TO ADJUST OR NOT TO ADJUST: THAT IS THE LEGAL AND POLITICAL QUESTION

I. THE CENSUS AND ADJUSTMENT: AN OVERVIEW

In an ideal world, the determination of the nation's population by the Census Bureau would be relatively free of political, philosophical, and legal controversy. All that is required of this large, competent, and well-funded agency is to determine, as accurately as practical, the population of the nation, states and local districts. Yet, these determinations are highly controversial and the Census Bureau has been enmeshed in many lawsuits over past census takings,[1] including the 1990 census.

The major thrust of lawsuits against the Census Bureau (or governmental units using the Bureau's population figures) centers on the decennial reapportionment process. Because the constitutional requirement that congressional and state legislative districts have equal populations has been settled for over a generation[2] and the question of what is the population seems to be a technical and bureaucratic determination, it would be expected that the reapportionment process should be free of extensive litigation, at least in regard to population figures.[3] However, the inaccuracies of the census are great enough and the interests impacted by those population figures important enough to warrant litigation. In a nutshell, the litigation is about money (federal funding) and political power.

Although other issues confront legislatures as the apportionment battles begin for the 1990s, the most important controversy, with the possible exception of compliance with the Voting Rights Act, involves appropriate population figures, either the census (un-

1. *See* Cuomo v. Baldrige, 674 F. Supp. 1089, 1091 (S.D.N.Y. 1987) (noting that challenges to the 1980 census have inundated district courts). *See also* Carey v. Klutznick, 653 F.2d 732, 735 n.10 (2d Cir. 1981) (listing over fifty suits).

2. The Supreme Court has allowed only small variances in congressional districting. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969) (in congressional districting, states must obtain equality of population as nearly as is practicable). State legislatures and local bodies have been allowed greater variances in population, although substantial equality is still required. *See* White v. Regester, 412 U.S. 755 (1973) (population deviation of 9.9% is acceptable).

3. Even if the population figures used were exact, there would still be litigation involving the issue of how the population is divided among districts of equal population. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109 (1986) (claims of unconstitutional gerrymandering are justiciable). What is perplexing is the amount of litigation over the determination of the actual population.

adjusted enumeration) or population figures derived from statistical adjustment of the census enumeration.

The political importance of the choice results from the fact that the state legislatures are required to adjust state and congressional districts to ensure that the districts have essentially equal populations at the beginning of every decade.[4] With few exceptions, the population figures used by the states are supplied by the Bureau of the Census.[5]

Clearly, the decennial reapportionment process is of great importance since it is an important factor in the distribution of political power in this country. Interstate apportionment determines the number of House representatives allotted for each state. House representatives (and votes in the electoral college) continue to be transferred to the south and west (with several states loosing House seats), suggesting fundamental shifts in political power.[6] Within each state, reapportionment of the legislature means that the political equation of power is altered.[7]

In addition to the enormous impact on the political makeup of Congress and state legislatures, the census population figures determine the level of funding each state receives under various federal programs.[8] The census also provides the data used to determine the unemployment rate, levels of job discrimination, and other important statistics which use large amounts of data.[9] Given the importance of the census, disputes over its accuracy are logically matters of bitter contention.

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4. For example, CAL. CONST. art. XXI, § 1 mandates that the population of Senatorial, Assembly, Congressional, and Board of Equalization districts be "reasonably equal." The California Supreme Court in Legislature v. Reinecke, 10 Cal. 3d 396 (1973), implemented a redistricting plan which required population equality within 1% for legislative districts.

5. *See* Michael V. McKay, Note, *Constitutional Implications of a Population Undercount: Making Sense of the Census Clause*, 69 GEO. L.J. 1427, 1435 n.48 (1981).

6. Census figures show that thirteen states, mostly in the north and east will lose thirteen congressmen to Arizona (1), California (7), Florida (4), Georgia (1), North Carolina (1), Texas (3), Virginia (1), and Washington (1). *The Census: Final Count Will Shift Seats to Far West, Southeast*, CONG. Q. 2793, 2794 (1990).

7. In California, the population increase has largely been in areas which tend to vote Republican. Thus, the reapportionment process offers the Republican party some hope that the Democratic control of the Legislature is threatened. *See* Bob Benenson, *Redistricting: Line-Drawing Work Intensifies in California, Connecticut*, CONG. Q. 2640 (1991).

8. *See* Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 Fed. Reg. 33,582 (1991) [hereafter Decision]. *See generally* Note, *Numbers that Count: The Law and Policy of Population Statistics Used in Formula Grant Allocation Programs*, 48 GEO. WASH. L. REV. 229 (1980).

9. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 219, 308 (1977) (census figures used to determine number of minority teachers in district).

A. *Procedure for the 1990 Census*

The 1990 census was designed to determine the population as of April 1, 1990. Population totals are required by law to be presented to the President by the end of 1990 and to state officials by April 1, 1991.[10] In conducting the census enumeration, the Census Bureau initially sent questionnaires to households, either through the postal service or census enumerators.[11] In certain remote and rural areas, actual door-to-door canvassing was conducted. During and after this process, extensive efforts were underway to increase the accuracy of the census, including extensive follow-ups on households that did not respond, hand delivery to addresses that the Postal service considered undeliverable, visits to group quarters (nursing homes, dormitories, etc.), and publicity to increase public awareness of the census effort.

