

You are here: [About](#) > [News & Issues](#) > [U.S. Gov Info / Resources](#)



News & Issues

U.S. Gov Info

Essentials

- [Miranda Rights Q & A](#)
- [Money to Start a Small Business](#)
- [Government Job Finder](#)
- [Unclaimed Property Search](#)
- [Government Sales and Auctions](#)

Government Offers

- [FDA Approval](#)
- [Administrative Law CFR](#)
- [E-Government Act](#)
- [Regulatory Affairs](#)
- [What are offers?](#)

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- [Government Jobs](#)
- [Business and Money](#)
- [Rights and Freedoms](#)
- [Auction and Sales](#)
- [Consumer Awareness](#)
- [Census and Statistics](#)
- [U.S. Congress](#)
- [The President and Cabinet](#)
- [U.S. Court System](#)
- [Defense and Security](#)
- [Historic Documents](#)
- [The Political System](#)
- [Older Americans](#)
- [Healthcare](#)
- [Technology and Research](#)

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**Administrative Procedure Act**

**Title 5 - United States Code - Chapter 5, sections 511-599**

The Administrative Procedure Act (APA) is the law under which some 55 U.S. government federal regulatory agencies like the FDA and EPA create the rules and regulations necessary to implement and enforce major legislative acts such as the Food Drug and Cosmetic Act, Clean Air Act or Occupational Health and Safety Act.

- [Read about the federal regulatory rulemaking process](#)

**PART I - THE AGENCIES GENERALLY**

**CHAPTER 5**

**SUBCHAPTER II - ADMINISTRATIVE PROCEDURE**

**§551. Definitions.**

For the purpose of this subchapter -

- (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
  - (A) the Congress;
  - (B) the courts of the United States;
  - (C) the governments of the territories or possessions of the United States;
  - (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title
  - (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
  - (F) courts martial and military commissions;
  - (G) military authority exercised in the field in time of war or in occupied territory; or
  - (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;
- (2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;
- (3) "party" includes a person or agency named or admitted as a party, or

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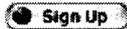
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- properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;
- (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
  - (5) "rule making" means agency process for formulating, amending, or repealing a rule;
  - (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
  - (7) "adjudication" means agency process for the formulation of an order;
  - (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
  - (9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;
  - (10) "sanction" includes the whole or a part of an agency -
    - (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
    - (B) withholding of relief;
    - (C) imposition of penalty or fine;
    - (D) destruction, taking, seizure, or withholding of property;
    - (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
    - (F) requirement, revocation, or suspension of a license; or
    - (G) taking other compulsory or restrictive action;
  - (11) "relief" includes the whole or a part of an agency -
    - (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
    - (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
    - (C) taking of other action on the application or petition of, and beneficial to, a person;
  - (12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;
  - (13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and
  - (14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

**§552. Public information; agency rules, opinions, orders, records, and proceedings.**

- (a) Each agency shall make available to the public information as follows:
  - (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -
    - (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

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- (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
  - (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
  - (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
  - (E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
- (2) Each agency, in accordance with published rules, shall make available for public inspection and copying -
- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
  - (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
  - (C) administrative staff manuals and instructions to staff that affect a member of the public;
- unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -
- (i) it has been indexed and either made available or published as provided by this paragraph; or
  - (ii) the party has actual and timely notice of the terms thereof.
- (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be

followed, shall make the records promptly available to any person.

- (4)
  - (A)
    - (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
    - (ii) Such agency regulations shall provide that - (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use; (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
    - (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
    - (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section - (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or (II) for any request described in clause (ii) (I) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
    - (v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.
    - (vi) Nothing in this subparagraph shall supersede

- fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.
- (vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.
  - (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
  - (C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.
  - ((D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.)
  - (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
  - (F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.
  - (G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.
  - (5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.
  - (6)
    - (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall -
      - (i) determine within ten days (excepting

- Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
- (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
- (B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request -
    - (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
    - (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
    - (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.
  - (C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.
- (b) This section does not apply to matters that are -
    - (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
    - (2) related solely to the internal personnel rules and practices of

- an agency;
- (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.
- (c)
  - (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -
    - (A) the investigation or proceeding involves a possible violation of criminal law; and
    - (B) there is reason to believe that
      - (i) the subject of the investigation or proceeding is not aware of its pendency, and
      - (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
  - (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless

- the informant's status as an informant has been officially confirmed.
- (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
  - (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
  - (e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include -
    - (1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
    - (2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;
    - (3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;
    - (4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;
    - (5) a copy of every rule made by such agency regarding this section;
    - (6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and
    - (7) such other information as indicates efforts to administer fully this section. The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.
  - (f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

#### **§552a. Records about individuals.**

- (a) **Definitions.**

For purposes of this section

- (1) the term "agency" means agency as defined in section 552(e) (FOOTNOTE 1) of this title;

- (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;
- (3) the term "maintain" includes maintain, collect, use, or disseminate;
- (4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
- (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
- (6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;
- (7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;
- (8) the term "matching program" -
  - (A) means any computerized comparison of -
    - (i) two or more automated systems of records or a system of records with non-Federal records for the purpose of - (I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or (II) recouping payments or delinquent debts under such Federal benefit programs, or
    - (ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,
  - (B) but does not include -
    - (i) matches performed to produce aggregate statistical data without any personal identifiers;
    - (ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;
    - (iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;
    - (iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103 (b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 464 or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

- (v) matches - (I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or (II) conducted by an agency using only records from systems of records maintained by that agency; if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;
  - (vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel; or
  - (vii) matches performed pursuant to section 6103(l)(12) of the Internal Revenue Code of 1986 and section 1144 of the Social Security Act;
- (9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;
- (10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;
- (11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;
- (12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and
- (13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).
- **(b) Conditions of Disclosure.**

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be

- (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
- (2) required under section 552 of this title;
- (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
- (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
- (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;
- (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the

Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

- (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
  - (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
  - (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;
  - (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;
  - (11) pursuant to the order of a court of competent jurisdiction; or
  - (12) to a consumer reporting agency in accordance with section 3711(f) of title 31.
- **(c) Accounting of Certain Disclosures.**

Each agency, with respect to each system of records under its control, shall -

- (1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of -
    - (A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and
    - (B) the name and address of the person or agency to whom the disclosure is made;
  - (2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;
  - (3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and
  - (4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.
- **(d) Access to Records.**

Each agency that maintains a system of records shall -

- (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
- (2) permit the individual to request amendment of a record pertaining to him and -
  - (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

- (B) promptly, either -
  - (i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
  - (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;
- (3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;
- (4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and
- (5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.
- **(e) Agency Requirements.**

Each agency that maintains a system of records shall -

- (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;
- (2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;
- (3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual -
  - (A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
  - (B) the principal purpose or purposes for which the information is intended to be used;
  - (C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
  - (D) the effects on him, if any, of not providing all or any part of the requested information;
- (4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall

include -

- (A) the name and location of the system;
- (B) the categories of individuals on whom records are maintained in the system;
- (C) the categories of records maintained in the system;
- (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;
- (E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;
- (F) the title and business address of the agency official who is responsible for the system of records;
- (G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;
- (H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and
- (I) the categories of sources of records in the system;
- (5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;
- (6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;
- (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;
- (8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;
- (9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;
- (10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;
- (11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and
- (12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.
- **(f) Agency Rules.**

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall -

- (1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;
  - (2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;
  - (3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;
  - (4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and
  - (5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record. The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.
- **(g) Civil Remedies.**

Whenever any agency

- (1)
  - (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
  - (B) refuses to comply with an individual request under subsection (d)(1) of this section;
  - (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
  - (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.
- (2)
  - (A) In any suit brought under the provisions of subsection (g)(1) (A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.
  - (B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

- (3)
  - (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.
  - (B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
- (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -
  - (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and
  - (B) the costs of the action together with reasonable attorney fees as determined by the court.
- (5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

- **(h) Rights of Legal Guardians.**

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

- **(i) Criminal Penalties**

- (1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.
- (2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.
- (3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses

shall be guilty of a misdemeanor and fined not more than \$5,000.

- **(j) General Exemptions.**

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is -

- (1) maintained by the Central Intelligence Agency; or
- (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

- **(k) Specific Exemptions.**

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is -

- (1) subject to the provisions of section 552(b)(1) of this title;
- (2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
- (3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;
- (4) required by statute to be maintained and used solely as statistical records;
- (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government

under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

- (6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or
- (7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence. At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

- **(l) Archival Records.**

- (1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.
- (2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.
- (3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

- **(m) Government Contractors.**

- (1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.
- (2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

- **(n) Mailing Lists.**

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

- **(o) Matching Agreements.**

- (1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying -
  - (A) the purpose and legal authority for conducting the program;
  - (B) the justification for the program and the anticipated results, including a specific estimate of any savings;
  - (C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;
  - (D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to -
    - (i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and
    - (ii) applicants for and holders of positions as Federal personnel, that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;
  - (E) procedures for verifying information produced in such matching program as required by subsection (p);
  - (F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;
  - (G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;
  - (H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;
  - (I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;
  - (J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and
  - (K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.
- (2)
  - (A) A copy of each agreement entered into pursuant to paragraph (1) shall -
    - (i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and



threatened during any notice period required by such paragraph.

- **(q) Sanctions.**
- (1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.
- (2) No source agency may renew a matching agreement unless -
  - (A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and
  - (B) the source agency has no reason to believe that the certification is inaccurate.
- **(r) Report on New Systems and Matching Programs.**

Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

- **(s) Biennial Report.**

The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report -

- (1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;
- (2) describing the exercise of individual rights of access and amendment under this section during such years;
- (3) identifying changes in or additions to systems of records;
- (4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.
- **(t) Effect of Other Laws.**
- (1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.
- (2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.
- **(u) Data Integrity Boards.**
- (1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this

- section.
- (2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.
  - (3) Each Data Integrity Board -
    - (A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;
    - (B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;
    - (C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;
    - (D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including -
      - (i) matching programs in which the agency has participated as a source agency or recipient agency;
      - (ii) matching agreements proposed under subsection (o) that were disapproved by the Board;
      - (iii) any changes in membership or structure of the Board in the preceding year;
      - (iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;
      - (v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and
      - (vi) any other information required by the Director of the Office of Management and Budget to be included in such report;
    - (E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;
    - (F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;
    - (G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and
    - (H) may review and report on any agency matching activities that are not matching programs.
  - (4)
    - (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. (FOOTNOTE 2)(FOOTNOTE 2) So in original. Probably should be "cost-effective."
    - (B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not

- required.
  - (C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.
- (5)
  - (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.
  - (B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that -
    - (i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;
    - (ii) there is adequate evidence that the matching agreement will be cost-effective; and
    - (iii) the matching program is in the public interest.
  - (C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).
  - (D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.
- (6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.
- (7) In the reports required by paragraphs (3)(D) and (6), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.
- **(v) Office of Management and Budget Responsibilities.**

The Director of the Office of Management and Budget shall -

- (1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and
- (2) provide continuing assistance to and oversight of the implementation of this section by agencies.

**§552b. Open meetings.**

- (a) For purposes of this section -

- (1) the term "agency" means any agency, as defined in section 552(e) (FOOTNOTE 1) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;
- (2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and
- (3) the term "member" means an individual who belongs to a collegial body heading an agency.
  
- (b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.
- (c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to -
  - (1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;
  - (2) relate solely to the internal personnel rules and practices of an agency;
  - (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
  - (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;
  - (5) involve accusing any person of a crime, or formally censuring any person;
  - (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
  - (7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
  - (8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
  -

- (9) disclose information the premature disclosure of which would
  - (A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or
  - (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or
- (10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.
- (d)
  - (1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.
  - (2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.
  - (3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.
  - (4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply:

*Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.*

- (e)
  - (1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.
  - (2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.
  - (3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.
- (f)
  - (1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.
  - (2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the

testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

- (g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.
- (h)
  - (1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.
  - (2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this

section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose. •(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

- (j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:
  - (1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.
  - (2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.
  - (3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.
  - (4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.
- (k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.
- (l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open. •(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

#### §553. Rule making.

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved -
  - (1) a military or foreign affairs function of the United States; or
  - (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -
  - (1) a statement of the time, place, and nature of public rule making proceedings;
  - (2) reference to the legal authority under which the rule is

- proposed; and
  - (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply -
    - (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
    - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -
  - (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
  - (2) interpretative rules and statements of policy; or
  - (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

#### §554. Adjudications.

- (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -
  - (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
  - (2) the selection or tenure of an employee, except a (FOOTNOTE 1) administrative law judge appointed under section 3105 of this title; (FOOTNOTE 1) So in original.
  - (3) proceedings in which decisions rest solely on inspections, tests, or elections;
  - (4) the conduct of military or foreign affairs functions;
  - (5) cases in which an agency is acting as an agent for a court; or
  - (6) the certification of worker representatives.
- (b) Persons entitled to notice of an agency hearing shall be timely informed of -
  - (1) the time, place, and nature of the hearing;
  - (2) the legal authority and jurisdiction under which the hearing is to be held; and
  - (3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had

for the convenience and necessity of the parties or their representatives.

- (c) The agency shall give all interested parties opportunity for -
  - (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
  - (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.
- (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not -
  - (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
  - (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply -
    - (A) in determining applications for initial licenses;
    - (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
    - (C) to the agency or a member or members of the body comprising the agency.
- (e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

#### **§555. Ancillary matters.**

- (a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.
- (b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.
- (c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory

proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

- (d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.
- (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

**§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.**

- (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
- (b) There shall preside at the taking of evidence -
  - (1) the agency;
  - (2) one or more members of the body which comprises the agency; or
  - (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

- (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may -
  - (1) administer oaths and affirmations;
  - (2) issue subpoenas authorized by law;
  - (3) rule on offers of proof and receive relevant evidence;
  - (4) take depositions or have depositions taken when the ends of justice would be served;
  - (5) regulate the course of the hearing;
  - (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
  - (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
  - (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
  - (9) dispose of procedural requests or similar matters;
  - (10) make or recommend decisions in accordance with section 557 of this title; and

- (11) take other action authorized by agency rule consistent with this subchapter.
- (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
- (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

**§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.**

- (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
- (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses -
  - (1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or
  - (2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.
- (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are

entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions -

- (1) proposed findings and conclusions; or
  - (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
  - (3) supporting reasons for the exceptions or proposed findings or conclusions. The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -
    - (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
    - (B) the appropriate rule, order, sanction, relief, or denial thereof.
- (d)
    - (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law -
      - (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
      - (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;
      - (C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
        - (i) all such written communications;
        - (ii) memoranda stating the substance of all such oral communications; and
        - (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;
      - (D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and
      - (E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has

knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

- (2) This subsection does not constitute authority to withhold information from Congress.

**§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.**

- (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
- (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.
- (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -
  - (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
  - (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

**§559. Effect on other laws; effect of subsequent statute.**

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

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U.S. Department of Justice

Washington, D.C. 20530

November 18, 1993

TO: Mary Anne Hook  
Dick Eddy  
Jeff Gutman

FR: Scott McIntosh JRM

RE: Dalton v. Specter

Here is the Solicitor General's draft of our opening brief in the Specter case. John Manning and Ed Kneedler, the people in the SG's office who are handling the case, have asked me to distribute it to you for your comments and suggestions.

The brief is due on December 2, and John and Ed have asked for comments by this coming Monday, November 22. Because John will be out of the office for the next several days, please use me as your contact for comments; I will pass everything along once all comments are in. My number is (202) 514-4052.

P.S. Dick, I'm assuming that you will distribute copies of this draft as needed to all interested parties in the Navy and DoD.

John Manning  
9/4/2/16/1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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JOHN H. DALTON, SECRETARY OF  
THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), 10 U.S.C. 2687 note (Supp. IV 1992), establishes a mechanism to identify unneeded domestic military bases for closure and realignment. The questions presented are:

1. Whether the base closure and realignment recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission, or the President's decision to accept or reject the Commission's recommendations, is subject to judicial review under the principles set forth in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

2. Whether the Base Closure Act itself "preclude[s] judicial review" of statutory claims for purposes of the Administrative Procedure Act, 5 U.S.C. 701(a)(1).

II

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and its members -- James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

Respondents in this Court, who were plaintiffs below, are Sen. Arlen Specter; Sen. Harris Wofford; Sen. Bill Bradley; Sen. Frank R. Lautenberg; Governor Robert P. Casey; Commonwealth of Pennsylvania; Ernest D. Preate, Jr., Pennsylvania Attorney General; Rep. Curt Weldon; Rep. Thomas Foglietta; Rep. Robert Andrews; Rep. R. Lawrence Coughlin; City of Philadelphia; Howard J. Landry; International Federation of Professional and Technical Engineers, Local 3; William F. Reil; Metal Trades Council, Local 687 Machinists; Governor James J. Florio; State of New Jersey; Robert J. Del Tufo, New Jersey Attorney General; Governor Michael N. Castle; State of Delaware; Rep. Peter H. Kostmeyer; Rep. Robert A. Borski; Ronald Warrington; and Planners Estimators Progressman & Schedulers Union Local No. 2.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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No. 93-289

JOHN H. DALTON, SECRETARY OF  
THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE PETITIONERS

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (Pet. App. 31a-87a) is reported at 971 F.2d 936. The opinion of the district court (Pet. App. 91a-97a) is reported at 777 F. Supp. 1226.

**JURISDICTION**

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. Pet. App. 26a-28a. The petition for a writ of certiorari was filed on August 23, 1993, and was granted on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990 (1990 Act), as amended, 10 U.S.C. 2687 note (Supp. IV 1992),<sup>1</sup> and relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 and 704, are reproduced at Pet. App. 98a-130a.

## STATEMENT

## A. Statutory Background

1. During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic military bases. See Defense Base Closure and Realignment Commission, Report to the President 1991, at 1-1 [hereinafter 1991 Report]; H.R. Rep. No. 1233, 94th Cong., 2d Sess. 5 (1976) (2700 base reductions, closures, or realignments since 1969). Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress in those areas. See, e.g., 122 Cong. Rec. 30,446-30,447 (1976) (Sen. Kennedy); id. at 30,453-30,455 (Sen. Muskie); id. at 30,456 (Sen. Brooke). In addition, opposition to base closures was fueled in part by the

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<sup>1</sup> The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608. For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

perception that Executive's selection of bases was influenced by improper political considerations. See 1991 Report at 1-1.

To address those concerns, Congress in 1977 enacted procedural restrictions on the Executive's authority to close or realign the size of military bases. Military Construction Authorization Act, 1978, Pub. L. No. 95-82, § 612, 91 Stat. 358, 379-380 (1977), codified at 10 U.S.C. 2687 (Supp. I 1977).<sup>2</sup> That legislation required the Secretary of Defense or the pertinent service Secretary to give Congress and the public advance notice of potential military base closures or realignments. 10 U.S.C. 2687(b)(1) (Supp. I 1977).<sup>3</sup> Moreover, at least 60 days before implementing a final base closure decision, the Department of Defense was to submit "a detailed justification" to the Armed Services Committees of both Houses. 10 U.S.C. 2687(b)(3)-(4) (Supp. I 1977).<sup>4</sup> Finally, the statute required the Department of Defense to comply with the National Environmental Policy Act,

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<sup>2</sup> The previous year, Congress had enacted substantially the same restrictions as a condition on the expenditure of appropriated funds. See Military Construction and Guard and Reserve Forces Facilities Authorization, 1977, Pub. L. No. 94-431, § 612, 90 Stat. 1366-1367.

<sup>3</sup> The Act defined realignment as "any action which both reduces and relocates functions and civilian personnel positions, but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, skill imbalances, or other similar causes." 10 U.S.C. 2687(d)(3) (Supp. I 1977). The 1990 Act includes a substantially similar definition. See 1990 Act § 2910(5). For convenience, we refer to both base closures and realignments as "base closures."

<sup>4</sup> The justification was to be accompanied by an estimate of the "fiscal, local economic, budgetary, environmental, strategic, and operational consequences of the proposed closure or reduction." 10 U.S.C. 2687(b)(3) (Supp. I 1977).

