

1                   IN THE SUPREME COURT OF THE UNITED STATES

2      -   -   -   -   -   -   -   -   -   -   -   -   -   -   X

3 UTAH, ET AL., :

4                      Petitioners                      :

5 v. : No. 01 -714

6 DONALD L. EVANS, SECRETARY OF :

7 COMMERCE, ET AL. :

8      -   -   -   -   -   -   -   -   -   -   -   -   -   -   X

9 Washington, D.C.

10 Wednesday, March 27, 2002

11                   The above-entitled matter came on for oral  
12       argument before the Supreme Court of the United States at  
13       10:15 a.m.

14      APPEARANCES:

15 THOMAS R. LEE, ESQ., Provo, Utah; on behalf of the  
16 Appellants.

17       WALTER E. DELLINGER, Washington, D.C.; on behalf of  
18       the North Carolina Appellees.

19 GEN. THEODORE B. OLSON, Solicitor General, Department  
20 of Justice, Washington, D.C.; for the Federal  
21 Appellees.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS R. LEE, ESQ.	
4	On behalf of the Appellants	3
5	ORAL ARGUMENT OF	
6	WALTER E. DELLINGER, ESQ.	
7	On behalf of the North Carolina Appellees	31
8	ORAL ARGUMENT OF	
9	THEODORE B. OLSON, SOLICITOR GENERAL, DEPARTMENT	
10	OF JUSTICE, on behalf of the Federal	
11	Appellees	44
12	REBUTTAL ARGUMENT OF THOMAS R. LEE, ESQ.	
13	On behalf of the Appellants	63
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 01-714, Utah vs. Donald L. Evans, Secretary of Commerce. Mr. Lee.

ORAL ARGUMENT OF THOMAS R. LEE, ESQ.

ON BEHALF OF THE APPELLANTS

MR. LEE: Mr. Chief Justice and may it please the Court: for most of the history of the census of the American population, that census has been conducted by means of an actual count unaltered by any methods of statistical estimation. At the time of the first census of 1790, James Madison noted that this was the way required by the Constitution and ever since then, that requirement has been implemented by Congress in the Census Act. The question presented in this case is whether the Census Bureau acted unlawfully in departing from that longstanding historical tradition by using the method of estimation called hot-deck imputation in the 2000 apportionment count. 99.6 percent of the 2000 apportionment count was comprised of actual data compiled by census enumerators in two phases. First, a mailing sent to all addresses on a master address file, and second, as many as six follow-up visits.

1           Imputation added an additional .4 percent to that  
2     count, 1.2 million statistically generated persons were  
3     added to the apportionment count by means of a statistical  
4     estimate. The basic essence of the estimate was to say  
5     the 620,000 addresses that the Census Bureau was unable to  
6     enumerate are assumed to have estimated to have the same  
7     number of occupants as their next door neighbors.

8           QUESTION: Mr. Lee, I would like to ask you to  
9     address early on whether this injury that Utah alleges to  
10    have suffered is redressable in any fashion. Things have  
11    happened since the census was taken. North Carolina  
12    presumably has drawn districts and has gone quite far down  
13    the road in reliance on the census. The President has  
14    turned over the numbers and so forth. How can this be  
15    redressed, do you think, now?

16          MR. LEE: I suppose, Justice O'Connor, that  
17    there are two aspects of your question if I'm  
18    understanding it. One of them would be a redressability  
19    standing question. That's a question as the Solicitor  
20    General notes that has already been decided by this Court  
21    both in Franklin and in Montana with regard to --

22          QUESTION: Well, there is jurisdiction,  
23  
24  
25

1 but I don't know that we have really addressed the  
2 redressability issue fully in prior cases. When could  
3 Utah have made its challenge? When is the earliest time  
4 Utah could have challenged this imputation business?

5 MR. LEE: It would have been impossible, Justice  
6 O'Connor, for Utah to have brought a challenge prior to  
7 the census. As North Carolina indicated --

8 QUESTION: Well, why is that? I mean, you knew,  
9 did you, that the Census Bureau planned to use it?

10 MR. LEE: Yes. We certainly had constructive  
11 knowledge.

12 QUESTION: But you wouldn't have had an injury.

13 MR. LEE: We wouldn't have had an injury, and in  
14 fact as the Census Bureau itself indicates, there would  
15 have been no way even to have anticipated that imputation  
16 would have had this effect.

17 QUESTION: Well, you have no incentive to bring  
18 a challenge until you know that you are losing a  
19 congressional seat, I suppose.

20 MR. LEE: That's exactly right. And that was  
21 one of the problems. It took us some time to get

22

23

24

25

1 the numbers from the Census Bureau, specific state by  
2 state numbers, in order to be able to determine whether in  
3 fact this was a method that impacted Utah, and as soon as  
4 we got those numbers, we brought this suit within a few  
5 days.

6 QUESTION: Well, was there a window of time  
7 between completion of the census and the submission of the  
8 numbers to the President where you could have sued? How  
9 long was that period of time?

10 MR. LEE: That was, the time line is that the  
11 Secretary must submit the numbers by the end of the  
12 calendar year to the President, and then the President  
13 must submit those numbers within seven days after the  
14 first day of the Congress. The problem, Justice Kennedy,  
15 was that we didn't have those numbers at that time. The  
16 Census Bureau had not released again state by state  
17 imputation numbers until well into March of 2001, and it  
18 was within a few days after that that we brought this  
19 suit.

20 QUESTION: Well, if you prevail, what's supposed  
21 to happen?

22 MR. LEE: The remedy that we are asking for,  
23 Justice Kennedy, is simply a declaration and an injunction  
24 to the Secretary of Commerce directing the Secretary to  
25 issue a new apportionment count free of

1 the statistical estimates that we believe are unlawful  
2 under the Census Act and under the Census Clause of the  
3 Constitution.

4 QUESTION: Well, what's supposed to happen under  
5 the Act? I mean, I went back and read the Act last night.  
6 And that's geared to certain automatic apportionment, and  
7 that in turn is geared to the delivery of the numbers by  
8 the date specified. So let's assume the Secretary and  
9 then the President comes with different numbers. The Act  
10 doesn't have any provision in effect for self-adjustment,  
11 does it?

12 MR. LEE: And I think, Justice Souter, that's  
13 effectively North Carolina's argument. That there are  
14 time deadlines set forth in the Census Act that somehow  
15 stand in the way of reviewability here. That is an  
16 argument that was raised and rejected in Franklin. The  
17 Franklin opinions, Justice O'Connor's opinion for a four  
18 justice plurality on that point, says that if this Court  
19 agrees with the Plaintiffs in this case, we may presume  
20 that the President of the United States will conform to  
21 our decision and will in fact issue a new apportionment  
22 count that is consistent with the law as we clarify it.  
23 By the same token --

24 QUESTION: I will presume that, too, but  
25

1 that was four justices, and there wasn't a specific  
2 discussion of what is supposed to happen under the  
3 statute, even assuming the President sort of takes counsel  
4 from our opinion.

5 MR. LEE: And the other opinion in that case,  
6 Justice Souter, that also addresses this issue was Justice  
7 Stevens' concurring opinion, for a separate four-justice  
8 concurrence on this issue, and his analysis was in fact  
9 that the statute would require the President to conform to  
10 a revised count that the Secretary might present in  
11 conformity to a decision of this Court.

12 QUESTION: Well, that's what he said and as you  
13 know, I joined his opinion. But that didn't have a  
14 majority, either. So isn't it incumbent upon you to tell  
15 us whether in fact the position that some of us took that  
16 first time is in fact correct? Why will they, I mean, it  
17 seemed so to me at the time but it's a real issue in this  
18 case, as to whether the statute which is geared to  
19 delivery of information at certain times can in effect  
20 reverse itself.

21 MR. LEE: The other point that Justice Stevens  
22 made in his concurring opinion, Justice Souter, which I  
23 think is critical on this issue, is that the time lines  
24 under the statute can be

25



1 understood only to trigger, only with regard to the issue  
2 of ripeness. In other words, it makes no sense to think  
3 that a time deadline for executive action under a statute  
4 means that you, you must -- it makes no sense to think  
5 that those deadlines are a bar to judicial review. In  
6 fact, what we usually think of when we look at a statute  
7 that has deadlines is that once those deadlines have  
8 passed, then executive action is at an end, there is a  
9 ripe claim that may be brought and then it's appropriate  
10 for the federal courts to step in.

11 QUESTION: But those are not cases where after,  
12 after the deadline provisions, you have a, a basic change  
13 in, in the court's role, that after the deadline in this  
14 case, you are going to have to, the court is going to have  
15 to issue an opinion that purports to bind the President.  
16 Which is, you know, a significant step.

17 MR. LEE: Yes. I think that the opinion does  
18 not need to purport to bind the President, and as the  
19 Court indicated in Franklin, there is no need for the  
20 order to go to that point.

