

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

# THE SUPREME COURT

## OF THE

## UNITED STATES

CAPTION: DEPARTMENT OF COMMERCE, ET AL., Appellants v.  
UNITED STATES HOUSE OF REPRESENTATIVES, ET  
AL.; and WILLIAM JEFFERSON CLINTON, PRESIDENT  
OF THE UNITED STATES, ET AL., Appellants v.  
MATTHEW GLAVIN, ET AL.

CASE NO: 98-404 & 98-564 C-1

PLACE: Washington, D.C.

DATE: Monday, November 30, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEPARTMENT OF COMMERCE, ET AL. :

4 Appellants :

5 v. : No. 98-404.

6 UNITED STATES HOUSE OF :

7 REPRESENTATIVES, ET AL., :

8 And :

9 WILLIAM JEFFERSON CLINTON, :

10 PRESIDENT OF THE UNITED STATES, :

11 ET AL., :

12 Appellants :

13 v. : No. 98-564.

14 MATTHEW GLAVIN, ET AL. :

15 - - - - -X

16 Washington, D.C.

17 Monday, November 30, 1998

18 The above-entitled matter came on for oral  
19 argument before the Supreme Court of the United States at  
20 10:03 a.m.

21 APPEARANCES:

22 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
23 Justice, Washington, D.C.; on behalf of the Appellants.

24 MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of  
25 the Appellees in No. 98-404.

1 MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of  
2 the Appellees in No. 98-564.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 98-404, the Department of Commerce v. the  
5 United States House of Representatives, and William  
6 Jefferson Clinton v. Matthew Glavin.

7 General Waxman.

8 ORAL ARGUMENT OF SETH P. WAXMAN

9 ON BEHALF OF THE APPELLANTS

10 GENERAL WAXMAN: Mr. Chief Justice, and may it  
11 please the Court:

12 Article I, Section 2, Clause 3 of the  
13 Constitution requires that representatives be apportioned  
14 based on the number of persons in each State. And to  
15 effectuate that requirement, Congress is directed to  
16 provide for, quote, the actual enumeration, to occur every  
17 10 years, in such manner as Congress shall by law direct.

18 In modern times, as the census has faced  
19 increasing challenges, Congress has delegated authority to  
20 the Secretary of Commerce to conduct a census in such form  
21 and content as he may determine.

22 Following exhaustive study and the unanimous  
23 recommendation of the Census Bureau, the National Academy  
24 of Sciences, and other professional groups, the Secretary  
25 has determined that for the 2000 census, employing

1 statistical sampling, in addition to other means of  
2 enumeration, will best achieve the constitutional goal of  
3 determining the number of persons in each State. The  
4 important --

5 QUESTION: General Waxman, I understand there  
6 are -- there are two kinds of statistical sampling  
7 involved here. And I want to ask you about the first  
8 one -- rather the second one -- which I -- I gather is a  
9 series of 750,000 housing units, selected randomly. And  
10 they will then be used to adjust the figures from census  
11 tracts?

12 GENERAL WAXMAN: That's correct, Mr. Chief  
13 Justice. If -- just a small correction in the premise of  
14 the question. There are three methods of sampling that  
15 the Census Bureau proposes to conduct. One is not  
16 challenged by -- at least directly -- by any of the  
17 plaintiffs in this case. But the third one, the  
18 integrated cover-ment measurement portion of the survey,  
19 is actually quite similar in -- in the means by which it  
20 will done -- is going to be done -- as in 1990, the  
21 post-enumeration survey that the Court discussed in  
22 Wisconsin v. City of New York.

23 That is, after the first two phases of the  
24 census are completed and there is an initial enumeration  
25 roster with respect to every census block and tract,

1 the --

2 QUESTION: Well, that initial enumeration is  
3 first based on responses and then based on follow-up  
4 interviews?

5 GENERAL WAXMAN: That's correct. There are --  
6 there are three phases, Mr. Chief Justice, to the 2000  
7 Census. The first phase will be a -- a series of mailings  
8 to every individual household, an 800 number for people  
9 who don't want to respond by mail to call in their  
10 answers, the distribution of questionnaires in malls and  
11 public libraries and other places. That's the first  
12 phase.

13 The second phase involves what's called  
14 non-response follow-up. And that includes both an effort  
15 to physically visit a certain number -- up to 90 percent  
16 of the houses in each census tract, and the use of  
17 statistical sampling to impute the population  
18 characteristics with respect to those homes which did not  
19 send in -- mail in their census information and were not  
20 located personally.

21 QUESTION: But when you say up to 90 percent,  
22 there -- there is going to be an intentional effort not to  
23 do 100 percent?

24 GENERAL WAXMAN: No, there -- Justice Scalia,  
25 there is an intentional effort in this census to obtain



1 census information from every household that is known to  
2 exist by mailings, by a Be Counted program, by telephone,  
3 by the Internet. The Census Bureau has determined that in  
4 order to make the population totals for apportionment  
5 purposes more accurate, it will not have enumerators  
6 physically go to every single house that did not respond  
7 to those initial requests for information, but rather will  
8 go to enough houses so that 90 percent of every household  
9 in each census tract has been the subject of a, quote,  
10 physical count.

11 And it will then use statistical sampling on a  
12 completely random basis -- and I think this is key,  
13 because none of the plaintiffs have alleged, nor could  
14 they, that they have been injured in any way by the  
15 effort -- by the attempt to use sampling --

16 QUESTION: Let -- let's -- let's stay on the  
17 question of describing this -- this procedure.

18 GENERAL WAXMAN: Yes, sir. The -- once the  
19 initial enumeration roster is completed by means of the  
20 mail-in, the non-response follow-up, which is both  
21 physical and sampling, the national vacancy check, which  
22 uses sampling to impute population, there will be what's  
23 called an initial enumeration roster.

24 The Bureau will then conduct, much as it did in  
25 1990, but on a much larger, more sophisticated scale,

1 using a completely separate cadre of individuals, it will,  
2 on 25,000 blocks of the country, selected in advance  
3 according to methodologies that have been specified,  
4 survey intensively every single one of those households to  
5 determine the extent to which the people show up the  
6 second time that weren't identified the first time or were  
7 identified the first time and weren't identified the  
8 second time. And any discrepancy in information that any  
9 person gives will be the subject of a follow-up visit.

10 The results of that procedure, the inter --  
11 integrated coverage measurement, it is in effect a quality  
12 check on the initial enumeration roster. And using the  
13 system of dual-system estimation that the Court described  
14 better in Wisconsin v. City of New York than I could  
15 standing here, it will adjust the results of the initial  
16 enumeration roster to more accurately reflect the total  
17 number of persons in each State, district --

18 QUESTION: So -- so you will get the initial  
19 returns from the census. And then you send -- send out  
20 follow-up people to try to contact those who were not  
21 contacted. But then you use this to kind of change the  
22 results from that, as I understand it?

23 GENERAL WAXMAN: Yes. The in -- integrated  
24 coverage measurement is a means, a highly reliable  
25 statistical means, of correcting for inaccuracies. That

1 is, improving the quality of the -- the results of the  
2 initial enumeration roster.

3 QUESTION: How can you know in advance that  
4 there are inaccuracies?

5 GENERAL WAXMAN: Justice -- Chief Justice  
6 Rehnquist, there -- every effort to enumerate the  
7 population, from the 1790 Census until now, has produced  
8 only an estimate of the true population totals in each  
9 State. That's agreed. That's understood. We now have  
10 the means -- the -- the Census Bureau and statisticians  
11 have developed the means, really beginning in the 1940's  
12 and on, to be able to ascertain just how far from the true  
13 number the enumeration efforts are -- are --

14 QUESTION: But how can you know -- but if -- if  
15 you have this census, which is a very -- and it's  
16 inaccurate, it doesn't reflect the, quote, true number,  
17 how -- how do you know what the, quote, true number, close  
18 quote, is?

19 GENERAL WAXMAN: Well, the -- I recall that was  
20 the -- that was the question that was asked of my  
21 predecessor in City of New York v. Wisconsin, as the  
22 subject of an explanation in the Court's opinion in that  
23 case. And I don't think I can improve upon it. But the  
24 demographers and statisticians have means for very  
25 accurately estimating both what the national population is

1 in the country, using something called demographic  
2 analysis, and sub-national population totals, using a  
3 combination of demographic data and the results of prior  
4 censuses.

5 QUESTION: Well, why do we need -- why do we  
6 need a census then?

7 GENERAL WAXMAN: Well, because there -- there is  
8 a requirement in the Constitution that every 10 years the  
9 respective number of persons in each State be determined.  
10 That is the constitutional goal. And the actualization of  
11 that goal is the actual enumeration, which is done every  
12 10 years and which must be done in the means -- manner by  
13 which Congress directs. Now --

14 QUESTION: Well, most people would think that  
15 actual enumeration meant a count. I mean that -- that's  
16 what immediately springs to mind. And how do you get  
17 around that?

18 GENERAL WAXMAN: Well, I think it depends how  
19 you define -- actual enumer -- most people would think  
20 actual enumeration means a count in the sense of  
21 determining the number of persons. If -- if I am told to  
22 conduct an actual enumeration of the people in Camden  
23 Yards during an Oriole -- Orioles game that I'm at, and  
24 I'm given 30 minutes, the best means that I may have to do  
25 that is by a statistical sampling of some sort, rather



1 than trying to count people one by one. I --

2 QUESTION: And you would call that an actual  
3 enumeration; you sort of scan Camden Yards and say, it's  
4 the best I can do, it's 25,000, you would call that an  
5 actual enumeration?

6 GENERAL WAXMAN: Well, the words "the actual  
7 enumeration" I don't think would come up very likely in  
8 the context of Camden Yards. But if one is talking about  
9 what the constitutional phrase means, Justice Scalia, I  
10 think it's very, very important to look at the actual  
11 wording of the constitution -- this constitutional clause,  
12 which is included on page 1a of each of our opening  
13 briefs.

14 The first sentence states the constitutional  
15 goal. That is, that you base apportionment on the total  
16 number of persons in each State.

17 The second sentence actualizes that goal. The  
18 very first words of the second sentence says: The actual  
19 enumeration. That is the -- the -- the determination of  
20 the number of persons in each State. And by what manner  
21 shall it be conducted? Every 10 years and in the manner  
22 by which they shall choose.

23 Those are the words of the Constitution. And in  
24 fact --

25 QUESTION: What -- what --

1 GENERAL WAXMAN: -- they very -- I'm sorry.

2 QUESTION: What, in your judgment, is excluded  
3 by the adjective "actual"? I mean they could have said  
4 "enumeration." It seems to me they went out of their way  
5 to say an actual enumeration.

6 GENERAL WAXMAN: Well, the -- the --

7 QUESTION: If -- if -- if estimation by  
8 statistics or anything else is not excluded, what is  
9 excluded, rolling the dice or -- or what?

10 GENERAL WAXMAN: Well, we know for --

11 QUESTION: It says "actual enumeration." What  
12 is the adjective there -- what does it bring to our -- to  
13 our decision here?

14 GENERAL WAXMAN: "Actual" was defined then as it  
15 is now as that which comprises action. That is, it is --  
16 the enumeration will really be done. The data will be  
17 collected by the Federal Government every 10 years and  
18 tabulated to determine the number of persons in each  
19 State.

20 QUESTION: You say it means not a phony  
21 enumeration, not a false enumeration; is that -- is that  
22 all it means?