42 U.S.C. 4331, et seq., before proceeding with base closures.  
10 U.S.C. 2687(b)(2) (Supp. I 1977).

The 1977 legislation imposed no substantive restrictions on the Executive's authority to close military bases. Its procedural requirements, however, placed significant obstacles in the path of base closure. In particular, opponents of base closure used NEPA litigation to delay and frustrate the base closure process. See, e.g., H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988); H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 1, at 8 (1988); H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 2, at 16 (1988). Indeed, the procedural impediments of the 1977 statute effectively prevented the government from carrying out significant closure of bases. See 1991 Report at 1-1; H.R. Rep. No. 735, supra, Pt. 1, at 8 (noting testimony of Secretary of Defense that government "is unable to close or realign unneeded military bases because of impediments, restrictions, and delays imposed by provisions of current law").

2. Congress first sought to break the resulting stalemate by enacting the Base Closure and Realignment Act of 1988 (1988 Act), Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act is the direct predecessor of, and shares many basic features with, the statute at issue here. The 1988 Act established an independent Commission on Base Closure and Realignment. 1988 Act § 203, 102 Stat. 2627-2628. The Commission was charged with preparing a base closure report for the Secretary of Defense, who had no authority to close bases until after

he approved the report and forwarded it to Congress. 1988 Act §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act also provided a 45-day waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627.

This mechanism was designed to eliminate the impediments to, and delays in, the base closure process under the 1977 statute. See H.R. Rep. No. 735, supra, Pt. 1, at 8; H.R. Rep. No. 735, supra, Pt. 2, at 8. To that end, the 1988 Act not only made 10 U.S.C. 2687 inapplicable (1988 Act § 205(2), 102 Stat. 2630), but also explicitly exempted the base closure decisions of the Commission and the Secretary from NEPA. 1988 Act § 204(c)(1), 102 Stat. 2632; H.R. Rep. No. 735, supra, Pt. 1, at 10; H.R. Rep. No. 735, supra, Pt. 2, at 16; H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 3, at 4 (1988).<sup>5</sup> Although House and Senate conferees endorsed NEPA's goals of "public disclosure and clear identification of potential adverse environmental impacts," they nevertheless restricted the applicability of NEPA based on the "recogni[tion] that [it] ha[d] been used in some cases to delay and

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<sup>5</sup> In 1985, Congress revised 10 U.S.C. 2687 to eliminate the provision explicitly applying NEPA to base closure. See Pub. L. No. 145, § 1202(a), 99 Stat. 716. NEPA, however, continued to apply of its own force to the base closure process. Thus, Congress was required to take further action to free base closures from NEPA review.

As introduced, the 1988 legislation entirely exempted base closures from the requirements of NEPA. H.R. Conf. Rep. No. 1071, supra, at 22; H.R. Rep. No. 735, supra, Pt. 2, at 16. As amended in the House, the actual selection of bases was exempted from NEPA, and NEPA challenges to the implementation of particular base closures were subjected to a strict 60-day time limit. H.R. Conf. Rep. No. 1071, supra, at 22-23; H.R. Rep. No. 735, supra, Pt. 2, at 16.

ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, supra, at 23.

**B. The Defense Base Closure and Realignment Act of 1990**

The 1988 Act was not a permanent mechanism for closing and realigning military installations, but established a mechanism for one round of base closures. Accordingly, Congress passed the 1990 Act to provide a more comprehensive mechanism for identifying and closing unnecessary domestic military bases. In doing so, Congress relied on the 1988 Act as "an example of the right way to close bases" and assumed that "[a] new base closure process will not be credible unless the 1988 base closure process remains inviolate." H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990).

The 1990 Act accordingly establishes the following mechanism for base closures. The Act provides for three rounds of base closures,<sup>6</sup> to take place in 1991, 1993, and 1995. 1990 Act § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan \* \* \* based on an assessment \* \* \* of the probable threats to the national security" during that period. 1990 Act § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria for base closure recommendations. 1990 Act

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<sup>6</sup> The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5). For convenience, we use the term "base closures" to refer to both base closures and realignments.

§ 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. 1990 Act § 2903(c).

The 1990 Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent commission established under the Act. 1990 Act §§ 2902(a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. 1990 Act § 2903(d)(1) and (2). The Commission may change the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. 1990 Act § 2903(d)(2)(B) and (C). The Commission must then forward its report to the President by July 1. 1990 Act § 2903(e).

The President may approve or disapprove the Commission's recommendations, and must transmit his determination to Congress and the Commission by July 15. 1990 Act § 2903(e)(1)-(3). If the President disapproves the Commission's recommendations, it must prepare new recommendations and resubmit them to the President no later than August 15. § 2903(e)(3). If the President then disapproves the revised recommendations (or takes no action by September 1), no bases may be closed that year under the Act. 1990 Act § 2903(e)(5).

If the President approves the initial or revised recommendations, Congress then reviews the President's decision through the mechanism of considering a joint resolution of disapproval. 1990 Act §§ 2904(b), 2908. If a joint resolution of disapproval is enacted (after presentment to the President for signing), the Secretary of Defense may not close or realign the bases approved by the President. 1990 Act § 2904(b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,<sup>7</sup> the Secretary must close or realign all of the military installations approved by the President for closure or realignment. 1990 Act § 2904(a).

Like the 1988 Act, the 1990 Act's mechanism was in lieu of the procedural requirements of the 1977 legislation. See 1990 Act § 2905(d). Similarly, the 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 \* \* \* shall not apply to the actions of the President, the Commission, and \* \* \* the Department of Defense in carrying out [the Act]." 1990 Act § 2905(c)(1). The 1990 Act does apply NEPA review to steps taken to implement base closure decisions after bases have been selected. See 1990 Act § 2905(c)(2)(A) (NEPA applies to decisions made "during the process of property disposal[] and \* \* \* relocating functions"). But it strictly requires such post-selection NEPA suits to be filed within 60 days of the challenged action. 1990 Act § 2905(c)(3).

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<sup>7</sup> To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate usual delays. 1990 Act § 2908.

### C. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission a list of domestic military installations for closure or realignment. That list included the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184 (1991). The Commission held public hearings in Washington, D.C., as well as in Philadelphia and elsewhere around the country, receiving testimony from Defense Department officials, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Shipyard. The Commission recommended the closure or realignment of 82 bases. Those recommendations differed from the Secretary's in several respects, but the Commission concurred in the Secretary's recommendation to close the Philadelphia Shipyard. Pet. App. 33a.

On July 10, 1991, the President approved the Commission's recommendations. C.A. App. 52. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. Pet. App. 33a-34a. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing debate, several of the respondent Members of Congress urged adoption of the proposed resolution because of alleged flaws in the procedures through which the Philadelphia Naval Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews).

The House, however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; Pet. App. 34a.

b. On July 8, 1991, respondents filed this action under the APA and the 1990 Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. J.A. \_\_, \_\_, \_\_, \_\_ [C.A. App. 7, 61, 65, 68].<sup>8</sup> Respondents did not name the President as a defendant, nor did they allege that he violated the Act or otherwise acted improperly.

Respondents' complaint sets forth three counts, two of which remain at issue here. Count I alleges that the Secretary of the Navy and the Secretary of Defense violated substantive and procedural requirements of the 1990 Act in deciding to recommend the Philadelphia Naval Shipyard for closure. J.A. \_\_-\_\_.<sup>9</sup> Count II

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<sup>8</sup> Respondents are Members of Congress from Pennsylvania and New Jersey; Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; Philadelphia Naval Shipyard workers; and members of local unions. See Pet. App. 33a.

<sup>9</sup> Respondents allege that the Navy developed a deficient force structure plan (J.A. \_\_ [Complaint ¶¶ 124-132, 217(i)]); deviated substantially from the force structure plan and base closure criteria (J.A. \_\_ [Complaint ¶¶ 175-176]; disregarded its own objective ratings (J.A. \_\_ [Complaint ¶¶ 106-123, 174]; used unpublished selection criteria (J.A. \_\_ [Complaint ¶ 217(g)]; concealed its real reasons for selecting the Philadelphia Naval Shipyard (J.A. \_\_ [Complaint ¶ 217(d)]; withheld data from the General Accounting Office (GAO), the Commission, and Congress until after the close of public hearings (J.A. \_\_, \_\_, \_\_, \_\_ (Complaint ¶¶ 133, 170, 177, 217(a))); failed to provide the GAO with sufficient documentation of its decision (J.A. \_\_, \_\_, \_\_ [Complaint ¶¶ 139, 143, 217(b)-(c)]); and failed to comply with Department of Defense directives concerning record keeping and "internal control plans" (J.A. \_\_, \_\_ [Complaint ¶¶ 93, 217(h)]).

makes similar allegations concerning the Commission's preparation of its recommendations to the President.<sup>10</sup>

On November 1, 1991, the district court dismissed the suit in its entirety. Pet. App. 85a-91a. The district court concluded that the Base Closure Act itself "preclude[s] judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). Pet. App. 85a-88a. In the alternative, it held that the political question doctrine forecloses review of the base closure decision. Id. at 88a-91a.

2. a. A divided panel of the court of appeals affirmed in part and reversed in part. See Pet. App. 26a-82a.<sup>11</sup> As a preliminary matter, the court of appeals considered whether the actions at issue in this case constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. Although respondents were challenging actions or omissions of the Secretary of Defense and the Commission in making their recommendations, the court rea-

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<sup>10</sup> Respondents alleged that the Commission used improper criteria such as the availability of private shipyard capacity [J.A. \_\_, \_\_ [Complaint ¶¶ 168-69, 220(h)-(i)]; failed to consider all Navy installations equally (J.A. \_\_ [Complaint ¶¶ 220(f)-(g)]); adopted the Navy's recommendations even though the Commission knew of deficiencies in the Navy's decisionmaking process (J.A. \_\_ [Complaint ¶ 220(d)]); held closed meetings with the Navy after the completion of public hearings (J.A. \_\_ [Complaint ¶ 161]); relied on Navy documentation that was not subject to GAO review or public comment (J.A. \_\_, \_\_, \_\_ [Complaint ¶¶ 160, 162-163, 220(a)]); did not place certain information in the record until after the close of public hearings (J.A. \_\_ [Complaint ¶ 220(e)]); and failed to ensure that the GAO carried out its duties under the Act (J.A. \_\_ [Complaint ¶¶ 220(b)-(c)]).

<sup>11</sup> The court of appeals held that respondent union members and Philadelphia Shipyard employees had standing to challenge the base closure. Because the legal contentions of all of the respondents were the same, the court declined to address the standing of the others. Pet. App. 41a-44a.

soned that "at least in one sense, we are being asked to review a presidential decision." Pet. App. 43a. Because the Secretary and the Commission have authority only to make recommendations under the Act, respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. Id. at 42a. The court of appeals recognized that the APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. Id. at 43a. Nevertheless, the court concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, immune from judicial review at common law. Ibid.

Turning to other grounds for preclusion of review under the APA, the court of appeals held that the Base Closure Act itself precludes judicial review of some, but not all, claims under the Act. First, the court held that no judicial review of decisions under the Act is available prior to the effective date of the President's decision, i.e., until after expiration of the 45-day period for congressional review under Section 2904(b). The court explained that the Act sets a very stringent timetable and that "the ability of participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention." Pet. App. 44a-45a

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found

that the substance of the President's base closure decision "is committed by law to presidential discretion." Pet. App. 46a; see 5 U.S.C. 701(a)(2) (no judicial review of actions "committed to agency discretion by law"). Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. Pet. App. 56a-60a, 61a-62a.

At the same time, the court found no evidence that Congress intended to preclude judicial review of compliance by the Secretary or the Commission with the Act's procedural provisions. Pet. App. 60a-62a. Specifically, the court found that judicial review would be available for respondents' claims that: (1) the Secretary failed to transmit to the Commission and the General Accounting Office (GAO) all of the information that the Secretary used in making his recommendations; and (2) the Commission did not hold public hearings as required by the Act. Id. at 60a, 62a & n.15.

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the 1990 Act violated their rights under the Due Process Clause. The court reasoned that the Act creates no property interest in the plaintiffs. Pet. App. 67a-69a.<sup>12</sup>

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<sup>12</sup> The court of appeals also reversed the district court's ruling that this suit should be dismissed under the political question doctrine. Pet. App. 63a-67a. The government has not sought review of that holding.

b. Judge Alito dissented, concluding that the 1990 Act precludes judicial review of all statutory claims, procedural as well as substantive. Pet. App. 69a-82a. After examining the structure and history of the 1990 Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

3. On June 26, 1992, this Court issued its decision in Franklin v. Massachusetts, 112 S. Ct. 2767, which, inter alia, addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act provides that the Secretary of Commerce must submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled under a statutory formula. This Court held that the Secretary's report was not "final agency action" because it served as "a tentative recommendation" and carried "no direct consequences for reapportionment." *Id.* at 2774. Although the President's action had sufficient indicia of finality, the Court held that the President is not an "agency" -- and that his certification to the House of Representatives therefore is not "agency action" -- for purposes of the APA. *Id.* at 2775.

Because of the similarities between this case and Franklin, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of Franklin. Pet. App. 83a-84a.

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that Franklin does not affect the reviewability of respondents' procedural claims. Pet. App. 1a-25a. The court reasoned that the Court in Franklin "declined only to review the President's decision under the APA" and that it "expressly sanctioned" judicial review of the constitutionality of Presidential decisions. Pet. App. 10a (emphasis added). The majority concluded that if, as alleged, the Secretary and the Commission violated the 1990 Act's procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. Id. at 10a-12a. The majority further reasoned that if the President acts without constitutional or statutory authority, his actions violate the separation-of-powers doctrine and are therefore unconstitutional. Id. Accordingly, in the court's view, review of Presidential action for consistency with the "non-discretionary mandates of [an] authorizing statute" is "a form of constitutional review" permitted under Franklin. Id.

b. Judge Alito again dissented. Pet. App. 19a-25a. He noted that respondents "vigorously contended \* \* \* that Franklin does not bar review under the APA," and did not argue "that they were entitled to non-APA review based either on common law or

separation of powers principles." Id. at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the 1990 Act's procedural requirements. Id. at 21a-25a.

### SUMMARY OF ARGUMENT

[TO BE ADDED]

### ARGUMENT

#### I. RESPONDENTS' CLAIMS ARE NOT SUBJECT TO JUDICIAL REVIEW UNDER THE PRINCIPLES ARTICULATED IN FRANKLIN V. MASSACHUSETTS

##### A. Preparation Of Nonbinding Base Closure Recommendations By The Secretary And The Commission Is Not "Final Agency Action" And The President's Approval Of Those Recommendations Is Not Subject to the APA

The court of appeals' decision in this case squarely conflicts with the principles of judicial review set forth by this Court in Franklin v. Massachusetts, supra. Under the statute at issue in Franklin, the Secretary of Commerce prepared a report to the President containing each State's population according to the 1990 census, and the President, in turn, certified to Congress the number of United States Representatives to which each State was entitled under a statutory formula. Franklin, 112 S. Ct. at 2771. The plaintiffs claimed, inter alia, that the Secretary's method of allocating military service members among the States was arbitrary and capricious under the APA.

This Court held that there was no "final agency action" that may be reviewed under the APA. Franklin, 112 S. Ct. at 2773.

Turning first to the report prepared by the Secretary of Commerce, the Court explained that the "core question" regarding finality was "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Id. Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." Id. at 2774.

By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. Franklin, 112 S. Ct. at 2775. The Court held, however, that the President was not an "agency" for purposes of the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court held that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." Ibid. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2775-2776.

A straightforward application of Franklin makes clear that there likewise is no "final agency action" in this case. As relevant here, respondents' complaint challenges the procedures used by the Secretary of Navy, the Secretary of Defense, and the Commission to prepare their base closure recommendations. Like

the Secretary's report in Franklin, the base closure report of the Commission is only tentative and has "no direct effect" (Franklin, 112 S. Ct. at 2774), until after the President certifies his approval of the report to Congress. See 1990 Act § 2904(a) and (b); pp. \_\_\_-\_\_\_, supra. The actions of the Secretary of the Navy and the Secretary of Defense, which precede those of the Commission in the decision-making process, are still more "tentative." Franklin, 112 S. Ct. at 2774. In short, because the challenged actions of petitioners are merely nonbinding and preliminary to the President's final decision, they do not, under Franklin, constitute "final agency action" that is subject to judicial review under the APA.<sup>13</sup> See Cohen v. Rice, 992 F.2d 376, 381-382 (1st Cir. 1993) (holding that Franklin forecloses judicial review of challenges to the preparation of recommendations under the 1990 Act); see also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process"). And because the President is not an "agency," his action approving

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<sup>13</sup> Respondents argue (Br. in Opp. 13) that the Secretary's report in Franklin was less obviously final because the President could instruct the Secretary of Commerce to amend the report. If anything, the Secretary's and the Commission's recommendations in this case are more clearly nonfinal than the census report of the Secretary of Commerce in Franklin. Whereas the President's role in reapportionment is "admittedly ministerial" (Franklin, 112 S. Ct. at 2775), the 1990 Act explicitly contemplates that the President must approve or disapprove the Commission's recommendations, and he may end the process entirely by disapproving the Commission's recommendations. 1990 Act § 2903(e)(3) and (5).

the Commission's recommendations and certifying that approval to Congress is not subject to judicial review under the APA. Franklin, 112 S. Ct. at 2775-2776.

**B. Franklin's Exception For Constitutional Challenges To Presidential Action Is Inapplicable**

1. Although this Court vacated the court of appeals' initial decision and remanded for further consideration of the principles articulated in Franklin (see 113 S. Ct. 455; Pet. App. 83a-84a), the court of appeals on remand found respondents' procedural claims reviewable. The court of appeals acknowledged that under Franklin, respondent's claims were not reviewable under the APA. At the same time, however, the court found their claims reviewable based on "common law" principles of judicial review outside the carefully limited provisions of the APA. See Pet. App. 8a. In particular, the court focused on Franklin's observation that "the President's actions may \* \* \* be reviewed for constitutionality," even though they are not subject to the APA. 112 S. Ct. at 2776. The court of appeals reasoned that if (as respondents allege) petitioners committed procedural violations of the 1990 Act in preparing base closure recommendations, the President exceeded his authority -- and violated the Constitution -- by approving those recommendations and forwarding them to Congress. Pet. App. 11a-13a.

That reasoning necessarily rests on the premise that respondents' claims of statutory error by the Secretary and the Commission inherently state a constitutional claim against the President. Respondents have never alleged that the President violated

any provision of law, much less the Constitution.<sup>14</sup> Rather, their complaint is directed entirely at the alleged acts and omissions of the Navy, the Secretary of Defense, and the Commission prior to forwarding recommendations to the President. See notes \_\_\_ & \_\_\_, supra. Even as to those actions, moreover, respondents' only constitutional claim was dismissed at an earlier stage in the proceedings, and it is no longer at issue in this case.<sup>15</sup> Thus, the clear import of the court of appeals' decision is that when petitioners violate the 1990 Act's procedural requirements in formulating their recommendations, the President

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<sup>14</sup> Aside from reciting the bare fact that the President approved the Commission's recommendations (J.A. \_\_\_ [Complaint ¶ 182]), the complaint makes no reference to the President's actions. Nowhere does the complaint allege that the President committed any unconstitutional, or otherwise unlawful, act or omission. And respondents later went out of their way to make clear that they were not challenging the legality of the President's actions. Respondents emphasized to the court of appeals that "it is the conduct of [the] defendants -- not that of the President -- that [they] challenge." Resp. C.A. Remand Br. 12 (emphasis added). Respondents also explained that they "do not seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." Id. at 8 (emphasis in original).

