 There was no sampling that was used. It was the  
20 enumeration that was used and then any adjustment was  
21 considered not sufficiently reliable.

22          GENERAL DAYS: That's correct.

23                 There is ongoing experimentation and study of  
24 various statistical forms of adjustment. In fact,  
25 Secretary Mosbacher encouraged the Census Bureau, after he

1 decided in July of 1991, to continue to experiment and do  
2 research on the whole idea of statistically adjusted  
3 censuses. But as I was saying, I don't think there's any  
4 determination at this point to do a PES in the way that  
5 was suggested in this lawsuit and is the subject of the  
6 debate between the respondents and us.

7 QUESTION: Do you know what was the source of  
8 the trial judge's confidence that the use of an adjustment  
9 after the enumeration would be inevitable?

10 GENERAL DAYS: Well, I'm not certain, Justice  
11 Ginsburg, but I think that after he heard 13 days of  
12 testimony from experts of the highest caliber --

13 QUESTION: He was punchy.

14 (Laughter.)

15 GENERAL DAYS: He may have been punchy, but I  
16 think he also got the sense that the statistical science  
17 was moving forward and there would probably be the ability  
18 of the Census Bureau to rely more heavily than in the past  
19 on this.

20 After all, we have seen a progression in 1980  
21 that was an effort by the Census Bureau to look at what  
22 was called a post-enumeration program, not a PES but a  
23 PEP, and it was decided that that was not sufficiently  
24 robust or reliable to use.

25 In 1990 we've moved another step, and I think he

1 was simply suggesting that science and time move on  
2 without any definitive understanding of exactly what might  
3 happen.

4 QUESTION: You know that's another lawsuit,  
5 though. Right? I mean, this one will decide whether you  
6 must use statistical estimates and the next one will  
7 decide whether you may use it. I assume somebody will  
8 have an interest in saying that you can't do it next time  
9 around, if you do it.

10 GENERAL DAYS: Well, that may well be but,  
11 Justice Scalia, if we are successful to the extent that we  
12 would like to be in this suit, we think there would be a  
13 cutting back on challenges to determinations made by the  
14 Secretary of Commerce in this regard.

15 If appropriate deference is shown to the  
16 Secretary in making these decisions, which are myriad, in  
17 coming to a conclusion as to what should be done with  
18 respect to the census, what types of adjustments should be  
19 made, then I don't think that we have to experience what  
20 was the case after the 1980 census in which there were 50  
21 lawsuits that -- over 50 lawsuits that weren't concluded  
22 until 1987.

23 Our principal point is that there are some types  
24 of challenges that deserve to be in court when there's an  
25 indication of intentional racial discrimination, when the

1 Secretary of Commerce wants to hold a decennial census  
2 every 15 years rather than every 10 years, or where it's  
3 clear that the Secretary is not trying to count anybody.  
4 Those may well be appropriate matters for courts to  
5 consider.

6 But what the respondents have really invited the  
7 courts to do in this case -- and certainly the court of  
8 appeals seems to have accepted the invitation -- was for  
9 the courts to take sides in a statistical dispute among  
10 statisticians and demographers about the propriety of a  
11 statistical adjustment. We do not think that that's the  
12 type of dispute that properly belongs in Federal court.

13 QUESTION: What --

14 QUESTION: Would you go --

15 QUESTION: What do you say is the applicable  
16 standard that we should employ in determining whether the  
17 Secretary's decision is consistent with the constitutional  
18 goal of equal representation?

19 GENERAL DAYS: Justice O'Connor, certainly  
20 that's the way that we would describe the standard. We  
21 think that applying it in this particular case, looking at  
22 the three decisions that I just mentioned, insofar as the  
23 Secretary is relying upon distributive accuracy as the  
24 principal objective, it seems to us that that's consistent  
25 with the constitutional language and the goal of equal

1 representation, that that's what the Constitution has in  
2 mind: how does the Congress and the Secretary of Commerce  
3 go about figuring out how Representatives should be  
4 allocated among the States, apportioned among the States.  
5 That's perfectly consistent with the constitutional  
6 language.

7 And when we talk about the need for the  
8 statistical adjustment to be superior to the actual count,  
9 we think that that is consonant with but not dictated by  
10 the text and history of the Constitution. After all, what  
11 the Secretary of Commerce is doing or was doing in 1990  
12 was relying upon experience that the Census Bureau had  
13 gained ever since marshals went around in 1790 from door  
14 to door asking people who lived in their households.  
15 That's what the Secretary was doing. It may not be that  
16 the Secretary has to do precisely what was done in 1790 or  
17 1980, but there has to be some approximation and that's  
18 exactly what was going on here.

19 QUESTION: You're saying in response to Justice  
20 O'Connor's question that the Secretary gave an accurate  
21 interpretation of the Constitution.

22 I took it the thrust of her question was what  
23 standard should the Court use in assessing the adequacy of  
24 his determination.

25 GENERAL DAYS: Well, I --

1 QUESTION: I assume your answer would be that  
2 there would be rational basis --

3 GENERAL DAYS: That's right. Reasonableness,  
4 and although the district court here used arbitrary and  
5 capricious, we think that that's about as far as the Court  
6 should go, but we would argue for a more deferential  
7 standard, one that apparently eluded the court of appeals  
8 in this case.

9 QUESTION: Would you take the position that it  
10 would satisfy the standard, at least in the absence of the  
11 kind of extraordinary circumstances like evidence of  
12 intentional undercounting, discrimination, and so on --  
13 would you take the position that it would satisfy the  
14 standard for the Secretary to take the position as a  
15 matter of principle that because all of these adjustment  
16 techniques ultimately involve kinds of value choices and  
17 are therefore politically manipulable, that it would  
18 simply be safer to go with the kind of garden variety  
19 actual enumeration, to the exclusion of adjustments as a  
20 matter of principle, to avoid the risk of political  
21 manipulation?

22 Would you go so far as to say --

23 GENERAL DAYS: Yes, yes. I think the --

24 QUESTION: -- if he bases his decision on that  
25 principled reasoning, that satisfy rational basis

1 regardless of what arguments might be made that this  
2 technique would be helpful and that technique might not  
3 be?

