SUPREME COURT OF THE UNITED STATES

No. 91–1502

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL., APPELLANTS *v.* MASSACHUSETTS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[June 26, 1992]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

In my opinion the Census Report prepared by the Secretary of Commerce is "final agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U. S. C. §701 *et seq*. I am persuaded, however, that the Secretary complied with the Census Act and with the Constitution in the preparation of the 1990 Census and that, under the standard of deference appropriate here, the Secretary's actions were not arbitrary or capricious. I therefore agree that the judgment of the District Court must be reversed.

During the decade after 1980 the population of Massachusetts increased less rapidly than the population of the entire Nation. In the apportionment following the 1990 census, it received only 10 of the 435 seats in the House of Representatives whereas formerly it had 11.

In the District Court, appellees, who are the Commonwealth of Massachusetts and two of its registered voters, made two separate attacks on the process that reduced the size of Massachusetts' congressional delegation. They challenged the Secretary's conduct of the census, and they

challenged the method of apportioning congressional seats based on the Census Report. The District Court rejected the challenge to the constitutionality of the method of apportionment prescribed in the Apportionment Act of 1941, 55 Stat. 761–762. *Commonwealth* v. *Mosbacher,* 785 F. Supp. 230, 256 (Mass. 1992). That decision was consistent with the analysis subsequently set forth in our opinion in *United States Dept. of Commerce* v. *Montana*, 503 U. S. ___ (1992), and is no longer in dispute. Pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U. S. C. §706(2), the District Court also examined the decision of the Secretary of Commerce to include overseas federal employees in the census count. The court concluded that the Secretary's decision was "arbitrary and capricious, and an abuse of discretion." 785 F. Supp., at 267.

In a rather surprising development, this Court reverses because it concludes that the Census Report is not "final agency action," 5 U. S. C. §704. The reason the Court gives for this conclusion is that the President—who is not himself a part of the agency that prepared the census and who has no statutory responsibilities under the Census Act—might revise that Report in some way when he is performing his responsibilities under an entirely separate statute, the Apportionment Act. The logic of the Court's opinion escapes me, and apparently was not obvious to the Solicitor General, for he advanced no such novel claim in his argument seeking reversal. The Court's conclusion is erroneous for several reasons.

Article I, §2, cl. 3, of the Constitution, as modified by the Fourteenth Amendment, provides that Members of the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ." To ensure that the apportionment remains representative of the current

population, the Constitution further requires that a census be taken at least every 10 years.[1]

Beginning in 1790, Congress fulfilled the constitutional command by passing a census Act every 10 years. Under the early census statutes, marshals would transmit the collected information to the Secretary of State. The census functions of the Secretary of State were transferred to the Secretary of the Interior after that Department was established in 1849.[2] A Census Office in the Department of the Interior was established in 1899 and made permanent in 1902.[3] A year later, the Census Office was moved to the newly formed Department of Commerce and Labor.[4]

Following each census, Congress enacted a statute to reapportion the House of Representatives. After the 1920 census, however, Congress failed to pass a reapportionment Act. This congressional deadlock provided the impetus for the 1929 Act that established a self-executing apportionment in the case of congressional inaction. See S. Rep. No. 2, 71st Cong., 1st Sess., 2–4 (1929). The bill produced an automatic reapportionment through the application of a mathematical formula to the census. The automatic connection between the census and the reapportionment was the key innovation of the Act.[5]

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[1]"The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct." U. S. Const., Art. I, §2, cl. 3.

[2]See C. Wright, The History and Growth of the United States Census, S. Doc. No. 194, 56th Cong., 1st Sess., 40 (1900).

[3]32 Stat. 51.

[4]32 Stat. 826–827.

[5]See 71 Cong. Rec. 1609–1610 (1929) (remarks of

In its original version, the bill directed the Secretary of Commerce to apply a mathematical formula to the census figures and to transmit the resulting apportionment calculations to Congress. A later version made the President responsible for performing the mathematical computations and reporting the result. From the legislative history, it is clear that this change in the designated official was intended to have no substantive significance.[6] There is no indication whatsoever of an intention to introduce a layer of Executive discretion between the taking of the census and the application of the reapportionment formula. The intention was exactly the contrary: to make the apportionment proceed automatically based on the census.