<sup>15</sup> To be sure, respondents' complaint alleged a procedural due process claim similar to the statutory claims still at issue. See J.A. \_\_\_ [Complaint ¶ 225] ("The defendants' disregard of the procedures set forth in the Base Closure Act \* \* \* constitute[s] violations of the Due Process Clause"). However, in its first decision, the court of appeals rejected that claim on the merits, holding that the 1990 Act created no property interest on behalf of respondents. See Pet. App. 67a-69a. Respondents did not seek review of that ruling, and its validity is thus not at issue in this case.

necessarily violates the Constitution by accepting those recommendations.<sup>16</sup>

In our view, the court of appeals' ruling effectively does away with Franklin's restrictions on judicial review of Presidential action. As discussed, the principal claims found subject to review are (1) that the Secretary of Defense did not provide the Commission and the GAO all of the information used in making his recommendations, and (2) that the Commission held some nonpublic hearings, in violation of the 1990 Act. Pet. App. 60a, 62a & n.15. If those routine claims of statutory error by subordinate officials trigger "common law" (Pet. App. 8a) judicial review of the President's action under the Act, then Franklin's exception for constitutional claims will swallow the rule that the President's actions are unreviewable.

That result would sharply undermine Franklin's concern for "the separation of powers and the unique constitutional position of the President." Franklin, 112 S. Ct. at 2775. By vesting the ultimate decision on base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a uniquely accountable official. "The President's unique constitutional status distinguishes him from other executive officials." Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982). He is entrusted under the Constitution "with supervisory

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<sup>16</sup> The court of appeals purported to limit its ruling to claims of procedural error under the statute. For reasons we will discuss below (see pp. \_\_\_-\_\_\_, infra), that distinction cannot be sustained.

powers of utmost discretion and sensitivity," including the responsibility to "take Care that the Laws be faithfully executed." Ibid. (quoting U.S. Const., Art. II, § 3). Accordingly, this Court has been reluctant, in a variety of contexts, to hold that the President's actions are subject to judicial review. See, e.g., Franklin, 112 S. Ct. at 2775-2776 (no review of presidential decisions under the APA); Nixon v. Fitzgerald, supra (President absolutely immune from private damage actions within the outer perimeter of his official duties); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867) (federal courts in general have "no jurisdiction \* \* \* to enjoin the President in the performance of his official duties").

In light of the separation of powers considerations underlying Franklin and other decisions of this Court (Nixon v. Fitzgerald, 457 U.S. at 747-753; Harlow v. Fitzgerald, 457 U.S. 800, 811 n.17 (1982)), the President's direct exercise of authority should not lightly be subjected to broad judicial review on theories of "common law" reviewability. This is particularly so where, as here, the claims relate to alleged statutory errors in the way his subordinates arrived at their tentative, nonbinding recommendation under a scheme that gives the President unfettered author-

ity to accept or reject the recommendations in question.<sup>17</sup> See pp. \_\_-\_\_, infra.

That conclusion is strongly reinforced, moreover, by the fact that the broad "common law" action recognized by the court of appeals would effectively upset the legislative bargain that resulted in Congress's waiver of sovereign immunity under the APA in 1976. See Pub. L. No. 94-574, § 1, 90 Stat. 2721, codified at 5 U.S.C. 702.<sup>18</sup> The type of action recognized by the court of appeals is a so-called "officer's suit," that is, a nonstatutory challenge premised on the notion that an officer has acted in excess of statutory authority. Before Congress amended the APA to include a waiver of sovereign immunity, such actions were the

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<sup>17</sup> The court of appeals, moreover, misplaced reliance (Pet. App. 12a) on the fact that Franklin involved only a claim of arbitrary and capricious action under the APA. The plaintiffs in that case also challenged the counting of overseas servicemembers on the ground that it violated the Census Act. See Commonwealth v. Mosbacher, 785 F. Supp. 230, 231 n.31 (D. Mass. 1992); Franklin, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); Brief for Appellees at 74-76, Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) (No. 91-1502). Although the majority in Franklin did not specifically refer to that claim in this Court, its holding that the appellees had no right of judicial review to raise their statutory claims under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(1) (allowing court to set aside agency actions that are "arbitrary and capricious," "an abuse of discretion," or "in excess of statutory \* \* \* authority"), and the lack of "final agency action" precludes review of both.

<sup>18</sup> The pertinent waiver of sovereign immunity provides: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. 702.

common basis for obtaining specific relief against federal officers in the absence of a waiver of sovereign immunity. See, e.g., Dugan v. Rank, 372 U.S. 609, 621 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). The theory underlying those cases was that when an "officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." Larson, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his acts "are ultra vires his authority and \* \* \* may be made the object of specific relief." Ibid.

As this Court has recognized, the doctrine of ultra vires conduct was applied confusingly and inconsistently. International Primate Protection League v. Administrators of Tulane Education Fund, 111 S. Ct. 1700, 1708 (1991); Malone v. Bowdoin, 369 U.S. 643, 646 (1962). See also Jaffe, Suits Against Governments and Officers, 77 Harv. L. Rev. 20, 29-39 (1963); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 3-11 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3-9 (1976). In 1976, Congress enacted a waiver of sovereign immunity under the APA, in large measure, to rectify the confusion and uncertainty surrounding that area of law, and to rationalize the law of judicial review of agency action. See H.R. Rep. No. 1656, supra, at 9-11; S. Rep. No. 996, supra, at 7-9. In eliminating the doctrine of sovereign immunity, however, Congress emphasized that other APA doctrines -- governing the

"availability, timing, and scope of judicial review" -- would continue to be available to "control[] unnecessary judicial intervention in administrative decisions." H.R. Rep. No. 1656, supra, at 9; S. Rep. No. 996, supra, at 9.

The court of appeals' ruling in this case undermines that understanding. First, by holding that judicial review is available outside the confines of the APA on the theory of ultra vires presidential action, the court threatens to introduce into the law the very brand of confusion that Congress amended the APA to eliminate in 1976. Second, by holding that judicial review is available without regard to the existence of "final agency action" or even "agency" action, the court of appeals also disregarded Congress's understanding that official action was broadly reviewable, but only subject to the limitations of the APA. Under the circumstances, this Court should not disrupt the carefully crafted review provisions of the APA by adopting a fiction that allows broad "common law" judicial review to determine whether executive officials acted in excess of their authority under the 1990 Act -- even though the actions are not reviewable under the APA. See Block v. North Dakota ex rel. Board of University & School Lands, 461 U.S. 273, 280-286 (1983) (Congress waived sovereign immunity in suits involving federal land under the Quiet Title Act; enactment of that carefully crafted statutory scheme precludes further resort to common law "officer's

suits").<sup>19</sup> Particularly because the APA broadly provides for review of claims that an agency acted "in excess of statutory \* \* \* authority" (5 U.S.C. 706(2)(C)), the effect of the lower courts' ruling is to allow review authorized by Congress under the APA, but without observance of the limitations imposed by Congress in that carefully crafted statute.

2. Even if an "officer's suit" of the type recognized by the court of appeals were available under current law, the President did not act ultra vires his authority in this case. The court of appeals, however, concluded that because the Act's procedural provisions are "nondiscretionary" (Pet. App. 12a), the alleged procedural errors of the Secretary and the Commission necessarily divested the President of authority to approve the Commission's recommendations. The effect of that reasoning, however, is to obliterate the distinction between routine statutory claims, like those at issue here (see p. \_\_, supra), and genuine claims of ultra vires action.

a. The proper distinction between simple error and ultra vires conduct is best illustrated by this Court's sovereign

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<sup>19</sup> The legislative history accompanying the 1976 waiver of sovereign immunity under the APA explicitly referred to the Quiet Title Act as an illustration of why sovereign immunity should be waived generally. See H.R. Rep. No. 1656, supra, at 9 ("Just as there is little reason why the United States as a landowner should be treated differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against an officer or agency in an official capacity."); S. Rep. No. 996, supra, at 8 (same). Thus, the Court's treatment of the waiver of sovereign immunity under the Quiet Title Act, and its relevance to the continued availability of "officer's suits" is relevant in the context of the APA.

immunity cases. See, e.g., Larson v. Domestic & Foreign Commerce Corp., supra. In those cases, this Court has distinguished between claims that an officer acted "ultra vires his authority," which are the proper subject of specific relief, and mere "claim[s] of error in the exercise of that power,"<sup>20</sup> which are barred by sovereign immunity. Larson, 337 U.S. at 689-690. As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all."<sup>21</sup> Larson, 337 U.S. at

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<sup>20</sup> For an illustration of a case involving mere error, see United States ex rel. Goldberg v. Daniels, 231 U.S. 218 (1913), upon which the Court relied heavily in Larson, 337 U.S. at 700-702. In Goldberg, the Secretary of the Navy awarded a contract for a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the surplus vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court later explained in Larson, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." Larson, 337 U.S. at 700-701.

<sup>21</sup> In that respect, the analysis of ultra vires executive conduct is properly analogized to the question whether a federal court has subject matter jurisdiction. Just as an executive official is authorized to act only if he has constitutional or statutory authority (see, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)), a federal court must have statutory or constitutional authority before it may exercise jurisdiction over a case. See, e.g., Finley v. United States, 489 U.S. 545, 547-548 (1989). This Court has accordingly equated the existence of subject matter jurisdiction with a federal court's "power to act" at all. McLucas v. DeChamplain, 421 U.S. 21, 28 (1975). In contrast, the Court has emphasized that "[a]ny error in granting or designing relief 'does not go to the jurisdiction of the court.'" Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 561 (1968) (quoting Swift Co. v. United States, 276 U.S. 311, 331 (1928)). Thus, it is significant that this Court has never treated a federal court's

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691 n.12; see Noble v. Union River Logging R.R., 147 U.S. 165, 174 (1893).

Although the distinction is not straightforward to apply (see, e.g., International Primate Protection League, 111 S. Ct. at 1708), a finding of ultra vires executive action at a minimum requires a "depart[ure] from a plain official duty" (Payne v. Central Pac. Ry., 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, e.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (specific relief against violation of "plain official duty, requiring no exercise of discretion"). In other words, under applicable principles, "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake." Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845). See also Wells v. Roper, 246 U.S. 335, 338 (1918) ("neither the question of official capacity nor that of official discretion is affected, for present purposes, by assuming or conceding that the proposed action may have been unwarranted by

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21 (...continued)

violation of a nondiscretionary procedural rule as a matter that divests the court of jurisdiction to enter a judgment. Cf. United States v. Olano, 112 S. Ct. 1770, 1776 (1993) (litigants in criminal and civil cases may waive their procedural rights in federal court).

the terms of the contract"); Philadelphia Co. v. Stimson, 223 U.S. 605, 620 (1912) ("The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made.").

Under those principles, the court of appeals in this case erred in holding that respondents' procedural allegations against the Secretary of Defense and the Commission state claims of ultra vires action by the President. Contrary to the majority's reasoning (Pet. App. 12a), nothing in the 1990 Act denies the President authority to approve the Commission's recommendations unless he determines that they were formulated free of procedural error. The President's powers and responsibilities are set forth in Section 2903(e) of the 1990 Act. Under the terms of that provision, the President "shall, by no later than July 15 \* \* \*, transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations." 1990 Act § 2903(e)(1). If the President disapproves the Commission's recommendations in whole or in part, he "shall transmit to the Commission and the Congress the reasons for that disapproval." 1990 Act § 2903(e)(3). In that event, the Commission must submit a revised list of recommendations by August 15, and if the President approves the revised recommendations, he "shall transmit a copy of such revised recommendations to Congress, together with a certification of such approval." 1990 Act § 2903(e)(4)-(5).

Nowhere in those provisions has Congress imposed, or even suggested, any condition or qualification on the President's unqualified statutory authority to "approv[e] or disapprov[e]" the Commission's recommendations.<sup>22</sup> Rather, the only obligation imposed on the President by the 1990 Act is to decide, in his discretion, to approve or disapprove those recommendations and give notice of his decision to the Commission and Congress within the time allowed. 1990 Act § 2903(e)(1)-(4). As Judge Alito explained in dissent:

Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities.

Pet. App. 23a-24a.<sup>23</sup>

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<sup>22</sup> Respondents themselves conceded below that "[i]t is not the President's duty to review the procedural integrity of the base closure process or analyze whether [petitioners] complied with the Act's procedural mandates." Resp. C.A. Remand Br. 2.

<sup>23</sup> Of course, even though the President is not required to review the procedural integrity of petitioners' actions, he is not foreclosed from doing so in the exercise of his broad discretion under the 1990 Act. The President may approve or disapprove the  
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Indeed, the court on appeals acknowledged in its initial decision that "the President and Congress \* \* \* may reject the Commission's recommendations for any reason at all," and that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 51a, 74a. That conclusion cannot be squared with the court's subsequent determination that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (Payne, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" in the circumstances presented here. Larson, 337 U.S. at 691 n.12. Rather, because the President's authority to accept or reject the Commission's recommendations "had no limitation placed on it by Congress," he did not act beyond his statutory powers by accepting the recommendations in this case. Dugan v. Rank, 372 U.S. 609, 622 (1963). Far from having exceeded his authority under the 1990 Act, the President did precisely what it authorized him to do.

b. That conclusion is reinforced by this Court's precedents holding that an agency's failure to comply even with mandatory statutory procedures will not automatically disable the agency

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23 (...continued)

Commission's recommendations on any ground, including procedural grounds such as those advanced by respondents.

from acting. As this Court has explained, "[t]here is no presumption or general rule that for every duty imposed upon \* \* \* the Government \* \* \* there must exist some corollary punitive sanction for departures or omissions." United States v. Montalvo-Murillo, 495 U.S. 711, 717 (1990) (government may seek pre-trial detention despite failure to comply with statutory "first appearance" requirement). Rather, "[m]any statutory requisitions intended for the guide of officers in the conduct of business devolved upon them \* \* \* do not limit their power or render its exercise in disregard of the requisitions ineffectual." Id. at 718 (quoting French v. Edwards, 80 U.S. (13 Wall.) 506, 511 (1872)). And this Court has been "reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." Brock v. Pierce County, 476 U.S. 253, 260 (1986) (agency not disabled from proceeding by failure to meet 120-day limitation on action to recover misused federal funds). See also United States v. Nashville, C. & St. L. Ry., 118 U.S. 120, 125 (1886) (noting "great principle of public policy \* \* \* which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided").

Thus, where a statute cannot "be read to require, or even suggest," that a procedural error disables the government from acting, no such consequence should be implied. Montalvo-Murillo, 495 U.S. at 717; see id. at 717-719. Furthermore, this Court has

made clear that Congress's use of mandatory language in imposing a procedural requirement is alone insufficient to give rise to the inference that the requirement limits the agency's "power to act" at all. Brock, 476 U.S. at 262. Thus, it is significant that the 1990 Act gives no suggestion either that the procedural requirements imposed on the Secretary and the Commission bind the President or that the President's discretion to accept or reject the Commission's recommendations is limited in any way. Given the President's direct responsibility for accepting or rejecting base closure recommendations and Congress's streamlined procedures for disapproving them, it is implausible to suggest that Congress meant to bring the base closure to a halt if a subordinate official committed a procedural error in preparing recommendations for those uniquely accountable entities.

3. Even if the President acted beyond his statutory authority in approving the Commission's recommendations, the court of appeals erred in concluding (Pet. App. 11a-12a) that the respondents stated a claim for relief under the Constitution.

In finding that respondents stated a constitutional claim, the court of appeals reasoned that under Youngstown Sheet & Tube Co. v. Sawyer, supra, the President must have constitutional or statutory authority for whatever action he takes. Pet. App. 11a. Accordingly, because the President has no inherent authority to close military bases, the court concluded that if he acted without statutory authority, he violated the Constitution. Ibid. ("our review of whether presidential action has remained within

statutory limits may be characterized as a form of constitutional review").

Contrary to the court of appeals' reasoning, however, no decision of this Court suggests that an Executive Branch officer who acts in excess of his statutory authority automatically violates the Constitution. Rather, this Court has explicitly distinguished between "actions contrary to [a] constitutional prohibition" and actions "merely said to be in excess of the authority delegated \* \* \* by the Congress." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396-397 (1971). See also Wheeldin v. Wheeler, 373 U.S. 647, 650-652 (1963) (absent a violation of Fourth Amendment, no federal cause of action exists for abuse of delegated subpoena power). Further, this Court's cases involving "officer's suits" expressly contemplate that immunity may be stripped from an official's actions if the officer being sued has acted either "unconstitutionally or beyond his statutory powers." Larson, 337 U.S. at 691 n.11 (emphasis added); accord, e.g., Dugan v. Rank, 372 U.S. at 621-622; Philadelphia Co. v. Stimson, 223 U.S. at 620. There would have been no reason for the Court to specify unconstitutionality and ultra vires conduct as separate categories in those cases if, as the court of appeals indicated (Pet. App. 11a), all conduct in excess of statutory powers were itself unconstitutional.

Indeed, in pre-1976 cases such as Larson, the question of ultra vires conduct arose in the specific context of deciding

whether sovereign immunity shielded the conduct at issue from challenge; it did not go to the distinct question, presented here, whether the plaintiff stated a claim for relief, much less a claim for relief under the Constitution. See Larson, 337 U.S. at 693 (distinguishing issue of "invasion of protected legal interest" from question whether conduct complained of is "sovereign or individual"); Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 81 (1941) ("The plaintiff cannot sue to redress merely any unauthorized action by an officer. To maintain the suit the plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff \* \* \*"). To be sure, in some instances the availability of a common law cause of action has turned on whether the government was authorized to undertake particular action. See, e.g., Dugan v. Rank, 372 U.S. at 622-623.<sup>24</sup> Even in those cases, however, the absence or presence of ultra vires conduct was merely relevant to whether an existing cause of action could be invoked; we are unaware of any case in which this Court held that a lack of authority was the source of the private right in question.

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<sup>24</sup> In Dugan v. Rank, for example, the Court held that the government's authority to seize plaintiffs' water rights eliminated any claim that the action was a trespass. 372 U.S. at 622-623. Because the government's invasion of their rights was authorized, the plaintiffs did not have a claim for trespass, but were limited to an action in the Court of Claims for a taking of property without just compensation. Id. at 623.

The court of appeals' contrary conclusion -- that an allegation of ultra vires conduct inherently states a cause of action under the Constitution (Pet. App. 11a-12a) -- rests largely on a misreading of Youngstown. That case involved the President's authority to seize private domestic steel mills during the Korean War. See 343 U.S. at 582-583. In seizing the mills, the President relied exclusively on his executive authority and his powers as commander-in-chief under Article II of the Constitution. Id. at 585-587. The mill owners sued to enjoin the seizure, arguing that Congress, and not the President, had the authority to seize the mills. This Court agreed, holding that the Executive had usurped congressional authority in seizing the mills. Id. at 588.

Youngstown differs from this case in two crucial respects, each of which undermines the court of appeals' broad reliance on that case. First, the government in Youngstown disclaimed any statutory basis for the President's actions. See 343 U.S. at 585-586. Although two statutes authorized the seizure of private property under specified conditions, it was conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that the pertinent statutory authority was "too cumbersome, involved, and time-consuming." 343 U.S. at 586. Instead, the government defended the seizures exclusively on the ground that they were authorized by Article II of the Constitution. Id. at 587-588. And the sole issue presented to the courts was therefore the constitutional

question whether "the seizure order [was] within the constitutional power of the President." Id. at 584.<sup>25</sup>

Here, by contrast, the underlying legal controversy involves a purely statutory question. Respondents claim that petitioners did not comply with the 1990 Act. Petitioners argue that they did. Neither the President nor petitioners have claimed that the closure of Philadelphia Naval Shipyard was properly a matter of inherent Article II power. Thus, even if respondents' allegations, in fact, focused on the President's action in accepting the base closure recommendations, resolution of the dispute in this case would not require a judgment about the constitutional authority of the President. Thus, to characterize this statutory controversy as a separation-of-powers dispute, as in Youngstown, is to disregard the essence of the claims and defenses in this case.