4 GENERAL DAYS: Yes, I think the Secretary could  
5 do that. That's consistent with the constitutional  
6 tradition, the history. It's rational.

7 Of course, the Secretary could balance off those  
8 considerations, as he did here and went through a list of  
9 eight considerations, and decided, after looking at all of  
10 those, that adjusting was not the right thing to do.

11 QUESTION: I think he may come regret being so  
12 open to the various options for estimation --

13 GENERAL DAYS: Well, Justice --

14 QUESTION: -- which he hasn't been in the past.

15 GENERAL DAYS: Well, Justice Scalia, I think  
16 that a new Secretary of Commerce came in and found himself  
17 faced with a lawsuit and felt that he would make a good  
18 faith effort to try to sort through this and hear what the  
19 experts had to say and evaluate it. And after going  
20 through an administrative process that produced 18,000  
21 pages of administrative record and had 650 comments from  
22 outsiders and spent a great deal of time looking at this,  
23 he came to the conclusion that he did.

24 One of the most troubling things for us about  
25 the court of appeals decision is that it seems to want to

1 assimilate wholesale the rigid standards of the Karcher  
2 decision into an evaluation of disputes over the census.

3 QUESTION: Of the what?

4 GENERAL DAYS: The Karcher.

5 QUESTION: Karcher?

6 GENERAL DAYS: Karcher v. Daggett where, in  
7 effect, there has to be mathematical equality. And as  
8 this Court mentioned in Montana, although it may be  
9 common-sensical in some ways to seek a precise  
10 mathematical test within each State, when you try to apply  
11 that same standard to the Nation as a whole, the common  
12 sense force of that becomes quite illusory.

13 The court of appeals certainly recognized that  
14 there were differences between the problems that the  
15 Federal Government faces with respect to the census and  
16 those that States confront, but did not give, in our  
17 estimation, a proper weight to those considerations.

18 After all, unlike a State, when we're talking  
19 about the reapportionment of Congress, there are certain  
20 constraints, three major ones. There has to be at least  
21 one Representative per State. There has to be not  
22 exceeding one Representative for every 30,000 people, and  
23 the district boundaries may not cross State lines. These  
24 in and of themselves make it very hard to imagine that  
25 there is any ability to achieve mathematical equality.

1 But the court of appeals, nevertheless, said  
2 that the Secretary had to make a good faith effort and  
3 found that the Secretary had not made a good faith effort  
4 under these circumstances.

5 QUESTION: Is there a way if in fact you did an  
6 actual enumeration, i.e., you went out and counted people,  
7 and you also thought that the inner cities were being  
8 undercounted because people couldn't find everyone -- it's  
9 hard for the --

10 GENERAL DAYS: Yes.

11 QUESTION: Is there a way in a system of actual  
12 enumeration to do better at counting the people in the  
13 inner cities that's a practical way?

14 GENERAL DAYS: Yes. Well, I think that this  
15 1990 census reflects probably the most forceful and  
16 dedicated effort to do that in history. There was an  
17 effort before the census was started to identify  
18 households. Municipalities and States were given an  
19 opportunity to challenge the list. They were able to do  
20 that afterwards. There were special get-out-the-census  
21 count campaigns specifically targeted to hard-to-count  
22 populations around the country.

23 That's why I think the ultimate census,  
24 although, Mr. Chief Justice, we don't know whether it's  
25 exactly 98.4, by all estimates it's 98.4. We're talking

1 about missing 4 million people approximately in a  
2 population of 248 to 253 million, which is a pretty good  
3 record.

4 But let me say in closing something about this  
5 differential undercount because it has really driven this  
6 lawsuit, and I think the Secretary reflected his concern  
7 about this, as well he should have been concerned. And I  
8 think all of us are concerned.

9 But what he established was that the statistical  
10 adjustment could not show that there would be reliable  
11 distributive accuracy. What that means is, if there's not  
12 distributive accuracy at the State level, one doesn't know  
13 where to place the minorities who are presumably  
14 undercounted. It's not clear whether one puts the so-  
15 called undercount groups in New York or South L.A. or  
16 other parts of the country, and that can produce great  
17 distortions.

18 If one looks at the adjusted count's impact on  
19 New York City, for example, New York State gained  
20 population under the adjustment.

21 May I finish this comment, Mr. Chief Justice?

22 QUESTION: Yes.

23 GENERAL DAYS: Gained population but it lost  
24 share. That is, it lost its ranking relative to the other  
25 States in the Union.

1           We think for these reasons the court of appeals  
2 judgment should be reversed and the case remanded for the  
3 entry of judgment in favor of petitioners.

4           Thank you very much.

5           QUESTION: Thank you, General Days.

6           General Doyle, we'll hear from you.

7                   ORAL ARGUMENT OF JAMES E. DOYLE

8                   ON BEHALF OF THE STATE PETITIONERS

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

11           The people of the State of Wisconsin stand to  
12 lose a seat in Congress to the State of California, which  
13 is no longer even pursuing its claim because the City of  
14 New York and the other respondents seek to engraft on the  
15 Constitution certain statistical procedures about how to  
16 take the census over which even statisticians disagree.

17           QUESTION: Do you agree that the individual  
18 voters who claim their districts have been undercounted  
19 have standing to bring this suit?

20           MR. DOYLE: We do not agree with standing in the  
21 -- in apportionment. We believe that that standing  
22 belongs to the State, not the individual voters, as it  
23 does in the Karcher case in which you can actually assess  
24 what your proportional share of the voting statistic is.  
25 But in the case of apportionment to the State, we believe

1 that belongs to the State. As in Montana and in Franklin  
2 v. Massachusetts, both of those claims were pursued by the  
3 States that stood to lose a seat in Congress if it had  
4 been -- if the procedure had been adopted.

5 In this case, California pursued its claim in  
6 the district court, was -- did not appeal the district  
7 court's ruling against it, and we believe the State of  
8 California is bound by that judgment.

9 QUESTION: Do individual voters then not have  
10 the standing because the States necessarily supersede  
11 their interests?

12 MR. DOYLE: In our view, it is in this case the  
13 States' interest and the individual voter does not have  
14 the standing.