The statutory scheme creates an interlocking set of responsibilities for the Secretary and the President.

Sen. Vandenberg). The automatic reapportionment on the basis of the decennial census was retained when the reapportionment features of the bill were modified somewhat in 1941. Act of Nov. 15, 1941, 55 Stat. 761. See *United States Dept. of Commerce* v. *Montana*, 503 U. S. ___, ___, and n.25 (1992).

[6]The sponsor of the bill, Senator Vandenberg, explained the change:

"[T]he President of the United States is substituted in the bill as the person who shall make the computation and report instead of the Secretary of Commerce, who was identified in the bill last February simply and solely because it was my own personal notion that if we were to accomplish a permanent end through the passage of permanent legislation it were better to name a constitutional officer rather than a statutory officer. I have quite no pride of opinion at that point and I think it makes quite no difference, because everybody will get the same answer when we undertake to do that problem in arithmetic." 71 Cong. Rec. 1613 (1929).

The Secretary of Commerce is required to take a "decennial census of population as of the first day of April of [every tenth] year, which date shall be known as the `decennial census date.' " 13 U. S. C. §141(a). The Secretary reports the collected information to the President, see §141(b), who is directed to "transmit to the Congress" a statement showing the population of each State "as ascertained under the seventeenth and each subsequent decennial census . . . ." 2 U. S. C. § 2a(a). The plain language of the statute demonstrates that the President has no substantive role in the computation of the census. The Secretary takes the "decennial census," and the President performs the apportionment calculations and transmits the census figures and apportionment results to Congress.

In the face of this clear statutory mandate, the Court must fall back on an argument based on statutory silence. The Court insists that there is no law *prohibiting* the President from changing the census figures after he receives them from the Secretary. The Court asserts: "Section 2a does not expressly require the President to use the data in the *Secretary's report*, but, rather, the data from the `*decennial census*.'" *Ante*, at 8 (emphasis added). This statement is difficult to comprehend, for it purports to contrast two terms that the statute equates. The "decennial census" is the name the statute gives to the information collected by the Secretary and reported to the President. The Court's argument cannot be harmonized with a statutory scheme that directs the Secretary to take the "decennial census" and the President to report to Congress figures "as ascertained under the . . . decennial census." This language cannot support the Court's view that the statute endows the President with discretion to modify the census results reported by the Secretary.

The legislative record, moreover, establishes that

the Executive involvement in the process is to be wholly ministerial.[7] The question of the discretion allowed to the President was discussed on the floor of the Senate, and the sponsor of the bill, Senator Vandenberg of Michigan, stated unequivocally that the President exercised no discretion whatsoever: "I believe as a matter of indisputable fact, that function served by the President is as purely and completely a ministerial function as any function on earth could be." 71 Cong. Rec. 1858 (1929).[8] In a colloquy with

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[7]The Senate Report, for example, states:

"The objection that this is an improper `delegation of power' to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President reports upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. No. 2, 71st Cong., 1st Sess., 4–5 (1929).

[8]At another point, Senator Vandenberg explained: "The bill calls upon the President to report the result of a census to the Congress. We have always depended upon somebody to report the result of a census to us. The bill calls upon the President, when he reports the result of the census, also to report the result of a problem in arithmetic. If the President did not present the answer to that problem in arithmetic, somebody else would have to do the problem in arithmetic, because no matter what method is embraced for purposes of apportionment, there is inevitably needed a formula which, like a chemical formula, may in itself be somewhat inscrutable, and yet which always reaches the same conclusion." 71 Cong. Rec. 1613 (1929). The accuracy of Senator

other legislators, Senator Vandenberg made clear that the bill did not allow the President to change the census figures he received:

