DCN 584

JS 44C
(Rev. 12/84)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. **(SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)**

I (a) PLAINTIFFS

Senator Arlen Specter, et al.

(See attached)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Phila.
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

H. Lawrence Garrett, III, Secretary of the Navy, et al.

(See attached)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT U.S.
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Bruce W. Kauffman, Esquire
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- X 2 U.S. Government Defendant
- X 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only) (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
The Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §§1331, 1337, 1346 and 1361; the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Titl XXIX, §§2901-2910 (November 5, 1990); the Administrative Procedure Act, 5 U.S.C. §§701, et se
Venue is proper in this Court pursuant to 28 U.S.C. §1391.

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT	TORTS: PERSONAL INJURY	TORTS: PERSONAL INJURY / PERSONAL PROPERTY	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	☐ 362 Personal Injury Med. Malpractice ☐ 365 Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Food & Drug ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS 820 Copyrights 830 Patent 840 Trademark SOCIAL SECURITY 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC (405(g)) ☐ 863 DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes 871 IRS—Third Party 26 USC 7609 ☐ 875 Customer Challenge 12 USC 3410	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/etc. ☐ 460 Deportation ☐ 470 Racketeer Influenced & Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes X 890 Other Statutory Actions

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 441 Voting ☐ 442 Employment ☐ 443 Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights	510 Motions to Vacate Sentence 28 USC 2255 530 Habeas Corpus 540 Mandamus & Other 550 Civil Rights

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- X 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A **CLASS ACTION** ☐ UNDER F.R.C.P. 23

DEMAND $ Declaratory Judgment

Check YES only if demanded in complaint
JURY DEMAND: ☐ YES X NO

VIII. RELATED CASE(S) (See instructions): **IF ANY** N/A JUDGE _____ DOCKET NUMBER _____

DATE July 8, 1991

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

PLAINTIFFS

United States Senator Arlen Specter
Room 9400
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Harris Wofford
Room 9456
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Bill Bradley
Union-1605
Vauxhall Road
Union, New Jersey

United States Senator Frank R. Lautenberg
Gateway I
Newark, New Jersey

Governor Robert P. Casey
Room 229
Main Capitol
Harrisburg, Pennsylvania

Commonwealth of Pennsylvania
Attention: Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

Pennsylvania Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

United States Representative Curt Weldon
1554 Garrett Road
Upper Darby, Pennsylvania

United States Representative Thomas Foglietta
Room 10402
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Representative Robert E. Andrews
16 Somerdale Square
Somerdale, New Jersey 08083

United States Representative R. Lawrence Coughlin
Norristown, Pennsylvania

City of Philadelphia
Attention: Charisse Lillie
Office of the City Solicitor

Howard J. Landry
President of the International Federation
of Professional and Technical Engineers
Local 3
Cherry Hill, New Jersey

International Federation of Professional
and Technical Engineers ("IFPTE")
Local 3
Shipyard
Philadelphia, Pennsylvania

William F. Reil
President of the Metal Trades Council
Local 687 Machinists
Philadelphia, Pennsylvania

Metal Trades Council
Local 687 Machinists ("MTC")
Shipyard
Philadelphia, PA

DEFENDANTS

H. Lawrence Garrett, III
Secretary of the Navy
Department of the Navy
The Pentagon
Washington, D.C.

Richard Cheney
Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C.

The Defense Base Closure
and Realignment Commission
(the "Commission")

James A. Courter
Chairman of the Commission

William L. Ball, III
Membwer of the Commission

Arthur Levitt Jr.
Member of the Commission

James C. Smith, II, P.E.
Member of the Commission

Robert D. Stuart, Jr.
Member of the Commission

Howard H. Callaway
Member of the Commission

Gen. Duane H. Cassidy
USAF (Ret.)
Member of the Commission

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: See Attached

Address of Defendant: See Attached

Place of Accident, incident or Transaction: _____
(Use Reverse Side For Additional Space)

Does this case involve multidistrict litigation possibilities? Yes ☐ No ☒

RELATED CASE IF ANY

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes ☐ No ☐

CIVIL: (Place ☒ in *ONE CATEGORY ONLY*)

A. *Federal Question Cases:*
1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act—Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☒ All other Federal Question Cases (please specify)

B. *Diversity Jurisdiction Cases:*
1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability—Asbestos
9. ☐ All other Diversity Cases (Please specify)

ARBITRATION CERTIFICATION

(Check appropriate category)

I, Bruce W. Kauffman, Esquire, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 8, Section 4(a)(2), that, to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $75,000 exclusive of interest and cost;

☒ Relief other than monetary damages is sought.

DATE: July 8, 1991 /s/ Bruce W. Kauffman
Attorney-at-Law

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: July 8, 1991

Attorney-at-Law
Bruce W. Kauffman

CIV. 609
(Rev. 11/85)

MICHAEL E. KUNZ
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U. S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that pursuant to Local Rule 7(h) the United States magistrates of this district, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Appropriate consent forms for this purpose are available from the clerk of court.

Your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court. Only if all the parties in the case consent to the reference to a magistrate will either the judge or magistrate be informed of your decision.

The judge will then decide whether or not to refer the case to a magistrate for disposition but no action eligible for arbitration will be referred by consent of the parties until the arbitration has been concluded and trial *de novo* demanded pursuant to Local Rule 8, paragraph 7. The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate.

When a case is referred to a magistrate for all further proceedings, including the entry of final judgment, the final judgment may be appealed directly to the Court of Appeals for the Third Circuit, unless the parties elect to have the case reviewed by the appropriate district judge (in which event any further appeal to the Court of Appeals would only be by petition for leave to appeal). Accordingly, in executing a consent form, you will be asked to specify which appeal procedure you elect.

Nothing herein shall be construed to be a limitation of any party's right to seek review by the Supreme Court of the United States.

Michael E. Kunz

CLERK, UNITED STATES DISTRICT COURT

RB

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS, Plaintiffs, v. H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR., Defendants.	CIVIL ACTION NO. 91-CV-1322

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas Foglietta, Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of Philadelphia, Howard J. Landry, International Federation

of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists allege as follows:

INTRODUCTION

1. A declaratory judgment is necessary to prevent the imminent and unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the largest employer in the Philadelphia area. The actions taken by the government officials responsible for ensuring an independent, equal, lawful and fair process for closing and realigning military installations under the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990), have violated the Base Closure Act and the procedures and regulations promulgated thereunder in at least 18 separate and material respects.

2. The plaintiffs respectfully request a declaratory judgment that the Secretary of Defense, the Secretary of Navy and the Base Closure and Realignment Commission's actions are fundamentally inconsistent with the Base Closure Act and other applicable law and are therefore void.

3. Immediate declaratory relief is necessary because the defendants' unlawful conduct has resulted in the Shipyard being placed on a list of military installations slated for closure. If the requested relief is not granted, the plaintiffs will be immediately and irreparably injured.

PLAINTIFFS

4. Plaintiff United States Senator Arlen Specter is a

citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 9400, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

5. Plaintiff United States Senator Harris Wofford is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office at Room 9456, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

6. Plaintiff United States Senator Bill Bradley is a citizen of the State of New Jersey with his residence in Morris County, New Jersey, and an office at Union-1605, Vauxhall Road, Union, New Jersey.

7. Plaintiff United States Senator Frank R. Lautenberg is a citizen of the State of New Jersey with his residence in Secaucus, New Jersey, and an office at Gateway I, Newark, New Jersey.

8. Plaintiff Governor Robert P. Casey is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office at Room 229, Main Capitol, Harrisburg, Pennsylvania.

9. Plaintiff the Commonwealth of Pennsylvania is a State of the United States.

10. Plaintiff Pennsylvania Attorney General Ernest D. Preate, Jr. is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office

at 16th Floor, Strawberry Square, Harrisburg, Pennsylvania. Plaintiff Preate sues individually and as Attorney General of the Commonwealth of Pennsylvania.

11. Plaintiff United States Representative Curt Weldon is a citizen of the Commonwealth of Pennsylvania with his residence in Delaware County, Pennsylvania, and an office at 1554 Garrett Road, Upper Darby, Pennsylvania.

12. Plaintiff United States Representative Thomas Foglietta is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 10402, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

13. Plaintiff United States Representative Robert E. Andrews is a citizen of the State of New Jersey with his residence in Camden County, New Jersey, and an office at 16 Somerdale Square, Somerdale, New Jersey 08083.

14. Plaintiff United States Representative R. Lawrence Coughlin is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office in Norristown, Pennsylvania.

15. Plaintiff the City of Philadelphia is a municipality of the Commonwealth of Pennsylvania.

16. Plaintiff Howard J. Landry is the President of the International Federation of Professional and Technical Engineers, Local 3, and is a citizen of the State of New Jersey with his residence in Cherry Hill, New Jersey. Landry has been employed

since 1972 by the Shipyard and has over twenty-seven years of federal service employment. Landry is a member of the class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

17. Plaintiff International Federation of Professional and Technical Engineers ("IFPTE"), Local 3, is the exclusive bargaining representative for virtually all General Schedule ("GS") employees of the Shipyard. IFPTE Local 3 has its principal place of business at the Shipyard, Philadelphia, Pennsylvania. IFPTE represents over 1,300 employees of the Shipyard. These employees are employed in GS grades 3 through 12 and work as engineers, technicians and clerical staff, predominately holding positions in all phases of the repair, overhaul and maintenance of Navy vessels. Nearly all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

18. Plaintiff William F. Reil, the President of the Metal Trades Council, Local 687 Machinists, is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia, Pennsylvania. Reil has been employed since 1953 by the Shipyard. Reil is a member of the class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

19. Plaintiff Metal Trades Council, Local 687 Machinists ("MTC"), is the exclusive bargaining representative for all blue collar workers at the Shipyard. MTC represents over 8,000 employees of the Shipyard and Naval Station. Nearly all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

DEFENDANTS

20. Defendant H. Lawrence Garrett, III is the Secretary of the Navy and maintains his principal office at the Department of the Navy, The Pentagon, Washington, D.C. Defendant Garrett is sued in his official capacity as Secretary of Navy.

21. Defendant Richard Cheney is the Secretary of Defense and maintains his principal office at the Department of Defense, The Pentagon, Washington, D.C. Defendant Cheney is sued in his official capacity as Secretary of Defense.

22. Defendant The Defense Base Closure and Realignment Commission (the "Commission") is the agency of the United States charged with ensuring an independent, equal, lawful and fair process for closing and realigning military installations.

23. Defendant James A. Courter is Chairman of the Commission and is sued in his official capacity.

24. Defendant William L. Ball, III is a member of the Commission and is sued in his official capacity.

25. Defendant Howard H. Callaway is a member of the Commission and is sued in his official capacity.

26. Defendant Gen. Duane H. Cassidy, USAF (Ret.) is a member of the Commission and is sued in his official capacity.

27. Defendant Arthur Levitt Jr. is a member of the Commission and is sued in his official capacity.

28. Defendant James C. Smith, II, P.E. is a member of the Commission and is sued in his official capacity.

29. Defendant Robert D. Stuart, Jr. is a member of the Commission and is sued in his official capacity.

JURISDICTION AND VENUE

30. This Court has jurisdiction over the subject matter of this lawsuit pursuant to: (a) the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; (b) 28 U.S.C. §§1331, 1337, 1346 and 1361; (c) the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990); and (d) the Administrative Procedure Act, 5 U.S.C. §§701 et seq.

31. Venue is proper in this Court pursuant to 28 U.S.C. §1391.

STATEMENT OF FACTS

A. The Philadelphia Naval Shipyard

32. Founded in 1801, the Philadelphia Naval Shipyard is a major industrial complex consisting of extensive and large drydocks, piers, production shops, equipment and other assets valued at almost 3 billion dollars. The Philadelphia Naval Station services the Shipyard.

33. Operations at the Shipyard involve at least 47,000

jobs in the Philadelphia area (31,000 direct and indirect positions, 7,000 additional ship-associated personnel and 9,100 direct and indirect positions associated with the Philadelphia Naval Station).

34. There are eight Naval Shipyards in the United States: Puget Sound, Norfolk, Philadelphia, Mare Island, Charleston, Pearl Harbor, Portsmouth and Long Beach.

35. Almost 15% of the total repair and modernization work performed by all eight Naval Shipyards is accomplished at the Philadelphia Shipyard.

36. In addition to performing work on large amphibious ships and other large vessels, the Philadelphia Shipyard's physical assets and experienced work force make it the premier facility for work on the Navy's non-nuclear aircraft carriers and highly sophisticated and complex cruisers and destroyers.

37. The Shipyard excels in the Service Life Extension Program ("SLEP"), which extends the life of non-nuclear carriers in the Naval fleet by 15-30 years at a cost of about $1 billion or less per carrier.

38. Philadelphia is the only Naval Shipyard performing SLEP work.

39. In the 1991 Defense Appropriation Act, the Congress has required a $405 million CV-SLEP on the aircraft carrier U.S.S. Kennedy to be performed at the Shipyard. The CV-SLEP is not scheduled to be completed until mid-1996.

40. From 1980 through the present, Philadelphia has

led all eight Naval Shipyards in efficiency and cost-effectiveness, due largely to the excellence of its highly skilled work force.

41. Contrary to the statements of the Navy, not a penny will be saved by the closure of the Shipyard.

42. Philadelphia is one of only two Naval Shipyards operating in the black with positive net operating results in the last two years.

43. The Shipyard differs from most other governmental agencies because it operates as a private business and is not funded directly from the defense budget. Personnel payrolls, building maintenance and nearly all other overhead and operating expenses are paid for by selling Shipyard services to customers in a highly competitive environment.

44. Unlike most other governmental agencies, the Shipyard does not receive annual appropriations in support of operations. Rather, it generates its revenues by charging customers for work performed.

45. If the Shipyard is closed, the work performed there will ultimately be performed at greater cost to the Navy.

B. Enactment of the 1990 Defense Base Closure and Realignment Act

46. On May 3, 1988, then Secretary of Defense, Frank Carlucci, chartered the Defense Secretary's Commission on Base Realignment and Closure to evaluate and recommend a reduction in the military installations located in the United States.

47. In October 1988, Congress passed and the

President signed Public Law 100-526, the Defense Authorization Amendment and Base Closure and Realignment Act.

48. The 1988 Commission on Base Realignment and Closure recommended that 86 bases be closed and 59 bases be realigned or partially closed. These recommendations were strongly criticized by members of Congress and the public.

49. Congressional critics contended that the 1988 base closure and realignment recommendation process had not been sufficiently open to public scrutiny.

50. Congressional critics also charged that faulty data had been used to reach the 1988 final closure recommendations.

51. Congress believed that the General Accounting Office ("GAO") should have reviewed the data considered by the 1988 Commission on Base Realignment and Closure.

52. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 36 bases in the United States, including the Shipyard.

53. In connection with that proposal, the Vice Chief of Naval Operations conducted a study to justify the proposed closure. This study concluded that the Shipyard should not be closed.

54. On November 5, 1990, to redress the criticisms raised by the 1988 base closure process, the President signed into law the Base Closure Act.

55. The Base Closure Act:

(a) Expressly stated that its "purpose" was "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)];

(b) Required that all meetings of the Commission "be open to the public," except where classified information was being discussed [10 U.S.C. §2902(e)(2)(A)];

(c) Mandated the development and application of "final criteria" for making the closure and realignment determinations [10 U.S.C. §2903(b)(2)(A) and (c)];

(d) Mandated the creation of a six year force-structure plan for the Armed Forces for making the closure and realignment determinations [10 U.S.C. §2903(a) and (c)];

(e) Required the Secretary of Defense to consider all military installations "equally" for closure or realignment [10 U.S.C. §2903(c)(3)];

(f) Required the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [10 U.S.C. §2903(c)(2)]; and

(g) Required the Secretary of Defense to transmit to the GAO "all information used by the Department in making its recommendations to the Commission for closures and realignments," and required the GAO (i) to assist the Commission in its review and analysis of the recommendations made by the Secretary and

(ii) to transmit to the Commission and to Congress "a report containing a detailed analysis of the Secretary's recommendations and selection process" 45 days before the Commission's report was to be transmitted to the President [10 U.S.C. §§2903(c)(4), 2903(d)(5)(A) and 2903(d)(5)(B)].

C. The Oversight Role of Congress Under the Base Closure Act

56. The April 1991 Base Closure and Realignment Report of the Department of Defense ("DOD") acknowledges the significant oversight role retained by Congress with respect to military installation closures and realignments:

(a) Authority to disapprove by law the Secretary's final criteria;

(b) Receipt of the Secretary of Defense's force structure plan;

(c) Receipt of the Secretary's recommended closures and realignments;

(d) The role of the General Accounting Office; and

(e) The requirement that the Commission's proceedings, information, and deliberations be open, on request, to designated members of Congress.

D. The Evaluative and Oversight Role of the General Accounting Office Under the Base Closure Act

57. During the 1988 base closure process, Congress belatedly called upon the GAO to examine the 1988 commission's methodology, findings and recommendations.

58. Congress ensured an integral and timely role for the GAO during the 1991 base closure process.

59. The Secretary's April 1991 Base Closure and

Realignment Report to the Commission described the GAO's essential role:

> Public Law 101-510 provided for the General Accounting Office (GAO) to monitor the activities, while they occur, of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.
>
> The GAO is required to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO report, due by May 15, 1991, is also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act. In addition, the GAO is required to assist the Commission, if requested, with its review and analysis of the Secretary's recommendations. (Emphasis supplied.)

60. Purporting to comply with Congressional mandates, the Commission stated at p. 1-5 of its July 1, 1991 Base Closure and Realignment Report to the President that the "GAO has been an integral part of the process."

E. The 1991 Defense Base Closure Commission

61. The Base Closure Act provides for an eight member Commission to conduct an independent, equal, lawful and fair process for closing and realigning military installations.

62. To ensure the independence of the Commission, the Base Closure Act requires that the President nominate commissioners only after consulting with the speaker of the House of Representatives concerning the appointment of two members, the majority leader of the Senate concerning two members, the minority leader of the House of Representatives concerning the

appointment of one member and the minority leader of the Senate concerning the appointment of one member.

63. The President nominated former New Jersey Congressman James A. Courter as Chairman of the Commission and the following seven as members of the Commission: William L. Ball, III, former Secretary of the Navy; Howard H. (Bo) Callaway, former Secretary of the Army; Duane H. Cassidy, former commander-in-chief of the United States Transportation Command of the Military Airlift Command; Arthur Levitt, Jr., chairman of the board of Levitt Media Company; James C. Smith II, P.E., formerly a member of the Secretary of Defense's 1988 Base Closure Commission; Robert D. Stuart, Jr., former chairman of the board of the Quaker Oats Company; and Alexander Trowbridge, former Secretary of Commerce.

64. These nominations were confirmed by the Senate.

65. On May 17, 1991, Alexander Trowbridge resigned from the Commission because of a conflict of interest arising out of his ownership of a majority of stock in certain companies that had significant Pentagon contracts.

66. Section 2902 of the Base Closure Act requires that all vacancies be filled in the same manner as the original appointment.

67. In accordance with Congress' oversight role under the Base Closure Act, Alexander Trowbridge had been nominated by the President after consultation with Speaker Foley.

68. In violation of the Base Closure Act, Trowbridge's

vacancy was never filled.

69. The Commission established four procedures for gathering evidence to review the DOD's base closure proposals: (a) 15 public hearings in Washington, D.C. to receive information from the DOD, legislators and other experts; (b) 14 regional and site hearings to obtain public comment; (c) site visits by the Commissioners of the major facilities proposed for closure; and (d) review by the Commission's staff of the Armed Services' processes and data.

70. Under the Base Closure Act, the Commission was required to submit its Report to the President by July 1, 1991, setting forth its findings, conclusions and recommendations for closures and realignments inside the United States.

F. <u>The Department of Defense Base Closure Criteria and Process</u>

71. The Base Closure Act directs the Secretary of Defense to: (1) develop selection criteria for making recommendations for the closure of military installations and to finalize such criteria after public comment; (2) provide to Congress (with the Department of Defense's budget request for fiscal year 1992) a six-year, force-structure plan for the Armed Forces; (3) submit to the Commission by April 15, 1991 a list of military installations recommended for closure or realignment "<u>on the basis of the force-structure plan and the final criteria</u>" [10 U.S.C. §2903(c)(1)(emphasis supplied)]; and (4) make available to the Commission, the GAO and Congress "<u>all information</u> used by the Department in making its recommendations to the Commission for

closures and realignments" [10 U.S.C. §2903(c)(4)(emphasis supplied)].

72. As part of the objective process for determining whether to close a military installation, the Base Closure Act required the Secretary of Defense to establish selection criteria to be used in making a closure recommendation.

73. In developing these criteria, the Secretary was required to publish proposed criteria in the Federal Register and solicit public comments.

74. The DOD published eight proposed criteria and requested comments on November 30, 1990.

75. The proposed criteria closely mirrored the criteria established for the 1988 Defense Secretary's Commission on Base Realignment and Closure. The only notable differences were that priority consideration was given to military value criteria and payback was no longer limited to six years.

76. As a result of numerous public concerns raised about the criteria's broad nature and the need for objective measures or factors for the criteria, on December 10, 1990, the DOD issued a memorandum setting forth "policy guidance" and "record keeping" requirements to the Military Departments as follows:

> The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and

> The studies must consider <u>all</u> military installations inside the United States...<u>on an equal footing</u>,...
>
> * * *
>
> DOD components shall keep:
>
> - Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
>
> - Data, information and analysis considered in making base closure and realignment selections; and
>
> - Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act. (Emphasis supplied.)

77. On February 13, 1991, the DOD issued a memorandum setting forth "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

> - Uniform guidance defining data requirements and sources for each category of base,
>
> - Systems for verifying accuracy of data,
>
> - Documentation justifying any changes made to data submissions, and
>
> - Procedures to check the accuracy of the analysis made from the data provided.

78. The February 13, 1991 DOD Memorandum also provided the following procedures for evaluating closures and realignments: (a) if there was no excess capacity in a certain category, the bases in that category were exempted from closure; (b) if there was excess capacity and a base was recommended for closure or realignment, the Department's analysis must have

considered all military bases within that category and any cross-categories; and (c) military bases could only be excluded from further review if they were militarily/geographically unique or mission essential such that no other base could substitute for them.

79. On February 15, 1991, the DOD published in the Federal Register eight proposed final criteria to govern the base closure and realignment process.

80. The first four criteria concerned "military value," and were to receive preference:

(1) Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.

(2) The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

(4) The cost and manpower implications.

The fifth criteria concerned "return on investment":

(5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

The final three criteria involved "impacts":

(6) The economic impact on local communities.

(7) The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.

(8) The environmental impact.

81. The proposed criteria were subject to Congressional review between February 15, 1991 and March 15, 1991. The criteria became final on March 15, 1991.

G. The Necessity For The Navy To Develop And Implement An Internal Control Plan

82. The February 13, 1991 DOD Memorandum also required each Military Department to develop and implement an "internal control plan" to ensure the accuracy of data collection and analyses. At a minimum, the internal control plan was required to include (1) uniform guidance defining data requirements and sources for each category of base, (2) systems for verifying accuracy of data, (3) documentation justifying any changes made to data submissions, and (4) procedures to check the accuracy of the analyses made from the data provided.

83. The Navy failed to implement an "internal control plan" that ensured the accuracy of its data collection and analysis. The Navy did not prepare minutes of its deliberations on closures and realignments.

H. The Navy's Pre-Determination to Close the Philadelphia Naval Shipyard

84. On December 10, 1990, the DOD issued the exclusive procedures which the Military Departments were to follow in making defense base closure and realignment recommendations.

85. In accordance with the Base Closure Act, the procedures required that all military installations be considered equally, "without regard to whether the installation has been

previously considered or proposed for closure or realignment by the Department of Defense."

86. In blatant contravention of the express language of the Base Closure Act, its own internal procedures and clear Congressional intent to establish an objective and fair process, the Navy used a completely arbitrary, subjective process designed to justify a pre-determined conclusion to close the Shipyard.

87. Documents that were withheld by the Navy until after the close of the Commission's public hearings established that, as early as December 19, 1990 -- prior to the DOD's establishment of a force structure plan or final criteria for evaluating base closures -- the Secretary of the Navy had already decided to close the Shipyard.

88. On December 19, 1990, Admiral Peter Heckman, then Commander of the Naval Sea Systems Command, wrote a memorandum to the Chief of Naval Operations urging the Navy's reconsideration of its decision to close the Shipyard:

> While I realize that the Secretary has been briefed and has concurred with the proposal to mothball Philadelphia Naval Shipyard, I strongly recommend that this decision be reconsidered. It is more prudent to downsize Philadelphia Naval Shipyard...
>
> * * *
>
> Further, I recommend that the drawdown of Philadelphia Naval Shipyard to an SRF size shipyard not be done until FY 95, as the shipyard is required to support scheduled workload until that time. (Emphasis supplied.)

89. Although Admiral Heckman was responsible for

oversight of all Naval Shipyards, the Navy refused to allow him to become a part of the base closure process.

90. Admiral Heckman retired from the Navy on or about May 1, 1991. After his retirement, Admiral Heckman was instructed by the Assistant Secretary of the Navy, Donald Howard, that he was not to testify before the Commission at the public hearings on the Philadelphia Naval Shipyard.

91. The Navy predetermination to close the Philadelphia Naval Shipyard is confirmed by its treatment of other Naval Shipyards during the base closure process.

92. Navy guidelines expressly prohibited non-emergency capital upgrades of any military installations on the 1990 Base Closure List during the 1991 base closure process.

93. Nevertheless, on February 4, 1991 -- one day prior to the commencement of the Navy's force structure review process -- the Chief Naval Officer requested $1.05 million to upgrade for nuclear certification a shipyard that was clearly subject to the base closure process: Long Beach Naval Shipyard.

94. Long Beach is the only shipyard other than Philadelphia that does not have a nuclear certification.

95. The Navy's decision to upgrade Long Beach not only violated its own guidelines but clearly establishes a predisposition by the Navy to close the Philadelphia Naval Shipyard.

I. The Navy Base Structure Committee's Blatant Disregard for its Own Evaluation Results

96. In December 1990, the Secretary of the Navy

established a six-member Base Structure Committee ("BSC") to conduct a base structure review and to determine the Navy's closure and realignment candidates.

97. The BSC was charged with reviewing all installations inside the United States equally, "without regard to whether the installation was previously considered for closure or realignment."

98. By applying their admittedly subjective judgment, the BSC candidly admitted that it arrived at base closure decisions that "differed from the assessments one might make using the raw empirical data."

99. The BSC initially categorized all facilities according to function -- e.g., Naval Air Stations, Naval Shipyards -- to determine which categories possessed significant excess capacity.

100. The Navy then applied the eight selection criteria in two phases by assigning color codes to military bases in categories with excess capacity.

101. Phase I of the BSC's analysis required a consideration of the first four military criteria. After Phase I was completed, the Navy excluded those bases which it determined "were distinguished by virtue of their operational value," i.e. those that it gave an overall "green" rating under the first four military criteria.

102. Under the Navy's rating system, a "green" rating received one point, a "yellow" rating received two points, and a

"red" rating (favoring closure) received three points.

103. The Navy's color-coded/point approach resulted in the following total point allocations to each of the eight Naval Shipyards in the United States:

Shipyard	Points
Puget Sound, WA	4
Norfolk, VA	5
Philadelphia, PA	6
Charleston, SC	6
Mare Island, CA	6
Pearl Harbour, HI	6
Portsmouth, ME	6
Long Beach, CA	7

104. Puget Sound received a "green" rating for each of the first four military criteria and was therefore excluded from further closure consideration.

105. In accordance with the BSC base closure criteria, the seven remaining Naval Shipyards should have been evaluated under the remaining four non-military criteria set forth in Phase II.

106. Using the BSC's own rating system, the Philadelphia Naval Shipyard should have been treated the same as Charleston, Mare Island, Pearl Harbor and Portsmouth and better than Long Beach.

107. Ignoring its own rating system and in blatant disregard of the statutory mandate that all bases be considered "equally," the Navy -- for no apparent reason and without any supporting documentation or analysis -- gave overall "green" ratings to three undeserving shipyards: Mare Island, which just like Philadelphia Naval Shipyard, received two "yellow" and two

"green" ratings; Norfolk, which received three "green" and one "yellow" ratings; and Pearl Harbor, which received one "red" and three "green" ratings.

108. The BSC then arbitrarily, unilaterally and without reference to any one of the eight DOD criteria excluded all of the six nuclear-capable shipyards from any further review without providing any documentation or analysis to justify a drydock need for nuclear ships as compared with conventional carriers.

109. This process left only Long Beach (which is one of two California shipyards) and Philadelphia for further review.

110. To circumvent the fact that Long Beach scored poorly in three of the four military criteria and overall had the worst rating of all eight Naval Shipyards, the BSC then excluded Long Beach from further consideration contending that one of the drydocks at that shipyard could be used "to handle West Coast aircraft carriers (including CVN emergency work)." [Navy Report, Tab C, p. 10].

111. By this egregious process of elimination, the BSC was left with only one yard to consider for closure under the remaining four criteria, the Philadelphia Naval Shipyard. The BSC then performed a perfunctory application of the second four non-military criteria with respect to the Philadelphia Naval Shipyard to ensure its closure.

J. **The Navy's Force Structure Plan**

112. The Base Closure Act required the Navy to create

a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet during a six year fiscal period. Base closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act.

113. The Navy's force structure plan and conclusions regarding the Navy's drydock needs fall far short of the statutory requirements. The plan fails to provide the requisite specificity necessary to determine how many large drydocks, such as those at the Shipyard, the Navy will need from 1992 through 1997, including the number and types of ships that will remain in the fleet and the number of anticipated repairs, overhauls and refuelings required on those ships during the relevant time period.

114. In fact, the Navy's own April 1991 Report contradicts the conclusion that any of the Naval Shipyards should be closed.

115. The Navy's Report stated that the Navy is currently fully utilizing its drydocks "in excess of 100%." The Report also stated that the number of large amphibious ships is increasing and for 1994 and 1997 there will be insufficient naval drydocks to handle large carriers. [Navy Report, Tab C, p. 2]

116. In its Report, the Navy also determined that shipyard workloads would be virtually unaffected:

> While the Navy fleet in general is downsizing by 19%, <u>the types of ships worked on by the Naval Shipyards is downsizing by only 1%, and in some cases is increasing (large Amphibious</u>

> and AEGIS ships). Thus, the need for certain facilities to accomplish this work is not diminished.

[Navy Report, Tab C, p. 2 (emphasis added)].

117. A March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to the Chief of Naval Operations confirmed that the Navy's utilization of shipyards for large amphibious ships and other large vessels would be between 84.2% and 106.9% for fiscal years 1992 though 1997.

118. Since the Navy requires that Shipyards reserve 30% of their space for emergency repairs, it is clear that Shipyards, such as the Philadelphia Naval Shipyard, servicing large amphibious ships and other large vessels will have no "excess" capacity during the relevant six year period and should have been excluded from further review under the base closure process.

119. The Navy's failure to prepare and follow an adequate force structure plan substantially prejudiced Naval Shipyards, such as the Philadelphia Naval Shipyard, since Philadelphia has: (a) three of the Navy's five East Cost drydocks that are capable of handling large amphibious ships and other large vessels; and (b) two of only three East Coast drydocks capable of handling carriers.

120. A March 15, 1991 memo from Admiral Heckman to the Chief of Naval Operations recognized that "retention of a credible repair capability at Philadelphia for naval ships home ported in the Northeast area is the most cost effective

solution." Admiral Heckman concluded that:

> [T]he workload distribution for naval shipyard in the 90's supports full operations at Philadelphia through mid FY 95. As previously briefed, executing a realignment of Philadelphia Naval Shipyard in FY 93 will cause significant perturbations to carrier overhauling yard assignment and could result in an East Cost CV overhauling on the West Coast.

121. Despite express requests for the foregoing information by interested members of Congress, the Navy deliberately withheld the Claman and Heckman memoranda from the GAO, the Commission, Congress and the public until after the close of the public hearings.

122. The BSC submitted its recommendations, including its proposal to close the Philadelphia Naval Shipyard, to the Secretary of the Navy.

123. The Secretary of the Navy submitted BSC's nominated bases for closure and realignment to the Secretary of Defense.

124. On April 12, 1991, Secretary Cheney issued the DOD's Base Closure Report. The Report adopted the Navy's proposals and recommended 43 base closures, including the Philadelphia Naval Shipyard.

K. <u>The May 16, 1991 General Accounting Office Report</u>

125. The Base Closure Act provides for the GAO to monitor the activities of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.

126. The GAO was required (a) to assist the Commission in its review and analysis of the Secretary of Defense's closure recommendations and (b) to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO Report was also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act.

127. Despite the clear mandates of the Base Closure Act and the DOD's internal guidelines and regulations, the Navy failed to provide the GAO with sufficient documentation to support either its base closure process or its recommendations for closure.

128. The GAO's independent Report, entitled Observations on the Analyses Supporting Proposed Closures and Realignments, was issued on May 16, 1991, in accordance with the statutory mandate of the Base Closure Act. A copy of the relevant text of the GAO Report is annexed hereto as Exhibit A.

129. The GAO Report found that the Army and Air Force could document their use of the force-structure plan and the military value criteria. Therefore, the GAO concluded that the base closure recommendations made by the Army and Air Force were "adequately supported."

130. In stark contrast, the GAO concluded that the Navy's recommendations and processes were entirely inadequate.

131. The GAO Report concluded that the Navy did not offer sufficient documentation to prove whether or not its

process followed the force structure and selection criteria, thereby preventing the GAO from evaluating the Navy's specific recommendations for closure:

> We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.
>
> Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. [GAO Report at p. 46]

132. In addition to the lack of adequate documentation, and the absence of any internal control plan, the GAO determined that it could not evaluate the Navy's "methodology" for reviewing air stations, shipyards, or labs. [GAO Report at pp. 46-48]

133. Significantly, the GAO Report stated that, on May 7, 1991, the Navy's BSC informed the GAO that the BSC had ignored the data prepared by its working groups because of the BSC's view that "much of the data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs." According to the BSC, it therefore relied on informal briefings and meetings, many of which were in closed executive sessions. [GAO Report at p. 46]

134. The GAO Report identified three additional deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support "the basis for the [BSC's] military value ratings for Navy installations"; (2) the

implementation and use of an inconsistent color coding system to rate military bases; and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used by the Navy in its base structure reviews. [GAO Report at p. 48]

135. The GAO also discovered that, despite DOD guidance to the contrary, the Navy used budget data which did not use 1991 dollars as its baseline.

136. The GAO discovered inconsistencies in the Navy's service costs, savings estimates, payback calculations and recovery of closure costs. The GAO report concluded that the result of these inconsistencies was an overstatement of estimated annual savings and a shortening of the payback period for several closures.

137. The GAO Report also identified inconsistencies within the BSC's internal rating process, including the fact that the BSC had given identical ratings to two naval bases (Mare Island and Philadelphia Naval Shipyard) on each of the first four military selection criteria, but -- without any discernable justification -- had arbitrarily assigned an overall rating of green to one (Mare Island) and yellow to the other (Philadelphia Naval Shipyard). [GAO Report at p. 48]

138. Similarly, the BSC had assigned identical ratings to five naval bases but did not treat such bases equally. Again, the Philadelphia Naval Shipyard was not excluded from the closure process although four other naval shipyards which

received identical ratings were excluded from further review.

139. The GAO Report concluded that, since the BSC "did not document these differences," the GAO "could not determine the rationale for its final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." [GAO Report at p. 48]

140. In sum, the GAO Report found that the Navy and its BSC:

(a) Had not treated all bases equally, as required by the Base Closure Act;

(b) Had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act;

(c) Had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements; and

(d) Had prevented the GAO from performing its statutory mandate of reviewing and analyzing the recommendations for Naval base closures made by the Secretary of Defense and transmitting to Congress and the Commission a report containing a detailed analysis of the Secretary of Defense's recommendations for Naval base closures and the Navy selection process.

L. <u>Public Hearings</u>

141. The Base Closure Act established the 1991 Defense

Base Closure and Realignment Commission to ensure that "the [base closure] process is open." [Report to President, p.1-5].

142. The Base Closure Act therefore requires the Commission to conduct its proceedings in public and open its records and deliberations to public scrutiny.

143. The Commission expressly invited and received public testimony in Washington, D.C. from members of Congress.

144. By letter dated April 23, 1991, the Commission established five pages of procedures to govern Congressional testimony at the Commission's hearings. The Commission's procedures provided that:

> All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

145. The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation."

146. In accordance with the Base Closure Act, the Commission scheduled and held 28 hearings across the United States.

147. Congressional testimony on the Philadelphia Naval Shipyard was scheduled in Washington, D.C. for May 22, 1991. The regional hearing regarding the Philadelphia Naval Shipyard was scheduled for May 24, 1991.

148. In violation of the Base Closure Act and other applicable law, additional documentation was thereafter provided to the Commission that was not subject to GAO analysis or public comment and debate.

149. In blatant violation of the Base Closure Act, closed meetings with the Navy's BSC were held by the Commission on May 24, 1991 after the public hearings were completed.

150. Moreover, on May 24, 1991 -- after the close of the public hearings -- the Commission requested that the Navy's BSC provide it with additional information to "try to resolve missing gaps in the information provided."

151. Thereafter, the Navy's BSC provided additional documents and information to the Commission, including COBRA analyses, data underlying the color coding ratings, data regarding the VCNO study and other information regarding Navy closure recommendations, without affording interested members of Congress or the public a meaningful opportunity to comment on such information at a public hearing.

152. Despite repeated demands by members of Congress for a public hearing on the additional information supplied by the Navy, the Commission refused to allow any public debate.

M. The July 1, 1991 Commission Report To The President

153. On July 1, 1991, the Commission submitted its recommendations for the closure or realignment of U.S. military installations to the President.

154. In its July 1, 1991 Report to the President, the

Commission stated:

> The Navy presented a special challenge to the Commission. Its selection process was more subjective and less documented than that of either the Army or the Air Force. To determine whether the Navy complied with the law, the Commission's staff held a series of meeting with members of the Navy's Base Structure Commission and other high ranking naval officers...
>
> * * *
>
> These individuals responded to questions and supplied information to the Commission.

155. The Commission findings with respect to the Philadelphia Naval Shipyard were as follows:

> The Commission found that the overall public shipyard workload is falling significantly because of force reductions and budget limitations. The projected workload in nuclear shipyards during the 1990s was found to limit the potential for closing any nuclear shipyard until the late 1990s.
>
> The largest portion of Philadelphia's recent workload has been CV-SLEP, which the Navy desires to terminate. However, Congress has passed legislation that requires a CV-SLEP at Philadelphia. The Commission found that this CV-SLEP should be completed in mid-1996, about a year before the required closure date.
>
> Workload is available that could be diverted from public and private East Cost shipyards to Philadelphia to bring its activity up to levels that justify keeping it open. However, this would limit the Navy's ability to meet its target of putting 30 percent of its repair work in private yards ...
>
> * * *

> The Commission found that the combination of carrier-capable drydocks at Norfolk Naval Shipyard, Newport News Shipbuilding, and the mothballed drydocks at Philadelphia provide capacity for unplanned requirements.

156. The Commission exceeded its statutory authority in making base closure recommendations by considering the availability of privately-owned shipyards, such as Newport News, to provide emergency service for the Navy's fleet.

157. Consideration of private facilities as part of a force-structure plan to provide emergency service for the Navy's fleet is impermissible under the Base Closure Act and departs from long standing Navy strategic and operational requirements.

158. The Navy was fully aware of the need to keep the Philadelphia Naval Shipyard open, but withheld such information from the GAO, the Commission and the public. The March 1991 Admiral Claman memorandum to the Chief of Naval Operations clearly recognized that:

> Closure of Philadelphia Naval Shipyard, without retention of the large carrier capable dry docks creates a shortfall in dry dock capability for emergent dockings of aircraft carriers... Without the dry docks available at Philadelphia, the only other dock capable of taking an emergent carrier docking is at Newport News Shipbuilding (NNSB). Exhibit C-7 illustrates this situation graphically. This dock is privately owned and its docking schedule is not controlled by the Navy. The cost to have NNSB provide a dedicated dock under contract is considered prohibitive.

159. The Commission adopted the BSC's conclusion that the Shipyard should be closed based upon projected workload

trends. However, the Navy's force structure plan lacked sufficient detail for the Commission to evaluate the Secretary's recommendations.

160. The law requires the President to approve or disapprove the Commission's recommendations by July 15, 1991. If approved, the report will be sent to Congress. Unless Congress enacts a joint resolution disapproving the Commission's proposals within 45 legislative days (or prior to when Congress adjourns for the session), the Secretary must begin to close or realign those installations listed in the report.

161. In fact, the Navy failed to produce, and the Commission failed to obtain, detailed information about projected Naval Shipyard workloads.

162. The Navy failed to engage in a fair and objective process and did not treat all military installations equally in recommending the closure of the Shipyard.

163. The Navy deviated substantially from the force structure plan and base closure criteria in recommending the closure of the Shipyard.

164. The Navy failed to base its decision on each of the final selection criteria and failed to apply each of the eight criteria equally, fairly and objectively.

165. The Navy failed to provide <u>all</u> information used in making its base closure recommendations to the GAO and members of Congress and failed to consider all available information concerning the Shipyard, especially information which would have

prevented the BSC from recommending its closure.

166. The Commission's adoption of the DOD's recommended base closures and realignments also violated the procedural and substantive safeguards set forth in the Base Closure Act with respect to other military installations, including its recommendations to close the Philadelphia Naval Station and the realignment and elimination of the Warminster Naval Air Development Center and the U.S.Army Corps of Engineers division and district management headquarters located in the Commonwealth of Pennsylvania.

167. The foregoing actions of the defendants are in bad faith, arbitrary, capricious and in violation of the law.

N. Irreparable Injury

168. The foregoing conduct of defendants will cause plaintiffs to suffer immediate and irreparable harm.

169. According to the Navy's December 1990 Final Environmental Impact Statement for Base Closure/Realignment of the Philadelphia Naval Shipyard ("FEIS"), the direct economic consequence of the proposed closure of the Philadelphia Naval Shipyard includes a reduction in present Navy employment in the Philadelphia region by 88 percent, which represents eliminating directly almost 15,000 employment positions and indirectly causing the loss of an additional 7,384 jobs in the Philadelphia area.

170. The FEIS stated that the proposed closure would add an estimated 16,856 workers to the unemployment rolls (a 17.4

percent increase) and increase unemployment in the geographical region from 3.8 percent (in 1989) to 4.5 percent of the work force.

171. The FEIS also stated that "many employees of Philadelphia Naval Shipyard would experience difficulty re-entering the labor force without considerable retraining."

172. According to the FEIS, direct income and expenditures that would be withdrawn from the Philadelphia region as a result of the proposed closure would total $536.9 million.

173. An Economic Impact Report prepared by the Pennsylvania Economy League ("PEL") and submitted to the Naval Facilities Engineering Command on October 17, 1990 by the Commonwealth of Pennsylvania and the State of New Jersey concluded that closing the Philadelphia Naval Shipyard would have a much greater impact on the economy of Philadelphia and the entire tri-state region than that set forth in the FEIS since the Shipyard is the largest employer in the Philadelphia area.

174. Economic activity connected with the Philadelphia Naval Shipyard accounts for $2.1 billion in gross product in the Philadelphia metropolitan statistical area. This represent 1.45 percent of the region's total economic activity.

175. The PEL's Economic Impact Report concluded that the unemployment rate would jump 25 percent from 5.8 to 7.6 percent in the Philadelphia region, that the region would suffer a loss of $915 million in wage and salary income and retail sales would decline $382.8 million.

176. Plaintiffs do not have an adequate remedy at law.

177. There is presently an actual controversy between the parties, within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202.