21 QUESTION: Well, but I mean that's, that's even  
22 worse. You want us to decide something on the ground that  
23 some good may come out of it. But I just  
24  
25

1 don't know what your closest case is for the proposition  
2 that this satisfies the redressability requirement.

3 Let's assume that the President, were interested  
4 in implementing our orders. We send something to  
5 Congress, and maybe that's the end of it there. Can we  
6 force the Congress to act?

7 MR. LEE: Well, the, the order would go to the  
8 Secretary. The Secretary would submit a new apportionment  
9 count to the President that would be free of the  
10 estimations and the question then is what would the  
11 President do. And the President under two alternative,  
12 but not necessarily inconsistent theories, of eight  
13 justices in the Franklin case would certainly conform and  
14 would present those same numbers, that same revised  
15 apportionment count.

16 QUESTION: Mr. Lee --

17 QUESTION: Let me just -- what's your closest  
18 case to show that a declaration of this kind satisfies the  
19 requirement of redressability?

20 MR. LEE: Well, I believe it's Franklin, Justice  
21 Kennedy.

22 QUESTION: Excuse me. Other than Franklin.  
23 Because Franklin was a fractured opinion.

24 MR. LEE: Well, one understanding  
25

1 consistent with Justice O'Connor's opinion in Franklin  
2 would be that of a declaratory judgment. It does not in  
3 and of itself bind the parties. It rather declares the  
4 law. It is not a, it is not a, a binding order in the  
5 sense of ordering parties to do anything.

6 QUESTION: Well, it does bind the parties in a  
7 certain extent. It's just, there is no action required as  
8 a result of it. There is no mandate saying you must do  
9 this.

10 MR. LEE: That's right, Mr. Chief Justice, and I  
11 think that that's consistent again with Justice O'Connor's  
12 plurality opinion in Franklin.

13 QUESTION: We have never held that a declaratory  
14 judgment will issue where the Court has no power to compel  
15 the action that the declaratory judgment describes. I  
16 mean, you cannot get jurisdiction by saying well, you  
17 know, we have no power to, over this person to compel any  
18 action, but we are just going to declare what the law is  
19 because this person, you know, might follow it. I don't  
20 think that's a basis for jurisdiction.

21 MR. LEE: Well, Justice Scalia, but I think  
22 there are two alternative theories. One is Justice  
23 O'Connor's approach and the other is Justice  
24  
25

1 Stevens' approach in Franklin, and Justice Stevens'  
2 approach in Franklin in fact, is in fact that the  
3 President is required to conform with revised numbers.  
4 But the Secretary might represent --

5 QUESTION: But you are actually taking a  
6 position also that whether or not the President would  
7 respond, at least the Secretary would have a duty to do  
8 something in response to our order.

9 MR. LEE: That's exactly right.

10 QUESTION: Is it quite common that in suits the  
11 President is not named, and the Secretary is. But I  
12 wanted to go back to a question -- the President has  
13 acted, but Congress has not. Am I correct? Congress is  
14 waiting on what this court does?

15 MR. LEE: The final step, Justice Ginsburg, in  
16 this process, is for the clerk of the House of  
17 Representatives to forward to the states a certificate  
18 that shows how many seats in the House of Representatives  
19 they are entitled to after clerk receives the revised  
20 numbers from the President. And this Court in Franklin  
21 indicated clearly that that duty is a ministerial duty and  
22 that we can absolutely expect that the clerk of the House  
23 will follow suit. So the only question is with regard to  
24 the President,

25

1 and either under Justice O'Connor's approach or under  
2 Justice Stevens' approach in the Franklin opinions, we can  
3 and should expect that the President will in fact conform  
4 to this Court's order.

5 QUESTION: You only have a certain amount of  
6 time, Mr. Lee. I want to ask you a question about the  
7 merits of the case. Are you saying in effect that there  
8 has to be a specific, something more than just a little  
9 bit of educated guesswork with respect to every house in  
10 the country?

11 MR. LEE: Well, the actual enumeration clause of  
12 the Constitution would require an actual count, and --

13 QUESTION: Okay. But what, supposing that the  
14 census people have, they see a house, and they see a car  
15 in the driveway, but they can never find anybody home, and  
16 then someone sees lights on late at night. They do their  
17 best. Do they have to say nobody lives there?

18 MR. LEE: Yes, they do, Mr. Chief Justice, and  
19 one of the reasons is that the mere fact that there are  
20 lights on and cars there doesn't tell us that this is  
21 anyone's usual place of residence. It may be a seasonal  
22 vacation home.

23 QUESTION: It doesn't confirm it, but  
24  
25

1     isn't it a permissible inference for the census takers?

2             MR. LEE: Well, at some point a census taker may  
3     make a conclusion, if it's based on information specific  
4     to an individual household, may make a conclusion that a  
5     household is in fact occupied. Our position is that what  
6     the Census Act requires, Section 195, is -- what the  
7     Census Act prohibits, rather, is the use of information  
8     specific not to that individual household but specific to  
9     an entirely different household for the purpose of drawing  
10    an inference.

11            QUESTION: Okay. Would you, on that theory,  
12    would you agree that although they may not impute a number  
13    beyond one, it would be fair for them at least to count it  
14    as one? Because they start out as I understand it with a,  
15    in effect a report from the post office saying, you know,  
16    this is a house at which somebody lives. So isn't that  
17    kind of hearsay just as good as, let's say, the next door  
18    neighbor's hearsay at least to the extent of saying  
19    somebody lives there and they can count one person?

20            MR. LEE: Justice Souter, they don't start out  
21    with the proposition that this is a house and somebody  
22    lives there. They start out with the  
23  
24  
25

1 proposition that this is an address.

2 QUESTION: Well, doesn't an address usually mean  
3 somebody lives there, at least if we can establish that  
4 it's a residential neighborhood?

5 MR. LEE: Not necessarily, for a number of  
6 reasons. Number one, you have got the seasonal home  
7 problem. It may be no one's personal, no one's usual  
8 place of residence.

9 Number two, you have got the problem that some  
10 things that look like homes and that are in residential  
11 areas actually turn out to be businesses.

12 QUESTION: What percentage of homes in the  
13 United States when they take the census turn out to be  
14 vacation or second homes?

15 MR. LEE: I don't have that number handy off the  
16 top of my head, Justice O'Connor. I believe that it is in  
17 the record, but I'm not aware of that. The total number  
18 of imputations was with regard to 620,000 unrelated --

19 QUESTION: But the imputation techniques  
20 apparently treat all the dwellings that are identified as  
21 residences to be counted? They don't discount for a  
22 percentage that are vacation homes?

23 MR. LEE: No. They do not. And that's part of  
24 the problem. Part of the problem here is

25

1     that imputation assigns occupancy not only to units,  
2     Justice Souter, that are known to be houses.

3             QUESTION: That's saying that they are doing it  
4     bad. We have to assume they are doing it good. I mean,  
5     suppose they have learned with experience that an old age  
6     home that has two bedrooms in each apartment and that has  
7     a sign out in front that says "full," has two people. One  
8     in each bedroom. And now they learn something about this  
9     house. It's an old age home. It has two bedrooms. And  
10    the sign in front says full.

11            Now, can they make the assumption that this too  
12    has two people in it?

13            MR. LEE: I think not.

14            QUESTION: Not. Now, why not? Can they make an  
15    assumption that if the pizza man delivers pizza to the  
16    place and people eat the pizza, i.e., at least it  
17    disappears, that there is someone in the house? Can they  
18    make that assumption?

19            MR. LEE: They cannot, Justice Breyer.

20            QUESTION: They cannot make the assumption about  
21    the pizza man. They deliver it to the door and the food  
22    disappears and the lights are on and off. They can't make  
23    that assumption?

24            MR. LEE: No. People in businesses eat  
25



1 pizza and people who are living, staying temporarily in a  
2 vacation home eat pizza.

3 QUESTION: And by the way, there is a sign in  
4 front that says this is not a vacation home.

5 (Laughter.)

6 MR. LEE: Then I suppose -- I suppose under  
7 those circumstances, then we'd have information. But --

8 QUESTION: Fine. Once you are down, once you  
9 are down that road, then you are then -- then I can easily  
10 construct examples where the imputation is absolutely as  
11 strong. I mean, I just did that with my old age home. So  
12 you are not against imputations, you are against weak  
13 imputations.

14 MR. LEE: No. I'm against sampling because  
15 that's what the statute prohibits.

16 QUESTION: You have to take that position.

17 MR. LEE: I think it's important, though, to  
18 answer your question, Justice Breyer, to go back to the  
19 baseline of the House of Representatives decision. It  
20 holds that a method proposed by the Census Bureau in 1997  
21 is a method of sampling. We know that much, and so there  
22 is really a narrow statutory question presented here and  
23 it is, is this particular method meaningfully different?  
24 And the

25

1 answer is that it is not.