23 GENERAL WAXMAN: Well --

24 QUESTION: It has to be a real enumeration?

25 GENERAL WAXMAN: You see, that is our

1 understanding of what it means. It -- it is an emphatic  
2 adjective. They could have said "the enumeration."

3 QUESTION: But for that we would have thought a  
4 phony enumeration would do, had they not put in "actual"?

5 GENERAL WAXMAN: I don't think so. I think if  
6 they had said "The enumeration shall be conducted every 10  
7 years," it would have been clear in light of the goal, and  
8 particularly in light of the concerns that were expressed  
9 during the proceedings of the Constitutional Convention,  
10 that reliance not be had on existing State records, or  
11 efforts by individual States to produce --

12 QUESTION: All right. Isn't -- isn't that sort  
13 of the clue that -- that the word "actual" is not so much  
14 excluding as contrasting with what follows it? And what  
15 follows it is not so much an arbitrary assignment of  
16 representatives, but an assignment which I suppose was  
17 based, just as you said, on State records and what  
18 everybody more or less guessed.

19 GENERAL WAXMAN: That's --

20 QUESTION: Isn't that a plausible explanation  
21 for why the word "actual" is not redundant here?

22 GENERAL WAXMAN: Yes. In fact, it -- it -- the  
23 records of the -- in the records of the proceedings,  
24 the -- the phrase is actually used "actual census," in  
25 contradistinction to, quote, conjectural ratio, which is

1 what the framers understood they were doing in the first  
2 apportionment. That is --

3 QUESTION: General Waxman, do you mean actual  
4 enumeration is to be contrasted with what the article  
5 says, that is, actual enumeration in comparison to three  
6 from Mass -- three from New Hampshire -- was it -- eight  
7 from Massachusetts, 10 from Virginia -- that's the  
8 comparison for the actual enumeration in place of what was  
9 going -- the enumeration going in?

10 GENERAL WAXMAN: That's right. The -- the  
11 actual enumeration refers to the -- a good faith,  
12 empirical effort to determine the number of persons within  
13 each State. Which is the goal of the first sentence of  
14 Article I, Section 2, Clause 3. And the record of the  
15 proceedings, the -- the various debates and the -- and the  
16 successive drafts of what became the Census Clause, are  
17 all focused on determining the number of persons.

18 Edmund Randolph's original suggestion and the  
19 draft Constitution that was approved by the Convention  
20 spoke of determining the number of persons. And none of  
21 the drafts that occurred in between and none of the  
22 debates that occurred in between differed materially from  
23 that or evidenced any concern whatsoever about the means  
24 by which that number would be determined except in two  
25 respects: One, that it be conducted at preset regular



1 intervules -- intervals, which eventually became 10 years;  
2 and, two, that it be conducted in a manner in which  
3 they -- that is, Congress -- shall determine.

4 QUESTION: Well, was there much -- much in the  
5 way of an option or alternatives in 1787 to conducting a  
6 door-to-door census?

7 GENERAL WAXMAN: There certainly were not the  
8 options that are available now in many, many respects.  
9 They didn't have available to them, as we have had since  
10 1940, imputation techniques. They didn't have --

11 QUESTION: Do we know how the early censuses  
12 were taken?

13 GENERAL WAXMAN: We -- we have a very good  
14 record of how the early censuses were taken. And there is  
15 a -- a scholarly text that is cited in our brief -- I  
16 think it's called "200 Years of Census Taking" -- that  
17 goes quite methodically through.

18 But if you look at the first Census Act, the  
19 Census Act of 1790, the very first sentence in that Act --  
20 it's Chapter 2, Section 1 -- essentially equates  
21 enumeration with, quote, cause the number of inhabitants  
22 to be taken. And when it then goes ahead and talks about  
23 the oath that the marshals who would be collecting this  
24 information from each household had to take, that they  
25 would make a just and perfect enumeration and transfer the

1 enumeration to Washington, it then goes on, in Section 3,  
2 to make clear that what it is that they were transferring  
3 was, quote, the aggregate amount of persons.

4 And so we think those two sources, plus the  
5 Capitation Clause of the Constitution, which equates the  
6 actual enumeration with census --

7 QUESTION: They had -- they had estimation  
8 techniques then --

9 GENERAL WAXMAN: They --

10 QUESTION: -- as we have it now. Now you may  
11 say they were cruder, but they certainly had estima --  
12 they must have used estimation techniques for the initial  
13 allocation among the States, right?

14 GENERAL WAXMAN: That -- well, it prob --  
15 apparently, according to the records of the Convention,  
16 was somewhat cruder than that. Because when they actually  
17 did the initial allocation, some States were given  
18 additional members based on the representation that their  
19 population would grow or was likely to grow. That's why  
20 it was a conjectural ratio. But, Justice --

21 QUESTION: But you began -- you began with some  
22 estimation, right?

23 GENERAL WAXMAN: Justice Scalia --

24 QUESTION: And the difference now is that we're  
25 better at estimating than we were then, and that makes

1 estimation okay?

2 GENERAL WAXMAN: The -- the point here -- I  
3 think that there is -- it's easy to say, you know, they  
4 talked about an actual enumeration, not an actual  
5 estimate. But if one understands the words "the actual  
6 enumeration" as an empirical, good faith process to come  
7 up with the best approximation of the number of persons.

8 It may very well have been -- indeed, I think it  
9 was true, as Justice O'Connor suggested -- that the best  
10 means for doing that in 1787 and 1790 and in successive  
11 decades was to get Federal employees to go visit ho -- as  
12 many homes as possible, and ask them how member people are  
13 in -- in those houses.

14 QUESTION: I would think just the opposite,  
15 frankly. I would think that the difficulty of finding  
16 people in the early frontier days was much greater than  
17 the difficulty of -- of actually finding the people today.  
18 You -- you'd have to send somebody out into the wilderness  
19 to see how many mountain men are out there. Why not --  
20 you know, why not estimate how many -- how many went  
21 through St. Louis, or whatever?

22 It seems to me an estimation would have been  
23 much -- much more likely to be used then than it is now.

24 GENERAL WAXMAN: Well, I -- with all respect, I  
25 don't know how likely it would have been to have been used

1 then, Justice Scalia. It's a long, long time before I  
2 have any empirical, firsthand knowledge. But I do know  
3 that there is -- that the Secretary has determined, with  
4 the su -- overwhelming support of the scientific  
5 statistical community, that the actual number of persons  
6 in each State will be determined with a significantly  
7 higher degree of accuracy by the use of the science of  
8 statistical probability than the estimate that will be  
9 produced relying on methods that have been --

10 QUESTION: Is that -- is that what we're  
11 interested in for purposes of apportionment? I mean I  
12 take it that there is no objection to sampling for --  
13 nobody objects, everybody uses sampling for purposes of  
14 giving money out --

15 GENERAL WAXMAN: The -- the -- under Section  
16 141(a) of the --

17 QUESTION: Yeah --

18 GENERAL WAXMAN: -- the Constitution doesn't  
19 speak to --

20 QUESTION: No. But I -- I mean here, there is  
21 no argument among anybody. Everybody agrees, nobody  
22 disagrees with you, you can use sampling for giving out  
23 money. We're only concerned with allocating 435  
24 representatives among the States?

25 GENERAL WAXMAN: Correct.



1           QUESTION: All right. As long as that's the  
2 case, I take it, even if we were more accurate in five of  
3 the States and a little more accurate in two of the  
4 States, in terms of getting to what you call the real  
5 number, that would still be worse for purposes of  
6 apportionment. Because if we're off by 50 percent across  
7 the board, it works perfectly. If we're off by 80 percent  
8 across the board, it works perfectly. It's the same  
9 division of representatives.

10           GENERAL WAXMAN: Your -- your --

11           QUESTION: It's -- it's only if -- it's only if  
12 you -- you get differences in the errors that it begins to  
13 make a difference.

14           GENERAL WAXMAN: If I understand your point --

15           QUESTION: Yeah.

16           GENERAL WAXMAN: -- it's precisely the same  
17 basis for Secretary Mosbacher's determination in not -- in  
18 1991, not to adjust the physical enumeration with the  
19 results of a post-enumeration survey. And we were here  
20 just a few years ago defending the reasonable -- the  
21 lawfulness of that determination as a reasonable  
22 determination, based on the fact that the Secretary was  
23 unable to conclude that although the -- the total popu --  
24 there would be greater total accuracy if the physical  
25 enumeration results were adjusted, he could not conclude

1 that there would be greater distributional accuracy.

2 QUESTION: All right. So now you're saying  
3 there -- there -- all these scientific groups agree that  
4 if you're allowed to go ahead with this sampling there  
5 will be greater distributional accuracy; that is to say,  
6 the relationship of Indiana and California will be,  
7 compared one to the other, closer in terms of accuracy?

8 GENERAL WAXMAN: That -- that is precisely the  
9 point.

10 QUESTION: Yeah.

11 GENERAL WAXMAN: And not only has the Census  
12 Bureau and three National Academy of Sciences panels, that  
13 Congress directed the Census Bureau to work with and refer  
14 to, concluded that, but we've -- we've cited in our reply  
15 brief the General Accounting Office has cited that  
16 particular strength of this as a principal benefit of  
17 conducting the 19 -- the 2000 Census in the manner in  
18 which the Secretary proposes he do it.

19 QUESTION: Then can I go back to the Chief  
20 Justice's question? My -- my understanding of this is  
21 that on method one you will get some mail surveys back --  
22 think of a particular census block, I guess if -- maybe  
23 there are 30 housing units -- I don't know if I have the  
24 right terminology.

25 GENERAL WAXMAN: Approximately.

1           QUESTION: All right. So you'll get, like,  
2 questionnaires back. And you'll count people in terms of  
3 the answer to the questionnaire. And then where you don't  
4 get a questionnaire back, you send somebody to the house.  
5 And then when you don't get either, you do a little  
6 estimating. That's the first method.

7           GENERAL WAXMAN: Well --

8           QUESTION: Is that right, basically?

9           GENERAL WAXMAN: -- it's --

10          QUESTION: Crudely?

11          GENERAL WAXMAN: -- it's right to the extent  
12 that the -- the Census Bureau has determined, for a  
13 variety of reasons -- that I can explain to the Court if  
14 it wishes -- the Census Bureau has determined that, unlike  
15 in 1990, when it conducts the non-response follow-up  
16 portion -- that is, who didn't mail in anything from their  
17 home or from a mall, or who didn't call us or send us  
18 their information by Internet -- they are not going to  
19 attempt to have a physical follow-up visit with every home  
20 in every block.

21          QUESTION: All right. Yeah, but this -- no,  
22 this is -- so that -- let's think of census block A. And  
23 census block A roughly we counted in the way we did. And  
24 then there are certain hundreds of thousands of those  
25 census blocks all over the country -- or maybe millions.

1 Now, in method two, we're going to take census block B,  
2 which is one of our 750,000 sample blocks.

3 GENERAL WAXMAN: There's 25,000 census blocks.

4 QUESTION: Or 25,000 sample units. It's one of  
5 the cells that we're really going to look at. And there,  
6 I take it, we physically go out with people and literally  
7 dig up everybody. I mean we go not just door to door, we  
8 really -- we really do this thoroughly.

9 Is that what happens?

10 GENERAL WAXMAN: I don't know that we'll be  
11 going to the extent of digging up everybody, but --

12 QUESTION: Yes, right.

13 (Laughter.)