COUNT I

All Plaintiffs
v.
The Secretary of Defense and
The Secretary of the Navy

178. Plaintiffs incorporate herein by reference paragraphs 1 through 177 above, as if fully set forth herein.

179. The Secretary of Defense, by and through his agent the Secretary of the Navy, adopted the list of closure and realignment recommendations made by the Navy's BSC in violation of the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. They failed to make available to the Commission, the GAO and Congress all information which was used by the Navy in making its recommendations to the Commission, in violation of Section 2903(c)(4) of the Base Closure Act;

b. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to assist the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to

prepare and transmit to Congress and the Commission a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. They failed to publish in the Federal Register and transmit to the congressional defense committees and to the Commission a summary of the selection process that resulted in the recommendation for closure for each installation, together with a justification for each recommendation, in violation of Sections 2903(c)(1) and (2) of the Base Closure Act;

e. They failed to consider all Naval installations inside the United States equally, without regard to whether the installations has been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

f. They failed to apply the eight final criteria adopted by DOD equally to all Naval installations in making their recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

g. They utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act;

h. They failed to implement record keeping and internal controls promulgated by DOD in order to insure an

accurate and fair decision-making process, in violation of the Base Closure Act; and

i. They failed to adopt a force structure plan for the Navy in compliance with Section 2903(a) of the Base Closure Act and failed to base their base closure recommendations on a force structure plan which complied with the Base Closure Act.

180. The Secretary of the Navy's and the Secretary of Defense's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the list of Naval closure and realignment proposals provided by the Secretary of the Navy and the Secretary of Defense to the Commission on April 12, 1991 was developed in a manner inconsistent with the requirements of the Base Closure Act and is therefore void;

b. Find and declare that the Secretary of the Navy's and the Secretary of Defense's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment proposals, findings and conclusions which were submitted by the Secretary of the Navy;

d. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy; and

e. Grant such other and further relief as this Court deems just and equitable.

COUNT II

All Plaintiffs
v.
The Base Closure Commission

181. Plaintiffs incorporate herein by reference paragraphs 1 through 180 above, as if fully set forth herein.

182. The Commission, in reviewing and makings its recommendations regarding the base closures submitted by the Secretary of the Navy, violated the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. It based its decision on a significant amount of substantive information supplied by the Navy which was not evaluated or even made available to the GAO or to Congress, in violation of the Base Closure Act;

b. It failed to ensure that the GAO performed its statutorily mandated duty of assisting the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. It failed to ensure that the GAO performed its

statutorily mandated duty of preparing and transmitting to Congress and the Commission a report containing a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. It decided to adopt the list of closure and realignment recommendations made by the Navy's BSC even though the GAO had found that the Navy and its BSC: (i) had not treated all bases equally, as required by the Base Closure Act; (ii) had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act; and (iii) had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements;

e. It failed to hold public hearings, in violation of Section 2903(d)(1) of the Base Closure Act, because it did not include certain pivotal information regarding the Navy's recommendations and selection process in the record until after the close of the public hearings;

f. It failed to consider all Naval installations inside the United States equally, without regard to whether the installations had been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

g. It failed to apply the eight final criteria

adopted by DOD equally to all Naval installations in making its recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

h. It utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act; and

i. It exceeded its statutory authority in making Naval base closure recommendations by considering privately-owned shipyards.

183. The Commission's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the Navy's list of closure and realignment recommendations, submitted by the Commission to the President on July 1, 1991, was adopted by the Commission in violation of the Base Closure Act and is therefore void;

b. Find and declare that the Commission's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment recommendations, findings and conclusions which were submitted by

the Secretary of the Navy and adopted by the Commission;

d. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment recommendations made by the Commission; and

e. Grant such other and further relief as this Court deems just and equitable.

COUNT III

Landry, Reil, IFPTE and MTC
v.
All Defendants

184. Plaintiffs incorporate herein by reference paragraphs 1 through 183 above, as if fully set forth herein.

185. The defendants' actions constitute a violation of the plaintiffs' rights to Due Process as guaranteed under the Fifth Amendment of the United States Constitution.

186. The Base Closure Act expressly entitles the plaintiffs to a "fair process" by which it will be decided which military installations should be closed. Additionally, the Base Closure Act entitles the plaintiffs to have the Philadelphia Naval Shipyard remai open and in operation unless and until it is determined, in accordance with the Base Closure Act, that the closure of the Shipyard is warranted.

187. The defendants' disregard of the procedures set forth in the Base Closure Act, as more fully described in Counts I and II of this Complaint, impermissibly interfered with the rights which were granted to the plaintiffs under the Base Closure Act, and constitute violations of the Due Process Clause

of the United States Constitution.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that defendants' actions in developing, adopting, and concurring in the Navy's list of closure and realignment recommendations provided by the Commission to the President on July 1, 1991 violated the plaintiffs' rights guaranteed by the Due Process Clause of the United States Constitution;

b. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment proposals, findings and conclusions which were submitted by the Secretary of the Navy and adopted by the Commission;

c. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy and the Secretary of Defense and made by the Commission; and

d. Grant such other and further relief as this Court deems just and equitable.

/s/ Bruce W. Kauffman
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DATED: July 8, 1991

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United States General Accounting Office

GAO

Report to the Congress and the Chairman, Defense Base Closure and Realignment Commission

May 1991

MILITARY BASES

Observations on the Analyses Supporting Proposed Closures and Realignments

Exhibit A

GAO/NSIAD-91-224

EXECUTIVE SUMMARY

PURPOSE

The Department of Defense (DOD) spends billions of dollars annually operating its military bases in the United States. Events taking place throughout the world and within the United States have caused a reevaluation of our military strategy, and U.S. forces are to be significantly reduced. DOD and the Congress both recognize that with a reduced force structure there is a need to close and realign military installations.

The Defense Base Closure and Realignment Act of 1990 (P.L. 101-510) established a new process for DOD base closure and realignment actions within the United States. The act established an independent Defense Base Closure and Realignment Commission and specified procedures that the President, DOD, GAO, and the Commission must follow, through 1995, in order for bases to be closed or realigned.

This report responds to the act's requirement that GAO provide the Congress and the Commission, by May 15, 1991, an analysis of the Secretary of Defense's April 12, 1991, recommendations of bases for closure and realignment and the selection process used. GAO also received numerous letters, requests, and materials in connection with this review from congressmen, state and local government officials, and private citizens; however, due to the lack of time available to respond to each of the issues raised, GAO has submitted the materials to the Commission for its use.

BACKGROUND

In 1988, the Secretary of Defense chartered the Commission on Base Realignment and Closure to review military installations within the United States for realignment and closure. Later that year the Commission recommended that 145 installations be closed or realigned. The Secretary of Defense and the Congress accepted all the Commission's recommendations.

The Secretary of Defense unilaterally recommended additional closures and realignments on January 29, 1990, as a result of the shrinking defense budget. The Congress subsequently passed the Defense Base Closure and Realignment Act of 1990, which halted any closure actions based on the January 29, 1990, list and required all installations in the United States to be compared equally against (1) criteria to be developed by DOD and (2) the future years' Force Structure Plan (fiscal years 1992 to 1997).

The final eight criteria against which the April 12, 1991, list of proposed military installation closures and realignments was to be measured included four related to the military value of the

installations and four others that addressed the number of years needed to recover the costs of closure and realignment; the economic impact on communities; the ability of both the existing and potential receiving communities' infrastructure to support forces, missions, and personnel; and the environmental impact. DOD guidance provided to the services directed that they give priority to the four criteria that addressed the military value of installations.

RESULTS IN BRIEF

GAO agrees that a reduced military force structure requires that military installations be closed and realigned. The DOD process, when properly implemented, allows for a reduction in the U.S. military base structure by emphasizing the military value of the installations. Indeed, DOD successfully nominated 43 bases for closure and 28 for realignment. This represents a significant start in the process to propose bases for closure and realignment every other year for the next 6 years.

The Army and the Air Force can document the use of DOD's Force Structure Plan and the four military value criteria in the selection process. GAO found some inconsistencies in the way they developed military value rankings for quantifiable attributes used to compare similar installations; however, GAO believes those inconsistencies were not significant. GAO considers the closure and realignment recommendations made by the Army and the Air Force to be adequately supported.

Although the Navy had insufficient documentation to support its efforts, which precluded GAO from evaluating the Navy's process, this does not mean that Navy bases should not be closed. However, since the Navy did not document the rationale for its decisions, GAO was unable to analyze its specific closure and realignment recommendations. As an alternative means of evaluating the Navy's recommendations, GAO looked at ship berthing capacity in comparison to the Force Structure Plan. After analyzing capacity data, GAO found that the Navy will have significant excess berthing capacity if only the recommended facilities are closed. GAO found that changes have occurred in the strategic homeporting concept, which when combined with excess available pier space for berthing ships, supports the recommendation for fewer Navy bases.

Although recognizing that differences exist in the composition and functions of each service's bases, GAO is concerned that DOD's guidance allowed estimating processes and cost factors used by the services to vary. GAO analyzed the sensitivity of years to recover closing costs (the projected payback period) for each closure or realignment to 50 percent and 100 percent increases in one-time costs. The analysis showed that the payback period for many of the recommendations did not substantially increase. There

are several recommended closure and realignment actions, however, where the payback is sensitive to one-time costs.

PRINCIPAL FINDINGS

The Army's Process and Recommendations

The Army established the Total Army Basing Study group in 1990 to develop a total Army basing strategy and then tasked it to recommend potential closures and realignments. The Army used a two-phased approach to evaluate potential bases for closure or realignment that was designed to treat all bases equally. In phase I, it categorized all its installations by major mission categories and evaluated their military value in quantitative terms. The Army Audit Agency was involved in the process to review and verify data collected for the quantitative analysis. In phase II, the Army used the Force Structure Plan, the phase I results, and the major commands' future plans. It also considered (1) the economic payback for possible alternatives and (2) the socioeconomic and environmental impacts on the communities involved in the final proposed closures.

Because the Army's process was well documented, which enabled GAO to evaluate the process, and the Army Audit Agency provided a check in the process, GAO believes that the resulting recommendations were well supported.

The Air Force's Process and Recommendations

The Air Force process was designed to treat all bases equally, and the selections were based on DOD's criteria and the Force Structure Plan. The process emphasized the first four criteria, which address military value. Also, the judgments of the Secretary of the Air Force and individual members of the Air Force Base Closure Executive Group, which was supported by a working group, were a part of the process.

The Air Force initially identified all Air Force-owned property within the United States and then excluded 35 active component bases from the process after doing a (1) capacity analysis and (2) mission-essential analysis. The 51 remaining active component bases were then rated on the basis of approximately 80 subelements for DOD's eight criteria. The Air Force also considered Reserve Component bases for potential closure or realignment using a slightly different process. As a result of these assessments, the Secretary of the Air Force then recommended closing 14 bases and realigning 1 base. GAO's analysis focused on the data supporting the closure or realignment decisions. Generally, GAO found that the rationale was adequately supported by documentation.

The Navy's Process and Recommendations

Due to inadequate documentation of the process used by the Navy, GAO was unable to independently evaluate the relative military value of the bases considered. Further, the Navy did not establish required internal controls to ensure the accuracy of the data used.

According to the Navy, it established a Base Structure Committee to conduct its closure process. The Committee decided that the input it received from its working group was biased in favor of keeping bases open. Thus, the Committee based its recommendations on information provided during meetings with various Navy and Marine Corps headquarters officials and representatives from various field organizations.

GAO's review of the Navy's ship berthing capacity studies found that there would be significant excess space beyond what the Committee calculated, even if the bases recommended for closure were included.

COBRA Model Used in Cost Savings Estimates

The revised Cost of Base Realignment Actions (COBRA) model addresses a full range of factors for estimating the costs, savings, and payback period related to closure and realignment actions. GAO found cases where the services used inaccurate data in the model. GAO also found that the cost estimating process ignored the cost of Medicare to the federal government. However, overall, GAO believes that the recommendations made for base closings and realignments offer an opportunity for substantial savings.

DOD Did Not Ensure Cost Comparability

Without DOD oversight of the COBRA cost estimating process, each service approached common problems in different ways. Although DOD called for submission of cost estimates expressed in fiscal year 1991 dollars, the services used budget data for other than 1991 dollars as their baselines for estimating costs and savings. Service costs and savings estimates, as well as payback calculations, did not consistently rely on fiscal year 1991 input data. These errors could reduce estimated annual savings and lengthen the payback period for several closures.

RECOMMENDATIONS

GAO recommends that the Secretary of Defense

-- require the Secretary of the Navy to submit to the Defense Base Closure and Realignment Commission specific details on the manner in which its Base Structure Committee compared bases to develop closure and realignment recommendations and

-- ensure the use of consistent procedures and practices among the services in future base closure and realignment reviews.

GAO also recommends that the Chairman, Defense Base Closure and Realignment Commission,

-- consider, in evaluating the Navy requirement for bases, the impact of excess space for ship berths on base requirements and

-- consider for all the services the effects of incorrect cost and savings estimates on all proposed base closures and realignments, using the results of GAO's sensitivity analysis.

CHAPTER 4

THE NAVY's BASE CLOSURE AND REALIGNMENT PROCESS AND ASSOCIATED RECOMMENDATIONS

We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.

Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. However, we reviewed and recalculated the Navy's ship berthing capacity analysis and found that excess capacity would remain, even with the closure of recommended bases.

THE NAVY's PROCESS AS DESCRIBED BY NAVY OFFICIALS

The Navy's Base Structure Committee, which was charged with making base closure and realignment recommendations, began its review of the Navy's basing structure in late January 1991. However, the Committee did not fully explain its process to us until May 7, 1991, when it informed us that after review of data prepared by its working group, the Base Structure Committee decided that much of the data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs. Its review, therefore, emphasized a series of briefings and meetings attended by Committee members, Navy and Marine Corps headquarters officials, and representatives of field activities. According to Committee members, decisions made during the process were sometimes made in the presence of everyone in the meetings and were clear to everyone in attendance. In other cases, the decisions were made by the Committee in closed executive sessions. Based on this review, the Committee proposed closure and realignment actions to the Secretary of the Navy on March 21, 1991.

We reviewed the charts that were used in the presentations to the Committee. These charts were generally in outline form. Our review of this information showed that presentations were organized by 23 Navy and 6 Marine Corps categories representing the various Navy functions and missions. For example, the category "naval stations" included bases that have deep water harbors and piers and serve as home bases for Navy surface ships and aircraft carriers. The category "naval air stations" included bases that have runways and hangars and serve as home bases for aircraft. Other categories included submarine bases, shipyards, aviation depots, supply centers/depots, Marine Corps bases, Marine Corps air stations, reserve centers, and RDT&E activities.

The Base Structure Committee told us that a capacity analysis was then discussed for each functional category, which compared the 1997 force structure facility requirements against the existing inventory. Critical factors were identified for each category and served as units of measure for capacity. For example, pier space was used as the primary unit of measure for naval stations, and airfield apron and hangar space were used for naval air stations.

Of the eight categories of bases the Committee retained for further closure and realignment analysis, four were retained because the Base Structure Committee identified potential excess capacity: (1) naval stations, (2) naval air stations, (3) shipyards, and (4) Marine Corps air stations. Two other categories--the training and construction battalion centers categories--were retained for further analysis, because they showed potential excess capacity in segments of the overall categories. The medical category was also retained because of the link between medical facilities and major installations that were being evaluated for closure or realignment. Finally, the RDT&E category was retained for analysis based on a mandated requirement to reduce personnel by 20 percent.

A military value rating was then assigned by the Base Structure Committee to each base in all the categories being analyzed except for the medical category.[1] Committee members told us that they rated each installation using the first four DOD selection criteria, which addressed military value, and then they independently assigned each installation an overall color-coded rating.

Bases receiving an overall green rating were excluded from further study, according to Committee members. For example, in the naval stations category the bases receiving an overall green were Coronado, Guam, Ingleside, Little Creek, Mayport, Mobile, New York (Staten Island), Norfolk, Pascagoula, Pearl Harbor, Puget Sound/Everett, and San Diego. The Committee continued to evaluate bases that were given an overall rating of yellow or red. Additional bases were excluded from further review because of their unique assets, geographic location, strategic importance, or operational value, leaving 19 bases and the RDT&E category to be evaluated for closure.

Committee members told us they then performed a "quick estimate" cost-benefit analysis of each of the remaining bases to determine the feasibility of closing them. After making its final decisions, a full COBRA analysis for those closure candidates was conducted.

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[1]Three hospitals were reviewed because three installations with hospitals were being considered for closure: Orlando Naval Training Center, Whidbey Island Naval Air Station, and Long Beach Naval Station.

Local economic and environmental impact analyses were also done for the closure candidates.

The Committee proposed closing 11 bases and 10 RDT&E facilities. It also recommended that 1 base and 16 RDT&E facilities be realigned. In addition, three hospitals were proposed to be closed as a result of the Committee's decisions.

GAO's VIEWS ON THE NAVY's PROCESS

In addition to the limitations placed on our review by the lack of adequate documentation, we identified three problems with the Navy's process. First, due to the lack of supporting documentation, we could not determine the basis for the Committee's military value ratings for Navy installations. In late March, we received selected data given to the Committee by its Working Group. This information was provided to us, but we were not advised until May 7, 1991, that the Committee had decided that much of this data were biased in favor of keeping bases open. In mid-April, the Base Structure Committee provided us with four additional volumes of material that consisted primarily of briefing charts that were basically outlines of matters and data to be discussed, without any explanation or supporting data. Also, Committee members said they did not prepare minutes of their deliberations.

Second, we identified apparent inconsistencies within the Committee's internal rating process. For example, the Committee had given identical ratings to two naval stations on each of the first four DOD selection criteria but had assigned an overall rating of green to one and yellow to the other. Similarly, the Committee had assigned identical ratings to six naval air stations for the first four DOD selection criteria. Four bases were assigned an overall rating of yellow and two an overall rating of green. These inconsistencies are significant because any base given an overall rating of green, based on the first four DOD selection criteria, was excluded from further closure or realignment consideration. In explanation, Committee members stated that "not all yellows are equal" and "not all greens are equal." Since the Committee did not document these differences, we could not determine the rationale for its final decisions.

Lastly, although required by OSD policy guidance to develop and implement an internal control plan for its base structure reviews, the Navy did not assign responsibility for developing and implementing such a plan.

GAO's VIEWS ON THE CLOSURE AND REALIGNMENT RECOMMENDATIONS

Because the Committee did not document the rationale for its decisions, we could not comment on the Committee's closure and realignment recommendations based on the process. As an

alternative, we looked at ship berthing capacity of naval stations in comparison to the Force Structure Plan because naval stations are a major category of the Navy's facilities. Also, we have conducted prior work and have ongoing work related to homeporting needs. Data obtained from the Navy's Assistant Chief of Naval Operations (Surface Warfare) showed that the most appropriate indicator for naval station requirements is ship berthing capacity. An analysis of the capacity data showed the Navy will have excess capacity remaining if only the four recommended naval stations are closed.

The Navy's capacity analysis indicates an inventory of 257.6 thousand feet of berthing (KFB) at naval stations and a requirement of 174.2 KFB, leaving an excess of 83.4 KFB. This excess represents the capacity at naval stations worldwide and also includes some inadequate berthing space. In addition, 14.5 KFB of berthing space is available at facilities other than naval stations.

When we subtracted the 75.2 KFB identified with space associated with (1) overseas facilities, (2) recommended closures, and (3) inadequate berthing facilities, 22.7 KFB of excess berthing capacity remains (see table 4.1).

(1)

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT	District EASTERN DISTRICT OF PENNSYLVANIA
	Docket No. CIVIL ACTION NO. 91-4322
SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS v. H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY (cont.)	To: (Name and Address of Defendant) The Defense Base Closure and Realignment Commission 1625 K Street, NW Suite 400 Washington, DC 20006 ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

Bruce W. Kauffman
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk MICHAEL E. KUNZ	Date
(By) Deputy Clerk Carol D. James Carol D. James	7/8/91

Document Separator

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-
H. LAWRENCE GARRETT, III, Secretary of Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
REQUEST FOR DECLARATORY RELIEF

Plaintiffs United States Senator Arlen Specter, United States Senator Harris Wofford, United States Senator Bill Bradley, United States Senator Frank R. Lautenberg, Governor Robert P. Casey, Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., United States Representatives Curt Weldon, Thomas

Foglietta, Robert Andrews and R. Lawrence Coughlin, City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council Local 687 Machinists hereby respectfully submit, by their undersigned counsel, this Memorandum of Law in Support of the Complaint for Declaratory Judgment filed contemporaneously herewith.

I. INTRODUCTION

By their Complaint, plaintiffs seek a declaratory judgment to prevent the unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the Philadelphia area's largest employer. The actions taken by defendants with regard to the Shipyard have violated the express mandates of the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§ 2901-2910 (November 5, 1990), and thus precluded an independent, equal and fair process for closing and realigning military installations. In particular, defendants have failed to follow numerous express statutorily prescribed procedural and substantive safeguards. Defendants' actions have substantially prejudiced the interests of plaintiffs herein and are subject to immediate judicial review.

II. STATEMENT OF FACTS

A full exposition of the facts underlying this matter is contained in the Complaint, which is incorporated herein by reference.

III. ARGUMENT

A. THE ACTIONS OF DEFENDANTS TAKEN PURSUANT TO THE BASE CLOSURE ACT ARE SUBJECT TO JUDICIAL REVIEW

It is axiomatic 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." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); National Treasury Employees Union v. United States Merit System, 743 F.2d 895, 906 (D.C. Cir. 1984); see also Society Hill Civic Association v. Harris, 632 F.2d 1045, 1055 (3d Cir. 1980).[1] In recognition of this principle, the Administrative Procedure Act, 5 U.S.C. §§701 et seq. ("APA"), establishes a strong presumption of reviewability. See, e.g., Kirby v. United States Department of Housing & Urban Development, 675 F.2d 60, 67 (3d Cir. 1982) ("The Supreme Court has made it clear that there is a strong presumption that agency action is reviewable.").

The Supreme Court further elaborated on this theme in Abbott Labs, holding that the APA's "generous review provisions must be given a hospitable interpretation," and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S.

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[1] There can be little doubt that the DOD, the Department of the Navy and the Commission are administrative agencies, and that the actions challenged herein constitute final agency actions. See 5 U.S.C. §551(1) (regarding the definition of "administrative agencies"); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1080-81 (3d Cir. 1989) (discussing the definition of "final agency action").

at 141 (citations omitted); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Society Hill Civic Association, 632 F.2d at 1055. Section 702 of the APA thus provides:

> A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §702. This broad grant of the right to judicial review is limited only "to the extent that statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. §701(a). Both of these exceptions are to be read exceedingly narrowly, and neither has any applicability to the instant action. See Heckler v. Chaney, 470 U.S. 821, 829 (1984); State of Florida, Dept. of Business Regulation v. United States Dept. of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

The first exception "requires explicit statutory language precluding review," which is plainly absent from the Base Closure Act. See California Human Development Corp. v. Brock, 762 F.2d 1044, 1048 n. 28 (D.C. Cir. 1985). The second exception is likewise inapplicable, as it is strictly limited to those "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Overton Park, supra, 401 U.S. at 410 (quoting legislative history of the APA); Society Hill Civic Assoc., 632 F.2d at 1045. Given the elaborate procedural and substantive safeguards established by the Base Closure Act, and the previous history which provided those safeguards, there is

manifestly "law to apply."

Moreover, the Third Circuit has held that review is always available, notwithstanding this exception, for violations of statutory procedures of the sort involved in the instant action:

> Even when agency action is determined to have been committed to agency discretion by law, that determination does not completely insulate the action from judicial review. As this court has noted, a court may in any event consider allegations "that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates constitutional, statutory or regulatory command. For the APA circumscribes judicial review only **to the extent that**...agency action is committed to agency discretion by law; it does not foreclose judicial review altogether."

Kirby, 675 F.2d at 67 (quoting Local 2855 AFGE v. United States, 602 F.2d 574, 578 (3d Cir. 1979)) (underlined emphasis added; bold emphasis in original).

Accordingly, the blatant failure of the Secretary of Defense, the Secretary of the Navy and the Commission to follow the unambiguous statutory commands of the Base Closure Act has resulted in flawed agency actions which are clearly subject to judicial review by this Court under the APA.

B. THE DEFENDANTS' BLATANT FAILURE TO FOLLOW THE UNAMBIGUOUS PROCEDURAL AND SUBSTANTIVE SAFEGUARDS OF THE BASE CLOSURE ACT MANDATES A DECLARATION THAT THE LIST OF RECOMMENDED CLOSURES AND REALIGNMENTS BE DECLARED VOID INSOFAR AS IT RELATES TO NAVAL FACILITIES

As the Complaint filed in this matter demonstrates, the Secretary of Defense, the Secretary of the Navy and the Commission have blatantly disregarded not only the procedural and substantive

safeguards governing base closures expressly mandated by the Base Closure Act, but also their own procedures and regulations promulgated pursuant to the Base Closure Act. These violations have inflicted substantial prejudice to the interests of the plaintiffs herein contrary to the express objective of Congress in adopting the Base Closure Act.

The APA specifically provides for the review of agency action to determine whether it complies with statutory mandates and statutorily prescribed procedures:

> The reviewing court shall -
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> * * *
>
> (D) without observance of procedure required by law;

5 U.S.C. §706(2)(A)(B)(D). The actions of the defendants herein were plainly "not in accordance with law" and "without observance of procedure required by law" (i.e., the Base Closure Act) and were "contrary to constitutional right" (i.e., the Due Process Clause of the Fifth Amendment).

Furthermore, it is clear that a reviewing court must carefully examine the challenged actions "to determine independently that the

[agencies have] not acted unfairly or in disregard of the statutorily prescribed procedures...." Natural Resources Defense Council v. Environmental Protection Agency, 790 F.2d 289, 297 (3d. Cir. 1986) (emphasis added). Equally importantly, this Court must invalidate agency actions which "are inconsistent with a statutory mandate or that frustrate a statutory policy." Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131, 1134 (3d Cir. 1988), cert. denied, 488 U.S. 881 (1988). In this regard, the Court of Appeals for the District of Columbia has recognized the authority of a reviewing court to closely scrutinize agency action which is alleged to violate statutorily prescribed procedures:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulation before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures. [citation omitted] Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historical reliance on the courts as the exponents of procedural fairness.

Weyerhouser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis added); see also Natural Resource Defense Council, Inc. v. S.E.C., 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("Our review of an agency's procedural compliance with statutory norms is an exacting one."). Given that the process which resulted in the defendants' recommendation to close the Philadelphia Naval Shipyard could hardly have been more unfair or have departed by a wider margin from the statutorily prescribed procedures, it is manifestly within

the competence of this Court to review that process and declare its results void insofar as Navy bases are concerned.

C. THE PROCESS BY WHICH THE COMMISSION ARRIVED AT ITS LIST OF RECOMMENDED CLOSURES OF NAVAL BASES WAS RIDDLED WITH PROCEDURAL IRREGULARITIES AND SUBSTANTIVE VIOLATIONS OF THE BASE CLOSURE ACT

1. The Navy's Failure to Provide The Data Necessary For The GAO To Perform Its Important Statutory Duty Under The Base Closure Act Was A Violation Of The Act.

The Base Closure Act specifically provides that the GAO is to play a critical role in ensuring the integrity and fairness of the Commission's process. Thus, Section 2903(d)(5) requires the Comptroller General to: (1) assist the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense; and (2) transmit to the Congress and the Commission "a report containing a detailed analysis of the Secretary's recommendations and selection process."

In order to permit the GAO to perform its statutorily mandated function, the Base Closure Act specifically imposes upon the Secretary of Defense the following duty:

> The Secretary shall make available to the Commission and the Comptroller General of the United States <u>all information</u> used by the Department in making its recommendations to the Commission for closures and realignments.

10 U.S.C. §2903(c)(4) (emphasis supplied). The Secretary of Defense failed to provide this information to the GAO.

As a direct result of the Secretary's violation of the Base Closure Act, the GAO was disabled from <u>both</u> assisting the Commission in its review and analysis of the Navy base closure

recommendations and providing the "detailed analysis of the Secretary's recommendations and selection process" as required by the Base Closure Act. Thus, on May 16, 1991, the GAO published its report concluding that the Navy's documentation was patently insufficient:

> We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.
>
> Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures.

See GAO Report to the Commission dated May 16, 1991 (the "GAO Report") at p.46, a true and correct copy of which is attached to the Complaint as Exhibit A.

In addition to the lack of adequate documentation, the GAO report identified three deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support the basis for the Navy Base Structure Committee's ("BSC") military value ratings of Navy installations; (2) the implementation and use of an unclear, unequal and inconsistent color coding system to rate military bases;[2] and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used

[2] This procedural irregularity is discussed, infra, at 14-17.

by the Navy in its base structure reviews, as required by the Office of the Secretary of Defense policy guidelines.[3] [GAO Report at p.48]

The GAO also identified inconsistencies within the Committee's internal rating process, including the fact that the BSC had given identical ratings to two naval stations -- (Mare Island and the Philadelphia Naval Shipyard) -- on each of the first four military selection criteria but had assigned an overall higher rating of green to Mare Island and an overall lower rating of yellow to the Philadelphia Naval Shipyard. Similarly, the BSC had assigned identical ratings to six naval stations but did not treat them equally.[4] The Philadelphia Naval Shipyard was not excluded from the base closure process by the BSC, although the five other naval stations which received identical or worse ratings were excluded from further review.

The GAO Report concluded that since the BSC "did not document these differences," the GAO "could not determine the rationale for its final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." The Secretary thus plainly failed to meet the express requirements of the Base Closure Act, thereby disabling the GAO from submitting a report containing a detailed analysis of the Secretary's recommendations and selection process.

Indeed, on May 7, 1991, shortly before the GAO disseminated

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[3] This procedural irregularity is discussed, <u>infra</u>, at 17-19.

[4] <u>See</u>, <u>infra</u>, at 14-17.

its report, the BSC admitted that "much of the [Navy's] data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs."[5] [GAO Report at p. 46] As a result, the BSC admitted that it had reached its decisions through a series of informal meetings, many of which were closed executive sessions. [GAO Report at p. 46] The Navy's admittedly ad hoc approach to base closure recommendations flies in the face of the procedural and substantive safeguards and requirements established by the Base Closure Act.

This egregious violation of the Base Closure Act clearly requires that this Court declare void that portion of the Commission's recommendations for base closures and realignments which relate to Navy facilities. See, e.g., Kirby, 675 F.2d at 68.

2. The Commission's Failure To Provide Meaningful Public Hearings Is A Violation Of The Base Closure Act.

In accordance with the Congressional objective of ensuring the procedural integrity of the base closure and realignment process, the Base Closure Act expressly provides that the Commission shall conduct public hearings on the Secretary's recommendations. 10 U.S.C. §2904(d). The Base Closure Act also requires the Commission to open its records and deliberations to public scrutiny. 10 U.S.C. § 2902(e)(2)(A)(B).

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[5] This admission is especially significant since the BSC's process involved excluding 7 of 8 shipyards from the base closure process, thereby leaving only the Philadelphia Naval Shipyard for possible closure. See, infra, at 15-17.

Thus, the Commission expressly invited and received public testimony in Washington, D.C. from members of Congress. By letter dated April 23, 1991, the Commission established procedures to govern Congressional testimony at the hearings:

> All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation."

In accordance with the Base Closure Act, the Commission scheduled and held 28 hearings across the United States. Congressional testimony on the Philadelphia Naval Shipyard was scheduled in Washington, D.C. for May 22, 1991. The regional hearing regarding the Philadelphia Naval Shipyard was scheduled for May 24, 1991. In violation of the Base Closure Act and other applicable law, additional documentation was thereafter provided to the Commission <u>that was not subject to GAO analysis or public comment and debate.</u>

In blatant violation of the Base Closure Act, closed meetings with the Navy's BSC were held by the Commission on May 24, 1991 <u>after</u> the public hearings were completed. Moreover, on May 24, 1991 -- <u>after</u> the close of the public hearings -- the Commission requested that the Navy's BSC provide it with additional

information to "try to resolve missing gaps in the information provided." Thereafter, the Navy's BSC provided additional documents and information to the Commission without affording interested members of Congress or the public a meaningful opportunity to comment on such information at a public hearing.

Under these circumstances, the requirement of public hearings in the Base Closure Act has plainly been violated. See, e.g., National Wildlife Federation v. Marsh, 568 F.Supp. 985, 994 (D.D.C. 1983); Joseph v. Adams, 467 F. Supp. 141, 160-61 (E.D. Mich. 1978); see also Monongahela Power Company v. Marsh, 1988 WL 84262 (D.D.C. 1988). The facts and holding of National Wildlife Federation are particularly relevant to the instant case and compel the conclusion that the list of recommended closures and realignments of Navy bases should be declared void. The plaintiffs in National Wildlife Federation brought suit against the Secretary of the Army seeking a declaration that a dredging and construction permit issued by the Army was invalid. The plaintiff asserted that the permit was invalid because the Army relied upon a staff report which was not made a part of the record until after the public hearings were held. According to the plaintiff, the consideration of this staff evaluation only after the close of the period for public comment violated its right to meaningfully participate in the statutorily required public hearings.

The Court held that the inclusion of important data in the record after the conclusion of public hearings had in fact violated the relevant statute, stating in terms equally applicable here:

> [T]he opportunity to comment and the right to a hearing both necessarily require that the Army present for public scrutiny the rationale and pivotal data underlying its proposed action before the close of the comment and hearing period. Unfortunately, that requirement was not satisfied in the administrative proceeding here. After a careful examination of the administrative record, the Court finds that the inclusion of the Staff Evaluation in the administrative record after the close of the comment and hearing period had the effect of shielding the essential data and the agency's rationale from public hearing and comment.

National Wildlife Federation, 568 F. Supp. at 994 (emphasis in original). The Court concluded in this same vein: "Only when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion." 568 F. Supp. at 993 (quoting U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 540 (D.C. Cir. 1978)); see also Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

Accordingly, the Navy's failure to disclose important and material information and documentation before conclusion of the public hearings required by the Base Closure Act is a clear violation of the Act.

3. The Failure Of The Secretary Of Defense To Consider All Naval Installations Equally Was A Violation Of The Base Closure Act.

Section 2903(c)(3) of the Base Closure Act expressly provides that "the Secretary shall consider all military installations inside the United States equally without regard to whether the

installation has been previously considered or proposed for closure or realignment by the Department." The actions of the Secretary of the Navy with respect to the Philadelphia Naval Shipyard were clearly a violation of both the letter and spirit of this provision of the Base Closure Act.

The Complaint discloses that, in December 1990, the Secretary of the Navy established the BSC to conduct a base structure review and to determine the Navy's closure and realignment candidates. In accordance with the Base Closure Act's mandate, the BSC was charged with reviewing all installations inside the United States equally, "without regard to whether the installation was previously considered for closure or realignment."

The BSC initially categorized all facilities according to function -- e.g., naval air stations, Naval Shipyards -- to determine which categories possessed significant excess capacity. The Navy then applied the eight selection criteria in two phases by assigning color codes to military bases in categories with excess capacity. Phase I of the BSC's analysis required a consideration of the first four military criteria. After Phase I was completed, the Navy excluded those bases which it determined "were distinguished by virtue of their operational value," i.e. those that it gave an overall "green" rating under the first four military criteria.

Under the Navy's rating system, a "green" rating received one point, a "yellow" rating received two points, and a "red" rating (favoring closure) received three points. The Navy's color-

coded/point approach resulted in the following total point allocation to each of the eight Naval Shipyards in the United States:

Shipyard	Points
Puget Sound	4
Norfolk	5
Philadelphia	6
Charleston	6
Mare Island	6
Pearl Harbour	6
Portsmouth	6
Long Beach	7

Thus, Puget Sound received a "green" rating for each of the first four military criteria and was therefore excluded from further consideration of closure.

In accordance with the BSC base closure criteria, the seven remaining Shipyards should have been evaluated under the remaining four non-military criteria set forth in Phase II. Using the BSC's own rating system, the Philadelphia Naval Shipyard should have been treated the same as Charleston, Mare Island, Pearl Harbor and Portsmouth and better than Long Beach. However, the Navy ignored its own rating system and blatantly disregarded the statutory mandate that all bases be considered "equally." Thus, the Navy -- for no apparent reason and without any supporting documentation or analysis -- gave overall "green" ratings to three other shipyards: Mare Island, which just like the Philadelphia Naval Shipyard, received two "yellow" and two green ratings; Norfolk, which received three "green" and one "yellow" ratings; and Pearl Harbor, which received one "red" and three "green" ratings.

The BSC then arbitrarily, unilaterally and without reference

to any one of the eight selection criteria, excluded all of the six nuclear-capable shipyards from any further review without providing any documentation or analysis to justify a drydock need for nuclear ships as compared with conventional carriers. This process left only Long Beach and Philadelphia for further review.

To circumvent the fact that Long Beach scored poorly in three of the four military criteria and overall had the worst rating of all eight Naval Shipyards, the BSC then excluded Long Beach from further consideration, contending that one of the drydocks at that shipyard could be used "to handle West Coast aircraft carriers (including CVN emergency work)." Navy Report, Tab C, p. 10. By this egregious process of elimination, the BSC was left with only one yard to consider for closure under the remaining four criteria, the Philadelphia Naval Shipyard. The BSC then performed a perfunctory application of the second four non-military criteria with respect to the Philadelphia Naval Shipyard to ensure its closure.

Accordingly, the Navy, through this procedural parody, made a mockery of both the letter and spirit of the Base Closure Act.

4. The Failure Of The Navy To Comply With The Department Of Defense Regulations With Respect To The Navy's Base Closure Actions Requires Invalidation Of The Resulting List Of Naval Closures.

An agency's failure to abide by its own regulations is alone grounds for invalidating agency action. See Boddie v. Department of Navy, 827 F.2d 1578, 1580 (Fed. Cir. 1987); Kelley v. Calio, 831 F.2d 190, 191-92 ("It is the duty of a reviewing court to ensure that an agency follows its own procedural rules.");

Wojciechowicz v. Department of Army, 763 F.2d 149, 153 (3d Cir. 1985). In this case, the failure of the Navy to abide by the requirements promulgated by the Department of Defense in furtherance of the Base Closure Act mandates invalidation of the base closure list compiled as a result of the Navy's failure.

On December 10, 1990, the DOD issued "policy guidance" and "record keeping" requirements to the Military Departments as follows:

> The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and
>
> The studies must consider all military installations inside the United States ... on an equal footing, ...
>
> * * *
>
> DOD components shall keep:
>
> - Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
>
> - Data, information and analysis considered in making base closure and realignment selections; and
>
> - Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act.

The DOD subsequently issued "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

> - Uniform guidance defining data requirements and sources for each category of base,
>
> - Systems for verifying accuracy of data,

- Documentation justifying any changes made to data submissions, and

- Procedures to check the accuracy of the analysis made from the data provided.[6]

The February 13, 1991 DOD Memorandum also provided the following procedures for evaluating closures and realignments: (a) if there was excess capacity and a base was recommended for closure or realignment, the Department's analysis must have considered all military bases within that category and any cross-categories; and (b) military bases could only be excluded from further review if they were militarily/geographically unique or mission essential such that no other base could substitute for them.

However, as found by the GAO in its May 16, 1991 Report, the Navy failed completely to meet any of these requirements in its procedures for base closures and realignments. See, supra, at 8-11. Thus, the GAO concluded in its Report that it "could not determine the rationale for [the BSC's] final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process."

Accordingly, the BSC and the Navy violated the DOD regulations promulgated in furtherance of the Base Closure Act, thereby invalidating the BSC's recommendations of base closures.

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[6] Although not published in the Federal Register, these requirements were the equivalent of regulations for purposes of judicial review under the APA. See Lucas v. Hodges, 730 F.2d 1493, 1504 n. 20 (D.C. Cir. 1984), vacated on other grounds, 738 F.2d 1392 (1984)(Agencies are "bound by their own substantive and procedural rules and policies, whether or not they are published in the Federal Register, if they are intended as mandatory.").

D. PLAINTIFFS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT HAVE BEEN VIOLATED BY DEFENDANTS' VIOLATIONS OF THE BASE CLOSURE ACT

The Due Process Clause protects individuals' property interests from interference by the federal government. Property interests are created by state and federal statutory schemes and customs which create a "legitimate claim of entitlement" to a specific benefit. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A claim of unconstitutional deprivation under the Fifth Amendment has three essential elements: 1) the claimant must be deprived of a protectable interest; 2) that deprivation must be due to some governmental action; and 3) the deprivation must be without due process. Cospito v. Heckler, 742 F.2d 72, 80 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985).

The plaintiff unions and their members clearly have a property interest in the continued operation of the Philadelphia Naval Shipyard unless and until it is determined pursuant to a non-arbitrary application of the criteria established under the Base Closure Act that the Shipyard should be closed. See, e.g., Hixon v. Durbin, 560 F. Supp. 654 (E.D. Pa. 1983) (property interest in having proposed, executory contracts reviewed in accordance with state law and approved if they meet the requirement of state law); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) (property interest is the right of lowest responsible bidder in full compliance with the specification to be awarded the contract). For example, the Third Circuit in Winsett v. McGinnes, 617 F.2d 996, 1006-08 (3d Cir. 1980), cert. denied,

449 U.S. 1093 (1981) found that the plaintiff had a protected interest in the exercise of a government agency's discretion "within established parameters." Similarly, in this matter the discretion of the Commission, the Secretary the Navy and the Secretary of Defense must all be exercised within the "established parameters" and procedural mandates established by the Base Closure Act.

Plaintiffs' right to a fair, open and procedurally correct application of the Base Closure Act is particularly evident in light of the history, Congressional intent and significant procedural safeguards of the Base Closure Act. Thus, the Base Closure Act was passed by Congress to address the criticisms levelled at the 1988 base closure act. Complaint ¶ 45. To this end, Section 2901(b) expressly states that the "purpose" of the Act was "to provide a fair process that will result in the timely closure and realignment of military installations." (emphasis supplied). As demonstrated previously, the Act also contained numerous substantive and procedural safeguards to ensure that persons in the position of plaintiff unions and their members were not the victims of the arbitrary, parochial application of government power.

Having determined that plaintiffs have a protected property interest, the only further inquiry the Court must undertake is to determine what process is due. Mathews v. Eldridge, 424 U.S. 319, 334 (1975). In the instant matter it is clear that the procedures mandated by the Base Closure Act provided an appropriate and

necessary degree of protection of plaintiffs' property interest. Thus, the blatant violation of the procedures mandated by the Base Closure Act are a violation of the Fifth Amendment Due Process rights of plaintiff unions and their members.

IV. CONCLUSION

For the reasons stated in this Memorandum and the Complaint submitted herewith, plaintiffs respectfully request declaratory relief to prevent irreparable harm to them and the general public.

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△ ALSO MEMBER OF DC BAR
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◊◊ ALSO MEMBER OF DE BAR
○ ALSO MEMBER OF NJ BAR
P ALSO MEMBER OF PATENT BAR

July 9, 1991

The Honorable Ronald L. Buckwalter
5918 U.S. Courthouse
601 Market Street
Philadelphia, PA 19107

Re: Sen. Arlen Specter, et. al. v. H. Lawrence Garret, III, Secretary of the Navy, et al.
C.A. No. 91-CV-4322

Dear Judge Buckwalter:

I am enclosing two copies of Plaintiff's Motion for Expedited Discovery and Hearing in the above-referenced action, and papers in support thereof, the originals of which were filed today with the Clerk of the Court. I am also enclosing two copies of the Complaint, and brief in support thereof, that were filed with the Clerk of the Court yesterday.