15 But let me emphasize in this case California's  
16 case was brought State ex rel. for the people of the State  
17 of California by the Attorney General of the State.  
18 That's how the case was brought. So the Attorney General  
19 was bringing it not on behalf of the corporate entity of  
20 the State of California, but was bringing it on behalf of  
21 the people of the State of California. And he -- and  
22 California did not appeal the judgment of the district  
23 court.

24 QUESTION: Why doesn't an individual voter have  
25 standing on the theory that if there are more

1 Representatives for that voter's States, the ratio of  
2 Representative to voters will be more favorable and,  
3 therefore, the voter, as well as the State, has a stake?

4 MR. DOYLE: The apportionment -- in my view the  
5 apportionment right, the right to a certain number of  
6 seats in Congress does not convert into the same kind of  
7 statistical how many Representatives do I have, what share  
8 of a Representative do I have in Congress. And there is  
9 always going to be wide --

10 QUESTION: Well, they are conceptually different  
11 but they are related because the ratio will depend on the  
12 apportionment. So, it may be that the voter is not  
13 bringing in a technical sense an apportionment claim. The  
14 voter is bringing a variety of person to vote claim. But  
15 why doesn't the voter have standing to do that?

16 MR. DOYLE: Well, because as I said, I believe  
17 it's the State's right.

18 But let me emphasize this case. The voters have  
19 -- the Attorney General was representing the people of the  
20 State of California, and certainly the voters of New York  
21 do not have any standing to claim that Wisconsin should  
22 transfer a seat in Congress from Wisconsin to California.

23 The only practical result of this statistical  
24 adjustment, as it was later corrected -- the only  
25 practical result of this statistical adjustment, as it was

1 later corrected is that one seat in Congress will be  
2 transferred from Wisconsin to California. There is --

3 QUESTION: What about Federal funding that's  
4 based on population and so forth? Isn't that an injury?

5 MR. DOYLE: Federal funding is not a  
6 constitutional issue. There is no -- the question before  
7 this Court is whether there is a constitutional violation.  
8 You have no -- no individual has --

9 QUESTION: Well, doesn't that show injury?

10 MR. DOYLE: Not if there is not any showing of  
11 purposeful, intentional discrimination. There is no  
12 constitutional right to per capita receipt of Government  
13 largesse. There's no right that a citizen in Wisconsin  
14 has to get equal number of dollars from the Federal  
15 Government that a citizen in Illinois gets. It is -- it  
16 may be a statutory claim, perhaps reviewable under the  
17 APA, but it is not a constitutional claim.

18 The only constitutional --

19 QUESTION: Well, it's not a claim, but does it  
20 suffice to have the nexus of injury for him to bring the  
21 claim?

22 MR. DOYLE: It may have the nexus for injury to  
23 bring a claim, not the constitutional claim having to do  
24 with apportionment, which is the claim before this Court,  
25 but a statutory claim. It may have the nexus of injury

1 for standing. I don't think it would be a successful  
2 lawsuit, but it may be the nexus for standing of a non-  
3 constitutional claim.

4 QUESTION: But would you have a different basis  
5 for challenging the census as it is used under some of  
6 these statutes than you would have for challenging it in  
7 this lawsuit which does not relate to a statute but to the  
8 constitutional prescription?

9 MR. DOYLE: I think you may well have a  
10 different basis. You may well have -- even under the  
11 Franklin case, you may have a Administrative Procedures  
12 Act lawsuit. I don't know --

13 QUESTION: So, you could come out with different  
14 results? You'd have a census, and you'd have two  
15 different censuses, one of which would be valid for  
16 apportionment purposes and the other one of which would be  
17 valid for all of the statutory apportionments?

18 MR. DOYLE: That is true currently, Your Honor.  
19 There are various census numbers that are used for the  
20 distribution of Federal funds. There's a mid-decennial  
21 census that is taken that is not a constitutional census  
22 that is used for purposes of various Government programs.

23 QUESTION: No, but assume the statute just says  
24 according to the census figures. Is it possible that that  
25 would mean one thing for statutory distribution purposes

1 and something else for purposes of apportionment? What is  
2 the census?

3 MR. DOYLE: If the statute said the official  
4 census --

5 QUESTION: That's what it says.

6 MR. DOYLE: -- then we believe that you could  
7 conceivably have two different results, although I think  
8 it's unlikely.

9 But the issue before the Court is one of whether  
10 or not in this case there has been --

11 QUESTION: Oh, okay. So, we could have another  
12 lawsuit about it. We can do all this over again when  
13 somebody comes up with a statutory apportionment that  
14 requires it to be apportioned according to the census.  
15 And you say they can distinguish whatever we say in  
16 today's case because this only related to the official  
17 census.

18 MR. DOYLE: My understanding of the statutes  
19 having to do with disbursement of Federal funds is you would  
20 not have that lawsuit, but perhaps under a hypothetical  
21 statute, you might well.

22 You will have many, many lawsuits coming before  
23 you constantly if -- before the courts if the Second  
24 Circuit's decision is adopted. If in the year 2000 the  
25 census is harmful to the State of -- the statistical

1 estimation is done and the statute is harmful -- the  
2 census is harmful to the State of Wisconsin, we may well  
3 be before the Court if the Second Circuit decision is  
4 there, arguing that if you use different post-strata, if  
5 you had grouped Wisconsin with different States, if you  
6 had had a different way of imputing the people who you  
7 can't match, that we would be -- have a seat in Congress.

8 And under the Second Circuit's decision, not  
9 only would we have a claim, but by simply coming forward  
10 with a claim that we can do the census better than the  
11 Census Bureau did, count more people, we would have  
12 heightened scrutiny applied to that claim as well.

13 And if I might address the question about  
14 whether the adjustment of the census itself would be  
15 constitutional, the statistical estimation, whether it  
16 could constitutionally be done.

17 There is a significant constitutional problem  
18 with that. The Fourteenth Amendment, section 2, requires  
19 that the census be done by a counting of the people in the  
20 States.