In order to gauge the accuracy of the enumeration, the Bureau utilized a Demographic Analysis (DA) and the Post-Enumeration Survey (PES).[12] The DA utilizes scores of administrative records to determine the population from the birth rate, death rate, and rates of immigration and emigration. The importance of the method is that it is an independent check on the enumeration.[13] The PES is utilized in two procedures. First, it serves as a check on the accuracy of the actual enumeration. Second, data derived from the PES is used to statistically modify enumeration figures to derive adjusted population figures.[14] The basic procedure the Bureau used in compiling the PES was to send enumerators to randomly chosen population units to interview individuals. Then, the names of people were matched against the enumeration records. Those individuals who had not been recorded in the original enumeration were thus representative of those people "missed" in the census and thus undercounted. The PES was also used to identify individuals who

10. A provision of the Census Act, 13 U.S.C. § 141(b) (1993), requires the Bureau to report these figures to the President within nine months of the decennial census day.

11. The procedure for the actual enumeration is described in detail in Decision, *supra* note 8, at 33,623.

12. *Id.* at 33,626.

13. There are substantial sources of error in the DA procedure, such as the absence of national birth and death records prior to 1933. *See* Decision, *supra* note 8, at 33,634. However, the major flaw of this method is the absence of records for the large numbers of undocumented aliens. *See generally* Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 851 (1981). There has been some controversy about the inclusion of undocumented aliens in the census. Several congressmen have introduced legislation that would exclude undocumented aliens from the census, a policy that the Census Bureau has never attempted. One reason for this is that the Bureau has no accurate method of discounting undocumented aliens. In addition, the Bureau does not want to discourage any person from responding to census questionnaires. In any case, an attempt to exclude aliens would raise grave constitutional issues. *See* Peter Bragdon, *Census: Simple Question, Tough Answer: Whom Should Census Count?*, CONG. Q. 2145 (1989).

14. *See* Decision, *supra* note 8, at 33,589.

were incorrectly included in the enumeration (overcount).[15]

Using the data derived from the PES, the Bureau used statistical methods to prepare adjustment factors for groups of people with certain common characteristics. To obtain adjusted census figures, the census population of a particular group would be multiplied by the adjustment factor. The sum of all these adjusted group figures would be the adjusted population for a particular geographic region.[16]

B. *The Undercount*

The Census Bureau has admitted that certain groups of the population were undercounted. The estimates of the Bureau were that Blacks were undercounted by 4.8%, Hispanics by 5.2%, American Indians by 5.0%, and Asian-Pacific Islanders by 3.1%.[17] All population groups were apparently undercounted to a certain extent. If each population group had been undercounted at the same rate, then no group would have been disadvantaged relative to other population groups. However, this is not the case and it is the disproportionate undercount of certain population groups which raises issues of diluted voting power. Not only are racial and ethnic minorities disproportionately undercounted, but they are the groups who can least afford to be under-represented in the political process.

In litigation seeking to require use of adjusted census figures, the essential claim is that the use of the census enumeration, because of the disproportionate undercount, would result in malapportionment. Racial and ethnic minorities would suffer a dilution of their right to vote, and the states and local districts in which they live would receive reduced levels of federal funding.[18] A higher

15. The procedure described for the PES is a simplification. Complex statistical methods were utilized, although the basic process is as indicated. For a detailed description, see Decision, *supra* note 8, at 33,626.

16. For example, a group defined as female Asians, age 45 to 64, living in rented housing in Los Angeles might have an adjustment factor of 1.05. If the census enumeration for such a group was 10,000, the adjusted figure would be 10,500. *See* Decision, *supra* note 8, at 33,628 for a detailed description of this process.

17. *Census Bureau Releases Refined Estimates from Post Enumeration Survey of 1990 Census Coverage*, U.S. DEP'T OF COMMERCE NEWS, Table 4 (June 13, 1991). The presence of a disproportionate undercount has been a recurring problem. *See, e.g.*, Young v. Klutznick, 652 F.2d 617, 620 (6th Cir. 1981) (1970 census contained disproportionate undercount for Blacks and other minorities).

18. In 1980, New York City and New York state filed suit against the Census Bureau to compel statistical adjustment of the 1980 census enumeration. The suit was not settled until 1987, (Cuomo v. Baldrige, 674. F. Supp. 1089 (S.D.N.Y. 1987)), and the plaintiffs lost. A suit filed by Los Angeles, New York City, California, New York state, and other parties in 1988 alleged that the Census Bureau would improperly undercount certain segments of the population with procedures being developed for the 1990 census. The suit was settled when the parties agreed that the Census Bureau would conduct the PES to ascertain the accuracy of the enumeration. Once completed, the PES would be evaluated according to Department of Commerce guidelines to determine whether there should be an adjustment. However, the plaintiffs challenged the

proportion of the undercounted are poor, non-English speaking, minorities, and recent immigrants as compared to those counted. In addition, the undercount has a disproportionate impact in certain areas, since the groups most adversely affected are concentrated. For example, the impact on states such as Texas, Florida, New York, and California is considerable.[19] These states have large Latino populations, highlighting the detrimental impact of the undercount on the Latino community. With an undercount of 5.2% nationwide, the Latino community is the most adversely impacted by the failure of the Government to adjust the population figures.