Respectfully submitted,

Bruce W. Kauffman

BWK:bd
Enclosure

cc: Michael M. Baylson, U.S. Attorney General
for the Eastern District of Pennsylvania
(hand delivery)

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July 9, 1991

Mr. Michael E. Kunz
Clerk of the Court
The United States District Court
for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19107

Re: Sen. Arlen Specter, et. al. v. H. Lawrence Garret, III, Secretary of the Navy, et al.
C.A. No. 91-CV-4322

Dear Mr. Kunz:

Enclosed please find an original and one copy of Plaintiff's Motion for Expedited Discovery and Hearing in the above-referenced action, and papers in support thereof. Please file the original and return a time-stamped copy in the enclosed self-addressed stamped envelope.

Respectfully submitted,

Camille J. Wolf

CJW:bd
Enclosure
cc: Bruce W. Kauffman, Esquire
Sen. Arlen Specter
Michael M. Baylson, U.S. Attorney General
for the Eastern District of Pennsylvania
(hand delivery)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-CV- 4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

O R D E R

AND NOW, this day of , 1991, upon consideration of Plaintiffs' Motion for Expedited Discovery and Hearing, IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED, and it is further ORDERED that:

1. Defendants are ordered to respond to Plaintiffs' Request For Production of Documents by _____, 1991.

2. Defendants and their agents are required to appear for their depositions on the dates and times set forth in the attached Plaintiffs' Notice of Depositions.

3. Additional depositions may be scheduled upon 48 hours notice to the opposing parties.

4. A hearing on Plaintiff's Request for Declaratory Judgment shall take place on _____, 1991.

BY THE COURT:

_____
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

MOTION FOR EXPEDITED DISCOVERY AND HEARING

Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas Foglietta, Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of

Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists by their counsel, respectfully request this Court to enter an Order granting their Motion for Expedited Discovery and Hearing, and in support of this Motion allege as follows:

1. On July 8, 1991, plaintiffs filed their Complaint for Declaratory Relief. Plaintiffs seek immediate judicial relief to prevent the imminent and unlawful closing of the Philadelphia Naval Shipyard, the largest employer in the Philadelphia area. Plaintiffs also seek a declaration that defendants' conduct has deprived plaintiffs of their constitutionally protected due process rights. As extensively set forth in the Complaint, the actions taken by the government officials responsible for ensuring an independent, equal, lawful and fair process for closing and realigning military installations under the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990), have violated the Base Closure Act and the procedures and regulations promulgated thereunder in at least 18 separate and material respects.

2. Expedited discovery is necessary to allow plaintiffs to promptly discover the details and extent of defendants' unlawful conduct. Plaintiffs need this information to adequately prepare for a promptly scheduled hearing, and for any testimony and/or alleged evidence which may be presented by defendants at such

hearing. Unless this Motion is granted, defendants may also secret or destroy evidence relating to their violations of the Base Closure Act.

3. Plaintiffs therefore seek to have defendants respond by July ___, 1991 to Plaintiffs' Request for Production of Documents. Plaintiffs further seek to depose defendants and their agents on the dates set forth in the attached Notice of Depositions, with additional depositions to be scheduled upon 48 hours notice to the opposing parties.

WHEREFORE, plaintiffs respectfully request that this Court grant this Motion and issue the attached Order granting expedited discovery and scheduling a prompt hearing on the matters set forth in the Complaint.

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN
DAVID H. PITTINSKY
CAMILLE J. WOLF
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(215)875-7000

AND

SEN. ARLEN SPECTER
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

Attorneys for Plaintiffs

DATED: July 9, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas Foglietta,

Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists (hereinafter individually and collectively "Plaintiffs"), by their counsel, respectfully submit this Memorandum of Law in support of their Motion for Expedited Discovery.

I. PRELIMINARY STATEMENT

Plaintiffs seek a declaratory judgment to prevent the imminent and unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the largest employer in the Philadelphia area. As extensively set forth in the Complaint, the actions taken by the government officials responsible for ensuring an independent, equal, lawful and fair process for closing and realigning military installations under the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990), have violated the Base Closure Act and the procedures and regulations promulgated thereunder in at least 18 separate and material respects.

The plaintiffs therefore seek immediate judicial relief declaring that the Secretary of Defense, the Secretary of Navy and the Base Closure and Realignment Commission's actions are fundamentally inconsistent with the Base Closure Act and other applicable law and are therefore void.

Given the immediacy of the nature of the relief

requested by the plaintiffs, expedited discovery is necessary to protect plaintiffs from immediate harm and to protect the public from the unlawful conduct of the defendants.

II. DISCUSSION

It is well established that "expedited discovery should be granted when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time." Fimab-Finanziaria Maglificio, Etc. v. Kitchen, 548 F. Supp. 248, 250 (S.D. Fla. 1982). See also 4A Moore's Federal Practice ¶ 30.55[2] (2d ed. 1980); 8 C.Wright and A. Miller, Federal Practice and Procedure §2104, at 384 (1970).[1] In this Circuit, expedited discovery is routinely granted in actions seeking preliminary injunctive relief to avoid imminent irreparable harm or injury. See, e.g., Polaroid Corp. v. Disney, 862 F.2d 987, 991 (3d Cir. 1988); Washington Steel Corp. v. TW Corp., 602 F.2d 594, 597 (3d Cir. 1979); Ronson Corporation v. Liquifin Aktiengesellschaft, 483 F.2d 846, 484 (3d Cir. 1973); Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 692 (E.D. Pa. 1986); In re: American Sterilizer Shareholder Litigation, 1985 WL 4027 (E.D. Pa. 1985) (WESTLAW DCT Library).

Plaintiffs seek to prevent the unlawful closing of the Philadelphia Naval Shipyard. As extensively set forth in the

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[1] Expedited discovery is fully authorized by the Federal Rules of Civil Procedure. Rule 30(a) requires that a party obtain leave of court "to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant." Fed.R.Civ.P. 30(a). See also 34(b) (court may shorten time period for defendants's responses to documents production).

Complaint, the Secretary of Defense, the Secretary of the Navy and the Defense Base Closure and Realignment Commission ("Commission") have blatantly disregarded not only the procedural and substantive safeguards governing base closures expressly mandated by the Base Closure Act, but also their own procedures and regulations promulgated pursuant to the Base Closure Act. These violations have inflicted substantial prejudice to the interests of the plaintiffs herein contrary to the express objective of Congress in adopting the Base Closure Act: ensuring an independent, equal and fair process for closing and realigning military installations. As such, the immediate harm to the plaintiffs and the public is manifest.

Plaintiffs' request for expedited discovery seeks to uncover the nature and extent of the unlawful conduct of the defendants during the base closure and realignment process. Expedited discovery will also serve to prepare the plaintiffs for any testimony and/or evidence that may be presented by defendants at a declaratory judgment hearing.

III. CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant Plaintiffs' Motion for Expedited Discovery.

Respectfully submitted,

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN
DAVID H. PITTINSKY
CAMILLE J. WOLF
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Attorneys for Plaintiffs

DATED: July 9, 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

PLAINTIFFS' FIRST REQUEST FOR THE
PRODUCTION OF DOCUMENTS FOR INSPECTION AND REPRODUCTION

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas

Foglietta, Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists, by their counsel, hereby requests that, on or before July ____, 1991, defendants H. Lawrence Garrett, III, Secretary of Navy, Richard Cheney, Secretary of Defense, the Defense Base Closure Commission and its members James A. Courter, William L. Ball, III, Howard H. Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith, II, and Robert D. Stuart, Jr. produce for inspection and copying at the offices of plaintiffs' counsel, Dilworth, Paxson, Kalish and Kauffman, or at such other place as may be agreed upon by counsel for the parties, in accordance with the definitions and instructions set forth herein, the documents described below.

I. DEFINITIONS

4. The "Commission" shall mean the Defense Base Closure and Realignment Commission and its members (including James A. Courter, William L. Ball, III, Howard H. Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith, II, Robert D. Stuart, Jr.), staff, employees, agents, attorneys, representatives or any other person acting either directly or indirectly on their behalf for any purpose.

5. The "Navy" shall mean its officers, staff, members of the Naval forces, civilian employees, agents, attorneys, representatives or any other person acting either directly or indirectly on its behalf for any purpose.

6. The "GAO" shall mean the United States General Accounting Office, its staff, employees, agents, attorneys, representatives or any other person acting, either directly or indirectly, on its behalf for any purpose.

7. "Person", "persons", "individual", "individuals" or "anyone" shall mean any natural individual or any corporation, firm, partnership, proprietorship, association, business, governmental entity, board, authority, commission, agency, business organization or other legal entity, and any of their respective officers, directors, partners, employees, agents, attorneys, representatives or any other person acting either directly or indirectly, on their behalf for any purpose.

8. "Document", "documents" or words of similar import shall mean and include without limitation unless otherwise indicated and regardless of origin, source, or location, any original written, recorded, transcribed, taped, filmed, photographed or graphic material, and any and all copies thereof which are different in any way from the original whether by interlineation, receipt stamp, notation, indication of copies sent, or otherwise, including, but not limited to, papers, books, records, letters, photographs, tangible things, correspondence, communications, telegrams, cables, telex messages, telecopy messages, fax materials, memoranda, tape recordings, recordings of telephone or other conversations, interviews, conferences or other meetings, minutes, minutes of meetings, affidavits, statements, summaries, opinions, reports, studies, analyses, evaluations, contracts,

agreements, jottings, notes, agendas, intra-office communications, bulletins, manuals, handbooks, closing binders, catalogues, brochures, pamphlets, photographs, publications, newspapers or other periodical articles, schedules, charts, diagrams, plans, client lists, journals, statistical records, calendars, including desk calendars, appointment books, notebooks, diaries, lists, financial statements, tax returns, checks, check stubs, tabulations, sound recordings, computer software, computer print-outs, data processing program input and output, microfilm, books of account, records and invoices reflecting business operations, all records kept by electronic, photographic or mechanical means, any notes or drafts relating to the foregoing, and all things similar to any of the foregoing however denominated, which are in defendants' possession, custody or control, or in the possession, custody or control of defendants' present or former agents, representatives, or attorneys, or any and all persons acting on defendants' behalf, including documents at any time in the possession or custody or subject to the control of such individuals or entities, or known by defendants to exist or have existed.

Without limitation of the term "control" as used in the preceding sentence, a document is deemed to be in your control if you have the right to secure the document or a copy thereof from another person or public or private entity having actual possession thereof.

9. "Communication" or "communicate" shall mean every manner

or means of disclosure, transfer, or exchange of information whether person-to-person, in a group, by telephone, by letter or telex, or by any other process, electric, electronic or otherwise, to or by any person or entity. All communications in writing shall include, without limitation, printed, typed, handwritten or other readable Documents as defined herein.

10. "Or" and "and" means and/or.

11. "Relating" or "Relate" means to refer to, make a statement about, discuss, describe, reflect, identify with, consist of, or in any way pertain in whole or in part to the subject.

12. The singular includes the plural and vice versa.

13. The past includes the present tense where the meaning is not distorted by a change in time.

II. INSTRUCTIONS

A. This Document Request includes any and all Documents in the personal files of your present and former officers, directors, agents, representatives, employees, attorneys and accountants.

B. If any documents are withheld under a claim of privilege or because such document is classified as secret, furnish a list (signed by the person supervising the response to this Request) identifying each such document by date, sender, recipient, persons to whom copies where furnished and their job titles, number of pages, subject matter and the specific basis on which any privilege or classification is asserted.

C. The Documents produced are to be identified separately for each Request.

D. If a Document is not produced on the ground that such Document is no longer in defendants' possession, custody or control, the response shall identify each such Document individually and specify the author of the Document, the date of the Document, the sender and recipient of the Document, persons to whom copies were furnished and their job titles, number of pages, subject matter, the present location and custodian of the Document, if known, or the date upon which said Document was destroyed, lost or otherwise disposed of, if known.

E. The relevant time period for these requests, unless otherwise indicated, is January 1, 1989 to the present.

III. DOCUMENT REQUEST

1. All Documents relating to, referring to, evidencing or concerning the allegations set forth in the Complaint.

2. All Documents that you intend to rely on in defending against or refuting the allegations set forth in the Complaint.

3. All Documents prepared or signed by, transmitted to, or in the possession of the GAO relating to, referring to, evidencing or concerning the base closure or realignment recommendations by the Navy or the U.S. Army Corps of Engineers and the GAO's review of the Navy and the U.S. Army Corps of Engineers' process relating to base closures or realignments.

4. All Documents relating to, referring to, evidencing or concerning internal communications, meetings or conferences by the Navy regarding the base closure and realignment process or recommendations.

5. All Documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Commission and the Navy regarding the base closure and realignment process or recommendations.

6. All Documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Navy and the Department of Defense regarding the base closure and realignment process or recommendations.

7. All Documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Commission and the GAO regarding the base closure and realignment process or recommendations.

8. All Documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Navy and the GAO regarding the base closure and realignment process or recommendations.

9. All Documents submitted by the Navy to the Commission and/or the GAO relating to, referring to, evidencing or concerning base closures and realignments.

10. All Documents relating to, referring to, evidencing or concerning NAVSEA pertaining to base closure or realignment and future planning for industrial facilities and

shipyards.

11. All Documents relating to, referring to, evidencing or concerning (i) base closure or realignment, and (ii) future planning for industrial facilities and shipyards that were signed or prepared by, received from, reviewed by or otherwise within the possession of: Admiral F.B. Kelso, Admiral Trost, Admiral Loftus, Admiral Nyquist, Sean O'Keefe (Department of Defense Comptroller), Admiral Bruce DeMars, Jerry Cann (Assistant Secretary of the Navy for Research, Development and Acquisition), Admiral Peter Heckman, Admiral J. S. Claman, Admiral Patrick Drennon, Jackie Schafer (Assistant Secretary of the Navy for Installations and Development), Admiral David R. Oliver, Admiral Trost, Admiral F.B. Kelso, Donald Howard (Under Secretary of the Navy), Captain Thomas Williams, Charles Nemfakos, Admiral J. R. Lang, Cdr. John Hart, Capt. Jerry Vernon and Hon. Richard Cheney.

12. All Documents relating to, referring to, evidencing or concerning base closures or realignments for all Navy facilities and the U.S. Army Corps of Engineers that were signed, received, prepared, reviewed by or otherwise within the possession of the Base Closure Commission and/or its staff.

13. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning the Navy's implementation of the force structure plan.

14. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning the "consistency" of

the Navy's base closure recommendations with the force structure plan.

15. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning the Navy's future reconstitution of shipyard facilities.

16. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning shipyards and base closures and/or realignments.

17. All Documents relating to, referring to, evidencing or concerning current or future maintenance, overhauls, repairs, retirements, or additions to the Navy's nuclear fleet.

18. All Documents relating to, referring to, evidencing or concerning current or future maintenance, overhauls, repairs, retirements, or additions to the Navy's non-nuclear fleet.

19. All Documents relating to, referring to, evidencing or concerning the scheduling of ships or vessels for current or future maintenance, overhaul, repair or modernization, including but not limited to all public and private bids (and internal memoranda on bids), all documents that relate to why ships are scheduled in certain shipyards, how decisions are made for scheduling, all guidelines, criteria and directives regarding the scheduling of ships and vessels, all information relating to public vs. private competition/bids, and all requests for proposal regarding bids or scheduling of ships

and vessels.

20. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning Naval operational requirements, including but not limited to future deployment ratios, for future Naval forces and their consistency with base closure recommendations.

21. All Documents relating to, referring to, evidencing or concerning the Navy's policies, practices, treatment and handling of nuclear waste from aircraft carriers and other nuclear vessels, including sites for planned final disposal.

22. All Documents prepared or signed by, transmitted to, or in the possession of the Nuclear Propulsion Directorate relating to, referring to, evidencing or concerning current and future planning of work on nuclear vessels availabilities at Navy installations.

23. All documents prepared or signed by, transmitted to, or in the possession of NAVSEA relating to, referring to, evidencing or concerning current and future maintenance, repairs or modernization by shipyards on advanced propulsion systems.

24. All Documents prepared or signed by, transmitted to, or in the possession of the NAVSEA Industrial Facility Management Directorate, or any other NAVSEA directorate, relating to, referring to, evidencing or concerning the current and future plans for nuclear waste.

25. All Documents prepared or signed by, transmitted

to, or in the possession of Jackie Schafer, Assistant Secretary of the Navy for Installations and Development, relating to, referring to, evidencing or concerning the current and future plans for nuclear waste.

26. All Navy and other military health studies that explore, research or pertain to health risks for Navy and civilian personnel working on Naval nuclear vessels or at Navy Nuclear Shipyards.

27. All Documents relating to, referring to, evidencing or concerning Navy requirements for proximity of navy and civilian living quarters to nuclear facilities, facilities or ships at Navy shipyards.

28. All Documents relating to, referring to, evidencing or concerning health risks associated with the overhaul of the U.S.S. Enterprise.

29. All Environmental Impact Statements that relate to, refer to, evidence or concern shipyards.

30. All Documents, not otherwise produced, relating to, referring to, evidencing or concerning environmental clean up costs at the Philadelphia Naval Shipyard and the Navy's plan to clean up such yard.

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN
DAVID H. PITTINSKY
CAMILLE J. WOLF
PATRICK T. DAVISH
JOHN V. O'HARA
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(215)875-7000
AND
SEN. ARLEN SPECTER
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

DATED: July 8, 1991

Attorneys for Plaintiffs

ATKINS STATIONERY, PHILA., PA. (215) 627-1880

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Fed. R.Civ.P. 30, plaintiffs Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas Foglietta,

Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists, by their counsel, will take the deposition of the following defendants and their agents on the dates and times set forth below, as agreed upon by counsel for the plaintiffs and defendants at the offices of Dilworth, Paxson, Kalish & Kauffman, 2600 The Fidelity Building, 123 South Broad Street, Philadelphia, PA 19109, or at such other place as may be agreed upon between counsel, before an officer authorized by law to administer oaths. These depositions will commence at 10 A.M. and will continue from day to day until completed. You are invited to attend.

Deponent	Date
Admiral Peter M. Heckman	July __, 1991
Admiral J. S. Claman Commander, Naval Sea Systems Command	July __, 1991
Admiral Patrick Drennon Rear Admiral, USN	July __, 1991
Jackie Schafer, Assistant Secretary of the Navy for Installations and Development	July __, 1991
Admiral David R. Oliver, Rear Admiral, USN	July __, 1991
Admiral Trost Former Chief of Naval Operations	July __, 1991
Admiral F. B. Kelso Chief of Naval Operations	July __, 1991
H. Lawrence Garrett III, Secretary of the Navy	July , 1991

Deponent	Date
Donald Howard, Under Secretary of the Navy	July __, 1991
Donna Haviland U.S. General Accounting Office	July __, 1991
Robert Meyer U.S. General Accounting Office	July __, 1991
Captain Thomas Williams, USN	July __, 1991
Charles Nemfakos, Office of the Navy Comptroller	July __, 1991
Admiral J. R. Lang, Rear Admiral, U.S. Navy Director, Ship's Maintenance and Modernization Division	July __, 1991
Matthew P. Behrmann, Director of Staff, The Defense Base Closure Commission	July __, 1991
Paul J. Hirsch, Director of Review and Analysis, The Defense Base Closure Commission	July __, 1991
Benton L. Borden, Deputy Director of Review and Analysis, The Defense Base Closure Commission	July __, 1991
S. Alexander Yellin Staff Member, The Defense Base Closure Commission	July __, 1991
Rodell Anderson, U.S. General Accounting Office	July __, 1991
Marvin Casterline, U.S. General Accounting Office	July __, 1991
Jacob Sprouse, U.S. General Accounting Office	July __, 1991
Vic Zangla, U.S. General Accounting Office	July __, 1991
Commander John Hart, USN	July __, 1991
Capt. Jerry Vernon, USN	July __, 1991

Deponent	Date
David S. Chu Assistant Secretary of Defense (PANE)	July __, 1991
Donald J. Atwood, Jr. Deputy Secretary of Defense	July __, 1991
Jamie Gallagher Congressional liason for the Base Closure Commission	July __, 1991
Wendy Petsinger Congressional liason for the Base Closure Commission	July __, 1991
Mary McKinnon Deputy Shipyard Policy OP-431	July __, 1991
Hon. Richard Cheney, Secretary of Defense	July __, 1991
Hon. James A. Courter, Chairman The Defense Base Closure Commission	July __, 1991
Hon. William L. Ball, III The Defense Base Closure Commission	July __, 1991
Hon. Howard D. Callaway The Defense Base Closure Commission	July __, 1991
Hon. Duane H. Cassidy The Defense Base Closure Commission	July __, 1991
Hon. Arthur Levitt, Jr. The Defense Base Closure Commission	July __, 1991
Hon. James C. Smith, II The Defense Base Closure Commission	July __, 1991
Hon. Robert D. Stuart, Jr. The Defense Base Closure Commission	July __, 1991

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN
DAVID H. PITTINSKY
CAMILLE J. WOLF
PATRICK T. DAVISH
JOHN V. O'HARA
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(215)875-7000
AND
SEN. ARLEN SPECTER
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

Attorneys for Plaintiffs

DATED: July 9, 1991

CERTIFICATE OF SERVICE

I, CAMILLE J. WOLF, hereby certify that on this 9th day of July, 1991, I caused a true and correct copy of the foregoing Motion for Expedited Discovery to be hand delivered to Michael M. Baylson, Esquire, the United States Attorney for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania.

Camille J. Wolf

10 JUL 1991 ES-2288

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT	District EASTERN DISTRICT OF PENNSYLVANIA
SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS v. H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY (cont.)	Docket No. CIVIL ACTION NO. 91-4322 To: (Name and Address of Defendant) ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

Bruce W. Kauffman
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk MICHAEL E. KUNZ	Date
(By) Deputy Clerk Carol D. James Carol D. James	7/8/91

JS 44C
(Rev. 12/84)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

Senator Arlen Specter, et al.

(See attached)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Phila.
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

H. Lawrence Garrett, III, Secretary of the Navy, et al.

(See attached)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT U.S.
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Bruce W. Kauffman, Esquire
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- X 3 Federal Question (U.S. Government Not a Party)
- X 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)
PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
The Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §§1331, 1337, 1346 and 1361; the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Tit XXIX, §§2901-2910 (November 5, 1990); the Administrative Procedure Act, 5 U.S.C. §§701, et s
Venue is proper in this Court pursuant to 28 U.S.C. §1391.

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT	TORTS: PERSONAL INJURY	TORTS: PERSONAL INJURY	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	☐ 362 Personal Injury Med. Malpractice ☐ 365 Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability **PERSONAL PROPERTY** ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Food & Drug ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other **LABOR** ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 **PROPERTY RIGHTS** ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark **SOCIAL SECURITY** ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 863 DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) **FEDERAL TAX SUITS** ☐ 870 Taxes ☐ 871 IRS—Third Party 26 USC 7609 ☐ 875 Customer Challenge 12 USC 3410	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/Etc. ☐ 460 Deportation ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 891 Agricultural Act ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes X 890 Other Statutory Actions

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 441 Voting ☐ 442 Employment ☐ 443 Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights	510 Motions to Vacate Sentence 28 USC 2255 530 Habeas Corpus 540 Mandamus & Other 550 Civil Rights

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- X 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P. 23

DEMAND $ Declaratory Judgment

Check YES only if demanded in complaint
JURY DEMAND: ☐ YES X NO

VIII. RELATED CASE(S) IF ANY (See instructions) N/A

JUDGE _____ DOCKET NUMBER _____

DATE
July 8, 1991

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

PLAINTIFFS

United States Senator Arlen Specter
Room 9400
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Harris Wofford
Room 9456
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Bill Bradley
Union-1605
Vauxhall Road
Union, New Jersey

United States Senator Frank R. Lautenberg
Gateway I
Newark, New Jersey

Governor Robert P. Casey
Room 229
Main Capitol
Harrisburg, Pennsylvania

Commonwealth of Pennsylvania
Attention: Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

Pennsylvania Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

United States Representative Curt Weldon
1554 Garrett Road
Upper Darby, Pennsylvania

United States Representative Thomas Foglietta
Room 10402
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Representative Robert E. Andrews
16 Somerdale Square
Somerdale, New Jersey 08083

United States Representative R. Lawrence Coughlin
Norristown, Pennsylvania

City of Philadelphia
Attention: Charisse Lillie
Office of the City Solicitor

Howard J. Landry
President of the International Federation
of Professional and Technical Engineers
Local 3
Cherry Hill, New Jersey

International Federation of Professional
and Technical Engineers ("IFPTE")
Local 3
Shipyard
Philadelphia, Pennsylvania

William F. Reil
President of the Metal Trades Council
Local 687 Machinists
Philadelphia, Pennsylvania

Metal Trades Council
Local 687 Machinists ("MTC")
Shipyard
Philadelphia, PA

DEFENDANTS

H. Lawrence Garrett, III
Secretary of the Navy
Department of the Navy
The Pentagon
Washington, D.C.

Richard Cheney
Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C.

The Defense Base Closure
and Realignment Commission
(the "Commission")

James A. Courter
Chairman of the Commission

William L. Ball, III
Membwer of the Commission

Arthur Levitt Jr.
Member of the Commission

James C. Smith, II, P.E.
Member of the Commission

Robert D. Stuart, Jr.
Member of the Commission

Howard H. Callaway
Member of the Commission

Gen. Duane H. Cassidy
USAF (Ret.)
Member of the Commission

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: See Attached

Address of Defendant: See Attached

Place of Accident, incident or Transaction: _____
(Use Reverse Side For Additional Space)

Does this case involve multidistrict litigation possibilities? Yes ☐ No ☒

RELATED CASE IF ANY

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes ☐ No ☐

CIVIL: (Place ☒ in *ONE CATEGORY ONLY*)

A. *Federal Question Cases:*
1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act—Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☒ All other Federal Question Cases (please specify)

B. *Diversity Jurisdiction Cases:*
1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability—Asbestos
9. ☐ All other Diversity Cases (Please specify)

ARBITRATION CERTIFICATION

(Check appropriate category)

I, Bruce W. Kauffman, Esquire, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 8, Section 4(a)(2), that, to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $75,000 exclusive of interest and cost;

☒ Relief other than monetary damages is sought.

DATE: July 8, 1991 /s/ Bruce W. Kauffman
Attorney-at-Law

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: July 8, 1991
Attorney-at-Law
Bruce W. Kauffman

CIV. 609
(Rev. 11/85)

MICHAEL E. KUNZ
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U. S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that pursuant to Local Rule 7(h) the United States magistrates of this district, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Appropriate consent forms for this purpose are available from the clerk of court.

Your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court. Only if all the parties in the case consent to the reference to a magistrate will either the judge or magistrate be informed of your decision.

The judge will then decide whether or not to refer the case to a magistrate for disposition but no action eligible for arbitration will be referred by consent of the parties until the arbitration has been concluded and trial *de novo* demanded pursuant to Local Rule 8, paragraph 7. The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate.

When a case is referred to a magistrate for all further proceedings, including the entry of final judgment, the final judgment may be appealed directly to the Court of Appeals for the Third Circuit, unless the parties elect to have the case reviewed by the appropriate district judge (in which event any further appeal to the Court of Appeals would only be by petition for leave to appeal). Accordingly, in executing a consent form, you will be asked to specify which appeal procedure you elect.

Nothing herein shall be construed to be a limitation of any party's right to seek review by the Supreme Court of the United States.

Michael E. Kunz

CLERK, UNITED STATES DISTRICT COURT

United States General Accounting Office

GAO

Report to the Congress and the Chairman, Defense Base Closure and Realignment Commission

May 1991

MILITARY BASES

Observations on the Analyses Supporting Proposed Closures and Realignments

GAO/NSIAD-91-224

EXECUTIVE SUMMARY

PURPOSE

The Department of Defense (DOD) spends billions of dollars annually operating its military bases in the United States. Events taking place throughout the world and within the United States have caused a reevaluation of our military strategy, and U.S. forces are to be significantly reduced. DOD and the Congress both recognize that with a reduced force structure there is a need to close and realign military installations.

The Defense Base Closure and Realignment Act of 1990 (P.L. 101-510) established a new process for DOD base closure and realignment actions within the United States. The act established an independent Defense Base Closure and Realignment Commission and specified procedures that the President, DOD, GAO, and the Commission must follow, through 1995, in order for bases to be closed or realigned.

This report responds to the act's requirement that GAO provide the Congress and the Commission, by May 15, 1991, an analysis of the Secretary of Defense's April 12, 1991, recommendations of bases for closure and realignment and the selection process used. GAO also received numerous letters, requests, and materials in connection with this review from congressmen, state and local government officials, and private citizens; however, due to the lack of time available to respond to each of the issues raised, GAO has submitted the materials to the Commission for its use.

BACKGROUND

In 1988, the Secretary of Defense chartered the Commission on Base Realignment and Closure to review military installations within the United States for realignment and closure. Later that year the Commission recommended that 145 installations be closed or realigned. The Secretary of Defense and the Congress accepted all the Commission's recommendations.

The Secretary of Defense unilaterally recommended additional closures and realignments on January 29, 1990, as a result of the shrinking defense budget. The Congress subsequently passed the Defense Base Closure and Realignment Act of 1990, which halted any closure actions based on the January 29, 1990, list and required all installations in the United States to be compared equally against (1) criteria to be developed by DOD and (2) the future years' Force Structure Plan (fiscal years 1992 to 1997).

The final eight criteria against which the April 12, 1991, list of proposed military installation closures and realignments was to be measured included four related to the military value of the

installations and four others that addressed the number of years needed to recover the costs of closure and realignment; the economic impact on communities; the ability of both the existing and potential receiving communities' infrastructure to support forces, missions, and personnel; and the environmental impact. DOD guidance provided to the services directed that they give priority to the four criteria that addressed the military value of installations.

RESULTS IN BRIEF

GAO agrees that a reduced military force structure requires that military installations be closed and realigned. The DOD process, when properly implemented, allows for a reduction in the U.S. military base structure by emphasizing the military value of the installations. Indeed, DOD successfully nominated 43 bases for closure and 28 for realignment. This represents a significant start in the process to propose bases for closure and realignment every other year for the next 6 years.

The Army and the Air Force can document the use of DOD's Force Structure Plan and the four military value criteria in the selection process. GAO found some inconsistencies in the way they developed military value rankings for quantifiable attributes used to compare similar installations; however, GAO believes those inconsistencies were not significant. GAO considers the closure and realignment recommendations made by the Army and the Air Force to be adequately supported.

Although the Navy had insufficient documentation to support its efforts, which precluded GAO from evaluating the Navy's process, this does not mean that Navy bases should not be closed. However, since the Navy did not document the rationale for its decisions, GAO was unable to analyze its specific closure and realignment recommendations. As an alternative means of evaluating the Navy's recommendations, GAO looked at ship berthing capacity in comparison to the Force Structure Plan. After analyzing capacity data, GAO found that the Navy will have significant excess berthing capacity if only the recommended facilities are closed. GAO found that changes have occurred in the strategic homeporting concept, which when combined with excess available pier space for berthing ships, supports the recommendation for fewer Navy bases.

Although recognizing that differences exist in the composition and functions of each service's bases, GAO is concerned that DOD's guidance allowed estimating processes and cost factors used by the services to vary. GAO analyzed the sensitivity of years to recover closing costs (the projected payback period) for each closure or realignment to 50 percent and 100 percent increases in one-time costs. The analysis showed that the payback period for many of the recommendations did not substantially increase. There

are several recommended closure and realignment actions, however, where the payback is sensitive to one-time costs.

PRINCIPAL FINDINGS

The Army's Process and Recommendations

The Army established the Total Army Basing Study group in 1990 to develop a total Army basing strategy and then tasked it to recommend potential closures and realignments. The Army used a two-phased approach to evaluate potential bases for closure or realignment that was designed to treat all bases equally. In phase I, it categorized all its installations by major mission categories and evaluated their military value in quantitative terms. The Army Audit Agency was involved in the process to review and verify data collected for the quantitative analysis. In phase II, the Army used the Force Structure Plan, the phase I results, and the major commands' future plans. It also considered (1) the economic payback for possible alternatives and (2) the socioeconomic and environmental impacts on the communities involved in the final proposed closures.

Because the Army's process was well documented, which enabled GAO to evaluate the process, and the Army Audit Agency provided a check in the process, GAO believes that the resulting recommendations were well supported.

The Air Force's Process and Recommendations

The Air Force process was designed to treat all bases equally, and the selections were based on DOD's criteria and the Force Structure Plan. The process emphasized the first four criteria, which address military value. Also, the judgments of the Secretary of the Air Force and individual members of the Air Force Base Closure Executive Group, which was supported by a working group, were a part of the process.

The Air Force initially identified all Air Force-owned property within the United States and then excluded 35 active component bases from the process after doing a (1) capacity analysis and (2) mission-essential analysis. The 51 remaining active component bases were then rated on the basis of approximately 80 subelements for DOD's eight criteria. The Air Force also considered Reserve Component bases for potential closure or realignment using a slightly different process. As a result of these assessments, the Secretary of the Air Force then recommended closing 14 bases and realigning 1 base. GAO's analysis focused on the data supporting the closure or realignment decisions. Generally, GAO found that the rationale was adequately supported by documentation.

The Navy's Process and Recommendations

Due to inadequate documentation of the process used by the Navy, GAO was unable to independently evaluate the relative military value of the bases considered. Further, the Navy did not establish required internal controls to ensure the accuracy of the data used.

According to the Navy, it established a Base Structure Committee to conduct its closure process. The Committee decided that the input it received from its working group was biased in favor of keeping bases open. Thus, the Committee based its recommendations on information provided during meetings with various Navy and Marine Corps headquarters officials and representatives from various field organizations.

GAO's review of the Navy's ship berthing capacity studies found that there would be significant excess space beyond what the Committee calculated, even if the bases recommended for closure were included.

COBRA Model Used in Cost Savings Estimates

The revised Cost of Base Realignment Actions (COBRA) model addresses a full range of factors for estimating the costs, savings, and payback period related to closure and realignment actions. GAO found cases where the services used inaccurate data in the model. GAO also found that the cost estimating process ignored the cost of Medicare to the federal government. However, overall, GAO believes that the recommendations made for base closings and realignments offer an opportunity for substantial savings.

DOD Did Not Ensure Cost Comparability

Without DOD oversight of the COBRA cost estimating process, each service approached common problems in different ways. Although DOD called for submission of cost estimates expressed in fiscal year 1991 dollars, the services used budget data for other than 1991 dollars as their baselines for estimating costs and savings. Service costs and savings estimates, as well as payback calculations, did not consistently rely on fiscal year 1991 input data. These errors could reduce estimated annual savings and lengthen the payback period for several closures.

RECOMMENDATIONS

GAO recommends that the Secretary of Defense

-- require the Secretary of the Navy to submit to the Defense Base Closure and Realignment Commission specific details on the manner in which its Base Structure Committee compared bases to develop closure and realignment recommendations and

-- ensure the use of consistent procedures and practices among the services in future base closure and realignment reviews.

GAO also recommends that the Chairman, Defense Base Closure and Realignment Commission,

-- consider, in evaluating the Navy requirement for bases, the impact of excess space for ship berths on base requirements and

-- consider for all the services the effects of incorrect cost and savings estimates on all proposed base closures and realignments, using the results of GAO's sensitivity analysis.

CHAPTER 4

THE NAVY's BASE CLOSURE AND REALIGNMENT PROCESS AND ASSOCIATED RECOMMENDATIONS

We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.

Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. However, we reviewed and recalculated the Navy's ship berthing capacity analysis and found that excess capacity would remain, even with the closure of recommended bases.

THE NAVY's PROCESS AS DESCRIBED BY NAVY OFFICIALS

The Navy's Base Structure Committee, which was charged with making base closure and realignment recommendations, began its review of the Navy's basing structure in late January 1991. However, the Committee did not fully explain its process to us until May 7, 1991, when it informed us that after review of data prepared by its working group, the Base Structure Committee decided that much of the data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs. Its review, therefore, emphasized a series of briefings and meetings attended by Committee members, Navy and Marine Corps headquarters officials, and representatives of field activities. According to Committee members, decisions made during the process were sometimes made in the presence of everyone in the meetings and were clear to everyone in attendance. In other cases, the decisions were made by the Committee in closed executive sessions. Based on this review, the Committee proposed closure and realignment actions to the Secretary of the Navy on March 21, 1991.

We reviewed the charts that were used in the presentations to the Committee. These charts were generally in outline form. Our review of this information showed that presentations were organized by 23 Navy and 6 Marine Corps categories representing the various Navy functions and missions. For example, the category "naval stations" included bases that have deep water harbors and piers and serve as home bases for Navy surface ships and aircraft carriers. The category "naval air stations" included bases that have runways and hangars and serve as home bases for aircraft. Other categories included submarine bases, shipyards, aviation depots, supply centers/depots, Marine Corps bases, Marine Corps air stations, reserve centers, and RDT&E activities.

The Base Structure Committee told us that a capacity analysis was then discussed for each functional category, which compared the 1997 force structure facility requirements against the existing inventory. Critical factors were identified for each category and served as units of measure for capacity. For example, pier space was used as the primary unit of measure for naval stations, and airfield apron and hangar space were used for naval air stations.

Of the eight categories of bases the Committee retained for further closure and realignment analysis, four were retained because the Base Structure Committee identified potential excess capacity: (1) naval stations, (2) naval air stations, (3) shipyards, and (4) Marine Corps air stations. Two other categories--the training and construction battalion centers categories--were retained for further analysis, because they showed potential excess capacity in segments of the overall categories. The medical category was also retained because of the link between medical facilities and major installations that were being evaluated for closure or realignment. Finally, the RDT&E category was retained for analysis based on a mandated requirement to reduce personnel by 20 percent.

A military value rating was then assigned by the Base Structure Committee to each base in all the categories being analyzed except for the medical category.[1] Committee members told us that they rated each installation using the first four DOD selection criteria, which addressed military value, and then they independently assigned each installation an overall color-coded rating.

Bases receiving an overall green rating were excluded from further study, according to Committee members. For example, in the naval stations category the bases receiving an overall green were Coronado, Guam, Ingleside, Little Creek, Mayport, Mobile, New York (Staten Island), Norfolk, Pascagoula, Pearl Harbor, Puget Sound/Everett, and San Diego. The Committee continued to evaluate bases that were given an overall rating of yellow or red. Additional bases were excluded from further review because of their unique assets, geographic location, strategic importance, or operational value, leaving 19 bases and the RDT&E category to be evaluated for closure.

Committee members told us they then performed a "quick estimate" cost-benefit analysis of each of the remaining bases to determine the feasibility of closing them. After making its final decisions, a full COBRA analysis for those closure candidates was conducted.

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[1]Three hospitals were reviewed because three installations with hospitals were being considered for closure: Orlando Naval Training Center, Whidbey Island Naval Air Station, and Long Beach Naval Station.

Local economic and environmental impact analyses were also done for the closure candidates.

The Committee proposed closing 11 bases and 10 RDT&E facilities. It also recommended that 1 base and 16 RDT&E facilities be realigned. In addition, three hospitals were proposed to be closed as a result of the Committee's decisions.

GAO's VIEWS ON THE NAVY's PROCESS

In addition to the limitations placed on our review by the lack of adequate documentation, we identified three problems with the Navy's process. First, due to the lack of supporting documentation, we could not determine the basis for the Committee's military value ratings for Navy installations. In late March, we received selected data given to the Committee by its Working Group. This information was provided to us, but we were not advised until May 7, 1991, that the Committee had decided that much of this data were biased in favor of keeping bases open. In mid-April, the Base Structure Committee provided us with four additional volumes of material that consisted primarily of briefing charts that were basically outlines of matters and data to be discussed, without any explanation or supporting data. Also, Committee members said they did not prepare minutes of their deliberations.

Second, we identified apparent inconsistencies within the Committee's internal rating process. For example, the Committee had given identical ratings to two naval stations on each of the first four DOD selection criteria but had assigned an overall rating of green to one and yellow to the other. Similarly, the Committee had assigned identical ratings to six naval air stations for the first four DOD selection criteria. Four bases were assigned an overall rating of yellow and two an overall rating of green. These inconsistencies are significant because any base given an overall rating of green, based on the first four DOD selection criteria, was excluded from further closure or realignment consideration. In explanation, Committee members stated that "not all yellows are equal" and "not all greens are equal." Since the Committee did not document these differences, we could not determine the rationale for its final decisions.

Lastly, although required by OSD policy guidance to develop and implement an internal control plan for its base structure reviews, the Navy did not assign responsibility for developing and implementing such a plan.

GAO's VIEWS ON THE CLOSURE AND REALIGNMENT RECOMMENDATIONS

Because the Committee did not document the rationale for its decisions, we could not comment on the Committee's closure and realignment recommendations based on the process. As an

alternative, we looked at ship berthing capacity of naval stations in comparison to the Force Structure Plan because naval stations are a major category of the Navy's facilities. Also, we have conducted prior work and have ongoing work related to homeporting needs. Data obtained from the Navy's Assistant Chief of Naval Operations (Surface Warfare) showed that the most appropriate indicator for naval station requirements is ship berthing capacity. An analysis of the capacity data showed the Navy will have excess capacity remaining if only the four recommended naval stations are closed.

The Navy's capacity analysis indicates an inventory of 257.6 thousand feet of berthing (KFB) at naval stations and a requirement of 174.2 KFB, leaving an excess of 83.4 KFB. This excess represents the capacity at naval stations worldwide and also includes some inadequate berthing space. In addition, 14.5 KFB of berthing space is available at facilities other than naval stations.

When we subtracted the 75.2 KFB identified with space associated with (1) overseas facilities, (2) recommended closures, and (3) inadequate berthing facilities, 22.7 KFB of excess berthing capacity remains (see table 4.1).

Document Separator

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July 9, 1991

The Honorable Ronald L. Buckwalter
5918 U.S. Courthouse
601 Market Street
Philadelphia, PA 19107

Re: Sen. Arlen Specter, et. al. v. H. Lawrence Garret, III, Secretary of the Navy, et al.
C.A. No. 91-CV-4322

Dear Judge Buckwalter:

I am enclosing two copies of Plaintiff's Motion for Expedited Discovery and Hearing in the above-referenced action, and papers in support thereof, the originals of which were filed today with the Clerk of the Court. I am also enclosing two copies of the Complaint, and brief in support thereof, that were filed with the Clerk of the Court yesterday.

Respectfully submitted,

Bruce W. Kauffman

BWK:bd
Enclosure

cc: Michael M. Baylson, U.S. Attorney General
for the Eastern District of Pennsylvania
(hand delivery)

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July 9, 1991

Mr. Michael E. Kunz
Clerk of the Court
The United States District Court
for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19107

Re: Sen. Arlen Specter, et. al. v. H. Lawrence Garret, III, Secretary of the Navy, et al.
C.A. No. 91-CV-4322

Dear Mr. Kunz:

Enclosed please find an original and one copy of Plaintiff's Motion for Expedited Discovery and Hearing in the above-referenced action, and papers in support thereof. Please file the original and return a time-stamped copy in the enclosed self-addressed stamped envelope.

Respectfully submitted,

Camille J. Wolf

CJW:bd
Enclosure
cc: Bruce W. Kauffman, Esquire
Sen. Arlen Specter
Michael M. Baylson, U.S. Attorney General
for the Eastern District of Pennsylvania
(hand delivery)

CERTIFICATE OF SERVICE

I, CAMILLE J. WOLF, hereby certify that on this 9th day of July, 1991, I caused a true and correct copy of the foregoing Motion for Expedited Discovery to be hand delivered to Michael M. Baylson, Esquire, the United States Attorney for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania.

Camille J. Wolf

Document Separator

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 91-CV-4322
H. LAWRENCE GARRETT III, Secretary of the Navy, *et al.*, Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND HEARING

STATEMENT

The plaintiffs in this case, mainly political figures suing on behalf of their constituents, seek to overturn a tentative proposal to close the Philadelphia Naval Shipyard and numerous other naval bases. Even though Congress has explicitly declared that such recommendations are not subject to judicial review, and instead provided an alternative, political remedy, the plaintiffs have nevertheless requested the Court to intervene and assert judicial authority before Congress has an opportunity to consider the President's proposals. The plaintiffs now request the Court to permit depositions of twenty top officials of the Navy, the General Accounting Office, and the Defense Base Closure and Realignment Commission, and to require the defendants to produce thousands of documents, all within the next few weeks.