14 GENERAL WAXMAN: But I think -- I have -- I --

15 QUESTION: We've tried to get away from that,  
16 yes.

17 (Laughter.)

18 GENERAL WAXMAN: When we talk -- when we talk  
19 about actual residents, we're generally referring to  
20 people who have --

21 QUESTION: All right.

22 GENERAL WAXMAN: -- the ability to be vertical.

23 QUESTION: So, but in any case, as to that --

24 GENERAL WAXMAN: But can I -- can I just --

25 QUESTION: Yes.



1 GENERAL WAXMAN: Can I just correct one --

2 QUESTION: Yes.

3 GENERAL WAXMAN: I want to make sure that the  
4 Court is not under a misapprehension as to how the ICM is  
5 going to work.

6 For the 25,000 blocks that are chosen for retest  
7 during the second -- in the ICM phase, the initial  
8 enumeration will have a physical visit in the non-response  
9 follow-up phase to every home. That is, there will be no  
10 sampling for non-response follow-up in the 25,000 blocks  
11 that are going to be the subject of the ICM. Because the  
12 purpose of the ICM is to determine the accuracy or  
13 determine the quality of the initial enumeration effort.

14 QUESTION: Now --

15 GENERAL WAXMAN: Now I'm ready for your  
16 question.

17 QUESTION: -- in the second -- we're at the  
18 second one -- and the second one, in our 750,000 sample  
19 blocks, we really are thorough. We do real, actual  
20 enumeration beyond belief. Is -- is that right? I mean  
21 it's really very, very actual enumeration. It's certainly  
22 the most complete actual enumeration.

23 GENERAL WAXMAN: It --

24 QUESTION: And then we extrapolate from those  
25 750,000 to the X million that we didn't have time to do

1 that thorough on -- to do that thorough a count on?

2 GENERAL WAXMAN: Well, what will happen as a  
3 result of -- in the ICM process, the -- the results of the  
4 ICM and the results of the initial enumeration phases will  
5 be very carefully compared. The differences will be  
6 reconciled, and -- according to different categories of  
7 persons, according to demographic characteristics,  
8 according to post-strata.

9 QUESTION: So my question was the same as the  
10 beginning. If you were going to do this with the second  
11 phase, what -- what at that point does the first phase  
12 have to do with your final answer?

13 GENERAL WAXMAN: Well, the first phase -- one  
14 cannot arrive at the -- under the -- under the Census 2000  
15 plan, one cannot arrive at the number of persons in each  
16 State without both phases.

17 QUESTION: May I ask --

18 GENERAL WAXMAN: It -- you -- you just couldn't  
19 do it -- we're not proposing to do what sometimes has been  
20 referred to as a sample census. That is, we have a phase  
21 at which we are attempting to obtain information from  
22 every household in the United States, and a phase -- and  
23 this is what aggrieves the plaintiffs -- a phase at which  
24 we will use a sample to adjust for errors that inevitably  
25 occur in the initial traditional physical means of

1 enumeration.

2 QUESTION: General Waxman --

3 QUESTION: May I ask an elementary and rather  
4 stupid question? As of what date during the year is the  
5 census supposed to determine the number of people?

6 GENERAL WAXMAN: April 1st is Census Day.

7 QUESTION: So you don't count people born after  
8 April 1st?

9 GENERAL WAXMAN: No. Although one of the great  
10 sources of error is that people fill out their  
11 questionnaires later or, in non-response follow-up,  
12 somebody may come to the household in July or September  
13 and they count somebody who was born after that day, or  
14 somebody who had died the day before. Or they show up to  
15 do the post-enumeration -- the -- the non-response  
16 follow-up in South Florida in July and discover that all  
17 the residences are apparently vacant.

18 I mean one of the things that I think it's  
19 important for the Court to recognize, because what the  
20 Census Bureau is proposing to do now is something that is  
21 significantly different than what has been done before.  
22 But it's not as sharply different as the other side, I  
23 think, would suggest. Since 19 --

24 QUESTION: General Waxman, may I -- may I ask  
25 you something that relates to the questions you were asked

1 by Justice Breyer? And your answers confused me. You  
2 said, of course, for other purposes, you can use the  
3 method that you say is the -- the one that the scientists  
4 agree on. Would you -- suppose you were to lose this  
5 case, would you indeed conduct two census -- censuses? I  
6 thought one of your positions were that, practically, the  
7 answer to this question drives what you would do for the  
8 other purposes. Or would you conduct two censuses?

9 GENERAL WAXMAN: Practically, the answer to this  
10 question -- if the Court agrees with us, will make  
11 conducting the decennial census much easier, cheaper and  
12 more efficient for the Bureau. But if this Court were to  
13 determine that sampling, neither sampling in the  
14 non-response follow-up stage or in the national vacancy  
15 check stage or -- or ICM, could permissibly be used under  
16 the -- under the statute or the Constitution for determ --  
17 for apportionment purposes, the Secretary would be -- is  
18 required under Section 195 to use sampling in  
19 census-taking for all other purposes; that is, intrastate,  
20 district --

21 QUESTION: But if the decision went the other  
22 way, couldn't you say, well, it's not feasible to use it  
23 for the other purposes, because it would cost so much to  
24 run it two ways?

25 GENERAL WAXMAN: I think, Justice -- Justice



1 Ginsburg, it's clear that if we lost this case on the  
2 merits, the Census Bureau would proceed and conduct the  
3 census for -- for apportionment purposes without the use  
4 of any sampling in the non-response follow-up stage.

5 QUESTION: They'd do it like they always have  
6 done it.

7 GENERAL WAXMAN: They would -- they would do  
8 that the way they did it in 1990.

9 QUESTION: Yeah.

10 GENERAL WAXMAN: They would then -- the  
11 Secretary would then need to determine whether it is  
12 feasible -- and it certainly does not seem infeasible --  
13 to go ahead and conduct the ICM -- that is, the integrated  
14 coverage measurement survey, and adjust all other State --  
15 all other population totals -- that is, for Federal  
16 funding purposes or districting purposes -- and produce --

17 QUESTION: Are there any other purposes -- the  
18 other purposes -- the briefs mention redistricting,  
19 intrastate redistricting and distribution of Federal  
20 funds -- are there any other purposes, or are those  
21 three --

22 GENERAL WAXMAN: Those are the -- those are the  
23 principal purposes of the decennial census that the  
24 Secretary is required and authorized to conduct under  
25 Section 141(a). There are other provisions of the Census

1 Act that authorize the Secretary and the Bureau to conduct  
2 empirical surveys and censuses for other persons. For  
3 example, upon request by any State or local government.

4 But the point is that -- and this actually goes  
5 to the -- directly to the standing of the Glavin  
6 plaintiffs -- the point is that no matter what this Court  
7 decides with respect to the issue presented in this case,  
8 the Secretary will be required, if he considers it  
9 feasible, to use sampling in determining all population  
10 totals for all purposes other than the apportionment of  
11 representatives among the States.

12 QUESTION: General, are you going to get to  
13 standing?

14 GENERAL WAXMAN: I was just waiting to be asked.

15 QUESTION: I -- yes.

16 QUESTION: Just before you do, may I ask about  
17 the posture of this case? It was decided on summary  
18 judgment. So I thought we must therefore assume  
19 everything that you say about this leading to a more  
20 accurate count is so. Of course that was never tested in  
21 an adversarial way.

22 GENERAL WAXMAN: That is absolutely correct.

23 With respect to standing, let me just say the  
24 following few things. The House of Representatives is  
25 attempting to direct, through litigation, the execution of

1 the census laws. But under our system of separated  
2 powers, legislation, not litigation, is the means by which  
3 Congress gets this done.

4 The Constitution provides that the census shall  
5 be conducted in such manner as Congress shall, by law,  
6 direct, not by lawsuit.

7 With respect to the Glavin plaintiffs, they have  
8 virtually abandoned the claim that they will suffer injury  
9 in any manner protected by the Constitution or the Act.  
10 None of them has established that it is imminent, or  
11 certainly impending, that the Secretary's plan will cause  
12 his or her State to lose a seat.

13 QUESTION: Well, I thought -- now wait a  
14 minute -- I thought there was evidence in the record from  
15 Indiana that it was virtually certain that Indiana will  
16 lose a seat under the new plan. At least that's the  
17 expert witness's affidavit.

18 GENERAL WAXMAN: Justice O'Connor --

19 QUESTION: Isn't it?

20 GENERAL WAXMAN: -- that is what the ex -- that  
21 is what Dr. Webber --

22 QUESTION: For Indiana?

23 GENERAL WAXMAN: For Indiana, he concluded that  
24 it was virtually certain.

25 QUESTION: Right.

1           GENERAL WAXMAN: It is sig -- very -- we  
2           controverted that, both in terms of challenging the  
3           methodology that he used and his specific conclusion about  
4           Indiana. And it is perhaps for that reason that the  
5           district court did not find that it was likely or imminent  
6           that Indiana would lose a seat.

7           And here is what Mr. Glavin's counsel told the  
8           court about Indiana in the court below, at page 85 of the  
9           transcript. He said: The government spent all its time  
10          disputing whether or not Indiana was going to lose a  
11          congressional seat on the basis of Dr. Webber's data. To  
12          simplify this case, we'll concede it; Indiana is not going  
13          to lose a House seat. I don't care. It doesn't matter.  
14          Because there's intrastate vote dilution.

15          We don't think that for purposes of summary  
16          judgment against the government the district court could  
17          conclude, or this Court could conclude, that it was  
18          imminent or certainly impending that Indiana would likely  
19          lose a seat.

20          QUESTION: Well, let's -- let's think for a  
21          moment, General Waxman. I mean the -- the census has to  
22          be taken, one way or another, I guess, next spring. Now  
23          if the Court were to reverse the district court here, not  
24          on a question of law or not on a question of written law,  
25          but on the grounds that it shouldn't have granted summary



1 judgment, it should have itself decided factual issues in  
2 dispute, I daresay we would have no definitive  
3 pronouncement on the legal questions involved here  
4 probably before -- we would do well to get one in June.

5 GENERAL WAXMAN: Well, I -- that is true as far  
6 as you've taken it, Mr. Chief Justice. Our position is,  
7 leaving aside -- even if one accepts the facts as alleged  
8 below and not conceded below, the district court made  
9 findings of fact. It did not find that Indiana was likely  
10 to lose a seat. And there simply is not a cause to  
11 conclude that any other State is either imminent or  
12 actually impending in loss of a seat under the method of  
13 equal proportion. And the reason is --

14 QUESTION: Because that seems to me to  
15 contradict your argument on the merits. The first half  
16 hour you were saying how important it is to do this. And  
17 now you're saying it doesn't make any difference.

18 GENERAL WAXMAN: No, not at all. It's very  
19 important to do it. I am just -- we are suggesting -- and  
20 I will at this point be the first to say that I may be  
21 wrong on this. This Court, over the last term, has  
22 disagreed with the government's position on standing in  
23 many cases. But it seems to us that the plaintiffs in  
24 this case are seeking an advisory opinion. The Glavin  
25 plaintiffs, none of them have shown the -- what this Court

1 considers injury in fact, that --

2 QUESTION: Who -- who could challenge a disputed  
3 census procedure then?

4 GENERAL WAXMAN: Well, I think, certainly after  
5 the census is taken, it could be challenged in the way  
6 that -- that --

7 QUESTION: Well, but -- well, what good does  
8 that do anybody to -- you mean to say do a census over  
9 again in 1993 because it wasn't done correctly in 1990?