> "Mr. SWANSON: As I understand, the Senator from Montana says, after reading the bill carefully, that the President is bound and has no discretion under its terms; so that if there should be glaring frauds all over the country he would be compelled to make the apportionment according to the census.
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> "Mr. WALSH of Montana: I should say so, because as I understand, he is not authorized to disregard any numbers upon any ground.
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> "Mr. SWANSON: I should like to ask the Senator from Michigan if that is his view? I understand the Senator from Montana to say that if the census returns shall be shown to be reeking with frauds the President will have no power to correct them; that he must follow the census returns as certified, regardless of the fraud that may be involved. Is that the view of the Senator from Michigan?
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> . . . . .
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> "Mr. VANDENBERG: My answer is that the Senator from Montana is entirely correct. There is absolutely no discretion in name or nature reposed in the President in connection with the administration of this proposed act." 71 Cong. Rec. 1845–1846 (1929).[9]

Vandenberg's statements is confirmed by the analysis set forth in our opinion in *United States Dept. of Commerce* v. *Montana*, 503 U. S., at ___.

[9]An opponent of the bill, Senator Black, questioned whether the Act might allow the President more than

No President—indeed, no member of the Executive Branch—has ever suggested that the statute authorizes the President to modify the census figures when he performs the apportionment calculations. Nor did the Solicitor General advance that argument in this litigation.[10] As a matter of practice, the President has consistently and faithfully performed the ministerial duty described by Senator

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a ministerial role in the apportionment process. He considered such a possibility a recipe for tyranny. See 71 Cong. Rec. 1612 (1929).

[10]While asserting that the President has authority to direct the Secretary's performance of the census, the Solicitor General acknowledged that the statute does not authorize the President to deviate from the Secretary's report:

"MR. ROBERTS: The law directs [the President] to apply, of course, a particular mathematic formula to the population figures he receives, but I don't think there is a limit on his exercise of authority to direct the Secretary of Commerce to conduct the census in a particular manner. It would be unlawful, maybe not subject to judicial review, but unlawful just to say, these are the figures, they are right, but I am going to submit a different statement. But he can certainly direct the Secretary in the conduct of the census.

"QUESTION: But would he have to remand it in effect to the Secretary or could he say, well, I have had somebody over at the FBI making some checks for me and they tell me there are really more people in Massachusetts, so I am going to give them extra seats.

"MR. ROBERTS: I think under the law he is supposed to base his calculation on the figures submitted by the Secretary." Tr. of Oral Arg. 12–13.

Vandenberg. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.[11]

Because the Census Act directs that the tabulation of the total population by States shall be "reported by the Secretary to the President," the Court suggests that it is "like a tentative recommendation" to the President, *ante*, at 9. This suggestion is misleading

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[11]The Court confuses two duties of the President: (1) the general duty to supervise the actions of the Secretary of Commerce, and (2) the statutory duty to transmit the Census Report and the apportionment calculations to Congress. This confusion is evident from the Court's statement, "It is hard to imagine a purpose for involving the President if he is to be prevented from exercising his accustomed supervisory powers over his executive officers." *Ante*, at 11. It may be true that the statute does not purport to limit the President's "accustomed supervisory powers" over the Secretary of Commerce. The President would enjoy these "accustomed powers," however, whether or not he was responsible for transmitting the census and apportionment calculations to Congress. These "accustomed powers," therefore, cannot be relevant in deciding whether agency action is final for the purposes of the APA, or else no action of an Executive department would ever be final. The Court's argument then depends on construing the statute to grant discretion to the President that he would not otherwise enjoy. Such additional grants of authority were implicated in the cases on which the Court relies. See *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S. 103 (1948); *United States* v. *George S. Bush & Co.*, 310 U. S. 371 (1940). The statutory language here will not bear this interpretation. Moreover, whatever purpose the Court wishes to "imagine" for the statute's designating the President as the official

because, unlike the typical "tentative recommendation," the Census Report is a public document. It is released to the public at the same time that it is transmitted to the President.[12] By law, the Census Report is distributed to federal and state agencies because it provides the basis for the allocation of various benefits and burdens among the States under a variety of federal programs. The Secretary also transmits the census figures directly to the States to assist them in redistricting. See 13 U. S. C. §141(c).