The plaintiffs' motion for expedited discovery and hearing should be denied for three reasons. First, the Administrative Procedure Act ("APA"), on which the plaintiffs' claims are based,

simply prohibits them from taking any discovery, whether expedited or in the usual course of litigation. Second, even if discovery were generally permissible, their curt, one-page argument provides no justification for taking the extraordinary step of expediting such proceedings. Third, and most fundamentally, the Court should deny the plaintiffs' unsupported motion because their Complaint suffers from basic jurisdictional defects that undermine the Court's authority to entertain their claims in the first place. These preliminary issues should be fully briefed and resolved before the Court permits the plaintiffs to begin any broad exploration of the merits of their claims.

ARGUMENT

I. THE PLAINTIFFS ARE NOT ENTITLED TO ANY DISCOVERY OF MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD

The plaintiffs' motion for expedited discovery must be denied because, as a matter of well-settled federal law, they are not entitled to discovery at all. Even if there were some "final agency action" to review, see infra pp. x-x, the statute establishing the standard of review in this case does not permit the Court to undertake a de novo review, but limits the Court to a consideration of whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" based solely on the record compiled and filed by the agency. 5 U.S.C. §§ 702, 706(2)(A).

The Supreme Court and the federal circuits have uniformly held that in reviewing agency action under this narrow, deferen-

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tial standard,[1] "the focal point for judicial review should be the administrative record already in existence, not some new record made initially by the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973); see also Florida Power & Light v. Lorion, 470 U.S. 729, 743-44 (1985); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Twiggs v. Small Business Admin., 541 F.2d 150, 152 (3d Cir. 1976).[2]

Consequently, plaintiffs in Administrative Procedure Act cases simply are not entitled to supplement the agency record with discovery, because the Court could not consider that material even if the plaintiffs were permitted to obtain it. See, e.g., Montgomery Nat'l Bank v. Clarke, 703 F. Supp. 1161, 1172-73 (D.N.J.) (even if the record is deficient, "resort to extraneous information is unnecessary and unwarranted"), aff'd, 882 F.2d 87 (3d Cir. 1989); San Luis Obispo Mothers for Peace v.

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1 As the Supreme Court has described judicial review under this standard, the Court may overturn an administrative decision only if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

2 Accord National Org. for Women v. Social Security Admin., 736 F.2d 727, 734 (D.C. Cir. 1984) (en banc); Citizens Against Refinery's Effects v. EPA, 643 F.2d 178, 181 (4th Cir. 1981); CF&I Steel Corp. v. Economic Development Admin., 624 F.2d 136 (10th Cir. 1980); U.S. v. Nova Scotia Food Product Corp., 568 F.2d 240, 250 (2d Cir. 1977).

NRC, 751 F.2d 1287, 1324-27 (D.C. Cir. 1984) (precluding supplementation of the administrative record to establish the "true reasons" for the agency's decision).[3] "To permit an administrative determination 'to be attacked or supported in court by new evidence,' the Supreme Court has admonished, 'would substitute the court [for] the administrative tribunal." Doraiswamy, 555 F.2d at 840 (quoting Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444 (1930)).

Instead, assuming the Court has jurisdiction, the defendants will file the complete record on which the agencies' decisions were based. The sole question then will be whether, on the basis of that record alone, "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see Lorion, 470 U.S. at 743-44 ("[t]he task of the reviewing court is to apply the [arbitrary and capricious standard] based on the record the agency presents to the reviewing court") (emphasis added).

Indeed, even if the Court reviews the administrative record and determines that it fails adequately to document the agency's action so as to "frustrate effective judicial review," Camp, 411 U.S. at 143, the Court still should not permit the plaintiffs to supplement the record with discovery. Instead, the Court must

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[3] Countless other courts have reached the same conclusion. See, e.g., Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-38 (9th Cir. 1988), amended, 867 F.2d 1244 (9th Cir. 1989); Friends of the Earth v. Hintz, 800 F.2d 822, 828-29 (9th Cir. 1986); Buttrey v. United States, 690 F.2d 1170, 1184 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983); Doraiswamy v. Secretary of Labor, 555 F.2d 832, 839-43 (D.C. Cir. 1976).

first "obtain from the agency, either through affidavits or testimony, additional explanation of the reasons for the agency decision." Id. Then, if the Court still cannot evaluate the agency's decision, the proper course is to remand the issue to the agency for additional investigation. See Lorion, 470 U.S. at 744; Overton Park, 401 U.S. at 420; Camp, 411 U.S. at 143; Sears Savings Bank v. FSLIC, 775 F.2d 1028, 1030 (9th Cir. 1985); United States v. Kane, 602 F.2d 490, 493-94 (2d Cir. 1979). In any case, the plaintiffs are not permitted to develop information through discovery. The Court could not consider any information outside the administrative record that the plaintiffs obtained, and the plaintiffs' discovery requests are therefore not "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Furthermore, all of the plaintiffs' requests to take depositions (particularly those of the Secretary of the Navy, members of the Commission, and other top officials), as well as a number of their excessively broad document requests, must be independently rejected because they plainly inquire into the mental process by which the agency decisionmakers reached their conclusions. Discovery of such matters is not permitted, even aside from the "administrative record" rule described above. See Franklin Savings Assn. v. Ryan, 922 F.2d 209, 211 (4th Cir. 1991).

"[The Supreme] Court has recognized ever since Fletcher v. Peck, 6 Cranch 87, 130-31 (1810), that judicial inquiries into

legislative or executive motivation represents a substantial intrusion into the workings of other branches of government." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 268 n.18 (1977); see United States v. Morgan, 313 U.S. 409, 422 (1941). The Second Circuit summarized the holding of Morgan in KFC National Mgmt. Corp. v. NLRB, 497 F.2d 298, 304 (2d Cir. 1974), cert. denied, 423 U.S. 1087 (1976), concluding that agency's "thought processes, their reliance on their staffs -- is largely beyond judicial scrutiny." Where there are administrative findings and explanations made at the same time as the decision, further inquiry may be made "only upon a strong showing of bad faith or improper behavior." Hercules, Inc. v. EPA, 598 F.2d 91, 123 (D.C. Cir. 1978); National Nutritional Foods Assn. v. FDA, 491 F.2d 1141, 1145 (2d Cir.), cert. denied, 419 U.S. 874 (1974). Plaintiffs cannot make such a showing, and their efforts to discover information beyond the administrative record should be rejected.

II. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY BASIS FOR EXPEDITED DISCOVERY

Even if the APA permitted the plaintiffs to take discovery, they have not carried their burden to justify expediting those proceedings. As the plaintiffs essentially acknowledge,[4] expedited discovery may be permitted only where the plaintiff makes "a strong showing of necessity," demonstrating persuasive

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[4] Memorandum of Law In Support of Plaintiffs' Motion For Expedited Discovery ("Plaintiffs' Mem.") at 3.

"unusual circumstances" that require immediate relief.[5] Indeed, several courts have required plaintiffs seeking immediate discovery to show imminent, irreparable harm, likely success on the merits, and that the alleged injury will be mitigated if discovery is permitted. See, e.g., Fox v. Mow Trading Corp., 749 F. Supp. 473, 475 (S.D.N.Y. 1990); Pearce, 97 F.R.D. at 537; Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). This difficult standard recognizes that, in virtually every case, defendants should be permitted an opportunity to assess and respond to the complaint before discovery begins. See, e.g., Notaro, 95 F.R.D. at 405; Gibson, 87 F.R.D. at 61.

Having conceded that they bear a heavy burden to justify their proposal, however, the plaintiffs make almost no attempt to satisfy that standard. The plaintiffs' short argument simply concludes, without any analysis, that their bare allegations must support expedited discovery because the threat of immediate harm "is manifest." Plaintiffs' Mem. at 4.

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5 4A Moore's Federal Practice | 30.54[2], at 30-71; Pearce v. Southeast Banking Corp., 97 F.R.D. 535, 537 (S.D. Fla. 1983); Gibson v. Bagas Restaurants, Inc., 87 F.R.D. 60, 62 (W.D. Mo. 1980) (plaintiff must show "compelling urgency which necessitates the immediate taking of depositions"). The plaintiffs go on to argue that expedited discovery is "routinely granted" in this Circuit. Plaintiffs' Mem. at 3. None of the cases they cite supports their position. The passages cited by the plaintiffs merely note that expedited discovery was conducted; not one considers whether such a course was proper or addresses the legal standards for permitting it. See, e g., Webster v. Fall, 266 U.S. 507, 511 (1925) (no precedential value in "[q]uestions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon").

This blunt proclamation hardly justifies the proposed "headlong rush into discovery." N.C. Federal Savings & Loan Assn. v. Smith, 98 F.R.D. 744, 745 (W.D.N.C. 1983). The plaintiffs' repeated cries of impending injury cannot alone suffice as a "strong showing of necessity." Even if some harm were imminent, as they claim, the plaintiffs have not explained how the extensive discovery they propose -- twenty depositions of government officials, including the Secretary of the Navy, and immediate production of thousands of documents -- would assist them in mitigating that injury.

As outlined briefly infra pp. **x-x**, the defendants' opposition to the preliminary injunction motion will focus primarily on the numerous jurisdictional defects in the plaintiffs' claims, purely legal issues for which discovery will not assist the plaintiffs. They also have already filed a verified complaint attesting to their claims that the Navy is now taking illegal actions to close the Shipyard, and whatever factual issues may exist on those questions can be resolved without the overwhelming discovery the plaintiffs demand.

Undoubtedly, every plaintiff seeking preliminary injunctive relief would prefer to conduct discovery on an accelerated basis before arguing such a motion. But the law is rather clear that neither the mere filing of such a motion nor urgent claims of irreparable injury justifies such an exception to the usual practice. Even accepting the plaintiffs' allegations at face value, they have made no "strong showing" distinguishing their

situation from that of any other plaintiff seeking preliminary relief for discovery purposes, and their motion should be denied.

Moreover, many of the plaintiffs' allegations of irreparable injury claim only that some injury may occur several months from now. **CITE VERIFIED COMPLAINT.** By that time, however, Congress will have had a full opportunity to exercise its plenary authority to reject the pending recommendations by enacting a joint resolution of disapproval under a streamlined statutory process designed to bring such a resolution quickly to a vote. See Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510, {{ 2904(b), 2908, codified as 10 U.S.C. { 2687 note ("Base Closure Act").[6]

Also, the plaintiffs need not suffer the injury they forecast even if the plaintiff Members of Congress cannot persuade their colleagues to reject the recommendation. None of the plaintiffs except the unions even alleges a distinct injury to themselves, but merely claims that certain other individuals -- Shipyard employees and members of the public generally -- will be injured by the closure.

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[6] In fact, joint resolutions of disapproval have already been introduced in both Houses. Plaintiffs Specter and Wofford recently introduced S.J. Res. 175, and recited the principal allegations of the Complaint to the Senate. See 137 Cong. Rec. S 9490, 9510-11 (daily ed. July 10, 1991) (statement of Sen. Specter). A similar resolution was also introduced in the House, H.J. Res. 298, although it was not sponsored by any of the Representatives who are plaintiffs here. See 137 Cong. Rec. H 5432 (daily ed. July 11, 1991). The plaintiffs can hardly complain of imminent injury when two of their number have already initiated the statutorily-prescribed procedure to challenge the pending recommendations.

Moreover, the Base Closure Act does not require the Secretary of Defense to begin closing bases for up to two years after the President transmits the proposed list to Congress, and permits the Secretary to complete those closures within six years of the President's action. See id. at {{ 2903(a)(3), (4). The statute also provides economic adjustment assistance to communities where bases are closed or realigned, to minimize the economic impact of closure. See id. { 1905(a)(1)(B). Thus, even if closure of Philadelphia Naval Shipyard is finally approved several weeks from now, it will not instantly cease activity or cause any sudden irreparable injury.

Numerous contingencies stand between the plaintiffs and most of the injuries that they fear. And, even if some imminent threat does exist, the plaintiffs have not even attempted to explain how their proposal to compress overwhelming discovery into a few weeks of constant deposition and document production would mitigate the alleged harm. The plaintiffs' motion for expedited discovery should be denied.

III. THE COURT SHOULD NOT PERMIT DISCOVERY UNTIL FUNDAMENTAL ISSUES OF SUBJECT MATTER JURISDICTION AND REVIEWABILITY ARE RESOLVED

The plaintiffs' attacks on the pending recommendations also suffer from flaws much more profound than the statutory ban on discovery or their inability to demonstrate a need to take depositions and review documents immediately. These sixteen plaintiffs, whose standing is open to serious question, request this Court to order the Navy, the Defense Base Closure and

Realignment Commission, and the President, all of whom have independently reviewed the closure of the Shipyard, to reconsider all of the recommendations for closure of naval bases.

In doing so, the plaintiffs attempt to challenge decisions that Congress has explicitly declared unreviewable by the courts, seeking to short-circuit the political remedy that Congress intentionally built into the statute instead of judicial review to address the sort of objections that the plaintiffs now press. Even if the APA permitted it and the plaintiffs could make some showing of need for discovery, therefore, the Court should postpone it until the defendants have an opportunity fully to address these basic defects, as the Federal Rules of Civil Procedure contemplate, in a motion to dismiss or in response to the plaintiffs' preliminary injunction motion.[7]

First, the plaintiffs' Complaint raises substantial doubt that they even have standing to sue. See People of the State of Illinois v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989) (state and its officials lack standing to challenge base closure decisions). The plaintiffs' claims also run afoul of the prudential standing requirement that courts refrain from "adjudicating 'abstract questions of wide public significance' which amount to 'general-

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[7] Although there is plainly no need to expedite these proceedings, the Court could easily accommodate any perceived such need by establishing a briefing schedule on the jurisdictional issues or the plaintiffs' preliminary injunction motion. Thus, even if the plaintiffs were able to establish some justification for haste, which they have not, the Court could accommodate that need without permitting discovery, which does nothing to alleviate the harm the plaintiffs insist they will suffer.

ized grievances' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian College v. Americans United For Separation Of Church And State, 454 U.S. 464, 475 (1982) (citation omitted).

Second, this lack of standing reveals that the plaintiffs' objections are in fact an attempt to invoke the Judicial Branch to referee a purely political conflict between a few members of Congress and the Executive, in direct conflict with Congressional intent in the Base Closure Act. As the Supreme Court aptly observed in U.S. v. Richardson, 418 U.S. 166, 179 (1974): "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."

Here, reliance on Congress to solve these alleged deficiencies in the base closure process is not merely to be inferred, but is clear from the text and legislative history of the statute. As explained supra pp. **x-x**, the Base Closure Act provides a specific mechanism for Members of Congress to voice their disagreement with the Secretary's recommendations: they can nullify those proposals completely by enacting a joint resolution of disapproval. The statute plainly contemplates that Members dissatisfied with the Secretary's conclusions or procedure should address those objections to their colleagues, and attempt to persuade them that these failings require disapproval of the recommendations.

Instead, the Congressional plaintiffs have requested this Court to intervene in the dispute, and to reject the Secretary's recommendations as a matter of judicial authority. Even if the plaintiffs had standing to pursue it, Congress explicitly closed that avenue. As explained in the Conference Report:

> 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 Secretary of Defense's recommendation of closures and realignments of military installations . . .

House Conf. Rept. 101-923 at 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258. This explicit recognition that the statutory mechanism is the exclusive remedy for alleged violations of the Base Closure Act came only a few months after the D.C. Circuit's decision in National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990) ("NFFE"), which held that military decisions to close bases under an earlier version of the Base Closure Act were "committed to agency discretion by law" and therefore unreviewable under the APA. See 5 U.S.C. { 701.

Indeed, the restriction of judicial review retained in the 1990 Base Closure Act was designed to prevent suits precisely like this one: Congress stated that it had "assiduously protected the 1988 base closure process," at issue in NFFE, "in the face of numerous attempts to undermine it. Some of those attempts have come in Congress from those interested in keeping open a base

recommended for closure." House Rept. 101-665 at 342, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3068. Similarly, the conferees stated that the base closure process required amendment in part because "closures and realignments under existing law . . . take a considerable period of time and involve numerous opportunities for challenges in court." House Conf. Rept. 101-510 at 705, 1990 U.S. Code Cong. & Admin. News at 3257.

Even if the plaintiffs could demonstrate some need for haste in these proceedings, therefore, the Court should not permit them to begin discovery immediately. Their questionable standing, as well as Congress' clearly expressed view that judicial review would interfere with the statutory scheme, strongly suggest that the Court should permit the parties to brief these issues fully, to ensure that the Court in fact has jurisdiction to decide this case before discovery begins.

CONCLUSION

For the foregoing reasons, the Court should deny the plaintiffs' motion for expedited discovery and hearing.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-CV-4322
H. LAWRENCE GARRETT III, Secretary of the Navy, *et al.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND HEARING

STATEMENT

The plaintiffs in this case, mainly political figures suing on behalf of their constituents, seek to overturn a tentative proposal to close the Philadelphia Naval Shipyard and numerous other naval bases. Even though Congress has explicitly declared that such recommendations are not subject to judicial review, and instead provided an alternative, political remedy, the plaintiffs have nevertheless requested the Court to intervene and assert judicial authority before Congress has an opportunity to consider the President's proposals. The plaintiffs now request the Court to permit depositions of twenty top officials of the Navy, the General Accounting Office, and the Defense Base Closure and Realignment Commission, and to require the defendants to produce thousands of documents, all within the next few weeks.

The plaintiffs' motion for expedited discovery and hearing should be denied for three reasons. First, the Administrative Procedure Act ("APA"), on which the plaintiffs' claims are based,

simply prohibits them from taking any discovery, whether expedited or in the usual course of litigation. Second, even if discovery were generally permissible, their curt, one-page argument provides no justification for taking the extraordinary step of expediting such proceedings. Third, and most fundamentally, the Court should deny the plaintiffs' unsupported motion because their Complaint suffers from basic jurisdictional defects that undermine the Court's authority to entertain their claims in the first place. These preliminary issues should be fully briefed and resolved before the Court permits the plaintiffs to begin any broad exploration of the merits of their claims.

ARGUMENT

I. THE PLAINTIFFS ARE NOT ENTITLED TO ANY DISCOVERY OF MATERIALS OUTSIDE THE ADMINISTRATIVE RECORD

The plaintiffs' motion for expedited discovery must be denied because, as a matter of well-settled federal law, they are not entitled to discovery at all. Even if there were some "final agency action" to review, see infra pp. x-x, the statute establishing the standard of review in this case does not permit the Court to undertake a de novo review, but limits the Court to a consideration of whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" based solely on the record compiled and filed by the agency. 5 U.S.C. §§ 702, 706(2)(A).

The Supreme Court and the federal circuits have uniformly held that in reviewing agency action under this narrow, deferen-

tial standard,[1] "the focal point for judicial review should be the administrative record already in existence, not some new record made initially by the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973); see also Florida Power & Light v. Lorion, 470 U.S. 729, 743-44 (1985); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Twiggs v. Small Business Admin., 541 F.2d 150, 152 (3d Cir. 1976).[2]

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Instead, assuming the Court has jurisdiction, the defendants will file the complete record on which the agencies' decisions were based. The sole question then will be whether, on the basis of that record alone, "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see Lorion, 470 U.S. at 743-44 ("[t]he task of the reviewing court is to apply the [arbitrary and capricious standard] based on the record the agency presents to the reviewing court") (emphasis added).

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Even if the APA permitted the plaintiffs to take discovery, they have not carried their burden to justify expediting those proceedings. As the plaintiffs essentially acknowledge,[4] expedited discovery may be permitted only where the plaintiff makes "a strong showing of necessity," demonstrating persuasive

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Having conceded that they bear a heavy burden to justify their proposal, however, the plaintiffs make almost no attempt to satisfy that standard. The plaintiffs' short argument simply concludes, without any analysis, that their bare allegations must support expedited discovery because the threat of immediate harm "is manifest." Plaintiffs' Mem. at 4.

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This blunt proclamation hardly justifies the proposed "headlong rush into discovery." N.C. Federal Savings & Loan Assn. v. Smith, 98 F.R.D. 744, 745 (W.D.N.C. 1983). The plaintiffs' repeated cries of impending injury cannot alone suffice as a "strong showing of necessity." Even if some harm were imminent, as they claim, the plaintiffs have not explained how the extensive discovery they propose -- twenty depositions of government officials, including the Secretary of the Navy, and immediate production of thousands of documents -- would assist them in mitigating that injury.

As outlined briefly infra pp. **x-x**, the defendants' opposition to the preliminary injunction motion will focus primarily on the numerous jurisdictional defects in the plaintiffs' claims, purely legal issues for which discovery will not assist the plaintiffs. They also have already filed a verified complaint attesting to their claims that the Navy is now taking illegal actions to close the Shipyard, and whatever factual issues may exist on those questions can be resolved without the overwhelming discovery the plaintiffs demand.

Undoubtedly, every plaintiff seeking preliminary injunctive relief would prefer to conduct discovery on an accelerated basis before arguing such a motion. But the law is rather clear that neither the mere filing of such a motion nor urgent claims of irreparable injury justifies such an exception to the usual practice. Even accepting the plaintiffs' allegations at face value, they have made no "strong showing" distinguishing their

situation from that of any other plaintiff seeking preliminary relief for discovery purposes, and their motion should be denied.

Moreover, many of the plaintiffs' allegations of irreparable injury claim only that some injury may occur several months from now. **CITE VERIFIED COMPLAINT.** By that time, however, Congress will have had a full opportunity to exercise its plenary authority to reject the pending recommendations by enacting a joint resolution of disapproval under a streamlined statutory process designed to bring such a resolution quickly to a vote. See Defense Base Closure and Realignment Act of 1990, Pub. L. 101-510, {{ 2904(b), 2908, codified as 10 U.S.C. { 2687 note ("Base Closure Act").[6]

Also, the plaintiffs need not suffer the injury they forecast even if the plaintiff Members of Congress cannot persuade their colleagues to reject the recommendation. None of the plaintiffs except the unions even alleges a distinct injury to themselves, but merely claims that certain other individuals -- Shipyard employees and members of the public generally -- will be injured by the closure.

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[6] In fact, joint resolutions of disapproval have already been introduced in both Houses. Plaintiffs Specter and Wofford recently introduced S.J. Res. 175, and recited the principal allegations of the Complaint to the Senate. See 137 Cong. Rec. S 9490, 9510-11 (daily ed. July 10, 1991) (statement of Sen. Specter). A similar resolution was also introduced in the House, H.J. Res. 298, although it was not sponsored by any of the Representatives who are plaintiffs here. See 137 Cong. Rec. H 5432 (daily ed. July 11, 1991). The plaintiffs can hardly complain of imminent injury when two of their number have already initiated the statutorily-prescribed procedure to challenge the pending recommendations.

Moreover, the Base Closure Act does not require the Secretary of Defense to begin closing bases for up to two years after the President transmits the proposed list to Congress, and permits the Secretary to complete those closures within six years of the President's action. See id. at {{ 2903(a)(3), (4). The statute also provides economic adjustment assistance to communities where bases are closed or realigned, to minimize the economic impact of closure. See id. { 1905(a)(1)(B). Thus, even if closure of Philadelphia Naval Shipyard is finally approved several weeks from now, it will not instantly cease activity or cause any sudden irreparable injury.

Numerous contingencies stand between the plaintiffs and most of the injuries that they fear. And, even if some imminent threat does exist, the plaintiffs have not even attempted to explain how their proposal to compress overwhelming discovery into a few weeks of constant deposition and document production would mitigate the alleged harm. The plaintiffs' motion for expedited discovery should be denied.

III. THE COURT SHOULD NOT PERMIT DISCOVERY UNTIL FUNDAMENTAL ISSUES OF SUBJECT MATTER JURISDICTION AND REVIEWABILITY ARE RESOLVED

The plaintiffs' attacks on the pending recommendations also suffer from flaws much more profound than the statutory ban on discovery or their inability to demonstrate a need to take depositions and review documents immediately. These sixteen plaintiffs, whose standing is open to serious question, request this Court to order the Navy, the Defense Base Closure and

Realignment Commission, and the President, all of whom have independently reviewed the closure of the Shipyard, to reconsider all of the recommendations for closure of naval bases.

In doing so, the plaintiffs attempt to challenge decisions that Congress has explicitly declared unreviewable by the courts, seeking to short-circuit the political remedy that Congress intentionally built into the statute instead of judicial review to address the sort of objections that the plaintiffs now press. Even if the APA permitted it and the plaintiffs could make some showing of need for discovery, therefore, the Court should postpone it until the defendants have an opportunity fully to address these basic defects, as the Federal Rules of Civil Procedure contemplate, in a motion to dismiss or in response to the plaintiffs' preliminary injunction motion.[7]

First, the plaintiffs' Complaint raises substantial doubt that they even have standing to sue. See People of the State of Illinois v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989) (state and its officials lack standing to challenge base closure decisions). The plaintiffs' claims also run afoul of the prudential standing requirement that courts refrain from "adjudicating 'abstract questions of wide public significance' which amount to 'general-

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[7] Although there is plainly no need to expedite these proceedings, the Court could easily accommodate any perceived such need by establishing a briefing schedule on the jurisdictional issues or the plaintiffs' preliminary injunction motion. Thus, even if the plaintiffs were able to establish some justification for haste, which they have not, the Court could accommodate that need without permitting discovery, which does nothing to alleviate the harm the plaintiffs insist they will suffer.

ized grievances' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian College v. Americans United For Separation Of Church And State, 454 U.S. 464, 475 (1982) (citation omitted).

Second, this lack of standing reveals that the plaintiffs' objections are in fact an attempt to invoke the Judicial Branch to referee a purely political conflict between a few members of Congress and the Executive, in direct conflict with Congressional intent in the Base Closure Act. As the Supreme Court aptly observed in U.S. v. Richardson, 418 U.S. 166, 179 (1974): "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."

Here, reliance on Congress to solve these alleged deficiencies in the base closure process is not merely to be inferred, but is clear from the text and legislative history of the statute. As explained supra pp. **x-x**, the Base Closure Act provides a specific mechanism for Members of Congress to voice their disagreement with the Secretary's recommendations: they can nullify those proposals completely by enacting a joint resolution of disapproval. The statute plainly contemplates that Members dissatisfied with the Secretary's conclusions or procedure should address those objections to their colleagues, and attempt to persuade them that these failings require disapproval of the recommendations.

Instead, the Congressional plaintiffs have requested this Court to intervene in the dispute, and to reject the Secretary's recommendations as a matter of judicial authority. Even if the plaintiffs had standing to pursue it, Congress explicitly closed that avenue. As explained in the Conference Report:

> 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 Secretary of Defense's recommendation of closures and realignments of military installations . . .

House Conf. Rept. 101-923 at 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258. This explicit recognition that the statutory mechanism is the exclusive remedy for alleged violations of the Base Closure Act came only a few months after the D.C. Circuit's decision in National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990) ("NFFE"), which held that military decisions to close bases under an earlier version of the Base Closure Act were "committed to agency discretion by law" and therefore unreviewable under the APA. See 5 U.S.C. { 701.

Indeed, the restriction of judicial review retained in the 1990 Base Closure Act was designed to prevent suits precisely like this one: Congress stated that it had "assiduously protected the 1988 base closure process," at issue in NFFE, "in the face of numerous attempts to undermine it. Some of those attempts have come in Congress from those interested in keeping open a base

recommended for closure." House Rept. 101-665 at 342, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3068. Similarly, the conferees stated that the base closure process required amendment in part because "closures and realignments under existing law . . . take a considerable period of time and involve numerous opportunities for challenges in court." House Conf. Rept. 101-510 at 705, 1990 U.S. Code Cong. & Admin. News at 3257.

Even if the plaintiffs could demonstrate some need for haste in these proceedings, therefore, the Court should not permit them to begin discovery immediately. Their questionable standing, as well as Congress' clearly expressed view that judicial review would interfere with the statutory scheme, strongly suggest that the Court should permit the parties to brief these issues fully, to ensure that the Court in fact has jurisdiction to decide this case before discovery begins.

CONCLUSION

For the foregoing reasons, the Court should deny the plaintiffs' motion for expedited discovery and hearing.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

VINCENT M. GARVEY

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Attorneys for Defendants

Document Separator

10 JUL 1991 002288

7/91

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT	District EASTERN DISTRICT OF PENNSYLVANIA
	Docket No. CIVIL ACTION NO. 91-4322
SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS v. H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY (cont.)	To: (Name and Address of Defendant) ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

Bruce W. Kauffman
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk MICHAEL E. KUNZ	Date
(By) Deputy Clerk Carol D. James Carol D. James	7/8/91

JS 44C
(Rev. 12/84)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. **(SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)**

I (a) PLAINTIFFS

Senator Arlen Specter, et al.

(See attached)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Phila.
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

H. Lawrence Garrett, III, Secretary of the Navy, et al.

(See attached)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT U.S.
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Bruce W. Kauffman, Esquire
DILWORTH, PAXSON, KALISH & KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- X 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only) (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
The Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §§1331, 1337, 1346 and 1361; the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Ti XXIX, §§2901-2910 (November 5, 1990); the Administrative Procedure Act, 5 U.S.C. §§701, et
Venue is proper in this Court pursuant to 28 U.S.C. §1391.

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT	TORTS: PERSONAL INJURY	TORTS: PERSONAL INJURY	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	☐ 310 Airplane	☐ 362 Personal Injury Med. Malpractice	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 315 Airplane Product Liability	☐ 365 Personal Injury Product Liability	☐ 620 Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws		☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	PROPERTY RIGHTS	☐ 450 Commerce/ICC Rates/Etc.
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs	☐ 820 Copyrights	☐ 460 Deportation
☐ 151 Medicare Act	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 830 Patent	☐ 810 Selective Service
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	☐ 840 Trademark	☐ 850 Securities/Commodities/Exchange
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 891 Agricultural Acts
☐ 160 Stockholders' Suits	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 892 Economic Stabilization Act
☐ 190 Other Contract			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 893 Environmental Matters
☐ 195 Contract Product Liability			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 894 Energy Allocation Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 895 Freedom of Information Act
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence (28 USC 2255)	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 220 Foreclosure	☐ 442 Employment	☐ 530 Habeas Corpus	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 950 Constitutionality of State Statutes
☐ 230 Rent Lease & Ejectment	☐ 443 Accommodations	☐ 540 Mandamus & Other		☐ 870 Taxes	X 890 Other Statutory Actions
☐ 240 Torts to Land	☐ 444 Welfare	☐ 550 Civil Rights		☐ 871 IRS—Third Party 26 USC 7609	
☐ 245 Tort Product Liability	☐ 440 Other Civil Rights			☐ 875 Customer Challenge 12 USC 3410	
☐ 290 All Other Real Property					

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- X 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P. 23 — DEMAND $ Declaratory Judgment — Check YES only if demanded in complaint — JURY DEMAND: ☐ YES X NO

VIII. RELATED CASE(S) (See instructions): IF ANY N/A — JUDGE _____ DOCKET NUMBER _____

DATE: July 8, 1991

SIGNATURE OF ATTORNEY OF RECORD: [signature]

UNITED STATES DISTRICT COURT

PLAINTIFFS

United States Senator Arlen Specter
Room 9400
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Harris Wofford
Room 9456
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Senator Bill Bradley
Union-1605
Vauxhall Road
Union, New Jersey

United States Senator Frank R. Lautenberg
Gateway I
Newark, New Jersey

Governor Robert P. Casey
Room 229
Main Capitol
Harrisburg, Pennsylvania

Commonwealth of Pennsylvania
Attention: Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

Pennsylvania Attorney General Ernest D. Preate, Jr.
16th Floor
Strawberry Square
Harrisburg, Pennsylvania

United States Representative Curt Weldon
1554 Garrett Road
Upper Darby, Pennsylvania

United States Representative Thomas Foglietta
Room 10402
Green Federal Building
6th and Arch Streets
Philadelphia, Pennsylvania

United States Representative Robert E. Andrews
16 Somerdale Square
Somerdale, New Jersey 08083

United States Representative R. Lawrence Coughlin
Norristown, Pennsylvania

City of Philadelphia
Attention: Charisse Lillie
Office of the City Solicitor

Howard J. Landry
President of the International Federation
of Professional and Technical Engineers
Local 3
Cherry Hill, New Jersey

International Federation of Professional
and Technical Engineers ("IFPTE")
Local 3
Shipyard
Philadelphia, Pennsylvania

William F. Reil
President of the Metal Trades Council
Local 687 Machinists
Philadelphia, Pennsylvania

Metal Trades Council
Local 687 Machinists ("MTC")
Shipyard
Philadelphia, PA

DEFENDANTS

H. Lawrence Garrett, III
Secretary of the Navy
Department of the Navy
The Pentagon
Washington, D.C.

Richard Cheney
Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C.

The Defense Base Closure
and Realignment Commission
(the "Commission")

James A. Courter
Chairman of the Commission

William L. Ball, III
Membwer of the Commission

Arthur Levitt Jr.
Member of the Commission

James C. Smith, II, P.E.
Member of the Commission

Robert D. Stuart, Jr.
Member of the Commission

Howard H. Callaway
Member of the Commission

Gen. Duane H. Cassidy
USAF (Ret.)
Member of the Commission

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: See Attached

Address of Defendant: See Attached

Place of Accident, incident or Transaction: _____
(Use Reverse Side For Additional Space)

Does this case involve multidistrict litigation possibilities? Yes ☐ No ☒

RELATED CASE IF ANY

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes ☐ No ☐

CIVIL: (Place ☒ in *ONE CATEGORY ONLY*)

A. *Federal Question Cases:*
1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act—Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☒ All other Federal Question Cases (please specify)

B. *Diversity Jurisdiction Cases:*
1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability—Asbestos
9. ☐ All other Diversity Cases (Please specify)

ARBITRATION CERTIFICATION

(Check appropriate category)

I, Bruce W. Kauffman, Esquire, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 8, Section 4(a)(2), that, to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $75,000 exclusive of interest and cost;

☒ Relief other than monetary damages is sought.

DATE: July 8, 1991 /s/ Bruce W. Kauffman
Attorney-at-Law

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: July 8, 1991

Attorney-at-Law
Bruce W. Kauffman

CIV. 609
(Rev. 11/85)

MICHAEL E. KUNZ
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U. S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that pursuant to Local Rule 7(h) the United States magistrates of this district, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Appropriate consent forms for this purpose are available from the clerk of court.

Your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court. Only if all the parties in the case consent to the reference to a magistrate will either the judge or magistrate be informed of your decision.

The judge will then decide whether or not to refer the case to a magistrate for disposition but no action eligible for arbitration will be referred by consent of the parties until the arbitration has been concluded and trial *de novo* demanded pursuant to Local Rule 8, paragraph 7. The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate.

When a case is referred to a magistrate for all further proceedings, including the entry of final judgment, the final judgment may be appealed directly to the Court of Appeals for the Third Circuit, unless the parties elect to have the case reviewed by the appropriate district judge (in which event any further appeal to the Court of Appeals would only be by petition for leave to appeal). Accordingly, in executing a consent form, you will be asked to specify which appeal procedure you elect.

Nothing herein shall be construed to be a limitation of any party's right to seek review by the Supreme Court of the United States.

Michael E. Kunz

CLERK, UNITED STATES DISTRICT COURT

RB

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS, Plaintiffs, v. H. LAWRENCE GARRETT, III, Secretary of the Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR., Defendants.	CIVIL ACTION NO. 91-CV-1322

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Sen. Arlen Specter, Sen. Harris Wofford, Sen. Bill Bradley, Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Rep. Curt Weldon, Rep. Thomas Foglietta, Rep. Robert E. Andrews, Rep. R. Lawrence Coughlin, the City of Philadelphia, Howard J. Landry, International Federation

of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council, Local 687 Machinists allege as follows:

INTRODUCTION

1. A declaratory judgment is necessary to prevent the imminent and unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the largest employer in the Philadelphia area. The actions taken by the government officials responsible for ensuring an independent, equal, lawful and fair process for closing and realigning military installations under the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990), have violated the Base Closure Act and the procedures and regulations promulgated thereunder in at least 18 separate and material respects.

2. The plaintiffs respectfully request a declaratory judgment that the Secretary of Defense, the Secretary of Navy and the Base Closure and Realignment Commission's actions are fundamentally inconsistent with the Base Closure Act and other applicable law and are therefore void.

3. Immediate declaratory relief is necessary because the defendants' unlawful conduct has resulted in the Shipyard being placed on a list of military installations slated for closure. If the requested relief is not granted, the plaintiffs will be immediately and irreparably injured.

PLAINTIFFS

4. Plaintiff United States Senator Arlen Specter is a

citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 9400, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

5. Plaintiff United States Senator Harris Wofford is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office at Room 9456, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

6. Plaintiff United States Senator Bill Bradley is a citizen of the State of New Jersey with his residence in Morris County, New Jersey, and an office at Union-1605, Vauxhall Road, Union, New Jersey.

7. Plaintiff United States Senator Frank R. Lautenberg is a citizen of the State of New Jersey with his residence in Secaucus, New Jersey, and an office at Gateway I, Newark, New Jersey.

8. Plaintiff Governor Robert P. Casey is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office at Room 229, Main Capitol, Harrisburg, Pennsylvania.

9. Plaintiff the Commonwealth of Pennsylvania is a State of the United States.

10. Plaintiff Pennsylvania Attorney General Ernest D. Preate, Jr. is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office

at 16th Floor, Strawberry Square, Harrisburg, Pennsylvania. Plaintiff Preate sues individually and as Attorney General of the Commonwealth of Pennsylvania.

11. Plaintiff United States Representative Curt Weldon is a citizen of the Commonwealth of Pennsylvania with his residence in Delaware County, Pennsylvania, and an office at 1554 Garrett Road, Upper Darby, Pennsylvania.

12. Plaintiff United States Representative Thomas Foglietta is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 10402, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

13. Plaintiff United States Representative Robert E. Andrews is a citizen of the State of New Jersey with his residence in Camden County, New Jersey, and an office at 16 Somerdale Square, Somerdale, New Jersey 08083.

14. Plaintiff United States Representative R. Lawrence Coughlin is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office in Norristown, Pennsylvania.

15. Plaintiff the City of Philadelphia is a municipality of the Commonwealth of Pennsylvania.

16. Plaintiff Howard J. Landry is the President of the International Federation of Professional and Technical Engineers, Local 3, and is a citizen of the State of New Jersey with his residence in Cherry Hill, New Jersey. Landry has been employed

since 1972 by the Shipyard and has over twenty-seven years of federal service employment. Landry is a member of the class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

17. Plaintiff International Federation of Professional and Technical Engineers ("IFPTE"), Local 3, is the exclusive bargaining representative for virtually all General Schedule ("GS") employees of the Shipyard. IFPTE Local 3 has its principal place of business at the Shipyard, Philadelphia, Pennsylvania. IFPTE represents over 1,300 employees of the Shipyard. These employees are employed in GS grades 3 through 12 and work as engineers, technicians and clerical staff, predominately holding positions in all phases of the repair, overhaul and maintenance of Navy vessels. Nearly all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

18. Plaintiff William F. Reil, the President of the Metal Trades Council, Local 687 Machinists, is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia, Pennsylvania. Reil has been employed since 1953 by the Shipyard. Reil is a member of the class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

19. Plaintiff Metal Trades Council, Local 687 Machinists ("MTC"), is the exclusive bargaining representative for all blue collar workers at the Shipyard. MTC represents over 8,000 employees of the Shipyard and Naval Station. Nearly all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

DEFENDANTS

20. Defendant H. Lawrence Garrett, III is the Secretary of the Navy and maintains his principal office at the Department of the Navy, The Pentagon, Washington, D.C. Defendant Garrett is sued in his official capacity as Secretary of Navy.

21. Defendant Richard Cheney is the Secretary of Defense and maintains his principal office at the Department of Defense, The Pentagon, Washington, D.C. Defendant Cheney is sued in his official capacity as Secretary of Defense.

22. Defendant The Defense Base Closure and Realignment Commission (the "Commission") is the agency of the United States charged with ensuring an independent, equal, lawful and fair process for closing and realigning military installations.

23. Defendant James A. Courter is Chairman of the Commission and is sued in his official capacity.

24. Defendant William L. Ball, III is a member of the Commission and is sued in his official capacity.

25. Defendant Howard H. Callaway is a member of the Commission and is sued in his official capacity.

26. Defendant Gen. Duane H. Cassidy, USAF (Ret.) is a member of the Commission and is sued in his official capacity.

27. Defendant Arthur Levitt Jr. is a member of the Commission and is sued in his official capacity.

28. Defendant James C. Smith, II, P.E. is a member of the Commission and is sued in his official capacity.

29. Defendant Robert D. Stuart, Jr. is a member of the Commission and is sued in his official capacity.

JURISDICTION AND VENUE

30. This Court has jurisdiction over the subject matter of this lawsuit pursuant to: (a) the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; (b) 28 U.S.C. §§1331, 1337, 1346 and 1361; (c) the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990); and (d) the Administrative Procedure Act, 5 U.S.C. §§701 et seq.

31. Venue is proper in this Court pursuant to 28 U.S.C. §1391.

STATEMENT OF FACTS

A. The Philadelphia Naval Shipyard

32. Founded in 1801, the Philadelphia Naval Shipyard is a major industrial complex consisting of extensive and large drydocks, piers, production shops, equipment and other assets valued at almost 3 billion dollars. The Philadelphia Naval Station services the Shipyard.

33. Operations at the Shipyard involve at least 47,000

jobs in the Philadelphia area (31,000 direct and indirect positions, 7,000 additional ship-associated personnel and 9,100 direct and indirect positions associated with the Philadelphia Naval Station).

34. There are eight Naval Shipyards in the United States: Puget Sound, Norfolk, Philadelphia, Mare Island, Charleston, Pearl Harbor, Portsmouth and Long Beach.

35. Almost 15% of the total repair and modernization work performed by all eight Naval Shipyards is accomplished at the Philadelphia Shipyard.

36. In addition to performing work on large amphibious ships and other large vessels, the Philadelphia Shipyard's physical assets and experienced work force make it the premier facility for work on the Navy's non-nuclear aircraft carriers and highly sophisticated and complex cruisers and destroyers.

37. The Shipyard excels in the Service Life Extension Program ("SLEP"), which extends the life of non-nuclear carriers in the Naval fleet by 15-30 years at a cost of about $1 billion or less per carrier.

38. Philadelphia is the only Naval Shipyard performing SLEP work.

39. In the 1991 Defense Appropriation Act, the Congress has required a $405 million CV-SLEP on the aircraft carrier U.S.S. Kennedy to be performed at the Shipyard. The CV-SLEP is not scheduled to be completed until mid-1996.

40. From 1980 through the present, Philadelphia has

led all eight Naval Shipyards in efficiency and cost-effectiveness, due largely to the excellence of its highly skilled work force.

41. Contrary to the statements of the Navy, not a penny will be saved by the closure of the Shipyard.

42. Philadelphia is one of only two Naval Shipyards operating in the black with positive net operating results in the last two years.

43. The Shipyard differs from most other governmental agencies because it operates as a private business and is not funded directly from the defense budget. Personnel payrolls, building maintenance and nearly all other overhead and operating expenses are paid for by selling Shipyard services to customers in a highly competitive environment.

44. Unlike most other governmental agencies, the Shipyard does not receive annual appropriations in support of operations. Rather, it generates its revenues by charging customers for work performed.