10 GENERAL WAXMAN: No, I don't think a remedy  
11 would be to require that the census be done over again.  
12 And this Court has -- has -- has considered challenges to  
13 the means by which the census has been conducted after the  
14 fact on several occasions.

15 QUESTION: How would you challenge it after the  
16 fact? You -- you would compare the figures that -- that  
17 you came up with under this new system with what? Since  
18 you haven't done it under the old system --

19 GENERAL WAXMAN: Well --

20 QUESTION: -- how can you show that you've been  
21 injured?

22 GENERAL WAXMAN: The -- you have -- you have to  
23 prove that you likely -- that your State like --

24 QUESTION: No, but your experts would come in,  
25 just as they came in below, and say well, you were using

1 the 1990 census -- census figures, that -- that's --

2 GENERAL WAXMAN: Not -- not --

3 QUESTION: -- that's what was used in rebuttal  
4 to the Indiana argument, that, well, you were using the  
5 1990 figures; things have changed since 1990.

6 GENERAL WAXMAN: Not at all. Not at all. The  
7 Census Bureau will publish, as it's required to by law  
8 after the census is conducted, the results of the mail-in  
9 procedures, the results of the non-response follow-up  
10 results; that is, both the physical efforts at  
11 non-response follow-up and the 100 percent non-response  
12 follow-up, using ran -- sampling on a random basis.

13 All of those numbers will be available to  
14 plaintiffs after the fact --

15 QUESTION: But you will --

16 QUESTION: Some -- some court would decide what  
17 the population of the United States was in 19 -- in 2000?

18 GENERAL WAXMAN: Mr. Chief Justice, courts use  
19 imperfect census data all the time, particularly in  
20 districting -- redistricting cases that occur long after  
21 the census is conducted. And I acknow -- we acknowledge  
22 that devising remedies for a violation is frequently a  
23 difficult task.

24 What the Court probably should do is re -- would  
25 do in that instance is remand to the Secretary for a

1 determination of the likely consequences, if any, under  
2 the method of equal proportions. It may very well be --  
3 we don't have to reach it in this case -- that the 90  
4 percent number that is, quote, the way it's always been  
5 done in the past, is sufficient to constitute an actual  
6 enumeration.

7 I'd just like to say a few words about the --  
8 the statute, where -- which I haven't had the opportunity  
9 to address today. But it's our view that Section 141(a)  
10 of the Census Act has -- it could not possibly be clearer.  
11 It is the only command in the code for the Secretary to  
12 conduct the decennial census and the apportionment census.  
13 And the language has an entirely --

14 QUESTION: Well, but you have to read Section  
15 195, too, don't you? You -- you have to --

16 GENERAL WAXMAN: Exactly.

17 QUESTION: -- apply both.

18 GENERAL WAXMAN: You -- you --

19 QUESTION: And certainly 195 was thought for  
20 many years to preclude the use of sampling for purposes of  
21 apportionment.

22 GENERAL WAXMAN: We think that the only way to  
23 harmonize the reading of the two statutes is to read the  
24 except proviso of 195 as meaning what it says. Which  
25 means this isn't saying anything about the apportionment



1 census.

2 QUESTION: Well, don't you think that before it  
3 was amended in '76, that everyone thought it precluded  
4 using sampling?

5 GENERAL WAXMAN: Before it was amended in '76,  
6 Justice O'Connor, everybody thought --

7 QUESTION: But didn't they? Didn't they think  
8 that?

9 GENERAL WAXMAN: I'm answering your -- I'm  
10 trying to answer your question. Everybody thought that  
11 sampling in the apportionment census -- at least sampling  
12 in lieu of an effort to reach everybody -- was prohibited.  
13 What we submit to the Court is that it was not that  
14 clause -- sampling was prohibited before 195 was enacted  
15 because -- for two reasons. There was a provision,  
16 Section -- old Section 25(c) of the Census Act -- that  
17 required that an enumerator visit every house and record  
18 the number of persons present.

19 And a sample in lieu of that would have been  
20 impermissible. There was also a -- a determin -- I don't  
21 know about a determination -- but both the Congress, in  
22 '57, and the Bureau, in '57, indicated that a sample  
23 census or a sample survey would not be consistent with the  
24 statutory term "census." And in 1976 -- well 25(c) was  
25 repealed in 1964. And with respect to the implicit

1 meaning of the word "census," in 1976, Congress said in  
2 the most direct way it could that the census should be  
3 conducted in such form and content as the Secretary may  
4 determine, including the use of sampling procedures.

5 Now, the reading that the other side wants to  
6 give this would -- that is, that Section 195 prohibits  
7 sampling for apportionment purposes and requires it where  
8 feasible for all other purposes, deprives that amendment  
9 of Section 141(a) of any meaning at all. There's nothing  
10 left for those words to do.

11 And what's most significant to us is that by the  
12 time Congress enacted this amendment in 1976, the Census  
13 Bureau had been using imputation techniques -- in 1940, in  
14 1950, in 1960, in 1970, and in 1970 -- and this was  
15 known -- this was published by the Census Bureau and the  
16 subject of discussions in mentions in House reports and in  
17 hirings -- the Census Bureau had used statistical sampling  
18 in two different respects in the 1970 Census to correct  
19 the State population totals by one and a half million  
20 people. There was a sampling used in the national vacancy  
21 check and sampling used in something -- in the Southern  
22 States -- in something called Peapock.

23 QUESTION: I mean the obvious thing which I  
24 think they'll say as soon as they begin to talk, your  
25 opponents, is -- is that 141 is an introductory section;

1 141 says take a census of population. Then 143 says take  
2 a census of agriculture. And 161 says take a census of  
3 government. And then, when you get to 193, at the end, it  
4 begins to tell you more detail.

5 And so they'll say that's -- that's what they  
6 say in their briefs -- but what -- what is your response  
7 to that, that these introductory sections give the basic  
8 authorization, and of course they give it broadly, and  
9 then the later sections limit how you do it? That's  
10 their -- I think that's, as I understand it, a basic  
11 argument that they make.

12 GENERAL WAXMAN: Our first argument is that  
13 whichever provision is more specific or more general, the  
14 first principle of statutory construction is to read the  
15 two provisions to the extent -- in a manner in which  
16 harmonizes them if that can be done. But if this comes  
17 down to specific versus general, Section 141(a) is much  
18 more specific. It is the only provision that directs or  
19 allows the Census Bureau to conduct the apportionment  
20 census.

21 In fact, 141(b) makes it clear that's what's  
22 being required in 141(a) is the apportionment census.  
23 Section 195, which talks about sampling, refers not just  
24 to the decennial census or censuses in general, it refers  
25 to anything that the Secretary will do under this chapter.

1           May I reserve the remainder of my time, please?

2           QUESTION: Yes, you may, General Waxman.

3           Ms. Mahoney, we'll hear from you.

4           ORAL ARGUMENT OF MAUREEN E. MAHONEY, ESQ.

5           ON BEHALF OF THE APPELLEES IN NO. 98-404

6           MS. MAHONEY: Mr. Chief Justice, and may it  
7 please the Court:

8           I'd like to turn first to the issue of  
9 justiciability. Congress passed the '98 Appropriations  
10 Act to authorize this litigation to proceed in this Court  
11 before the census was taken. Because it found it was  
12 absolutely critical to protect the concrete interests of  
13 the House of Representatives and also to authorize private  
14 parties, who may be injured as well, to bring this  
15 controversy to the Court so it could be resolved in time  
16 to provide meaningful relief.

17           The House does not expect this Court to find  
18 that it has standing to resolve the issue of standing if  
19 the private parties have -- have established standing and  
20 if that judgment is affirmed. It would be perfectly  
21 appropriate, and we would agree that the Court should  
22 simply not reach the issue of the House's standing in  
23 those circumstances.

24           But if for any reason this Court finds that the  
25 private parties do not have standing, it should find that



1 the House does; that the district court properly  
2 determined that in these rare and unusual circumstances  
3 that Congress acted well within its constitutional  
4 authority to provide a cause of action for the House to  
5 come to court to resolve this -- this legal issue, this  
6 legal dispute which has created an impasse between the  
7 branches, and to provide relief so that the House will  
8 receive the information that it has requested and needs to  
9 perform its legislative functions and so that its own  
10 composition will not be unconstitutionally and unlawfully  
11 altered.

12 These are concrete interests. These are  
13 interests which are cognizable. And -- and there is no  
14 bar to the resolution of inter-branch or  
15 inter-governmental disputes under this Court's precedence.

16 QUESTION: Ms. Mahoney, what is your response to  
17 the -- I guess to the objection that if this is a  
18 sufficient basis for standing here, the Congress, as a  
19 practical matter, can place an obligation on some agency  
20 of the executive branch to provide it with information on  
21 a concrete subject; and if it ends up not liking the --  
22 the information that it gets, in effect, can sue the  
23 executive branch on matters that certainly impinge on the  
24 respective policy responsibilities of the two branches?

25 Are we opening up a very large door if we accept

1 your argument?

2 MS. MAHONEY: I don't think so, Your Honor, for  
3 several reasons.

4 First of all, there has to be a substantial  
5 nexus between the challenge to the executive branch  
6 conduct and the request for information. And that of  
7 course is satisfied here because, since the beginning of  
8 our history, Congress has always relied upon the executive  
9 branch to provide it with a report of the population  
10 numbers, determined in accordance with the constitutional  
11 requirement for an actual enumeration, and the Census Act  
12 requirements that it be based on an actual count. And so  
13 I -- I think that that nexus is clearly satisfied here.

14 Second, I think this Court could, and should,  
15 find that the only kinds of actions that should be  
16 challenged -- subject to challenge -- would be those  
17 executive branch actions which have traditionally been  
18 subject to challenge. And again, here that is clearly  
19 satisfied --

20 QUESTION: By whom? By whom?

21 MS. MAHONEY: By parties who have concrete  
22 injuries.

23 QUESTION: Yeah, but in this case, there is no  
24 tradition of challenge by the House of Representatives.

25 MS. MAHONEY: Your Honor, there's no tradition

1 of challenge by the House. But in United States v. Nixon,  
2 this Court said that what you look to is not -- not the --  
3 not the caption. You look to see whether the -- the  
4 issues, whether the -- the challenge to the conduct is one  
5 which has traditionally been reviewed or not.

6 And there the issue was whether the President  
7 had properly invoked ex -- executive privilege --

8 QUESTION: Well, but the answer is going to be  
9 no across the board here, isn't it? I mean this is --  
10 this a the first-time thing.

11 MS. MAHONEY: Well --

12 QUESTION: There's no tradition of challenge --  
13 as I understand it, there's no tradition of challenge  
14 either by the House or by private parties.

15 MS. MAHONEY: There is a tradition of  
16 challenging the census, Your Honor -- census decisions  
17 that have been made. This Court, in Franklin and Montana  
18 and in Wisconsin, entertained challenges by private  
19 parties to the decisions that had been made by the  
20 executive with respect to the conduct of the census.

21 QUESTION: Did -- have we done it before this  
22 past census?

23 MS. MAHONEY: Have you done it -- excuse me?

24 QUESTION: Before this past census.

25 MS. MAHONEY: Well, Your Honor, the --

1 QUESTION: How far back does it go?

2 MS. MAHONEY: Those three cases all came, I  
3 think -- I believe since 1990. But they specifically  
4 rejected the executive's claim that those were  
5 non-judicialable --

6 QUESTION: It's not much of a tradition.

7 (Laughter.)

