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 SCALIA, concurring in part and concurring in the judgment.

I agree with the Court that appellees had no cause of action under the judicial-review provisions of the Administrative Procedure Act (APA), 5 U. S. C. §701, *et seq.*, and I therefore join Parts I and II of its opinion.

Appellees have also challenged the constitutionality of the allocation methods used by the Secretary of Commerce in conducting the census. The Court concludes that they have standing to assert these claims, but that the claims are meritless.[1] I disagree with the Court's conclusion on the standing question, and therefore do not reach the merits. Our cases have established that there are three elements to the "irreducible constitutional minimum of standing" required by Article III: (1) the plaintiffs must establish that they have suffered "injury in fact"; (2) they must show causation between the challenged action and the injury; and (3) they must establish that it is likely that the injury will be redressed by a decision in their favor. *Lujan* v. *Defenders of Wildlife*, 504 U. S. ___, ___ (1992) (slip op., at 4). Appellees have clearly satisfied the first two requirements, but I think they founder on the third.

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[1]Although only a plurality of the Court joins that portion of JUSTICE O'CONNOR's opinion which finds standing (Part III), I must conclude that the *Court* finds standing since eight Justices join Part IV of the Court's opinion discussing the merits of appellees' constitutional claims.

The plurality concludes that declaratory relief directed at the Secretary alone would be sufficient to redress appellees' injury. *Ante*, at 13–14. I do not agree. Ordering the Secretary to recalculate the final census totals will not redress appellees' injury unless the President accepts the new numbers, changes his calculations accordingly, and issues a new reapportionment statement to Congress, and the Clerk of the House then submits new certificates to the States. 13 U. S. C. §141(b); 2 U. S. C. §2a. I agree that, in light of the Clerk's purely ministerial role, we can properly assume that insofar as *his* participation is concerned the sequence of events will occur. But as the Court correctly notes, *ante*, at 8–11, the President's role in the reapportionment process is *not* purely ministerial; he is not "required to adhere to the policy decisions reflected in the Secretary's report," *ante*, at 10. I do not think that for purposes of the Article III redressability requirement we are *ever* entitled to assume, no matter how objectively reasonable the assumption may be, that the President (or, for that matter, any official of the executive or legislative branches), in performing a function that is not wholly ministerial, will follow the advice of a subordinate official. The decision is by Constitution or law conferred upon him, and I think we are precluded from saying that it is, in practical effect, the decision of someone else. Indeed, judicial inquiry into or speculation about the probability of such "practical" subservience—never mind acting upon the outcome of such inquiry or speculation—seems to me disrespectful of a coordinate branch. On such a theory of redressability, suit would lie (assuming injury-in-fact could be shown) against the members of the President's Cabinet, or even the members of his personal staff, for the almost-sure-to-be-followed advice they give him in their respective areas of expertise.

The plurality, however, has a different theory of

redressability. In its view, it suffices that the "authoritative interpretation of the census statute and constitutional provision" rendered by the District Court will induce the President to submit a new reapportionment that is consistent with what the District Court judgment orders the Secretary to submit. *Ante*, at 13–14. It seems to me this bootstrap argument eliminates, rather than resolves, the redressability question. If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will *always* exist. Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power. It is the Court's *judgment*, in other words, its injunction to the Secretary of Commerce, that must provide appellees relief—not its accompanying excursus on the meaning of the Constitution.

Though the Court does not rely upon it, the judgment sought here *did* run against the President of the United States. The District Court's order expressly required, not only that a new census tabulation be prepared, but also that the President issue a new certification and that the Clerk of the House forward the new apportionment to the 50 Governors. It is a commentary upon the level to which judicial understanding—indeed, even judicial awareness—of the doctrine of separation of powers has fallen, that the District Court entered this order against the President without blinking an eye. I think it clear that no court has authority to direct the President to take an official act.