21 The way the Wisconsin number would be arrived  
22 at, if you accepted this statistical estimation, is that  
23 our count would not only be because of counts in our  
24 State, but through this post-strata system by which people  
25 are counted in Ohio and Indiana and Illinois and Michigan,

1 our numbers are adjusted basis -- based on counts that are  
2 made in the post-strata in other States.

3 In fact, in the post -- in the PES only I  
4 believe 169 blocks of Wisconsin, about 5,000 people, were  
5 included in the post-enumeration survey. And our numbers  
6 were being estimated based on that.

7 QUESTION: General Doyle, then are you  
8 disagreeing with General Days who said, in answer to the  
9 question might the sampling technique or some statistical  
10 adjustment be used, yes, it might? That's the Secretary  
11 is considering.

12 And there was also the prediction, the forecast,  
13 that we wouldn't get a lot of lawsuits because if we gave  
14 proper deference to the Secretary, then that would be  
15 that, as long as it met a reasonableness test.

16 But I think you are now suggesting that the  
17 Secretary doesn't have discretion.

18 MR. DOYLE: I am suggesting that the Secretary  
19 does not have discretion to do the kind of statistical  
20 sampling that was done in this case. There --

21 QUESTION: Any kind of statistical sampling?

22 MR. DOYLE: No. There may well be other kinds  
23 of statistical sampling that -- I'm not a statistician --  
24 that may serve the purpose, but I do not believe that you  
25 can arrive at the census of Wisconsin based on counts of

1 people that you have made in Illinois, Indiana, and  
2 Michigan, which is what --

3 QUESTION: Because that is inconsistent with the  
4 term "actual enumeration."

5 QUESTION: No. Counting the whole number.

6 MR. DOYLE: It's inconsistent with actual  
7 enumeration, but particularly it is inconsistent with the  
8 Fourteenth Amendment, section 2, which says counting the  
9 whole number of people --

10 QUESTION: I see.

11 MR. DOYLE: -- in the States. You count people  
12 in Illinois. You say, oh, there has been an undercount in  
13 Illinois. You group Wisconsin with Illinois, and our  
14 undercount's percentage is based on counts of people that  
15 are made in other States.

16 QUESTION: And I take it, you have a -- sort of  
17 a footnote to that argument too because I gather Wisconsin  
18 claims that it made unusual efforts to get out the census  
19 so that the very fact that you tried to do a good job  
20 would be a further reason, in fact as well as in  
21 principle, to say you shouldn't compare us with another  
22 State that might not have made that effort.

23 MR. DOYLE: Well, that's correct, Your Honor.  
24 Wisconsin worked very hard.

25 And let me say that there's a suggestion that

1 the majority States -- that there's a majoritarianism  
2 issue here. Every State has an interest in seeing that  
3 everybody in that State is counted, minority and non-  
4 minority citizens alike. When a minority citizen in  
5 Wisconsin is not counted, my vote -- my representation is  
6 as depreciated as that minority student -- that minority  
7 citizen who is not counted. So, every State has an  
8 interest in seeing a full count made.

9 QUESTION: Thank you, General Doyle.

10 MR. DOYLE: Thank you, Your Honor.

11 QUESTION: Mr. Rifkind, we'll hear from you.

12 ORAL ARGUMENT OF ROBERT S. RIFKIND

13 ON BEHALF OF THE RESPONDENTS

14 MR. RIFKIND: Mr. Chief Justice, and may it  
15 please the Court:

16 Let me say at the beginning that the court of  
17 appeals did not hold that Secretary Mosbacher's decision  
18 was unconstitutional. It only held, as I understand it,  
19 that the district court had employed an inappropriate  
20 standard when it found that the Secretary's decision,  
21 though mistaken, must be sustained because not so far  
22 beyond the pale of reason as to be arbitrary and  
23 capricious.

24 There should be no question about it. The  
25 district court found that the Secretary's decision was

1 wrong, but not beyond the pale of reason.

2 QUESTION: Well, on what basis did the district  
3 court go about finding that the Secretary's decision was  
4 wrong, as you put it?

5 MR. RIFKIND: The basis was, first of all, 13  
6 days of trial and the consideration of the evidence  
7 submitted there, but I think very largely on the basis  
8 made of concessions made by the Secretary. The Secretary  
9 never found -- never found -- that the adjustment was less  
10 accurate than the original count.

11 QUESTION: Perhaps we should refine what you  
12 mean by saying that the district court found the  
13 Secretary's decision was, quote, wrong, close quote.

14 MR. RIFKIND: What the district court said --  
15 and this is in the Wisconsin appendix at page 77 -- the  
16 Secretary has conceded that the objective criteria used to  
17 measure the adjusted counts show a greater numeric  
18 accuracy at the national level and that the Census Bureau  
19 estimates of distributive accuracy marginally favored the  
20 adjusted counts.

21 QUESTION: How does that add up to being wrong?

22 MR. RIFKIND: It found -- it adds up to being  
23 wrong if the standard is, is the corrected count more  
24 accurate than the original count, and --

25 QUESTION: So, you say it's simply a factual

1 inquiry that's up to the district court to decide whether  
2 one count was more accurate than the other, regardless of  
3 what the Secretary chose to do.

4 MR. RIFKIND: I believe, as I believe the Second  
5 Circuit did, that where fundamental constitutional rights  
6 are impacted, the court must conduct a more searching  
7 inquiry than merely beyond the pale of reason.

8 QUESTION: How could that be the test? I mean,  
9 if in fact the true cause is that people who live in inner  
10 cities and are hard to get to are undercounted, people who  
11 live in inner cities and are hard to get to also have more  
12 diseases and also eat less well. So, in fact, a census  
13 system that adjusted upwards by 1 percent according to  
14 diet would be more accurate. Yet, a system like that  
15 couldn't possibly be a more lawful system because you'd  
16 produce bizarre results in trying to apportion  
17 Representatives among the States. So, I don't see how  
18 that could be the test as opposed to the test being are we  
19 going to do our apportionment business of Representatives  
20 in Congress better.

21 MR. RIFKIND: Absolutely.

22 QUESTION: Well, then as soon as you say that,  
23 you run into their argument about, you know, who gets the  
24 extra Representative, and there are a thousand different  
25 ways to do it, and it's undercounted here and overcounted

1 there, and we don't know the true causes of the  
2 undercount, et cetera.