This wide distribution provides further evidence that the statute does not contemplate the President's changing the Secretary's report. If the President modified the census figures after he received them from the Secretary, the Federal Government and the States would rely on different census results. The Secretary has made clear that the existence of varying "official" population figures is not acceptable. In setting forth guidelines for possible adjustment of the census results,[13] the Secretary stated:

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responsible for performing the apportionment calculations, the legislative record makes it absolutely clear that the purpose was *not* to give the President any new discretionary authority over the census. See *supra*, at 4–7, and n. 6.

[12]See United States Department of Commerce News, Bureau of Census, 1990 Census Population for the United States is 249,632,692: Reapportionment Will Shift 19 Seats in the U. S. House of Representatives (Dec. 26, 1990); see also N.Y. Times, Dec. 27, 1990, p. A1, col. 3.

[13]The Court asserts that the possibility of census adjustments subsequent to the President's report to Congress supports its interpretation of the statute. See *ante*, at 8. On the contrary, the evidence the Court cites undermines its argument. The President's statement accompanying the transmittal of the 1990

> "The resulting counts must be of sufficient quality and level of detail to be usable for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published. . . .
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> "[T]here can be, for the population at all geographic levels at any one point in time, only one set of official government population figures." 55 Fed. Reg. 9840–9841 (1990).

To ensure uniformity, the Secretary's count must establish the final census figures.[14]

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census and apportionment figures to Congress explains, "The Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991." H.R. Doc. No. 102–18, p. 1 (1991). The statement underscores that it is the *Secretary*, not the President who determines the final census figures. That the Secretary will "publish" the corrected results also demonstrates that the Court is mistaken in likening the Secretary's report to a "tentative recommendation." *Ante*, at 9.

The possibility that the Secretary may modify the census figures, of course, cannot support the Court's view that the President's intervention deprives the Secretary's action of finality. The possibility of correction would mean, at most, that appellees' challenge was not ripe until the Secretary's eventual announcement that he would not adjust the census. See 56 Fed. Reg. 33582 (1991). Similarly, even if it were the President's report to Congress that signaled the end of a census-adjustment process, that would be relevant only in determining when a challenge is ripe, not whether the Secretary's report is "final agency action."

[14]Even in the Court's view, the Secretary's report of census information to recipients other than the President would certainly constitute "final agency

In light of the statutory language, the legislative history, and the consistent Executive practice, the Court's conclusion that the Census Report is not "final agency action" is as insupportable as it is surprising.[15]

In view of my conclusion that the Census Report prepared by the Secretary constitutes final agency action, I must consider the Secretary's contention that judicial review is not available because the conduct of the census is "committed to agency discretion by law." 5 U. S. C §701(a)(2).

As we have frequently recognized, the "strong presumption that Congress intends judicial review of administrative action," see *e.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986), cannot be overcome without "`clear and convincing evidence'" of a contrary legislative intent, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U. S. 367, 380 (1962)). No such evidence appears here.

The current version of the statute provides that "[t]he Secretary shall . . . take a decennial census of population as of the first day of April . . . in such form and content as [s]he may determine . . . ." 13 U. S. C.

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action." The Court's decision thus appears to amount to a pleading requirement. To avoid the bar to APA review that the Court imposes today, litigants need only join their apportionment challenges to other census-related claims. Notwithstanding the Court's novel reading of the statute, in view of the Secretary's insistence on unitary census data, relief on any census claim would yield relief on all other claims.

[15]My conclusion that the Secretary's action was reviewable makes it unnecessary for me to consider whether the President is an "agency" within the meaning of the APA.