Furthermore, communities with large minority populations, such as Los Angeles, would receive reduced funding for programs such as healthcare and education, which are of vital interest to the undercounted groups. In addition, the undercount would result in reduced levels of confidence of the undercounted groups in the Government, potentially resulting in greater isolation from the political process. Finally, within a given state, the undercount is not distributed equally and there are much higher levels of undercounting in urban areas or areas with large minority populations, such as Los Angeles.[20]

In considering the source of the undercount, there are several plausible reasons given. Some argue that it is the result of unavoidable error because of the sheer scope of the undertaking: attempting to determine the number of people in such a large area.[21] It is unquestionably true that certain population groups are more difficult to enumerate. Some people, such as undocumented aliens, do not want to be reported to officials of the federal government. Others are homeless and/or live in high crime areas where enumerators do not want to go to perform their enumeration.[22]

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guidelines in a subsequent suit, charging that the guidelines were biased against adjusting the census. *See* City of New York v. U.S. Dep't of Commerce, 739 F. Supp. 761 (E.D.N.Y. 1990). The district court affirmed the guidelines, stating that they allowed the Secretary of Commerce to make a good faith decision. Although the guidelines were upheld, the judge explained that the Census Bureau would bear the burden of explaining a decision that no adjustment was necessary.

19. Census figures indicate that California, with a minority population of 43% in 1990, has a population that was undercounted by over one million. *See supra* note 17, Table I.

20. The county of Los Angeles represents 3.6% of the nation's population. However, 8.1% of the undercounted population nationwide is attributed to the county. Richard Fajardo, Statement on Behalf of the Mexican American Legal Defense and Educational Fund Before the State Assembly and State Senate of California (July 18, 1991) (transcript on file with the CHICANO-LATINO L. REV.).

21. *See, e.g., Cuomo*, 674 F. Supp. at 1093 (Census Bureau competently met the enormous task of conducting the 1990 census). *See also* Note, *supra* note 13, at 850 (much of the error in the census is unavoidable due to the size and complexity of the undertaking).

22. In *Cuomo*, 674 F. Supp. at 1095, the court noted:

> a complex combination of social, economic, and cultural characteristics which tends to be associated with those minorities [which historically have been dis-

Critics of the Census Bureau contend that the error is largely due to poor management and that much of the error could be eliminated with better procedures.[23] Arguments have been made that the census enumeration is not only poorly conducted, but also inherently biased against minorities so that a disproportionate undercount is inevitable, regardless of how competently the census is conducted.[24] Finally, a lack of political will by a Republican administration—the undercount generally favors Republicans over Democrats[25]—may have contributed to the reluctance of the Census Bureau to adjust the figures.

II. LITIGATION

Proponents of adjustment argue that the use of unadjusted population figures results in dilution of the voting power of the undercounted population groups, which is contrary to constitutional mandates. An alternative population base for redistricting is the adjusted census population figure resulting from the PES.

Given the enormous stakes involved in the application of population figures, groups who believe that they have been shortchanged in the process, have challenged the results of the census. Given the complexity of the task and acknowledged shortcomings, many tenable arguments have been presented to demonstrate that these interest groups have in fact been shortchanged.

A. *Administrative Review*

Since the Census Bureau is an agency operating within the Department of Commerce under the authority of the Secretary of

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proportionately undercounted] makes those groups harder to count than the rest of the population. . . . These characteristics include poverty, poor education and language abilities, irregular living arrangements, residence in high crime areas, and fear or distrust of government.

23. Half of the members of the Special Advisory Panel (created as part of the settlement in City of New York v. U.S. Dep't of Commerce, 739 F. Supp. 761 (E.D.N.Y. 1990)), described the 1990 census procedures as suffering from "a staggering array of problems. The mail response rate was low, coverage differed between minorities and non-minorities, enumerators gathered less accurate information in cities than in other areas, and non-response follow-up operations had a high proportion of last resort and non-data defined responses." Decision, *supra* note 8, at 33,622.

24. *See, e.g.*, *Carey*, 637 F.2d at 836 (plaintiff claims census conducted in manner which will inevitably result in disproportionate undercount); City of New York v. U.S. Dep't of Commerce, 739 F. Supp. at 763 (plaintiff claims census skewed to undercount minorities).

25. Among those who support adjustment, Democrats are overwhelmingly represented. The few Democrats who oppose adjustment, such as Representative Paul E. Kanjorski from Pennsylvania, come predominately from states which would each lose a House seat if the adjustment were implemented. Some Republicans, such as Governor Pete Wilson of California and House Whip Newt Gingrich of Georgia, support adjustment because their states might gain seats. *See* Ronald D. Elving, *The Census: Refusal to Adjust Undercount Spurs Protest, Renews Suit*, 49 CONG. Q., 2006, 2008 (1991).