3 MR. RIFKIND: Well, the -- I think the key  
4 factors here are that the Census Bureau, the expert  
5 agency, to which normally I would suppose considerable  
6 deference was due, had spent a great deal of time trying  
7 to figure out the solution to the problem, after an  
8 enormous amount of effort and a very professional effort  
9 had decided that it had figured out the solution, or at  
10 least a significant amelioration of the problem, and I  
11 must say, Justice Breyer, repeatedly advised the  
12 Department of Commerce that there was no other way.

13 QUESTION: You said to whom a great deference is  
14 due, and as soon as we get into a great deference is due,  
15 they win.

16 MR. RIFKIND: Well, what I'm -- I guess what I'm  
17 saying is a decision that overthrows, as the Secretary did  
18 twice -- overthrows the recommendation of the expert  
19 agency, when the Secretary himself obviously claims --

20 QUESTION: Well --

21 MR. RIFKIND: -- expressly claims no expertise,  
22 it raises a question about who --

23 QUESTION: Are you saying, Mr. Rifkind, that a  
24 political appointee Secretary, who is authorized by  
25 Congress to take a particular action, if he rejects the

1 recommendations of his permanent staff, is therefore very  
2 likely of being held arbitrary and capricious?

3 MR. RIFKIND: I do not believe that arbitrary  
4 and capricious is the appropriate standard.

5 QUESTION: Well, what --

6 MR. RIFKIND: What I -- I guess what I'm trying  
7 to say is where you have -- where the Court has decided -  
8 - and I thought this Court had decided -- that it would  
9 look searchingly at Government action that undermines  
10 fundamental constitutional rights, that under those  
11 circumstances, when one considers the whole matrix of  
12 factors, the fact that an expert agency had made a  
13 recommendation and that the Secretary of Commerce had  
14 overturned it would lead a court to at least inquire did  
15 he have very good reasons to overturn it.

16 QUESTION: And what is the Government action  
17 here which you say undermines fundamental rights?

18 MR. RIFKIND: The promulgation by the Secretary  
19 of counts, in which persons are in very large numbers  
20 omitted not uniformly across the country but, as we have  
21 known since 1940, in those places in which minorities  
22 reside -- those minorities and the people who live next  
23 door to them, as the General said, are undercounted when  
24 it comes to drawing districts. That was established by  
25 Professor Kohl at Princeton in 1955 and is conceded.

1           QUESTION: But that assumes that they're  
2 entitled to some different form of count than they got.

3           MR. RIFKIND: They are entitled to a different  
4 form of count if there is an available count that doesn't  
5 have that consequence.

6           QUESTION: I don't think you're right on that.  
7 I think the Secretaries and -- the Congress is given great  
8 discretion by the Constitution. Congress in turn confers  
9 great discretion on the Secretary, and the idea that you  
10 simply decide all over again in the district court whether  
11 the Secretary was right or wrong I think is quite  
12 unsupported by any case.

13          MR. RIFKIND: The -- there is a tradition that  
14 goes back to the beginning of the century of Bureau  
15 autonomy. The remarkable thing about the 1990 census is  
16 it is the first occasion on which the Secretary of  
17 Commerce has undelegated to the Director of the Bureau the  
18 authority that the Director of the Bureau has always had  
19 in this respect.

20          QUESTION: Do you claim that the Secretary did  
21 not act in good faith in putting out the actual count  
22 census and relying on that?

23          MR. RIFKIND: I believe that the Secretary did  
24 not pursue in good faith the zealous pursuit of equality  
25 and accuracy which should be the overriding command.

1 QUESTION: Is it clear that some kind of  
2 statistical substitute for an actual count is permissible  
3 under the Constitution?

4 MR. RIFKIND: I think -- let me be clear. No  
5 one has suggested, not the Census Bureau and not we -- no  
6 one has suggested a substitute -- that is, disregarding  
7 the enumeration entirely.

8 The only question is whether it can be improved  
9 by statistical means. I don't hear the Government, the  
10 Solicitor General, or anyone else suggest that, except for  
11 Wisconsin perhaps, that one could never use a correction  
12 of statistical nature to improve the quality. And, of  
13 course --

14 QUESTION: Well, the Attorney General of  
15 Wisconsin is here saying the Constitution doesn't permit  
16 any statistical adjustment. Why do we think it does?

17 MR. RIFKIND: I think Wisconsin in that respect  
18 is wrong. I think --

19 QUESTION: Why?

20 MR. RIFKIND: -- the Solicitor General agrees  
21 with me on that, and I will say why.

22 I think that when the Constitution uses the word  
23 "enumeration," it means to render in numbers.

24 QUESTION: It doesn't just say enumerate. It  
25 says actual enumeration.

1 MR. RIFKIND: I take the word --

2 QUESTION: Actual enumeration. And you want to  
3 say that since you cannot do a perfect actual enumeration,  
4 you will take the actual enumeration and adjust it upward  
5 or downward by statistical means. I don't think that that  
6 -- it isn't clear to me at least that that constitutes an  
7 actual enumeration.

8 MR. RIFKIND: I take it the word "actual  
9 enumeration" in context there differentiates it from the  
10 attribution --

11 QUESTION: The imaginary enumeration.

12 (Laughter.)

13 MR. RIFKIND: -- contained in the -- well, in  
14 the proceedings clause of the Constitution which says for  
15 the first 3 years we'll allocate Congress the following  
16 way.

17 But the fact of the matter is --

18 QUESTION: That was not -- Mr. Rifkind, that was  
19 not an issue that was aired below since it was accepted by  
20 the Government --

21 MR. RIFKIND: It was.

22 QUESTION: -- that the Secretary spent all the  
23 time considering this. So, that isn't an issue.

24 But I was interested in your answer about this  
25 fundamental right, and we know the result. It was also

1 known that an absolute veterans' preference in  
2 Massachusetts would mean that of -- the upper echelon  
3 jobs, and the vast majority would be reserved to a group  
4 overwhelmingly male. And we have Washington v. Davis.