45. If the Shipyard is closed, the work performed there will ultimately be performed at greater cost to the Navy.

B. Enactment of the 1990 Defense Base Closure and Realignment Act

46. On May 3, 1988, then Secretary of Defense, Frank Carlucci, chartered the Defense Secretary's Commission on Base Realignment and Closure to evaluate and recommend a reduction in the military installations located in the United States.

47. In October 1988, Congress passed and the

President signed Public Law 100-526, the Defense Authorization Amendment and Base Closure and Realignment Act.

48. The 1988 Commission on Base Realignment and Closure recommended that 86 bases be closed and 59 bases be realigned or partially closed. These recommendations were strongly criticized by members of Congress and the public.

49. Congressional critics contended that the 1988 base closure and realignment recommendation process had not been sufficiently open to public scrutiny.

50. Congressional critics also charged that faulty data had been used to reach the 1988 final closure recommendations.

51. Congress believed that the General Accounting Office ("GAO") should have reviewed the data considered by the 1988 Commission on Base Realignment and Closure.

52. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 36 bases in the United States, including the Shipyard.

53. In connection with that proposal, the Vice Chief of Naval Operations conducted a study to justify the proposed closure. This study concluded that the Shipyard should not be closed.

54. On November 5, 1990, to redress the criticisms raised by the 1988 base closure process, the President signed into law the Base Closure Act.

55. The Base Closure Act:

(a) Expressly stated that its "purpose" was "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)];

(b) Required that all meetings of the Commission "be open to the public," except where classified information was being discussed [10 U.S.C. §2902(e)(2)(A)];

(c) Mandated the development and application of "final criteria" for making the closure and realignment determinations [10 U.S.C. §2903(b)(2)(A) and (c)];

(d) Mandated the creation of a six year force-structure plan for the Armed Forces for making the closure and realignment determinations [10 U.S.C. §2903(a) and (c)];

(e) Required the Secretary of Defense to consider all military installations "equally" for closure or realignment [10 U.S.C. §2903(c)(3)];

(f) Required the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [10 U.S.C. §2903(c)(2)]; and

(g) Required the Secretary of Defense to transmit to the GAO "all information used by the Department in making its recommendations to the Commission for closures and realignments," and required the GAO (i) to assist the Commission in its review and analysis of the recommendations made by the Secretary and

(ii) to transmit to the Commission and to Congress "a report containing a detailed analysis of the Secretary's recommendations and selection process" 45 days before the Commission's report was to be transmitted to the President [10 U.S.C. §§2903(c)(4), 2903(d)(5)(A) and 2903(d)(5)(B)].

C. The Oversight Role of Congress Under the Base Closure Act

56. The April 1991 Base Closure and Realignment Report of the Department of Defense ("DOD") acknowledges the significant oversight role retained by Congress with respect to military installation closures and realignments:

(a) Authority to disapprove by law the Secretary's final criteria;

(b) Receipt of the Secretary of Defense's force structure plan;

(c) Receipt of the Secretary's recommended closures and realignments;

(d) The role of the General Accounting Office; and

(e) The requirement that the Commission's proceedings, information, and deliberations be open, on request, to designated members of Congress.

D. The Evaluative and Oversight Role of the General Accounting Office Under the Base Closure Act

57. During the 1988 base closure process, Congress belatedly called upon the GAO to examine the 1988 commission's methodology, findings and recommendations.

58. Congress ensured an integral and timely role for the GAO during the 1991 base closure process.

59. The Secretary's April 1991 Base Closure and

Realignment Report to the Commission described the GAO's essential role:

> Public Law 101-510 provided for the General Accounting Office (GAO) to monitor the activities, while they occur, of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.
>
> The GAO is required to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO report, due by May 15, 1991, is also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act. In addition, the GAO is required to assist the Commission, if requested, with its review and analysis of the Secretary's recommendations. (Emphasis supplied.)

60. Purporting to comply with Congressional mandates, the Commission stated at p. 1-5 of its July 1, 1991 Base Closure and Realignment Report to the President that the "GAO has been an integral part of the process."

E. The 1991 Defense Base Closure Commission

61. The Base Closure Act provides for an eight member Commission to conduct an independent, equal, lawful and fair process for closing and realigning military installations.

62. To ensure the independence of the Commission, the Base Closure Act requires that the President nominate commissioners only after consulting with the speaker of the House of Representatives concerning the appointment of two members, the majority leader of the Senate concerning two members, the minority leader of the House of Representatives concerning the

appointment of one member and the minority leader of the Senate concerning the appointment of one member.

63. The President nominated former New Jersey Congressman James A. Courter as Chairman of the Commission and the following seven as members of the Commission: William L. Ball, III, former Secretary of the Navy; Howard H. (Bo) Callaway, former Secretary of the Army; Duane H. Cassidy, former commander-in-chief of the United States Transportation Command of the Military Airlift Command; Arthur Levitt, Jr., chairman of the board of Levitt Media Company; James C. Smith II, P.E., formerly a member of the Secretary of Defense's 1988 Base Closure Commission; Robert D. Stuart, Jr., former chairman of the board of the Quaker Oats Company; and Alexander Trowbridge, former Secretary of Commerce.

64. These nominations were confirmed by the Senate.

65. On May 17, 1991, Alexander Trowbridge resigned from the Commission because of a conflict of interest arising out of his ownership of a majority of stock in certain companies that had significant Pentagon contracts.

66. Section 2902 of the Base Closure Act requires that all vacancies be filled in the same manner as the original appointment.

67. In accordance with Congress' oversight role under the Base Closure Act, Alexander Trowbridge had been nominated by the President after consultation with Speaker Foley.

68. In violation of the Base Closure Act, Trowbridge's

vacancy was never filled.

69. The Commission established four procedures for gathering evidence to review the DOD's base closure proposals: (a) 15 public hearings in Washington, D.C. to receive information from the DOD, legislators and other experts; (b) 14 regional and site hearings to obtain public comment; (c) site visits by the Commissioners of the major facilities proposed for closure; and (d) review by the Commission's staff of the Armed Services' processes and data.

70. Under the Base Closure Act, the Commission was required to submit its Report to the President by July 1, 1991, setting forth its findings, conclusions and recommendations for closures and realignments inside the United States.

F. The Department of Defense Base Closure Criteria and Process

71. The Base Closure Act directs the Secretary of Defense to: (1) develop selection criteria for making recommendations for the closure of military installations and to finalize such criteria after public comment; (2) provide to Congress (with the Department of Defense's budget request for fiscal year 1992) a six-year, force-structure plan for the Armed Forces; (3) submit to the Commission by April 15, 1991 a list of military installations recommended for closure or realignment "on the basis of the force-structure plan and the final criteria" [10 U.S.C. §2903(c)(1)(emphasis supplied)]; and (4) make available to the Commission, the GAO and Congress "all information used by the Department in making its recommendations to the Commission for

closures and realignments" [10 U.S.C. §2903(c)(4)(emphasis supplied)].

72. As part of the objective process for determining whether to close a military installation, the Base Closure Act required the Secretary of Defense to establish selection criteria to be used in making a closure recommendation.

73. In developing these criteria, the Secretary was required to publish proposed criteria in the Federal Register and solicit public comments.

74. The DOD published eight proposed criteria and requested comments on November 30, 1990.

75. The proposed criteria closely mirrored the criteria established for the 1988 Defense Secretary's Commission on Base Realignment and Closure. The only notable differences were that priority consideration was given to military value criteria and payback was no longer limited to six years.

76. As a result of numerous public concerns raised about the criteria's broad nature and the need for objective measures or factors for the criteria, on December 10, 1990, the DOD issued a memorandum setting forth "policy guidance" and "record keeping" requirements to the Military Departments as follows:

> The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and

> The studies must consider <u>all</u> military installations inside the United States...<u>on an equal footing</u>,...
>
> * * *
>
> DOD components shall keep:
>
> - Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
>
> - Data, information and analysis considered in making base closure and realignment selections; and
>
> - Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act. (Emphasis supplied.)

77. On February 13, 1991, the DOD issued a memorandum setting forth "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

> - Uniform guidance defining data requirements and sources for each category of base,
>
> - Systems for verifying accuracy of data,
>
> - Documentation justifying any changes made to data submissions, and
>
> - Procedures to check the accuracy of the analysis made from the data provided.

78. The February 13, 1991 DOD Memorandum also provided the following procedures for evaluating closures and realignments: (a) if there was no excess capacity in a certain category, the bases in that category were exempted from closure; (b) if there was excess capacity and a base was recommended for closure or realignment, the Department's analysis must have

considered all military bases within that category and any cross-categories; and (c) military bases could only be excluded from further review if they were militarily/geographically unique or mission essential such that no other base could substitute for them.

79. On February 15, 1991, the DOD published in the Federal Register eight proposed final criteria to govern the base closure and realignment process.

80. The first four criteria concerned "military value," and were to receive preference:

(1) Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.

(2) The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

(4) The cost and manpower implications.

The fifth criteria concerned "return on investment":

(5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

The final three criteria involved "impacts":

(6) The economic impact on local communities.

(7) The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.

(8) The environmental impact.

81. The proposed criteria were subject to Congressional review between February 15, 1991 and March 15, 1991. The criteria became final on March 15, 1991.

G. The Necessity For The Navy To Develop And Implement An Internal Control Plan

82. The February 13, 1991 DOD Memorandum also required each Military Department to develop and implement an "internal control plan" to ensure the accuracy of data collection and analyses. At a minimum, the internal control plan was required to include (1) uniform guidance defining data requirements and sources for each category of base, (2) systems for verifying accuracy of data, (3) documentation justifying any changes made to data submissions, and (4) procedures to check the accuracy of the analyses made from the data provided.

83. The Navy failed to implement an "internal control plan" that ensured the accuracy of its data collection and analysis. The Navy did not prepare minutes of its deliberations on closures and realignments.

H. The Navy's Pre-Determination to Close the Philadelphia Naval Shipyard

84. On December 10, 1990, the DOD issued the exclusive procedures which the Military Departments were to follow in making defense base closure and realignment recommendations.

85. In accordance with the Base Closure Act, the procedures required that all military installations be considered equally, "without regard to whether the installation has been

previously considered or proposed for closure or realignment by the Department of Defense."

86. In blatant contravention of the express language of the Base Closure Act, its own internal procedures and clear Congressional intent to establish an objective and fair process, the Navy used a completely arbitrary, subjective process designed to justify a pre-determined conclusion to close the Shipyard.

87. Documents that were withheld by the Navy until after the close of the Commission's public hearings established that, as early as December 19, 1990 -- prior to the DOD's establishment of a force structure plan or final criteria for evaluating base closures -- the Secretary of the Navy had already decided to close the Shipyard.

88. On December 19, 1990, Admiral Peter Heckman, then Commander of the Naval Sea Systems Command, wrote a memorandum to the Chief of Naval Operations urging the Navy's reconsideration of its decision to close the Shipyard:

> While I realize that the Secretary has been briefed and has concurred with the proposal to mothball Philadelphia Naval Shipyard, I strongly recommend that this decision be reconsidered. It is more prudent to downsize Philadelphia Naval Shipyard...
>
> * * *
>
> Further, I recommend that the drawdown of Philadelphia Naval Shipyard to an SRF size shipyard not be done until FY 95, as the shipyard is required to support scheduled workload until that time. (Emphasis supplied.)

89. Although Admiral Heckman was responsible for

oversight of all Naval Shipyards, the Navy refused to allow him to become a part of the base closure process.

90. Admiral Heckman retired from the Navy on or about May 1, 1991. After his retirement, Admiral Heckman was instructed by the Assistant Secretary of the Navy, Donald Howard, that he was not to testify before the Commission at the public hearings on the Philadelphia Naval Shipyard.

91. The Navy predetermination to close the Philadelphia Naval Shipyard is confirmed by its treatment of other Naval Shipyards during the base closure process.

92. Navy guidelines expressly prohibited non-emergency capital upgrades of any military installations on the 1990 Base Closure List during the 1991 base closure process.

93. Nevertheless, on February 4, 1991 -- one day prior to the commencement of the Navy's force structure review process -- the Chief Naval Officer requested $1.05 million to upgrade for nuclear certification a shipyard that was clearly subject to the base closure process: Long Beach Naval Shipyard.

94. Long Beach is the only shipyard other than Philadelphia that does not have a nuclear certification.

95. The Navy's decision to upgrade Long Beach not only violated its own guidelines but clearly establishes a predisposition by the Navy to close the Philadelphia Naval Shipyard.

I. The Navy Base Structure Committee's Blatant Disregard for its Own Evaluation Results

96. In December 1990, the Secretary of the Navy

established a six-member Base Structure Committee ("BSC") to conduct a base structure review and to determine the Navy's closure and realignment candidates.

97. The BSC was charged with reviewing all installations inside the United States equally, "without regard to whether the installation was previously considered for closure or realignment."

98. By applying their admittedly subjective judgment, the BSC candidly admitted that it arrived at base closure decisions that "differed from the assessments one might make using the raw empirical data."

99. The BSC initially categorized all facilities according to function -- e.g., Naval Air Stations, Naval Shipyards -- to determine which categories possessed significant excess capacity.

100. The Navy then applied the eight selection criteria in two phases by assigning color codes to military bases in categories with excess capacity.

101. Phase I of the BSC's analysis required a consideration of the first four military criteria. After Phase I was completed, the Navy excluded those bases which it determined "were distinguished by virtue of their operational value," i.e. those that it gave an overall "green" rating under the first four military criteria.

102. Under the Navy's rating system, a "green" rating received one point, a "yellow" rating received two points, and a

"red" rating (favoring closure) received three points.

103. The Navy's color-coded/point approach resulted in the following total point allocations to each of the eight Naval Shipyards in the United States:

Shipyard	Points
Puget Sound, WA	4
Norfolk, VA	5
Philadelphia, PA	6
Charleston, SC	6
Mare Island, CA	6
Pearl Harbour, HI	6
Portsmouth, ME	6
Long Beach, CA	7

104. Puget Sound received a "green" rating for each of the first four military criteria and was therefore excluded from further closure consideration.

105. In accordance with the BSC base closure criteria, the seven remaining Naval Shipyards should have been evaluated under the remaining four non-military criteria set forth in Phase II.

106. Using the BSC's own rating system, the Philadelphia Naval Shipyard should have been treated the same as Charleston, Mare Island, Pearl Harbor and Portsmouth and better than Long Beach.

107. Ignoring its own rating system and in blatant disregard of the statutory mandate that all bases be considered "equally," the Navy -- for no apparent reason and without any supporting documentation or analysis -- gave overall "green" ratings to three undeserving shipyards: Mare Island, which just like Philadelphia Naval Shipyard, received two "yellow" and two

"green" ratings; Norfolk, which received three "green" and one "yellow" ratings; and Pearl Harbor, which received one "red" and three "green" ratings.

108. The BSC then arbitrarily, unilaterally and without reference to any one of the eight DOD criteria excluded all of the six nuclear-capable shipyards from any further review without providing any documentation or analysis to justify a drydock need for nuclear ships as compared with conventional carriers.

109. This process left only Long Beach (which is one of two California shipyards) and Philadelphia for further review.

110. To circumvent the fact that Long Beach scored poorly in three of the four military criteria and overall had the worst rating of all eight Naval Shipyards, the BSC then excluded Long Beach from further consideration contending that one of the drydocks at that shipyard could be used "to handle West Coast aircraft carriers (including CVN emergency work)." [Navy Report, Tab C, p. 10].

111. By this egregious process of elimination, the BSC was left with only one yard to consider for closure under the remaining four criteria, the Philadelphia Naval Shipyard. The BSC then performed a perfunctory application of the second four non-military criteria with respect to the Philadelphia Naval Shipyard to ensure its closure.

J. The Navy's Force Structure Plan

112. The Base Closure Act required the Navy to create

a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet during a six year fiscal period. Base closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act.

113. The Navy's force structure plan and conclusions regarding the Navy's drydock needs fall far short of the statutory requirements. The plan fails to provide the requisite specificity necessary to determine how many large drydocks, such as those at the Shipyard, the Navy will need from 1992 through 1997, including the number and types of ships that will remain in the fleet and the number of anticipated repairs, overhauls and refuelings required on those ships during the relevant time period.

114. In fact, the Navy's own April 1991 Report contradicts the conclusion that any of the Naval Shipyards should be closed.

115. The Navy's Report stated that the Navy is currently fully utilizing its drydocks "in excess of 100%." The Report also stated that the number of large amphibious ships is increasing and for 1994 and 1997 there will be insufficient naval drydocks to handle large carriers. [Navy Report, Tab C, p. 2]

116. In its Report, the Navy also determined that shipyard workloads would be virtually unaffected:

> While the Navy fleet in general is downsizing by 19%, <u>the types of ships worked on by the Naval Shipyards is downsizing by only 1%, and in some cases is increasing (large Amphibious</u>

> and AEGIS ships). Thus, the need for certain facilities to accomplish this work is not diminished.

[Navy Report, Tab C, p. 2 (emphasis added)].

117. A March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to the Chief of Naval Operations confirmed that the Navy's utilization of shipyards for large amphibious ships and other large vessels would be between 84.2% and 106.9% for fiscal years 1992 though 1997.

118. Since the Navy requires that Shipyards reserve 30% of their space for emergency repairs, it is clear that Shipyards, such as the Philadelphia Naval Shipyard, servicing large amphibious ships and other large vessels will have no "excess" capacity during the relevant six year period and should have been excluded from further review under the base closure process.

119. The Navy's failure to prepare and follow an adequate force structure plan substantially prejudiced Naval Shipyards, such as the Philadelphia Naval Shipyard, since Philadelphia has: (a) three of the Navy's five East Cost drydocks that are capable of handling large amphibious ships and other large vessels; and (b) two of only three East Coast drydocks capable of handling carriers.

120. A March 15, 1991 memo from Admiral Heckman to the Chief of Naval Operations recognized that "retention of a credible repair capability at Philadelphia for naval ships home ported in the Northeast area is the most cost effective

solution." Admiral Heckman concluded that:

> [T]he workload distribution for naval shipyard in the 90's supports full operations at Philadelphia through mid FY 95. As previously briefed, executing a realignment of Philadelphia Naval Shipyard in FY 93 will cause significant perturbations to carrier overhauling yard assignment and could result in an East Cost CV overhauling on the West Coast.

121. Despite express requests for the foregoing information by interested members of Congress, the Navy deliberately withheld the Claman and Heckman memoranda from the GAO, the Commission, Congress and the public until after the close of the public hearings.

122. The BSC submitted its recommendations, including its proposal to close the Philadelphia Naval Shipyard, to the Secretary of the Navy.

123. The Secretary of the Navy submitted BSC's nominated bases for closure and realignment to the Secretary of Defense.

124. On April 12, 1991, Secretary Cheney issued the DOD's Base Closure Report. The Report adopted the Navy's proposals and recommended 43 base closures, including the Philadelphia Naval Shipyard.

K. <u>The May 16, 1991 General Accounting Office Report</u>

125. The Base Closure Act provides for the GAO to monitor the activities of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.

126. The GAO was required (a) to assist the Commission in its review and analysis of the Secretary of Defense's closure recommendations and (b) to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO Report was also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act.

127. Despite the clear mandates of the Base Closure Act and the DOD's internal guidelines and regulations, the Navy failed to provide the GAO with sufficient documentation to support either its base closure process or its recommendations for closure.

128. The GAO's independent Report, entitled Observations on the Analyses Supporting Proposed Closures and Realignments, was issued on May 16, 1991, in accordance with the statutory mandate of the Base Closure Act. A copy of the relevant text of the GAO Report is annexed hereto as Exhibit A.

129. The GAO Report found that the Army and Air Force could document their use of the force-structure plan and the military value criteria. Therefore, the GAO concluded that the base closure recommendations made by the Army and Air Force were "adequately supported."

130. In stark contrast, the GAO concluded that the Navy's recommendations and processes were entirely inadequate.

131. The GAO Report concluded that the Navy did not offer sufficient documentation to prove whether or not its

process followed the force structure and selection criteria, thereby preventing the GAO from evaluating the Navy's specific recommendations for closure:

> We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.
>
> Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. [GAO Report at p. 46]

132. In addition to the lack of adequate documentation, and the absence of any internal control plan, the GAO determined that it could not evaluate the Navy's "methodology" for reviewing air stations, shipyards, or labs. [GAO Report at pp. 46-48]

133. Significantly, the GAO Report stated that, on May 7, 1991, the Navy's BSC informed the GAO that the BSC had ignored the data prepared by its working groups because of the BSC's view that "much of the data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs." According to the BSC, it therefore relied on informal briefings and meetings, many of which were in closed executive sessions. [GAO Report at p. 46]

134. The GAO Report identified three additional deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support "the basis for the [BSC's] military value ratings for Navy installations"; (2) the

implementation and use of an inconsistent color coding system to rate military bases; and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used by the Navy in its base structure reviews. [GAO Report at p. 48]

135. The GAO also discovered that, despite DOD guidance to the contrary, the Navy used budget data which did not use 1991 dollars as its baseline.

136. The GAO discovered inconsistencies in the Navy's service costs, savings estimates, payback calculations and recovery of closure costs. The GAO report concluded that the result of these inconsistencies was an overstatement of estimated annual savings and a shortening of the payback period for several closures.

137. The GAO Report also identified inconsistencies within the BSC's internal rating process, including the fact that the BSC had given identical ratings to two naval bases (Mare Island and Philadelphia Naval Shipyard) on each of the first four military selection criteria, but -- without any discernable justification -- had arbitrarily assigned an overall rating of green to one (Mare Island) and yellow to the other (Philadelphia Naval Shipyard). [GAO Report at p. 48]

138. Similarly, the BSC had assigned identical ratings to five naval bases but did not treat such bases equally. Again, the Philadelphia Naval Shipyard was not excluded from the closure process although four other naval shipyards which

received identical ratings were excluded from further review.

139. The GAO Report concluded that, since the BSC "did not document these differences," the GAO "could not determine the rationale for its final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." [GAO Report at p. 48]

140. In sum, the GAO Report found that the Navy and its BSC:

(a) Had not treated all bases equally, as required by the Base Closure Act;

(b) Had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act;

(c) Had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements; and

(d) Had prevented the GAO from performing its statutory mandate of reviewing and analyzing the recommendations for Naval base closures made by the Secretary of Defense and transmitting to Congress and the Commission a report containing a detailed analysis of the Secretary of Defense's recommendations for Naval base closures and the Navy selection process.

L. <u>Public Hearings</u>

141. The Base Closure Act established the 1991 Defense

Base Closure and Realignment Commission to ensure that "the [base closure] process is open." [Report to President, p.1-5].

142. The Base Closure Act therefore requires the Commission to conduct its proceedings in public and open its records and deliberations to public scrutiny.

143. The Commission expressly invited and received public testimony in Washington, D.C. from members of Congress.

144. By letter dated April 23, 1991, the Commission established five pages of procedures to govern Congressional testimony at the Commission's hearings. The Commission's procedures provided that:

> All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

145. The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation."

146. In accordance with the Base Closure Act, the Commission scheduled and held 28 hearings across the United States.

147. Congressional testimony on the Philadelphia Naval Shipyard was scheduled in Washington, D.C. for May 22, 1991. The regional hearing regarding the Philadelphia Naval Shipyard was scheduled for May 24, 1991.

148. In violation of the Base Closure Act and other applicable law, additional documentation was thereafter provided to the Commission that was not subject to GAO analysis or public comment and debate.

149. In blatant violation of the Base Closure Act, closed meetings with the Navy's BSC were held by the Commission on May 24, 1991 after the public hearings were completed.

150. Moreover, on May 24, 1991 -- after the close of the public hearings -- the Commission requested that the Navy's BSC provide it with additional information to "try to resolve missing gaps in the information provided."

151. Thereafter, the Navy's BSC provided additional documents and information to the Commission, including COBRA analyses, data underlying the color coding ratings, data regarding the VCNO study and other information regarding Navy closure recommendations, without affording interested members of Congress or the public a meaningful opportunity to comment on such information at a public hearing.

152. Despite repeated demands by members of Congress for a public hearing on the additional information supplied by the Navy, the Commission refused to allow any public debate.

M. The July 1, 1991 Commission Report To The President

153. On July 1, 1991, the Commission submitted its recommendations for the closure or realignment of U.S. military installations to the President.

154. In its July 1, 1991 Report to the President, the

Commission stated:

> The Navy presented a special challenge to the Commission. Its selection process was more subjective and less documented than that of either the Army or the Air Force. To determine whether the Navy complied with the law, the Commission's staff held a series of meeting with members of the Navy's Base Structure Commission and other high ranking naval officers...
>
> * * *
>
> These individuals responded to questions and supplied information to the Commission.

155. The Commission findings with respect to the Philadelphia Naval Shipyard were as follows:

> The Commission found that the overall public shipyard workload is falling significantly because of force reductions and budget limitations. The projected workload in nuclear shipyards during the 1990s was found to limit the potential for closing any nuclear shipyard until the late 1990s.
>
> The largest portion of Philadelphia's recent workload has been CV-SLEP, which the Navy desires to terminate. However, Congress has passed legislation that requires a CV-SLEP at Philadelphia. The Commission found that this CV-SLEP should be completed in mid-1996, about a year before the required closure date.
>
> Workload is available that could be diverted from public and private East Cost shipyards to Philadelphia to bring its activity up to levels that justify keeping it open. However, this would limit the Navy's ability to meet its target of putting 30 percent of its repair work in private yards ...
>
> * * *

> The Commission found that the combination of carrier-capable drydocks at Norfolk Naval Shipyard, Newport News Shipbuilding, and the mothballed drydocks at Philadelphia provide capacity for unplanned requirements.

156. The Commission exceeded its statutory authority in making base closure recommendations by considering the availability of privately-owned shipyards, such as Newport News, to provide emergency service for the Navy's fleet.

157. Consideration of private facilities as part of a force-structure plan to provide emergency service for the Navy's fleet is impermissible under the Base Closure Act and departs from long standing Navy strategic and operational requirements.

158. The Navy was fully aware of the need to keep the Philadelphia Naval Shipyard open, but withheld such information from the GAO, the Commission and the public. The March 1991 Admiral Claman memorandum to the Chief of Naval Operations clearly recognized that:

> Closure of Philadelphia Naval Shipyard, without retention of the large carrier capable dry docks creates a shortfall in dry dock capability for emergent dockings of aircraft carriers... Without the dry docks available at Philadelphia, the only other dock capable of taking an emergent carrier docking is at Newport News Shipbuilding (NNSB). Exhibit C-7 illustrates this situation graphically. This dock is privately owned and its docking schedule is not controlled by the Navy. The cost to have NNSB provide a dedicated dock under contract is considered prohibitive.

159. The Commission adopted the BSC's conclusion that the Shipyard should be closed based upon projected workload

trends. However, the Navy's force structure plan lacked sufficient detail for the Commission to evaluate the Secretary's recommendations.

160. The law requires the President to approve or disapprove the Commission's recommendations by July 15, 1991. If approved, the report will be sent to Congress. Unless Congress enacts a joint resolution disapproving the Commission's proposals within 45 legislative days (or prior to when Congress adjourns for the session), the Secretary must begin to close or realign those installations listed in the report.

161. In fact, the Navy failed to produce, and the Commission failed to obtain, detailed information about projected Naval Shipyard workloads.

162. The Navy failed to engage in a fair and objective process and did not treat all military installations equally in recommending the closure of the Shipyard.

163. The Navy deviated substantially from the force structure plan and base closure criteria in recommending the closure of the Shipyard.

164. The Navy failed to base its decision on each of the final selection criteria and failed to apply each of the eight criteria equally, fairly and objectively.

165. The Navy failed to provide <u>all</u> information used in making its base closure recommendations to the GAO and members of Congress and failed to consider all available information concerning the Shipyard, especially information which would have

prevented the BSC from recommending its closure.

166. The Commission's adoption of the DOD's recommended base closures and realignments also violated the procedural and substantive safeguards set forth in the Base Closure Act with respect to other military installations, including its recommendations to close the Philadelphia Naval Station and the realignment and elimination of the Warminster Naval Air Development Center and the U.S.Army Corps of Engineers division and district management headquarters located in the Commonwealth of Pennsylvania.

167. The foregoing actions of the defendants are in bad faith, arbitrary, capricious and in violation of the law.

N. Irreparable Injury

168. The foregoing conduct of defendants will cause plaintiffs to suffer immediate and irreparable harm.

169. According to the Navy's December 1990 Final Environmental Impact Statement for Base Closure/Realignment of the Philadelphia Naval Shipyard ("FEIS"), the direct economic consequence of the proposed closure of the Philadelphia Naval Shipyard includes a reduction in present Navy employment in the Philadelphia region by 88 percent, which represents eliminating directly almost 15,000 employment positions and indirectly causing the loss of an additional 7,384 jobs in the Philadelphia area.

170. The FEIS stated that the proposed closure would add an estimated 16,856 workers to the unemployment rolls (a 17.4

percent increase) and increase unemployment in the geographical region from 3.8 percent (in 1989) to 4.5 percent of the work force.

171. The FEIS also stated that "many employees of Philadelphia Naval Shipyard would experience difficulty re-entering the labor force without considerable retraining."

172. According to the FEIS, direct income and expenditures that would be withdrawn from the Philadelphia region as a result of the proposed closure would total $536.9 million.

173. An Economic Impact Report prepared by the Pennsylvania Economy League ("PEL") and submitted to the Naval Facilities Engineering Command on October 17, 1990 by the Commonwealth of Pennsylvania and the State of New Jersey concluded that closing the Philadelphia Naval Shipyard would have a much greater impact on the economy of Philadelphia and the entire tri-state region than that set forth in the FEIS since the Shipyard is the largest employer in the Philadelphia area.

174. Economic activity connected with the Philadelphia Naval Shipyard accounts for $2.1 billion in gross product in the Philadelphia metropolitan statistical area. This represent 1.45 percent of the region's total economic activity.

175. The PEL's Economic Impact Report concluded that the unemployment rate would jump 25 percent from 5.8 to 7.6 percent in the Philadelphia region, that the region would suffer a loss of $915 million in wage and salary income and retail sales would decline $382.8 million.

176. Plaintiffs do not have an adequate remedy at law.

177. There is presently an actual controversy between the parties, within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202.

COUNT I

All Plaintiffs
v.
The Secretary of Defense and
The Secretary of the Navy

178. Plaintiffs incorporate herein by reference paragraphs 1 through 177 above, as if fully set forth herein.

179. The Secretary of Defense, by and through his agent the Secretary of the Navy, adopted the list of closure and realignment recommendations made by the Navy's BSC in violation of the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. They failed to make available to the Commission, the GAO and Congress all information which was used by the Navy in making its recommendations to the Commission, in violation of Section 2903(c)(4) of the Base Closure Act;

b. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to assist the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to

prepare and transmit to Congress and the Commission a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. They failed to publish in the Federal Register and transmit to the congressional defense committees and to the Commission a summary of the selection process that resulted in the recommendation for closure for each installation, together with a justification for each recommendation, in violation of Sections 2903(c)(1) and (2) of the Base Closure Act;

e. They failed to consider all Naval installations inside the United States equally, without regard to whether the installations has been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

f. They failed to apply the eight final criteria adopted by DOD equally to all Naval installations in making their recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

g. They utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act;

h. They failed to implement record keeping and internal controls promulgated by DOD in order to insure an

accurate and fair decision-making process, in violation of the Base Closure Act; and

i. They failed to adopt a force structure plan for the Navy in compliance with Section 2903(a) of the Base Closure Act and failed to base their base closure recommendations on a force structure plan which complied with the Base Closure Act.

180. The Secretary of the Navy's and the Secretary of Defense's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the list of Naval closure and realignment proposals provided by the Secretary of the Navy and the Secretary of Defense to the Commission on April 12, 1991 was developed in a manner inconsistent with the requirements of the Base Closure Act and is therefore void;

b. Find and declare that the Secretary of the Navy's and the Secretary of Defense's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment proposals, findings and conclusions which were submitted by the Secretary of the Navy;

d. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy; and

e. Grant such other and further relief as this Court deems just and equitable.

COUNT II

All Plaintiffs
v.
The Base Closure Commission

181. Plaintiffs incorporate herein by reference paragraphs 1 through 180 above, as if fully set forth herein.

182. The Commission, in reviewing and makings its recommendations regarding the base closures submitted by the Secretary of the Navy, violated the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. It based its decision on a significant amount of substantive information supplied by the Navy which was not evaluated or even made available to the GAO or to Congress, in violation of the Base Closure Act;

b. It failed to ensure that the GAO performed its statutorily mandated duty of assisting the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. It failed to ensure that the GAO performed its

statutorily mandated duty of preparing and transmitting to Congress and the Commission a report containing a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. It decided to adopt the list of closure and realignment recommendations made by the Navy's BSC even though the GAO had found that the Navy and its BSC: (i) had not treated all bases equally, as required by the Base Closure Act; (ii) had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act; and (iii) had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements;

e. It failed to hold public hearings, in violation of Section 2903(d)(1) of the Base Closure Act, because it did not include certain pivotal information regarding the Navy's recommendations and selection process in the record until after the close of the public hearings;

f. It failed to consider all Naval installations inside the United States equally, without regard to whether the installations had been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

g. It failed to apply the eight final criteria

adopted by DOD equally to all Naval installations in making its recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

h. It utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act; and

i. It exceeded its statutory authority in making Naval base closure recommendations by considering privately-owned shipyards.

183. The Commission's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the Navy's list of closure and realignment recommendations, submitted by the Commission to the President on July 1, 1991, was adopted by the Commission in violation of the Base Closure Act and is therefore void;

b. Find and declare that the Commission's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment recommendations, findings and conclusions which were submitted by

the Secretary of the Navy and adopted by the Commission;

d. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment recommendations made by the Commission; and

e. Grant such other and further relief as this Court deems just and equitable.

COUNT III

Landry, Reil, IFPTE and MTC
v.
All Defendants

184. Plaintiffs incorporate herein by reference paragraphs 1 through 183 above, as if fully set forth herein.

185. The defendants' actions constitute a violation of the plaintiffs' rights to Due Process as guaranteed under the Fifth Amendment of the United States Constitution.

186. The Base Closure Act expressly entitles the plaintiffs to a "fair process" by which it will be decided which military installations should be closed. Additionally, the Base Closure Act entitles the plaintiffs to have the Philadelphia Naval Shipyard remai open and in operation unless and until it is determined, in accordance with the Base Closure Act, that the closure of the Shipyard is warranted.

187. The defendants' disregard of the procedures set forth in the Base Closure Act, as more fully described in Counts I and II of this Complaint, impermissibly interfered with the rights which were granted to the plaintiffs under the Base Closure Act, and constitute violations of the Due Process Clause

of the United States Constitution.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that defendants' actions in developing, adopting, and concurring in the Navy's list of closure and realignment recommendations provided by the Commission to the President on July 1, 1991 violated the plaintiffs' rights guaranteed by the Due Process Clause of the United States Constitution;

b. Pursuant to 5 U.S.C. §706(2), hold unlawful and void that portion of the list of closure and realignment proposals, findings and conclusions which were submitted by the Secretary of the Navy and adopted by the Commission;

c. Enjoin the Secretary of Defense from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy and the Secretary of Defense and made by the Commission; and

d. Grant such other and further relief as this Court deems just and equitable.

/s/ Bruce W. Kauffman
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DATED: July 8, 1991

Document Separator

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP. ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN, CITY OF PHILADELPHIA, HOWARD J. LANDRY, and INTERNATIONAL FEDERATION OF PROFESSIONAL and TECHNICAL ENGINEERS, LOCAL 3, and WILLIAM F. REIL and METAL TRADES COUNCIL, LOCAL 687 MACHINISTS,	
Plaintiffs,	CIVIL ACTION
v.	NO. 91-
H. LAWRENCE GARRETT, III, Secretary of Navy, RICHARD CHENEY, Secretary of Defense, THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
REQUEST FOR DECLARATORY RELIEF

Plaintiffs United States Senator Arlen Specter, United States Senator Harris Wofford, United States Senator Bill Bradley, United States Senator Frank R. Lautenberg, Governor Robert P. Casey, Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., United States Representatives Curt Weldon, Thomas

Foglietta, Robert Andrews and R. Lawrence Coughlin, City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil and Metal Trades Council Local 687 Machinists hereby respectfully submit, by their undersigned counsel, this Memorandum of Law in Support of the Complaint for Declaratory Judgment filed contemporaneously herewith.

I. INTRODUCTION

By their Complaint, plaintiffs seek a declaratory judgment to prevent the unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the Philadelphia area's largest employer. The actions taken by defendants with regard to the Shipyard have violated the express mandates of the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§ 2901-2910 (November 5, 1990), and thus precluded an independent, equal and fair process for closing and realigning military installations. In particular, defendants have failed to follow numerous express statutorily prescribed procedural and substantive safeguards. Defendants' actions have substantially prejudiced the interests of plaintiffs herein and are subject to immediate judicial review.

II. STATEMENT OF FACTS

A full exposition of the facts underlying this matter is contained in the Complaint, which is incorporated herein by reference.

III. ARGUMENT

A. THE ACTIONS OF DEFENDANTS TAKEN PURSUANT TO THE BASE CLOSURE ACT ARE SUBJECT TO JUDICIAL REVIEW

It is axiomatic 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." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); National Treasury Employees Union v. United States Merit System, 743 F.2d 895, 906 (D.C. Cir. 1984); see also Society Hill Civic Association v. Harris, 632 F.2d 1045, 1055 (3d Cir. 1980).[1] In recognition of this principle, the Administrative Procedure Act, 5 U.S.C. §§701 et seq. ("APA"), establishes a strong presumption of reviewability. See, e.g., Kirby v. United States Department of Housing & Urban Development, 675 F.2d 60, 67 (3d Cir. 1982) ("The Supreme Court has made it clear that there is a strong presumption that agency action is reviewable.").

The Supreme Court further elaborated on this theme in Abbott Labs, holding that the APA's "generous review provisions must be given a hospitable interpretation," and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S.

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[1] There can be little doubt that the DOD, the Department of the Navy and the Commission are administrative agencies, and that the actions challenged herein constitute final agency actions. See 5 U.S.C. §551(1) (regarding the definition of "administrative agencies"); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1080-81 (3d Cir. 1989) (discussing the definition of "final agency action").

at 141 (citations omitted); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Society Hill Civic Association, 632 F.2d at 1055. Section 702 of the APA thus provides:

> A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §702. This broad grant of the right to judicial review is limited only "to the extent that statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. §701(a). Both of these exceptions are to be read exceedingly narrowly, and neither has any applicability to the instant action. See Heckler v. Chaney, 470 U.S. 821, 829 (1984); State of Florida, Dept. of Business Regulation v. United States Dept. of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

The first exception "requires explicit statutory language precluding review," which is plainly absent from the Base Closure Act. See California Human Development Corp. v. Brock, 762 F.2d 1044, 1048 n. 28 (D.C. Cir. 1985). The second exception is likewise inapplicable, as it is strictly limited to those "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Overton Park, supra, 401 U.S. at 410 (quoting legislative history of the APA); Society Hill Civic Assoc., 632 F.2d at 1045. Given the elaborate procedural and substantive safeguards established by the Base Closure Act, and the previous history which provided those safeguards, there is

manifestly "law to apply."

Moreover, the Third Circuit has held that review is always available, notwithstanding this exception, for violations of statutory procedures of the sort involved in the instant action:

> Even when agency action is determined to have been committed to agency discretion by law, that determination does not completely insulate the action from judicial review. As this court has noted, a court may in any event consider allegations "that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates constitutional, statutory or regulatory command. For the APA circumscribes judicial review only **to the extent that**...agency action is committed to agency discretion by law; it does not foreclose judicial review altogether."

Kirby, 675 F.2d at 67 (quoting Local 2855 AFGE v. United States, 602 F.2d 574, 578 (3d Cir. 1979)) (underlined emphasis added; bold emphasis in original).

Accordingly, the blatant failure of the Secretary of Defense, the Secretary of the Navy and the Commission to follow the unambiguous statutory commands of the Base Closure Act has resulted in flawed agency actions which are clearly subject to judicial review by this Court under the APA.

B. THE DEFENDANTS' BLATANT FAILURE TO FOLLOW THE UNAMBIGUOUS PROCEDURAL AND SUBSTANTIVE SAFEGUARDS OF THE BASE CLOSURE ACT MANDATES A DECLARATION THAT THE LIST OF RECOMMENDED CLOSURES AND REALIGNMENTS BE DECLARED VOID INSOFAR AS IT RELATES TO NAVAL FACILITIES

As the Complaint filed in this matter demonstrates, the Secretary of Defense, the Secretary of the Navy and the Commission have blatantly disregarded not only the procedural and substantive

safeguards governing base closures expressly mandated by the Base Closure Act, but also their own procedures and regulations promulgated pursuant to the Base Closure Act. These violations have inflicted substantial prejudice to the interests of the plaintiffs herein contrary to the express objective of Congress in adopting the Base Closure Act.

The APA specifically provides for the review of agency action to determine whether it complies with statutory mandates and statutorily prescribed procedures:

> The reviewing court shall -
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> * * *
>
> (D) without observance of procedure required by law;

5 U.S.C. §706(2)(A)(B)(D). The actions of the defendants herein were plainly "not in accordance with law" and "without observance of procedure required by law" (i.e., the Base Closure Act) and were "contrary to constitutional right" (i.e., the Due Process Clause of the Fifth Amendment).

Furthermore, it is clear that a reviewing court must carefully examine the challenged actions "to determine independently that the

[agencies have] not acted unfairly or in disregard of the statutorily prescribed procedures...." Natural Resources Defense Council v. Environmental Protection Agency, 790 F.2d 289, 297 (3d. Cir. 1986) (emphasis added). Equally importantly, this Court must invalidate agency actions which "are inconsistent with a statutory mandate or that frustrate a statutory policy." Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131, 1134 (3d Cir. 1988), cert. denied, 488 U.S. 881 (1988). In this regard, the Court of Appeals for the District of Columbia has recognized the authority of a reviewing court to closely scrutinize agency action which is alleged to violate statutorily prescribed procedures:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulation before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures. [citation omitted] Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historical reliance on the courts as the exponents of procedural fairness.

Weyerhouser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis added); see also Natural Resource Defense Council, Inc. v. S.E.C., 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("Our review of an agency's procedural compliance with statutory norms is an exacting one."). Given that the process which resulted in the defendants' recommendation to close the Philadelphia Naval Shipyard could hardly have been more unfair or have departed by a wider margin from the statutorily prescribed procedures, it is manifestly within

the competence of this Court to review that process and declare its results void insofar as Navy bases are concerned.

C. THE PROCESS BY WHICH THE COMMISSION ARRIVED AT ITS LIST OF RECOMMENDED CLOSURES OF NAVAL BASES WAS RIDDLED WITH PROCEDURAL IRREGULARITIES AND SUBSTANTIVE VIOLATIONS OF THE BASE CLOSURE ACT

1. The Navy's Failure to Provide The Data Necessary For The GAO To Perform Its Important Statutory Duty Under The Base Closure Act Was A Violation Of The Act.

The Base Closure Act specifically provides that the GAO is to play a critical role in ensuring the integrity and fairness of the Commission's process. Thus, Section 2903(d)(5) requires the Comptroller General to: (1) assist the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense; and (2) transmit to the Congress and the Commission "a report containing a detailed analysis of the Secretary's recommendations and selection process."

In order to permit the GAO to perform its statutorily mandated function, the Base Closure Act specifically imposes upon the Secretary of Defense the following duty:

> The Secretary shall make available to the Commission and the Comptroller General of the United States <u>all information</u> used by the Department in making its recommendations to the Commission for closures and realignments.

10 U.S.C. §2903(c)(4) (emphasis supplied). The Secretary of Defense failed to provide this information to the GAO.

As a direct result of the Secretary's violation of the Base Closure Act, the GAO was disabled from <u>both</u> assisting the Commission in its review and analysis of the Navy base closure

recommendations and providing the "detailed analysis of the Secretary's recommendations and selection process" as required by the Base Closure Act. Thus, on May 16, 1991, the GAO published its report concluding that the Navy's documentation was patently insufficient:

> We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.
>
> Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures.