Commerce, one possible mode of attack for a plaintiff seeking to prevent the use of unadjusted population figures would be to challenge the Bureau under the Administrative Procedure Act.[26]

Initially, a court would have to determine if judicial review of the Bureau's decision not to adjust the population figures is available. There is a strong presumption in favor of judicial review over agency action, which usually can be rebutted only by explicit statutory preclusions.[27] However, the Bureau has argued that the determination over statistical adjustment of the population figures is at the Bureau's discretion, in which case judicial review is precluded under the Administrative Procedure Act § 701(a).[28] The complex issues involving the census would support arguments that the population determination is appropriately committed to agency discretion.[29]

Before reaching the merits of a claim for judicial review of an administrative action, as a threshold matter, the plaintiffs must first be found to have standing.[30] The requirements for standing were enunciated in *Association of Data Processing Service Organizations v. Camp*.[31] The test requires that the plaintiff show that the agency's actions have caused the plaintiff personal injury and that the plaintiff is within the zone of interest protected or regulated by the statute in question (the Census Act). Generally, courts which have considered this issue have found that plaintiffs have standing.[32] In addition, vote dilution has been recognized as a personal injury and of sufficient weight to justify standing many times.[33] The zone of

26. 5 U.S.C. §§ 551-76 (1993).

27. A strong presumption favoring judicial review over agency action was developed by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

28. *See* City of Philadelphia v. Klutznick, 503 F. Supp. 663, 674 (E.D. Pa. 1980) (Census Bureau argues that the question of adjustment for the census is committed to agency discretion and not subject to judicial review).

29. The Census Bureau has also argued that adjustment is precluded by provisions found in the Census Act. 13 U.S.C. § 195 states: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." However, most court decisions which have dealt with this issue have concluded that these Census Act provisions do not prohibit adjustment if it results in a more accurate adjustment. *See* Carey v. Klutznick, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); City of Philadelphia v. Klutznick, 503 F. Supp. at 679.

30. Although ripeness would also have to be considered as a threshold matter, it would not be a serious impediment to a lawsuit challenging the census if the deadline for reapportionment was approaching. In such a case, withholding review would impose a significant hardship on plaintiffs. In addition, the majority of courts have found that a challenge of the census is an issue fit for review.

31. 397 U.S. 150 (1970).

32. *See* City of Camden v. Plotkin, 466 F. Supp. 44, 51 (D.N.J. 1978) (plaintiffs have standing under Administrative Procedure Act to challenge census figures).

33. *See, e.g.*, Reynolds v. Sims, 377 U.S. 553, 562 (1964) (statutes which may dilute the effectiveness of the vote is subject to strict scrutiny analysis).

interest requirement is also satisfied since the purpose of the Census Act is to insure accurate population figures for equitable distribution of representation and federal funding.[34]

If a court determines that the Bureau's decision not to adjust is subject to judicial review, it must then determine which level of judicial review is appropriate. The two possibilities are deferential review under the arbitrary and capricious standard or de novo review.[35]

In *Cuomo*, the Bureau argued that the correct standard was arbitrary and capricious review, since the agency determination was based on technological determinations which warrant deference to the Bureau.[36] However, the plaintiffs argued that de novo review was appropriate since the claim involved a constitutional violation and the Bureau made its determination primarily from political considerations and not technological considerations.[37] The court agreed that the arbitrary and capricious standard should be used. It found that the Census Bureau's decision not to adjust "was primarily based upon its determination that it was not feasible to develop and implement an adjustment methodology which would be more accurate than the census itself."[38] The court concluded that political considerations had only a small impact on the decision and that the technological considerations (questions of statistics and demographics) were of such a complex nature so that deference to agency expertise was appropriate. Given the difficulty a court would have in deciding if adjustment is appropriate de novo, this decision seems logical.

As the above case indicates, under the arbitrary and capricious standard of review, it is difficult for a plaintiff to prevail against the Census Bureau on technical questions. A plaintiff would have the burden of showing that adjustment is feasible and would result in more accurate population figures. Meanwhile the Bureau has an enormous advantage because of the quality and quantity of experts and data available to the Bureau, resources few can hope to match. Even if plaintiffs demonstrate the feasibility of the adjustment, the Bureau can probably show that reasonable experts would agree with the Bureau's conclusions. A court would almost certainly be compelled to rule in favor of the Bureau if the determination not to adjust the census enumeration is based on technical considerations.

34. *See Plotkin*, 466 F. Supp. at 51 (legislative history of Census Act shows Congress was concerned with fair distribution of federal funds).

35. Under 5 U.S.C. § 706(1)(E) (1993), the substantial evidence test is used in review of formal rulemaking and adjudication. The decision of the Census Bureau whether or not to adjust the census enumeration is an informal agency action.

36. 674 F. Supp. at 1104.

37. *Id.*

38. *Id.* at 1105 n.29.

A court cannot decide such technically complex questions, but simply evaluates if the agency considered the relevant factors, explained its reasoning, and followed correct procedures in making its determinations.

However, review of the political issues considered by the Bureau in its decision not to adjust may provide plaintiffs a better chance of prevailing.[39] Although it does have expertise in the area of political considerations, the Bureau's evaluation in this area merits less deference from the courts than its consideration of technical issues. In addition, the Director of the Census herself recommended adjustment; however, that decision was overruled by the Secretary of Commerce.[40] Since the Census Bureau experts recommended use of the adjusted data, the technical arguments advanced by the Secretary were somewhat undercut. This suggests that political considerations may have had a major role in the Bureau's determination not to adjust the 1990 enumeration.