Second, the seizure of the steel mills in Youngstown invaded the property rights of the mill owners -- personal rights that

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<sup>25</sup> A similar constitutional challenge was presented in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the other case cited by this Court in Franklin for the proposition that presidential conduct may be reviewed for constitutionality. In Panama Refining, Congress gave the President authority to ban interstate transportation of oil produced in violation of state production and marketing limits. This Court invalidated the statute as an unconstitutional delegation of Congress's Article I powers. In Panama Refining, as in Youngstown, the dispute never involve the scope of the President's statutory authority; rather, the challenge turned solely on the Constitution. In addition, plaintiffs' complaint in Panama Refining alleged that their property rights were being invaded by state and federal officials, and that the statutes in question violated the Fourth and Fifth Amendments and the non-delegation doctrine. Record at 1-9, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (No. 135).

were protected not only by the common law, but also by the Fifth Amendment. By contrast, the closure of the Philadelphia Naval Shipyard does not deprive respondents of any such rights. In its initial decision, the court of appeals held (and respondents have not contested) that the respondent unions and employees -- the plaintiffs with the most concrete stake in this litigation -- lack any property interest in the Shipyard's continued operation. See Pet. App. 69a (respondents "can identify no legitimate claim of entitlement").<sup>26</sup> Thus, unlike other cases involving the issue of ultra vires conduct, there is no independent common law or constitutional right to be vindicated by respondents' claims. Compare, e.g., Philadelphia Co. v. Stimson, 223 U.S. at 632 (land title and riparian rights under state law); Larson, 337 U.S. at 693 (tort claim); Dugan v. Rank, 369 U.S. at 622 (trespass claim); Youngstown, supra (unauthorized taking and trespass). See also Franklin, 112 S. Ct. at 2776-2777 (justiciable claim of malapportionment under Article I, § 2, cl. 3). We are unaware of any case in which the claim of ultra vires conduct

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<sup>26</sup> The court of appeals in this case correctly held that plaintiffs' due process claim failed for want of a cognizable property interest. The plaintiffs cannot state a valid property interest under the 1990 Act, because the Act vests absolute discretion in the President. Cf. Meachum v. Fano, 427 U.S. 215, 226-229 (discretionary decision by state prison officials to transfer prisoner implicated no liberty interest, despite loss of employment); Bishop v. Wood, 426 U.S. 341, 344-347 (1976) (no property interest in "at will" employment). See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). Absent such a property interest, plaintiffs cannot assert a due process claim.

alone sufficed to state a claim for relief -- much less a constitutional claim for relief -- and no independent claim for such relief has been stated here.

In short, Youngstown provides no support for the court of appeals' decision because this case lacks both the constitutional dimensions and the individual interests that supported the exercise of judicial power in Youngstown. Respondents have, in fact, brought a straightforward action for APA review of the actions of subordinate federal officials in preparing nonbinding recommendations for the President. Because Franklin instructs that those actions are not "final agency action" for purposes of the APA, those claims are not subject to judicial review under the APA. Aside from a single procedural due process claim no longer in the case, respondents have alleged no violation of their constitutional rights. The court of appeals erred in circumventing the holding of Franklin by treating their routine claims of procedural error under the 1990 Act as claims of constitutional deprivation.

**II. THE STRUCTURE, HISTORY, AND PURPOSE OF THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT DISPLAY CONGRESS'S INTENT TO PRECLUDE JUDICIAL REVIEW WITHIN THE MEANING OF THE ADMINISTRATIVE PROCEDURE ACT**

The court of appeals also erred in holding in its initial decision (Pet. App. 53a-60a) that the 1990 Act does not "preclude judicial review" of respondents' claims within the meaning of the APA, 5 U.S.C. 701(a)(2). Although the court held that the 1990 Act impliedly precludes judicial review of respondents' substantive challenges to decisions made during the base selection pro-

cess,<sup>27</sup> it also held that the Act does not preclude courts from reviewing claims that the Department of Defense and the Commission failed to comply with the Act's procedural requirements. Pet. App. 60a-62a.

The Act is an intricate statutory compromise that carefully balances the interests of the Executive Branch and Congress in order to achieve consensus on the politically sensitive issue of closing domestic military bases in a neutral and expeditious manner. To achieve that end, the Act assigns the President a direct role in the base closure process, and involves Congress in overseeing the Executive Branch's decisionmaking process. The Act also provides that bases are recommended for closure by a nonpartisan Commission whose recommendations must be accepted or rejected as a single, indivisible package. Finally, to accom-

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<sup>27</sup> In particular, the court found that Congress did not intend to permit judicial review of the following claims against the Secretary of Defense: (1) that the Secretary's force structure plan lacked sufficient detail; (2) that the force structure plan was based upon insufficient data; (3) that the Secretary impermissibly prejudged the question whether the Philadelphia Naval Shipyard should be closed; and (4) that the Secretary relied on insufficiently explained and inadequately documented advice from the Secretary of the Navy. Pet. App. 56a. The court reasoned that Congress committed those decisions to the Secretary's discretion, that the decisions required military and other types of expertise, and that Congress provided alternative avenues of review -- the Commission and the GAO. *Id.* at 56a-58a. The court also found that the 1990 Act precluded review respondents' claims that the Commission (1) failed to consider all Navy installations equally; (2) accepted inadequately documented recommendations; (3) utilized unpublished criteria; and (4) failed to apply published criteria equally. *Id.* at 61a. In the court's view, the issues were not amenable to judicially manageable standards, and the 1990 Act provided alternative means of review of the Commission's decisionmaking -- specifically, oversight by the President and Congress. *Id.* at 62a.

plish Congress's goals of expedition and finality, the 1990 Act eliminates procedural obstacles that effectively blocked the closure of bases prior to 1988.

Judicial intervention at the behest of persons affected by individual base closures strikes at the heart of this carefully developed statutory scheme. It invites federal courts to overturn the result embraced by the political Branches in the base closure process. It threatens to disrupt the balance struck by the statute, and in so doing, to displace the President and Congress as the final arbiters of the base closure process. And it subjects the President's decision to the very kinds of procedural litigation and delays that the 1990 Act was designed to eliminate. In light of these consequences, the court of appeals erred in holding that the 1990 Act does not preclude judicial review.

**A. The Court Of Appeals Erred In Applying The Presumption of Reviewability**

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. Pet. App. 45a-46a. In our view, reliance on that presumption is misplaced in the context of the 1990 Act, which addresses sensitive questions of national security and military policy. See Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (presumption of reviewability "runs aground when it encounters concerns of national security"). See also, e.g., Chappell v. Wallace, 462 U.S. 296 (1983) (no constitutional tort remedy available under Bivens v. Six Unknown Named Agents of

Federal Bureau of Narcotics, supra, for service-related military injuries); Orloff v. Willoughby, 345 U.S. 83, 92-94 (1953) (no habeas corpus review of plaintiff's duty assignment); Feres v. United States, 340 U.S. 135 (1950) (Federal Tort Claims Act inapplicable to service-related torts). As this Court has explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Id. at 530 (citing cases).

As the court of appeals itself acknowledged, the 1990 Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the Nation's military resources." Pet. App. 51a. In addition, the court recognized that the task of formulating and applying base closure standards by the Secretary and Commission require military judgment and expertise. Id. at 56a-59a. See also National Federation of Federal Employees v. United States, 905 F.2d 400, 405-406 (D.C. Cir. 1990) (base closure process under 1988 Act). Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, e.g., 1990 Act § 2903(a), (c)(1) and (d)(2)), the court of appeals erred in applying the usual administrative law presumption that Congress desires judicial review of the outcome of an administrative process.<sup>28</sup>

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<sup>28</sup> Although the court of appeals purported to limit judicial review to alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act provides that the  
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B. Even If There Is A Rebuttable Presumption of Reviewability, The Structure, History, And Purpose Of The 1990 Act Demonstrate That Congress Intended To Preclude Judicial Review Of Respondents' Procedural Claims

Even if the presumption of reviewability were applicable here, this Court has emphasized that "[t]he presumption favoring judicial review of administrative action is just that -- a presumption." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). That "presumption favoring judicial review [is] overcome \* \* \* whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 351. The pertinent congressional intent may be found in a various sources. The presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Id. at 349. Congressional intent "may also be inferred from contemporaneous judicial construction barring review and congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." Ibid. (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." Ibid. Accordingly, as long as "the congressional intent to preclude judicial review is 'fairly

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28 (...continued)

President can approve or disapprove the Commission's recommendations for any reason at all (Pet. App. 46a, 69a); the court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his subordinates have not observed every procedural particular alleged to be required under the 1990 Act.

discernible'" from any of these sources (id. at 351), judicial review is foreclosed. When measured against these standards, the Act precludes judicial review of the base closure process.

1. The structure of the 1990 Act indicates that judicial review is incompatible with the statutory scheme, which was designed to minimize the ways in which political maneuvering could impede the base closure process. Like its immediate predecessor -- the 1988 Act<sup>29</sup> -- the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990). See also H.R. Rep. No. 735, supra, Pt. 2, at 8 (noting purposes of the 1988 Act). To achieve that objective, a process was designed that would should address the tendency of "political pressures \* \* \* to interfere" with the integrity of the process. H.R. Rep. No. 735, supra, Pt. 2, at 8-9; see H.R. Conf. Rep. No. 923, supra, at 705; 1991 Report at 1-1 to 1-2; Pet. App. 82a-84a (Alito, J., dissenting in part).

Accordingly, the 1990 Act is structured to limit the avenues through which political maneuvering can delay or derail the base closure process. It does so in part by striking a careful

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<sup>29</sup> As discussed (see pp. \_\_\_-\_\_\_, supra), the 1988 Act provided for an independent Commission. § 203, 102 Stat. 2627-2628. The Commission submitted a report recommending base closures to the Secretary of Defense, who was not authorized to close bases under the 1988 Act unless he approved the report and transmitted it to Congress. §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act provided a waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627.

balance between the President and Congress. By requiring the President to approve the base closure recommendations (1990 Act § 2903(e)), Congress provided that the ultimate decision maker in the Executive Branch would be an official directly accountable to the public. At the same time, Congress also called for extensive congressional involvement throughout the process. For example, the Act provides for presidential consultation with key Members of Congress before the President appoints the Commissioners. 1990 Act § 2902(c)(2). The Act also requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the preparation of base closure recommendations for the President. See, e.g., 1990 Act § 2903(a)(1), (b)(2), (c)(1) and (d)(3).<sup>30</sup> Finally, the process facilitates substantial congressional oversight by adopting streamlined legislative procedures eliminating usual opportunities for delay and strategic maneuvering. 1990 Act §§ 2904(b), 2908.<sup>31</sup>

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<sup>30</sup> For example, the Secretary of Defense must submit the force-structure plan to Congress along with the budget justification documents submitted each year. 1990 Act § 2903(a)(1). In addition, the Secretary was required to transmit to the congressional defense committees the final criteria for base closure selection. 1990 Act § 2903(b)(2). When the Department of Defense publishes its recommended closures in the Federal Register, it must also transmit the list of recommendations to those congressional committees. 1990 Act § 2903(c)(1). If the Commission departs from the Secretary's recommendations, it must prepare a report explaining and justifying the departure, and it must transmit the report to Congress and the President at the same time. 1990 Act § 2903(d)(3).

<sup>31</sup> A Member of Congress may introduce a joint resolution of disapproval within 10 days of the President's transmittal of the Commission's report with his approval. 1990 Act § 2908(a). That resolution covers all of the recommendations (ibid.), and it is  
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A critical aspect of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, supra, at 341. To safeguard the Commission's role in the process, the Act provides that its recommendations must be considered as an indivisible package. H.R. Conf. Rep. No. 923, supra, at 704. The President may trigger base closures under the Act only by approving "all the recommendations" of the independent Commission. See 1990 Act § 2903(e)(2) and (4).<sup>32</sup> The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approved for closure, and no amendments to the joint resolution may be entertained. 1990 Act § 2908(a)(2) and (d)(2).

Consequently, the scheme of the 1990 Act reflects a desire to transform the base closure process into one whose safeguards are provided by the direct, and carefully balanced, participation of the President and Congress. By allowing litigants to contest

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<sup>31</sup> (...continued)  
referred to the Armed Services Committee of the appropriate House. 1990 Act § 2908(b). If the Committee does not report on the resolution within 20 days of the President's transmittal of the report, the resolution is automatically discharged and placed on the legislative calendar. 1990 Act § 2908(c). Three days later, a Member may make a nondebatable motion to proceed to consideration of the resolution. 1990 Act § 2908(d)(1). When the resolution is considered, debate is limited to two hours. 1990 Act § 2908(d)(2).

<sup>32</sup> The President, of course, is free to disapprove the Commission's recommendations in whole or in part. 1990 Act § 2903(e)(3). If he does so, the Commission produces a new set of recommendations. Ibid. At that point, if the President does not approve "all the recommendations," no base closures can be effectuated under the Act for that round. 1990 Act § 2903(e)(4) and (5).

individual base closures after the President has approved and Congress has declined to disapprove a package of base closures, the court of appeals has struck at the heart of the carefully balanced statutory mechanism enacted by Congress. Under the court's decision, private parties -- whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedures<sup>33</sup> -- will be able to pick apart the end product of that process. If litigants can sue to extract an individual base (like the Philadelphia Naval Shipyard) from the package of closures and require the Commission to redo its recommendation for that base, then "the President and Congress will be placed in precisely the situation that the new scheme was designed to avoid -- deciding whether to close or spare a single

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<sup>33</sup> As discussed (see p. \_\_, supra), on July 30, 1991, the House of Representatives considered a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the debate on that resolution, several of the respondent Members of Congress argued that the resolution of disapproval should be passed because of alleged flaws in the procedures used to select the Philadelphia Naval Shipyard for closure. See id. at H6009-H6010 (Rep. Weldon); id. at H6010-H6011 (Rep. Foglietta); id. at H6021 (Rep. Andrews). The 1990 Act was designed with the understanding that Congress would be in a position to determine whether the base closure process had been conducted "honestly and fairly" before it voted on whether to disapprove the base closure report transmitted by the President. H.R. Rep. No. 665, supra, at 384. The explicit provision for substantial congressional oversight in the base closure process is strong evidence that Congress did not intend to rely on the courts to police that carefully designed process. See Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (en banc) ("The lack of any authorization for \* \* \* review at the behest of members of the public, when viewed in the context of \* \* \* the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.").

base." App., infra, 87a (Alito, J., dissenting in part).<sup>34</sup>

That result is inconsistent with Congress's objective to break the political stalemate through the use of a unitary process of base closures superintended by both political Branches.

2. a. Judicial review also is precluded where it is inconsistent with Congress's goals of expedition and finality. See, e.g., Morris v. Gressette, 432 U.S. 491, 501-505 (1977). Based on the recognition that "[e]xpeditious procedures \* \* \* are essential to make the base closure process work" (H.R. Rep. No. 665, supra, at 384), Congress crafted a process that "would considerably enhance the ability of the Department of Defense \* \* \* promptly [to] implement proposals for base closures and realignment." H.R. Conf. Rep. No. 923, supra, at 707. Congress recognized that delay had been one of the significant causes of the stalemate over base closures. See Pet. App., 80a-82a (Alito, J., dissenting in part); H.R. Conf. Rep. No. 923, supra, at 705 (the prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commis-

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<sup>34</sup> The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See Pet. App. 86a (Alito, J., dissenting in part).

sion, the President, and the Congress." Pet. App. 80a (Alito, J., dissenting in part).<sup>35</sup>

To that end, Congress established a rigid series of deadlines and time limits to expedite the base closure process. See pp. \_\_\_, supra. For example, the Act provides for the Secretary of Defense to publish his final selection criteria no later than February 15, 1991, and to publish any amendments to those criteria no later than January 15 in 1993 and 1995. 1990 Act § 2903 (b) (2) (A). For the Secretary's submission of recommended base closures, moreover, Congress set deadlines of April 15, 1991, and March 15 in 1993 and 1995. 1990 Act § 2903(c). The Commission is required transmit its recommendations to the President by July 1 in each of the three years (1990 Act § 2903 (d) (2) (A)), and the President, in turn, must approve or disapprove the list by July

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<sup>35</sup> During the July 30, 1991, debate on the joint resolution of disapproval, one of the principal authors of the 1990 Act emphasized the importance of speed and finality in the legislative scheme:

[O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closing were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.

Under this procedure, however, all the communities affected [have] a chance to thoroughly make their case for their base. Now, this time of deliberations will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

137 Cong. Rec. H6008 (daily ed.) (Rep. Armey).

15 (1990 Act § 2903(e)(1)). Congress then has 45 days to disapprove the list before it takes legal effect. 1990 Act § 2904(b). That strong emphasis on expedition in the process of selection is hardly compatible with the broad availability of judicial review capable of displacing the results of that process thereafter.

b. The emphasis on expedition and finality is confirmed, moreover, by the fact that Congress expressly exempted the process of selecting bases from the requirements of NEPA. As discussed (see pp. \_\_-\_\_, supra), prior to the enactment of the 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges to base closures under NEPA. See H.R. Conf. Rep. No. 1071, supra, at 23. Accordingly, the 1990 Act forecloses all NEPA actions relating to the base selection process, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. 1990 Act § 2905(c).<sup>36</sup> Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base

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<sup>36</sup> Specifically, NEPA applies only after the process of selection is complete. It applies to actions by the Department of Defense "(i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated." 1990 Act § 2905(c)(2)(A). The Act specifically provides that the Secretary is not required under NEPA to consider "the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission" or "military installations alternative to those recommended or selected." 1990 Act § 2905(c)(2)(B) (i) and (iii). Thus, Congress explicitly crafted the applicability of NEPA to make clear that the selection process is not subject to its constraints.

closures." H.R. Conf. Rep. No. 1071, supra, at 23. Congress recognized that NEPA challenges could impede or defeat base closures despite the procedural nature of the litigation and acted to eliminate the threat of such disruptive procedural litigation.

There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring NEPA challenges to the selection decision while allowing broad procedural attacks on the way the Commission formulates its nonbinding recommendations to the President. The protracted delays inherent in such litigation would directly undermine the objectives that Congress pursued by adopting a streamlined process and eliminating the threat of burdensome NEPA litigation.<sup>37</sup>

c. Although the court of appeals acknowledged the 1990 Act's emphasis on expedition and finality, the court assumed that those interests lapse once Congress has acted. Pet. App. 50a-51a. However, even after the base selection process is complete, the 1990 Act places a continuing premium on expedition and finality. Thus, while the 1990 Act permits a limited class of

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<sup>37</sup> Contrary to the court of appeals' view (Pet. App. 56a), it is not plausible that Congress's disallowance of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. As discussed in the text, NEPA cases were the primary litigation-related impediments to base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. 10 U.S.C. 2687(b)(3) (Supp. I 1977). Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

NEPA suits concerning the implementation of final base closure decisions, the Act subjects such suits to a 60-day time limit. 1990 Act § 2905 (c)(3). That strict time limit is inexplicable if speed and finality lose significance once base closure decisions have become final.

Moreover, given the substantial threat to finality and delay from suits like the present one, it is also inexplicable that Congress omitted a similar time limitation if it intended to permit such suits. See Pet. App. 80a-81a n.16 (Alito, J., dissenting in part) ("No statute of limitations was prescribed for a suit of the type at issue here. This seems a clear indication that no such suits were contemplated."). If Congress had contemplated that courts could hear challenges to the Secretary's and Commission's compliance with the 1990 Act's procedural requirements, it would not have left plaintiffs free to proceed without time limits, while imposing rigid time limits on NEPA suits with far less impact on the base closure process.

The court of appeals' narrow view of Congress's concerns with speed and finality also overlooks the cyclical nature of the base closure process under the Act. The Act provides for three successive biennial rounds of base closures (see p. \_\_, supra), and the finality of each round's decisions is vital to planning for the following round. Delay caused by litigation over the bases closed during one round will inevitably interfere with successive rounds by creating uncertainty about the existing base structure and capacity of the Armed Services. In short, judicial

review, regardless of when it is conducted, cannot be undertaken without jeopardizing the interests in speed and finality emphasized by Congress in the 1990 Act.