2 It is not under the statistical understanding of  
3 the term sampling. It also is not because the definition  
4 that the appellees are proposing here is a definition that  
5 would nullify this Court's decision in the House of  
6 Representatives because the two methods simply are not  
7 distinguishable. Let me talk about the appellees'  
8 definitions and explain why that's true.

9 The definitions that they propose say that  
10 sampling is limited to methods that are employed as a last  
11 resort, only after an initial effort to enumerate the  
12 whole population. Under that definition, in fact, both,  
13 neither one of the methods that's at issue here would  
14 follow sampling, and so that effectively is an argument  
15 that the Court got it wrong in House of Representatives  
16 and that that case ought to effectively be nullified. And  
17 here's why.

18 QUESTION: Are you suggesting, Mr. Lee, that the  
19 Census Bureau goes about this thing in a way, say,  
20 supposing you have a lake in northern Wisconsin where the  
21 temperatures get down to about 40 below in the winter. So  
22 you know it's not a year-round, you see a bunch of houses  
23 around the lake. The census people come along and do you  
24 think

25

1 if they could find somebody there, they would just  
2 automatically say yes, that person counts? Without  
3 inquiring as to whether it's a vacation home or not?

4 MR. LEE: Well, if they know that there is  
5 somebody who is living there, they have to find out  
6 whether the somebody who is living there lives there as  
7 his usual place of residence, or that person doesn't count  
8 in the apportionment count. But what's going on --

9 QUESTION: But under the imputation method as I  
10 understand it, the assumption is made that if a house is  
11 there, that it is a residence, and a second assumption is  
12 made that the number of occupants will be that in a  
13 general geographic area of other homes. Is that right?

14 MR. LEE: That's right. And that's exactly the  
15 sense in which this particular method of imputation is a  
16 method of sampling. The Census Bureau took a sample of  
17 620,000 addresses. They called them donor housing units  
18 in the 2000 census. It used that sample of 620,000  
19 addresses or housing units as a representative sample of  
20 the 620,000 addresses that they never were able to count  
21 on the theory that they were representative, knowing that  
22 next door neighbors are not always the same, but that

23  
24  
25

1 generally across the board, if you take the 620,000 sample  
2 or donor units and use them to estimate the 620,000  
3 addresses about which we know nothing, generally across  
4 the board it will average out and it will be  
5 representative. And that's sampling. Sampling is taking  
6 information about the parts to make an inference about the  
7 whole.

8 QUESTION: I'm curious both in your argument  
9 here this morning and in the brief, I think both parties  
10 seem to assume that the key question is whether or not  
11 this is sampling. Do you take the position that other  
12 statistical methods of adjustment are permitted just so  
13 long as they are not called sampling?

14 MR. LEE: Our position is, Justice Kennedy, that  
15 any method that takes information from a part of the  
16 population to make an inference about the whole is a  
17 method of sampling and is prohibited. Now, there are  
18 methods, statistical methods that the Bureau uses that  
19 don't amount to sampling that are permitted. Let me give  
20 you one example.

21 QUESTION: Go ahead.

22 MR. LEE: It's called the method of quality  
23 assurance, and the quality assurance phase, what the  
24 Bureau does is to randomly send out

25

1 enumerators to given census tracts to try to find the  
2 tracts where there are a large number of errors, where the  
3 enumerators may have made a lot of mistakes.

4 But the response to that is to send out an  
5 additional army of enumerators to those problematic tracts  
6 to sort out the problem to get the new information. Now,  
7 that's an actual count. That's not sampling but it's a  
8 statistical method. And so that's an example.

9 QUESTION: What about a house where they have  
10 not been able to find anybody to talk to, no returns sent  
11 back, so they go to the people next door and they say is  
12 there anybody living in that house and the person next  
13 door says yes, there are two people. Now, is that  
14 permissible under your theory?

15 MR. LEE: That is permissible under our theory.  
16 That's the use of proxy data that the Bureau currently  
17 engages in and Mr. Chief Justice, that would be  
18 permissible.

19 QUESTION: But the Act refers both to sampling  
20 and to other methods of statistical adjustment. It seems  
21 to me sampling is a way to gather the data, and what we  
22 are talking about here are statistical assumptions made to  
23 evaluate the

24

25

1 data, and I'm not sure why you have to concede that you  
2 lose if we say this isn't sampling.

3 MR. LEE: Well, there may be another way to get  
4 there, Justice Kennedy, but my understanding under the  
5 statute is that Section 195 prohibits the statistical  
6 method known as sampling. That may suggest that there are  
7 other statistical methods that are not, that don't amount  
8 to sampling, and the quality assurance example that I gave  
9 I think is one of those examples that would be permitted  
10 under the statute.

11 But all methods that take information from a  
12 part, from these 620,000 addresses that are occupied, to  
13 make an inference about the rest of the population, the  
14 620,000 addresses that we don't know anything about, those  
15 are methods of sampling and again you really cannot  
16 distinguish this method in any meaningful way from the  
17 method that was struck down in 1997. The principal  
18 difference is that instead of 620,000 addresses about  
19 which we know nothing, under the 1997 plan, the Bureau  
20 anticipated that there may be many more.

21 QUESTION: Yes. But there is one significant  
22 difference and that is in the technique that was struck  
23 down before, a number of inferences

24

25

1 are being drawn from the so-called sample. In this case,  
2 only one inference is being drawn from a sample of one,  
3 and that is at least a tremendous difference in degree,  
4 and I suppose it's a difference in degree that would be  
5 likely to have an effect on accuracy.

6 MR. LEE: In fact, Justice Souter, that is not a  
7 distinction. The fact that there is an imputation being  
8 made one individual housing unit at a time, again, does  
9 not distinguish this method from the method struck down in  
10 the House of Representatives case.

11 QUESTION: Well, it wouldn't in a literal sense  
12 if you were simply making one imputation at a time, but  
13 you were making a long series of imputations from the one  
14 sample, in this case, the one house. But this is simply  
15 one imputation made one time, and it involves not so much  
16 a, a principle of selection, or let's put it this way.  
17 You can characterize it not only as based on a principle  
18 of selection, but you can, you can characterize it on, on  
19 a rule of probability, like birds of a feather flock  
20 together. People who live next door tend to be much  
21 alike.

22 So it seems to me that there is a qualitative  
23 difference and a quantitative difference.

24

25

1           MR. LEE: But Justice Souter, once you pool all of  
2 the individual housing units together, the 627 -- 620,000,  
3 rather, of these housing units that were used to estimate  
4 the 620,000 addresses that we know nothing about after six  
5 follow-up visits, that's your sample. That's your group.

6           QUESTION: No. Your sample isn't 620 to tell  
7 you about just any random 620. It's, it's a selection of  
8 one to tell you about one more which is right next to it.  
9 So it seems to me that it sort of masks the issue to talk  
10 about 620 and 620 as opposed to one and one.

11           MR. LEE: Mathematically it seems to me, though,  
12 Justice Souter, we get to the same end. This is an  
13 intermediate step, even though it happens on a household  
14 by household basis. It's an intermediate step for the  
15 clear purpose of making an ultimate inference about the  
16 population as a whole. If, for example, there are three  
17 --

18           QUESTION: Yes, but that, I mean that would be  
19 true about any inferential conclusion. I mean, strictly  
20 it would be true I suppose even if accepting the hearsay  
21 conclusion is true. And there is an awful lot of  
22 inference that does not fall within anyone's notion of  
23 what is a sample or what is

24  
25



1 in a technical sense a statistical method.

2 MR. LEE: It is also true, however, Justice  
3 Souter, of the method struck down by this Court in the  
4 House of Representatives case. And I probably didn't make  
5 this clear enough the first time I mentioned it so let me  
6 just make it one more quick time.

7 Under the 1997 plan, it's clear that the Census  
8 Bureau proposed to estimate the roughly 10 percent of the  
9 population that it was not going to enumerate one  
10 individual housing unit at a time. As is indicated in the  
11 administrative record in this case at page 1647, it was  
12 precisely the nearest neighbor assumption that the Bureau  
13 had in mind under the 1997 plan. So that truly is not a  
14 distinction between this particular method and the method  
15 at issue in the House of Representatives case, and thus  
16 the argument that's being proposed here really is an  
17 argument that would effect an end run around the House of  
18 Representatives decision.

19 QUESTION: Mr. Lee, as I understand it, the  
20 imputation method that was actually used after the 2000  
21 census has the effect of counting non-households as  
22 households in some instances?

23 MR. LEE: That's correct, Justice  
24  
25

1 O'Connor.

2 QUESTION: And it counts one household several  
3 times in some instances.

4 MR. LEE: That's correct, because some of these  
5 are different --

6 QUESTION: And, all right. And the imputation  
7 is not based on the nearest neighbor. I mean, there is a  
8 big block of homes, and the assumption about who lives on  
9 it is not based on a nearest neighbor.

10 MR. LEE: Ordinarily, as I understand it, it is  
11 the nearest neighbor address that's used to estimate or  
12 impute the address about which we know nothing.