There are several political arguments that the Bureau has advanced to support its decision not to adjust. First, the Bureau argued that adjustment would result in a loss of confidence in the census, leading to reduced levels of participation by citizens and governmental units.[41] Second, the Bureau suggested that significant political disruption would occur if the adjustment were allowed.[42]

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39. The technical questions involved in the adjustment are impacted by political considerations over how much money to spend on completing the census. For example, the Bureau may determine that it does not have the technical ability to adjust accurately within its current budget.

40. In addition to Census Director Barbara Bryant's decision in favor of adjustment, the Undercount Steering Committee, composed of senior Census Bureau personnel, voted in favor of the adjustment. *See* Elving, *supra* note 25.

41. Guideline four states: "The decision whether or not to adjust the 1990 census should take into account the effects such a decision might have on future census efforts." Final Guidelines for Considering Whether or Not a Statistical Adjustment of the 1990 Decennial Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population. 55 Fed. Reg. 9838, 9841 (1990). The Secretary concluded that adjustment could erode public confidence in the census and lead to reduced participation by individuals, state and local governments, and other interest groups. In particular, state and local governments might not allocate the needed resources to conduct an enumeration if simple statistical adjustments could give population figures.

42. The Secretary of Commerce, in his statement on the decision to not adjust the census, stated that adjustment would disrupt the political process by leading to more litigation and delay the states' reapportionment process. Decision, *supra* note 8, at 33,584. In addition, the Secretary felt that the integrity of the Census Bureau would be compromised if the census enumeration were adjusted. Decision, *supra* note 8, at 33,605. Evidently, the reasoning is that the actual enumeration is a goal which is apolitical in nature and helps maintain the Census Bureau's reputation as being above politics. The Bureau maintains that the enumeration is based upon physically locating people in particular places on decennial census day, a strictly technical result. However, the statistical adjustment, can be manipulated in a facile manner to achieve certain political results.

The problem with this analysis is that the census enumeration does have political ramifications, whether intended or not. The enumeration does contribute to the inequi-

It is unlikely that plaintiffs seeking administrative judicial review of the Census Bureau's decision to not adjust would prevail under the arbitrary and capricious test. Although the argument in favor of adjustment appears to have strengthened between the 1980 census and the current census,[43] there is sufficient credibility to both sides of the technical arguments. Unless plaintiffs can prove that an adjustment would be more accurate, the Bureau would prevail under a deferential standard of judicial review.

B. *Freedom of Information Act (FOIA)*[44]

In addition to lawsuits seeking to compel the use of adjusted population figures, some litigation involves efforts to have the adjusted figures released under the Freedom of Information Act. With this data, state legislatures could reapportion using the adjusted figures since there is no federal requirement to use the official census.[45]

The FOIA was a sweeping attempt to allow access to government information. The general presumption is that information must be disclosed, unless the information falls into one of the exemptions under the FOIA.

The Supreme Court has held that some data controlled by the Census Bureau is exempt from disclosure. In *Baldrige v. Shapiro*,[46] the Court held that address lists were exempt from the disclosure requirements of the FOIA under provisions of the Census Act,[47] which protect the confidentiality of information supplied by particular respondents. However, unlike the information in *Baldrige*, the data from adjusted enumeration figures is not linked to particular individuals and the provisions of the Census Act do not apply. Accordingly, there have been requests for the adjusted figures.[48] The

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ties felt by the disproportionately undercounted groups. In fact, the only population figures which would be acceptable and free of political manipulation are those which are undeniably the most accurate.

43. *See supra* note 39.

44. 5 U.S.C. § 552 (1992).

45. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 91 (1966) (Constitution does not require state legislatures to use census enumeration as the standard in reapportionment).

46. 455 U.S. 345 (1981).

47. 13 U.S.C. §§ 8-9.

48. In California, Assembly Speaker Willie Brown requested that the Department of Commerce release the adjusted population figures, under FOIA, 5 U.S.C. § 552(a)(3), in a letter dated April 10, 1991. The reply from the Commerce Department stated that the requested information was not yet available and when it was available, it would be exempt from disclosure under § 552(b)(5), which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Assembly Speaker Brown appealed this decision arguing that § (b)(5) did not apply to data in its final form. The final response from the Commerce Department was to reiterate that the data was not yet available and that any request under the FOIA must

only possible exemption that might be used by the Census Bureau in its attempts to preclude disclosure of the adjusted figures is FOIA § 552(b)(5),[49] which is designed to protect the internal deliberations of the government.[50] Since the adjusted figures in their final form are no longer subject to such deliberations, the exemption cannot apply. Thus, plaintiffs should prevail and obtain disclosure of the adjusted figures.

C. *Constitutional Challenges*

A plaintiff trying to compel use of the adjusted population figures could certainly make a constitutional claim as part of the litigation strategy. Such a claim would propose that the use of unadjusted population figures by the Census Bureau (or state) would impair plaintiff's fundamental right to vote,[51] because use of the unadjusted figures would result in malapportioned congressional, legislative, and local election districts. In fact, some electoral districts would have higher populations than is required for official apportionment purposes; thus, voters in those districts would have less direct political representation.