4. The legislative history reinforces the inferences of unreviewability drawn from the structure and policies of the 1990 Act. As discussed (see pp. \_\_\_-\_\_\_), Congress's objective of expedition and finality -- which is evident on the face of the Act -- is confirmed by legislative history indicating that the 1988 and 1990 Acts were designed, in large measure, to avoid litigation-related delays that had effectively shut down the process of base closures previously. See pp. \_\_\_-\_\_\_, supra. More directly, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." Pet. App. 73a (Alito, J., dissenting in part). Specifically, the relevant passage of the 1990 conference report states:

[N]o final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan \* \* \*, the issuance of selection criteria \* \* \*, the Secretary of Defense's recommendation of closures and realignments \* \* \*, the decision of the President \* \* \*, and the Secretary's actions to carry out the recommendations of the Commission \* \* \*.

H.R. Conf. Rep. No. 923, supra, at 706.<sup>38</sup> That passage pro-

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<sup>38</sup> Congress reiterated this view when it subsequently amended the 1990 Act in respects not relevant here. See 137 Cong. Rec. H10,394-10,395 (daily ed. Nov. 18, 1991); id. at S17,540 (daily ed. (continued...))

vides direct confirmation that the 1990 Act was designed with the understanding that the courts would not police official compliance with statutory requirements of the base closure process.<sup>39</sup>

5. Finally, judicial intervention would necessarily give rise to severe remedial problems. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recommendations to the Secretary and Commission for further proceedings in accordance with the Act. Pet. App. 55a n.13. The Commission itself, however, goes out of existence after each of the

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38 (...continued)

Nov. 22, 1991). The conference report accompanying the 1991 amendments states that "the conferees reaffirm the view, expressed in the [1990 conference report] accompanying the [1990 Act], that actions taken under the Act 'would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to judicial review.'" *Id.* at H10,143. That reaffirmation of the unreviewability occurred after the district court in this case had held that the 1990 Act precludes judicial review, a development that respondents called to Congress's attention. See, *e.g.*, 137 Cong. Rec. S17,153-S17,170 (daily ed. Nov. 20, 1991) (Sen. Specter). The fact that Congress amended the 1990 Act in other respects, while reiterating its earlier statements regarding the unavailability of judicial review, supports the conclusion that Congress intended to preclude judicial review.

39 The court of appeals dismissed the 1990 conference report by arguing that its discussion of reviewability was properly understood in terms of its reference to "final agency action." Pet. App. 53a-54a. In the court's view, the report's reference to "[s]pecific actions which would not be subject to judicial review" (H.R. Conf. Rep. No. 923, *supra*, at 706) merely related back to the previous reference to the lack of finality. For two reasons, however, that conclusion does not advance respondents' position. First, it merely reinforces our contention that judicial review is precluded here because respondents are not challenging "final agency action" within the meaning of the APA. Second, the court itself acknowledged (Pet. App. 54a) that some of the "specific actions" described by the report as unreviewable -- such as the "decision of the President" -- "concededly do not fit" that explanation.

biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. 1990 Act § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been assembled for the next biennial round. At that point, the Commission is occupied with the next set of base closures.

Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval of the President's report and certification, the Secretary of Defense "shall \* \* \* close all military installations recommended for closure by the President pursuant to section 2903(e)." 1990 Act § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

**B. The Procedural Nature of Respondents' Remaining Claims Supports The Inference Of Preclusion Of Review**

The court of appeals held that although the substance of the base closure decision is unreviewable, Congress did not preclude

judicial review of alleged procedural violations of the 1990 Act. Pet. App. 60a-61a, 62a. That distinction does not withstand scrutiny.

First, as explained (see pp. \_\_\_-\_\_\_, supra), the most significant barriers to closing unneeded domestic military installations prior to 1988 consisted of procedural litigation. Congress explicitly made NEPA applicable to base closures in 1977. See 10 U.S.C. § 2687(b)(2) (Supp. I 1977). As this Court has explained, obligations imposed on federal agencies by NEPA are "essentially procedural." Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980). See also, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Thus, if Congress had been concerned only with precluding substantive challenges to base closure decisions, it would not have gone out of its way to restrict NEPA actions under Section 2905(c) of the 1990 Act. Second, even though the court of appeals purported to limit its decision to procedural matters, judicial review will inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Naval Shipyard and other naval installations. Accordingly, it is clear that even procedural claims of the variety that remain at issue here threaten the expedition and integrity of the process established by Congress -- which quite explicitly relies on oversight by the President and Congress to see that the law is observed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## ARGUMENT

I. *FRANKLIN v. MASSACHUSETTS* SUPPORTS JUDICIAL REVIEW.A. The Third Circuit's Opinions Are Consistent With *Franklin*.

Under the "automatic reapportionment statute" at issue in *Franklin*, the Secretary of Commerce was required to report census data to the President, who then applied a formula specified in the statute to determine the number of representatives allocated to each state. 112 S.Ct. at 2771. No particular procedural safeguards were mandated for the Secretary to follow. The President subsequently transmitted the results to Congress for implementation of the decennial reapportionment. The Secretary included in her census report federal employees living abroad (primarily military personnel) as residents of their "designated" home state. Plaintiffs sought review of this report under both the APA and the constitution.<sup>15</sup> *Id.* at 2773.

The district court found for plaintiffs on their APA challenge and ordered the President to recalculate congressional apportionment using census figures that did not include overseas federal employees. *Id.* Reversing the district court in a direct appeal, this Court held that the Secretary's report to the President constituted mere "tentative recommendations" and was not "final" agency action subject to judicial review because the automatic reapportionment statute did not require

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<sup>15</sup> The Secretary's decision to include the disputed federal employees in the 1990 census caused one House seat to be shifted from Massachusetts to the State of Washington 112 S.Ct. at 2770. Plaintiffs argued that the Secretary's action was arbitrary and capricious because there was substantial evidence that when military personnel designated their home state upon induction, they disproportionately selected a state with low income tax rates rather than their actual home state. *Id.* at 2771-73. Plaintiffs' constitutional challenge was based on their argument that the inclusion of federal employees living abroad violated the requirement that the census be conducted through an "actual enumeration" of persons living within a state. *Id.* at 2773.

the President to accept or even consider the Secretary's census figures. He could act totally independently from the Secretary or instruct the Secretary to reform the census. *Id.* at 2774.

*Franklin* further held that the President's actions were not reviewable under the APA because the President is not an "agency" within the meaning of that statute.<sup>16</sup> *Id.* at 2775. This Court expressly confirmed, however, that regardless of his status under the APA, "the President's actions may still be reviewed for constitutionality." *Id.* at 2776.

Although the Third Circuit's initial opinion in this case was rendered before *Franklin*, it is consistent. The Third Circuit concluded that judicial review under the Act is appropriate after the Base Closure Commission's list has been transmitted by the President to Congress and not rejected within 45 days. In addition, the Third Circuit, anticipating *Franklin*'s ruling that the President is not an "agency" under the APA, assumed for the purpose of its analysis that presidential conduct is *not* subject to judicial review under the APA's "arbitrary and capricious" standard.

The Third Circuit nonetheless concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates exceeded their powers under applicable statutes or the Constitution. The Third Circuit's opinion on remand, citing *Youngstown* – a case also relied on by *Franklin* – confirmed this basic precept of American jurisprudence. See *Specter v. Garrett*, 995 F.2d at 409. Thus, both *Franklin* and the Third Circuit's opinions

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<sup>16</sup> The Court explained: "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the APA's textual silence did not provide an adequate basis to assume that Congress intended that the President's performance of "statutory duties be reviewed for abuse of discretion." 112 S. Ct. at 2775.

hold that where the President exceeds the scope of his statutory or constitutional powers, judicial review *must* be available to preserve the tripartite structure of our constitutional form of government.<sup>17</sup>

**B. *Franklin* Confirms The Historic Power Of The Federal Judiciary To Restrain Executive Branch Conduct Violating The Constitutionally Mandated Separation Of Powers.**

Nothing in *Franklin* even purports to disturb the federal judiciary's historic role of ensuring that presidential conduct does not exceed constitutional or statutory boundaries. On the contrary, *Franklin's* narrow holding that the President is not an agency under the APA has *no* effect on the fundamental principles governing judicial review that originated nearly 150 years before the APA's enactment. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (President's instructions that went beyond scope of congressional authorization could not "legalize an act which without those instructions would have been a plain trespass"). *See also Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"); *A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) ("The purpose of [the APA] was to extend judicial review that had previously existed and to proscribe procedure and scope of judicial review. Such judicial review as existed outside of the Act remained unfettered by it.").<sup>18</sup>

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<sup>17</sup> Petitioners cite no authority for their argument that there is a meaningful distinction between presidential actions taken in excess of statutory authority and actions taken contrary to a constitutional provision. No case has ever suggested that the federal judiciary does not possess the constitutional power to review under the separation of powers doctrine the actions of the President for statutory or constitutional compliance.

<sup>18</sup> Petitioners rely on *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as support for the total abrogation of judicial review under the Act.

Rather than limiting *Youngstown* (or any other source of judicial review of presidential conduct other than under the APA's "arbitrary and capricious" standard), *Franklin* relied on *Youngstown* for the proposition that the President's conduct is subject to review for constitutionality. The Third Circuit also properly relied on *Youngstown* to conclude that the President's conduct is subject to constitutional review where he exceeds the scope of authority granted by Congress under the Base Closure Act. *Franklin* is thus not only consistent with, but affirmatively supports, the decision below.

**1. Executive Branch Conduct That Violates The Scope Of Authority Delegated By Congress Or The Constitution Will Be Enjoined To Preserve The Constitution's Separation Of Powers.**

The Constitution divides governmental power into three branches: the legislative, the executive and the judicial. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). That division of powers and functions "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that was drafted in Philadelphia in the Summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The Constitution separates the branches of government "not to promote efficiency, but to preclude the exercise

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Significantly, just three weeks ago, the Second Circuit in *County of Seneca*, \_\_\_ F.3d \_\_\_, 1993 WL 504463 (2d Cir., Dec. 10, 1993), agreed with the Third Circuit that violations of the Act's fair process mandate are judicially reviewable. See note 1, *supra*. To the extent *Cohen* even applies, it is plainly wrong. *Cohen* affirmed summary judgment for the government on the ground that the Commission's transmittal of the base closure package to the President was not final agency action within the meaning of *Franklin*. For the reasons stated herein, that ruling was erroneous. See discussion *infra* at pp. 29-32. Moreover, *Cohen* did not even purport to address the federal courts' historic powers (outside of the APA) to review presidential conduct which exceeds statutory or constitutional authority. Without a valid package, the President simply lacks the authority to act. See discussion *infra* at pp. 20-27.

of arbitrary power” and to “save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect that vital safeguard of liberty, the *Youngstown* Court enjoined enforcement of a presidential order that exceeded both the scope of authority granted by Congress and that granted under Article II of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). See also Hamilton, *The Federalist No. 78* (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

Franklin’s reliance on *Youngstown* was well placed. In April, 1952, at the height of the Korean conflict, the steelworkers’ unions gave notice of a nationwide strike. To ensure continued production of essential war materials, President Truman ordered the Secretary of Commerce to seize and operate the steel mills. Justice Black’s “Opinion of the Court” first recognized that the President’s authority was limited by the Constitution’s separation of powers:

The President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

343 U.S. at 587.

Finding the President without either constitutional or statutory authority to order the seizure of private industries – regardless of the asserted military crisis – the Court declared the President’s order illegal and affirmed the injunction against the Secretary entered below. See Currie, *The Constitution in the Supreme Court: 1888-1986*, p. 369 (Chicago 1990) (“*Youngstown* . . . stands as an eloquent reminder that the President must obey the law and that in general he may act only on the basis of statute.”).

The pole-star of *Youngstown* – that the executive branch is bound by express limitations on authority granted by Congress and the Constitution – is almost as old as the Republic itself. In *Little v. Barreme*, an action for damages was brought against the commander of an American warship for his capture of a Dutch commercial vessel on the open seas. The commander defended his seizure on the grounds that: 1) the President had instructed naval commanders to seize American vessels bound to or from French ports; and 2) there was probable cause to believe the ship of American origin. In fact, the *Flying Fish* was of Dutch, not American origin. More critically, however, the statute under which the President issued the instructions only authorized the seizure of American vessels sailing *to* French ports, and the *Flying Fish* had been seized on its way *from* a French port.

While noting that it was “by no means clear” that the President lacked constitutional authority to order the seizure as Commander-in-Chief, Justice Marshall nonetheless emphasized that Congress *had* prescribed limited grounds for seizure. 2 Cranch at 177-78. Justice Marshall thus concluded that, as the President’s instructions had gone beyond the scope of the limited congressional authorization, they could not “legalize an act which without those instructions would have been a plain trespass.” *Id.* at 178. *See also Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) (“[I]t would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”).

*Youngstown* and *Little* stand for a principle at the very core of our constitutional government – that where the President or subordinate executive officers act beyond the scope of their legal authority, judicial relief must be available to protect the separation of powers. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (“When judicial action is needed to serve broad public interests . . . as when the Court acts, not in derogation of separation of powers, but to maintain their

proper balance . . . that exercise of jurisdiction has been held warranted"); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution. . . ."); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress"). Nothing in *Franklin* abrogates that critical role of the federal judiciary. And nothing in the Third Circuit's opinions below is inconsistent with *Franklin*.<sup>19</sup>

## 2. Judicial Review Is Available To Secure Executive Branch Compliance With The Mandatory Procedural Requirements Of The 1990 Base Closure Act.

Petitioners concede that their *only* authority to close domestic military bases is that which they obtained from Congress under the Base Closure Act: "Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure." [Brief at 33]. It is likewise undisputed for the purposes of this appeal that they deliberately ignored congressionally mandated procedural safeguards in determining to close the Shipyard. Thus, Petitioners, having acted without either statutory

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<sup>19</sup> Even Justice Scalia's separate opinion in *Franklin*, although suggesting that separation of powers concerns should prevent a federal court from entering injunctive relief against the President, nonetheless distinguished between an injunction against the President directly and one against a subordinate executive officer attempting to carry out an illegal presidential directive. Justice Scalia's reluctance to allow the former did not:

in any way suggest 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.

112 S. Ct. at 2790 (emphasis in original) (citing *Youngstown*). In the present case, Respondents seek to enjoin the Secretary of Defense, not the President, from closing the Shipyard.

or constitutional authority, cannot close the Shipyard. *Youngstown* and *Franklin* both support the Third Circuit's holding that judicial review is available to enjoin Petitioners from exceeding the scope of their legal authority.

**(a) The President Was Without Statutory Authority To Approve A Base Closure Package Prepared In Violation Of The Congressional Mandate.**

Petitioners first suggest that *Youngstown* can be distinguished because it involved an assertion of presidential authority that Congress had specifically rejected when it refused to amend the Taft-Hartley Act to permit executive branch seizure of private industry. In contrast, Petitioners argue, the Base Closure Act authorizes the President to accept or reject the Commission's indivisible base closure package for any reason at all. Thus, according to Petitioners, the President's limited involvement under the Act places the entire base closure process beyond judicial review, even though the Secretary and the Commission deliberately violated congressional mandates in performing their respective statutory duties.<sup>20</sup>

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<sup>20</sup> In fact, *Franklin* itself suggests that no amount of statutory discretion can ever insulate a President from the illegal conduct of subordinate executive officers. In holding the President's conduct subject to constitutional review regardless of APA status, and despite the lack of finality of the Secretary's tentative census report, the *Franklin* Court nonetheless examined whether "the Secretary's allocation of overseas federal employees to the States violated the command of Article I, § 2, cl. 3, that the number of Representatives per State be determined by an 'actual Enumeration' of 'their respective Numbers.'" 112 S. Ct. at 2777 (emphasis added). Nothing in *Franklin* suggested that federal overseas employees were included in the 1990 census at the President's direction or that the President was required by statute to approve the Secretary's methods. Yet nothing in *Franklin* suggested that the majority had changed its mind and decided to review the Secretary's conduct, regardless of finality. Thus, *Franklin* reviewed only the *President's* conduct in deciding whether the *Secretary's* census method violated the Constitution.

Petitioners radically misconstrue both the nature of the statutory scheme at issue here and the nature of the President's limited involvement within that scheme. As the Third Circuit recognized, the President's *only* authority under the Act is to approve or reject a base closure package which was prepared in accordance with the statutory procedures:

[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.*

\* \* \*

*[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process.*

995 F.2d at 407, 409 (footnote omitted) (emphasis partly in original).

The President has no greater statutory authority to approve a materially flawed base closure package than he has to submit to Congress a closure package of his own independent creation. Where the Act's non-discretionary statutory safeguards have been ignored, the President receives nothing from the Commission upon which he has statutory authority to act. Hence, the President's "approval" of the 1991 base closure package was "without authority of law, illegal and void." *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to

provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void").

As with the Base Closure Act, the statutory scheme in *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349 (D.C. Cir. 1965), required presidential approval of agency determinations. Specifically, the statute authorized the President to approve or reject decisions of the Civil Aeronautics Board (the "Board") affecting overseas air carriers. Seventeen years earlier, in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), this Court had declared that, in light of the President's broad constitutional authority over foreign affairs, his statutory approval of a Board determination was not subject to judicial review on the ground that the Board order lacked "substantial evidence." *Id.* at 111-12.<sup>21</sup>

Chief Justice (then Judge) Burger distinguished *Waterman* as involving only whether the Board determination was supported by "substantial evidence." 348 F.2d at 353. In contrast, plaintiffs in *American Airlines* alleged that the Board acted beyond the scope of statutory authority in authorizing "split charter" arrangements. *Id.* at 351. In finding that *Waterman* did not preclude review of the President's approval

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<sup>21</sup> Although the *Waterman* majority did not specify the nature of the plaintiffs' challenge to the Board order at issue, the dissent noted that plaintiffs had alleged the Board lacked "substantial evidence" to support its findings. 333 U.S. at 117. In any event, the majority did note that the Board proceedings were not being "challenged as to regularity." *Id.* at 105. Based on that language, subsequent courts have distinguished *Waterman* as *not* involving a claim that the Board exceeded the scope of its statutory authority. See *Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394, 396 (D.C. Cir. 1963) ("[*Waterman*] neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board"); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (Burger, J.) (*Waterman* has no relevance where "the President purports to approve a recommendation which the Board was powerless to make").

of a Board determination itself violating statutory authority, Judge Burger held:

The deference *Waterman* accords to presidential discretion in matters of national defense and foreign policy as they bear on overseas air carriers has no relevancy where, as here alleged, the President purports to approve a recommendation which the Board was powerless to make; *if indeed the Board has no power, then as a legal reality there was nothing before the President.*

*Id.* at 353 (emphasis added). See also Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) ("if the President cannot act without a Board recommendation, it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive himself was acting within his statutory authority").

From the outset, Respondents have alleged that the Secretary and the Commission acted beyond the scope of congressional authority in preparing the 1991 base closure package. And as the Third Circuit acknowledged, the President's own statutory authority is "expressly confined by Congress to action based on a particular type of process." Because that process was materially flawed, the President had no lawful base closure package upon which he could act. The President's purported approval of the defective package, and his transmission of that defective package to Congress, were thus beyond the scope of the statutory authority delegated to him by Congress. Both *Youngstown* and *Franklin* establish that, to protect the constitutionally mandated separation of powers, the President's involvement in the base closure process must be subject to judicial review.

**(b) Where The Executive Branch Exceeds The Scope Of Authority Delegated By Congress, It Necessarily Breaches The Constitutionally Mandated Separation Of Powers.**

While Petitioners concede that *Franklin* permitted constitutional review of the President's conduct, they contend that *Franklin's* holding is not relevant here because the President violated only a statute, not the Constitution. In contrast, Petitioners suggest, *Franklin* reviewed whether the Secretary's census method violated a specific provision of the Constitution. *Without citing any authority*, Petitioners assert that the distinction between presidential conduct that violates the constitutionally mandated separation of powers, and presidential conduct that violates specific constitutional provisions, makes a difference with respect to the availability of judicial review under the Base Closure Act. That argument must be flatly rejected.