8 QUESTION: What --

9 QUESTION: Of course, they were all after the  
10 census figures were available.

11 MS. MAHONEY: Yes, Your Honor. But the -- the  
12 really -- I think the district court fully considered the  
13 issue of ripeness, and found that here there is really no  
14 dispute that the use of sampling in this case is likely --  
15 is -- is -- is going to lead to an -- an alteration in the  
16 apportionment of the House of Representatives. And -- and  
17 therefore, to present it with a prospect where not only  
18 has its composition been unlawfully altered, but it's also  
19 been deprived of the information that it would need in  
20 order to correct that problem. And that's the -- that  
21 really is the purpose of the report.

22 QUESTION: Ms. Mahoney, in -- in what other  
23 areas have we stepped in to resolve a dispute between the  
24 two political branches rather than letting them duke it  
25 out?



1 MS. MAHONEY: Yes. And of course we did try to  
2 duke it out, Your Honor. That -- those efforts were  
3 exhausted.

4 QUESTION: Well -- well, the President thinks  
5 that you've succeeded in duking it out.

6 MS. MAHONEY: The President signed this  
7 legislation. We came to court because this was a -- a  
8 reasonable way to resolve this.

9 The two cases, Your Honor, where I believe that  
10 are most germane would be United States v. Nixon, where of  
11 course the controversy there -- there were only two  
12 parties in that case before this Court -- it was a  
13 subordinate executive branch official and the -- the  
14 President himself --

15 QUESTION: Yeah, it was the executive branch  
16 against itself. Give me a case where it is the Congress  
17 against the President. Or one house of the Congress  
18 against the President.

19 MS. MAHONEY: There are two cases. Chadha was a  
20 case. It did have a private party. But the -- but the --

21 QUESTION: Give me a case without a private  
22 party.

23 (Laughter.)

24 MS. MAHONEY: Senate Select Committee v. Nixon.  
25 It was not heard by this Court, but it was a statute, in

1 1974, that authorized the Senate Committee to bring the  
2 action in court to challenge the assertion of executive  
3 privilege. There were no private parties.

4 The -- the D.C. Circuit did exercise  
5 jurisdiction in that case. And --

6 QUESTION: When was this decided?

7 MS. MAHONEY: I believe it was 1974.

8 QUESTION: Oh, during the period when the D.C.  
9 Circuit was notorious for its expansive view of standing.

10 (Laughter.)

11 MS. MAHONEY: Well, Your Honor, in that case,  
12 the statute specifically authorized review. The executive  
13 branch has -- has long, I think, acknowledged their view  
14 that in fact the Congress does have the power to come to  
15 court in order to enforce subpoenas. The -- an opinion of  
16 the Office of Legal Counsel has taken that view.

17 And really, this position is -- is firmly rooted  
18 in this Court's precedence throughout this century that  
19 says the Constitution does afford Congress with the means  
20 necessary to take the -- to use compulsory process to make  
21 sure that it gets the information that it needs for its  
22 legislative functions.

23 QUESTION: I don't like injecting us into --  
24 into a battle between the two political branches. I -- I  
25 think they may survive. I'm not sure we will.

1 MS. MAHONEY: Your Honor, I think that in these  
2 circumstances where it is a narrow cause of action, it is  
3 one that is expressly created for this precise purpose,  
4 where the branches have reached an impasse, have tried to  
5 work it out, and it is --

6 QUESTION: Well, they -- they haven't reached an  
7 impasse, because Congress basically has enacted a statute,  
8 and then gives its own separate houses the standing to  
9 challenge it. That -- that -- it seems to me that  
10 destroys all discipline that's required for a separation  
11 of powers system. And I -- I don't know how -- how would  
12 you confine this? Well, it's -- it's a census. It's  
13 important because of how the House of Representatives  
14 itself is composed. I mean is that -- is that the  
15 limiting principle?

16 MS. MAHONEY: Your Honor, the fact that it is  
17 the composition of the House itself is very important  
18 here. Because that is a concrete interest under this  
19 Court's decision in 67th Minnesota Senate, where it found  
20 that a State legislative body that was directly affected  
21 by orders pertaining to its own composition did have  
22 standing, did have cognizable interests --

23 QUESTION: But the national separation of powers  
24 was not involved in that case?

25 MS. MAHONEY: No, Your Honor, it wasn't. But it

1 did go to the issue -- I think we have to separate the  
2 issues here. And -- and one is whether these are  
3 cognizable at all within an Article III sense. And I  
4 think certainly this Court's decision in -- in Beans  
5 establishes that the compositional interests, a  
6 legislative body's compositional interest, is cognizable.  
7 And it is firmly rooted in the text. It is something that  
8 Cong -- that the House has guarded throughout its history  
9 and has made every effort to make sure that the size of  
10 the delegation conformed to the constitutional  
11 requirements.

12 And of course here that constitutional  
13 requirement is that the numbers be determined in  
14 accordance with an actual enumeration. And --

15 QUESTION: Does it matter at all that that  
16 language, "actual enumeration," was just put in there by  
17 the committee on style, when the drafting history shows  
18 that what was used in the Constitution was "numbers"?  
19 Then it goes to the committee on style, and it comes back  
20 "actual enumeration." Does that matter?

21 MS. MAHONEY: Well, Your Honor, I think in -- in  
22 the Nixon case, this Court -- the Judge Nixon case -- this  
23 court said that of course the version that was ultimately  
24 adopted by the Convention is the one that is entitled to  
25 the most weight. And I think if we look at the -- at the



1 way this proceeded, it was first that a census be taken.  
2 It was then that the numbers be taken. And it was then  
3 that an actual enumeration be taken.

4 And that it -- the best reading, of course, is  
5 that the actual enumeration was most consistent with what  
6 was intended from the outset. And if we look to what the  
7 1790 Congress thought those words meant -- I'd like to  
8 expand on what the Solicitor General said here, because  
9 I -- I think perhaps he left the impression that there was  
10 authority to use estimates.

11 And in fact it's quite the contrary. That even  
12 though at the time the -- the States were very familiar  
13 with how to do estimations -- and Thomas Jefferson himself  
14 had done an estimation of the population of Virginia in  
15 1792 that is thought to have been very accurate -- the  
16 1790 Act specifically requires that the marshals only  
17 prepare schedules that list every household in the Nation,  
18 identify the number of people in the household, the sex  
19 and the age, and provides that the -- the -- they can only  
20 report the aggregate amount of each description of persons  
21 within their respective districts. In other words, they  
22 can only report the people who have been described.

23 And Madison, at the time that this was adopted,  
24 referred to the fact in the debates that -- of the  
25 difficulty of taking the census in, quote, the way

1 required by the Constitution. And I think there really is  
2 not much doubt, from the 1790 practice, which of course  
3 has been followed all throughout history --

4 QUESTION: Ms. Mahoney, can I ask you a question  
5 that's sort of the converse of the question Justice Scalia  
6 asked about what does "actual" mean if it doesn't mean,  
7 you know, the very narrow confinement? What -- what, in  
8 your view, would be permissible if a census-taker got no  
9 response from a particular address, went to -- say it's a  
10 large apartment complex and everybody in the neighborhood  
11 knows it's -- they have lots of undocumented aliens that  
12 live in there, but nobody is going to tell you how many  
13 because they just don't want to reveal the information?  
14 What does -- what does the Constitution permit the  
15 census-taker to do to find out how many people live in  
16 that apartment complex and other similar apartment  
17 complexes?

18 MS. MAHONEY: I think they can ask the  
19 neighbors. They can ask the postman.

20 QUESTION: And say no -- they say, we're not  
21 going to talk. We --

22 MS. MAHONEY: They --

23 QUESTION: -- we don't want to tell you about  
24 what's going on.

25 MS. MAHONEY: Your Honor, they can't guess.

1 When it's all said and done --

2 QUESTION: So they -- what do -- do they put  
3 down zero then?

4 MS. MAHONEY: That's right.

5 QUESTION: Okay.

6 MS. MAHONEY: It is an objective standard. The  
7 whole point here was that the Framers said, we want an  
8 objective standard. We do not want something that will  
9 invite subjective --

10 QUESTION: But they would know that there were a  
11 lot of people in there. They couldn't find out how many.  
12 So the objective standard would require you list it as  
13 zero?

14 MS. MAHONEY: I think so, Your Honor.

15 QUESTION: Even if the lights go on and off in  
16 the evening?

17 (Laughter.)

18 MS. MAHONEY: Your Honor, it certainly -- maybe  
19 in some sense you could say it would be more accurate to  
20 put one than zero. But we know that in 1790, I mean if a  
21 bridge went out and they couldn't get to a town, they  
22 couldn't put -- put it down on their schedule unless they  
23 had the name and could identify the people. And they were  
24 subject to fines if they included --

25 QUESTION: Ms. Mahoney, I know we're going over

1 to the merits now, but I would like you just to stay with  
2 the standing a moment longer. Because I don't see a  
3 stopping point, other than Congress says, gee, this is  
4 really important; we want you to resolve it, Court. And I  
5 also don't catch what you said about the legislature  
6 exhausted its legislative remedies.

7 Well, it would have -- it didn't -- it didn't  
8 pass the first bill over the President's veto. So it's  
9 not a question that -- it failed in that endeavor. Could  
10 the legislature even now say, well, we don't like what the  
11 President and the Bureau of Census is doing, so we're  
12 going to say no funds for the Census; what about that  
13 remedy?

14 MS. MAHONEY: Your Honor, then -- then the House  
15 will suffer the injury.

16 The problem here, unlike most circumstances, is  
17 the House's injury cannot be solved through its own  
18 unilateral action.

19 QUESTION: Sure it can.

20 QUESTION: But it could if they had enough  
21 votes.

22 QUESTION: It can -- it can refuse to  
23 appropriate money for the White House staff. It can say,  
24 we're not going to give you any money. There -- there are  
25 900 ways that the House can -- can stymie the President if



1 it has the political will to do it. And you're telling me  
2 it doesn't have the political will, so we should solve the  
3 problem for the House.

4 MS. MAHONEY: Your Honor, if I could go first to  
5 the example of withholding money for the Census. If -- if  
6 the House withholds money for the Census --

7 QUESTION: Well, I wouldn't do that. I wouldn't  
8 do that. I'm withholding money for the White House.

9 (Laughter.)

10 QUESTION: The White House staff.

11 MS. MAHONEY: If I could -- if I could answer  
12 Justice Ginsburg's question. Withholding money for the  
13 Census of course will cause the harm. Because the House  
14 will be un -- unlawfully composed in 2 -- in 2002.

15 QUESTION: I'll go with Justice Scalia's,  
16 withhold money whatever.

17 MS. MAHONEY: Withholding -- well, what we can  
18 say, Your Honor, is that they tried to pass legislation  
19 which would reaffirm the prohibition in Section 195. In  
20 fact, it said 195 prohibits the use of sampling for  
21 purposes of apportionment. It did that in disaster relief  
22 legislation. And the President, nevertheless, vetoed it.

23 QUESTION: The wonderful thing about not  
24 appropriating money is that you don't have to pass  
25 legislation. All you have to do is not pass legislation.

1 (Laughter.)

2 MS. MAHONEY: Your Honor --

3 QUESTION: You see. And that's the way Congress  
4 usually makes its will felt in these disputes with the  
5 President, who has the veto power. It says, okay, you  
6 can't veto non-legislation. We are not going to  
7 appropriate money for the White House. Why can't the  
8 House do that?