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await the Secretary's decision on whether to release the data. However, the Department did state that the invocation of the § (b)(5) exemption was premature. These letters were released by the California Assembly Committee on Elections, Reapportionment and Constitutional Amendments at the hearing held in Los Angeles in August 1991.

Following this exchange, Brown filed suit against the Department of Commerce. On February 10, 1992, the district court ordered the release of the data. Assembly of California v. U.S. Dep't of Commerce, 797 F. Supp. 1554 (E.D. Cal. 1992). The Ninth Circuit Court of Appeals affirmed the district court's holding reasoning that the disclosure of the census data would not have revealed anything about the deliberative process of the Census Bureau since the data was of a factual nature, and did not qualify for an FOIA exemption. 968 F.2d 916 (9th Cir. 1992). *Cf.* Senate of California v. Mosbacher, 968 F.2d 974 (9th Cir. 1992) (holding that none of the provisions of the federal census statutes, the census clause of the Constitution, nor the Voting Rights Act, required disclosure to the California Senate of the adjusted figures). An Eleventh Circuit Court of Appeals decision determined that the adjusted census figures were exempt from disclosure under § (b)(5). Florida House of Rep. v. U.S. Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992). However, this decision analyzed the question of exemption as simply whether or not the information sought to be disclosed represented the give-and-take of the consultive process. Reasoning that the adjusted figures were not simply facts, but recommendations resulting from a complex statistical process to be considered by the Secretary in his final decision, the court concluded that the adjusted figures were part of the deliberative process and thus exempt from disclosure.

49. *See Baldrige*, 455 U.S. 345 (1981). The other exemptions of the FOIA apply to matters unrelated to the census, such as national security.

50. *See* NLRB v. Sears, 421 U.S. 132, 150 (1975) (Congress adopted exemption (b)(5) to protect decision making processes of agencies).

51. Specifically, a plaintiff could claim that use of the unadjusted enumeration is a violation of the Fourteenth Amendment (prohibiting vote dilution resulting from electoral districts of unequal populations), and the Census Clause of the Constitution, U.S. CONST. art. I, § 2, cl. 3. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 7 (1963) (Census Clause requires each person to have vote of equal weight in congressional districts). The *Wesberry* principle was extended to state legislative districts by application of the Fourteenth Amendment in Reynolds v. Sims, 377 U.S. 533 (1964).

However, it is possible that a court would not reach the merits of the constitutional claim because it also raises a political question. The modern doctrine for examining a political question is based upon *Baker v. Carr*.[52] The Census Bureau has argued that the issue whether or not to allow an adjustment of the census was nonjusticiable because there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[53]

However, this argument has been rejected by several courts which have considered it for two major reasons. First, the courts, in reviewing the history of the Census Clause, reasoned that making Congress responsible for direction of the census was intended to protect the census from local influences and not a provision intended to prevent other branches of government from influencing the census.[54] Second, courts have rejected the Census Bureau's political question argument by holding that the claim against the Census Bureau is essentially one that the courts have dealt with extensively—the dilution of the fundamental right to vote.[55]

A stronger argument that the adjustment issue is a political question may lie in the "lack of judicially discoverable and manageable standards for resolving it."[56] It is true that since *Baker*, the Supreme Court has indicated that cases involving reapportionment were justiciable. This might lead to the conclusion that a court would regard litigation involving claims to adjust the census figures as justiciable. However, there is a fundamental difference between the reapportionment cases such as *Reynolds* and litigation seeking adjustment of the Census enumeration.

In the *Reynolds* line of cases, there was no contention that the population figures used were inaccurate. Malapportionment was a political decision of the legislatures and not the result of inaccurate data. Thus, the orders of the courts for state legislatures to comply with the one man-one vote requirement simply involved redrawing of political boundaries and not the complex technical and statistical analysis of determining the census. The administrative requirement of *Reynolds* was in fact straightforward; there were indeed judicially manageable standards.

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52. 369 U.S. 186 (1962).

53. *Id.* at 217.

54. *See* City of Philadelphia v. Klutznick, 503 F. Supp. at 674 (language of the Census Clause does not indicate a textually demonstrable commitment).

55. *See* Carey v. Klutznick, 637 F.2d at 838 (claims of mismanagement against the Census Bureau do not present a political question, but are justiciable since the claim alleges impairment of the right to vote); City of New York v. U.S. Dep't of Commerce, 739 F. Supp. at 765 (challenge to census is justiciable under precedents challenging congressional redistricting because the census is the foundation for apportionment). *But see* Tucker v. U.S. Dep't of Commerce, 135 F.R.D. 175, 182 (N.D. Ill. 1991) (determination of whether or not to adjust census is a political decision and non-justiciable).

56. *Baker*, 369 U.S. at 217.