See GAO Report to the Commission dated May 16, 1991 (the "GAO Report") at p.46, a true and correct copy of which is attached to the Complaint as Exhibit A.

In addition to the lack of adequate documentation, the GAO report identified three deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support the basis for the Navy Base Structure Committee's ("BSC") military value ratings of Navy installations; (2) the implementation and use of an unclear, unequal and inconsistent color coding system to rate military bases;[2] and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used

[2] This procedural irregularity is discussed, infra, at 14-17.

by the Navy in its base structure reviews, as required by the Office of the Secretary of Defense policy guidelines.[3] [GAO Report at p.48]

The GAO also identified inconsistencies within the Committee's internal rating process, including the fact that the BSC had given identical ratings to two naval stations -- (Mare Island and the Philadelphia Naval Shipyard) -- on each of the first four military selection criteria but had assigned an overall higher rating of green to Mare Island and an overall lower rating of yellow to the Philadelphia Naval Shipyard. Similarly, the BSC had assigned identical ratings to six naval stations but did not treat them equally.[4] The Philadelphia Naval Shipyard was not excluded from the base closure process by the BSC, although the five other naval stations which received identical or worse ratings were excluded from further review.

The GAO Report concluded that since the BSC "did not document these differences," the GAO "could not determine the rationale for its final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." The Secretary thus plainly failed to meet the express requirements of the Base Closure Act, thereby disabling the GAO from submitting a report containing a detailed analysis of the Secretary's recommendations and selection process.

Indeed, on May 7, 1991, shortly before the GAO disseminated

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[3] This procedural irregularity is discussed, <u>infra</u>, at 17-19.

[4] <u>See</u>, <u>infra</u>, at 14-17.

its report, the BSC admitted that "much of the [Navy's] data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs."[5] [GAO Report at p. 46] As a result, the BSC admitted that it had reached its decisions through a series of informal meetings, many of which were closed executive sessions. [GAO Report at p. 46] The Navy's admittedly ad hoc approach to base closure recommendations flies in the face of the procedural and substantive safeguards and requirements established by the Base Closure Act.

This egregious violation of the Base Closure Act clearly requires that this Court declare void that portion of the Commission's recommendations for base closures and realignments which relate to Navy facilities. See, e.g., Kirby, 675 F.2d at 68.

2. The Commission's Failure To Provide Meaningful Public Hearings Is A Violation Of The Base Closure Act.

In accordance with the Congressional objective of ensuring the procedural integrity of the base closure and realignment process, the Base Closure Act expressly provides that the Commission shall conduct public hearings on the Secretary's recommendations. 10 U.S.C. §2904(d). The Base Closure Act also requires the Commission to open its records and deliberations to public scrutiny. 10 U.S.C. § 2902(e)(2)(A)(B).

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[5] This admission is especially significant since the BSC's process involved excluding 7 of 8 shipyards from the base closure process, thereby leaving only the Philadelphia Naval Shipyard for possible closure. See, infra, at 15-17.

Thus, the Commission expressly invited and received public testimony in Washington, D.C. from members of Congress. By letter dated April 23, 1991, the Commission established procedures to govern Congressional testimony at the hearings:

> All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation."

In accordance with the Base Closure Act, the Commission scheduled and held 28 hearings across the United States. Congressional testimony on the Philadelphia Naval Shipyard was scheduled in Washington, D.C. for May 22, 1991. The regional hearing regarding the Philadelphia Naval Shipyard was scheduled for May 24, 1991. In violation of the Base Closure Act and other applicable law, additional documentation was thereafter provided to the Commission <u>that was not subject to GAO analysis or public comment and debate.</u>

In blatant violation of the Base Closure Act, closed meetings with the Navy's BSC were held by the Commission on May 24, 1991 <u>after</u> the public hearings were completed. Moreover, on May 24, 1991 -- <u>after</u> the close of the public hearings -- the Commission requested that the Navy's BSC provide it with additional

information to "try to resolve missing gaps in the information provided." Thereafter, the Navy's BSC provided additional documents and information to the Commission without affording interested members of Congress or the public a meaningful opportunity to comment on such information at a public hearing.

Under these circumstances, the requirement of public hearings in the Base Closure Act has plainly been violated. See, e.g., National Wildlife Federation v. Marsh, 568 F.Supp. 985, 994 (D.D.C. 1983); Joseph v. Adams, 467 F. Supp. 141, 160-61 (E.D. Mich. 1978); see also Monongahela Power Company v. Marsh, 1988 WL 84262 (D.D.C. 1988). The facts and holding of National Wildlife Federation are particularly relevant to the instant case and compel the conclusion that the list of recommended closures and realignments of Navy bases should be declared void. The plaintiffs in National Wildlife Federation brought suit against the Secretary of the Army seeking a declaration that a dredging and construction permit issued by the Army was invalid. The plaintiff asserted that the permit was invalid because the Army relied upon a staff report which was not made a part of the record until after the public hearings were held. According to the plaintiff, the consideration of this staff evaluation only after the close of the period for public comment violated its right to meaningfully participate in the statutorily required public hearings.

The Court held that the inclusion of important data in the record after the conclusion of public hearings had in fact violated the relevant statute, stating in terms equally applicable here:

> [T]he opportunity to comment and the right to a hearing both necessarily require that the Army present for public scrutiny the rationale and pivotal data underlying its proposed action before the close of the comment and hearing period. Unfortunately, that requirement was not satisfied in the administrative proceeding here. After a careful examination of the administrative record, the Court finds that the inclusion of the Staff Evaluation in the administrative record after the close of the comment and hearing period had the effect of shielding the essential data and the agency's rationale from public hearing and comment.

National Wildlife Federation, 568 F. Supp. at 994 (emphasis in original). The Court concluded in this same vein: "Only when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion." 568 F. Supp. at 993 (quoting U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 540 (D.C. Cir. 1978)); see also Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

Accordingly, the Navy's failure to disclose important and material information and documentation before conclusion of the public hearings required by the Base Closure Act is a clear violation of the Act.

3. The Failure Of The Secretary Of Defense To Consider All Naval Installations Equally Was A Violation Of The Base Closure Act.

Section 2903(c)(3) of the Base Closure Act expressly provides that "the Secretary shall consider all military installations inside the United States equally without regard to whether the

installation has been previously considered or proposed for closure or realignment by the Department." The actions of the Secretary of the Navy with respect to the Philadelphia Naval Shipyard were clearly a violation of both the letter and spirit of this provision of the Base Closure Act.

The Complaint discloses that, in December 1990, the Secretary of the Navy established the BSC to conduct a base structure review and to determine the Navy's closure and realignment candidates. In accordance with the Base Closure Act's mandate, the BSC was charged with reviewing all installations inside the United States equally, "without regard to whether the installation was previously considered for closure or realignment."

The BSC initially categorized all facilities according to function -- e.g., naval air stations, Naval Shipyards -- to determine which categories possessed significant excess capacity. The Navy then applied the eight selection criteria in two phases by assigning color codes to military bases in categories with excess capacity. Phase I of the BSC's analysis required a consideration of the first four military criteria. After Phase I was completed, the Navy excluded those bases which it determined "were distinguished by virtue of their operational value," i.e. those that it gave an overall "green" rating under the first four military criteria.

Under the Navy's rating system, a "green" rating received one point, a "yellow" rating received two points, and a "red" rating (favoring closure) received three points. The Navy's color-

coded/point approach resulted in the following total point allocation to each of the eight Naval Shipyards in the United States:

Shipyard	Points
Puget Sound	4
Norfolk	5
Philadelphia	6
Charleston	6
Mare Island	6
Pearl Harbour	6
Portsmouth	6
Long Beach	7

Thus, Puget Sound received a "green" rating for each of the first four military criteria and was therefore excluded from further consideration of closure.

In accordance with the BSC base closure criteria, the seven remaining Shipyards should have been evaluated under the remaining four non-military criteria set forth in Phase II. Using the BSC's own rating system, the Philadelphia Naval Shipyard should have been treated the same as Charleston, Mare Island, Pearl Harbor and Portsmouth and better than Long Beach. However, the Navy ignored its own rating system and blatantly disregarded the statutory mandate that all bases be considered "equally." Thus, the Navy -- for no apparent reason and without any supporting documentation or analysis -- gave overall "green" ratings to three other shipyards: Mare Island, which just like the Philadelphia Naval Shipyard, received two "yellow" and two green ratings; Norfolk, which received three "green" and one "yellow" ratings; and Pearl Harbor, which received one "red" and three "green" ratings.

The BSC then arbitrarily, unilaterally and without reference

to any one of the eight selection criteria, excluded all of the six nuclear-capable shipyards from any further review without providing any documentation or analysis to justify a drydock need for nuclear ships as compared with conventional carriers. This process left only Long Beach and Philadelphia for further review.

To circumvent the fact that Long Beach scored poorly in three of the four military criteria and overall had the worst rating of all eight Naval Shipyards, the BSC then excluded Long Beach from further consideration, contending that one of the drydocks at that shipyard could be used "to handle West Coast aircraft carriers (including CVN emergency work)." Navy Report, Tab C, p. 10. By this egregious process of elimination, the BSC was left with only one yard to consider for closure under the remaining four criteria, the Philadelphia Naval Shipyard. The BSC then performed a perfunctory application of the second four non-military criteria with respect to the Philadelphia Naval Shipyard to ensure its closure.

Accordingly, the Navy, through this procedural parody, made a mockery of both the letter and spirit of the Base Closure Act.

4. The Failure Of The Navy To Comply With The Department Of Defense Regulations With Respect To The Navy's Base Closure Actions Requires Invalidation Of The Resulting List Of Naval Closures.

An agency's failure to abide by its own regulations is alone grounds for invalidating agency action. See Boddie v. Department of Navy, 827 F.2d 1578, 1580 (Fed. Cir. 1987); Kelley v. Calio, 831 F.2d 190, 191-92 ("It is the duty of a reviewing court to ensure that an agency follows its own procedural rules.");

Wojciechowicz v. Department of Army, 763 F.2d 149, 153 (3d Cir. 1985). In this case, the failure of the Navy to abide by the requirements promulgated by the Department of Defense in furtherance of the Base Closure Act mandates invalidation of the base closure list compiled as a result of the Navy's failure.

On December 10, 1990, the DOD issued "policy guidance" and "record keeping" requirements to the Military Departments as follows:

> The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and
>
> The studies must consider all military installations inside the United States ... on an equal footing, ...
>
> * * *
>
> DOD components shall keep:
>
> - Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
>
> - Data, information and analysis considered in making base closure and realignment selections; and
>
> - Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act.

The DOD subsequently issued "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

> - Uniform guidance defining data requirements and sources for each category of base,
>
> - Systems for verifying accuracy of data,

- Documentation justifying any changes made to data submissions, and

- Procedures to check the accuracy of the analysis made from the data provided.[6]

The February 13, 1991 DOD Memorandum also provided the following procedures for evaluating closures and realignments: (a) if there was excess capacity and a base was recommended for closure or realignment, the Department's analysis must have considered all military bases within that category and any cross-categories; and (b) military bases could only be excluded from further review if they were militarily/geographically unique or mission essential such that no other base could substitute for them.

However, as found by the GAO in its May 16, 1991 Report, the Navy failed completely to meet any of these requirements in its procedures for base closures and realignments. See, supra, at 8-11. Thus, the GAO concluded in its Report that it "could not determine the rationale for [the BSC's] final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process."

Accordingly, the BSC and the Navy violated the DOD regulations promulgated in furtherance of the Base Closure Act, thereby invalidating the BSC's recommendations of base closures.

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[6] Although not published in the Federal Register, these requirements were the equivalent of regulations for purposes of judicial review under the APA. See Lucas v. Hodges, 730 F.2d 1493, 1504 n. 20 (D.C. Cir. 1984), vacated on other grounds, 738 F.2d 1392 (1984)(Agencies are "bound by their own substantive and procedural rules and policies, whether or not they are published in the Federal Register, if they are intended as mandatory.").

D. PLAINTIFFS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT HAVE BEEN VIOLATED BY DEFENDANTS' VIOLATIONS OF THE BASE CLOSURE ACT

The Due Process Clause protects individuals' property interests from interference by the federal government. Property interests are created by state and federal statutory schemes and customs which create a "legitimate claim of entitlement" to a specific benefit. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A claim of unconstitutional deprivation under the Fifth Amendment has three essential elements: 1) the claimant must be deprived of a protectable interest; 2) that deprivation must be due to some governmental action; and 3) the deprivation must be without due process. Cospito v. Heckler, 742 F.2d 72, 80 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985).

The plaintiff unions and their members clearly have a property interest in the continued operation of the Philadelphia Naval Shipyard unless and until it is determined pursuant to a non-arbitrary application of the criteria established under the Base Closure Act that the Shipyard should be closed. See, e.g., Hixon v. Durbin, 560 F. Supp. 654 (E.D. Pa. 1983) (property interest in having proposed, executory contracts reviewed in accordance with state law and approved if they meet the requirement of state law); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) (property interest is the right of lowest responsible bidder in full compliance with the specification to be awarded the contract). For example, the Third Circuit in Winsett v. McGinnes, 617 F.2d 996, 1006-08 (3d Cir. 1980), cert. denied,

449 U.S. 1093 (1981) found that the plaintiff had a protected interest in the exercise of a government agency's discretion "within established parameters." Similarly, in this matter the discretion of the Commission, the Secretary the Navy and the Secretary of Defense must all be exercised within the "established parameters" and procedural mandates established by the Base Closure Act.

Plaintiffs' right to a fair, open and procedurally correct application of the Base Closure Act is particularly evident in light of the history, Congressional intent and significant procedural safeguards of the Base Closure Act. Thus, the Base Closure Act was passed by Congress to address the criticisms levelled at the 1988 base closure act. Complaint ¶ 45. To this end, Section 2901(b) expressly states that the "purpose" of the Act was "to provide a fair process that will result in the timely closure and realignment of military installations." (emphasis supplied). As demonstrated previously, the Act also contained numerous substantive and procedural safeguards to ensure that persons in the position of plaintiff unions and their members were not the victims of the arbitrary, parochial application of government power.

Having determined that plaintiffs have a protected property interest, the only further inquiry the Court must undertake is to determine what process is due. Mathews v. Eldridge, 424 U.S. 319, 334 (1975). In the instant matter it is clear that the procedures mandated by the Base Closure Act provided an appropriate and

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENATOR ARLEN SPECTER, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, et al.,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY

In a striking display of audacity, defendants seek from this Court the extraordinary and unheard of relief of a stay of discovery in the midst of ongoing expedited discovery in preparation for an imminent injunction hearing. Defendants do this in the face of this Court's Order expressing allowing plaintiffs' expedited discovery, and in the face of the September 30 preliminary injunction hearing date -- less than thirty days from today -- set by this Court because of plaintiffs' showing of the imminent irreparable harm they face as a result of defendants' unlawful actions. Defendants thus brazenly seek to delay this matter indefinitely while the Navy busily goes about closing and dismantling the Philadelphia Naval Shipyard (the "Shipyard") before this Court has had the opportunity to determine for itself the merits of plaintiffs' case.

Despite the fact that as of Friday, August 30, the parties had already completed the document production which defendants had repeatedly characterized as "massive" and well beyond their ability to comply with, defendants still claim that the "burden and expense of unnecessarily responding to plaintiffs' massive discovery requests" requires entry of a protective

order. Defendants' Memorandum of Points and Authorities In Support of Their Motion to Stay Discovery ("Stay Memorandum"). This conclusory, unsubstantiated claim is completely insufficient to justify entry of the protective order sought by defendants. Moreover, defendants have not and cannot challenge the fact that the imminent harm which led this Court to set a preliminary injunction of September 30, 1991 has not diminished in the slightest. Thus, plaintiffs' need for discovery is as urgent and grave as it was on the day this Court granted plaintiffs' motion for expedited discovery, and the delay sought by defendants can only prejudice plaintiffs' rights.

Defendants' claim that simply the filing of their motion should operate to stay discovery is also legally and factually insupportable. The law is well settled that the filing of such a motion is patently insufficient to require a stay of discovery. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint, filed contemporaneously herewith, demonstrates that, in any event, the purported grounds in support of defendants' motion to dismiss are groundless.

Finally, defendants inexplicably devote half of their Stay Memorandum to refuting the argument that this Court should stay discovery because plaintiffs need no discovery to respond to the motion to dismiss (see pp. 6-10). Plaintiffs do not contend, nor have they ever, that they seek discovery in order to respond to defendants' motion to dismiss. Rather, as defendants well know, plaintiffs need the discovery they seek in order to prepare for the preliminary injunction hearing scheduled for September 30, 1991.

Under these circumstances, the speciousness of defendants' request for a stay of discovery is abundantly evident, and this Court should scotch defendants' attempt to make a mockery of

the orderly procedures of this Court, as they have made a mockery of the base closure process under the Base Closure Act.

ARGUMENT

A motion to stay discovery is tantamount to a request for a protective order prohibiting or limiting discovery pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. See, e.g., Kron Medical Corp. v. Groth, 119 F.R.D. 636, 637 (M.D.N.C. 1988); Howard v. Galesi, 107 F.R.D. 348, 350 (S.D.N.Y. 1985). For that reason, such motions are not granted without a "strong showing" of good cause by the party seeking the stay. See, e.g., Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982); Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988); Howard v. Galesi, supra, 107 F.R.D. at 350; 8 C. Wright and A. Miller, Federal Practice and Procedure §2035 (1970).

Motions to stay discovery are not favored "because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." Simpson, 121 F.R.D. at 263; Twin City Fire Insurance Company v. Employers Insurance of Wausau, 124 F.R.D. 652, 653 (D. Nev. 1989). As the Court in Kron Medical Corp. explained:

> Motions for a protective order which seek to prohibit or delay discovery are not favored. In considering such motions, the Court needs to remain mindful of its responsibility to expedite discovery and minimize delay. Disruption or prolongation of the discovery schedule is normally in no one's interest. A stay of discovery duplicates costs because counsel must reacquaint themselves with the case once the stay is lifted. Matters of importance may be mislaid or avenues unexplored. A case becomes more of a management problem to the Court when it leaves the normal trial tracks.

119 F.R.D. at 637-638 (citations omitted).

Furthermore, defendants cannot merely rely as they do on conclusory statements of the purported burdensomeness of discovery to establish the good cause necessary for entry of a protective order. See, e.g., General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (The movant for a protective order postponing civil discovery has the burden of coming forward with "particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements."), cert. denied, 414 U.S. 1162 (1974); Continental Illinois National Bank & Trust Co. of Chicago v. Caton, 130 F.R.D. 145, 147 (D. Kan. 1990) ("[B]are assertions that discovery will be unduly burdensome or that it should be stayed because pending dispositive motions will probably be sustained, are insufficient to justify the entry of an order staying discovery generally."); Twin City Fire Insurance, 124 F.R.D. at 653 ("Courts have insisted on a particular and specific demonstration of fact, as distinguished from conclusory statements, in order to establish good cause."). Accordingly, defendants' bare assertion that they should not be put to the inconvenience and expense of continuing with discovery -- much of which is already completed -- cannot support a stay of discovery. Likewise, defendants' claim that simply the filing of its motion to dismiss should stay discovery is patently insufficient to stay discovery. See, e.g., Continental Illinois, 130 F.R.D. at 147.

Moreover, none of the cases cited in support of defendants' motion to stay discovery involved a situation even remotely similar to the instant situation, where the Court has already entered an Order granting expedited discovery, and plaintiffs' preliminary injunction hearing date is less than thirty days away. Indeed, it is simply unheard of to stay discovery in a case seeking immediate injunctive relief. The urgent need for discovery and the imminence of irreparable harm which plaintiffs have already demonstrated entirely removes this situation from the ambit

of cases where a stay of discovery might under some circumstances be warranted. As the Court in Simpson observed:

> In deciding whether to stay discovery pending resolution of a pending motion, the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery.

121 F.R.D. at 263.

The application of such a balancing test to this case compels the denial of defendants' motion for a stay of discovery. Defendants have already demonstrated to this Court's satisfaction the harm which will be caused by a delay in hearing plaintiffs' claim, in particular the Navy's evident commitment to close the Shipyard before this Court has had an opportunity to act. And defendants have utterly failed to show any harm that continued discovery will cause them other than the normal degree of "inconvience and expense" of depositions, which "does not suffice to establish good cause for a protective order." Twin City, 124 F.R.D. at 653; Lehnert v. Ferris Faculty Association - MEA-NEA , 556 F. Supp. 316 (W.D. Mich. 1983).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motion to stay discovery.

Respectfully submitted,

/s/ Bruce W. Kauffman

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Dated: September 3, 1991

CERTIFICATE OF SERVICE

I, Camille J. Wolf hereby certify that on this 3rd day of September, 1991, I caused a true and correct copy of plaintiffs' Memorandum of Law in Oposition to Defendants' Motion to Stay Discovery to be hand delivered on the following counsel of record: David F. McComb, Assistant United States Attorney for the Eastern District of Pennsylvania, 3310 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania, 19106; and federal expressed to Mark W. Batten, Trial Attorney, U.S. Department of Justice, Civil Division.

/s/ Camille J. Wolf
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PRELIMINARY STATEMENT

Defendants seek to close the Philadelphia Naval Shipyard by totally immunizing their brazen disregard for procedural statutory mandates from any review by any Court. For the purposes of this motion, defendants have admitted violating the express procedures of the 1990 Defense Base Closure and Realignment Act (the "Base Closure Act"), but nevertheless argue that this Court is disabled from even considering the integrity of the process because (1) the Base Closure Act implicitly precludes any review[1] and (2) the political question doctrine insulates their admitted procedural violations from any judicial scrutiny. The law is well settled that even in the face of statutory language expressly precluding judicial review -- which is conspicuously absent from the Base Closure Act -- a federal court has jurisdiction to review claims of procedural irregularities and violations of statutory mandates.

Defendants' claim that separation-of-powers concerns are implicated in this matter is also demonstrably erroneous, as federal courts routinely review agency actions to ensure adherence to statutory mandates. Likewise, defendants' attack on plaintiffs' standing is factually insupportable and foreclosed by abundant caselaw.

In short, this Court's historical mandate to scrutinize the procedural regularity of the actions of federal administrative agencies cannot be defeated by defendants' groundless claims of immunity from any judicial review for even the most intentional and flagrant violations of Congressionally mandated procedural safeguards. Nothing in the Base Closure Act, its

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[1] Defendants concede that the Base Closure Act does not by its own terms preclude judicial review, and does expressly declare that its purpose is to provide a "fair process" of base closure and realignment.

legislative history or the doctrine of separation-of-powers allows the defendants -- charged with carrying out the express mandates of the Base Closure Act in a fair manner -- to make a mockery of the process. In a democratic republic historically protected by an independent federal judiciary, any other result would be unthinkable.

FACTUAL BACKGROUND

Both Congress and the President, and indeed even the plaintiffs herein, agree that military bases must be closed and realigned. That objective is not controversial and has absolutely nothing to do with the instant case. The only judicial review sought by plaintiffs is a scrutiny of defendants' failure to obey the procedural mandates of the Base Closure Act which resulted in the decision to close the most efficient and cost-effective Naval shipyard in the United States.[2]

Ironically, the exact procedural deficiencies being charged here pervaded prior base closure processes, and indeed provoked enactment of the 1990 Base Closure Act. The procedural inequities of the prior base closure process became manifest after a twelve member base closure commission, acting under authority of the 1988 Defense Base Closure and Realignment Act, Pub.L. No. 100-526, summarily concluded that 145 military installations should be closed or realigned. These recommendations were strongly criticized as unfair by members of Congress and the public primarily because the base closure process had not been sufficiently open to public scrutiny. Congressional critics also charged that faulty data had been

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[2] Founded in 1801, the Philadelphia Shipyard is a $3 billion dollar major industrial complex with operations that involve at least 47,000 jobs in the Philadelphia metropolitan area. Since 1980, Philadelphia has led all eight naval shipyards in efficiency and cost-effectiveness and almost 15% of the total repair and modernization work performed by such shipyards is accomplished at the Philadelphia Shipyard.

used to reach the 1988 final closure recommendations and that the General Accounting Office ("GAO") should have reviewed the data considered by the 1988 Commission.

Following on the heels of the questionable recommendations of the 1988 base closure commission, the Department of Defense independently announced on January 29, 1990 a proposal to close 36 additional military installations in the United States, including the Philadelphia Shipyard. Congress recognized that "the list of bases for study transmitted by Secretary Cheney on January 29, 1990 raised suspicions about the integrity of the base closure process." H. R. Conf. Rep. 101-923 at 3257 (emphasis supplied). To rectify the procedural inequities of the 1988 Act and to nullify the Department of Defense's January 29, 1990 list of proposed closures, in November 1990, Congress enacted the Base Closure Act.

The genesis, structure and objectives of the 1990 Base Closure Act confirm a congressional commitment to ensure the procedural integrity and fairness of the base closure process. The Base Closure Act explicitly provides that its "purpose" is "to provide a fair process that will result in timely closure and realignment of military installations." 10 U.S.C. §2901(b) (emphasis supplied). To this end, the Act provides numerous procedural safeguards which were absent from the 1988 Act, including, inter alia, the requirement that the Commission hold public hearings on the Secretary's recommendations [10 U.S.C. §2903(d)(1)]; that all meetings be "open to the public," except where classified information was being discussed [10 U.S.C. §2902(e)(2)(A)]; the requirement of the development of a six-year force structure plan and the development, publication and even-handed application of "final criteria" for making the closure and realignment determinations [10 U.S.C. §2903(b)(2)(A) and (c)]; the express requirement that the Secretary of Defense consider all military installations "equally" for closure or realignment

[10 U.S.C. §2903(c)(3)]; the requirement that the Secretary of Defense transmit to the GAO during the review process "all information used by the Department in making its recommendations to the Commission for closures and realignments" so that the GAO can monitor the activities of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act [10 U.S.C. §2903(c)(4)]; and the requirement that the GAO analyze the Department of Defense's recommendations and compliance with the Base Closure Act [10 U.S.C. §§ 2903(d)(5)(A) and (B)].

Defendants themselves admit that these procedures were expressly required by the Base Closure Act, and must admit for the purposes of this motion that they intentionally refused to obey the Congressional mandates. See Defendants' Memorandum at 11-12.[3] The defendants nevertheless maintain that there is no judicial review of their blatant disregard of the clear statutory mandates of the Base Closure Act. In light of the genesis, purpose and nature of this procedurally oriented statute, this Court clearly has jurisdiction to review the integrity of the base closure process.

ARGUMENT

Defendants seek to dismiss the Verified Amended Complaint under Rule 12 of the Federal Rules of Civil Procedure. In particular, defendants move under Rule 12(b)(6) for failure to state a claim, and under Rule 12(b)(1) for lack of standing. Since defendants' motion seeks dismissal under Rule 12(b)(6), the Court "must accept as true the facts alleged in the

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[3] Defendants must also admit for purposes of their motion that they not only egregiously violated the procedures expressly required by the Base Closure Act, but failed even to follow procedures promulgated by the Department of Defense and Navy. [See Verified Amended Complaint ¶¶86-88, 92-105, 143, 152].

complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) for failure to state a claim is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Company, 906 F.2d 100, 103 (3d Cir. 1990); Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Likewise, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975). Under this standard, defendants' motion is clearly deficient and must be denied.

I. Defendants' Bold Violations of the Procedures Mandated By the Base Closure Act Are Subject to Judicial Review

It is axiomatic 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." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); see also Traynor v. Turnage, 485 U.S. 535, 542 (1988); National Treasury Employees Union v. United States Merit System, 743 F.2d 895, 906 (D.C. Cir. 1984); Society Hill Civic Association v. Harris, 632 F.2d 1045, 1055 (3d Cir. 1980). In recognition of this principle, the Administrative Procedure Act, 5 U.S.C. §§701 et seq. ("APA"), establishes a strong presumption of reviewability. See, e.g., Kirby v. United States Department of Housing & Urban Development, 675 F.2d 60, 67 (3d Cir. 1982) ("The Supreme Court has made it clear that there is a strong presumption that agency action is reviewable."); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979).

The Supreme Court further elaborated on this theme in Abbott Labs, holding that the APA's "generous review provisions must be given a hospitable interpretation," and that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141 (citations omitted); see also Traynor v. Turnage, 485 U.S. at 542; Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Society Hill Civic Association, 632 F.2d at 1055. As the Supreme Court explained in Bowen:

> We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive violates such a command.

476 U.S. at 681. For this reason, defendants bear a heavy burden of demonstrating that their actions are immune from any judicial review whatsoever. International Ladies' Garment Union v. Donovan, 722 F.2d 795, 807 (D.C. Cir. 1983) ("The burden on the appellees in advancing an argument against judicial review is a heavy one....").

Section 702 of the APA thus provides in respect to judicial review of agency action:

> A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §702. This broad grant of the right to judicial review is limited only "to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §701(a). Both of these exceptions are to be read narrowly, and neither has any applicability to the instant action. See Heckler v. Chaney, 470 U.S. 821, 829 (1984); Doe v. Casey, 796 F.2d 1508, 1513-14 (D.C. Cir. 1986) ("In the decades of litigation

over the scope of these two grounds for preclusion, the Supreme Court and this court have emphasized in the strongest terms that preclusion is the rare exception and certainly not the norm."); State of Florida, Dept. of Business Regulation v. United States Dept. of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

Defendants concede that the second exception, for agency action "committed to agency discretion by law," has no applicability to the instant matter.[4] Defendants limit their claim of immunity from judicial scrutiny under the APA to the first exception, i.e., that the Base Closure Act itself purportedly precludes judicial review of their wrongful actions. In support of this exceptionally extreme position, defendants rely principally on an excerpt of the legislative history underlying the Act, since the Base Closure Act itself does not preclude judicial review. In fact, the legislative history lends no support to defendants' claim that their intentional disregard of the express procedural requirements of the Base Closure Act is totally unreviewable.[5]

Defendants do not challenge -- nor can they -- that the APA specifically provides for the review of agency action to determine whether it complies with statutory mandates and statutorily prescribed procedures:

The reviewing court shall -

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[4] This exception is limited to those "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Overton Park, supra, 401 U.S. at 410 (quoting legislative history of the APA). Given the elaborate procedural safeguards established by the Base Closure Act, defendants concede -- as they must -- that there is manifestly "law to apply."

[5] See pages 2-4, supra.

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> * * *
>
> (D) without observance of procedure required by law;

5 U.S.C. §706(2)(A)(B)(D). As the actions of the defendants herein were plainly "not in accordance with law", "without observance of procedure required by law" (i.e., the Base Closure Act) and were "contrary to constitutional right" (i.e., the Due Process Clause of the Fifth Amendment), the need for, and appropriateness of, judicial review is manifest.

Moreover, with regard to allegations of procedural deficiencies in agency action of the sort involved herein, it is well settled that a reviewing court must carefully examine the challenged actions "to determine independently that the [agencies have] not acted unfairly or in disregard of the statutorily prescribed procedures...." Natural Resources Defense Council v. Environmental Protection Agency, 790 F.2d 289, 297 (3d. Cir. 1986) (emphasis added). Equally importantly, this Court must invalidate agency actions which, like those of defendants herein, "are inconsistent with a statutory mandate or that frustrate a statutory policy." Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131, 1134 (3d Cir. 1988), cert. denied, 488 U.S. 881 (1988). In this regard, the Court of Appeals for the District of Columbia has recognized the duty of a reviewing court to closely scrutinize agency action which is alleged to violate statutorily prescribed procedures:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulation before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures. [citation omitted] Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historical reliance on the courts as the exponents of procedural fairness.

Weyerhouser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis added); see also Natural Resource Defense Council, Inc. v. S.E.C., 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("Our review of an agency's procedural compliance with statutory norms is an exacting one."). Because the flawed process which resulted in the defendants' recommendation to close the Philadelphia Naval Shipyard could hardly have been more unfair or have departed by a wider margin from the statutorily prescribed procedures, it manifestly is within the competence of this Court to review the integrity of that process and declare its results void insofar as Navy bases are concerned.

A. The Base Closure Act Does Not Preclude Judicial Review of Defendants' Violations of the Procedures Mandated By the Act or Defendants' Violations of Their Own Procedures

By consistently refusing to understand that plaintiffs do not challenge the substantive merits of discretionary administrative decision making, defendants attempt to focus this Court's attention on the wrong issue. Defendants have failed to cite a single case which holds that judicial review of an agency's failure to follow statutory procedures or their own procedures can be precluded under Section 701(a) of the APA. In fact, the law is directly to the contrary. The Supreme Court has made clear in respect to preclusion of review under the APA that "Congress did not set agencies free to disregard legislative direction in the statutory

scheme that the agency administers." Heckler v. Chaney, 470 U.S. at 839. In words directly applicable to the instant matter, Justice Brennan opined in his concurrence in Heckler: "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...." 470 U.S. at 839. See also Electricities of North Carolina, Inc. v. Southeastern Power Administration, 774 F.2d 1262, 1267 (4th Cir. 1985) ("[A]n agency decision that violates a statutory or constitutional command or is prompted by a bribe is not immune from judicial review even when a lawful exercise of an agency's discretion has that immunity.")(emphasis supplied); Ness Investment Corp. v. United States Dept. of Agriculture, 512 F.2d 706, 714 (9th Cir. 1975); East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 534 (9th Cir. 1972) ("[T]he Council's claim of entitlement to a specification of issues, a hearing, and formal findings in conjunction with the Director's reconsideration raises procedural issues that are clear, specific, and separable from the merits and that are therefore judicially determinable.").

Moreover, federal courts have consistently held that judicial review is available under the APA for procedural violations by an agency, notwithstanding a statute expressly precluding judicial review. See, e.g., First Federal Savings and Loan Association of Lincoln v. Casari, 667 F.2d 734, 739-740 (8th Cir. 1982); Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979); Graham v. Caston, 568 F.2d 1092, 1097 (5th Cir. 1978). In Graham, for example, the Court allowed judicial review of the failure of the Secretary of Housing and Urban Development (HUD) to adhere to statutorily prescribed procedural requirements despite the fact that the relevant statute provided that the Secretary's decision was "final and conclusive" and

"not subject to judicial review." 568 F.2d at 1096. The Court held that in spite of this express statutory directive precluding review, the Secretary's departure from statutory authority and HUD's own procedures were nevertheless subject to judicial review:

> If an administrative official clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable.... Likewise, judicial review is available where the administrative agency fails to follow procedures outlined in regulations adopted by that administrative agency.

568 F.2d at 1097 (citations omitted). In the instant case, defendants have not only ignored the procedures expressly required by the Base Closure Act, but have even failed to follow procedures promulgated by the Departments of Defense and Navy.

The Court in Hollingsworth likewise permitted review of the actions of the Secretary of Health and Human Resources to determine whether the Secretary violated the agency's own regulations, notwithstanding that the statute pursuant to which the regulations were promulgated "withdraws federal court jurisdiction to review 'determinations' by the Secretary under that section...." 608 F.2d at 1027. In recognition of this principle that judicial review of procedural regularity cannot be cut off, the Court in Casari allowed judicial review of the procedural propriety of a determination made by a designated planning agency ("DPA") under authority delegated by the Secretary of Health, Education and Welfare, notwithstanding the relevant federal statute which expressly provided that"[a] determination by the Secretary * * * shall not be subject to administrative or judicial review." 667 F.2d at 739. In this regard, the Court opined:

> We agree with First Federal that DPA determinations are subject to judicial review regarding issues of procedural propriety....

667 F.2d at 739 (emphasis supplied).

The principle applied by the Courts in Graham, Hollingsworth and Casari applies with even greater force to the instant matter, as those cases involved statutes which expressly precluded judicial review, whereas the Base Closure Act provides for no such preclusion of judicial review. Defendants must resort to a tortured reading of the legislative history to support their claim that judicial review of procedural irregularities is precluded by the Act. Though in fact the legislative history of the Base Closure Act lends no support to defendants' position, these cases demonstrate that even express statutory provisions precluding review cannot bar judicial review of an agency's failure to follow statutory procedures, its own procedures, or to act in any other respect "without observance of procedure required by law." 5 U.S.C. §706(2)(D). A fortiori, a statute like the Base Closure Act which does not expressly preclude review cannot bar judicial review of plaintiffs' challenge to the procedural integrity of the base closing process, regardless of what clues defendants strain to find in the legislative history.

Furthermore, in the analogous context of purported judicial preclusion under the other APA exception to review, i.e., the provision which precludes review "to the extent that agency action is committed to agency discretion by law," the Third Circuit has explicitly adopted the principle applied in Graham, Hollingsworth and Casari. Thus, this Circuit has held that review is always available, notwithstanding this exception, for violations of statutory procedures or the agency's own procedures as alleged, and for present purposes admitted, herein:

> Even when agency action is determined to have been committed to agency discretion by law, that determination does not completely insulate the action from judicial review. As this court has noted, a court may in any event consider allegations "that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the

> decision violates constitutional, statutory or regulatory command. For the APA circumscribes judicial review only **to the extent that**...agency action is committed to agency discretion by law; it does not foreclose judicial review altogether."

Kirby, 675 F.2d at 67 (quoting Local 2855 AFGE v. United States, 602 F.2d 574, 578 (3d Cir. 1979)) (underlined emphasis added; bold emphasis in original).

Accordingly, defendants' specious claim that judicial review is totally unavailable to remedy defendants' admitted procedural violations of the Base Closure Act must fail.

B. Even if the Legislative History of the Base Closure Were Relevant, It Does Not Support A Congressional Intent to Preclude All Judicial Review of Defendants' Procedural Violations

Given the fact that no provision of the Base Closure Act expressly precludes the right to judicial review, defendants resort to an excerpt from the Conference Report in the legislative history of the Base Closure Act to support their argument that the Act precludes judicial review.[6] Even if the legislative history of the Base Closure Act were relevant, however, it simply does not indicate an intent to preclude judicial review of procedural fairness.

Nothing in the Conference Report or any other part of the legislative history of the Base Closure Act even remotely suggests that the Act's procedural safeguards might be disregarded or that the defendants -- charged with carrying out this express procedural mandate with fairness -- could with impunity make a mockery of the process. Contrary to defendants' claim, the portion of the Conference Report excerpted in their Memorandum does not even suggest, let alone compel, this anomalous conclusion. At best, that provision only exempts the administrative actions undertaken by certain of the defendants from the rulemaking and

[6] The relevant provisions of the Conference Report are set forth at page 16, infra.

adjudication provisions of the APA, but clearly does not insulate defendants from judicial review to determine whether they have followed the procedures mandated by the Base Closure Act, or their own procedures.

A brief overview of the structure of the APA is necessary for an understanding of the language of the Conference Report upon which defendants premise their argument. The APA essentially has two functions: Chapter 5 of the APA prescribes specific procedures for a federal agency to follow if that agency is engaged in the formulation of rules for general application (rulemaking) or the judicial determination of individual matters (adjudication). See 5 U.S.C. §§553 and 554. Section 553 of the APA requires, inter alia, that an agency engaged in rulemaking give general notice of the proposed rule in the Federal Register, give interested parties an "opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation," and give an interested person the right to petition for the issuance, amendment, or repeal of a rule. See 5 U.S.C. §553(b), (c), and (e). Similarly, section 554 of the APA provides that adjudications "required by statute to be determined on the record after opportunity for an agency hearing" must meet certain procedural requirements, including, inter alia, that the agency give notice, an opportunity for all interested parties for "submission and consideration of facts, arguments, offers of settlement or proposals of adjustment...," and a hearing conducted in accordance with the numerous procedural requirements of Sections 556 and 557 of the APA. See 5 U.S.C. §554(b), (c)(1), (c)(2).

A second and entirely separate function of the APA -- established by an entirely different series of provisions, Chapter 7 of the APA -- is to provide for the right of review of agency actions by aggrieved persons. Thus §702 of the APA provides:

> A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §702.

The provisions contained in Chapter 5 of the APA containing procedures for rulemaking and adjudication (5 U.S.C. §§553 and 554) are separate and distinct from the provisions contained in Chapter 7 granting the right to judicial review of agency action (5 U.S.C. §§701 et seq.), and do not contain equivalent limitations. Thus, agency action may be exempt from the special procedural requirements of the APA for rulemaking and adjudication contained in Sections 553 and 554 on one of several grounds, but will nevertheless be subject to judicial review under Chapter 7 of the APA for a determination of whether the challenged agency action was "without observance of procedure required by law" or "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. §706(2). One illustration of the separation between these two sets of provisions is that 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.[7] Accordingly, a particular agency action may be exempt from the

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[7] These exceptions to judicial review, discussed supra at 6-9, are contained in Section 701 of the APA:

rulemaking and adjudication procedural requirements of the APA as being a military function -- as defendants' actions herein are -- but may 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)).

Given this structure of the APA, the provision of the Conference Report selectively quoted by defendants, when read in its entirety, clearly does not suggest an intention to preclude judicial review of defendants' failure to observe the procedural requirements of the Base Closure Act itself:

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures 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 Procedures 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 Procedures 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

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> (a) This chapter [5 U.S.C. §§701 et seq.] applies, according to the provisions thereof, except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. §701(a) (emphasis supplied).

> Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

H. R. Conference Report No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("H. R. Conf. Rep. 101-923") (emphasis supplied).

This passage thus indicates only that the agency actions involved herein would be exempt from the procedural requirements imposed by the rulemaking and adjudication provisions of the APA (5 U.S.C. §§553, 554, 556 and 557) and judicial review for compliance therewith, not that all agency action would be exempt from judicial review under Chapter 7 of the APA to determine, inter alia, whether the defendants' actions were "without observance of procedure required by law [the Base Closure Act]." 5 U.S.C. §706(2)(D). It is for this reason that the Conference Report does not reference, even once, the Chapter of the APA which confers the right to judicial review, 5 U.S.C. §§701 et seq., and instead refers only to the "military affairs exception to the Administrative Procedure Act," which is not a bar to judicial review under Chapter 7 of the APA, but rather only an exemption to compliance with the special procedures for rulemaking and adjudication contained in Chapter 5 of the APA. Accordingly, this provision of the Conference Report does not indicate a congressional intent to curtail plaintiffs' right to judicial review conferred by Chapter 7 of the APA.

There is, moreover, another compelling reason which indicates that this passage is not intended to preclude judicial review. The Conference Report's list of "[s]pecific actions which would not be subject to judicial review" significantly omits the actions of the Commission itself in recommending bases for closure or realignment. This is highly significant in that the Commission is, obviously, the central feature of the Base Closure Act, and its deliberations and recommendations are of primacy in the entire base closure process. Plainly, the omission of the

Commission itself could not have been an oversight. Therefore, even assuming arguendo that Congress intended to foreclose judicial review of certain actions undertaken during the process of base closure and realignment -- which in any event is contradicted by the preceding language of the excerpted portion of the Conference Report -- this omission demonstrates that the actions of the Commission itself were intended to be subject to judicial review. Thus, even giving the Conference Report the erroneous interpretation imposed on it by defendants, the actions of the Commission are nevertheless subject to judicial review under the APA.

Defendants also cite National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990) ("NFFE") in support of their claim that the Base Closure Act by its own terms precludes judicial review. In particular, defendants argue that because the Court in NFFE found that base closure actions taken pursuant to the 1988 Act were "committed to agency discretion by law," and therefore unreviewable under Section 701 of the APA, Congress would have explicitly provided for the reviewability of actions under the Base Closure Act if it intended to permit judicial review. In this regard, defendants argue that "[h]ad Congress intended to permit judicial review of decisions under the 1990 Act, it was, of course, free to create an explicit judicial review provision to avoid repetition of the NFFE decision. It did not." Defendants' Memorandum at 21.

