SUPREME COURT OF THE UNITED STATES

Syllabus

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

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

No. 91–1502. Argued April 21, 1992—Decided June 26, 1992

The Constitution requires that the apportionment of Representatives be determined by an ``actual Enumeration'' of persons ``in each State,'' conducted every 10 years. Art. I, §2, cl. 3; Amdt. 14, §2. After the Secretary of Commerce takes the census in a form and content she determines, 13 U.S.C. §141(a), she reports the tabulation to the President, §141(b). He, in turn, sends Congress a statement showing the number of persons in each State, based on data from the ``decennial census,'' and he determines the number of Representatives to which each State will be entitled. 2 U.S.C. §2a(a). For only the second time since 1900, the Census Bureau (Bureau) allocated the Department of Defense's overseas employees to particular States for reapportionment purposes in the 1990 census, using an allocation method that it determined most closely resembled ``usual residence,'' its standard measure of state affiliation. Appellees Massachusetts and two of its registered voters filed an action against, *inter alios,* the President and the Secretary of Commerce, alleging, among other things, that the decision to allocate federal overseas employees is inconsistent with the Administrative Procedure Act (APA) and the Constitution. In particular, they alleged that the allocation of overseas military personnel resulted in the shift of a Representative from Massachusetts to Washington State. The District Court, *inter alia,* held that the Secretary's decision to allocate such employees to the States was arbitrary and capricious under APA standards, directed the Secretary to eliminate them from the apportionment count, and directed the President to recalculate the number of Representatives and submit the new calculation to Congress.

Held: The judgment is reversed.

785 F.Supp. 230, reversed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1.There was no ``final agency action'' reviewable under the APA. Pp.6–12.

(a)An agency action is ``final'' when an agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. Here, the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress. He is not required to transmit the Secretary's report directly to Congress. Rather, he uses the data from the ``decennial census'' in making his statement, and, even after he receives the Secretary's report, he is not prohibited from instructing the Secretary to reform the census. The statutory structure here differs from those statutes under which an agency action automatically triggers a course of action regardless of any discretionary action taken by the President. *Japan Whaling Assn.* v. *American Cetacean Soc.,* 478 U.S. 221, distinguished. Contrary to appellees' argument, the President's action here is not ceremonial or ministerial. Apportionment is not foreordained by the time the Secretary gives the President the report, and the fact that the final action is the President's is important to the integrity of the process. Pp.6–11.

(b)The President's actions are not reviewable under the APA. He is not specifically included in the APA's purview, and respect for the separation of powers and the President's unique constitutional position makes textual silence insufficient to subject him to its provisions. Pp.11–12.

2.The Secretary's allocation of overseas federal employees to their home States is consistent with the constitutional language and goal of equal representation. It is compatible with the standard of ``usual residence,'' which was the gloss given the constitutional phrase ``in each State'' by the first enumeration Act and which has been used by the Bureau ever since to allocate persons to their home States. The phrase may mean more than mere physical presence, and has been used to include some element of allegiance or enduring tie to a place. The first enumeration Act also used ``usual place of abode,'' ``usual resident,'' and ``inhabitant'' to describe the required tie. And ``Inhabitant,'' in the related context of congressional residence qualifications, Art. I. §2, has been interpreted to include persons occasionally absent for a considerable time on public or private business. ``Usual residence'' has continued to hold broad connotations up to the present day. The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that overseas employees have retained ties to their home States, actually promotes equality. Pp.14–17.

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O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and WHITE, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.