13 QUESTION: That's not my understanding, but we  
14 can explore that with the other side. But I was concerned  
15 because it seems to be a method that does amount to what  
16 we said couldn't be done, in House of Representatives, on  
17 a much smaller scale.

18 MR. LEE: That's exactly right and of course the  
19 scale of the practice is beside the point.

20 QUESTION: Well, they say it isn't beside the  
21 point. I take it that their argument is basically in  
22 House of Representatives, what the census was trying to do  
23 was to use a special kind of

24

25

1     inferential method to determine the population of an  
2     entire area.

3             Well, here they are using an inferential method  
4     to determine the population of an individual house. Now,  
5     if you don't make that distinction, and you say that  
6     distinction is irrelevant, we are left with your  
7     distinction which seems as Justice Souter just pointed out  
8     to be the same as all inference. In other words, I infer  
9     that when you deliver pizza and it disappears, someone is  
10    in the house, because of the set of similar to pizza type  
11    cases that I have seen in the past. Or, you know, that's  
12    I think what Justice Souter was bringing out, they have a  
13    different distinction. Now how do I deal with the  
14    problem?

15            MR. LEE: Well, Justice Breyer, let me mention  
16    two reasons why that distinction doesn't get them  
17    anywhere. It doesn't get them anywhere number one because  
18    it simply isn't borne out in the statistical understanding  
19    of methods of sampling, in two senses.

20            Number one, the statistical understanding of  
21    sampling says generally, what statisticians understand to  
22    be encompassed within the general category of sampling is  
23    taking information from a

24

25

1 part to make a statistical definition.

2 QUESTION: You have the statistical definition,  
3 but my question was directed at a particular problem that,  
4 if I take your approach I can't get myself out of. That  
5 is, that your definition applies to all inference. Their  
6 definition distinguishes among kinds of inference and they  
7 have their statistical support.

8 MR. LEE: The problem with the distinction is,  
9 another problem with the distinction is that it's clear  
10 that it would permit the Census Bureau to replicate the  
11 1997 plan. If you buy that distinction, the Bureau can  
12 get back exactly to where it wanted to go in 1997 merely  
13 by scaling back its nonresponse follow-up efforts.

14 QUESTION: I don't understand the pizza man.  
15 Does the pizza man, does that inference consist of  
16 imputing something from the part to the whole? I mean, I  
17 would think that's your answer to the pizza man example.  
18 It is an inference.

19 QUESTION: No, no. It goes from the whole to  
20 the parts.

21 QUESTION: But it's not the same kind of  
22 inference that is done by what you say is sampling,  
23 mainly, imputing information that belongs to a part  
24  
25

1 to the whole. That's not what's going on in the pizza man  
2 case.

3 MR. LEE: Maybe, Justice Scalia and Justice  
4 Breyer, maybe I missed the pizza man example, but that may  
5 well, that may well be a distinction.

6 QUESTION: I didn't think the imputation  
7 involved any actual things like looking at, when pizza was  
8 delivered. It involves looking at what houses returned,  
9 take a big block in the district they are serving. It  
10 involves looking at the houses that returned the form,  
11 looking at the houses where they reach people in a  
12 follow-up visit, and there are some they may might still  
13 be missing and so they impute the map.

14 They don't go see if there is a car in the  
15 garage or look at the pizza delivery. They arbitrarily  
16 say we are going to impute from the data we have that  
17 there are X number of additional houses and that X number  
18 of houses are occupied at a certain level of occupancy.  
19 That's what's going on.

20 MR. LEE: That's exactly right. That's  
21 precisely right, Justice O'Connor. The pizza man knows  
22 how many people live there. He is a proxy and he can give  
23 that information to a census enumerator. But the end run  
24 problem is illustrated by this

25

1 distinction; if the Census Bureau can use any methods that  
2 fall within the definition that's now being proposed, the  
3 Bureau can simply scale back slightly its nonresponse  
4 follow-up effort and estimate increasing percentages of  
5 the population, up to and even exceeding the 10 percent  
6 that was proposed in 1997.

7 QUESTION: Mr. Lee, didn't it prove out that,  
8 after, that in the majority of these cases, something like  
9 75 percent, that they know for sure that these were houses  
10 where people lived?

11 MR. LEE: Actually not, Justice Ginsburg. The  
12 75 percent figure is misleading and completely unhelpful.  
13 At page 445 of the joint appendix the memorandum that's at  
14 issue there simply says that in 75 percent of the status  
15 imputed cases, status imputation was done with regard to  
16 enumerator returns or respondent returns. In other words,  
17 these were not mail-back returns.

18 QUESTION: But you don't have a negative  
19 showing, either, that it wasn't accurate? And there was  
20 something Justice O'Connor said, and I'm not sure whether  
21 I fully understand it. I thought that this imputation was  
22 made for people who didn't respond to the mailing, that  
23 the like comparison was with the  
24  
25

1 group of people that were eventually counted, but that  
2 they were nonrespondents the first time around.

3 MR. LEE: That's right. I think if understand  
4 your question, Justice Ginsburg, I think that's right.  
5 They took information from initial nonresponding  
6 households, used those as a sample of those who never  
7 responded, and some of those may well not have been homes,  
8 Justice O'Connor, some of those may well have been  
9 duplicates, etc. If there are no further questions, Mr.  
10 Chief Justice, I'd like to reserve the remainder of my  
11 time for rebuttal.

12 QUESTION: Very well, Mr. Lee. Mr. Dellinger,  
13 we'll hear from you.

14 ORAL ARGUMENT OF WALTER E. DELLINGER

15 ON BEHALF OF THE NORTH CAROLINA APPELLEES.

16 MR. DELLINGER: May it please the Court, because  
17 North Carolina believes very strongly that the right time  
18 to challenge the Census Bureau's planned use of a  
19 statistical method is before rather than after the census  
20 is completed, let me begin by --

21 QUESTION: Well, how could the challenge have  
22 been brought before Utah knew that the imputation figures  
23 caused this problem?

24 MR. DELLINGER: Under your decision in  
25

1 House of Representatives, I think on page 332, you note  
2 that citizens of Utah, you didn't specify the state, but  
3 citizens who anticipate that the use of a method like  
4 imputation, as suburbanites might, would dilute their in  
5 intrastate districting representation, are specifically  
6 said in House of Representatives to have authority to  
7 bring that suit. So I think that there would have been  
8 parties able to litigate it. In response --

9 QUESTION: Well, you can't bring a suit before  
10 you know about what's going on.

11 MR. DELLINGER: Yes, you can, Mr. Chief Justice.  
12 It is true, as you noted, that there might not be a  
13 special incentive on Utah's part, but they don't know they  
14 are going to be the loser. They might have come out  
15 better or worse with or without imputation. But every  
16 governor, attorney general, states and cities are  
17 carefully watching this. Many as you know sued in 1997.  
18 So the suit could have been brought that, by any resident  
19 of a suburb could have had an expert allege that they are  
20 going to be diluted if you impute households because it's  
21 rural areas where the files are often damaged or --

22 QUESTION: But Mr. Dellinger, a state can't, you  
23 suggest there are suburban people, city  
24  
25



1 people, a state can't, until it knows what the result is  
2 going to be, and Congress used the words any aggrieved  
3 person. The state, you are saying is the state can never  
4 bring such a suit, because it is not aggrieved before. It  
5 can't predict that it's going to be aggrieved. It will  
6 know only when the returns are in, so in effect, you are  
7 saying this is not a question that the state has come too  
8 late. It's not sooner or later, it's a never question for  
9 the state. You're saying Congress simply did not authorize  
10 the states to bring this kind of case.

11 MR. DELLINGER: Justice Ginsburg, that is  
12 correct, if a state is unable to show, does not have the  
13 experts about a forthcoming census that is unable to  
14 demonstrate that it will be aggrieved. How much we should  
15 worry about a nonaggrieved party not being able to obtain  
16 judicial review is --

17 QUESTION: They are aggrieved at the end of the  
18 line.

19 MR. DELLINGER: They are now, but my point is  
20 that if Utah had been watching this carefully, and as you  
21 know, many states were involved in the '97 litigation as  
22 amici and otherwise. Surely the Governor could have found  
23 many citizens of the State of Utah who, and this suit  
24 itself includes individual

25

1 voters, some of whom may very well, the plaintiffs --

2 QUESTION: The governor had no incentive to do  
3 so.

4 MR. DELLINGER: I understand that.

5 QUESTION: He could have gotten a stalking horse  
6 to, some suburbanite to bring the suit but he had no  
7 notion that there was any reason to do that.

8 MR. DELLINGER: It seems to me that that is  
9 exactly correct, but that it's exactly why any governor,  
10 major city mayor or others, these citizens, those who  
11 brought suit in 1997 and did not include this,  
12 suburbanites are going to hurt, would want to sue, could  
13 bring the suit, but in any event, they could also  
14 participate in the Bureau's process. Utah never made this  
15 objection.