9 MS. MAHONEY: Your Honor, I think that this has  
10 become an intractable controversy. It is one where there  
11 really is no reasonable solution. The parties determined  
12 that there were concrete injuries here and that this was a  
13 reasonable solution.

14 QUESTION: When you say it's intractable, you  
15 mean the President has one and the House is unwilling to  
16 do whatever further is necessary to -- to bring the  
17 President to heel on the point.

18 MS. MAHONEY: Your Honor --

19 QUESTION: But that's a political dispute. We  
20 don't get into that kind of stuff.

21 QUESTION: Well, Ms. Mahoney, I suppose if the  
22 Glavin plaintiffs have standing, we don't have to worry  
23 about whether the House does, do we?

24 MS. MAHONEY: That's absolutely correct. If  
25 they have standing, this Court need not -- not reach the

1 issue --

2 QUESTION: But what do we do about the -- it's a  
3 summary judgment and so forth on the Indiana plaintiff  
4 then?

5 MS. MAHONEY: In -- in the other case?

6 QUESTION: I mean who has that --

7 MS. MAHONEY: I'm sorry.

8 QUESTION: -- who -- who -- which individual has  
9 been hurt, and how has that been demonstrated?

10 MS. MAHONEY: In -- in that case, I think  
11 Mr. Carvin will be speaking to the -- to the issue of  
12 standing in the -- in the private plaintiff case.

13 QUESTION: Oh, okay.

14 MS. MAHONEY: But I do think that there are --  
15 there certainly is substantial evidence to indicate that  
16 there will be harm to the individuals. And it doesn't  
17 have to be proven with any degree of certainty. We are  
18 talking here about a procedure that was established by the  
19 Framers and also by the Congress to prevent the use of  
20 sampling.

21 QUESTION: All right. When you -- when you  
22 looked this up -- this is meant to be somewhat supportive,  
23 but -- because this is a case in which Congress and the  
24 President have asked this Court to decide this question;  
25 it's not a case of we're doing it without their

1 permission. They passed a statute saying to decide it.

2 Now, if we were in fact -- if we were in fact to  
3 say there is no standing in this case for the House, then  
4 I take it your argument is that then the House and the  
5 Senate couldn't subpoena witnesses from the executive  
6 branch?

7 MS. MAHONEY: That's -- my decision invoking

8 QUESTION: I mean it's the same kind of issue.  
9 How often -- how often in the past has that occurred?  
10 You've probably looked into this. My impression is it's  
11 fairly common, but it may not be common at all that they  
12 subpoena witnesses.

13 MS. MAHONEY: The House subpoena witnesses on a  
14 regular basis I believe, Your Honor. And the House has  
15 come to court -- I mean, excuse me -- the Senate has come  
16 to court in order to enforce its subpoenas.

17 QUESTION: Many times? A few?

18 MS. MAHONEY: I think approximately six or seven  
19 times. And I believe only once against the executive  
20 branch. And that was when --

21 QUESTION: And of course, if the executive is  
22 willing to flout the Congress, the executive might well be  
23 willing to flout this Court if it felt that -- that its  
24 assertion of executive privilege was important enough. I  
25 mean I -- I don't see how you solve these inter-branch



1 disputes by dragging in the third branch.

2 MS. MAHONEY: Your Honor, I really believe that  
3 was rejected in United States v. Nixon. There, this Court  
4 was confronted with a situation where the President said,  
5 this is not a case or controversy because I have invoked  
6 executive privilege, my subordinate disagrees with me, he  
7 cannot come to court to challenge my decision invoking  
8 executive privilege, this is not a case or controversy,  
9 and this Court unanimously held that the fact that both  
10 parties are members, officials of the executive branch  
11 cannot be viewed as a barrier to suit, because we have to  
12 look behind the captions.

13 And one of the things that this Court stressed  
14 is that there was a regulation in place at the time, of  
15 the Department of Justice, which authorized the executive  
16 branch official to come to court in order to get issues of  
17 executive privilege resolved, and this Court said, we must  
18 respect and enforce that regulation.

19 And I submit, Your Honor, that if there is  
20 reason to decide that controversy based upon the fact that  
21 there was a regulation in place, that certainly when the  
22 President has signed legislation that authorizes us to  
23 come and have this controversy resolved, that provides an  
24 even greater basis to respect and enforce the judgment of  
25 the United States Government that it is appropriate to

1 resolve this controversy, especially where the issue here  
2 is not one that is of the type that raises special  
3 sensitivities of prosecutorial discretion, or even  
4 executive privilege. It just how to interpret the  
5 Constitution in the face of that. And those issues have been subject to review in  
6 this Court several times in the last decade, so I think  
7 that this really was a very appropriate response,  
8 especially where here the House itself is essentially  
9 captive to the executive branch's decision to proceed with  
10 an unlawful plan that's going to alter its composition and  
11 deprive it of the information that it needs in order to  
12 take corrective action or pass new apportionment  
13 legislation.

15 QUESTION: But you agree, do you not, that for  
16 intrastate redistricting and for Federal funding purposes  
17 this is lawful, it is not only lawful but required by the  
18 act if feasible, or do you take issue with that?

19 MS. MAHONEY: Your Honor, we have not made that  
20 part of our case because our standing derives from the  
21 interest in protecting the House's composition, which  
22 pertains to the size of the delegations in the States, but  
23 I do not -- so we haven't briefed the issue, but I do not  
24 think that it is at all clear that that is the correct  
25 answer to the question.

1 I think when you read the Census Act it  
2 certainly indicates that the tabulation of population that  
3 is done in the decennial census is supposed to be made  
4 without the use of sampling, and that it does not  
5 authorize the Secretary to go and make some different  
6 tabulation of population.

7 QUESTION: So you think for any purpose, it  
8 can't be used for redistricting intrastate or for  
9 distribution of Federal funds.

10 MS. MAHONEY: I think that's correct, the  
11 population numbers, unless Congress steps in and  
12 authorizes it, and --

13 QUESTION: That seems to leave nothing for 141  
14 under the statute.

15 MS. MAHONEY: Actually, Your Honor, I think 141  
16 clearly is a general reference to the Secretary's  
17 authority to use sampling. Of course, the decennial  
18 census covers, it's not so much funding and that sort of  
19 thing, it's the myriad of information that has to be  
20 collected.

21 The decennial census is the census of population  
22 and housing and matters pertaining to population and  
23 housing. That's probably 30-some subjects that gets  
24 addressed, and really the point of 195, and the point of  
25 141, is to allow the Secretary the authority to use

1 sampling to make inquiries with respect to all of that  
2 kind of information, but not to determine the population  
3 for the decennial census.

4 Certainly to determine the population for the  
5 mid-decade census. 195 would allow the Secretary to do  
6 that, but I don't think that the Census Act could readily  
7 be read to support the view that the Secretary is required  
8 to go out and conduct an actual enumeration of everyone in  
9 the United States by household under the decennial census  
10 and then go back and do it over using sampling for other  
11 purposes.

12 I think that the distinction is between the  
13 determination of the population in the decennial and the  
14 gathering of all the other information, and that that is  
15 the best reading of the act, but that is not -- it is not  
16 actually squarely presented by our case, because we are  
17 here challenging the methods that are being used to  
18 determine the size of the State delegations.

19 I'd also like to just make it clear in terms of  
20 what actually is being done here in terms of sampling.  
21 For nonresponse follow-up there will basically be the  
22 judgment that what the plan provides is that the Census  
23 Bureau will deliberately not try to go and find out who  
24 lives in 10 percent of the households in the country,  
25 deliberately. They will send the mailing, and that will



1 be that.

2 Thank you, Your Honor.

3 QUESTION: Thank you, Ms. Mahoney.

4 Mr. Carvin, we'll hear from you.

5 ORAL ARGUMENT OF MICHAEL A. CARVIN

6 ON BEHALF OF THE APPELLEES IN NO. 98-564

7 MR. CARVIN: Mr. Chief Justice, and may it  
8 please the Court:

9 I'd like to pick up with the point that Ms.  
10 Mahoney was just addressing, because I want to make sure  
11 that the factual premise for our standing is clear.

12 I think the key point for the Court to  
13 understand is that there will be no 100-percent actual  
14 enumeration in 2001. There will be no 100-percent head  
15 count. What the Census Bureau will do is enumerate 90  
16 percent of the households, and then will do two  
17 statistical estimations --

18 QUESTION: You say 90 percent of the households.  
19 Does that mean 90 percent of the households in each tract,  
20 or 90 percent en masse?

21 MR. CARVIN: Both, Your Honor. They will try  
22 and achieve, Mr. Chief Justice, 90 percent in each census  
23 tract and, of course, in the aggregate that will be 90-  
24 percent of the households --

25 QUESTION: Well, I guess they'll give the forms

1 to every household.

2 MR. CARVIN: Yes, that's correct, Your Honor,  
3 and they --

4 QUESTION: So they're not trying to get 90  
5 percent. They're trying to get them all, but they know  
6 that judged on past experience they're not going to get a  
7 return over about 67 percent.

8 MR. CARVIN: Precisely, Justice O'Connor. They  
9 anticipate that about 67 percent of the people who they  
10 mail out to will mail back to them, and then so assume  
11 you'll have 30 percent of the people in a census tract  
12 will not have responded, to make it simple.

13 What they will do is then go send an enumerator  
14 to 20 percent of the households, in other words, to get to  
15 90 percent.

16 QUESTION: Let me just clarify one thing.  
17 Supposing they'd sent -- they tried to send them to the  
18 remaining 30 instead of just the 20. Your case would  
19 still be the same, wouldn't it, because they won't get  
20 answers from all of them.

21 MR. CARVIN: I -- no --

22 QUESTION: I mean, say they -- in other words  
23 they -- on the first go around they tried to get the 100  
24 percent instead of the 90.

25 MR. CARVIN: Yes.

1 QUESTION: But they failed to get it, and they  
2 only got half of what they try.

3 MR. CARVIN: Right.

4 QUESTION: And then -- could they then use  
5 sampling? You'd say no.

6 MR. CARVIN: As to the ICM, that is true.

7 QUESTION: Yes.

8 MR. CARVIN: We object to both --

9 QUESTION: So I don't understand the  
10 significance of the 90-percent argument, is what I'm  
11 trying to say.

12 MR. CARVIN: It's significant for standing  
13 purposes, Justice Stevens, for this reason. We need -- we  
14 argue that the 100-percent head count is the only  
15 permissible means of apportioning the population in 2001.

16 QUESTION: Has there ever been a 100-percent  
17 head count? Hasn't there always been people missed, as  
18 Ms. Mahoney responded?

19 MR. CARVIN: Yes. I have to answer that on two  
20 levels, Justice Ginsburg. There's always been a 100-  
21 percent head count of those people who could reasonably be  
22 found through traditional enumeration techniques.

23 No one has ever thought that that included every  
24 person residing in the continental United States, but  
25 clearly it was always -- every census has made a good

1 faith effort to count 100 percent of the households that  
2 they know are occupied.

3 This is the first time that the Census Bureau  
4 has decided it will cost too money -- too much money to do  
5 that, so what we're going to do is estimate 10 percent of  
6 the population, roughly 27 million people.

7 QUESTION: But you must agree, because of the  
8 summary judgment posture of this case, that the scientific  
9 evidence is all in favor of the Government to the effect  
10 that you will get a more accurate count of the population  
11 their way.