§141(a).[16] The Secretary asserts that the discretion afforded by the statute is at least as broad as that allowed the Director of Central Intelligence in the statute we considered in *Webster* v. *Doe*, 486 U. S. 592 (1988). That assertion cannot withstand scrutiny. The statute at issue in *Doe* provided that "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee

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[16]Moreover, this language appeared only recently in the statute. The Act passed in 1929 stated, "That a census of population . . . shall be taken by the Director of the Census in the year 1930 and every ten years thereafter." 46 Stat. 21. Before the 1976 amendment, the Act provided: "The Secretary shall, in the year 1960 and every ten years thereafter, take a census of population . . . ." 71 Stat. 483. It was not until 1976 that Congress added the language, "in such form and content as [s]he may determine." To the extent that the argument for unreviewability depends on this phrase, it requires the conclusion that when Congress amended the statute in 1976, it intended to effect a new, unreviewable commitment to agency discretion. There is no support for this position whatsoever. The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment). See S. Rep. 94–1256, pp. 2–3 (1976). The legislative history evidences no intention to expand the scope of the Secretary's discretion.

The Senate Report on the new language in 13 U. S. C. §141(a) reads in its entirety:

"Subsection (a) of section 141 essentially rewords the existing subsection, adding the term `decennial census of population' so as to distinguish this census, to be taken in 1980 and every ten years thereafter, from the mid-decade census, which is to be taken in 1985 and every ten years thereafter. New language is added at the end of the subsection to encourage

of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .” 50 U. S. C. §403(c). In concluding that employment discharge decisions were committed to agency discretion, we emphasized the language of “deem . . . advisable,” which we found to provide no meaningful standard of review. We also relied on the overall statutory structure of the National Security Act.

No language equivalent to “deem . . . advisable” exists in the census statute. There is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion. Moreover, it is difficult to imagine two statutory schemes more dissimilar than the National Security Act and the Census Act. Though they both relate to the gathering of information, the similarity ends there. *Doe* raises the possibility that, except for constitutional claims, the Director of Central Intelligence may enjoy unreviewable discretion to discharge employees. This conclusion accords with the principle of judicial deference that pervades the area of national security. See*, e.g., Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988); *CIA* v. *Sims*, 471 U. S. 159, 180–181 (1985). While the operations of a secret intelligence agency may provide an exception to the norm of reviewability,[17] the taking of the census does not. The open

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the use of sampling and surveys in the taking of the decennial census.” S. Rep. 94–1256, at 4.

Indeed, other portions of the Act limited the Secretary's authority by requiring, if feasible, the use of sampling in the nonapportionment census. 90 Stat. 2464, 13 U. S. C. §195.

[17]Indeed, it was asserted in *Webster* v. *Doe*, 486 U. S. 592 (1988), that the statute should be construed to preclude review even of constitutional claims. See

nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government.[18] The reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.

More generally, the Court has limited the exception to judicial review provided by 5 U. S. C. §701(a)(2) to cases involving national security, such as *Webster* v. *Doe* and *Department of Navy* v. *Egan*, or those seeking review of refusal to pursue enforcement actions, see *Heckler* v. *Chaney*, 470 U. S. 821 (1985); *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444 (1979); *Morris* v. *Gressette*, 432 U. S. 491 (1977). These are areas in which courts have long been hesitant to intrude. The taking of the census is not such an area of traditional deference.[19]

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id., at 605–606 (O'CONNOR, J., concurring in part and dissenting in part); *id.,* at 621 (SCALIA, J., dissenting) (describing Court's refusal to preclude constitutional review as creating "the world's only secret intelligence agency that must litigate the dismissal of its agents").

[18]See 3 Encyclopedia of the Social Sciences 296 (reprinted in Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Senate Committee on Governmental Affairs, The Decennial Census: An Analysis and Review, 96th Cong., 2d Sess., 461 (Comm. Print 1980)). The tradition of publicity, of course, relates to the tabulated information. The confidentiality of individual responses has long been assured by statute. See 13 U. S. C. §§8(b), 9(a); see also *Baldrige* v. *Shapiro*, 455 U. S. 345, 356–358 (1982).