5 How can you argue that even though you know that  
6 the undercount will disproportionately affect minority  
7 members, that for that reason you get this highest level  
8 of scrutiny when this Court has rejected that over and  
9 over again?

10 MR. RIFKIND: I'm not sure that one gets it  
11 because it disproportionately affects minorities. I would  
12 have thought one got it under the line of cases following  
13 Baker v. Carr. One gets it because when we require of  
14 States that they proportion quite precisely equal numbers  
15 for equal -- equal representation for equal numbers, we  
16 don't inquire about their intent, and we don't listen to  
17 200 years of history as an explanation for why they got  
18 there because --

19 QUESTION: But then General Days has told us  
20 that you can't compare the national census with  
21 apportionment one person/one vote within a State, and  
22 General Doyle tells us that what we have to concentrate  
23 on, the only thing at the constitutional level before us,  
24 is taking away from Wisconsin one seat, adding to  
25 California one seat. That's what he said is before us,

1 nothing else.

2 MR. RIFKIND: I don't think that's all that's  
3 before us, although that is before us.

4 QUESTION: Why -- explain then. The Secretary  
5 said I'm concentration -- concentrating on distributional  
6 accuracy within the United States. The result of doing  
7 this PES will mean that California gets another seat,  
8 Wisconsin gets one seat less. Now, why is anything more  
9 than that involved?

10 MR. RIFKIND: Well, we all know -- and the  
11 Congress has commanded -- that the census also be  
12 available for the States to use in drawing congressional  
13 districts.

14 QUESTION: If they so will. If they so will.  
15 They're not required to.

16 MR. RIFKIND: I think it would be a temeritous  
17 State that declined to use the census counts to draw its  
18 congressional districts. After Karcher at least, I think  
19 there's a grave doubt whether they're free to do that, but  
20 assuming they are, they will certainly be exposed to an  
21 array of litigation much larger than has been suggested.

22 And as a practical matter, this is fairly  
23 traceable to what the Secretary does. As a practical  
24 matter, we know the Secretary is commanded by section 141  
25 to give to each of the States the most accurate data they

1 can so that they can draw their congressional districts,  
2 State districts, State legislative districts. And since  
3 1962, this Court has required the States to do just that,  
4 to draw equal populace districts.

5 QUESTION: Mr. Rifkind, why couldn't the State  
6 say, we take the enumeration and then for our own purposes  
7 of apportioning, we will take this adjustment?

8 MR. RIFKIND: No State in fact is equipped to do  
9 that.

10 QUESTION: But -- because they don't have the  
11 numbers to do it?

12 MR. RIFKIND: Only -- in this case we have the  
13 numbers because we forced the Government to give them the  
14 numbers.

15 QUESTION: Yes.

16 MR. RIFKIND: But even so, most States have  
17 constitutional requirements of their own and statutes of  
18 their own that say you use what the Secretary of Commerce  
19 delegates -- sends to you pursuant to section 141 of the  
20 code. And --

21 QUESTION: Well, then maybe each State should  
22 redecide how that statute should be and say that we want  
23 to have the enumeration plus the statistical adjustment.  
24 And then it's a question for the State's political  
25 process.

1 MR. RIFKIND: Well, that may be.

2 As a -- in this decade that doesn't solve the  
3 problem. We have a set of data and we have an alternate  
4 set of data. The Secretary chose the data that the  
5 experts in the agency, that the Bureau told them were the  
6 less reliable, that missed 4 million or 5 million people  
7 nationally, that undercounted blacks, Hispanics, Asians,  
8 and so on.

9 QUESTION: And you told me the practical result  
10 on the State level, but I'm looking for the constitutional  
11 infirmity.

12 MR. RIFKIND: Well, I think there's at least a  
13 suggestion in Karcher that the States are required to use  
14 the census counts unless they can prove -- prove -- that  
15 they have something better, at the very least.

16 QUESTION: Mr. Rifkind, your whole argument  
17 seems to rest on the assumption that we're dealing with  
18 two sets of figures which are alike in every respect  
19 except one is more accurate than the other, and that in  
20 fact is not so, is it?

21 We are, in fact, dealing with a set of figures  
22 which are derived, one of them by actual count, the other  
23 one by estimate, which depends upon a series of value  
24 judgments in order to determine how to make the estimate.  
25 So, we are not comparing a big apple against a little

1 apple. We are comparing two different kinds of  
2 vegetables, aren't we?

3 MR. RIFKIND: Justice Souter --

4 QUESTION: I mean, isn't that so?

5 MR. RIFKIND: With respect, it is fundamentally  
6 wrong.

7 QUESTION: All right.

8 MR. RIFKIND: And I'd like to address that.

9 The census is full of estimation. The original  
10 enumeration, the enumeration, is full of estimation.  
11 Every Director of the Bureau that I have known of -- and  
12 we quote several of them at page 9 of our brief -- has  
13 said the notion that there's no estimation in the  
14 enumeration doesn't understand what the actual way we  
15 count people is.

16 QUESTION: Would it be fair then to say that the  
17 difference between these two figures is a difference on  
18 the -- a difference depending on the amount of estimation  
19 versus actual enumeration which in fact is involved in  
20 reaching the number?

21 MR. RIFKIND: There is --

22 QUESTION: By definition, there's -- I presume  
23 there's more estimation in the method that you want used  
24 or you wouldn't want it used.

25 MR. RIFKIND: There is more estimation involved,

1       although in 1980 --

2               QUESTION:   Okay.

3               MR. RIFKIND:  -- the explanation involved which  
4       involved imputing the existence of people and their  
5       numbers by a very crude device was challenged in Orr v.  
6       Baldrige in a dispute between Florida and Oklahoma because  
7       it shifted a Congressman, and the Census Bureau prevailed.

8               QUESTION:   Okay, but we have a different --

9               QUESTION:   What was the estimation?  I'm not  
10       sure.  What was that imputation?

11              MR. RIFKIND:  My recollection is that in -- that  
12       the process there involved is when a house was seen to be  
13       -- you couldn't find the people in the house and the  
14       neighbors didn't know how many people were there and the  
15       postman didn't know how many people were there, they said,  
16       we know it's not vacant, so we'll attribute the numbers in  
17       this house to be equal to the numbers of people in the  
18       adjacent house.  And with that device, which I describe as  
19       crude, but better than nothing, they added, as I recall,  
20       790,000 people to the census which shifted a Congressman  
21       from Indiana to Florida.