In holding the President's conduct subject to constitutional review, *Franklin* relied squarely on *Youngstown*. Yet *Youngstown* itself relied on the separation of powers precepts that are not traceable to any specific constitutional provision, but instead are "woven into the document" as a whole. *See Buckley*, 424 U.S. at 123. *Youngstown* examined not just whether the executive branch violated a single constitutional provision, but whether the President's conduct had breached the very fabric of our constitutional order. The President's violation of the Base Closure Act raises constitutional concerns no less compelling.

Thus, the Third Circuit properly relied on both *Franklin* and *Youngstown* in holding that judicial review is available to determine whether the President exceeded the scope of his statutory authority in approving the 1991 base closure package. As recognized below:

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take

and that judicial review is available to determine whether such authority exists. *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. Indeed, we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*.

995 F.2d at 409 (citations and footnote omitted).

Whether judicial review in this case is labeled "constitutional review," or a "form" of constitutional review, is not important. Regardless of label, judicial review of the President's compliance with the law is an absolute necessity if the separation of powers is to serve the purpose for which it was designed. See *American School of Magnetic Healing v. McAnulty*, 187 U.S. 94, 108 (1902) ("The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of his authority or under an authority not validly conferred").

(c) **For The Purpose Of Determining The Scope Of Judicial Review, No Distinction Can Be Made Between Constitutional Claims Involving Separation Of Powers Issues And Claims Involving Constitutionally Protected Property Interests.**

Finally, Petitioners attempt to distinguish *Youngstown* as involving constitutionally protected private property rights. In contrast, Petitioners suggest, the "constitutional" issue raised here involves the separation of powers. Petitioners fail to explain, however, why that distinction should make any difference, particularly since the decision below sustaining Respondents' standing is not on appeal here. Clearly, Petitioners elevate form over substance.

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), a constitutional challenge to the "legislative veto," this Court rejected a similar attempt to elevate "private" constitutional rights over constitutional claims involving separation of powers issues:

We must . . . reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests. . . . If the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled.

*Id.* at 935-36 (citation omitted). *See also Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty"); Madison, *The Federalist No. 51* ("the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights").

Here, as in *Chadha*, if Respondents prevail on their argument that judicial review is necessary under the Act to implement the intent of Congress, and if they are able to enjoin the Shipyard's closure, their private interests will certainly be advanced. *Franklin's* constitutional challenge to the

Secretary's census allocation of overseas federal employees involved no more of a "private" constitutional right than the separation of powers challenge raised by Respondents here. To conclude that Congress intended to give the executive branch unlimited power to close military bases for whatever reason it deemed proper (or for no reason at all) would render the Act meaningless. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

**3. *Franklin* Must Not Be Read To Eviscerate The Congressional Mandate Of Fair Process In The Closure Of Domestic Military Bases, Thereby Nullifying The Act.**

Limited presidential involvement in a statutory scheme cannot give the imprimatur of legality to executive branch conduct brazenly violating congressional mandates. When Congress declared a statutory "purpose" – *i.e.*, to ensure a "fair process" – it certainly never intended for the executive branch to decide for itself whether the law should be obeyed. *See Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). The power of this argument is dramatically confirmed by Petitioners' astonishing failure to deal with it. Not even once in any of the 48 pages of their Brief do Petitioners acknowledge the declared "purpose" of the Act. They disingenuously ignore it – just as they boldly ignored the Congressional mandates designed to ensure the "fair process."

The fallacies in Petitioners' interpretation that there is no judicial review are illustrated by the following hypothetical. Assume that: (1) totally ignoring his statutory duty (§ 2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather based upon his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) despite knowledge of these violations and in violation of its own statutory duties (§ 2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider a joint resolution of disapproval within 45 days, and after only 2 hours of debate; and (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live – all *without* a fair process.

Petitioners' strained interpretation would preclude judicial review of even the most blatant, arbitrary and unlawful executive branch disregard of the procedures mandated by Congress to ensure a "fair process." That remarkably extreme argument cannot be squared with *Youngstown's* fundamental principle that the "Constitution is neither silent nor equivocal about who shall make the laws." As Justice Frankfurter cautioned in *Youngstown*:

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

343 U.S. at 594 (Frankfurter, J., concurring).

**C. Because The President Has No Authority To Accept A Base Closure Package Which Was The Product Of An Unfair Process, The Commission Report Is "Final" For The Purpose Of Judicial Review.**

The Base Closure Act and the automatic reapportionment statute in *Franklin* do not share "similar statutory schemes." In *Franklin*, the act imposed no procedural requirements on the Secretary of Commerce and the Secretary's report to the President carried "no direct consequences" and had "no direct effect." 112 S. Ct. at 2774. Indeed, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner as to completely change the outcome of reapportionment. *Id.* (statute did not "require the President to use the data in the Secretary's report"). In fact, a Department of Commerce press release, issued the same day that the Secretary presented her report to the President, expressly confirmed that "the data presented to the President was still subject to correction." *Id.*

In stark contrast to the statute in *Franklin*, the Base Closure Act does not permit the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety and is not permitted to "cherry-pick" - *i.e.*, to add or eliminate individual bases.<sup>22</sup> As Petitioners concede:

A critical feature of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard* the Commission's role in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, *supra*, at

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<sup>22</sup> The Act does not permit either the President or Congress to target any individual base or group of bases for closure. The list must be accepted or rejected by the President and Congress as presented. Thus, neither the President nor Congress could close a base not included on the Commission's indivisible base closure list.

704. The President may trigger base closures under the Act only by approving 'all the recommendations' of the *independent* Commission.

[Brief at 40 (emphasis added)]. The Act does not give the President either the time<sup>23</sup> or the resources to determine whether Petitioners complied with the Act's procedural mandates; indeed, that historically has been the function of the judiciary. See *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and [defining] their jurisdiction").

The President must rely exclusively on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the mandated procedural safeguards that are the *raison d'être* of the Act. See, e.g., *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void"); Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 700 (1961) (supporting "decisions holding that the courts will determine whether the Commission has complied with the statutory requirements regarding notice and hearing and, finding such defects, will hold invalid a presidential proclamation based on such an investigation"). For the base closure process to function as Congress intended and for the President's decision to be informed and responsible, the Act's procedural mandates must be complied with at the *agency* level. The agencies' actions must therefore be "final" for the purpose of judicial review. See *Franklin*, 112 S. Ct. at 2773 ("core

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<sup>23</sup> See 10 U.S.C. § 2903(e) (President has only 15 days to review Commission's report).

question" regarding finality is whether "the agency has completed its decisionmaking process" and whether "the result of that process is one that will directly affect the parties").

Petitioners thus err in stating that the Act "makes the President *personally* responsible for base closure decisions, and provides for extensive congressional involvement and *oversight* in the process." [Brief at 15]. Petitioners themselves concede elsewhere in their Brief that Congress and the President intended to *avoid* responsibility for politically sensitive closure decisions by delegating their authority to target bases for closure to an independent commission. [Brief at 2-3]. The Secretary and the Commission alone are subject to the Act's procedural requirements and where those mandates have been ignored, the President is left without a legal package of base closures upon which to act. *See American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (if agency action was without statutory authority, "then as a legal reality there was nothing before the President"). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) (where the President cannot act without agency recommendation, "it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive was himself acting within his statutory authority.").

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J. concurring) ("It may be presumed that Congress does not intend administrative agencies,

agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands . . . "); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, to apply *Franklin* in the sweeping manner urged by Petitioners would eviscerate the two centuries of pre-*Franklin* precedent sustaining judicial review of agency action.

## II. THE STRONG PRESUMPTION OF JUDICIAL REVIEW UNDER THE ACT HAS NOT BEEN REBUTTED BY "CLEAR AND CONVINCING EVIDENCE."

It is axiomatic that judicial review of final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). It is "presume[d] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen*, 476 U.S. at 681. This strong presumption in favor of judicial review can be overcome only upon a showing of "clear and convincing" evidence of a contrary congressional intent. *Id.* As emphasized in *Bowen*:

We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' [citation omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 2 L Ed 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'

\* \* \*

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the Administrative Procedure Act the Senate Committee on the Judiciary remarked:

'Very rarely do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' [citation omitted].

\* \* \*

The Committee on the Judiciary of the House of Representatives agreed that Congress *ordinarily intends that there be judicial review*, and emphasized the clarity with which a contrary intent must be expressed:

'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' [citation omitted].

476 U.S. at 670-71 (emphasis added). See also *Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("[I]t is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue"). Accord, Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 403 (1958) ("there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon

executive power by the constitutions and legislatures"); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) ("statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases").

As Petitioners concede, the Act contains no express limitation on judicial review. That is itself evidence that Congress intended judicial review, since when Congress intends such a radical departure from tradition, it knows how to do so in plain language.<sup>24</sup> Indeed, as Petitioners themselves point out, in the *very statute at issue in this case*, Congress expressly limited procedurally-oriented challenges under NEPA, thereby conclusively demonstrating that it knew how to abrogate procedural challenges if it wanted to. *See* Brief at 43-44. Therefore, the complete absence of any language in the Base Closure Act expressly precluding judicial review must be deemed intentional, particularly in light of the express statutory purpose of ensuring a "fair process." *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 97-99 (1991).

In addition, as the Third Circuit held, neither the structure nor the legislative history of the Act contain evidence of congressional intent to abrogate judicial review. 971 F.2d at 949-50 ("we find no clear evidence of a congressional intent to preclude all judicial review other than limited NEPA review"). The presumption in favor of judicial review is of even greater force where, as here, it is alleged that the

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<sup>24</sup> *See, e.g.*, The Regulatory Flexibility Act of 1980, 5 U.S.C. § 611(a)-(b) (1982) (expressly precluding substantive and procedural judicial review of an agency's compliance with the Act); Export Regulations of the War and National Defense Act, 1979, Pub. L. No. 96-72, 50 U.S.C. § 2412 (expressly exempting certain actions taken under the Export Regulation subchapter of the War and National Defense Act from 5 U.S.C. §§ 551, 553-559 of the APA and from the APA's judicial review sections (5 U.S.C. §§ 701-706)). *See also* Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 791 (1958) ("The right to judicial review is too basic a protection. It is not too great a burden upon Congress to require it to speak to the issue.").

executive branch has exceeded the scope of delegated authority or has violated specific constitutional provisions. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence"); *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958). As set forth below, each of Petitioners' arguments to the contrary fail to rebut the strong presumption of judicial review.

**A. National Security And Military Policy Concerns Do Not Abrogate Judicial Review.**

Petitioners argue that the strong presumption in favor of judicial review is inapplicable to the closure of domestic military bases because such decisions involve "sensitive questions of national security and military policy." [Brief at 36-37]. They further contend that courts should not "intrude upon the authority of the executive in military and national affairs." However, the Act was expressly designed to provide a "fair process" for the closure of bases which severely impacted on regional economics and a significant number of *civilian*, not military, employees. 10 U.S.C. § 2687(a); § 2909(c).

Moreover, Congress considered issues of national security when it formulated the exclusive procedure under which domestic military bases are to be closed or realigned. The Act expressly *exempts* from its coverage the closure of a military base "if the President certifies to Congress that such closure . . . must be implemented for reasons of national security or military emergency." 10 U.S.C. § 2687(c). No such certification was made with respect to the Shipyard, which Petitioners concede has been slated for closure pursuant to the Act. Petitioners thus err in arguing that the "national security" concerns implicated by the closure of military installations should be construed to eliminate the strong presumption of

judicial review. *See also* *Vogelaar v. United States*, 665 F. Supp. 1295, 1303-04 (E.D. Mich. 1987).

Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518 (1988), is equally misplaced. *Egan* involved the Navy's refusal to grant a security clearance to a civilian employee working at a Trident nuclear submarine base. Concluding that the Navy's denial was not subject to review, the Court found that the "sensitive and inherently discretionary judgment call" that must be made on each request for a security clearance was "committed by law to the appropriate agency of the executive branch." In reaching that conclusion, the Court expressly noted that the President's broad discretion regarding access to information bearing on national security flowed from his constitutional powers as commander and chief and "exist[ed] quite apart from any explicit congressional grant." *Id.* at 527.

In contrast to *Egan*, Petitioners expressly disclaim any authority for their actions other than that granted to them by Congress under the Act. [Brief at 33]. Moreover, it is well established that the mere involvement of issues affecting the military does not immunize executive branch conduct from review. In fact, judicial review has been found particularly appropriate when, as here, "the actions of the military affect the domestic population during peacetime." *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

#### **B. Judicial Review Is Consistent With The Timetables And Objectives Of The Act.**

Petitioners suggest that "[b]y allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove [an indivisible] package of base closures, the Third Circuit has struck at the heart of the carefully balanced statutory mechanism enacted by Congress." As support for that position, they refer to the Act's "rigid series of deadlines and time limits" without a single reference to the Act's "fair process" mandate. [Brief at 42]. That argument, however, contains the seed of its own destruction, for without judicial review the executive branch could

simply ignore the Act's procedural timetable, just as it here ignored the Act's procedural "fair process."

Could the Secretary attempt to initiate a base closure round in 1994 – a year not provided for in the statute? Could the President attempt to submit a base closure package to Congress thirty days (instead of 15 days) after he received it from the Commission, and then direct his Secretary of Defense to begin closing military bases after Congress was unable to muster the votes for a resolution of disapproval? Could Congress disapprove a closure package 90 days (instead of 45 days) after its receipt from the President? Would any base closure package tainted by such procedural defects properly be enjoined by a federal court?<sup>25</sup> Taking Petitioners' fundamental argument to its logical conclusion, the answer to all of the foregoing questions would be a clear "No."

Petitioners' argument flies in the face of the paramount fact that the declared *purpose* of the Act is to ensure the *procedural integrity* of the base closure process. Understanding "the importance of public confidence in the integrity of the decision making process," Congress mandated a number of critical procedural safeguards, not one of which had appeared in prior legislation. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) (Congress designed the procedural safeguards of the 1990 Act to allay continuing "suspicions about the integrity of the base closure selection process").

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<sup>25</sup> Petitioners' own Brief concedes that: (1) the Secretary: a) "must submit a six-year force structure plan", b) "must establish . . . selection criteria for base closure recommendations" and c) "must prepare base closure recommendations"; (2) the Commission: a) "is *charged* with" holding public hearings, b) preparing a single package of recommendations and c) "must" forward a single indivisible package of base closures to the President by July 1; (3) the President "must" approve or disapprove the entire package within 15 days; and (4) Congress *must* disapprove the entire package – if at all – within 45 days. [See, e.g., Brief at 5-6, 16]. See § 2904(b) (Secretary may not carry out any closure or realignment if Congress enacts joint resolution disapproving Commission's base closure package within 45 days of receipt from President).

The express purpose of these safeguards was to ensure that the Commission, the President and Congress each received "balanced and informed advice" in the course of their statutory duties. Considering the genesis, purpose and nature of this procedurally-oriented statute, if quick closures were the only goal, the 1990 Act would have been totally unnecessary. Indeed, as recognized by the Third Circuit, there is:

little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decision-making process and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time consuming; bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental action involving far greater exigency.

971 F.2d at 948 (citations omitted).

**C. Limited And Ambiguous References In The Legislative History To The Scope Of APA Review Do Not Reflect Congressional Intent To Preclude Judicial Review.**

Petitioners further suggest that the Act's legislative history reflects a congressional intent to preclude review. That argument, however, rests on a strained misreading of an ambiguous excerpt from the Act's Conference Report and does not constitute "clear and convincing" evidence of an intent to deny judicial review.<sup>26</sup> The Conference Report states:

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<sup>26</sup> To begin with, one never gets to the legislative history to destroy the expressed *purpose* of an unambiguous statute. See *Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (clarity of statutory language obviates

The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) contain explicit exemptions for 'the conduct of military or foreign affairs functions.' An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the Administrative Procedure Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), the decision of the President under section 2803(e), and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("H.R. Conf. Rep. 101-923").

Even if it were appropriate to review this legislative history, given the clear and unambiguous expression of Congressional intent in the Act's "fair process" mandate, the Conference Report reflects, at most, that in carrying out their

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need for inquiry into legislative history); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("best evidence" of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President").

statutory duties under the Act, the Secretary of Defense and the Commission were to be exempt from the rulemaking and adjudication provisions of *Chapter 5* of the APA (5 U.S.C. §§ 553, 554, 556 and 557). This limitation, however, is entirely separate and distinct from the review sought here under *Chapter 7* of the APA.<sup>27</sup> A broad right to judicial review of agency action is provided by Chapter 7 to determine, *inter alia*, whether Petitioners' actions were "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).<sup>28</sup>

Moreover, the quote from the Conference Report does not reflect congressional intent to preclude judicial review of the *integrity* of the process. The Report's list of "[s]pecific

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<sup>27</sup> Chapter 5 of the APA, which establishes procedures for agency rulemaking and adjudication (5 U.S.C. §§ 553 and 554), is entirely separate and distinct from Chapter 7 of the APA, which grants a broad right to judicial review of agency action by aggrieved persons (5 U.S.C. §§ 701 *et seq.*), and does not contain equivalent limitations. Petitioners disregard the fact that agency action may be exempt from the APA's special procedural requirements for agency rulemaking (§ 553) and agency adjudication (§§ 553 and 554) on any of several independent grounds, but nonetheless remain subject to the entire spectrum of judicial review under Chapter 7, *e.g.*, to determine whether agency action was "without observance of procedure required by law," or was "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2). *See, e.g., Common Cause v. Dept. of Energy*, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983).

<sup>28</sup> One important illustration of the distinction between these two sets of provisions is that, as set forth in Petitioners' Brief, the rulemaking and adjudication provisions contained in Chapter 5 of the APA expressly do *not* apply to "the conduct of military or foreign affairs functions." 5 U.S.C. §§ 553 and 554. However, the right to judicial review found in Chapter 7 is *not* subject to this exception, but rather has its own exceptions, which apply only to Chapter 7 of the APA. Accordingly, a particular agency action may be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function, but nevertheless be subject to judicial review under section 702 of the APA for adherence to constitutional, statutory and procedural requirements. *See, e.g., International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy*, 915 F.2d 727 (D.C. Cir. 1990).

actions which would not be subject to judicial review" *omits the actions of the Commission* itself in preparing the base closure package. That omission is highly relevant since the Commission has the dominant role in the base closure process. Plainly, that omission was not an oversight, and demonstrates that the actions of the Commission itself were intended to be subject to judicial review for compliance with the Act's mandatory procedures. Thus, the legislative history on which Petitioners so heavily rely does *not* provide "clear and convincing evidence" necessary to abrogate the Act's unambiguously declared purpose to ensure a "fair process" and, at the very least, leaves "substantial doubt" that Congress intended to preclude all judicial review. Thus, the "general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

**D. The Act's Limitation On Review Of NEPA Claims Is Not Evidence Of Congressional Intent To Abrogate Judicial Review Of The Claims In This Case.**

Petitioners contend that the Act's express limitations on review under NEPA (the National Environmental Policy Act of 1969), reflect a congressional intent to preclude all other forms of judicial review.<sup>29</sup> [Brief at 43-44]. That argument was decisively rejected by the Third Circuit:

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<sup>29</sup> NEPA is a "disclosure" statute requiring federal agencies to include an Environmental Impact Statement "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Congress recognized that NEPA litigation had been used "to delay and ultimately frustrate base closure." H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) at 23. The Act therefore only requires the Department of Defense to comply with NEPA's disclosure mandates "during the process of relocating functions from a military installation being closed or realigned to another military installation . . ." 10 U.S.C. § 2905(c)(2)(A). The Act limits NEPA review by requiring that any action to enforce the statute's disclosure requirements be brought within 60 days of the alleged violation. 10 U.S.C. § 2905(c)(3). Thus, without eliminating

Defendants point out that NEPA claims have been used to delay earlier base closures; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, '[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute.' *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905(c) does not constitute clear evidence of congressional intent with respect to all judicial review under the Act.

971 F.2d at 948. See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent") (quoting Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 771 (1958)).