Defendants distort the NFFE holding and its significance to this case. The NFFE plaintiffs did not challenge the procedures employed by the Secretary of Defense, but rather the substance and wisdom of the Secretary's choice of bases for closure. Indeed, a procedural challenge would have been impossible, as the 1988 Act challenged in NFFE contained none of the procedural safeguards embodied in the Base Closure Act, including the right to public

hearings, the evaluation and analysis of the GAO, or the requirement that all bases be considered equally. Given plaintiffs' substantive challenge to the Secretary of Defense's recommendations, the Court necessarily concluded that such a substantive challenge was nonjusticiable:

> It is clear, then, that judicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessments of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy.

905 F.2d at 406. The Court therefore held that since there was no "judicially manageable" standards against which to judge the Secretary's and Commission's exercise of discretion, their decisions were "committed to agency discretion by law" under the APA. 5 U.S.C. §701(a)(2); 905 F.2d at 405. The relief sought by plaintiffs herein, by contrast, would clearly not involve this Court in such "assessments of the nation's military force structure," Id., at 406, or any other substantive second-guessing, but rather only a review of the procedural integrity of the base closure process created by the 1990 Act. Defendants implicitly acknowledge this fact in that they do not even argue that their actions herein are unreviewable as being "committed to agency discretion by law," but rather only that the Base Closure Act supposedly precludes judicial review. Defendants' Memorandum at 18-22.

Accordingly, even if Congress was aware of the holding in NFFE when it passed the Base Closure Act, there would have been no reason for it to include an express provision granting judicial review for procedural violations, as NFFE did not address, let alone foreclose, such challenges. All that may be inferred from the fact that Congress did not create an explicit review provision in the Base Closure Act in light of NFFE is that Congress recognized that substantive challenges to decisions made pursuant to statutes which contain no procedural

safeguards -- like the 1988 Act -- will be barred by the "committed to agency discretion" exception to review under the APA. This point is well-settled, and by no means suggests that Congress intended in its enactment of the Base Closure Act to foreclose judicial review for agency violations of the procedures of the Base Closure Act.

C. The Structure and Objectives of the Base Closure Act Demonstrate the Availability of Judicial Review of Procedural Integrity

In their Memorandum, defendants also argue that the "structure and objectives" of the Base Closure Act demonstrate that Congress intended to preclude any judicial review. Defendants' Memorandum at 22-25. Ironically, defendants' principal claim in this regard is that allowing judicial review for procedural violations of the Base Closure Act would allegedly "reduce the carefully crafted statutory mechanism to a meaningless exercise." Defendants' Memorandum at 23. Obviously, just the opposite is true. By permitting defendants to flout the important procedural safeguards of the Base Closure Act -- which are indeed the very purpose and heart of the Act -- the "carefully crafted statutory mechanism" of the Act would most definitely be reduced to a "meaningless exercise," and the Base Closure Act itself rendered a superfluous waste of legislative effort.

Defendants' arguments are, in any event, fatally undermined by the indisputable fact that the 1990 Base Closure Act was created with the intent to ensure, above all, the procedural integrity of the process of base closing. In the same Conference Report relied on by defendants, Congress identified as one of the two main reasons for the enactment of the Base Closure Act the need to safeguard the procedural integrity of the base closing process. Thus, the Conference Report states that the Base Closure Act was intended in large measure to correct the procedural deficiencies of the base closing process under the 1988 Act:

> Second, the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raised suspicions about the integrity of the base closure process.

H. R. Conf. Rep. 101-923 at 3257 (emphasis supplied).

Consistent with this underlying purpose, the Base Closure Act explicitly provides that its "purpose" was "to provide a fair process that will result in timely closure and realignment of military installations." 10 U.S.C. §2901(b) (emphasis supplied). To this end, the Act provides numerous procedural safeguards which were absent from the 1988 Act, including, inter alia, the requirement that the Commission hold public hearings [10 U.S.C. §2903(d)(1)]; that all meetings be "open to the public," except where classified information was being discussed [10 U.S.C. §2902(e)(2)(A)]; the requirement of the development, publication and even handed application of "final criteria" for making the closure and realignment determinations [10 U.S.C. §2903(b)(2)(A) and (c)]; the express requirement that the Secretary of Defense consider all military installations "equally" for closure or realignment [10 U.S.C. §2903(c)(3)]; and the requirement that the Secretary of Defense transmit to the GAO "all information used by the Department in making its recommendations to the Commission for closures and realignments." [10 U.S.C. §2903(c)(4)]. Defendants themselves admit that these procedures were expressly required by the Base Closure Act, and must admit for the purposes of their motion that these procedures were almost totally disregarded. (See, for example, Defendants' Memorandum at 11-12: "The Act requires the Commission to hold public hearings on the Secretary's recommendation.")[8]

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[8] If the Commission simply had concluded that it would hold no public hearings because the members felt them to be a waste of time, can there be any doubt that, this Court would have jurisdiction to ensure the procedural integrity of the process?

Considering the genesis, purpose and nature of this procedurally oriented statute, it is unfathomable that Congress would have established these procedural safeguards only to have them ignored without any recourse to the courts. As previously discussed, even interpreting the Conference Report in the inaccurate manner urged by defendants, the most that can be said is that Congress meant to preclude substantive judicial intervention at certain junctures in the process, i.e., before the Commission made its final recommendations. See supra at 16-17. However, to argue that even the procedural integrity of the Commission's final recommendations are insulated from any judicial examination renders the Base Closure Act a dead letter, which clearly could not have been the intent of Congress.

In their Memorandum, defendants attempt to obscure the indisputable fact that the structure and objectives of the Base Closure Act reveal a congressional commitment to procedural integrity and fairness. Thus, defendants argue that the Act, in particular the joint resolution of disapproval procedure, "was designed to balance Congress's interest in exercising influence over closing decisions against the need to prevent a disappointed minority from overruling the consensus reached by the Executive and Legislative Branches." Defendants' Memorandum at 23. Defendants can point to no legislative history or statutory language which supports this claim, and in fact it is contradicted by the numerous procedural safeguards which have nothing to do with "the need to prevent a disappointed minority" from challenging the base closure recommendations.

If Congress's paramount objective in the Base Closure Act had been to prevent a disappointed minority from challenging closure recommendations, why would it not simply have left in place the 1988 Act, which provided no procedural protections whatsoever? The

reason is simple and is explained in the Conference Report: because the process under the 1988 Act "raised suspicions about the integrity of the base closure selection process." See H. R. Conf. Rep. 101-923 at 3257. It was this commitment to rectifying the procedural inequities of the 1988 Act that led to the passage of the Base Closure Act, not any need to muzzle a disappointed minority, as claimed by defendants.

The case upon which defendants principally rely to support their argument that the "structure and objectives" of the Base Closure Act preclude judicial review, Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991), offers no support for their claim. The statute involved in Armstrong, the Presidential Records Act ("PRA"), raised the truly delicate constitutional issue of the balance between congressional power and presidential prerogative.[9] The PRA regulates the preservation and disposal of presidential records, requiring the President to preserve records which reflect the performance of his duties, and allowing him to dispose of those records which are of little historical significance. 924 F.2d at 285-86. Under the PRA, the Archivist of the United States may notify Congress of the President's intent to dispose of records, and if the Archivist notifies Congress, the President must wait 60 days before destroying the records. The Armstrong plaintiffs were suing to prevent the proposed destruction of records under the PRA.

The D.C. Circuit held that the "PRA is one of the rare statutes that does impliedly preclude judicial review." 924 F.2d at 290. The Court reached this conclusion, however, only because of the statutory scheme in question kept "in equipoise important competing political and

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[9] Armstrong also involved a challenge to an agency determination made pursuant to another federal statute, the Federal Records Act, which the Court found did not preclude judicial review. This important holding of the case is discussed infra at 28-29.

constitutional concerns." 924 F.2d at 290 (emphasis supplied). The Court explicitly identified these competing concerns as follows:

> First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. . . . But Congress was also keenly aware of the separation of power concerns that were implicated by legislation regulating the conduct of the President's daily operations.... Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office.

924 F.2d at 290 (emphasis supplied; citations omitted).

In stark contrast, the instant case does not involve any competing political or constitutional concerns. Both Congress and the President, and indeed even the plaintiffs herein, agree that military bases must be closed and realigned. That objective is not controversial, and simply does not implicate separation-of-powers concerns or the balance of competing constitutional prerogatives as did the PRA in Armstrong. The PRA necessarily struck a balance between an inherent power of the President to control the preservation and disposal of his documents and protect from interference the "day-to-day operations" of his office, and the power and duty of Congress to ensure the preservation of presidential documents of value to posterity. There is no such clash in the instant case.

The only judicial review here sought by plaintiffs arises from defendants' intentional failure to adhere to the procedural mandates of the Base Closure Act, and that simply has nothing to do with balancing the competing interests of Congress and the President. Indeed, Congress and the President had every right to rely on the procedural integrity of the process that led to the base closure recommendations, and both branches have a coordinate interest in

allowing the federal judiciary to carry out the procedural aspect of the review function as the historical exponent of procedural fairness.

Accordingly, neither Armstrong, the text of the Base Closure Act itself nor its legislative history offers any support for defendants' claim that the "structure and objectives" of the Base Closure Act compel a finding that this Court is disabled from carrying out its constitutionally mandated and historically critical role in ensuring the adherence of federal agencies to the procedural mandates of the law.

II. Plaintiffs' Challenge of Procedural Integrity Does Not Implicate Separation-of-Powers Principles And Is Not Precluded by the Political Question Doctrine

Defendants attempt to shield their disregard of procedural safeguards from any judicial review on the further grounds that the separation-of-powers principles embodied in the political question doctrine preclude review. Defendants' Memorandum at 25-28. Citing the Supreme Court's decision in Baker v. Carr, 369 U.S. 186 (1962), defendants assert that separation-of-powers concerns are implicated in two ways. First, defendants argue that the Constitution commits "virtually all decisions concerning military organization to the political branches, and such questions are therefore unreviewable." Defendants' Memorandum at 26. Secondly, defendants claim that this Court's review of their procedural violations of the Base Closure Act would express a "lack of respect due coordinate branches of government," Baker, 369 U.S. at 217, since the President and Congress have failed to disapprove the Commission's recommendation for base closure. Defendants' Memorandum at 27. Neither of these arguments has any merit.

First, federal courts in fact routinely decide a myriad of questions concerning "military organization," including questions concerning military personnel, see, e.g., Falk v. Secretary of the Army, 870 F.2d 941 (2nd Cir. 1989); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989); the award of military contracts for important military hardware, see, e.g., International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy, 915 F.2d 727 (D.C. Cir. 1990); McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987); and the construction of military facilities, see, e.g., Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988). To suggest that every agency action done pursuant to a statute which regulates military organization is non-reviewable is simply wrong and contradicted by abundant case law.

Moreover, defendants' argument concerning the supposed constitutional basis for their political question claim is completely erroneous. Defendants contend that because Article I vests Congress with the power to "raise and support Armies," "make rules for the Government and regulation of the land and naval forces," and "provide for the organizing, arming, and disciplining [of] the Militia" (Article I, Section 8, clauses 12, 14 and 16), all decisions concerning military organization are unreviewable. In fact, Article I, Section 8 also vests Congress with the power, inter alia, to lay and collect taxes (clause 1); to regulate commerce among the several states (clause 3); to establish naturalization rules (clause 4); and "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (clause 8). However, it would be absurd to argue that all decisions concerning taxation, interstate commerce, immigration or

patents and copyrights are therefore committed to the political branches and hence unreviewable under the political question doctrine. Defendants' argument is manifestly frivolous.

Furthermore, the instant case bears not even a remote resemblance to the cases cited by defendants in support of their argument that "all decisions concerning military organization" are unreviewable. For example, the plaintiff in Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), was an army private who sought a declaration that the "American military action in Vietnam [was] unconstitutional and illegal..." 373 F.2d at 665. The plaintiff also sought to enjoin the Secretary of Defense and the Secretary of Navy from sending him to Vietnam. Id. The plaintiffs in Gilligan v. Morgan, 413 U.S. 1 (1973), were students at Kent State University at the time the Ohio National Guard killed and injured several students during an anti-war demonstration. Plaintiffs sought relief which would have required the Court "to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." 413 U.S. at 5. In particular, plaintiffs sought a "judicial evaluation of the appropriateness of the training, weaponry and orders of the Ohio National Guard," and the judicial establishment of "standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." 413 U.S. at 5-6. It was in view of this sweeping relief sought by plaintiffs that the Supreme Court held that plaintiffs' claim was barred by the political question doctrine.

The contrast between these cases and the instant one could hardly be more dramatic. Plaintiffs herein do not seek to involve this Court in any military decisions or determinations involving the deployment, training or use of military personnel, or the foreign or military policy of the United States, which matters are traditionally barred from review by

the political question doctrine. Rather, plaintiffs merely seek to establish that the procedures mandated by Congress have been flouted by federal agencies, a function routinely undertaken by federal courts, and one which "derives from this country's historical reliance on the courts as the exponents of procedural fairness." Weyerhouser Company, 590 F.2d at 1027. The fact that it is military facilities being closed, as opposed to customs warehouses, government research facilities or any other federal offices is simply not relevant. It is the integrity of the process which is at issue in this lawsuit.

Defendants' second purported ground for applying the political question doctrine to this case, i.e., that an exercise of this Court's jurisdiction would express a "lack of respect due" to Congress and the President, is likewise seriously flawed. Defendants urge this court to abstain from reviewing the challenged actions in this matter because Congress and the President have already reviewed the Commission's recommendations and failed to disapprove them. Defendants' argument, however, proves too much, and would result in the preclusion of judicial review over almost all agency actions.

The D.C. Circuit recently rejected this same argument in Armstrong v. Bush, supra, a case relied on by defendants. The government defendants in Armstrong argued that the Federal Records Act ("FRA"), like the Presidential Records Act, impliedly precluded judicial review. In particular, the Armstrong defendants, like the defendants herein, argued that Congress chose to ensure compliance with the FRA through congressional oversight rather than judicial review. 924 F.2d at 291. In language equally applicable to the instant matter, the Court squarely rejected this argument and held that judicial review is available under the FRA:

> Similarly, the fact that Congress retains some direct oversight over agencies' compliance with the FRA does not necessarily indicate

> an intent to preclude judicial review. Indeed, in American Friends we rejected their argument as over broad because it "would create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken."

924 F.2d at 291-292 (citation omitted); see also American Friends Service Committee v. Webster, 720 F.2d 29, 43-44 (D.C. Cir. 1983). As the D.C. Circuit indicated, defendants' argument would preclude review of most agency actions, as Congress may in most instances express its disapproval of agency action through a variety of means, including funding reductions, passage of specific legislation, or the circumscribing of the agency's jurisdiction.

The President's limited role in the base closure process is likewise insufficient to distinguish the defendants' actions challenged herein from the typical agency action routinely reviewed by the federal courts. The President as Chief Executive obviously maintains an oversight role over all executive agencies. Defendants have not cited and cannot cite any case which has held this to be sufficient reason for precluding judicial review of agency actions. Analogously, the President may sign into law legislation which is constitutionally infirm. However, no one would seriously argue that the President's role in enacting that legislation -- similar to the President's limited power under the Base Closure Act -- immunizes that legislation from review by the federal courts by virtue of the political question doctrine.

Finally, both Congress and the President had every right to rely on the integrity of the process underlying the Commission's recommendation for closure and realignment. Under the Base Closure Act, it is not the role of Congress or the President to police the procedural correctness and fairness of defendants' actions, nor is that the role played by the Executive or Legislative branches of government under the Constitution. That is, however,

most emphatically and appropriately the role of the federal judiciary under our Constitution and system of laws.

III. Plaintiffs Have Standing to Challenge the Defendants' Failures to Comply With The Procedures Mandated By the Base Closure Act

Defendants assert that none of the plaintiffs has standing to challenge their blatant violations of the Base Closure Act. In particular, defendants claim that plaintiff workers and their unions lack standing to press both their statutory and constitutional claims, even though virtually all of those plaintiff workers will lose their jobs as a direct result of defendants' disregard of procedural safeguards.

A. Plaintiff Workers and Unions Have Standing Under The APA and the Constitution To Challenge Defendants' Wrongful Actions

Though defendants discuss and rely on the D.C. Circuit's holding in NFFE throughout their Memorandum, they conspicuously fail to bring to the Court's attention one of the most pertinent aspects of the case, namely the Court's holding and discussion concerning the standing of the plaintiff workers therein. First, the Court outlined the requirements for Article III standing announced by the Supreme Court in Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982). In Valley Forge, the Court held that Article III standing will be found where it is shown that [1] the plaintiff "has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury [2] fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision." 454 U.S. at 472. Like the NFFE plaintiffs, plaintiff workers and unions easily meet this standard.

In applying this test to the NFFE plaintiffs, i.e., union members whose jobs were threatened by base closure, the Court found that NFFE's members had standing, and concluded in words equally applicable here:

> First, there can be no doubt that NFFE's members satisfy the "actual injury" requirement; many of them will lose their jobs if the base closings are carried out. It is also indisputable that the injury NFFE's members will suffer is exclusively traceable to the potential base closing. If the base closures do not take place, NFFE's members will suffer no harm. Finally, it is clear that the harm NFFE's members will suffer as a result of the base closing will be redressed by a decision in favor of NFFE.

905 F.2d at 403.

Not surprisingly, defendants do not come to terms with this holding or even attempt to distinguish it in their Memorandum. Rather, they merely advance the patently frivolous argument that plaintiff workers' and unions' injuries are not "fairly traceable" to the actions of defendants, and therefore the Valley Forge test for standing is not satisfied. See Defendants' Memorandum at 46-50. Thus, defendants argue that their actions did not result in harm to plaintiff workers and unions because "[t]he Navy, Secretary of Defense and Commission are not vested with final base closing authority. Rather the Act charged the defendants only with recommending closures and realignments." Defendants' Memorandum at 48. In this regard, defendants disingenuously characterize their intensive efforts and final recommendations as "predecisional suggestions," Defendants' Memorandum at 49, and claim that since the President and Congress had the power to disapprove their recommendations, plaintiff's injuries are not "fairly traceable" to defendants as required for Article III standing under Valley Forge.

Despite defendants' attempt to minimize their critical and preeminent role in the base closure process, it can hardly be doubted that plaintiffs' injuries are fairly traceable to their

challenged actions. Plaintiffs' allegations -- which must be accepted as true for the purposes of this motion -- demonstrate that the Shipyard would not have been closed but for the illegal actions of defendants. [Verified Amended Complaint, ¶¶167-181]. Once having slated the Shipyard for closure, defendants, in particular the Commission, created a powerful political momentum which has led directly to the injury plaintiffs seek to have redressed. The possibility that Congress or the President could theoretically have broken the causal link is insufficient to defeat standing. See NFFE, 905 F.2d at 403.

Furthermore, defendants' causation analysis is simply wrong even under the authority relied on in their Memorandum. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984); Warth v. Seldin, 422 U.S. 490 (1975). As defendants argue, Simon, Allen and Warth stand for the proposition that causation will not be found only if there is some "independent reason unrelated" to the alleged cause which could as easily have caused the harm. Simon, 426 U.S. at 43; Defendants' Memorandum at 48. That is, it is impossible to say that reason A caused result X, if there are also independent reasons B, C and D which might as easily have caused result X. That, however, is not the case in this matter.

The failure of the President and Congress to disapprove the Commission's recommendations is not an "independent reason unrelated" to the Commission's recommendations. It is indisputable that if the Commission had not slated the Shipyard for closure, its continued existence would not be now threatened. Thus, there is but/for causation between the Commission's recommendation that the Shipyard be closed and the imminent harm

to plaintiff workers, which is plainly sufficient to establish Article III standing under Simon, Allen and Warth.

B. Plaintiff Workers and Unions Clearly Fall Within the Zone of Interests of the Base Closure Act

Defendants also claim that plaintiff workers and unions lack standing under the APA because they are outside "the zone of interests protected by the Act." Defendants' Memorandum at 43 (emphasis supplied). This argument is both legally and factually insupportable. As a matter of law, defendants have blatantly misstated the "zone of interest" test articulated by the Supreme Court for standing under the APA. In Clarke v. Securities Industry Association, 479 U.S. 388 (1987), the Supreme Court repudiated the restrictive approach which some lower courts had taken to the zone of interest test, expressly holding:

> The [zone of interest] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

479 U.S. at 399-400 (emphasis supplied). The Court observed in a footnote to this holding that "[i]nsofar as lower court decisions suggest otherwise..., they are inconsistent with our understanding of the "zone of interest" test, as now formulated." 479 U.S. at 400, n. 15. Thus, defendants' claim that plaintiff workers and unions must show that the Base Closure Act was intended to benefit or protect them in order to have standing under the APA is an egregious distortion of the law.

The Supreme Court in Clarke further emphasized that, in view of Congress' intent to make agency action presumptively reviewable, the zone of interest test should bar the right to judicial review only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended

to permit the suit." 479 U.S. at 399. See also Armstrong v. Bush, supra, 924 F.2d at 287-88; Glasgow, Inc. v. Federal Highway Administration, 843 F.2d 130, 134-35 (3d Cir. 1988); City of Milwaukee v. Block, 823 F.2d 1158, 1167 (7th Cir. 1987). In this case, the interests of plaintiff unions and workers are obviously sharply impacted by, and intimately related to, the Base Closure Act, and are consistent with the purposes of the Act. This is starkly illustrated by the fact that one of the eight criteria approved by Congress governing the base closure and realignment process specifically provided for the consideration of "[t]he economic impact [of base closures] on local communities." 56 Fed. Reg. 6374 (Feb. 15, 1991).

Defendants' sole argument in opposition to this fact is that because Congress recognized that some workers would necessarily lose their jobs if their military facility was closed, persons like plaintiff unions and workers could not have been within the zone of interest of the Base Closure Act. Once again, defendants' superficial analysis seeks to obscure the fact that the Base Closure Act is a procedure laden statute, the declared purpose of which 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). Accordingly, the interest of plaintiff workers and unions in defendants' adherence to the procedural safeguards of the Base Closure Act is not "inconsistent with the purposes implicit in the statute," Clarke, 479 U.S. at 399, but rather is consistent with, and a necessary compliment to, the declared purpose of the Base Closure Act.

The cases cited by defendants are not to the contrary. In Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913 (1991), a case discussed extensively by defendants, the statute challenged by plaintiff postal union contained no

procedural safeguards whatsoever, nor was its purpose, express or implicit, to provide a fair process or any process whatsoever. The statute challenged in Air Courier was the Private Express Statute ("PES"), which merely codified the postal monopoly in the United States. The particular provision of the PES in Air Courier allowed the Postal Service to "suspend [the PES restrictions] upon any mail route where the public interest requires the suspension." 111 S. Ct. at 914. Pursuant to this provision, the Postal Service determined that the public interest required the lifting of the ban on "international remailing," which plaintiff union argued would eventually reduce employment opportunities for the union's members.[10] 111 S.Ct. at 916.

The Air Courier plaintiff thus challenged a substantive administrative determination (i.e., that lifting the ban on international remailing was in the public interest) made pursuant to a statute which provided no procedural protection whatsoever. The contrast between the PES in Air Courier and the Base Closure Act here is glaring, as the Base Closure Act was expressly designed to ensure procedural fairness and protect the integrity of the process established by Congress. The PES contained no equivalent provisions.

Defendants' reliance on District Court's opinion in NFFE is likewise misplaced. While the District Court in NFFE did find that plaintiff union lacked standing under the APA, which holding defendants' quote extensively, they conspicuously ignore the fact that on appeal of that decision, the D.C. Circuit assumed that plaintiff union did have standing under the APA, and went on to determine the merits of plaintiff's challenge. 905 F.2d at 405.

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[10] "International remailing" entails bypassing the Postal Service, and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses. 111 S.Ct. at 916.

Moreover, the District Court's holding in NFFE has no relevance to the instant matter, as the 1988 Act challenged there was materially different from the Base Closure Act of 1990 involved here. The 1988 Act did not contain any of the numerous procedural safeguards the violation of which forms the basis of plaintiffs' claim here; nor was the declared purpose of the 1988 Act to provide a "fair process." Indeed, as previously discussed, a primary reason for the passage of the Base Closure Act was to address the procedural shortcomings of the 1988 Act. Thus, the fact that the District Court in NFFE found that under the 1988 Act plaintiff union lacked standing -- which holding was not affirmed by the D.C. Circuit -- has no bearing on the instant action.

C. The Standing of Plaintiff Workers and Unions Precludes Any Challenge to the Standing of the Other Plaintiffs

Given that plaintiff unions and their members plainly have standing under Article III and the APA to challenge defendants' violations of the Base Closure Act, this Court need not consider the standing of the other plaintiffs, whose position is identical to plaintiff unions and workers. See, e.g., Bowsher v. Synar, 478 U.S. 714, 721 (1986); Secretary of Interior v. California, 464 U.S. 312, 319 n. 3 (1984); Coalition on Sensible Transportation, Inc. v. Dole, 642 F. Supp. 573, 583 n. 2 (D.D.C. 1986). In this regard, the Supreme Court in Bowsher opined:

> A threshold issue is whether the Members of Congress, members of the National Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. This is sufficient to confer standing under §274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress. Accordingly, we turn to the merits of the case.

478 U.S. at 721 (citations omitted; emphasis supplied).

Likewise, the Supreme Court in Secretary of Interior v. California recognized and applied this principle:

> Petitioner-defendants (hereafter petitioners) state their disagreement with the Court of Appeals for the Ninth Circuit holding that environmental groups and local governments have standing to sue under CZMA §307(c)(1), but do not challenge that standing decision here. Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's.

464 U.S. at 320, fn. 3 (emphasis supplied).

Accordingly, the standing of the plaintiff unions and their members is sufficient to establish the standing of the additional plaintiffs, all of whom are congressmen or governmental entities with a direct stake in the Shipyard, the Philadelphia region, and the procedural integrity of the base closure process.[11]

IV. Plaintiff Workers and Unions Have Sufficiently Stated a Claim Under the Due Process Clause of the Fifth Amendment

Defendants argue that plaintiff Shipyard workers and unions have failed to state a claim for deprivation of property without due process of law. In this regard, defendants claim that (1) plaintiff workers and unions have "no property interest in the Shipyard's continued operation"; (2) there "has been no government action that could constitute a deprivation of the

[11] The State of New Jersey, Governor James J. Florio and New Jersey State Attorney General Robert J. Del Tufo have filed a succinct brief which addresses their clear right to sue parens patriae on behalf of the citizens of New Jersey. Plaintiffs the Commonwealth of Pennsylvania, Governor Casey, Pennsylvania State Attorney General Ernest D. Preate, Jr., the State of Delaware and Governor Michael N. Castle hereby join in such brief. In the interest of brevity, plaintiffs will not unnecessarily burden this Court with arguments addressing the clear and independent standing of each of the other plaintiffs.

unions' [and workers'] property"; and (3) plaintiff workers and unions "have received all the process that is constitutionally due." Defendants' Memorandum at 51, 59 and 62. In fact, none of these interrelated arguments has any merit.

First, plaintiffs have not claimed an entitlement to the "Shipyard's continued operation." Rather, plaintiffs' property interest under the Base Closure Act is the Shipyard's continued operation unless and until it is determined, pursuant to a fair and non-arbitrary process in accordance with the mandates of the Base Closure Act, that the Shipyard should be closed. This type of property interest in the non-arbitrary and procedurally correct decisionmaking of government actors is well established, and has been applied numerous times by the Court of Appeals and the District Courts in this Circuit. See, e.g., Winsett v. McGinnes, 617 F.2d 996, 1004-1008 (3d Cir. 1980), cert. denied, 449 U.S. 1093 (1980), Andersen-Myers Co., Inc. v. Roach, 660 F. Supp. 106, 109-111 (D. Kan. 1987); L. & H. Sanitation, Inc. v. Lake City Sanitation, Inc., 585 F. Supp. 120, 122-125 (E. D. Ark. 1984); Hixon v. Durbin, 560 F. Supp. 654, 659-661 (E. D. Pa. 1983) (Newcomer, J.); Duva v. World Boxing Association, 548 F. Supp. 710, 721-723 (D. N.J. 1982); Telprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6, 9-11 (W.D. Pa. 1981); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1130-1132 (W.D. Pa. 1980).

Furthermore, plaintiffs do not claim that they have a property right in "the procedure itself" established by the Act. See Defendants' Memorandum at 52. In fact, the principal case relied on by defendants to defeat this strawman argument demonstrates the validity of plaintiffs' true property interest. Thus, in Three Rivers Cablevision v. City of Pittsburgh the District Court for the Western District of Pennsylvania held that the right of the lowest bidder

for a cable franchise to be awarded that franchise by the city in accordance with the mandate of the relevant statutes was a property interest protected by the Due Process Clause. 502 F. Supp. at 1131. In this regard the Court opined:

> Simply stated, the [property] interest was the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the city in fact decided to make an award. The due process to which one possessing the protected interest was entitled was the non-arbitrary exercise by the city of its discretion in making the award. And it follows that a deprivation of the substantive benefit (the protected property interest) without the process due is an actionable wrong.

502 F. Supp. at 1131.

The Court's holding was thus consistent with the holding in Winsett v. McGinnes, in which the Third Circuit found that the plaintiff had a protected interest in the exercise of a government agency's discretion being exercised consistently with the "purpose and policy behind" the relevant statute. 617 F.2d at 1007. The Court in Three Rivers identified the operative principle underlying both its holding and that of the Third Circuit in Winsett:

> The determinative factor in Winsett was that the scope of discretion to be employed in assessing an applicant was not absolute, but under state law had to be exercised in a reasonable manner. The same is true in the case at bar....

502 F. Supp. at 1131.

Defendants' arbitrary departure from the mandated procedure of the Base Closure Act is directly analogous to the actions of the defendants in the above cases, which violated the plaintiffs' rights to the non-arbitrary exercise of an important governmental power. Indeed, the principle applied in Winsett, Three Rivers and the other cases cited herein applies with even greater force in the instant matter, as the benefit protected by the due process clause in those

cases was a prospective one, whereas in the instant matter plaintiff workers already possess their jobs and are threatened, through defendants' due process violations, with the loss of them.

Defendants' second argument, that there has been no government action that could constitute a deprivation of property, is absurd on its face. In Three Rivers, for example, it was beyond dispute that the plaintiff's injury in not being awarded the franchise to which it was entitled under the relevant statutes, and the award of that franchise to another party, was a deprivation caused by government action. Similarly, the closure of the Shipyard as a result of defendants' arbitrary departure from the prescribed procedures of the Base Closure Act will result in an injury to plaintiffs which, like plaintiff's injury in Three Rivers, is clearly a deprivation caused by government action.

The cases cited by defendants are not to the contrary. The plaintiffs in both Cospito v. Heckler, 742 F.2d 72 (3d Cir. 1984) and O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) were patients in medical facilities who had lost federal medicare and medicaid benefits because their respective facilities had been decertified by the Secretary of Health, Education and Welfare. In both cases, however, the plaintiffs sought a "pretermination hearing," which was not a procedure even arguably required by the relevant statutes or agency regulations. See Cospito, 742 F.2d at 80. In this case, the judicial review sought is limited to the integrity of the process. Accordingly, neither Cospito nor O'Bannon have any relevance to this matter.

Finally, defendants' argument that plaintiff workers and unions have received "all the process that is constitutionally due" is manifestly erroneous. The cases cited by defendants to support this proposition are utterly inapposite, as they involve attempts to challenge legislation

which did not infringe any identifiable constitutional right, but rather had shortcomings which the courts held should be addressed by the legislature. See Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984); Alessi v. Pennsylvania Department of Public Welfare, 893 F.2d 1444 (3d Cir. 1990). In the instant matter, plaintiffs do not challenge the Base Closure Act itself, but rather only defendants' blatant disregard of its procedural mandates. Defendants have cited no authority -- and in fact none exists -- which can alter the inescapable conclusion that plaintiffs' due process rights consist at a minimum of defendants' adherence to the express procedural safeguards of the Base Closure Act.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this court deny defendants' motion to dismiss the Verified Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Camille J. Wolf hereby certify that on this 3rd day of September, 1991, I caused a true and correct copy of plaintiffs' Memorandum of Law in Oposition to Defendants' Motion to Dismiss the Verified Amended Complaint to be hand delivered on the following counsel of record: David F. McComb, Assistant United States Attorney for the Eastern District of Pennsylvania, 3310 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania, 19106; and federal expressed to Mark W. Batten, Trial Attorney, U.S. Department of Justice, Civil Division.

/s/ Camille J. Wolf
Camille J. Wolf

Document Separator

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, et al.,	:	
Defendants.	:	

PLAINTIFFS' PRE-HEARING MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Injunction. The slated closure of the Philadelphia Naval Shipyard (the "Shipyard") is a matter of grave and urgent public concern, not only because of the devastating effects such closure will have on the Shipyard workers and the entire regional economy, but because discovery has revealed a shocking disregard for the law and plaintiffs' statutory and constitutional rights.

STATEMENT OF FACTS

Plaintiffs incorporate by reference their Proposed Findings of Fact and Conclusions of Law (hereinafter "Plaintiffs' Findings") for a full exposition of the facts underlying this matter. For purposes of summary, however, it is indisputable that Plaintiffs' Findings document a brazen and near total disregard by defendants of the clearly expressed will of Congress in the Base Closure Act (the "Act"). Though the Act was specifically adopted to rectify the procedural shortcoming of its predecessor base closing statute, and its declared purpose is to provide a fair procedure for the closure and realignment of military installations, defendants have violated virtually every procedural safeguard embodied in the Act.

Thus, for example, one of the most critical features of the Act was its specific requirement that the Department of Defense ("DOD") and Department of Navy wipe the state clean with respect to earlier base closure efforts and treat all bases equally without regard to whether they had been previously considered for closure. Pltffs.' Finding, ¶¶ 34, 56-57. Yet the evidence demonstrates that the Navy secretly maintained what they themselves cynically described as a "stealth list" of closures, including the Shipyard, which dated from August or September 1990,

at least three months before the Act even became law. Id., ¶¶ 23-32; 56-93. The evidence also shows that it was on the basis of this stealth list -- which had been approved by the Secretary of the Navy even before the Navy purportedly began its "fresh" analysis under the Act -- that the Navy concluded that the Shipyard should be closed. Id., ¶¶ 56-93. The Navy's predetermination to close the Shipyard, dating from well before the Act was even passed, could hardly be more abundantly documented or more clearly violative of the express requirements of the Act.

Another critical feature of the Act was the statutorily mandated role the General Accounting Office was to play in the base closure process. Pltffs.' Findings, ¶¶ 54-55, 240. The Act expressly provided that the DOD was to provide the GAO with all of the information used by the DOD in making its closure and realignment recommendations. This mandatory requirement was in order that the GAO could fulfill its specific statutory duties of (i) preparing a report to the Base Closure Commission (the "Commission") analyzing the DOD's recommendations and selection process, and (ii) assisting the Commission in its review of the DOD's recommendations. Id, ¶¶ 182-222.

The evidence unequivocally demonstrates the Navy's deliberate disregard for this clear statutory duty, and their continued stonewalling of the GAO to conceal the Navy's subjective, undocumented and completely prejudicial process of arriving at recommendations for closure and realignment, in particular the closure of the Shipyard. Pltffs.' Findings, ¶¶ 182-191. The GAO itself was compelled to publicly report to the Congress and the Commission that it simply could not fulfill its statutory duty of analyzing the Navy's recommendations and analysis, because the Navy consistently frustrated the GAO's attempt to obtain information and validate the Navy's supposed methodology. Id., 192-222. The GAO's candid criticisms of the Navy's process

contained in the GAO's report to the Commission are vivid evidence of the Navy's pattern of shocking and deliberate violations of the Act's integral procedural safeguards.

The facts also demonstrate that the Navy boldly disregarded the DOD's own regulations specifically promulgated to ensure compliance with the mandates of the Act. Pltffs.' Findings, ¶¶ 111-119. The DOD regulations required that all bases be considered on an equal footing, and that the Navy develop "internal control plans," providing at a minimum for procedures to check the accuracy of data and analysis. Id. But, as the GAO specifically found, the Navy failed to institute any of these procedures or follow any of the DOD regulations. Id., ¶¶ 118-119. This failure is alone sufficient to invalidate the list of naval closures and realignments.

Even the Navy's evaluation process supposedly performed pursuant to the Act -- all of which was in any event a charade to mask the Navy's predetermination to close the Shipyard -- reveals a deliberate disregard for the mandates of the Act. Thus, the DOD promulgated eight criteria which, under the Act, were to be the exclusive criteria upon which the Navy was to base its analysis and recommendations. Pltffs.' Findings, ¶¶ 42-48. Yet the Navy fabricated a wholly new ninth criterion, the so-called "Step 5" -- which not subject to notice and comment and congressional disapproval as the Act required criteria to be -- and which the Navy used to justify its irrational and insupportable decision to recommend the Shipyard for closure. Id., ¶¶ 139-181. Without the use of this new criterion, the Navy could never even have considered closing the Shipyard unless it first closed two other naval shipyards which consistently ranked below Philadelphia under the eight criteria established under the Act. Id., ¶¶ 130-131.

Plaintiffs' Findings also demonstrate that defendants -- in particular the Navy -- made a mockery of the Act's requirement of open public hearings relative to military bases recommended

for closure. Pltffs.' Findings, ¶¶ 238-259. It is established that the Navy withheld every piece of information favorable to the Shipyard from public scrutiny, public hearing, or GAO analysis. The Navy also ensured that the one witness who knew the most about naval shipyards of any person in the Navy, Vice Admiral Hekman -- and who strongly disagreed with the Navy's recommendation to close the Shipyard -- would not testify in the public hearings on the Shipyard. Id., ¶265. The Commission and the Navy further violated the Act's requirement of open, public hearings by meeting in closed-door sessions from which members of Congress and the public were excluded. Id.

Defendants' determination to close the Shipyard also flies in the face of all available data and even violates -- without any rational explanation whatsoever -- the long standing policy of the Navy to maintain two naval shipyards on each coast capable of repairing conventional aircraft carriers in order to maintain immediate repair capability. Pltffs.' Findings, ¶264 (i). In order to conceal the utter irrationality of closing the Shipyard, the Navy even misrepresented critical facts to the Commission, including, inter alia, the cost of the Shipyard to the Navy (in 1989 and 1990 the Shipyard had a net operating profit, in contrast to the other seven naval shipyards which sustained losses); the Shipyard's workload (contrary to the Navy's misrepresentation, the Shipyard will have no excess capacity over the next six years); the so called "cost savings" associated with closure of the Shipyard (which the Navy represented to the Commission would be $36 million annually, but would in fact at best be no more than $6 million annually); and the costs of closure of the Shipyard, which the Navy originally represented to the Commission would be $102 million, but which the Navy's own internal documents show to be, at a minimum, no less than $592 million. Id., ¶ 263.

Plaintiffs' Findings document several more of defendants' egregious violations of the Act, and their arbitrary and capricious actions which simply trashed the elaborate procedural safeguards of the Act. Plaintiffs' Findings also demonstrate that the injunctive relief sought is acutely necessary to prevent irreparable harm to plaintiffs, the Shipyard, and the entire Philadelphia tri-state region. The facts show that well before the Commission reached its final conclusion to recommend closure of the Shipyard on or about July 1, 1991, the Navy was taking drastic steps to ensure that the Shipyard would be irreversibly shuttered before their shocking activities would ever see the light of day. Plaintiffs' Findings, ¶¶ 287-312. Thus, as early as April 1991, the Navy took steps to "starve" the Shipyard by removing all of its incoming work, including the prevention of the Shipyard's low bids on ship repair contracts from being accepted because of the Navy's unilaterally-imposed additions to the Shipyard's best and final offers. Id. The Navy even attempted to reschedule the overhaul on the USS Kennedy -- which Congress had expressly required to be done in Philadelphia -- the result of which would have been the virtually immediate closure of the Shipyard. Id., ¶ 302.

Under these circumstances, the law is well settled that the list of naval closures and realignments resulting from this procedural parody must be set aside, and the Secretary of Defense enjoined from instituting closure of the Shipyard.

ARGUMENT

I. Plaintiffs are Entitled to the Injunctive Relief They Seek

To obtain a preliminary injunction in this Circuit, plaintiffs must establish four essential elements: (1) that they have a reasonable probability of success on the merits of their underlying claim; (2) that they will be irreparably injured by denial of the requested relief; (3) that the

denial of the preliminary relief will result in greater harm for plaintiffs than for defendants; and (4) that the granting of preliminary relief will be in the public interest. Sullivan v. City of Pittsburgh, 811 F.2d 171, 181 (3d Cir. 1987), cert. denied, 484 U.S. 849 (1987); SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1980).

The Court need only determine that plaintiffs have a fair or reasonable probability of success on the merits. Moteles v. University of Pennsylvania, 730 F.2d 913, 919 (3d Cir. 1984), cert. denied, 469 U.S. 855 (1984); Oburn v. Shapp, 521 F.2d 142, 148 (3d Cir. 1975).

Under these standards, plaintiffs are clearly entitled to the injunction they seek to prevent the wrongful closure of the Shipyard.[1]

A. Plaintiffs Have Shown a Reasonable Probability of Success on Their Claim That Defendants' Actions Have Violated the Base Closure Act and are Arbitrary and Capricious

1. This Court Must Carefully Scrutinize Defendants' Actions to Determine Whether They Comply With Statutory Procedures

This Court's scope of review of defendants' actions and remedial powers over agency actions is clearly provided by Section 706 of the Administrative Procedure Act:

> The reviewing court shall --

[1] Plaintiffs have supplied ample evidence of defendants' violations of the Act based on the depositions of numerous Navy and government officials. However, defendants refused to produce for deposition Secretary of the Navy Garrett, Admiral Kelso, Chief of Naval Operations, and Under Secretary of the Navy Howard. Accordingly, the Court may draw inferences adverse to defendants regarding information which would be in the possession of these witnesses under defendants' control, which these defendants could have addressed in their testimony. See, e.g., Chicago College of Osteopathic Medicine v. Fuller, 719 F.2d 1335, 1353 (7th Cir. 1984). In particular, the deposition testimony indicating that Secretary of the Navy Garrett concurred in the decision to close the Shipyard as early as December 1990, on the basis of the stealth list, must be supported by Secretary Garrett's failure to testify. See Pltffs.' Findings, ¶¶ 77, 123.

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

* * *

(D) without observance of procedure required by law;

5 U.S.C. §706(2)(A)(B)(D). See also York Bank & Trust Company v. Federal Savings & Loan Insurance Company, 851 F.2d 637, 641 (3d Cir. 1988), cert. denied, 488 U.S. 1005 (1988); Natural Resources Defense Council v. Environmental Protection Agency, 790 F.2d 289, 296-97 (3d Cir. 1986), cert. denied sub nom. Chicago Assoc. of Commerce and Industry v. Natural Resources Defense Council, 479 U.S. 1984 (1987).[2] Thus, it is axiomatic that this Court "must set aside any agency action found to be arbitrary, capricious, an abuse of discretion, short of statutory right or without observance of procedure required by law." Maxey v. Kadrovach, 890 F.2d 73, 76 (8th Cir. 1989); see also Acadian Gas Pipeline System v. Federal Energy Regulatory Commission, 878 F.2d 864, 868 (5th Cir. 1989); Great Salt Lake Minerals and Chemicals Corp. v. Marsh, 596 F. Supp. 548, 552 (D. Utah, 1984).