22              QUESTION:   Okay.

23              MR. RIFKIND:  And in previous decades, they've  
24       added millions of people by similar estimating processes.

25              QUESTION:   Now, may I go back to the comparisons

1 of these two estimations, one of which is more ambitious  
2 than the other?

3 If we assume that the two figures are properly  
4 comparable so that we can say one is better than the  
5 other, we have to assume something about the judgments  
6 that are made in deciding how to make the preferable  
7 estimate. We have to say, yes, those value choices were  
8 good value choices.

9 Isn't it the case then that you have a problem  
10 in your argument, just taking it on its own terms, by  
11 virtue of the fact that, if I recall correctly, the head  
12 of the Census Bureau said, I wouldn't have done it this  
13 way, but the Secretary's choice is within the realm of  
14 reason?

15 In other words, it could -- a reasonable person  
16 could make a different set of value choices from the ones  
17 which I personally prefer. It would still be within the  
18 realm of reason. Isn't that a difficulty for your case?

19 MR. RIFKIND: I can see it. Dr. Bryant said,  
20 reasonable men can differ, reasonable persons can differ.

21 QUESTION: And that's why you have to insist on  
22 the heightened scrutiny standard because otherwise you  
23 lose.

24 MR. RIFKIND: Well, I think there's a risk of  
25 that. I did --

1 QUESTION: And a high risk.

2 QUESTION: Maybe a high risk, yes.

3 MR. RIFKIND: I must say I don't envy the  
4 position Dr. Bryant was in when she had to utter that  
5 statement. She was standing next to her boss, and it's a  
6 common thing for non-lawyers to say when they're standing  
7 next to their bosses.

8 (Laughter.)

9 QUESTION: Okay, but we don't have any finding  
10 from the people -- the judge who heard the testimony that  
11 in fact it's not to be believed.

12 MR. RIFKIND: I agree with that, but I think if  
13 you read the report -- and it's in the joint appendix of  
14 Dr. Bryant -- you read the report of the Census Committee,  
15 you read those sorts of materials, you come away with the  
16 feel that she felt very emphatically that they had solved  
17 the problem. And with good reason because --

18 QUESTION: Well, she felt very emphatically that  
19 they had come to one, and indeed in her view preferable  
20 obviously, solution to an assumed problem of  
21 undercounting.

22 But to say that they had solved the problem is  
23 truly to say they had come up with one solution to a  
24 problem and there were other solutions, and it was within  
25 the realm of reason to say that in fact the cure might be

1 worse than the disease.

2 MR. RIFKIND: No one at the trial and not the  
3 Secretary said that the enumeration was better, whatever  
4 that means, than the correction. What the Secretary said  
5 in effect was because sampling is involved, because  
6 sampling always brings in an element of what the  
7 statisticians call sampling error, random error, there's  
8 an element I don't know quite as much about, and because I  
9 don't know, I'm going to prefer what is on its face the  
10 worst mechanism. That's essentially the ground rules for  
11 decision that the Secretary put out.

12 And I think whether that's an appropriate ground  
13 rule for decision where constitutional rights are involved  
14 is an appropriate inquiry for a court.

15 QUESTION: Mr. Rifkind, isn't that quite an  
16 exaggeration to say I'm going to stay with the worst  
17 method? He said, I'm going to stay with the method we  
18 have unless I am convinced that something is better.

19 And even Judge McLaughlin didn't say the  
20 Secretary was wrong. What he said was if I were the  
21 decision maker, I would probably -- not certainly -- I  
22 would probably have ordered the adjustment. That's the  
23 furthest he goes.

24 MR. RIFKIND: No. I think he goes further  
25 actually, Justice Ginsburg. He says the court is

1 satisfied that for most purposes -- that is appendix 59 -  
2 - for most purposes the PES resulted in a more accurate  
3 count than the original census. And he says, the  
4 Secretary has conceded that the objective criteria used to  
5 measure the adjusted counts show a greater numeric  
6 accuracy at the national level and that the Census  
7 Bureau's estimates of distributive accuracy marginally  
8 favor the adjusted --

9 QUESTION: For most purposes, but that's the  
10 crucial phrase there. What the Secretary did not concede  
11 was that this adjusted method was more accurate for the  
12 central purpose of distributing Representatives among the  
13 States more accurately.

14 MR. RIFKIND: That's just --

15 QUESTION: For that purpose, he thought that the  
16 actual enumeration was better without statistical  
17 adjustment. Isn't that -- wasn't that in essence what he  
18 said?

19 MR. RIFKIND: My understanding of what he said  
20 is that he never actually says that the adjustment is not  
21 better, or to put it differently, that the enumeration is  
22 better for that purpose too, Justice Scalia, than the  
23 adjusted counts. What he says is, since I can't tell --

24 QUESTION: That the other one is better.

25 MR. RIFKIND: -- then my rule of decision tells

1 me I rule that way.

2 QUESTION: Is that unreasonable? That's -- I  
3 mean, suppose there are two things causing undercount, A  
4 and B, and California has all A and New York has all B.  
5 And what we do is we adjust on A and we don't adjust on B.  
6 We might discover all the seats go to California, New York  
7 loses. But the reality is that they shouldn't shift at  
8 all. And so, obviously, the simple fact that you get a  
9 more accurate count doesn't solve the apportionment  
10 problem.

11 Indeed, all statistics has that problem, doesn't  
12 it? You have to figure out how to draw the boxes and what  
13 your causal theory is before you do the sampling. And as  
14 soon as you get into that, you know it or you don't know  
15 it. If you know it, why not just send out the census  
16 takers? If you don't know it, it can be manipulated.

17 MR. RIFKIND: I think it's unreasonable for at  
18 least three or four reasons.

19 First -- and I think this is something that  
20 courts are quite as capable of addressing as the Secretary  
21 of Commerce.