In contrast, claims of malapportionment resulting from the census undercount involve complex technical and bureaucratic determinations, although there are still political considerations. Scores of enumerators, statisticians, and bureaucrats are required to assemble the population data. While these cases have been heard by the courts, they have involved thousand of pages of testimony and many expert witnesses. A district judge is called upon to decide whether the complex statistical conclusions of the Census Bureau are incorrect or whether plaintiffs have demonstrated that the census adjustment would result in more accurate population figures; thus, such a case is one which may qualify for nonjusticiability due to a lack of manageable standards.[57]

Although it is surprising that the lack of judicially manageable standards has not been considered more carefully by the courts, the conclusion has been (and will continue to be) that the claim of census undercount malapportionment is justiciable. However, the plaintiff would be required to demonstrate that his fundamental right to vote has been burdened, a daunting prospect indeed. Because the plaintiff would have to show that the adjusted figures are a more reliable estimate of the population and that use of the unadjusted figures would result in malapportionment, the challenge would involve statistical evidence of sufficient strength to refute the Census Bureau. With the Census Bureau's scores of experts, this burden is a heavy one.

Even if a court were to accept that there has been a malapportionment, it might conclude that the abridgement of the right to vote has not been unduly burdensome or that a remedy is lacking. First, it could be argued that the levels of vote dilution which result from the undercount are relatively minor. Blacks were undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%.[58] This range of malapportionment is well within the range which the Supreme Court has accepted for deviations in state legislative districts. In addition, the court might take judicial notice of the fact that malapportionment of electoral districts at the end of the decade (ninth year) certainly exists at levels in excess of those in the undercount figures. Yet the court would certainly not suggest that reapportionment should occur prior to the beginning of the new decade.[59]

A plaintiff could probably refute the argument that the un-

57. *See, e.g., Tucker*, 135 F.R.D. at 181-182 (judicially manageable standards are lacking in evaluating how to adjust census enumeration).

58. *See Census Bureau Releases Refined Estimates, supra* note 17.

59. *See* French v. Boner, 771 F. Supp. 896, 902 (M.D.Tenn. 1991) (although some population deviations develop toward the end of the decennial period, limits on frequency of apportionment are justified by need of stability and continuity).

dercount is not unduly burdensome. First, the Court has required exacting standards in congressional districts. Thus, malapportionment from the above figures would be clearly unconstitutional. In addition, because minorities are often concentrated geographically, the undercount estimates are not an accurate measure of the real dilution suffered by minorities. Finally, a court may not want to accept any level of undercount, even de minimis, as acceptable. Indeed, the Supreme Court has rejected a de minimis standard in congressional districting in order to prevent legislatures from aiming for such a standard.[60] The congressional districts must be as equal as is practicably possible.

Fashioning a remedy may present a more difficult problem for a court. First, there are major time constraints involved in redistricting issues. If a court ordered readjustment of population figures, the result would be delays in elections as new districts were drawn and new procedures established. Such a delay could be disruptive to the electoral process. Another problem with a remedy could be the costs and efforts involved. If a court ordered a recalculation of the population or new procedures to determine the undercount, the Bureau might be faced with extensive new expenses and bureaucratic duties. Unless the court finds that the adjusted figures already in place are acceptable, it might be reluctant to order new procedures.

Another issue for the court to consider is whether or not the Census Bureau is the proper defendant in a lawsuit. The proper defendant might appear to be the Census Bureau, since it is charged with the task of determining the population by Congress. However, the state legislatures determine congressional and legislative districts, albeit usually based on the Bureau's population figures, and it is now established that there is no constitutional requirement for state legislatures to use the census figures.[61] A state may decide that other population figures should be used. In fact, the Census Bureau has argued that it should not be the defendant in litigation involving the issue of the adjusted data since it merely supplies the information. Courts which have considered this issue have agreed and found that the Bureau could not be a defendant in suits seeking adjustment of population figures as there was a lack of causation between the Bureau's refusal to adjust population figures and a legislatures' use of those figures. In *Young v. Klutznick*,[62] the court concluded that because the Michigan legislature could decide to

60. *See Kirkpatrick*, 394 U.S. at 531 (de minimis standard in population variances between congressional districts not acceptable since it would encourage legislators to aim for such a standard).

61. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 91 (1966) (Constitution does not require state legislatures to use census figures as standard in reapportionment).

62. 652 F.2d 617, 624 (6th Cir. 1981). *See also* Note, *supra* note 13, at 859 (arguing

adjust the census figures, the plaintiffs did not have standing in a suit against the Census Bureau. The court reasoned that the legislature, as an independent agent, broke the causation between the harm to the plaintiffs' right to vote and the decision of the Census Bureau not to adjust the census figures.

The lack of causation arguments do not appear convincing.[63] It is true that a state legislature could decide to use adjusted population figures. However, practical considerations force the conclusion that if the Bureau itself does not adjust the population figures, a state legislature would be hard pressed to use alternative figures. First, although the states have the right to use non-census figures in their districts, they may lack the resources to generate these figures on their own. Second, it would be wasteful for states to engage in duplicative efforts. Third, the use of alternate population data for various states would cause confusion, particularly because the census figures would be used for federal programs and the State's own figures used for elections. Finally, many state constitutions require the use of the Census figures in electoral districts.