[19]The great weight of authority supports the view that

Nor is this an instance in which the statute is so broadly drawn that "`there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*. 401 U. S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The District Court found that the overall statutory scheme and the Census Bureau's consistently followed policy provided "law to apply" in reviewing the Secretary's exercise of discretion. 785 F. Supp., at 262. As the District Court explained, the relationship of the census provision contained in 13 U. S. C. §141 and the apportionment provision contained in 2 U. S. C. §2a demonstrates that the Secretary's discretion is constrained by the requirement that she produce a tabulation of the "whole number of persons in each State." 2 U. S. C. §2a.[20] This statutory command also embodies a duty

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the conduct of the census is not "committed to agency discretion by law." See*, e.g., Carey* v. *Klutznick*, 637 F. 2d 834 (CA2 1980); *New York* v. *United States Dept. of Commerce*, 739 F. Supp. 761 (EDNY 1990); *New York* v. *United States Dept. of Commerce*, 713 F. Supp. 48 (EDNY 1989); *Cuomo* v. *Baldrige*, 674 F. Supp. 1089 (SDNY 1987); *Willacoochee* v. *Baldrige*, 556 F. Supp. 551 (SD Ga. 1983); *Carey* v. *Klutznick*, 508 F. Supp. 404 (SDNY 1980); *Philadelphia* v. *Klutznick*, 503 F. Supp. 663 (ED Pa. 1980); *Young* v. *Klutznick*, 497 F. Supp. 1318 (ED Mich. 1980), rev'd on other grounds, 652 F. 2d 617 (CA6 1981), cert. denied, *sub nom. Young* v. *Baldrige,* 455 U. S. 939 (1982); *Camden* v. *Plotkin*, 466 F. Supp. 44 (N. J. 1978).

[20]The Census Act provides various other rules, as well, that limit the Secretary's discretion. For example, the statute requires the Secretary to take a decennial census of population "as of the first day of April" in every 10th year. 13 U. S. C. §141(a). Thus, persons who die in February or March, or who are not born until May or June, are not to be counted. The fact

to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment. The "usual residence" policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion. See generally *Heckler* v. *Chaney*, 470 U. S., at 836; *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29, 41–43 (1983); *Padula* v. *Webster*, 822 F. 2d 97, 100, 261 U. S. App. D.C. 365, 368 (1987). The District Court was clearly correct in concluding that the statutory framework and the long-held administrative tradition provide a judicially administrable standard of review.[21]

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that the statute gives the Secretary broad discretion with respect to the "form and content" of the census surely does not mean that she could lawfully count persons who predeceased the census date or who were born thereafter. Similarly, it would be plain error to count as Massachusetts residents a family that moved from New York to Boston on June 1.

[21]Nothing in the language of the statute or in the overall statutory scheme supports the Secretary's alternative argument that this is an instance in which the relevant "statutes preclude judicial review." 5 U. S. C. §701(a)(1). In the absence of express statutory language, we have generally reserved that exception for cases in which the existence of an alternative review procedure provided "clear and convincing evidence," *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 671 (1986) (citations and internal quotation marks omitted), of a legislative intent to preclude judicial review. See, *e.g., Department of Navy* v. *Egan*, 484 U. S. 518, 530–533 (1988); *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 130–133 (1987); *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 346–348 (1984). No such alternative scheme appears here. The ability of

For the reasons stated in Part IV of the Court's opinion, I agree that the inclusion of overseas employees in state census totals does not violate the Constitution.[22] I turn now to appellees' contention that the Secretary's decision to include overseas federal employees was arbitrary and capricious and should have been set aside under the APA.

With the exception of the census conducted in 1900, overseas federal employees were not included

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Congress, itself, to resolve apportionment issues by enacting new laws does not provide any evidence of an intent to preclude judicial review.

[22]I believe that appellees' challenge to the use of "home of record" data also merits brief consideration.