22 Everyone knew going into this that what was  
23 going to go on was the substitution to some extent of  
24 random error, the error derived from sampling, as against  
25 what the statisticians call but we also call bias. And

1 the Secretary has decided here, among other things, that  
2 he prefers bias to random error.

3 And I think the courts are entitled to say  
4 that's something one ought to look at very closely because  
5 the bias that the Secretary preferred over random error is  
6 consistently, persistently decade after decade falling in  
7 the same places. It doesn't float around and it has a  
8 very distinct sense of unfairness.

9 There are a lot of respects in which we use  
10 random methods. When we pick a jury or when we pick a  
11 draft, we use random methods because there is a heightened  
12 sense of equity in it, and I think that's a relative  
13 consideration.

14 But secondly, the Secretary had agreed with us  
15 in the stipulation which this case produced on a mechanism  
16 that was going to be employed as part of the census. At  
17 the time he did that, he had before him the machinery that  
18 the Census Bureau had prepared.

19 The decision he finally came to, after -- and  
20 everyone agrees that the post-enumeration survey was  
21 excellently conducted. The Secretary doesn't dispute  
22 that. So, the decision he finally came to was a decision  
23 he could have come to before he started because he knew  
24 that a measurable, foreseeable amount of random error was  
25 going to be interjected into the affair.

1 I think that's inconsistent with, if you like,  
2 it's not in good faith with, the stipulation that he  
3 entered into at the beginning saying we're going to  
4 conduct this post-enumeration survey and we're going to  
5 conduct it as part of the census under the ground rules,  
6 under the tests, under the standards that the Bureau has  
7 set forth. At the end of the day, it met all those tests.

8 Suddenly there was a change of grounds of  
9 decision, a change of the rules of decision, if you like,  
10 and I think that is suspect and requires further attention  
11 from a court, or at least I think that's what the Second  
12 Circuit was saying.

13 QUESTION: Mr. Rifkind, are you -- you are  
14 relying at bottom on a constitutional claim.

15 MR. RIFKIND: Absolutely.

16 QUESTION: Under the census clauses of the  
17 Constitution or the Fifth Amendment as well? It's not  
18 clear to me.

19 MR. RIFKIND: Well, maybe that's because it's  
20 not clear to me, but I think the answer is both, Your  
21 Honor. I think we rely on what underpins the line of  
22 decisions, Wesberry and everything since Baker v. Carr,  
23 and I think those come both from the -- according to their  
24 respective numbers --

25 QUESTION: What is the specific harm claimed?

1 The change in congressional reapportionment?

2 MR. RIFKIND: It certainly includes that. There  
3 was -- I should be clear because the Solicitor General  
4 questioned this in his brief.

5 There's extensive testimony in the record  
6 uncontested that congressional district by congressional  
7 district -- and we used the example of California -- the  
8 number of people uncounated varied directly with the number  
9 of minority in the congressional district and, to be  
10 frank, varied directly with the number of Democrats  
11 registered in the district. So, there is a close -- and  
12 the regression analyses that were done on it were very  
13 meticulous -- a very close and overwhelming --

14 QUESTION: Is there some claim of harm because  
15 of the intrastate districting that results ultimately?

16 MR. RIFKIND: Absolutely.

17 QUESTION: You claim that as well.

18 MR. RIFKIND: I who live in New York say that  
19 whether or not New York is entitled to an additional  
20 Congressman, New York City is entitled to a larger share  
21 of the electoral power of the State of New York both in  
22 Congress and in Albany. And the same thing is said by my  
23 colleagues from Los Angeles who are here, although  
24 California --

25 QUESTION: But, Mr. Rifkind, then we get back to

1 the point that I made before. That's not because the  
2 Federal authorities are compelling that. That's because  
3 the States, so far as this record shows, have chosen that  
4 that's the way they're going to do their interstate.

5 There's nothing that shows that the States could  
6 not one by one have picked what you say is the better way  
7 of doing it. They have the numbers. They could do it.

8 MR. RIFKIND: I think in my view in principle  
9 that ought to be right. I think in practice, with all  
10 respect, I think it's wholly unrealistic.

11 QUESTION: But practice -- how does the practice  
12 rise to the level of a constitutional decision? We're  
13 saying we know that States could do this, but they won't.  
14 Politically they won't. So --

15 MR. RIFKIND: No, it's not only politically.  
16 They're not equipped to do it as a general matter, and  
17 Congress has required --

18 QUESTION: Well, I thought you agreed that you  
19 got the numbers for them and those numbers, I take it, are  
20 not going to be any less available in the future.

21 MR. RIFKIND: But they are numbers that until  
22 this day had been under the great cloud that the Secretary  
23 of Commerce put them under, and that's why I say it would  
24 be a courageous State Attorney General in California or  
25 New York who said, well, we're going to -- the Secretary

1 of Commerce rejected that, but that's what we're going to  
2 use in New York. I think that takes a temerity --

3 QUESTION: Because New York would violate one  
4 person/one vote if it used those? Do you think that  
5 anyone could mount such a challenge?

6 MR. RIFKIND: The New York Constitution  
7 requires. Now, you say the New York Constitution could be  
8 amended, and I agree with that. All I'm saying is as a  
9 practical matter -- and I can't get further than that --  
10 it's unrealistic.

11 I think to put it differently, the claim of the  
12 New York City dweller or the Los Angeles -- or of Los  
13 Angeles or of the Los Angeles dweller is fairly traceable  
14 to the action taken by the Secretary of Commerce.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
16 Rifkind.

17 The case is submitted.

18 (Whereupon, at 11:02 a.m., the case in the  
19 above-entitled matter was submitted.)  
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## CERTIFICATION

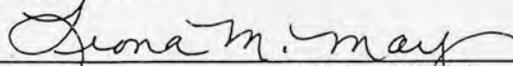
*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

WISCONSIN, Petitioner v. CITY OF NEW YORK, ET AL.; OKLAHOMA, Petitioner v. CITY OF NEW YORK, ET AL.; DEPARTMENT OF COMMERCE, ET AL., Petioners v. CITY OF NEW YORK, ET AL.

CASE NO. : 94-1614, 94-1631, 94-1985

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

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