We have long recognized that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers, compare *Nixon* v. *Fitzgerald*, 457 U. S. 731, 750

(1982) ("The President's unique status under the Constitution distinguishes him from other executive officials") with *Harlow* v. *Fitzgerald*, 457 U. S. 800, 811, n. 17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself"). Although we held in *United States* v. *Nixon*, 418 U. S. 683 (1974), that the President is not *absolutely* immune from judicial process, see also *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.) (upholding subpoena directed to President Jefferson), the order upheld there merely required the President to provide information relevant to an ongoing criminal prosecution, which is what any citizen might do; it did not require him to exercise the "executive Power" in a judicially prescribed fashion. We have similarly held that Members of Congress can be subpoenaed as witnesses, see *Gravel* v. *United States*,
408 U. S. 606, 615 (1972), citing *United States* v. *Cooper*,
4 Dall. 341 (1800) (Chase, J., sitting on Circuit), though there is no doubt that we cannot direct *them* in the performance of their constitutionally prescribed duties, see *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975) (refusing to enjoin the issuance of a congressional subpoena).

I am aware of only one instance in which we were specifically asked to issue an injunction requiring the President to take specified executive acts: to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. As the plurality notes, *ante*, at 13, we emphatically disclaimed the authority to do so, stating that "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1867). See also C. Burdick, The Law of the American Constitution §50, pp. 126–127 (1922); C.

Pyle & R. Pious, The President, Congress, and the Constitution 170 (1984) ("No court has ever issued an injunction against the president himself or held him in contempt of court"). The apparently unbroken historical tradition supports the view, which I think implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested—viz., the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary.[2]

For similar reasons, I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court. Many of the reasons we gave in *Nixon* v. *Fitzgerald*, *supra*, for acknowledging an absolute presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions: The President's immunity from such judicial relief is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.*, at 749; see also *id.*, at 749–757; *id.*, at 760–764 (Burger, C. J., concurring).[3] Permitting declaratory or injunctive

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[2]In *Mississippi* v. *Johnson* we left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, see 4 Wall. 475, 498–499 (1867); cf. *Kendall* v. *United States*, 12 Pet. 524 (1838) (Postmaster General); *Marbury* v. *Madison*, 1 Cranch 137 (1803) (Secretary of State). As discussed earlier, the President's duty here was not that.

[3]Although the relief granted in *Powell* v. *McCormack*,

relief against the President personally would not only distract him from his constitutional responsibility to "take Care that the Laws be faithfully executed," U. S. Const. Art. II, §3, but, as more and more disgruntled plaintiffs add his name to their complaints, would produce needless head-on confrontations between district judges and the Chief Executive. (If official-action suits against the President had been contemplated, surely they would have been placed within this Court's original jurisdiction.) It is noteworthy that in the last substantive section of *Nixon* v. *Fitzgerald* where we explain why "[a] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," 457 U. S., at 757, because of "[t]he existence of alternative remedies and deterrents," *id.*, at 758, injunctive or declaratory relief against the President is not mentioned.

None of these conclusions, of course, in any way suggests that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of

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395 U. S. 486 (1969), was only declaratory, and although we reserved the question whether *coercive* relief could properly be granted against the congressional officers, we discussed the issue of the form of relief only *after* having concluded that the actions of these officers were not protected by legislative immunity, *id.*, at 517–518. Accordingly, nothing in the case suggests that declaratory relief may be awarded for actions protected by congressional (or Presidential) immunity.

Congress for the performance of their legislative duties, see, *e.g.*, *Powell* v. *McCormack*, 395 U. S. 486, 503–506 (1969); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive. Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties.

In sum, we cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush, and since we have no power to do that, I believe appellees' constitutional claims should be dismissed.[4] Since I agree with the Court's conclusion that appellee's constitutional claims do not provide an alternative ground that would support the judgment below, I concur in its judgment reversing the District Court.

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[4]A contrary conclusion is not required by the fact that in *Department of Commerce* v. *Montana*, 503 U. S. ___ (1992), we reached the merits of a challenge to the President's use of the method of equal proportions in calculating the reapportionment. "`[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.'" *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 119 (1984) (quoting *Hagans* v. *Lavine*, 415 U. S. 528, 533, n. 5 (1974)).