16 Now, here's why that's so unfair. It's simply  
17 this. The, it is, we don't know who would have gained  
18 this seat if Utah had bought its objections to the Census  
19 Bureau before the census was conducted.

20 QUESTION: Is there a statutory time period for  
21 people to challenge the Census Bureau proposed techniques  
22 before the census is taken? Is there some provision  
23 whereby that challenge can be made?

24

25

1           MR. DELLINGER: Yes. The public law which was the  
2 basis for the suit in 1997 is a permanent law, and that  
3 suit allows aggrieved parties to bring suit when the  
4 census produces its plan. So it's certainly at least --

5           QUESTION: But is it a fact that somebody is  
6 aggrieved when you are at the stage of the Census Bureau  
7 just saying this is what I plan to do?

8           MR. DELLINGER: Yes. The law involved, the  
9 public law, that was a basis of the '97 suit makes it  
10 clear that if you could say if they do that plan, that's  
11 exactly how it works in House of Representatives, if you  
12 do that plan, we expect that our district will be diluted.

13          QUESTION: Well, does the law provide for some  
14 sort of administrative hearing before the Census Bureau,  
15 some sort of an exhaustion requirement? I thought that's  
16 what you were suggesting. If Utah had just brought this  
17 to the attention of the Census Bureau. Is there some  
18 structure for doing that?

19          MR. DELLINGER: Yes. The Census Bureau does  
20 have a structure for doing this. I'm not saying that they  
21 are foreclosed because they didn't participate in the  
22 administrative process, but the Bureau was open to hear  
23 these objections and the

24  
25

1 courts were open to hear them.

2 QUESTION: But, you say now the Bureau, is that  
3 well publicized? Is there some person you can go to in the  
4 Bureau and say I don't like what you are doing?

5 MR. DELLINGER: Yes. And that is the exact  
6 process that is followed with every -- that's why they  
7 publish the plan for the census. Now, if --

8 QUESTION: It seems unfair to Utah, though, to  
9 say that they are supposed to bring a suit before they  
10 know they have been hurt and why. How -- what are they  
11 supposed to do? Of course they wouldn't come in ahead of  
12 time. For all they know, the system would benefit them.

13 MR. DELLINGER: Justice Breyer, those who sued  
14 in the House of Representatives litigation had a very thin  
15 basis for knowing that they would be adversely affected.  
16 Indiana maybe wrong in thinking that --

17 QUESTION: Well, of course, sometimes you could  
18 guess in advance, but a lot of times you couldn't, and  
19 it's important that there be a fair method that treats  
20 states fairly. So why, why would it be fair, any way, to  
21 cut off those states that don't know they have been  
22 treated unfairly and hurt,

23

24

25

1     until they find out later?

2                   MR. DELLINGER:   And here's why.   Here's why it's  
3     not unfair.   Because the unfairness is so great for the  
4     disruption on the other side.

5                   If it had been determined by the Bureau itself  
6     or through litigation that imputation could not be used in  
7     2000, the Census Bureau absolutely would have used some  
8     means other than imputation to ascertain the enumeration  
9     of those established residential addresses whose records  
10    were damaged, missing or incomplete.

11                  There are in North Carolina approximately 16,000  
12    households that are established residential addresses on  
13    the carefully pruned master address list.   Those houses  
14    often were visited by an enumerator in the, often the  
15    houses were added where it was status imputation by a  
16    field enumerator during the enumeration process.   But the  
17    new form, because it wasn't on the master address list  
18    before being added, never caught up with the master  
19    address list.   So you have no residential addresses, and,  
20    and the Bureau absolutely would have had another method.

21                  I mean, even now theoretically they could go  
22    back and start again and say what are we going to do about  
23    620,000 established residential addresses

24

25

1 for which we don't have input numbers, because at the end  
2 of this massive process, now, this is a process that  
3 involves 500,000 enumerators, 120 million households, one  
4 and a half billion pieces of paper, imputation occurs at  
5 the end of that process when all the records are  
6 centralized. It began in 1960, five censuses ago because  
7 that's when computers were able to process these cards.

8 Damaged cards, now forms, can't be read. The  
9 data is discrepant or missing. It doesn't mean that these  
10 are households that were visited six times.

11 QUESTION: Mr. Dellinger, you have recognized  
12 that your argument is, as stated, that the position of  
13 Utah that can't project what the returns will be, does not  
14 have, does not qualify as an aggrieved person at the only  
15 moment in time when it can say that it's aggrieved. I  
16 think you had another justiciability issue, did you not?  
17 Because time is running and I think we grasp your position  
18 that it's too bad they are not aggrieved because they have  
19 to come in in the beginning and not at the end.

20 MR. DELLINGER: Yes. Justice Ginsburg, we are  
21 not suggesting that these issues are immune from judicial  
22 review. I believe someone could challenge  
23  
24  
25

1     imputation and would.

2                 QUESTION:  Are you sure they were not aggrieved  
3     at the beginning?  I'm surprised that you -- I mean, is it  
4     not an aggrievement for the State of Utah or for any state  
5     that its districts are distorted?  Even if it doesn't lose,  
6     you know, congressmen to another state, isn't the  
7     distortion of the districts within that state a  
8     grievance of that state?

9                 MR. DELLINGER:  That is a very helpful answer,  
10    and that is not -- a very helpful suggestion.  And that  
11    has not been by any means ruled out, nor has it been ruled  
12    out in my view that a state could say we believe we are  
13    entitled to have a fair process determine our  
14    representation.  This process isn't fair.  We don't know  
15    how it's going to come out.  But this process is loony.

16                Now, you would also see there's just a matter on  
17    the merits.  Congress has said in Title II, Section 2 that  
18    the President's determination shall be final and the  
19    states are entitled to that for the next period of time  
20    until the next apportionment unless Congress itself acts,  
21    which they specifically provide for.  That's surely  
22    constitutional because the Constitution itself in  
23    providing that the census

24

25

1     need be done only every 10 years puts a great stake in  
2     permanency.

3             Now, turning to the merits, it's striking the  
4     extent to which the issues in this case are anticipated by  
5     the Court's decision in the Wisconsin case. At page 22 in  
6     Wisconsin --

7             QUESTION: Before you go on to the merits, you  
8     have nothing else to say then about justiciability? I  
9     mean, let's suppose they can file a suit. What's the  
10    remedy going to be at the end of the day at this stage?

11            MR. DELLINGER: Oh, at this stage?

12            QUESTION: Yes.

13            MR. DELLINGER: Justice O'Connor, that is a very  
14    good question. Utah seems to assume that if the case went  
15    back to the District Court, overturning the District  
16    Court's ruling that imputation is satisfactory on the  
17    statute and the Constitution, that you would simply take  
18    out those occupancy figures for 620,000 households  
19    nationwide.

20            It seems to me that the, that what ought to be  
21    done is you return that to the Bureau and say now there  
22    may be time to match up the missing forms that were added  
23    late in the enumeration process. There may be other ways  
24    to recover that data. Ways

25



1     that certainly would have been done if it were brought  
2     before the census might still be brought now.  So that we  
3     don't, it seems utterly unfair to treat all of those as  
4     zero when some of them are houses that, an enumerator  
5     comes to 212 Elm Street, it's not on his list, he goes in,  
6     interviews Ozzie, Harriet, the kids, sends in the form and  
7     it was corrupted or it didn't get matched up at the time,  
8     faced with that time deadline.  It may now be available.  
9     We don't know who would prevail on that.

10                 On the statutory issue I think if you look at  
11     page 22, the Court itself creates statistical adjustments  
12     as done in '70 and '80, and as they were done here --

13                 QUESTION:  Page 22 of what?

14                 MR. DELLINGER:  I'm sorry, Justice Rehnquist.  I  
15     referred earlier to the decision of Wisconsin vs. the City  
16     of New York, the unanimous opinion.  On the statutory  
17     issue, the Court says that the statistical adjustments in  
18     1970 and 1980 which were imputation, hot-deck imputation,  
19     were an entirely different type than the adjustment  
20     considered here, and they took place on a dramatically  
21     smaller scale.

22                 The Court also treats actual enumeration  
23  
24  
25

1 in the Wisconsin case and speaks of actual enumeration at  
2 page 6 in the Wisconsin case as having been something that  
3 the Bureau has never, or the country has never actually  
4 achieved actual enumeration. It's never been wholly  
5 successful. Treating it clearly as the end result of the  
6 process, the right number and not as a method.

7 Now, let me go right to one point. We do not  
8 believe that there are no constitutional limits on how  
9 Congress can conduct the census. Wisconsin says that  
10 there is virtually unlimited deference to Congress, but  
11 they also set a standard that the congressional goal must  
12 be related to representation according to the respective  
13 numbers.