In the event that a court is satisfied that the failure to use the adjusted figures does result in an abridgement of a plaintiff's fundamental right to vote, the next consideration would be the compelling state interests needed to justify this state action. Since this issue involves a fundamental right, presumably a court would evaluate the justification under a strict scrutiny analysis. Two state interests of sufficient importance likely to be used to defend a decision not to adjust the population figures are preventing political disruption that would occur with the use of adjusted figures and the necessity of maintaining public confidence in the census overall.[64]

Yet, it is unlikely that these state interests can be considered compelling. The fact that so much effort is being expended to get the census enumeration adjusted indicates that the public already lacks confidence in the census. In addition, the process of reapportionment is inherently disruptive, regardless of which population figures are used.

D. *Challenges Under the Voting Rights Act*

In seeking to establish a violation of Section 2 of the Voting

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that the Census Bureau cannot be a defendant in apportionment lawsuits because legislatures are not required to use census figures).

63. *Klutznick*, 652 F.2d at 629. In a powerful dissent to the majority in *Klutznick*, Judge Keith disagreed that the plaintiffs lacked standing against the Census Bureau arguing that it was reasonable to anticipate that the Michigan legislature, under the circumstances of the case, would utilize the census figures because the legislature had always done so. *Id. See also* McKay, *supra* note 5 (arguing that the Census Bureau should be the defendant because states have relied on census figures in the past).

64. *See supra* notes 41-42 and accompanying text.

Rights Act,[65] a plaintiff may argue that the use of unadjusted population figures is a "practice or procedure" which results in an abridgement of the right to vote. Because the populations which are typically undercounted—racial and language minorities—are the groups the Voting Rights Act was designed to protect, such a claim is very plausible.

The Supreme Court pronouncement on Section 2 in *Thornburg v. Gingles*,[66] indicated that "[t]he essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social or historical conditions to cause an inequality in opportunities" for the protected groups.[67] Since the major purpose of the census enumeration is to provide the basis for apportionments and is an integral part of the election process, the use of unadjusted population figures is a "practice" and thus is subject to claims under the Voting Rights Act.

The *Gingles* Court indicated that three factors were required to show a violation involving multi-member districts. First, a plaintiff must prove that the minority group was sufficiently large and compact to constitute a majority in a single member district. Second, a plaintiff must show that the minority group within the district is a politically cohesive group. Third, a plaintff must show that bloc voting prevents a minority candidate from winning an election.[68]

The use of adjusted population figures could serve as a measure of the size and compactness of the minority population.[69] Plaintiffs could show that use of adjusted figures results in population figures of sufficient size to allow minorities to constitute a majority in a single district and therefore the use of enumerated figures would be a violation of Section 2.

Plaintiffs would not necessarily be limited to applying Section 2 to lawsuits where they can demonstrate that the minority population is sufficiently large and compact to constitute a majority in a

65. The Voting Rights Act of 1965 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1991)). Section 2 of the Voting Rights Act, in part, states: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b)." 42 U.S.C. § 1973(b)(1991).

66. 478 U.S. 30 (1986).

67. *Id.* at 47.

68. *Id.* at 50-51.

69. In Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal. 1990), the court indicated that in order for plaintiffs to overcome the presumption in favor of census data, they do not need to show that the census was inaccurate. Rather, the court said, "it is sufficient to conclude that there has been significant demographic changes since the decennial census and that there exists post-decennial population data that more accurately reflects evidence of the current demographic conditions." *Id.* at 1345. In the same fashion, plaintiffs could argue that the adjusted population figures demonstrate the current demographics more accurately than the census enumeration.

single member district.[70] In *Chisom v. Roemer*,[71] the Supreme Court stated that if plaintiffs demonstrate that they have less opportunity both to participate in the political process and to elect candidates of their choice, then a Section 2 claim has been established. Even if the minority population is not sufficient to create a majority district, if the use of unadjusted figures diluted a minority's ability to influence the election, a Section 2 claim is possible.[72]

III. CONCLUSION

Plaintiffs seeking to require apportionment with adjusted census figures have a variety of strategies to use in court. It seems unlikely that plaintiffs could prevail by utilizing judicial review under the Administrative Procedure Act. However, chances for success seem quite good in challenging the adjusted figures under the Voting Rights Act. In addition, if plaintiffs simply seek release of the adjusted census figures, they should prevail under the FOIA.

It is hard to predict what a court would decide in a case involving a constitutional claim. Although plaintiffs can certainly demonstrate an abridgement of their right to vote, there are significant problems with the remedy that would be available to plaintiffs.

Finally, the technical and bureaucratic considerations of adjustment raise serious questions of whether litigation is an appropriate method of settling the issue. The inequities in electoral representation and federal funding that proponents of the adjustment seek to redress are concerns that can be redressed by the Congress. For example, Congress could decide that some federal programs should be distributed using figures derived from an adjustment of the enumeration. The success of the Voting Rights Act demonstrates that when Congress does act to redress such inequities, it can do so very successfully.

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70. For a discussion of the application of Section 2 to a case involving single member districts, see Jeffers v. Clinton, 756 F. Supp. 1195 (E.D. Ark. 1990).

71. 111 S. Ct. 2354, 2365 (1991).

72. *See, e.g.*, Armour v. Ohio, 775 F. Supp. 1044, 1062 (N.D. Ohio 1991)(three-judge court) (dilution of minority "influence" may be sufficient to establish Section 2 violation).

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