The contention that overseas personnel may have little connection with their "home of record" clearly has some force. A person designates a "home of record" when entering the service and is not permitted to change it thereafter. See App. 147, n. 5. This information may therefore be quite stale, implicating the constitutional requirements of accuracy and decenniality.

The special problems of including overseas personnel in the census, though, necessitate difficult judgments about the best data to use. In view of the discretion available to the Secretary in formulating residence rules, the adoption of the "home of record" principle cannot be said to transgress any constitutional command. Accuracy in this context is clearly a comparative concept, and appellees have not demonstrated that the constitutional requirement of accuracy dictates a different method of determining residence.

Like the District Court, I also conclude that the Secretary's decision did not violate any specific provision of the Census Act. See 785 F. Supp., at 266, n. 31.

in state census totals before 1970.[23] In the census conducted in 1970, during the Vietnam War, overseas military personnel were assigned to States for apportionment purposes based on the "home of record" appearing in their personnel files.[24] The Bureau reverted to its previous policy of excluding overseas employees from apportionment totals in the 1980 census. In explaining this decision, one of the reasons cited by Bureau officials was the "unknown reliability" of the data relied on to determine the "home State" of overseas personnel. App. 55. In discussions with the Census Bureau and in testimony before Congress, officials of the Defense Department agreed that "home of record" data had a high "error rate" and might have little correlation with an employee's true feelings of affiliation. See *id.,* at 124, 183.

In July 1989, then-Secretary Mosbacher decided to include overseas employees in state population figures in the 1990 census.[25] The decision memorandum approved by the Secretary described several reasons for this conclusion, including "growing bipartisan concern of the Congress" and the belief of the Defense Department that its employees should be included in apportionment calculations because they considered themselves to be "usual residents" of the United States. *Id.,* at 120. The prospect of more accurate data than previously available also contributed to the decision. The memorandum stated that the Defense Department's plans to conduct an enumeration of its employees provided a "significant reason" for the decision. *Id.,* at 121; see also *id.,* at 184. In December 1989, however, a lack of funds led the Defense Department to cancel the survey. *Ibid.* The Secretary nevertheless adhered to the decision to

[23]See App. 175–177.

[24]See *id.,* at 57.

[25]*Id.,* at 182.

include overseas personnel.

In reaching the ultimate decision to allocate overseas federal employees to States, the Secretary had an obligation to "examine the relevant data and articulate a satisfactory explanation for [the] action including a `rational connection between the facts found and the choice made.'" *State Farm*, 463 U. S., at 43 (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)). The District Court was properly concerned by the scant evidence that the Secretary reconsidered the apportionment policy following the cancellation of the Defense Department survey. If the justification for the decision no longer obtained, the refusal to reconsider would be quite capricious. The District Court was certainly correct in concluding that "[i]nertia cannot supply the necessary rationality" for the Secretary's decision. 785 F. Supp., at 265.

While the question is a close one, two factors in particular lead me to conclude that the decision to include overseas employees ultimately rested on more than inertia. First, the Secretary received assurances from the Defense Department that, even without the survey, information on overseas personnel would be "supplemented and improved," App. 161, and would thus be more accurate than the data available in the past. Moreover, while the anticipated Defense Department survey played an important role in the Secretary's initial decision, other factors cited in the memorandum continued to support the Secretary's choice to include overseas personnel.

The record could be more robust. However, the basis for the agency's decision need not appear with "ideal clarity," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974), as long as it is reasonably discernible. As the Court explains, see *ante*, Part IV, the Secretary had discretion to include overseas personnel in the

census count. Although the hopes for more accurate data were not fully realized, the record discloses that the decision to include overseas personnel continued to be supported by valid considerations. I therefore conclude that the decision of the Secretary was not arbitrary or capricious.[26]

For these reasons, I concur in the Court's judgment, but only in Part IV of its opinion.

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[26]The record indicates that the Secretary considered the alternative methods of allocating overseas employees to States and that the choice of "home of record" data was certainly not arbitrary or capricious. See*, e.g.,* App. 162.