14 The way I read that is this. A proposed census  
15 as designed is not reasonably calculated to produce  
16 distributive accuracy among the states is constitutionally  
17 suspect, because it will not produce an apportionment  
18 according to the respective numbers. And that would be a  
19 fatal flaw.

20 Here, every imputed occupant and household is to  
21 an established residential address with a precise  
22 geographical location. It was an effort to enumerate  
23 every household in the country by using the best  
24 information available on known household

25

1 addresses. This is historically consistent with what we  
2 did when the neighbors are asked for their opinion, the  
3 postal worker is asked for his opinion. You use proxy  
4 information. Here you take --

5 QUESTION: Mr. Dellinger, this isn't really a  
6 use of proxy information. This isn't going to a neighbor  
7 who lives next door, this is using a statistical method to  
8 make assumptions, isn't it?

9 MR. DELLINGER: Yes, it is.

10 QUESTION: I think you have to be realistic  
11 about that.

12 MR. DELLINGER: Yes, it is a statistical method  
13 by which you take, when you have a known established  
14 household address, the information from that, basically  
15 the next door neighbor, somewhat refined, Justice  
16 O'Connor, the next door neighbor that was a nonresponding  
17 household of a similar type and they found over the years  
18 that that information is more reliable than zero.

19 Utah's position is that the Constitution  
20 requires when you have an address known to be occupied, if  
21 you put down that it's occupied by zero people, that's not  
22 an actual enumeration, that is literally a counterfactual  
23 enumeration from what one knows to be the case. This is a  
24 process where you

25

1 use one unit's characteristics to supply to another.

2 QUESTION: That's just part of it. It also, it  
3 also imputes nonhouseholds as households. I mean, it does  
4 a lot of things.

5 MR. DELLINGER: It imputes only to known  
6 addresses. Thank you.

7 QUESTION: Thank you, Mr. Dellinger. General  
8 Olson, we'll hear from you.

9 ORAL ARGUMENT OF THEODORE B. OLSON  
10 SOLICITOR GENERAL, DEPARTMENT OF JUSTICE  
11 ON BEHALF OF THE FEDERAL APPELLEES

12 GENERAL OLSON: Mr. Chief Justice and may it  
13 please the Court: The Census Bureau has consistently  
14 utilized the imputation technique for drawing inferences  
15 about a tiny fraction of damaged, discrepant or missing  
16 population data for the past five censuses.

17 QUESTION: Do you agree that that's a  
18 statistical methodology or is it just a method of making  
19 deductions from circumstantial evidence?

20 GENERAL OLSON: We agree that it is a  
21 statistical methodology, Justice Kennedy, and it's very  
22 important in that context to focus on the words of the  
23 statute. The words of the statute are that the  
24 statistical method known as sampling is the one

25

1     that's prohibited with respect to the apportionment.

2             That statement in the statute suggests that  
3     other statistical methods are not prohibited by the  
4     statute, and that one particular statistical method, that  
5     is the one that is known as sampling, which is in quotes  
6     in the statute, which imports that it's a term of art that  
7     was known by Congress to be a term of art. It was a  
8     phrase that was suggested by the Secretary himself in  
9     1957, when that statute was added, that exact phrase came  
10    from the Secretary. The Secretary was presumed to know  
11    what that phrase meant. It is a term of art that  
12    statisticians know what it is. Furthermore --

13            QUESTION: Well, I thought the statute also said  
14    that statistical adjustments pose a risk.

15            GENERAL OLSON: It does not say that. In fact,  
16    the import of the statute, Justice Kennedy, is that  
17    statistical adjustments, and I will refer to what my  
18    colleague Mr. Dellinger just referred to, at page 22 in  
19    the Wisconsin decision which was unanimous decision by  
20    this Court just six years ago, distinguishing the sampling  
21    method that the Court was talking about in that case from  
22    statistical adjustments known as imputation, which is  
23    described on pages 4 and 5 of the Respondent's brief,  
24    referred

25

1 to on those pages of the Supreme Court, this Court's  
2 unanimous decision just six years ago as being an entirely  
3 different thing.

4 We would go back also to the fact that this  
5 Court unanimously held in that case that the Constitution  
6 vests virtually unlimited discretion in Congress  
7 respecting the manner in which the census shall be  
8 conducted, and that Congress has delegated its broad  
9 authority to the Secretary to take the census in such form  
10 and content as he shall direct. Now, the Congress has  
11 exercised that discretion by passing it on to the  
12 Secretary with the one limitation with respect, with  
13 respect to one statistical method known as sampling.

14 Now, at the same time, the Secretary was  
15 proposing the prohibition of the sampling method; with  
16 respect to the apportionment of the census in 1957, the  
17 Secretary was planning the 1960 census, which was the  
18 first computerized census and the first time that the  
19 imputation method which we are talking about today was  
20 used. So it's obvious that the Secretary did not believe  
21 that hot-deck imputation was sampling, because the very  
22 next census three years later imputation was being used in  
23 that census. And it was used again in 1970, 1980, 1990,  
24 and 2000.

25

1 And with respect to 1970, and 1980, it was actually  
2 considered by this Court in connection with the Wisconsin  
3 case.

4 It is widely understood in the industry that  
5 sampling is a collection of, a collection technique  
6 whereby a sample, a fraction of the whole population is  
7 used to deduct -- deduce the actual whole population.

8 It seemed to me that a metaphor that might be  
9 considered outside the context of population gathering  
10 would be if the Court asked the library of this Court to  
11 ascertain the number of books, to conduct the number of  
12 books in the Court's library, and the, but sampling was  
13 not permitted to do that, so that the librarian could not  
14 go to every third shelf, multiply, count the books,  
15 multiply by three and get the census. But if the  
16 librarian went to those shelves and counted every  
17 particular volume and found that there was a space here on  
18 that shelf, a space this big on the next shelf, and a  
19 space this big on another shelf, for example, the  
20 imputation would be saying well, all the books or the  
21 books right next to this are this size, and therefore that  
22 space a book is missing, so we know we have a book, and we  
23 will impute one book to that space or two

24

25

1 books to this space. So that the sampling technique is  
2 completely discrete from the imputation technique.

3 We know that because the Secretary has always  
4 regarded it that way. The Congress has given the  
5 authority to this expert agency which has been conducting  
6 the census for years and years and has drawn various  
7 different types of inferences which is what imputations  
8 are.

9 QUESTION: Why, just out of curiosity. I mean,  
10 I'd like to understand this better. In the library, you  
11 look and see that everything around the book is a history  
12 book and so then you impute the characteristic of being a  
13 history book to the one that's missing. That's your  
14 analogy of what goes on here, is that right?

15 GENERAL OLSON: Well, yes, I think that's an  
16 extension of it. In the example that I was giving you  
17 look at the space and impute the size of the space by the  
18 book that is immediately next to it.

19 QUESTION: Okay. Why is it called statistical?  
20 Why isn't that just ordinary inference? Why -- you said we  
21 do it statistically? What's statistical about it?

22 GENERAL OLSON: Well, I'm not sure. That's a  
23 good question. I don't know the answer to  
24  
25



1     why it should be called statistics, because in my thinking  
2     of it, it is drawing logical inferences from the data  
3     available. Now Justice O'Connor, it is not creating  
4     phantom homes. Most of these cases in, the statistics  
5     indicated that with respect to one of the forms of the  
6     imputation, and this is in the record at the joint  
7     appendix, the information may be found in pages 445  
8     through 448 of the joint appendix, that 98 percent of the  
9     household size imputation forms were enumerator forms with  
10    the status of occupied homes.

11                 Now, the problem is that with respect to any,  
12    and the statistics are different, but in 93 percent with  
13    respect to occupancy imputation, 75 percent with respect  
14    to status imputation. Each of these are attempting to  
15    find actual people drawing from the closest comparable  
16    unit and it's one unit for each inference. It's not  
17    extrapolating from one unit to the whole population.

18                 The problem with the census is that there are  
19    billions of pieces of paper as Mr. Dellinger indicated.  
20    Some people refuse to return the forms and their known  
21    addresses. Some people fill out the forms incorrectly.  
22    They may say occupied but zero. The enumerators might get  
23    bad information.

24                 In 1850, a substantial portion of the  
25

1 entire State of California the returns were actually  
2 burned, and the Census Bureau in 1850 actually used a  
3 process to replace the 70,000 people that were not there.  
4 And one of the questions indicated, neighbors have been  
5 used as proxies. Heads of households have been used as  
6 proxies. Postal service has been used as proxies. These  
7 are all means by which the postal, the Census Bureau  
8 attempts to develop the most accurate count it possibly  
9 can.

10 QUESTION: When you say heads of households have  
11 been used as proxies. Does that mean you go to the head  
12 of the household who appears at the door and ask him how  
13 many other people live in the house?