12 MR. CARVIN: As -- on the summary judgment on  
13 the merits we do not contest that it is more accurate,  
14 because that's a disputed issue of fact, so no, we are  
15 saying regardless of its relative accuracy it is  
16 nonetheless illegal and unconstitutional.

17 For standing purposes, my point is that you  
18 can't have an apportionment if you accept our allegations  
19 as true in 2001, because you won't have the 100 percent  
20 apportionment number.

21 So this is no different than the Census Bureau  
22 saying tomorrow we'll enumerate 50 percent of the houses,  
23 or not conduct any census at all, and that hurts two kinds  
24 of people. It hurts people who will benefit from the  
25 apportionment in 2001, like, it is undisputed, the State



1 of Georgia, which will gain an additional seat. They  
2 would be in a better position if the Census Bureau had  
3 done its constitutional duty.

4 It will also hurt, to return to your question,  
5 Justice Stevens, in Indiana people who are likely to have  
6 more Congressmen under the 100-percent head count than  
7 they will retain under defendant's sampling.

8 QUESTION: How can that matter be resolved at  
9 the summary judgment stage? I mean, I didn't dwell too  
10 long on the counter-affidavits, but among other things it  
11 was clear that the counter-affidavits challenge the very  
12 factual basis of the selection figures on which you base  
13 your claim, so how can that be resolved at the summary  
14 judgment stage?

15 MR. CARVIN: Well, under Lujan, remember, they  
16 are moving for summary judgment on standing. We are the  
17 respondents, and under Lujan you must accept the  
18 allegations in our affidavits as true.

19 QUESTION: Yes, but then there's something  
20 between dismissal and summary judgment, and even if we say  
21 yes, under Lujan you got past the 12(b)(6) stage, how do  
22 you go automatically, as, frankly, the district court  
23 seems to have done, said, well, we must assume in favor of  
24 the plaintiffs so they get their foot in the door, and  
25 then that foot in the door, it seems to me they've gone

1 all the way into the house, and then we judge the merits.

2 MR. CARVIN: This procedural posture is  
3 identical to the City of New York line item veto case from  
4 last year. Plaintiffs were moving for summary judgment on  
5 the merits, the Government was in essence moving for  
6 summary judgment on standing, and what the Court did in  
7 that case was look at the affidavits and see if they had  
8 alleged facts that, if true, would show likely injury, and  
9 that is exactly what Indiana has done here.

10 But the other important point, I think, to focus  
11 on here is that we are like, the Indiana claimants are  
12 like the people in Lujan who had lived next to a federally  
13 licensed dam. As the Court held in Lujan, they would have  
14 standing to insist upon an environmental impact statement  
15 to be built -- to be done before the dam was built.

16 QUESTION: Yes, well, Mr. Carvin, let's stick  
17 with this point for just a minute. The district court in  
18 the Glavin case said that general factual allegations of  
19 injury may suffice to establish the Article III standing.

20 MR. CARVIN: Uh-huh.

21 QUESTION: Now, let's just suppose that we  
22 disagree with the district court and think that while that  
23 might work for a motion to dismiss --

24 MR. CARVIN: Uh-huh.

25 QUESTION: -- that it won't work for summary

1 judgment, that there you have to show standing.

2 So what do we do here? Do we have to go through  
3 the record and try to figure out whether there was enough  
4 standing, then, for a summary judgment in connection with  
5 the Glavin claimants?

6 MR. CARVIN: No. I think all the Court need do  
7 is read our affidavits from our expert, as the district  
8 court had done.

9 QUESTION: Well, they were disputed, of course,  
10 by the other side.

11 MR. CARVIN: Well, actually, Your Honor, in  
12 terms of intrastate redistricting, they were not disputed  
13 in any way, shape, or form.

14 QUESTION: Let's talk about intrastate  
15 redistricting. What is your point? What is your point on  
16 that?

17 MR. CARVIN: Our point is that --

18 QUESTION: Intrastate?

19 MR. CARVIN: Intra, Mr. Chief Justice, and what  
20 I mean by that is that we have three counties, Delaware  
21 County, Cumberland County, and Bergen County, who, it is  
22 undisputed, are likely to have less population under the  
23 Government's sampling plan than they would have under the  
24 100-percent enumeration and, as I say, please read their  
25 affidavits, read their briefs.

1           The Government nowhere alleges that it is  
2 remotely conceivable that it is possible that those three  
3 counties will do as well under their plan as --

4           QUESTION: But I thought the issue here was only  
5 apportionment among the States, and you're getting into --  
6 there is a dispute on it, but it hasn't been resolved by  
7 any district court.

8           General Waxman told us that for other purposes  
9 intrastate, what the census wants to do is okay, and  
10 Ms. Mahoney says, well, we don't think it's okay, but it's  
11 not yet in issue.

12           MR. CARVIN: It is not yet in issue because  
13 they've never come up with such a plan. In other words,  
14 there's no dispute that this plan, where they will use one  
15 population number for apportionment, redistricting, and  
16 funding, will hurt us because it will cost us money.

17           QUESTION: But I didn't think you could allege  
18 in this case that's before us now anything other than the  
19 interstate apportionment.

20           MR. CARVIN: No. We are alleging injury  
21 intrastate. The reason it is unlawful is because you  
22 cannot use a sampling population number for apportionment.

23           QUESTION: You have a New Jersey statute which  
24 requires the intrastate apportionment to be done pursuant  
25 to the census.

1 MR. CARVIN: Right.

2 QUESTION: Just as in the New York State case  
3 last term, the line item veto case, there was a New York  
4 State statute that required the money to go the other way,  
5 and we said, close enough for Government work.

6 MR. CARVIN: Justice Scalia --

7 QUESTION: Now -- so when the New Jersey State  
8 statute refers to the census, it obviously refers to  
9 whatever census is going to be taken.

10 MR. CARVIN: Right, and the only way the  
11 Solicitor General can avoid that, Justice Ginsburg, is  
12 hypothesizing that for the first time in American history  
13 the census is going to come up with two population  
14 numbers. It will use the head count number for  
15 apportionment, and then it will use the sampling number  
16 for redistricting and funding, but there's no  
17 administrative decision to do that.

18 We have no idea if the States will use the  
19 sampling number for redistricting --

20 QUESTION: Excuse me. I thought that it was  
21 conceded here that they are not going to do a head count  
22 number.

23 MR. CARVIN: I'm sorry, they're -- we are now  
24 talking -- the Solicitor General's point is that our  
25 injury will not be redressed by the district court's



1 injunction, and the reason it won't be addressed is  
2 because they could come up with a different plan, this  
3 two-number census plan, but it is certainly conceded that,  
4 absent judicial intervention now, there will only be one  
5 population total and that will, of course, injure us.

6 QUESTION: But that certainly depends on what  
7 the New Jersey statute means by census, doesn't it?

8 MR. CARVIN: Precisely, and obviously the New  
9 Jersey statute has always been interpreted as the number  
10 produced by the census --

11 QUESTION: By intrastate, are you talking about  
12 State legislators or Congressmen?

13 MR. CARVIN: Well, actually, of course,  
14 congressional districts are within a State.

15 QUESTION: Is that what you're talking about?

16 MR. CARVIN: I'm mainly focusing on State  
17 legislatures.

18 QUESTION: State legislatures?

19 MR. CARVIN: Yes.

20 QUESTION: The problem is, the act talks about,  
21 it gives you standing to any resident of a State whose  
22 congressional representation or a district could be  
23 changed.

24 MR. CARVIN: Right, but --

25 QUESTION: I take it if we take State

1 legislatures, then we're going to have to get to what I'd  
2 call the prudential question of what this act means. I  
3 mean --

4 MR. CARVIN: I may not have been clear  
5 initially. State legislators do congressional  
6 redistricting. It is the State legislatures that draw  
7 congressional districts --

8 QUESTION: Well, that's true, but so what?

9 MR. CARVIN: -- and so obviously, if our  
10 population is reduced within a State, we will have a  
11 smaller share of both congressional districts and --

12 QUESTION: But you have no problem if you can  
13 show that your population is reduced significantly  
14 compared to others, because then you fit around -- but  
15 Justice O'Connor was pointing out that that seems in  
16 dispute, and so if that's in dispute, and we don't know  
17 what's going to happen to Indiana's population, how does  
18 it help us to say that the legislature may change its  
19 makeup?

20 MR. CARVIN: Again, Justice Breyer, it is not in  
21 dispute. It is -- and please, ask Solicitor General  
22 Waxman when he returns if he can argue, and if -- if  
23 there's any affidavit in the record which suggests that  
24 Cumberland County, Delaware County, or Bergen County is  
25 just as likely to have the same amount of relative share

1 of population under defendant's sampling plan as it is  
2 under our plan.

3 QUESTION: Well, I don't think there's any  
4 question about there being an affidavit that makes those  
5 specific references, but I think what's bothering a number  
6 of us is that there is an affidavit which basically goes  
7 to the assumptions upon which all your calculations are  
8 based, and I may be missing something, but assuming there  
9 is an affidavit of that sort, why is its significance for  
10 intrastate redistricting different from its significance  
11 interstate? There may be a reason. I just don't know  
12 what it is.

13 MR. CARVIN: Yes, Justice Souter. The affidavit  
14 says that the diminution in Indiana State's population may  
15 not result -- may not be severe enough for Indiana to lose  
16 a congressional seat.

17 There is no affidavit or similar argument that  
18 these counties in the State of Pennsylvania will lose  
19 population, and if you lose population, even if it's not  
20 enough to cost you a Congressman, nonetheless your funding  
21 goes down and your intrastate representation goes down,  
22 and the Census Bureau has made an administrative finding  
23 that the adjustment that occurred in 1990 is predictive of  
24 the results that will occur under the adjustment that they  
25 will use in 2000.

1           When they argued that sampling was more accurate  
2 than a head count, they had to figure out what results we  
3 could anticipate under a head count and they looked solely  
4 at the results of the 1990 census and assumed that those  
5 results would be replicated down to the census tract  
6 level.

7           So since they have found that the results of the  
8 '90 statistical adjustment are predictive of the 2000  
9 statistical adjustment, they can now not turn around and  
10 for standing purposes deny that the '90 statistical  
11 adjustment that we have set out in our facts will again be  
12 replicated in the 2000 statistical adjustment.

13           QUESTION: But they have done that in an  
14 affidavit. They have done that.

15           MR. CARVIN: Again, they --

16           QUESTION: Their affidavit does that. It says  
17 you can't use the 1990 figures, doesn't it?

18           MR. CARVIN: This -- well, but again, it says  
19 you can't infer from the '90's figures that you will lose  
20 enough population to cost you a Congressman because --

21           QUESTION: In Indian. Okay.

22           MR. CARVIN: Because the method of equal  
23 proportions turns on such small --

24           QUESTION: I see.

25           MR. CARVIN: -- changes in populations. But at

1 the general level of saying, you will lose population,  
2 yes, these people who were adjusted downward in 1990, they  
3 actually had populations subtracted from these counties  
4 while everyone else was, of course, having population  
5 added to them.