The foregoing conclusion is consistent with the maxim of statutory construction: *unius est exclusio alterius*, which dictates that a specific statutory exclusion should be construed to exclude *only* that which is specifically excluded. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("enactment of a provision defining the preemptive reach of a

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NEPA's important goals, Congress simply limited NEPA challenges to a 60-day window.

statute implies that matters beyond that reach are not pre-empted"). Because Congress expressly limited only *one* specific form of procedural challenge to the base closure process, it should be presumed that Congress (with knowledge of this Court's holdings that judicial review is presumed unless there is clear and convincing evidence to the contrary) did *not* intend to prohibit other forms of review – particularly the review of claims concerning the procedural fairness and integrity of the base closure process itself.

**E. By Joint Resolution Congress Confirmed That The Legislative Veto Provision Was Not Intended As A Substitute For Judicial Review.**

Petitioners suggest that evidence of congressional intent to eliminate all judicial review may be discerned from the Act's "legislative veto" provision and stretch even further and claim that the integrity of the Act "quite explicitly relies on oversight by Congress to see that the law is observed." [Brief at 48]. This argument is totally contradicted by the structure and declared purpose of the Act. Congress not only has a maximum of only 45 days to pass a joint resolution disapproving the base closure package in its entirety, but any debate on such resolution is limited to a scant *two hours*, to be "divided equally between those favoring and those opposing the resolution." § 2687(d)(2). This is hardly clear and convincing evidence that Congress intended to assume responsibility for assuring the procedural integrity of the base closure process.<sup>30</sup>

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<sup>30</sup> Indeed, accepting *arguendo* Petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. for Cert. at 5), the President would have veto power to decide base closures. Such a veto would be virtually impossible to override in the limited time and circumstances provided for Congress to act. If Congress had intended to give the President unilateral authority to close bases, the Base Closure Act would have been unnecessary.

Even if there were any lingering doubt on the issue, Congress in fact passed a joint resolution expressly confirming that its legislative veto power was *not* intended to supplant judicial review of "fair process":

It is the sense of . . . [Congress] that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendations, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the Resolution of Disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base [Closure] and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

S. Res. 1216, 102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781-13811. See also *Kennedy for President Committee v. Federal Election Comm.*, 734 F.2d 1558, 1563 n.7 (D.C. Cir. 1984) ("we do not believe that the simple existence of a legislative veto provision should immunize an agency from challenges that its action oversteps its statutory authority"). Accordingly, judicial review of the procedural integrity of the base closure process manifestly remains the province of the federal judiciary.<sup>31</sup>

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<sup>31</sup> Petitioners also attempt to insulate their conduct from judicial review by arguing that there is no adequate remedy for their egregious misconduct. However, the Shipyard could simply be removed from the 1991 closure list.

### III. THE BASE CLOSURE ACT WOULD BE UNCONSTITUTIONAL IF READ TO PRECLUDE ALL FORMS OF JUDICIAL REVIEW.

If the Act were construed to abrogate all forms of judicial review, including constitutional claims, two constitutional questions would arise: (1) would the Act unconstitutionally delegate legislative power to the executive branch? and (2) would the Act unconstitutionally abrogate the power of the federal judiciary to review constitutional claims? *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974) (“We . . . reaffirm that it is the province and duty of this Court ‘to say what the law is’ . . .”). To avoid both questions, this Court should affirm the decision below. *See Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2283 (1993) (“if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”). This Court’s reluctance to address constitutional issues unnecessarily is particularly acute where, as here, those issues “concern the relative powers of coordinate branches of government.” *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

#### A. Without Judicial Review, The Act Would Unconstitutionally Delegate Legislative Power To The Executive Branch.

The doctrine prohibiting Congress from delegating its legislative power “is rooted in the principle of separation of powers that underlies our tripartite system of Government.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The

Court has "long . . . insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another branch." *Id.* at 371-72 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)). As Justice Scalia noted in his dissent in *Mistretta*:

It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

488 U.S. at 415 (Scalia, J., dissenting). As the Court held in the context of a challenge to wartime economic regulation, delegation of legislative power is:

constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*

*American Power & Light Co. v. Securities and Exchange Comm.*, 329 U.S. 90, 105 (1946) (emphasis added).

Although the doctrine of unconstitutional delegation necessarily is balanced against a recognition that Congress must have the resources and flexibility to perform its legislative function, *see, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), Congressional delegation of power is still subject to careful scrutiny. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). The delegation doctrine "ensur[es] that courts charged with reviewing the exercise of legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union*, 448 U.S. at 686. *See also*

*Touby v. United States*, 111 S. Ct. 1752, 1758 (1991) (Marshall, J., concurring) (“judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds”). Delegation of legislative power will survive constitutional scrutiny only “so long as Congress provides an administrative agency with standards guiding its actions such that a court could ‘ascertain whether the will of Congress has been obeyed.’” *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Yakus v. United States*, 321 U.S. 414 (1944)). Thus, judicial review is a critical component of a valid statutory delegation.

As in *American Power & Light*, 329 U.S. at 105, the fate of domestic military bases presents substantial and basic issues of public policy. In the Act, Congress has delegated a great portion of its authority to make base closure decisions to the executive branch (*i.e.*, the Secretary of Defense and the Commission), but *subject* to stringent procedural mandates. A serious constitutional question would therefore arise if the courts were stripped of their historic jurisdiction to review whether the Secretary and the Commission have each complied with the will of Congress by following the mandated procedures. To avoid this constitutional issue, the Act should be read to permit judicial review. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 367 (1974) (“it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided”).

**B. Judicial Review Of Constitutional Claims Cannot Be Abrogated.**

As concluded below, the question of “whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review.” 995 F.2d at 409. Petitioners nonetheless argue that Congress did not intend for there to be judicial review under the Act, even of constitutional issues. However, imparting such broad intent to Congress would raise a serious constitutional issue because

Congress has not and could not place executive branch conduct beyond constitutional scrutiny. See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

In *Webster*, a discharged CIA employee brought both APA and constitutional claims against the Agency's Director. In light of the Director's broad statutory authority with respect to employment decisions, the court held the Director's decision to discharge plaintiff was not subject to APA review. Despite significant national security concerns, however, the *Webster* Court concluded that the Act did not – and possibly could not – be construed to preclude review of the former employee's constitutional claims:

In [CIA's] view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robinson*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid 'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

486 U.S. at 603 (emphasis added) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). At a minimum, the issue whether or not the Secretary, the Commission and the President have transgressed the limits of their statutory authority presents a "colorable constitutional claim." As with the issue of unconstitutional delegation, this issue can be avoided by determining that the Act permits review of Respondents' constitutional claims. See, e.g., *A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) (construing statute to authorize judicial

review to avoid constitutional issue raised if statute were construed to prohibit review).<sup>32</sup>

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<sup>32</sup> An association known as "Business Executives for National Security" ("BENS") – two members of which were members of the 1991 base closure commission and defendants in this case – has filed an *amicus* brief supporting reversal of the decision below. Arguing backwards, BENS suggests that congressional intent to eliminate all judicial review under the Act can be discerned from the fact that, as a matter of recent experience, conversion of military installations to civilian use is easier without the threat of judicial intervention and the attendant delays of litigation. Of course, most executive branch decisions could be implemented more simply and more expeditiously without the specter of judicial review. Such a bold statement of bureaucratic absolutism, however, has no place in our constitutional order. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of authority or under an authority not validly conferred"). If expedition had been Congress' only goal in passing the Act, there would have been no need to pass it. The plain language of the Act itself memorializes Congress' goal of ensuring that a "fair process" is employed in closing bases.

**CONCLUSION**

For the foregoing reasons, the decisions of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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January 5, 1994

*Philadelphia, Pennsylvania*



No. 93-289

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In The  
**Supreme Court of the United States**

October Term, 1993

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JOHN H. DALTON, SECRETARY OF  
THE NAVY, *et al.*,

*Petitioners,*

v.

ARLEN SPECTER, *et al.*,

*Respondents.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

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**BRIEF FOR RESPONDENTS**

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the President has authority under the Defense Base Closure and Realignment Act of 1990 (the "Act") to order closure of domestic bases absent a valid list of closures submitted by the Base Closure Commission? (Answered in the negative by the court of appeals).

2. Whether the President's "accept all-or-nothing" limited involvement under the Act immunizes from judicial review base closure conclusions that were the product of a flawed and unfair administrative process? (Answered in the negative by the court of appeals).

3. Whether the strong presumption that acts of Congress are subject to judicial review applies where: (a) the express "purpose" of the Act is to provide a "fair process" for base closures; (b) there is no statutory language denying review; (c) the base closure process was flawed; and (d) construction of the Act to preclude judicial review would render it a complete nullity? (Answered in the affirmative by the court of appeals).

4. Whether federal courts have jurisdiction to review deliberate violations of the "fair process" expressly declared to be the "purpose" of the Act when there is no other way to ensure compliance with mandatory statutory safeguards? (Answered in the affirmative by the court of appeals).

5. Whether there is "final" agency action within the meaning of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), after: (a) the Base Closure Commission has submitted its all-or-nothing list to the President, who, within 15 days, accepts it in its entirety – as he must if there are

**COUNTERSTATEMENT OF THE  
QUESTIONS PRESENTED – Continued**

to be *any* base closings for the year; (b) the House – after the *maximum* of two hours' debate – fails to pass a resolution of disapproval within 45 days; and (c) the Secretary of Defense begins to close and realign military bases? (Answered in the affirmative by the court of appeals).

**TABLE OF CONTENTS**

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	vi
COUNTERSTATEMENT OF THE CASE .....	1
A. Statutory Background .....	3
B. The Defense Base Closure And Realignment Act Of 1990 .....	5
C. The Proceedings Below .....	7
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT.....	13
I. <i>FRANKLIN v. MASSACHUSETTS</i> SUPPORTS JUDICIAL REVIEW .....	13
A. The Third Circuit's Opinions Are Consistent With <i>Franklin</i> .....	13
B. <i>Franklin</i> Confirms The Historic Power Of The Federal Judiciary To Restrain Executive Branch Conduct Violating The Constitutionally Mandated Separation Of Powers...	15
1. Executive Branch Conduct That Violates The Scope Of Authority Delegated By Congress Or The Constitution Will Be Enjoined To Preserve The Constitution's Separation Of Powers.....	16
2. Judicial Review Is Available To Secure Executive Branch Compliance With The Mandatory Procedural Requirements Of The 1990 Base Closure Act.....	19

## TABLE OF CONTENTS – Continued

	Page
(a) The President Was Without Statutory Authority To Approve A Base Closure Package Prepared In Violation Of The Congressional Mandate	20
(b) Where The Executive Branch Exceeds The Scope Of Authority Delegated By Congress, It Necessarily Breaches The Constitutionally Mandated Separation Of Powers .....	24
(c) For The Purpose Of Determining The Scope Of Judicial Review, No Distinction Can Be Made Between Constitutional Claims Involving Separation Of Powers Issues And Claims Involving Constitutionally Protected Property Interests.....	26
3. <i>Franklin</i> Must Not Be Read To Eviscerate The Congressional Mandate Of Fair Process In The Closure Of Domestic Military Bases, Thereby Nullifying the Act .....	27
C. Because The President Has No Authority To Accept A Base Closure Package Which Was The Product Of An Unfair Process, The Commission Report Is “Final” For The Purpose Of Judicial Review.....	29

**TABLE OF CONTENTS – Continued**

	Page
II. THE STRONG PRESUMPTION OF JUDICIAL REVIEW UNDER THE ACT HAS NOT BEEN REBUTTED BY “CLEAR AND CONVINCING EVIDENCE”.....	32
A. National Security And Military Policy Concerns Do Not Abrogate Judicial Review....	35
B. Judicial Review Is Consistent With The Timetables And Objectives Of The Act ....	36
C. Limited And Ambiguous References In The Legislative History To The Scope Of APA Review Do Not Reflect Congressional Intent To Preclude Judicial Review .....	38
D. The Act's Limitation On Review Of NEPA Claims Is Not Evidence Of Congressional Intent To Abrogate Judicial Review Of The Claims In This Case .....	41
E. By Joint Resolusion Congress Confirmed That The Legislative Veto Provision Was Not Intended As A Substitute For Judicial Review .....	43
III. THE BASE CLOSURE ACT WOULD BE UNCONSTITUTIONAL IF READ TO PRECLUDE ALL FORMS OF JUDICIAL REVIEW.....	45
A. Without Judicial Review, The Act Would Unconstitutionally Delegate Legislative Power To The Executive Branch.....	45
B. Judicial Review Of Constitutional Claims Cannot Be Abrogated .....	47
CONCLUSION .....	50

## TABLE OF AUTHORITIES

	Page
CASES	
<i>A &amp; M Brand Realty Corp. v. Woods</i> , 93 F. Supp. 715 (D.D.C. 1950).....	15, 48
<i>Abbot Laboratories v. Gardner</i> , 387 U.S. 136 (1967)....	32
<i>Alaska Airlines, Inc. v. Pan American World Airways, Inc.</i> , 321 F.2d 394 (D.C. Cir. 1963).....	22
<i>American Airlines, Inc. v. Civil Aeronautics Board</i> , 348 F.2d 349 (D.C. Cir. 1965).....	22, 23, 31
<i>American Power &amp; Light Co. v. Securities and Exchange Comm.</i> , 329 U.S. 105 (1946).....	46, 47
<i>American School of Magnetic Healing v. McAnnulty</i> , 187 U.S. 94 (1902).....	25
<i>Block v. Community Nutrition Inst.</i> , 467 U.S. 340 (1984).....	41
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986).....	32, 33, 42, 48
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	16, 19, 24
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977).....	35
<i>Carl Zeiss, Inc. v. United States</i> , 76 F.2d 412 (Cus- toms Ct. App. 1935).....	21, 30
<i>Chicago &amp; Southern Air Lines, Inc. v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948).....	22, 23
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992).....	42
<i>Cohen v. Rice</i> , 992 F.2d 376 (1st Cir. 1993).....	15, 16
<i>Common Cause v. Dept. of Energy</i> , 702 F.2d 245 (D.C. Cir. 1983).....	40

## TABLE OF AUTHORITIES – Continued

	Page
<i>Concrete Pipe &amp; Products of California, Inc. v. Const. Laborers Pension Trust for Southern California</i> , 113 S. Ct. 2264 (1993) .....	45
<i>County of Seneca v. Cheney</i> , ___ F.3d ___, 1993 WL 504463 (2d Cir., Dec. 10, 1993) .....	1, 16
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970) .....	9
<i>Department of Navy v. Egan</i> , 484 U.S. 518 (1988) .....	36
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building &amp; Const. Trades Council</i> , 485 U.S. 568 (1988) .....	45
<i>Franklin v. Massachusetts</i> , 112 S. Ct. 2767 (1992) .....	passim
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985) .....	31
<i>Immigration and Naturalization Service v. Chadha</i> , 462 U.S. 919 (1983) .....	26
<i>Industrial Union Dept., AFL-CIO v. American Petroleum Inst.</i> , 448 U.S. 607 (1980) .....	46
<i>International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy</i> , 915 F.2d 727 (D.C. Cir. 1990) .....	40
<i>Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers</i> , 482 U.S. 270 (1987) .....	15
<i>J.W. Hampton, Jr. &amp; Co. v. United States</i> , 276 U.S. 394 (1928) .....	16
<i>Johnson v. Robinson</i> , 415 U.S. 361 (1974) .....	47, 48
<i>Kendall v. United States</i> , 37 U.S. (12 Pet.) 524 (1838) .....	18
<i>Kennedy for President Committee v. Federal Election Comm.</i> , 734 F.2d 1558 (D.C. Cir. 1984) .....	44

## TABLE OF AUTHORITIES – Continued

	Page
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972) .....	36
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958) .....	27, 32, 35
<i>Little v. Barreme</i> , 6 U.S. (2 Cranch) 170 (1804) .....	15, 17, 18
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	2
<i>Marshall Field &amp; Co. v. Clark</i> , 143 U.S. 649 (1892) ....	46
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989) .....	45, 46
<i>Morris v. Gressette</i> , 432 U.S. 491 (1977) .....	42
<i>Myers v. United States</i> , 272 U.S. 52 (1926) .....	17
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982) .....	18
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935) ....	46
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986) .....	3
<i>Patterson v. Shumate</i> , 112 S. Ct. 2242 (1992) .....	38
<i>Philadelphia Co. v. Stimson</i> , 223 U.S. 605 (1912) ...	25, 49
<i>Public Citizen v. Dept. of Justice</i> , 491 U.S. 440 (1989) .....	45
<i>Shapiro v. United States</i> , 335 U.S. 1 (1948) .....	27
<i>Skinner v. Mid-America Pipeline Co.</i> , 490 U.S. 212 (1989) .....	47
<i>Specter v. Garrett</i> , 995 F.2d 404 (3d Cir. 1993) .....	14, 21, 25, 47
<i>Specter v. Garrett</i> , 971 F.2d 936 (3d Cir. 1992) .....	8, 9, 11, 38, 42
<i>Specter v. Garrett</i> , 777 F. Supp. 1226 (E.D. Pa. 1991) .....	8
<i>Stark v. Wickard</i> , 321 U.S. 288 (1944) .....	19, 30, 33

---

**TABLE OF AUTHORITIES – Continued**

	Page
5 U.S.C. § 558.....	34
5 U.S.C. § 559.....	34
5 U.S.C. § 701.....	34, 40
5 U.S.C. § 702.....	34, 40
5 U.S.C. § 703.....	34
5 U.S.C. § 704.....	34
5 U.S.C. § 705.....	34
5 U.S.C. § 706.....	34
5 U.S.C. § 706(2).....	40
5 U.S.C. § 706(2)(D).....	40
Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2263.....	4
Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. IV 1992) [reproduced at Pet. App. 98a-128a]:	
§ 2901.....	1
§ 2901(b).....	5
§ 2902(c).....	5
§ 2902(e)(2)(A).....	6
§ 2903.....	5
§ 2903(a).....	39
§ 2903(a)(1)-(2).....	6
§ 2903(b).....	28

---

## TABLE OF AUTHORITIES – Continued

	Page
<i>Touby v. United States</i> , 111 S. Ct. 1752 (1991) .....	47
<i>United States v. American Ry. Express Co.</i> , 265 U.S. 425 (1924).....	9
<i>United States v. Menasche</i> , 348 U.S. 528 (1955) .....	27
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	45
<i>Vogelaar v. United States</i> , 665 F. Supp. 1295 (E.D. Mich. 1987).....	36
<i>Webster v. Doe</i> , 486 U.S. 592 (1988).....	48
<i>West Virginia University Hospitals, Inc. v. Casey</i> , 499 U.S. 83 (1991).....	34, 39
<i>Yakus v. United States</i> , 321 U.S. 414 (1944).....	47
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	<i>passim</i>

## CONSTITUTION, STATUTES AND RULES

## U.S. Const.:

Art. I, § 2, cl. 3 .....	20
Art. II .....	17, 19

Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*:

5 U.S.C. § 551 .....	34, 39
5 U.S.C. § 553 .....	34, 39, 40
5 U.S.C. § 554 .....	34, 39, 40
5 U.S.C. § 555 .....	34
5 U.S.C. § 556 .....	34, 39, 40
5 U.S.C. § 557 .....	34, 39, 40

## TABLE OF AUTHORITIES - Continued

	Page
§ 2903(c) .....	6
§ 2903(c)(3).....	7
§ 2903(c)(4).....	6
§ 2903(d) .....	28
§ 2903(d)(2)(b) .....	5
§ 2903(e) .....	5, 12, 30
§ 2904.....	39
§ 2904(b) .....	12, 37
§ 2905.....	39
§ 2905(c) .....	42
§ 2905(c)(2)(A).....	41
§ 2905(c)(3).....	41
§ 2908(c)-(d).....	12
§ 2908(d)(2) .....	6
§ 2909(a) .....	21
§ 2909(c) .....	35
§ 2909(c)(2).....	11
Export Regulations of the War and National Defense Act, 1979, Pub. L. No. 96-72, 50 U.S.C. § 2412.....	34
Military Construction and Guard and Reserve Forces Facilities Authorization Acts, 1977, Pub. L. No. 94-431, § 612, 90 Stat. § 1366-1367, 10 U.S.C. § 2661 <i>et seq.</i> :	
§ 2687(a) .....	35
§ 2687(b) (Supp. IV 1980) .....	4