14 GENERAL OLSON: That's correct, Mr. Chief  
15 Justice, and that was the way it was done in 1790.

16 QUESTION: That doesn't seem too statistical.

17 GENERAL OLSON: Well, it's not necessarily  
18 statistical. And I guess that, the fact is that as far as  
19 the statute is concerned, there is only one technique  
20 that's prohibited. The technique of drawing inferences  
21 through sampling is prohibited. It's prohibited probably  
22 because Congress feels that it might be subject to  
23 manipulation.

24

25

1           QUESTION: Yes. On the merits, I think we have to  
2 know whether this so-called hot-deck imputation is a form  
3 of sampling. Which it appears that it might well be. I  
4 think that's the --

5           GENERAL OLSON: Well, Justice O'Connor, the  
6 expert agency to which Congress delegated this broad  
7 authority doesn't believe so. That seems to me that there  
8 should be a substantial deference to the expertise of the  
9 agency. Not only that, but Congress with full awareness  
10 that hot-deck imputation has been used over the past --

11           QUESTION: Why do we call it hot-deck?

12           GENERAL OLSON: Hot-deck imputation is  
13 distinguishable from cold-deck imputation in the sense  
14 that information from the most current census and the  
15 actual neighborhood, the most current available  
16 information for the actual census that's being developed  
17 is being used. Now where that term came from, I don't  
18 know. But that's what it means. But this methodology has  
19 been used with the knowledge of Congress, with the full  
20 knowledge of Congress, for the past five censuses.

21           There was litigation over this matter, it's  
22 referred to as the Orr case in the briefs, where a seat  
23 may have been allocated to Indiana or Florida,

24

25

1 depending upon how the imputation process came out. So  
2 that litigation took place. Congress actually changed the  
3 terminology, Section 141, which provides the Secretary  
4 with the authority to conduct the census in a manner that  
5 the Secretary thinks appropriate, in 1976. After  
6 imputation had been used in two censuses already.

7 QUESTION: Of course, against all of that, and  
8 I'm not sure why we should give deference to the agency  
9 here. They didn't conduct a rulemaking. They didn't have  
10 any adjudication on this subject. That's just what they  
11 happened to do, right?

12 GENERAL OLSON: Well, as a matter of fact, in  
13 the unanimous decision of this Court in the Wisconsin case  
14 six years ago, the court said substantial deference should  
15 be owed to the agency.

16 QUESTION: There's a lot of water over the dam  
17 since six years ago.

18 GENERAL OLSON: But the reasoning of the Court,  
19 I would submit, is --

20 QUESTION: I refer to Meade in particular.  
21 And, but wouldn't the deference to the agency, even if  
22 there is to be some, potentially be outweighed by a  
23 constitutional doubt? If we thought that even if this  
24 isn't sampling, it may well be not enumeration

25

1 within the meaning of the constitutional requirement, and  
2 given, given that constitutional doubt, we think the wise  
3 course is to interpret the word sampling as including,  
4 including this?

5 GENERAL OLSON: Justice Scalia, not only the  
6 Wisconsin case, but the other decisions of this Court  
7 which have considered census have suggested that the  
8 framers of the Constitution by using the word enumeration  
9 didn't mean a particular method by which the census would  
10 be conducted, nor did it wish to constrain both the  
11 Congress and whomever the Congress may delegate to --

12 QUESTION: Even sampling, presumably.

13 GENERAL OLSON: Presumably. Possibly.

14 QUESTION: Pretty accurate sampling, you know?

15 GENERAL OLSON: Possibly, Justice Scalia. But  
16 that's nowhere close to that and this is not remotely  
17 sampling.

18 QUESTION: Is this remotely estimation?

19 GENERAL OLSON: This is not remotely estimation.  
20 This is drawing an inference with respect to one  
21 particular piece of data. We would agree that the gross  
22 estimation --

23 QUESTION: Why isn't it estimation? Why  
24  
25

1     isn't it estimation? You estimate that there are so many  
2     people in this house because the house next door to it has  
3     that many people. You don't call that estimation?

4             GENERAL OLSON: In each of these cases, Justice  
5     Scalia, the words can be changed and added to, but the  
6     process by which the framers analyzed this in framing the  
7     Constitution, the very first House of Representatives was  
8     assigned according to an estimation, and the words actual  
9     enumeration were used to compare an actual count, an  
10    effort to find the actual number of people by indulging in  
11    a process --

12            QUESTION: That's why I asked about estimation.  
13    You say there is a difference in an estimation and a  
14    deduction, I suppose.

15            GENERAL OLSON: What I think the Constitution  
16    and courts with respect to the term actual enumeration, is  
17    an effort to go out and find a count. We, we pointed out  
18    that the, the enumeration can mean listing by particular  
19    items as used in the Ninth Amendment, the enumerated  
20    powers. It may be a process by which a count might be  
21    taken or it might simply refer to a census, find the  
22    population. We submit that the Capitation Clause as we  
23    have referred

24  
25

1 to in our brief, which uses the word census and  
2 enumeration indistinguishably as synonyms, and in fact the  
3 Appellants in their brief, in their reply brief at page 15  
4 acknowledge that the words enumeration and census are used  
5 in the Constitution interchangeably.

6 Justice Scalia, it didn't seem, it does not seem  
7 that the framers of the Constitution actually specified a  
8 method. And in fact, what the Appellants were saying here  
9 today and are saying in their briefs, every census  
10 conducted by asking people who may have lived next door or  
11 drawing inferences from other pieces of information would  
12 not have been the individual by individual count that --

13 QUESTION: You think sampling --

14 QUESTION: Sampling would have been okay as far  
15 as the Constitution is concerned? Real, real sampling?

16 GENERAL OLSON: I think --

17 QUESTION: We are going to do two-thirds of the  
18 state and just guess that the other third is pretty much  
19 like that.

20 GENERAL OLSON: Well, we are not remotely close  
21 to that here. But with respect --

22 QUESTION: I understand. But your  
23  
24  
25

1 argument is that since enumeration doesn't mean anything  
2 except census, sampling would be okay.

3 GENERAL OLSON: From the standpoint of the  
4 Constitution, I think a reasonably good argument could be  
5 made and the Government has in the past made it, that  
6 sampling if it is consistent with the process of an  
7 attempt to find an actual count utilizing sophisticated  
8 accurate and nonmanipulatable techniques --

9 QUESTION: Surely the term actual, though,  
10 before the word enumeration, narrows the idea that, what  
11 might otherwise be an enumeration.

12 GENERAL OLSON: I believe it does and I think,  
13 Chief Justice, the District Court in this case  
14 distinguished actual enumeration from the conjectural  
15 apportionment that actually occurred in the Constitution  
16 itself with respect to the first House of Representatives.

17 What we are talking about here today, though, is  
18 an effort to, an effort to produce extremely conscientious  
19 and meticulous, to count all of the households in the  
20 United States starting with a meticulously prepared master  
21 address list. All of those people were submitted post  
22 office forms which has been authorized by Congress for a  
23 certain --

24

25



1           QUESTION: That's not the issue. Can I ask you a  
2 question about the standing issue? I know that you in your  
3 brief do not, do not contest the standing. You say that  
4 Franklin has decided it, because four justices thought  
5 that there was standing on one basis, and four thought  
6 there was standing on another basis. Which of those two  
7 bases do you agree with?

8           GENERAL OLSON: Well, we --

9           QUESTION: Do, do, do, is it your position that  
10 the President will have to do whatever, whatever, accept  
11 whatever revised census figures are submitted to him by,  
12 by the Secretary?

13          GENERAL OLSON: If this Court is to, determines  
14 that the process by which the 2000 census was conducted  
15 was inconsistent with the statute or inconsistent with the  
16 Constitution and orders the Secretary to take out the  
17 imputed numbers --

18          QUESTION: Right.

19          GENERAL OLSON: -- and deliver a different  
20 piece of information to the President --

21          QUESTION: Right.

22          GENERAL OLSON: -- the President will transmit  
23 that certificate or that certified, those certified  
24 results to Congress for the process. In

25

1 other words, in answer to your question, the President  
2 will do what this Court assumed in those cases that the  
3 President would do.

4 QUESTION: He has told you that that's what he  
5 will do?

6 GENERAL OLSON: The President will --

7 QUESTION: You see, because, I sort of wouldn't  
8 want to make the people of North Carolina mad by taking  
9 away one of their representatives. And were I President,  
10 I might well say, look at this judgment of the Court,  
11 doesn't run against me. It runs against my Secretary,  
12 everybody agrees, you know, that it's not binding upon me.  
13 It's sort of like a declaratory judgment. And I just  
14 think too much time has passed and it would upset things  
15 too much and I don't want to take away a representative.

16 GENERAL OLSON: The President is willing to  
17 accept the import, not only of the Franklin and the other  
18 decision that we referred to, but also if this Court  
19 decides that the process was unconstitutional or  
20 inconsistent with the statute, the President will accept  
21 that, this Court's judgment in that respect.

22 QUESTION: So if another, if the next President  
23 comes along, we get another case like this,

24

25

1 and the next President tells his Solicitor General, I will  
2 not accept it, then we come out differently.