6 QUESTION: So you're saying that affidavit  
7 doesn't affect the New Jersey intrastate --

8 MR. CARVIN: Precisely.

9 QUESTION: Even though it affects the Indiana.

10 MR. CARVIN: And that was the reason I conceded  
11 below that you don't need to focus on Indiana. I would  
12 like to make the additional point that Indiana --

13 QUESTION: Why did you raise New Jersey, then,  
14 just in a footnote? What is it, footnote 11 of your  
15 brief? I mean --

16 MR. CARVIN: Well --

17 QUESTION: -- this is a major part of your  
18 argument, and it is all contained in --

19 MR. CARVIN: Your Honor, we've never filed --

20 QUESTION: Appellees have satisfied this  
21 standard with respect to their claim of interstate vote --  
22 well, wait, that's -- contrary -- well, I'm sorry.

23 MR. CARVIN: Your Honor, we had page  
24 limitations, and we focused on disputed facts.

25 QUESTION: Footnote 25, it was. I mean -- and



1 this is your whole case.

2 MR. CARVIN: Right, Your Honor, but it wasn't  
3 contested. It wasn't contested below, it's not  
4 contested --

5 QUESTION: All the more reason to devote your  
6 brief to it --

7 (Laughter.)

8 QUESTION: -- rather than footnote 25.

9 MR. CARVIN: And if I haven't made it clear, I  
10 hope I have clarified in argument that this is in accepted  
11 facts, that the States will use the census number for  
12 apportionment absent judicial intervention for intrastate  
13 redistricting, and that will cost us voting power.  
14 Federal agencies will use the census number to distribute  
15 funds, and that will cost us money.

16 So I don't think that this is a situation, the  
17 additional point I guess I'd make, is where we need to  
18 prove it was scientific --

19 QUESTION: But the answer to your question was  
20 that this is going to happen to you anyway, because we are  
21 permitted to have the two census things.

22 MR. CARVIN: Oh, no. It would only happen to us  
23 if the Census Bureau makes an entirely different decision  
24 than is already made.

25 For example, last year in Akins they could have

1 denied plaintiff in that case, Mr. Akins, APAC's  
2 membership numbers if they'd used a different rationale to  
3 withhold APAC's membership information, but this Court  
4 held quite clearly that it doesn't matter if the agency  
5 can make the same decision pursuant to a different legal  
6 rationale, because plaintiffs have ability to challenge  
7 the legal rationale that is motivating this plan, and no  
8 one argues that they can implement this plan, that they've  
9 got to come up with a different plan.

10 But just as speculation about what the  
11 Government will do doesn't give plaintiff standing, the  
12 Government can't defeat standing by speculating about some  
13 other plan that it might come up with for the first time  
14 in American history, so in terms of what they are going to  
15 do, it will injure us, and it is irrelevant that they  
16 could legally injure us if they came up with a different  
17 plan, just as it was irrelevant in Akins.

18 QUESTION: Can I ask you, what about their main  
19 point? They say that there's a statute which says, except  
20 for population -- except for apportionment purposes the  
21 Secretary shall if feasible use sampling, and then they  
22 say, a few paragraphs earlier it does say that the  
23 Secretary shall take a population census in any form he  
24 wants, including sampling, and unless that thing I last  
25 said was meant to allow him to do what you don't like, it

1 would be meaningless. ~~Iruly meaningless, because everyone~~  
2 ~~agrees that~~ MR. CARVIN: Well, but as you pointed out  
3 earlier Justice Breyer, all 141 does is authorize sampling  
4 as specified in the subsequent statutory provisions that  
5 deal directly with sampling. ~~ngless, showing conclusively~~  
6 ~~that Cong~~ The Solicitor General argues that the word ~~any~~  
7 sampling in 141 is therefore somewhat redundant, but the  
8 presumption against redundancy has been incredibly ~~he~~  
9 rebutted in this statute, because the Solicitor General  
10 simultaneously concedes that the Solicitor General's  
11 authority for nonapportionment sampling under 141 is ~~ed to~~  
12 controlled by section 195, that you need to read section  
13 195 into 141 for nonapportionment sampling. ~~ugh, a plain~~  
14 ~~statement~~ Also, of course, it's inherent in the statutory  
15 scheme. ~~usably, and that has certainly not been~~  
16 ~~accomplish~~ They use the word sampling four times. Every  
17 time they gave the Secretary authority in 1976 they threw  
18 in, including sampling. ~~Carvin, may I just ask one --~~

19 Now, we know that wasn't intended to mean  
20 anything, because in 14(d), which deals strictly with mid-  
21 decade apportionment and therefore deals -- mid-decade ~~our~~  
22 census, and therefore has nothing to do with apportionment  
23 sampling, it deals strictly with nonapportionment  
24 sampling, they have the same language, and they say the  
25 Secretary can do nonapportionment sampling. ~~et. and since~~

1           That is entirely meaningless, because everyone  
2 agrees that under section 195 the Secretary already had  
3 authority to do nonapportionment sampling, so the  
4 reference to sampling in the mid-decade sentencing  
5 provision was entirely meaningless, showing conclusively  
6 that Congress didn't intend for this language to have any  
7 substantial import.

8           My final point is, even if the grant to the  
9 Secretary is ambiguous, the defendant's plan is still  
10 unlawful, because clearly, if you are making a major  
11 change in policy after 190 years, this Court has ruled in  
12 seven different cases cited throughout our briefs that  
13 that change in policy needs to be done through a plain  
14 statement rule. It needs to be done clearly and  
15 unambiguously, and that has certainly not been  
16 accomplished here.

17           Moreover, of course --

18           QUESTION: Mr. Carvin, may I just ask one --

19           MR. CARVIN: Sure.

20           QUESTION: -- clarification? On your position  
21 about that string of six States, are you saying -- is your  
22 position that all of those states would lose seats, or at  
23 least one of the six?

24           MR. CARVIN: My position is that all of them  
25 have a realistic possibility of losing a seat, and since

1 this is a case, like an environmental impact statement,  
2 where the alleged refusal of the Government to provide  
3 information is what is at issue, they need not show that  
4 providing them the information will definitely benefit  
5 them.

6 QUESTION: No, but is the possibility realistic  
7 because one of them will, or because there is a realistic  
8 possibility that more than one of them will?

9 MR. CARVIN: Both are true, perhaps two or  
10 three, but again, we're not relying on that part of our  
11 affidavit. The uncontested part of our affidavit goes to  
12 the counties losing funds and intrastate redistricting  
13 power. That's uncontested.

14 What is contested is that one or two or three of  
15 those six States might lose a Congressman, but as again,  
16 under Lujan, we need not show that if they gave us 100  
17 percent actual enumeration number, we will definitely  
18 benefit.

19 We need only show that it might benefit us  
20 realistically, just like an environmental impact statement  
21 might realistically benefit you.

22 You need not be caught in a catch 22, where you  
23 challenge the Government's refusal to provide information,  
24 and the standing requirement is, you must show that the  
25 information will definitely benefit you, if the reason you



1 don't have the information is because the Government has  
2 unlawfully refused to provide you with that information.

3 So under any theory of standing, we have it both  
4 on an interstate basis, and on an intrastate basis, and as  
5 the Chief Justice pointed out earlier, this Court will be  
6 in no better position to resolve this factual question in  
7 2001, because in 2001, as today, there will not be a 100-  
8 percent actual enumeration then.

9 So if you insist the plaintiffs show you that we  
10 will have 10 Congressmen under the 100-percent head count  
11 number and we will only have 9 under the defendant's  
12 sampling plan, no plaintiff will ever be able to make that  
13 showing, because there will never be a 100-percent actual  
14 enumeration number, since they have decided to stop at 90  
15 percent in counting people, and they have decided to  
16 statistically estimate the rest of those people up to 100  
17 percent.

18 And to return very briefly to the Constitution,  
19 if actual enumeration is a process, then clearly, the only  
20 process it contemplates is counting.

21 QUESTION: Thank you, Mr. Carvin.

22 MR. CARVIN: Thank you.

23 QUESTION: General Waxman, you have 3 minutes  
24 remaining.

25 REBUTTAL ARGUMENT OF SETH P. WAXMAN

1 ON BEHALF OF THE APPELLANTS

2 GENERAL WAXMAN: Thank you, Mr. Chief Justice.

3 Justice Stevens, you were asking about what  
4 happens -- asking Ms. Mahoney what happens if no one's  
5 home, and the implications of her answer is that what the  
6 Census Bureau has done consistently since 1940 is  
7 unconstitutional in her view, because since 1940 the  
8 Census Bureau has been using imputation techniques to  
9 assign population figures to residences or locations that  
10 are known to exist but where it is not known whether  
11 anybody lives there or not.

12 QUESTION: That is not a challenge here, is it?

13 GENERAL WAXMAN: Excuse me?

14 QUESTION: I mean, that may well be, but it's  
15 not under challenge here, is it?

16 GENERAL WAXMAN: It's not under challenge here,  
17 but it's highly relevant, Justice Scalia, to the question  
18 of whether what has been going on and what the  
19 Constitution requires is a "head count."

20 QUESTION: Since 1940.

21 GENERAL WAXMAN: Since 1940. Similarly --

22 QUESTION: Not much of a tradition, either.

23 GENERAL WAXMAN: Similarly, it's also highly  
24 relevant to the meaning of the 1976 amendment that gave  
25 the Secretary the authority under 141(a) to use whatever

1 means he thought desirable, including sampling, that in  
2 1970 there was not just imputation but statistical  
3 sampling in two different instances that added 1.5 million  
4 people to the initial enumeration total.

5 Now, the plaintiffs in the case have made much  
6 of the fact that there is little legislative history to  
7 support the notion that Congress in 1976 affirmatively  
8 wanted to permit sampling, but the legislative history on  
9 their side both on 1976 and in 1957 is deafening. There  
10 were hearings all the time in the 1970's about what the  
11 Census Bureau was doing, and the undercount, and talked  
12 about what they had done.

13 The Census Bureau had published reports about  
14 what it had done in 1970 to use sampling to correct for  
15 the undercount. In 1976 they had a hearing about using  
16 dual system estimation to correct the 1980 undercounts,  
17 and there is not one word in the reports that accompanied  
18 the 1976 amendments or any of the debates that suggested  
19 that anybody thought there was anything wrong with using  
20 statistical sampling to increase the accuracy of the  
21 effort to count to get information from every person.

22 On the issue of House standing, as anybody --

23 QUESTION: Now, but you're not using it to  
24 increase the accuracy. I mean, you can say that if you do  
25 a 100-percent head count and then use statistics to try to

1 get the people you didn't get in the 100-percent head  
2 count.

3 But as described, and I think it's an accurate  
4 description, you don't do 100 percent. You don't even try  
5 to do 100 percent head count. You just count 90 percent.

6 GENERAL WAXMAN: Justice Scalia, the Census  
7 Bureau and the National Academy of Science panels and the  
8 GAO all agree that the Bureau's method for conducting the  
9 nonresponse follow-up, which uses some statistical  
10 sampling, will be at least as accurate as if they had done  
11 physical nonresponse follow-up, and it will increase the  
12 overall accuracy of the census because it will be  
13 conducted in 5 weeks rather than 14 weeks and permit the  
14 ICM part of the process to be conducted with more --  
15 better trained people, and at a time that is closer to  
16 Census Day.

17 It has been recognized -- thank you, Mr. Chief  
18 Justice.

19 CHIEF JUSTICE REHNQUIST: Thank you, General  
20 Waxman

21 The case is submitted.

22 (Whereupon, at 11:33 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25

# 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:

DEPARTMENT OF COMMERCE, ET AL., Appellants v. UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., and WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., Appellants v. MATTHEW GLAVIN, ET AL.

CASE NOS: 98-404 and 98-564

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

BY Donna Maria Fedirko

(REPORTER)