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COMMENTS

THE CONSTITUTION, THE CENSUS, & OVERSEAS AMERICANS

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The current discussion about how many overseas Americans exist, and whether they should be included in the decennial census has me concerned. I believe I understand the concerns of the proponents of the overseas count and consider it a laudable goal to have these persons counted in the same manner as stateside residents. However, I see inherent problems with any attempt to include the overseas population in the decennial census counts that are the basis for the apportionment process and the peaceful transition of political power in our American experiment with democracy.

One of my roles as a consultant is to assist stakeholders around the country in determining where the boundaries for new political districts should be placed. Of paramount concern to everyone involved in the apportionment process is the accuracy of the data collected and disseminated by the U.S. Bureau of the Census. Given the numerous problems with the counting of overseas Americans, it seems unlikely that any attempt to count them will increase the accuracy of the decennial census counts.

The main areas of concern, from my perspective², are summarized as follows.

1. Who should be included in the count?
2. How good a job can be made to count them?
3. What will be the cost?

Who should be included? The threshold question here seems to be whether it is permissible to count any overseas residents for the constitutional purposes for which the decennial census was established, i.e., apportionment of representatives (and direct taxes) in the U.S. House. While the overseas military and federal employees (and their dependents) have been added for the past few census counts, there appears to be no requirement to include them. Clearly, one of the first objections in any lawsuit to result from the inclusion of the overseas in the apportionment count

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² While I am a consultant to stakeholders around the nation, these views are my own and do not necessarily reflect those of any of my clients.

will be the legality of including any, regardless of the methodology used. While the Secretary of Commerce does appear to have wide discretion as to *how* to count these persons, I believe the issue of the Department's ability to include them in the first place is still an open constitutional question.

Additionally, there is a qualitative distinction between overseas Americans sent there by the federal government (military and federal employees) and others who have traveled abroad on their own. This brings up the overall question of the "usual residence" rule that appears to be the touchstone for inclusion in the decennial census. The question in this area becomes complicated for overseas persons with respect to the "element of allegiance" or "enduring tie to a place" that comprises the logical nexus for them to be considered as a resident of any state. Representatives, after all, are apportioned among the several States³. The military and federal employees are clearly in service to their government, absent from their states by duty, and likely to return to their states at some point in time. Their nexus is clear. The same can not be said for many persons who left the American shores on their own.

How good a job can be made to count them? Inherent with this concern is the methodology used and the estimate of the universe of overseas persons to assess the rate of coverage.

As to the methodology, I think an appropriate analogy here is a presidential election. Campaign operatives for U.S. Presidential campaigns recognize that while there is an overarching national aspect to their quest for the White House, it is the Electoral College that matters. Therefore, they do not run one campaign but 51 campaigns, one for each state and the District of Columbia. They recognize that each state has special circumstances that require a separate campaign plan. So it is with the counting of overseas Americans. Each country will evince special circumstances and require a separate effort. This separate effort may result in coverage that is better, or worse, than the coverage in other countries. A bias could be introduced by these problems to the nation-by-nation count.

Similarly, a bias could be introduced by these problems in the state-by-state count. For example, if it were easier to count "overseas" Americans in Canada, this might overweight the counts in the northern border states. On the other hand, if it were harder to count in Mexico, this might underweight the count in the southern border states.

This raises the bigger issue of relativity. Proponents may feel that the count of overseas Americans will increase the delegation in the U.S. House for their home state. However, apportionment is a zero-sum game. Counting the overseas is likely to raise every state by some amount. For a state to gain an extra seat, it would need to gain substantially more persons than other states, in relative terms.

Utah, the loser in the most recent round, will clearly get a fourth seat in 2010 regardless of the overseas count⁴. As to other states, due to the large size of the ideal congressional district of approximately 650,000, the marginal increase in additional persons would be substantial. It is difficult to speculate as to the actual impact of adding some 4,000,000 overseas persons to the count for the apportionment of seats as there are several imponderables. However, given the

³ U.S. Const. Article 1, section 2 & the 14th Amendment, section 2.

⁴ See the most recent Polidata projections for 2010 at the following link:
<http://www.polidata.org/census/est003dl.htm>.

relative nature of the apportionment formula, it is unlikely that the addition of overseas Americans will shift more than 1, or possibly 2, seats, if any.

Another concern about the counting is what stateside address will be used? Will this be verifiable? What if there is no longer a housing unit there? What if that address contains persons from the stateside actual enumeration? Are these persons related to the overseas persons? Was the person already counted in the stateside count? Is there a double count in this census block?

What will be the cost? This concern does not deal with just the monetary cost but the overall cost to the Department of Commerce and specifically, the cost to the Bureau of the Census.

The Census Bureau currently does a good job at counting residents for the purposes of apportionment. This is their mission. This is the constitutional purpose for the “actual Enumeration”. To accomplish this mission, the Bureau takes great pains to assure that a successful census is taken with an accurate count⁵, not the least of which is a national address list. The Bureau also has an extensive follow-up program for non-response to account for a mail response rate of approximately 67-75% of the known universe.

These two integral elements would be missing from the overseas count. There can be no master address list and there can be no determination as to what the universe of persons to be counted is. Therefore, assessing the coverage of the count would be problematic. Without an assessment, it would be difficult to determine if those persons added increased or decreased the accuracy of the overall count for apportionment purposes. Without even the ability to assess coverage, it would be impossible to claim a successful count.

Any plan that proposes to include an overseas count of Americans for the purposes of apportionment in 2010 seems to be untenable. It is not likely to be of sufficient quality to increase the accuracy of the count. Moreover, it is likely to distract the Bureau from the main mission before it and set the Bureau up for a failure. The Bureau can not, given these limitations, produce an overseas count for the 2010 decennial census that could withstand any scrutiny, let alone a court challenge. Given the multiple difficulties, the resources required to overcome them and still produce a realistic count are just too enormous. Spending more may produce a higher count but it may not improve the accuracy of the apportionment count. It is more likely to only result in a selective Enumeration and not an “actual Enumeration”.

What to do? I believe the only realistic goal that the Department of Commerce can take in this area is to undertake a Survey of Nonresident Americans. This survey should not be in conjunction with the 2010 census but a separate operation, with separate funding, so that everyone can assess the degree to which Americans live beyond our borders, where they are, and what their logical nexus to the U.S. is. Even if these persons were never added to the count for the purposes of apportionment⁶, the results of the survey would be enlightening to all concerned, including members of the U.S. House.

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⁵ Accuracy here refers to both the numerical accuracy of the overall numbers and the distributive accuracy as to where these persons reside. The degree of coverage can be viewed as a component of accuracy.

⁶ In fact, this was the holding of *U.S. House of Representatives v. Department of Commerce and Glavin v. Clinton*, [525 U.S. 316 \(1999\)](#), i.e., that sampling is not valid for the purposes of apportionment.

States Gaining/Losing Seats based upon 2010 Projections

Based upon Census Estimates and POLIDATA Projections to 2010
Projections based upon 2003 Estimates, extended out by 2 year simple average.