3 GENERAL OLSON: Well, if, for that reason, if  
4 Mr. Chief Justice, the Court decides that that is not the  
5 kind of result that this Court can issue, because of that  
6 possibility, we'll accept that result as well.

7 (Laughter.)

8 GENERAL OLSON: But we think -- we think it  
9 is very unlikely for that to occur, because it is quite  
10 clear that the Constitution intended to give considerable  
11 flexibility, did not want to freeze in a system the  
12 ability of the Government.

13 QUESTION: Mr. Olson, you are saying we can  
14 presume the President will obey the law?

15 GENERAL OLSON: Yes, Justice Stevens.

16 QUESTION: What happens after that? He transmits  
17 to the Congress, I take it the clerk of the Congress says  
18 not certified, the House has not certified the results  
19 yet?

20 GENERAL OLSON: I'm not sure of the answer to  
21 that question. I guess the answer is that is correct. Or  
22 no. That it has been certified and I would gather that it  
23 would have to be a revised certification if that should  
24 occur.

25

1           QUESTION: You say you assume the President will  
2 obey the law. So you are accepting the -- you are  
3 accepting the position that the President must, even if he  
4 didn't want to, that the law requires him to transmit  
5 whatever the Secretary gives him, is that right?

6           GENERAL OLSON: What we are saying --

7           QUESTION: Just answer that question yes or no.  
8 Do you take the position that the President must transmit  
9 what the Secretary gives it to him, and he has no, no  
10 objection?

11          GENERAL OLSON: I only can answer it this way,  
12 Justice Scalia. If this Court determines that the process  
13 before was unconstitutional or in violation of the statute  
14 and the Secretary must redo it and if that information is  
15 transmitted to the Secretary, he will transmit that.

16          QUESTION: That is not the question I asked.

17          GENERAL OLSON: Then I misunderstood your  
18 question.

19          QUESTION: The question I asked is whether, you  
20 say the President will obey the law. I take that to mean  
21 that you feel the President is bound by law to transmit  
22 whatever revised figures the  
23  
24  
25

1 Secretary takes, is that correct?

2 GENERAL OLSON: If it is based upon a decision  
3 by this Court that the Court has the power to issue --

4 QUESTION: To tell the Secretary. Let's assume  
5 we have the power to tell the Secretary. Does the  
6 President acknowledge that he is bound by law to transmit  
7 whatever figures the Secretary gives him?

8 GENERAL OLSON: I think that that would only  
9 occur in the context of this Court's decision.

10 QUESTION: If not, he is not bound by law and I  
11 don't think you are going to give that away.

12 GENERAL OLSON: I don't think we need to give  
13 anything away, Justice Scalia. We would be talking about  
14 a context in which this Court came to the conclusion it  
15 could render a jurisprudentially binding decision in a  
16 case in which there was redressability in that context.

17 QUESTION: Fine. But that's a far cry by saying  
18 he is bound by law.

19 QUESTION: You seem to be accepting Marbury and  
20 Madison.

21 (Laughter.)

22 GENERAL OLSON: Let me just summarize because my  
23 time is about up. This Court's words

24

25

1 again, that the Constitution gave virtually unlimited  
2 discretion to the Congress with respect to the manner in  
3 which the census would be --

4 QUESTION: Extend your time by two minutes.

5 I'll extend Mr. Lee's time by two minutes.

6 GENERAL OLSON: Thank you, Mr. Chief Justice.  
7 There is no evidence that the framers of the Constitution  
8 wanted to bind themselves to a particular method of  
9 counting people. All of the evidence suggested that what  
10 the framers wanted to do was to have a reasonably reliable  
11 accurate, reasonably accurate count of the citizens in the  
12 manner that the, that Congress would determine. Congress  
13 in the words of this Court has delegated all of that broad  
14 authority to the Census Bureau.

15 The Census Bureau, conscientiously using a  
16 technique that they have been using consistently for 50  
17 years with the awareness of Congress, the General  
18 Accounting Office, oversight committees and the actual  
19 awareness of this Court, as reflected in this 1996  
20 decision, has demonstrated, developed a method that is  
21 reasonably accurate, uses statistical methods other than  
22 those known as sampling to get an accurate count. We urge  
23 the Court to sustain that outcome.

24 QUESTION: Thank you, General Olson.

25

1 Mr. Lee, you have five minutes remaining.

2 REBUTTAL ARGUMENT OF THOMAS R. LEE

3 ON BEHALF OF THE APPELLANTS.

4 MR. LEE: Thank you, Mr. Chief Justice. I have  
5 just two or three quick points. The first is to clarify  
6 briefly the record on an important issue. With all due  
7 respect to the Solicitor General, the record does not  
8 indicate that the majority of the imputations here were in  
9 units known to be occupied.

10 The Bureau's memo at page 445 of the joint  
11 appendix indicates that fully 69 percent of the units  
12 subjected to imputation were the kinds of units that  
13 Justice O'Connor's questions directed us to be concerned  
14 about, units where after as many as six visits, census  
15 enumerators were not able to determine whether the unit in  
16 question was a valid occupied housing unit and not a  
17 duplicate, not a seasonal home, not a home that happens  
18 not to be occupied.

19 Second, I would point the Court to another  
20 unanimous decision that this Court has handed down with  
21 regard to the census, and it's the Montana decision, and  
22 I'd like to read a brief quote from Montana and explain  
23 how important I think it is here. This is from 503 U.S.  
24 at 465.

25 "To the extent that the potentially

1     divisive and complex issues associated with apportionment  
2     can be narrowed by the adoption of both procedural and  
3     substantive rules that are consistently applied year after  
4     year, the public is well served."

5             That is precisely the goal of both the Census  
6     Act and the Census Clause. To give us rules that can be  
7     consistently applied year after year, not rules that will  
8     ebb and flow with debates among statisticians, and that's  
9     where the Census Bureau is heading us here. The variable  
10    standard that will be produced by a debate as to whether a  
11    particular method of sampling is sufficiently premeditated  
12    or follows a sufficiently premeditated intent to --

13            QUESTION: What about what we said in the  
14    Wisconsin vs. New York case by your opponent, Mr.  
15    Dellinger, where we referred to this very kind of action,  
16    this imputation, and indicated that that was vastly  
17    different from the broader statistical?

18            MR. LEE: I don't believe that was an issue in  
19    that case, first of all, Justice O'Connor. Secondly,  
20    there isn't any reason to give either deference to the  
21    Secretary here or much less to congressional inaction for  
22    a very important reason. Imputation simply has not been  
23    on anyone's radar

24  
25



1 screen. It's been a nonentity because it's undisputed  
2 that it impacted apportionment only once prior to this  
3 case, in 1980. In 1960, in 1970, in 1990, it had no  
4 impact. Congress reenacted the statute, amended the  
5 statute in 1976.

6 At that point in time, imputation had never  
7 affected apportionment to any degree whatsoever. There  
8 was no reason for anyone even to be focusing on it and  
9 therefore no reason to give any deference here.

10 I'd like to just close by saying a few brief  
11 words about the constitutional question here. Mr. Chief  
12 Justice, to go back to your question about the word  
13 actual. The word actual is important, and it's important  
14 because it's not just that the word enumeration is defined  
15 to mean an actual count and not an estimate. It's that  
16 this was a term of art. This phrase actual enumeration  
17 was used consistently in the founding era, both in  
18 colonial assessments of population when they reported  
19 their populations to boards of trade, and also in Great  
20 Britain throughout the 18th century. James Madison  
21 himself referred to a distinction between an actual  
22 enumeration and a mere estimate. John Adams similarly  
23 said there is a difference between an authentic  
24 enumeration and a

25

1       mere estimate.

2               Not only that, but the framers of the  
3       Constitution thought they were giving us a permanent,  
4       fixed standard. That's what they said they were doing and  
5       James Madison said not only is it permanent and fixed, it  
6       is the way required by the Constitution and "which we are  
7       obliged to perform." It was a methodology; they  
8       understood it as such; and they understood also that it  
9       had its shortcomings. They knew that it would result in  
10      an undercount, that when you require a count, you are  
11      going to leave some people out.

12             George Washington himself said look, we  
13      understand at the time of the first census that the real  
14      numbers will exceed greatly the official returns. Thomas  
15      Jefferson similarly said we know that the omissions in the  
16      census will be great. If they understood those  
17      limitations, then why did they do it? The answer is clear.  
18      They understood that that was a necessary price of a  
19      permanent, fixed, precise standard that would not be  
20      subject to manipulation, that would not be subject to the  
21      vicissitudes of debates among not only politicians, but  
22      statisticians from year to year. And the impulse, the  
23      proper impulse of this Court's unanimous

24

25

1 decision in Montana --

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

3 The case is submitted.

4 (Whereupon, at 11:28 a.m., the case in the  
5 above-entitled matter was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25