## TABLE OF AUTHORITIES - Continued

	Page
§ 2687(c) .....	35
§ 2687(d)(2) .....	43
§ 2803(b) .....	39
§ 2803(d) .....	39
§ 2803(e) .....	39
National Environmental Policy Act of 1969, Pub. L. No. 99-145, § 1202(a), 99 Stat. 716, 42 U.S.C. § 4332(2)(C) .....	41
Pub. L. No. 89-188, § 611, 79 Stat. 793, 818 (1965) .....	4
Regulatory Flexibility Act of 1990, 5 U.S.C. § 611(a)-(b) (1982) .....	34
Fed. R. Civ. P. 12(b)(6) .....	3
 MISCELLANEOUS:	
137 Cong. Rec. 135, 13781-13811 (1991) .....	44
56 Fed. Reg. 6374 (Feb. 15, 1991) .....	2, 6
H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) .....	41
H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. (1990) .....	39
H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. (1990) .....	5, 9, 29, 37
H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) .....	34
H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990) .....	29
Currie, <i>The Constitution in the Supreme Court: 1888-1986</i> (Chicago 1990) .....	17

---

## TABLE OF AUTHORITIES - Continued

	Page
Hamilton, <i>The Federalist No. 78</i> .....	17
Hanlon, <i>Military Base Closings: A Study of Govern- ment by Commission</i> , 62 U. Colo. L. Rev. 331 (1991).....	3
Hochman, <i>Judicial Review of Administrative Pro- cesses in which the President Participates</i> , 74 Harv. L. Rev. 684 (1961) .....	23, 30, 31
Jaffe, <i>The Right to Judicial Review I</i> , 71 Harv. L. Rev. 401 (1958).....	33, 42
Jaffe, <i>The Right to Judicial Review II</i> , 71 Harv. L. Rev. 769 (1958).....	34
Madison, <i>The Federalist No. 51</i> .....	26

## COUNTERSTATEMENT OF THE CASE

As Judge Stapleton of the Third Circuit observed at oral argument, the issues in this case go to the very core of the Republic. Petitioners' argument that there is no judicial review of their deliberate refusal to follow mandatory procedural safeguards of the Base Closure Act would permit the President unilaterally to nullify the will of Congress.<sup>1</sup>

Petitioners' egregious violations of the Act in rigging the decision to close the Philadelphia Naval Shipyard (the "Shipyard") constituted nothing less than outright *fraud*. By preventing the most knowledgeable Navy officers from testifying before the Base Closure Commission (the "Commission"), concealing critical Navy documents opposing closure of the Shipyard, holding closed meetings instead of public hearings<sup>2</sup>

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<sup>1</sup> The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. IV 1992) [reproduced at Pet. App. 98a-128a], expressly states that its "*purpose . . . is to provide a fair process. . . .*" § 2901 (emphasis added). On December 10, 1993, the Court of Appeals for the Second Circuit concurred with the Third Circuit's decision herein, holding justiciable allegations that the government "circumvented the base closure process by undertaking a [base] realignment . . . without submitting to the procedures specified" in the Act. *County of Seneca v. Cheney*, \_\_\_ F.3d \_\_\_, 1993 WL 504463, at pp. 1-2 & nn.2-3 (2d Cir., Dec. 10, 1993).

<sup>2</sup> Specifically, as alleged by Respondents, on December 19, 1990 and again on March 15, 1991, Admiral Heckman wrote memoranda to the Chief of Naval Operations, Admiral Kelso, urging the Navy not to close the Philadelphia Shipyard. Although Heckman was responsible for oversight of all Naval shipyards, the Navy refused to allow him to become a part of the base closure process. After his retirement from the Navy on May 1, 1991, Admiral Heckman was instructed by the Assistant Secretary of the Navy that he was *not* to testify before the Base Closure Commission at the public hearings on the Philadelphia Shipyard. In addition, a March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to Admiral Kelso recognized that closure of the Philadelphia Shipyard's large drydocks would create a shortfall for the Navy in the event of an emergency. Despite repeated requests by interested members of Congress for all relevant information, the Navy deliberately withheld and

and cynically predetermining the fate of the Shipyard<sup>3</sup> by compiling a "stealth list" of closures before the statutory process even began, Petitioners decimated the procedural heart of the Act and the express intent of Congress to provide a "fair process."<sup>4</sup> [Amended Complaint, ¶220, at App. 54-55]. Petitioners' argument that their illegal acts cannot be reviewed by a court – at any level, in any jurisdiction or under any circumstances – would eviscerate the vitality of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and two hundred years of subsequent constitutional jurisprudence.

Respondents do *not* challenge the substantive merits of the decision to close the Shipyard; they seek only to invoke the historic role of the federal judiciary to "check and balance" a runaway bureaucracy which boldly has disregarded express Congressional mandates critical to a "fair process." To expose the Navy's fraud has required the unprecedented and herculean bipartisan efforts of several members of Congress and the pro bono contribution of a major Philadelphia law firm, together with the extraordinary efforts of the Shipyard workers, their unions, the Governors of Pennsylvania, New Jersey and Delaware and the City of Philadelphia and its Mayor.

Having never anticipated that their fraud would be exposed, Petitioners now resort to the extreme argument that

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fraudulently concealed the Claman and Heckman memoranda from the General Accounting Office ("GAO"), the Commission, Congress and the public until after the close of the public hearings. [Amended Complaint, ¶¶96-100, 129, 132-133, 170, at App. 29-30, 34-35, 43].

<sup>3</sup> See Amended Complaint, ¶185, at App. 45.

<sup>4</sup> Obviously stung by the widespread publicity of the Navy's alleged misconduct in the U.S.S. *Iowa* disaster and the "Tailhook" debacle, Petitioners lamely argue that the violations here were merely "routine" and "garden variety." [Petitioners' Brief (hereinafter "Brief") at 14, 34]. However, deliberate violations which go to the very heart of a statute designed to ensure "fair process" in the closure of domestic military bases – decisions that affect the "livelihood and security of millions of Americans" – are hardly "routine" or "garden variety." 56 Fed. Reg. 6374 (Feb. 15, 1991).

even the most brazen and deliberate violations of the Act are beyond judicial scrutiny.<sup>5</sup> *Not once* in their 48-page brief do they even attempt to explain how this over-zealous interpretation of the Act can be reconciled with its Congressionally declared purpose: "to provide a fair process." Such an interpretation not only cynically ignores the preeminent role of the federal courts as the protector of constitutional rights, but would effectively *repeal* the Act, the guiding purpose of which is to restore procedural integrity to the base closure process.

#### A. Statutory Background

The Act's express purpose is to ensure a "fair process" and thus eliminate the political machinations and secret deliberations that had pervaded base closure decisions under prior statutes.<sup>6</sup> The Act vests an independent commission, whose members must be confirmed by the Senate, with the authority to formulate an all or nothing package of bases to be closed – thus depriving both the executive branch and Congress of the discretion to close bases unilaterally. The magnitude of the powers delegated to the Commission makes it critical that the mandatory procedures for evaluating bases and formulating the base closure package are rigorously enforced. Without judicial review, all of the carefully crafted procedural safeguards would be rendered meaningless rhetoric.

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<sup>5</sup> In this case, the District Court dismissed the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, this Court must accept all of its well-pleaded factual averments of a flawed base closure process as true and view them in the light most favorable to Respondents. Fed. R. Civ. P. 12(b)(6); *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

<sup>6</sup> There is much historical evidence suggesting that the executive branch has used base closings as a potent weapon to punish its political "enemies." See Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331 at n.13 (1991) (Nixon administration closed military bases in Massachusetts shortly after it was the only state to support McGovern in the 1972 presidential elections).

1. Congress first regulated the base closure process in 1966 by requiring the Department of Defense to provide it with 30 days' notice of any base closing. Pub. L. No. 89-188, § 611, 79 Stat. 793, 818 (1965). As conceded by Petitioners:

During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic bases. Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. . . . To address those concerns, Congress in 1977 enacted procedural restrictions on the Executive's authority to close or realign the size of military bases.

[Brief at 2 (citations omitted) (emphasis added)].

2. Under the 1977 legislation, the Secretary of Defense was prohibited from closing a military base unless he had (1) notified the Armed Services Committees of both the House and Senate, (2) submitted an evaluation to Congress of the likely impact of the closure and (3) afforded Congress 60 days to reject the closure. *See* 10 U.S.C. § 2687(b) (Supp. IV 1980).

3. Intending to relinquish political responsibility for these sensitive base closure decisions, Congress and the President created an independent base closure commission under the 1988 Defense Base Closure and Realignment Act, Pub. L. No. 100-526. Congressional critics, however, charged that the 1988 commission's final closure decisions were made in secret, on the basis of flawed data, and that the GAO had no opportunity to review and verify the data.

4. On January 29, 1990, the Department of Defense unilaterally proposed to close the Shipyard and 35 other military installations in the United States. Because the Department's list of targeted bases "raised suspicions about the integrity of the base closure process," and to remedy the

lack of fair process inherent in the 1988 legislation, Congress enacted the 1990 Base Closure Act. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3110, 3257.

#### B. The Defense Base Closure And Realignment Act Of 1990

Petitioners *totally ignore* the indisputable fact that the express "purpose" of the Act is "to provide a *fair process* that will result in the timely closure and realignment of military installations." 10 U.S.C. § 2901(b) (emphasis supplied).<sup>7</sup> To ensure fairness, the Act creates an *independent* Base Closure Commission to prepare a package of base closures which must be accepted or rejected *in toto* by the President and the Congress.<sup>8</sup> The Commission is not a perfunctory agency. Its members are endowed with the only authority to determine particular bases for closure. § 2903(d)(2)(b).<sup>9</sup> However, in exchange for this autonomy in determining bases for closure, Congress mandated a number of non-discretionary procedural safeguards – agreed to by the President when he signed the Act into law – for the Commission's deliberations and conclusions that were absent from predecessor base closure statutes. As Petitioners *concede*:

- The Secretary of Defense *must* prepare and publish, subject to congressional disapproval, a six

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<sup>7</sup> *Not one word* of Petitioners' Brief reflects any recognition of the express purpose of the Act. Astonishingly, it is simply *ignored*.

<sup>8</sup> A provision of the Act not invoked in this case permits the President to send the list back to the Commission once. The Commission may or may not then revise the list, but, in any event, when resubmitted to the President, it must be accepted or rejected *in toto*. § 2903(e). If rejected, there will be *no* base closings for that year. § 2903.

<sup>9</sup> The Commission's members are appointed by the President only after consultation with Congress and confirmation by the Senate. § 2902(c).

year "force structure" plan assessing potential national security threats and the military force structure necessary to meet such threats. § 2903(a)(1)-(2), [Brief at 5];

- The Secretary *must* prepare and publish, subject to congressional disapproval, specific criteria for use in identifying military installations to be closed or realigned. Among the eight closure criteria promulgated by the Secretary is the "economic impact on communities" of a closure or realignment. 56 Fed. Reg. 6374 (Feb. 15, 1991), [Brief at 5];
- The Secretary's closure recommendations *must* be based upon the published force structure plan, the published base closure criteria and the relevant "data base." § 2903(c), [Brief at 5];
- The Secretary *must* transmit to both the Commission and the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments," so that the GAO can assist the Commission in its deliberations. § 2903(c)(4), [Brief at 39 & n.26];
- The Commission *must* conduct public hearings on the Secretary's recommendations and must open all its deliberations to the public, except where classified information is discussed. § 2902(e)(2)(A), [Brief at 5-6].

The President has a mere 15 days to accept or reject the list submitted by the Commission in its entirety. If approved, the unchangeable list next goes to Congress, which is given a maximum of only 45 days to disapprove the package as a whole and but 2 hours to debate the matter. § 2908(d)(2).

It is unthinkable that Congress – having gone to such great lengths to create an act for the very "purpose" of

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ensuring a "fair process" – intended to strip the federal judiciary of its historic role to check the bureaucracy's homework. The facts of the case now before this Court – where a fraudulent process will survive unchecked if Petitioners have their way – powerfully illustrate that such a construction of the Act would render it a complete nullity.

### C. The Proceedings Below

1. On April 15, 1991, Secretary of Defense Richard Cheney submitted an extensive list of military installations to be closed or realigned to the 1991 Base Closure Commission. The Shipyard was one of the installations targeted for closure. The decision to close the Shipyard was the product of an admittedly *flawed and unfair* process. Contrary to the Act's express mandates, the Secretary, *inter alia*, concealed key Navy documents recommending that the Shipyard remain open, prevented the most knowledgeable commanding Naval officer from testifying before the Commission and failed to provide the GAO and the Commission with adequate documentation to support his recommendation for closure. In fact, the decision to close the Shipyard had been predetermined without any procedural safeguards and recorded on a "stealth list" formulated in secret before the 1990 Act was even passed.<sup>10</sup> See note 2, *supra*.

The GAO concluded that, because of lack of documentation, *it could not perform its statutory duty* to review the Navy's decision.<sup>11</sup> In an illegal attempt to "try to resolve missing gaps in the information provided," the Commission held closed meetings with the Navy after the public hearings

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<sup>10</sup> The Act expressly forbids the Secretary of Defense from considering any military installation on the basis of prior Department of Defense base closure considerations or recommendations. § 2903(c)(3).

<sup>11</sup> Indeed, the GAO Report concluded that the Navy's recommendations and process were *entirely* inadequate in violation of numerous provisions of the Act. [Amended Complaint, ¶¶139, 142-146, 151-152, at App. 36-39].

were completed during which it received documentation necessary to rationalize its predetermined conclusions. [Amended Complaint, ¶¶159-164, at App. 40-41]. On June 23, 1991, upon completion of its badly flawed process, the Commission submitted to the President an "indivisible package" of base closures that included the Shipyard.

3. Respondents filed their Complaint on July 9, 1991, and an Amended Complaint on July 19, 1991, seeking to enjoin the Secretary from closing the Shipyard because a fundamentally flawed process had tainted the results. Respondents alleged – and those allegations must be deemed true for purposes of this appeal, *see* note 5 *supra* – that the Secretary and the Commission had deliberately failed to comply with non-discretionary procedural mandates of the Act. On July 15, 1991, the President nevertheless approved the Commission's entire package of closures, and on July 30, 1991 (less than 15 days later), the House of Representatives, after only 2 hours of debate, rejected a resolution disapproving the Commission's recommendations. On August 30, 1991, the Secretary began closing targeted military installations.

4. On November 1, 1991, following expedited discovery and a hearing on Respondents' motion for preliminary injunctive relief, the District Court erroneously dismissed the Amended Complaint on the ground that the legislative history of the Act reflected a congressional intent to abrogate all judicial review. *Specter v. Garrett*, 777 F. Supp. 1226, 1227-28 (E.D. Pa. 1991).<sup>12</sup>

5. On April 17, 1992, the Court of Appeals reversed, holding that there was "no clear evidence of congressional intent to preclude all judicial review." *Specter v. Garrett*, 971 F.2d 936, 949 (3d Cir. 1992). The court concluded that the judicial branch has the power and duty to review violations of

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<sup>12</sup> Alternatively, the District Court found Respondents' claims non-justiciable under the "political question" doctrine. *Specter v. Garrett*, 777 F. Supp. at 1227-28. That ruling, however, was reversed by the Third Circuit and as Petitioners' "Statement of Questions Presented" makes clear, is not an issue before this Court. [Brief at I].

the Act's mandatory non-discretionary procedures. 971 F.2d at 936.

6. On November 9, 1992, this Court granted *certiorari* and remanded the case to the Third Circuit for consideration of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, the Third Circuit found no reason to change its prior holdings.<sup>13</sup>

7. On August 28, 1993, Petitioners again sought *certiorari*, which was granted on October 18, 1993. For the following reasons, it is respectfully submitted that the decisions of the Court of Appeals for the Third Circuit should be affirmed.

### SUMMARY OF THE ARGUMENT

Confronting "suspicions about the integrity of the base closure selection process," H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), Congress adopted the 1990 Base Closure Act as the "exclusive means for the closure of domestic bases." *Specter v. Garrett*, 971 F.2d at 947 (quoting § 2909(a)). The Act's express "purpose" is to ensure a fair process in the closure of domestic military bases. Petitioners argue that even a fundamentally flawed process is immune from judicial review. This strained interpretation ignores two centuries of precedent holding that, to protect our democracy, congressional limitations on delegated authority will be enforced by an independent federal judiciary. Nothing in

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<sup>13</sup> Petitioners suggest that the Third Circuit, on remand, based its conclusion of judicial review on constitutional grounds not raised by the parties. However, Respondents did argue the principle that drives the constitutional issue here: the executive branch is not above the law. Even if Petitioners were correct, however, it is a fundamental principle that an appellate court may affirm a decision on any ground supported by the record, even on a ground rejected by a lower court. See *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered" below) (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

*Franklin* abrogates this historic role of the federal judiciary. Petitioners seek to obscure the core issues in this case by presenting hypertechnical, abstruse arguments which, if accepted, would eviscerate the meaning and purpose of the Act and create a most dangerous precedent.

I.A. The Third Circuit's opinions are consistent with *Franklin*. The Third Circuit concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates have exceeded powers under applicable statutes or the Constitution.

B. *Franklin* does not alter the federal judiciary's historic role of ensuring that presidential conduct does not exceed statutory or constitutional authority. In fact, *Franklin* (the latest in a line of decisions stretching back nearly 200 years) confirms that presidential action may be reviewed even if review is not permitted under the Administrative Procedure Act ("APA"). Consistent with *Franklin*, the Third Circuit's initial opinion held that presidential conduct is subject to judicial review, independently of the APA, where it exceeds the scope of statutory or constitutional authority. On remand, the Third Circuit confirmed, holding that the President's approval of a procedurally flawed closure package exceeded his authority and thus raised a judicially reviewable separation of powers issue. Although Petitioners argue that the Third Circuit erred in relying on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court in *Franklin* itself cited *Youngstown* for the proposition that non-APA review of presidential acts is permissible where the President has exceeded his authority.

C. The unique facts which led this Court in *Franklin* to hold that the agency action was not final do *not* apply to the independent Base Closure Commission's report to the President, which must be accepted or rejected *in its entirety* within 15 days of receipt. In contrast to *Franklin*, where the President had complete discretion to reject or ignore the recommendations of the Secretary of Commerce and substitute his own data, the President *cannot* unilaterally amend or modify the base closure package, *nor* is he authorized to add or eliminate individual bases to the closure list. Indeed, the

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President has neither the time nor the means to verify that the base closure package has been lawfully prepared pursuant to the "fair process" mandated by Congress.

Instead, the President must rely on the Commission's process in preparing the list. As the Third Circuit emphasized:

Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

971 F.2d at 947 (emphasis added). The Commission's actions are thus "final" for purposes of judicial review.

II. The Third Circuit correctly held that there was *not sufficient evidence to rebut the strong presumption that Congress intended judicial review of violations of the Act's procedural mandates*. While conceding that there is a strong presumption in favor of judicial review and that the Act does not expressly prohibit such review, Petitioners nonetheless suggest that the Act's structure, purpose and legislative history reflect "clear and convincing" evidence of a congressional intent to deny all judicial review, even review of constitutional and statutory violations. However, Petitioners' construction would render the Act a nullity since its mandate of a "fair process" could be flouted, as it deliberately was here, by the executive branch and its bureaucracy at will. If Congress had intended that result, it simply could have permitted the executive branch to close bases for any reason at all.

A. Petitioners argue that the base closure process under the Act is immune from judicial review because it implicates matters of "national security" or "sensitive questions of military policy." However, base closures that deal with matters of national security are *expressly exempt* from the Act. 10 U.S.C. § 2909(c)(2).

B. Petitioners' Brief totally *ignores* the Act's express "purpose," *i.e.*, to ensure a "fair process," and inexplicably