Moreover, with regard to allegations of procedural deficiencies in agency action of the sort involved herein, it is well settled that this Court must carefully examine defendants' actions "to determine independently that the agency has not acted unfairly or in disregard of the

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[2] Defendants do not dispute, nor could they, that the Department of Defense ("DOD"), the Department of Navy and the Commission are administrative agencies. See 5 U.S.C. §551(a) (regarding the definition of "administrative agencies"); Solar Turbines, Inc. v. Seif, 879 F.2d 1073, 1080-81 (3d Cir. 1989) (discussing the definition of "final agency action").

statutorily prescribed procedures...." Natural Resources Defense Council v. Environmental Protection Agency, 790 F.2d at 297 (emphasis added). This Court must invalidate agency actions which, like those of defendants herein, "are inconsistent with a statutory mandate or that frustrate a statutory policy." Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131, 1134 (3d Cir. 1988), cert. denied, 488 U.S. 881 (1988). In this regard, the Court of Appeals for the District of Columbia has recognized the duty of a reviewing court to closely scrutinize agency action which is alleged to violate statutorily prescribed procedures:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulation before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures. [citation omitted] Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historical reliance on the courts as the exponents of procedural fairness.

Weyerhouser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis added); see also Natural Resource Defense Council, Inc. v. S.E.C., 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("Our review of an agency's procedural compliance with statutory norms is an exacting one.").

Given that plaintiffs have established that defendants' actions: (1) have violated the Base Closure Act; (2) have violated their own procedures and regulations; (3) were arbitrary and capricious; and (4) have violated the Due Process Clause of the Fifth Amendment, this Court must set aside and declare void the list of closures and realignments insofar as it relates to naval installations. In particular, this Court must enjoin the Secretary of Defense from instituting

closure of the Shipyard based on the egregiously flawed 1991 process of closure and realignment under the Act.

2. Defendants' Violations of the Act Require Voiding the List of Naval Closures and Realignments

An agency's violation of a statute or non-compliance with statutory procedures constitutes arbitrary and capricious agency action and must be set aside. See, 5 U.S.C. §706; Natural Resources Defense Council, 790 F.2d at 289; Bunyard v. Hodel, 702 F. Supp. 820, 822 (D. Nev. 1988); Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. 157, 162 (D.C.D.C. 1983) Gloucester County Concerned Citizens v. Goldschmidt, 533 F. Supp. 1222, 1228 (D.N.J. 1982); see also, Marshall v. Lansing, 839 F.2d 933, 943 (3d Cir. 1988); American Petroleum Institute v. Environmental Protection Agency, 787 F.2d 965, 976-77 (5th Cir. 1986). As Plaintiffs' Findings demonstrate, defendants have egregiously violated the express mandates of the Act by literally trashing the procedural safeguards promulgated thereunder. Thus, plaintiffs have proved, inter alia, violations of no fewer than the following six provisions of the Act:

a. 10 U.S.C. §2903(c)(3) - requiring the Secretary of Defense to "consider all military installations equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department [of Defense]." (emphasis supplied). This paramount statutory mandate was flagrantly and deliberately flouted by defendants -- particularly the Navy. Pltffs.' Findings, ¶¶ 56-93. As the facts demonstrate, the Navy determined in its "stealth list," compiled long before the Act even became law, that the Shipyard would be closed. Id., ¶¶ 23-32, 56-93. The Navy's later charade of purporting to comply with this provision -- which itself was fatally flawed for independent reasons -- cannot

disguise the fact that the Secretary of Navy concurred in the decision to recommend closure of the Shipyard several weeks before the Navy even first undertook to perform its bogus "fresh" consideration of all naval installations. Id., ¶ 77.[3]

b. 10 U.S.C. §2903(c)(4) - requiring the Secretary of Defense to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments." The Navy's determination to disable the GAO from performing its statutory duties is incontrovertible in light of the GAO's own conclusion that it could not verify or analyze the closure recommendations made by the Navy, or the methodology and data purportedly supporting them. Pltffs.' Findings, ¶¶ 182-222; 260-263. The evidence amply demonstrates the Navy's steely determination to stonewall the GAO even as the GAO made repeated attempts to perform its statutory duty. Id., ¶¶ 182-222.

c. 10 U.S.C. §2903(d)(5) - providing that the Comptroller General "transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process." Because of the Navy's stonewalling, the GAO was disabled from analyzing the DOD's recommendations and selection process, and conceded that fact in their report to Congress and the Commission. Pltffs.' Findings, ¶¶ 192-222. In this way, one of the principle reasons for Congress' enactment of the Act was frustrated. Id., ¶ 240.

d. 10 U.S.C. §2903(b)(2)(A) - requiring the Secretary of Defense to publish in the Federal Register the "final criteria" which, along with the force-structure plan,

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[3] See footnote 1, supra.

provide the exclusive basis on which recommendations of closure and realignment were to be made. As more fully discussed infra at pp. 13-17, even in the charade put on to justify its predetermination to closue the Shipyard, the Navy used an unapproved and inpermissable criterion in justifying its predetermination. The criterion, known as "Step 5," was also irrational and insupportable. Pltffs.' Findings, ¶¶ 139-181. Furthermore, the Navy went well beyond the force-structure plan in considering the Navy's projected needs for the years 1998-2000. Id., ¶¶ 145-146. These actions clearly violated the statutory requirement that the DOD base its recommendations exclusively on the "final criteria" and the force-structure plan. Id., 36-37. 42.

e. 10 U.S.C. §2903(d) - requiring that the Commission conduct public hearings on the recommendations for closure and realignment. As more fully discussed infra at pp. 19-21, the Navy egregiously violated the Act's express requirement of open public hearings by witholding all information favorable to the Shipyard and suppressing the testimony of Vice Admiral Hekman, the Navy Official most knowledgeable about shipyards who strongly dissented from the Navy's predetermination to close the Shipyard. Pltffs.' Findings, ¶¶ 238-259; 267-270.

f. 10 U.S.C. §2902(e)(2)(A) - requiring that all meetings of the Commission be open to the public (except where classified information is being discussed). The closed-door meetings between the Navy and the Commission after the close of public hearings relative to the closure of the Shipyard clearly violated this statutory mandate. Pltffs.' Findings, ¶¶ 238-259. Furthermore, since the Navy had completely stonewalled in the process, those meetings were critical to uncovering the Navy's gross violations of the Act and DOD regulations. Id.

The shocking pattern of defendants' intentional disregard for the procedural safeguards mandated by the Act, as more fully described in Plaintiffs' Findings and herein, frustrates a clearly expressed statutory policy, render the defendants' challenged actions arbitrary, capricious and not in accordance with the express commands of the Act, see, e.g., Marshall, 839 F.2d at 943; Hotel & Restaurant Employees, 563 F.Supp. at 112; Goldschmidt, 533 F.Supp. at 1228, and therefore must be invalidated. See, e.g., Department of Navy, 840 F.2d at 1134.

3. The Navy's Use of a Criterion Not Approved by Congress Violated the Act and Constituted Arbitrary and Capricious Agency Action

It is axiomatic that agency action must be set aside if the agency has:

> "relied on factors which Congress has not intended it to consider..."

Motor Vehicles Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983) (emphasis supplied); see also State of Ohio v. Department of the Interior, 880 F.2d 432, 479 (D.C. Cir. 1989); National Resources Defense Council, supra, 790 F.2d at 297-298.

In the context of the base closure process, Congress made clear the exclusive factors which it intended the Commission, DOD and Navy to rely on in determining which installations should be closed or realigned. The Act expressly required that the DOD publish in the Federal Register and submit for the approval of Congress the "final criteria" to be used, along with the force structure plan, as the exclusive basis for making closure and realignment recommendations. See 10 U.S.C. §§2903(b)(1), (b)(2)(A) and 2903(c); see also Pltffs.' Findings, ¶¶ 36-37, 42.

The Defense Department submitted eight criteria, which were published in the Federal Register on February 15, 1991. Long before these criteria were even promulgated, however, the

Navy had made its decision to close the Philadelphia Naval Shipyard. Pltffs.' Findings, ¶¶ 56-93. The eight exclusive criteria were:

> (1) Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.
>
> (2) The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.
>
> (3) The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
>
> (4) The cost and manpower implications.
>
> (5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.
>
> (6) The economic impact on local communities.
>
> (7) The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.
>
> (8) The environmental impact.

Pltffs.' Findings, ¶¶ 47.

Notwithstanding this exclusive list of criteria, the Navy Base Structure Committee ("BSC"), in evaluating Naval shipyards, explicitly relied on a wholly new and different ninth criterion, which was neither published nor submitted for Congressional approval as required by the Act. This criterion, called the "Step 5" criterion by the Navy, excluded from consideration for closure all six shipyards capable of performing nuclear repairs on nuclear vessels. Pltffs.' Findings, ¶¶ 139-181. It was directly as a result of the application of this unapproved criterion

that the Navy, through its egregious process of elimination, was left with only the Philadelphia Naval Shipyard as a candidate for closure. Id.

Aside from the speciousness of the "Step 5" criterion,[4] the BSC's use of the criterion to exclude from further consideration for closure all of the nuclear naval shipyards was plainly not in accordance with the Act. Pltffs.' Findings, ¶¶ 139-181. The evidence reveals that the BSC evaluated all eight of the shipyards according to the first four criteria, i.e., the military criteria. Id., ¶¶ 135-138. As a result of this evaluation, the Shipyard was ranked sixth. Id., ¶ _____. It was only thereafter that the BSC applied the "Step 5" criterion, thereby eliminating all shipyards other than the Philadelphia Shipyard and Long Beach from further review for closure or realignment. Id., ¶ 130; 160-169.[5]

The evidence thus indicates that the "Step 5" criterion was a makeweight criterion added into the evaluation process only to rig the rankings so that the Shipyard ended up at the bottom, even though under the eight published criteria the Shipyard would have been closed only after two other shipyards had already been closed. Pltffs.' Findings, ¶¶ 130-131. Thus, the Navy clearly "relied on [a] factor which Congress has not intended it to consider," thereby violating the Act and resulting in arbitrary and capricious agency action, thus mandating the relief sought by plaintiffs. State Farm, 463 U.S. at 43.

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[4] The evidence establishes that the criterion is irrational, as 25 percent to 50 percent of the work done on nuclear vessels is conventional work which the Shipyard is capable of performing. See Pltffs.' Findings, ¶ 148.

[5] The BSC later decided to exclude Long Beach from further closure consideration as part of its "Step 5" procedure, even though Long Beach was a more appropriate candidate for closure than the Shipyard. Pltffs.' Findings, ¶¶ 160-169.

In this same vein, the Navy flaunted the requirement that its closure recommendations be based on the force structure plan. Pltffs.' Findings, ¶¶ 145-146. However, in its "Step 5" criterion analysis, the Navy used the period 1998-2000 to justify excluding the six nuclear capable naval shipyards from consideration for closure. Id., 145-146. However, the Navy's force structure plan under the Act covered only the years 1992 to 1997. Id. Therefore, the Navy also violated the Act's requirement that it base its recommendations on the five year force structure plan mandated by the Act.

Accordingly, the Navy's impermissible use of the "Step 5" criterion and failure to base its closure recommendations on a statutorily proper force structure plan mandates the setting aside of the list of naval installations recommended for closure or realignment.

4. The Navy's Violation of Defense Department Regulations Was Arbitrary, Capricious and Not in Accordance with Law

An agency's failure to abide by its own regulations is alone grounds for invalidating agency action. See Bodie v. Department of Navy, 827 F.2d 1578, 1580 (Fed. Cir. 1987); Kelly v. Calio, 831 F.2d 190, 191-92 (9th Cir. 1987) ("It is the duty of a reviewing court to ensure that an agency follows its own procedural rules."); Wojciechowicz v. Department of Army, 763 F.2d 149, 153 (3d Cir. 1985). In this case, the failure of the Navy to abide by the requirements promulgated by the DOD pursuant to the Act mandates invalidation of the naval closure list. Plaintiffs' Findings, ¶¶ 111-119.

On December 10, 1990, the DOD issued "policy guidance" and "record keeping" requirements to the Military Departments as follows:

> The recommendations in the studies must be based on the final base closure and realignment selection criteria established under the Section [2903 of the Act]; and

> The studies must consider all military installations inside the United States...on an equal footing,... (Emphasis supplied)
>
> * * *
>
> DOD components shall keep:
>
> - Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
>
> - Data, information and analysis considered in making base closure and realignment selections; and
>
> - Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act.

Pltffs.' Findings, ¶ 116.

The DOD subsequently issued "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

> - Uniform guidance defining data requirements and sources for each category of base,
>
> - Systems for verifying accuracy of data,
>
> - Documentation justifying any changes made to data submissions, and
>
> - Procedures to check the accuracy of the analysis made from the data provided.[6]

Pltffs.' Findings, ¶ 117.

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[6] Although not published in the Federal Register, these requirements were the equivalent of regulations for purposes of judicial review under the APA. See Lucas v. Hodges, 730 F.2d 1493, 1504 n. 20 (D.C. Cir. 1984), vacated on other grounds, 738 F.2d 1392 (1984) (Agencies are "bound by their own substantive and procedural rules and policies, whether or not they are published in the Federal Register, if they are intended as mandatory.").

However, as found by the GAO in its May 16, 1991 Report, and amply supported by the documents and testimony adduced in discovery, the Navy failed completely to meet any of these requirements in its procedures for base closures and realignments. Pltffs.' Findings, ¶¶ 111-119. Thus, the GAO concluded in its Report that it "could not determine the rationale for [the BSC's] final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." Pltffs.' Findings, ¶¶ 192-222. Furthermore, the evidence establishes that the Navy violated the DOD's procedures in that it failed to implement an "internal control plan" in order to ensure an accurate and fair decision-making process, failed to ensure the accuracy of data collection and analysis, and failed to prepare minutes of its deliberations on closures and realignments. Pltffs.' Findings, ¶¶ 111-119. These egregious shortcomings in the process clearly worked a substantial prejudice to the Shipyard and plaintiffs' interests.

Accordingly, the BSC and the Navy violated the DOD regulations promulgated in furtherance of the Act, thereby invalidating the Navy's recommendations of base closures.

5. The "Public Hearings" Held by the Commission Were Not Meaningful and Therefore Violated the Act

Plaintiffs' Findings unequivocally establish that the Navy withheld every piece of information favorable to the Shipyard from the Commission, Congress, the GAO and the public. Pltffs.' Findings, ¶¶ 238-259. The Navy also saw to it that the single most knowledge Navy officer regarding shipyards, Vice Admiral Hekmen, did not testify before the Commission at any time. Id., ¶¶ 267-270. Furthermore, after the public hearings held by the Commission, the Navy's BSC provided additional documents and information to the Commission without affording interested members of Congress or the public a meaningful opportunity to comment at

a public hearing, and held closed door meetings with the Commission from which members of Congress and the public were excluded. Pltffs.' Findings, ¶¶ 238-259. Thus, the Navy and Commission deliberately flaunted the Act's requirement of open public hearings, 10 U.S.C. §2903(d)(1), and the Act's requirement that each meeting of the Commission be open to the public, except where classified information is to be discussed, 10 U.S.C. §2902(e)(2)(A).

The law is well settled that the statutory guarantee of a hearing necessarily entails the right to a meaningful hearing, which the Navy's actions plainly were designed to and did in fact thwart. See, e.g., National Wildlife Federation v. Marsh, 568 F. Supp. 985, 994 (D.D.C. 1983); Joseph v. Adams, 467 F. Supp. 141, 160-61 (E.D. Mich. 1978); see also Monongahela Power Company v. Marsh, 1988 WL 84262 (D.D.C. 1988). The facts and holding of National Wildlife Federation are particularly relevant to the instant case and compel the conclusion that the list of recommended closures and realignments of Navy bases must be declared void. The plaintiffs in National Wildlife Federation brought suit against the Secretary of the Army seeking a declaration that a dredging and construction permit issued by the Army was invalid. The plaintiff asserted that the permit was invalid because the Army relied upon a staff report which was not made a part of the record until after the public hearings were held. According to the plaintiff, the consideration of this staff evaluation only after the close of the period for public comment violated its right to meaningfully participate in the statutorily required public hearings.

The Court held that the inclusion of important data in the record after the conclusion of public hearings had in fact violated the relevant statute, stating in terms equally applicable here:

> [T]he opportunity to comment and the right to a hearing both necessarily require that the Army present for public scrutiny the rationale and pivotal data underlying its proposed action before the close of the comment and hearing period. Unfortunately, that

> requirement was not satisfied in the administrative proceeding here. After a careful examination of the administrative record, the Court finds that the inclusion of the Staff Evaluation in the administrative record after the close of the comment and hearing period had the effect of shielding the essential data and the agency's rationale from public hearing and comment.

National Wildlife Federation, 568 F. Supp. at 994 (emphasis in original). The Court continued in this same vein: "Only when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion." 568 F. Supp. at 993 (quoting U.S. Lines v. Federal Maritime Commission, 584 F.2d 519, 540 (D.C. Cir. 1978)); see also Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

That the information acquired by the Commission after conclusion of the public hearings was important and material is indisputable. Indeed, the very reason for the meetings between the Commission and Navy after the public hearings was the Commission's threat that if the Navy did not document their process, the Commission would undertake the task itself since the Navy's omissions had been so glaring. Pltffs.' Findings, ¶ 254. More importantly still, however, even after the meetings between the Commission and the Navy, the Navy withheld critical information on the Shipyard, including, inter alia, the true costs of closing the Shipyard; the true "cost savings" figure associated with closure of the Shipyard; the profitability of the Shipyard; and the true figures for workload in the naval shipyards. Id., ¶ 264.

Accordingly, the Navy's failure to disclose important and material information and documentation before the conclusion of the public hearings required by the Base Closure Act as

well as the closed-door meetings between the Commission and Navy, are clear violations of the Act and require the invalidation of the list of naval closures and realignments.

6. Plaintiffs' Due Process Rights Have Been Violated

Plaintiff Shipyard workers and unions possess a property interest in the continued operation of the Shipyard until and unless it is determined, pursuant to a fair and non-arbitrary process in accordance with the mandates of the Act, that the Shipyard should be closed. See Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 37-41; Winsett v. McGinnes, 617 F.2d 996, 1004-1008 (3d Cir. 1980), cert. denied, 449 U.S. 1093 (1980), Andersen-Myers Co., Inc. v. Roach, 660 F. Supp. 106, 109-111 (D. Kan. 1987); L. & H. Sanitation, Inc. v. Lake City Sanitation, Inc., 585 F. Supp. 120, 122-125 (E.D. Ark. 1984); Hixon v. Durbin, 560 F. Supp. 654, 659-661 (E. D. Pa. 1983) (Newcomer, J.); Duva v. World Boxing Association, 548 F. Supp. 710, 721-723 (D. N.J. 1982); Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6, 9-11 (W.D. Pa. 1981); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1130-1132 (W.D. Pa. 1980).

The facts adduced in support of plaintiffs' motion for preliminary injunction prove unquestionably that defendants' actions under the base closure process involved numerous material violations of the Act, and were arbitrary, capricious and in excess of statutory authority. See, supra, at 10-13. Accordingly, plaintiffs have shown a reasonable likelihood of success on their claim that the due process rights of plaintiff Shipyard workers and unions have been egregiously violated.

B. Plaintiffs Will be Irreparably Injured if the Injunction Does Not Issue

The evidence reveals the Navy's predetermined and relentless decision to close the Shipyard in total disregard of the procedural safeguards of the Act. Thus, the Navy began systematically diverting work from the Shipyard long before the Commission made its final recommendations, and has arbitrarily refused to award work to the Shipyard for which it was the lowest bidder. Pltffs.' Findings, ¶¶ 289-299. The Navy also attempted to redirect the USS Kennedy away from Philadelphia despite the fact that Congress had specifically authorized that work on the Kennedy to be performed in Philadelphia. Id., 300-311. Since the diversion of the USS Kennedy would have resulted in the virtually immediate closure of the Shipyard, this threat was quite substantial and imminent, and averted only at the last minute because of Congressional and public outcry. Id., ¶ 311. It nevertheless demonstrates the Navy's deviousness in pursuing its goal of immediate closure of the Shipyard through its deliberate disregard for the procedures mandated by the Act, as well as their disregard for the authority and power of this Court.

Despite averting the immediate catastrophe that loss of the USS Kennedy would have been, the Shipyard is losing highly skilled and often irreplaceable professionals at an alarming rate due to the uncertainty of the Shipyard's future. Pltffs.' Findings, ¶ 304. Furthermore, even with the USS Kennedy in Philadelphia, the Navy's other actions to starve the Shipyard have already taken their toll, as current plans are to lay off approximately 10 percent of the Shipyard's workforce in the spring of 1992. Id., ¶ 312.

Moreover, the evidence is simply overwhelming that closure of the Shipyard would have dramatically adverse effects on the plaintiff Shipyard workers and unions, who will lose their jobs, and to the entire Southeastern Pennsylvania region, including the affected areas of the

States of New Jersey and Delaware. Pltiffs.' Findings, ¶¶ 314-321. Indeed, the Navy's own study indicates that closure of the Shipyard will entail the elimination directly of almost 15,000 jobs, and would indirectly cause the loss of 7,384 jobs in the Philadelphia area. Id., ¶¶ 314-318. The Navy's report estimates that the closure would add an estimated 16,856 workers to the unemployment rolls and dramatically increase unemployment in the region. Id. A report prepared by the Pennsylvania Economy League is even more grim in its outlook for the post-Shipyard world. Id., ¶¶ 319-321.

Finally, the irreparable nature of the injury to plaintiffs is confirmed by the fact that the Shipyard, once closed, will be lost irretrievably. As Admiral Hekman, until recently the Navy official in charge of all naval shipyards in the United States testified, once drydocks like those in the Shipyard are mothballed, they are lost forever. Pltffs.' Findings, ¶¶ 177, 263(i)(A).

Accordingly, the irreparable injury to plaintiffs which will be caused by the unwarranted closure of the Shipyard cannot be overstated.

C. Defendants Will Not be Harmed by Entry of the Injunction Sought

Defendants have offered not a scintilla of evidence, nor could they credibly, that entry of the injunction sought by plaintiffs would cause them any injury whatsoever. Obviously, the Commission will suffer no harm, as it has no further duties under the Act, and its members are clearly not subject to liability. With respect to the Navy and DOD, the relief sought by plaintiffs will likewise cause no injury. In fact, the evidence discloses that the Philadelphia Shipyard is the most cost effective of all naval shipyards, and alone among the eight shipyards posted a net profit for 1989-1990. Pltffs.' Findings, ¶ 263(b). Furthermore, the relief sought by plaintiffs plainly would not preclude the Navy and DOD from considering the Shipyard for closure in

1993 under the Act, though a fair procedure under the Act would inevitably conclude that the Shipyard should not be closed. See Plaintiffs' Surreply in Opposition to Defendants' Motion to Dismiss, filed contemporaneously herewith, at pp. 1-2. Given that work on the USS Kennedy will in any event keep the Shipyard at least partially open until this process could be redone in 1993, and the Shipyard will be performing its usual high-quality, cost effective work, it is simply absurd for defendants to argue that they will be harmed by the relief sought by plaintiffs.

D. Entry of the Injunction Sought by Plaintiffs Is In the Public Interest

It is indisputable that the public interest is served by requiring defendants to adhere to the procedural safeguards of the Act, the express purpose of which was to provide a fair process for base closure and realignment. See 10 U.S.C. §2901(b). More specifically, the public interest of the entire Delaware Valley tri-state region will be served by preventing the arbitrary and capricious closing of the Shipyard, with the resulting loss of jobs and other devastating economic consequences.

CONCLUSION

For the reasons stated in this Memorandum of Law, as well as those discussed extensively in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, this Court should grant plaintiffs the preliminary injunctive relief they seek.

Respectfully submitted

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 91-CV-4322
H. LAWRENCE GARRETT, III, Secretary of the Navy, et al.,	:	HON. RONALD L. BUCKWALTER
Defendants.	:	

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I. FINDINGS OF FACT

A. INTRODUCTION

1. Founded in 1801, the Philadelphia Naval Shipyard (the "Phila Shipyard") is a major industrial complex consisting of extensive and large carrier dry piers, production shops, equipment and other assets valued at almost 3 billion dollars.

2. Operations at the Philadelphia Shipyard involve at least 47,000 jobs Philadelphia metropolitan area: 31,000 direct and indirect positions; 7,000 additional associated personnel; and 9,000 direct and indirect positions associated with the Philade Naval Station.

3. There are eight Naval Shipyards in the United States: Puget Sou Norfolk, Philadelphia, Mare Island, Charleston, Pearl Harbor, Portsmouth and Long Beach

4. Almost 15% of the total repair and modernization work performed by eight Naval Shipyards is accomplished at the Philadelphia Shipyard.

5. From 1988 through the present, Philadelphia has led all eight Nav Shipyards in efficiency and cost-effectiveness, due largely to the excellence of its highly skille work force.

B. THE 1988 BASE CLOSURE ACT

6. On May 3, 1988, then Secretary of Defense, Frank Carlucci, chartered the Defense Secretary's Commission on Base Realignment and Closure to evaluate and recommend a reduction in the military installations located in the United States. [Courter Dep. Ex. 14 at 1-1].

7. In October 1988, Congress passed and the President signed Public Law

100-526, the Defense Authorization Amendment and Base Closure and Realignment Act. [Courte Dep. Ex. 14 at 1-1].

8. The 1988 Commission on Base Realignment and Closure recommended tha 86 bases be closed and 59 bases be realigned or partially closed. [Courter Dep. Ex. 14 at 1-2].

9. These recommendations were strongly criticized by members of Congres and the public. [Courter Dep. Ex. 14 at 1-2 to 1-3].

10. Congressional critics contended that the 1988 base closure and realignmen recommendation process had not been sufficiently open to public scrutiny. [Courter Dep. Ex. 2 and 14 at 1-3].

11. Congressional critics also charged that faulty data had been used to reach the 1988 final closure recommendations. [Courter Dep. Ex. 2 and 14 at 1-3].

12. Congressional critics believed that the General Accounting Office ("GAO") should have independently reviewed the data considered by the 1988 Commission on Base Realignment and Closure during the proceedings. [Courter Dep. Ex. 2 and 14 at 1-3].

C. <u>THE "SECDEF 17" LIST</u>

13. In January 1990, an executive committee meeting was held by the Secretary of Defense, the Service Secretaries and the Chairman of the Joint Chiefs of Staff ("JCS") to review additional military installations for closure and/or realignment. [Tzavaras Dep. at 13-14].

14. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 36 additional bases in the United States (the "SECDEF 17 list"). [Courter Dep. Ex. 14 at 1-2; January 29, 1991 DoD New Release].

15. The SECDEF 17 list identified 17 Navy installations for closure, including the Philadelphia Shipyard. [Tzavaras Dep. at 12; January 29, 1991 DoD News Release].

16. The SECDEF 17 list had been approved by the Secretary of the Navy, H. Lawrence Garrett, III ("Garrett"). [Tzavaras Dep. at 14-15].

17. This was the first public announcement by the Secretary of Defense of a proposal to close the Philadelphia Shipyard. [Hekman Dep. at 9-10].

18. As Capt. Tzavaras -- the action officer for base closure issues for the Chairman of the JCS -- testified, when the SECDEF 17 list became public, "[i]t hit[] the presses, [went] into the Congress [and] everyone [got] all upset." [Tzavaras Dep. at 14-15].

D. THE SECRETARY OF THE NAVY'S APPOINTMENT OF A THREE STAR ADMIRAL ADVISORY COMMITTEE

19. As a result of public and congressional criticism, a second executive committee meeting was held by the Secretary of Defense, the Service Secretaries and the Chairman of the JCS in the early summer of 1990 to discuss base closures. [Tzavaras Dep. at 15].

20. As a result of that meeting, Capt. Tzavaras testified that the Service staffs "again started churning and burning to produce a new recommendation" on base closures and realignments. [Tzavaras Dep. at 15].

21. In early 1990, the Secretary of the Navy directed the Vice Chief of Naval Operations to charter a Three Star Admiral Advisory Committee and subordinate Working Group to study and justify proposed base closures for the Navy (the "OPNAV" or "VCNO" study). [Tzavaras Dep. at 18-19; MacKinnon Dep. at 17].

22. The Advisory Committee was comprised of Three Star Admirals from

various Navy commands, as well as the Comptroller of the Navy and some of his staff. [Hekm Dep. at 23-25; Tzavaras Dep. at 18-19]. The Three Star Group (also referred to as the "Adviso Committee") was headed by Vice Admiral Smith. [Hekman Dep. at 23-25].

E. THE THREE STAR ADMIRAL ADVISORY COMMITTEE'S CREATIO OF THE JULY 1990 "STEALTH LIST" WHICH CALLED FOR CLOSUR OF THE PHILADELPHIA NAVAL SHIPYARD

23. To redress the criticisms of the 1988 base closure process and Secretar Cheney's January 29, 1990 list of proposed closures, Congress began drafting new legislation t substantially amend the 1988 Defense Realignment and Base Closure Act by adding procedur safeguards. [Courter Dep. Ex. 14 at 1-3].

24. Between June and September, the prospect of some legislation on bas closure being enacted was "evident." [Tzavaras Dep. at 15-16]. However, even as Congress wa drafting the new law, the Navy's Three Star Admiral Advisory Group was continuing to develo its secret list of bases to close. [Tzavaras Dep. at 16].

25. On July 10, 1990, the Three Star Admiral Advisory Committee voted to retai Long Beach Naval Shipyard and to mothball the Philadelphia Shipyard:

> The Navy Inactive Fleet Maintenance Facility will remain at Philadelphia, as well as the propeller facility and the major tenant, NAVSSES. The drydocks are to be mothballed and retained for contingency purposes.

[Loftus Dep. Ex. 1 at 5; Tzavaras Dep. at 19]. This action occurred only four months before the final passage of the 1990 Base Closure Act. [10 U.S.C. §2901 et seq.].

26. In the words of the Navy's own memorandum, the Advisory Committee's decisions to mothball the Philadelphia Shipyard and to retain the Long Beach Shipyard "were forwarded and concurred in by CNO [Chief of Naval Operations Kelso], SECNAV [Navy

Secretary Garrett] and SECDEF [Defense Secretary Cheney]." However, "[f]or political re these agreements have not been officially promulgated. A revised closure list is forthcc however, it may not be released until after the first of the calendar year." [Loftus Dep. E: 5].

27. Thus, the "stealth list" was born. [Loftus Dep. Ex. 1].

28. Although the "stealth list" was due for publication in August or Sept 1990, it was concealed. "That is why it was called the stealth list because it was published." [Tzavaras Dep. at 15-16 and 23].

29. The "stealth list" of Navy base closures was also known as the "SEC 46" list. [Tzavaras Dep. at 15 and 23].

30. The "stealth list" or SECNAV 46 list had the specific approval of Navy Secretary Garrett and CNO Kelso. [Tzavaras Dep. at 20-21].

31. The "stealth list" or SECNAV 46 list recommended the closure c Philadelphia Shipyard. [Loftus Dep. Ex. 1 at 5; Tzavaras Dep. at 19].

32. Despite the fact that the Navy knew by the beginning of September that new base closure legislation would undoubtedly be enacted, it persisted in its plan f closure of the Philadelphia Shipyard. Thus, by October 18, 1990, the Navy Working (reporting to the Advisory Committee stated that "[t]he plan for closure of Philadelphia Shipyard and the resultant redistribution of workload has been developed." [MacKinnon Ex. 2 at 1].

F. THE NOVEMBER 5, 1990 ENACTMENT OF THE BASE CLOSURE

33. On November 5, 1990, the President signed into law the De

Realignment and Base Closure Act (the "Base Closure Act"). [Courter Dep. Ex. 14 at v].

34. The Base Closure Act:

(a) Expressly stated that its "purpose" was "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)];

(b) Required that all meetings of the Commission "be open to the public," except where classified information was being discussed [10 U.S.C. §2902(e)(2)(A)];

(c) Mandated the development and application of "final criteria" for making the closure and realignment determinations [10 U.S.C. §2903(b)(2)(A) and (c)];

(d) Mandated the creation of a six year force-structure plan for the Armed Forces for making the closure and realignment determinations [10 U.S.C. §2903(a) and (c)];

(e) Required the Secretary of Defense to consider all military installations "equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department." [10 U.S.C. §2903(c)(3) (emphasis supplied)];

(f) Required the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [10 U.S.C. §2903(c)(2)];

(g) Required the Secretary of Defense to transmit to the GAO and the Commission "all information used by the Department in making its recommendations to the Commission for closures and realignments," and required the GAO (i) to assist the Commission in its review and analysis of the recommendations made by the Secretary and (ii) to transmit to

the Commission and to Congress "a report containing a detailed analysis of the Secr recommendations and selection process" 45 days before the Commission's report was transmitted to the President [10 U.S.C. §§2903(c)(4), 2903(d)(5)(A) and 2903(d)(5)(B)]

(h) Proscribed the Secretary of Defense from carrying out any clos realignment recommendation before the earlier of (i) the enactment of a joint resoluti Congress disapproving the closure recommendations, or (ii) the expiration of a 45 day sta period that commenced on the day that the President transmitted the recommended closu realignment list to Congress [10 U.S.C. §2904 (b)].

35. In reaching its decision to close the Philadelphia Shipyard, the Nav the Base Closure Commission violated the Base Closure Act in several material respects:

(a) The Navy did not consider all shipyards equally without regard to consideration of proposals to close, and prior recommendations to close, the Philad Shipyard. [10 USC §2903 (c)(3)];

(b) The Navy's determination to close the Philadelphia Shipyard was ba an ultra vires criterion outside the "final criteria" promulgated by the Defense Depar pursuant to the Base Closure Act. [10 USC §2903 (b)(2)(A) and (c)];

(c) The Navy's determination to close the Philadelphia Shipyard was ba its allegedly perceived force structure needs beyond the six-year period mandated by the Closure Act. [10 USC §2903 (c)(3)];

(d) The GAO reported on May 15, 1991 that it was unable to perfo statutory functions with respect to the Navy's base closure process and decisions becau Navy (i) "stonewalled" the GAO's efforts to monitor the Navy's base closure process

occurred, (ii) employed a "subjective" process devoid of supporting documentation and (ii refused to institute an internal control plan with respect to its process and decisions in violatic of a Defense Department directive. [10 USC §§2903 (d)(5)(A) and (B); Yellin Dep. Ex. 2];

(e) The Navy's process was not "fair" because (i) it was not equal but instea predetermined by prior proposals and recommendations, (ii) it was subjective, (iii) critical Nav documents were withheld from the Commission's public hearing and scrutiny process and (iv Admiral Peter Hekman ("Hekman"), the Navy officer most knowledgeable in the operations of Naval shipyards, was discouraged by the Navy from providing critical Navy testimony during the Commission's public hearings. [10 USC §§2903 (c)(3) and (c)(4), §2903 (e)(2)(A)];

(f) All meetings of the Commission were not open to the public since the Commission directed its staff to hold private meetings with the Navy's Base Structure Committee in a private effort to cure the deficiencies publicly found by the GAO in the Navy's base closure process and decisions. [10 USC §2903 (e)(2)(A)];

(g) The Commission withheld critical Navy documents, obtained after the last public hearing on the Philadelphia Shipyard, from its own public hearing and scrutiny process. [10 USC §2903 (e)(2)(A)]; and

(h) The Navy concealed from the Commission all documents opposing closure of the Philadelphia Shipyard. Members of the plaintiff Congressional delegation inadvertently discovered several of these critical documents; however, the Commission held no hearings to publicly scrutinize these documents or to ascertain the existence of other concealed Navy documents. [10 USC §2903(c)(4)].

G. THE BASE CLOSURE ACT'S FORCE STRUCTURE PLAN

36. The Base Closure Act required the Secretary of Defense to submit to the Congress and the Commission a force structure plan for the six fiscal years from 1992 through 1997. [10 U.S.C. §2903(a)].

37. The Act required that the Defense Secretary's recommendations for closure or realignment be based on this force structure plan. [DoD April 1991 Report at 7].

38. In December 1990, the DoD issued its Force Structure Plan for the six fiscal years from 1992 through 1997. [DoD April 1991 Report at 15].

39. The Force Structure Plan was submitted to Congress on March 19, 1991, and to the Base Closure Commission on March 23, 1991. [Courter Dep. Ex. 14 at B-1].

40. The unclassified summary of the Force Structure Plan disclosed that the Navy would have 94 fewer battle force ships, one less aircraft carrier and two fewer carrier air wings by the end of FY 1995. [DoD April 1991 Report at 21; Courter Dep. Ex. 14 at B-5].

41. During the 1990s the current mix of 34 Poseidon and Trident submarines would also be reduced to a force of 18 Trident submarines. [DoD April 1991 Report at 20].

H. THE DEFENSE DEPARTMENT FINAL CRITERIA

42. As part of the objective process for determining whether to close a military installation, the Base Closure Act required the Secretary of Defense to establish selection criteria to be used in making a closure recommendation. [DoD April 1991 Report at 8].

43. In developing these criteria, the Secretary was required to publish proposed criteria in the Federal Register and solicit public comments. [DoD April 1991 Report at 8 and 23].

44. The Defense Department published eight proposed criteria and requested comments on November 30, 1990. [DoD April 1991 Report at 23].

45. The proposed criteria closely mirrored the criteria established for the 1988 Defense Secretary's Commission on Base Realignment and Closure. The only notable differences were that priority consideration was given to military value criteria and payback was no longer limited to six years. [DoD April 1991 Report at 23].

46. On February 15, 1991, the DoD published in the Federal Register eight proposed final criteria to govern the base closure and realignment process. [DoD April 1991 Report at 24].

47. The first four criteria concerned "military value" and were required to receive preference:

(1) Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.

(2) The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

(4) The cost and manpower implications.

The fifth criterion concerned "return on investment":

(5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

The final three criteria involved non-military "impacts":

(6) The economic impact on local communities.

(7) The ability of both the existing and potential receiving communities'

infrastructures to support forces, missions, and personnel.

(8) The environmental impact.

[DoD April 1991 Report at 24; Courter Dep. Ex. 14 at C-1].

48. The proposed criteria were subject to Congressional review b February 15, 1991 and March 15, 1991. The criteria became final on March 15, 1991. April 1991 Report at 24].

I. THE DEFENSE DEPARTMENT DECEMBER 10, 1990 AND FEBR 13, 1991 DIRECTIVES

49. On December 10, 1990, the Department of Defense issued a di mandating the exclusive procedures which the Military Departments were to follow in r defense base closure and realignment recommendations. [Nemfakos Dep. Ex. 1].

50. In accordance with the Base Closure Act, the December 10, 1991 D Department directive required that:

(a) All base closure studies have as their basis the six-year force structu mandated by the Act;

(b) All base closure recommendations be based upon the final c promulgated pursuant to the Act; and

(c) All bases be considered for closure "on an equal footing, without to whether the installation has been previously considered or proposed for closure or realig by the Department of Defense."

[Nemfakos Dep. Ex. 1 at 2]. The Navy violated each of these requirements.

51. The December 10, 1990 directive also required the Navy to keep:

(a) Descriptions of how base closure selections were made and hov

satisfied the final criteria;

(b) Data, information and analyses considered in making base closure selections; and

(c) Documentation for each base closure recommendation.

[Nemfakos Dep. Ex. 1 at 2]. On May 15, 1991, the GAO concluded that the Navy did not maintain any of the requisite information, thereby preventing the GAO from performing its statutory function. [Meyer Dep. at 105; Yellin Dep. Ex. 2 at 46].

52. On February 13, 1991, the Department of Defense issued a directive requiring each of the Military Departments to "develop and implement an internal control plan for [their] base structure reviews to ensure the accuracy of data collection and analyses." [Nemfakos Dep. Ex. 2 at 2]. As will be demonstrated below, the GAO concluded that the Navy did not develop or implement an internal control plan for its base structure reviews. [Yellin Dep. Ex. 2 at 48].

J. THE ROLE OF CONGRESS UNDER THE BASE CLOSURE ACT

53. Congress was precluded from exercising their statutory right to participate in the base closure process because (a) the GAO was unable to monitor the Navy's base closure process and decisions, (b) the Commission held private meetings with the Navy Base Structure Committee in a private effort to cure the deficiencies publicly found by the GAO in the Navy's base closure process and decisions and (c) critical Navy documents and testimony were withheld from the Commission's public hearing and scrutiny process. [10 U.S.C. §2903].

K. THE EVALUATIVE AND OVERSIGHT ROLE OF THE GENERAL ACCOUNTING OFFICE UNDER THE BASE CLOSURE ACT

54. The Defense Secretary's April 1991 Base Closure and Realignment Report

to the Commission described the GAO's essential statutory role under the Base Closure Act as follows:

> Public Law 101-510 provided for the General Accounting Office (GAO) to monitor the activities, while they occur, of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.
>
> The GAO is required to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO report, due by May 15, 1991, is also intended to describe how the DoD selection process was conducted and whether it met the requirements of the Act. In addition, the GAO is required to assist the Commission, if requested, with its review and analysis of the Secretary's recommendations.

[DoD April 1991 Report at 9 (emphasis supplied)].

55. The Navy deliberately prevented the GAO from monitoring its base closure process as it occurred. The GAO concluded that the Navy's base closure process was subjective and not adequately documented and the GAO further concluded that the Navy's base closure decisions did not satisfy the requirements of the Base Closure Act. [Yellin Dep. Ex. 2 at 46-48].

L. THE THREE STAR ADVISORY COMMITTEE'S PROCEEDINGS AFTER ENACTMENT OF THE BASE CLOSURE ACT ON NOVEMBER 5, 1990: APPROVAL OF THE SECDEF 17 AND "STEALTH LIST" RECOMMENDATIONS FOR CLOSURE OF THE PHILADELPHIA SHIPYARD

56. Under the new Base Closure Act, which was enacted on November 5, 1990, the Navy was required to start the base-closing process anew with a "clean slate." [10 U.S.C. §2903(c)(3)].

57. The new legislation required that the Philadelphia Shipyard, which was

slated for closure on both the SECDEF 17 list and the "stealth list," be given a new start on an equal basis with all other shipyards. [10 U.S.C. §2903(c)(3)].

58. However, internal Navy documents and Navy deposition testimony make it abundantly clear that, despite the enactment of the new law, Navy Secretary Garrett, the Three Star Admiral Advisory Committee, the Advisory Committee's Working Group and the staff of the Chief of Naval Operations all continued to persist in closure of the Philadelphia Shipyard based upon the recommendations of the SECDEF 17 list and the "stealth list" or SECNAV 46 list. [See, e.g. MacKinnon Dep. Ex. 3, 5, 8, 14 and 15; MacKinnon Dep. at 84-88, 125, 154-155; Tzavara Deposition at 42-43, 46 and 57].

59. After the Base Closure Act had been passed by Congress and only five days before the President signed it, Mary MacKinnon ("MacKinnon"), the person on the Advisory Committee Working Group responsible for shipyards, informed her Navy officer superiors that she would "write justification why we passed up lower ranked shipyards to select Phila. for closure." [MacKinnon Dep. Ex. 5 at 1; MacKinnon Dep. at 84-86]. MacKinnon also stated that she would "[d]evelop implementation plan and timeline to close Phila. Naval Shipyard after completion of CV 64 SLEP." [MacKinnon Dep. Ex. 5 at 3; MacKinnon Dep. at 86-88].

60. On November 16, 1990, only eleven days after the Base Closure Act was enacted, the Advisory Committee Working Group reported that "[t]he 'stealth list' will become the [Navy's] 1991 base closure list...[O]ur plan is to keep Philadelphia Naval Shipyard on the 1991 list and close/realign as planned." [MacKinnon Dep. Ex. 8 at 2 (emphasis supplied); MacKinnon Dep. at 125].

61. At that time, the question was not if Philadelphia would close, but "when

it would close." [MacKinnon Dep. at 124 (emphasis supplied)].

62. On November 5, 1990, the date when the Base Closure Act was enacted, the Working Group had ranked the Philadelphia Shipyard sixth, with a score of 274 points, ahead of the Portsmouth Shipyard, with 263 points, and the Mare Island Shipyard, with 215 points. [MacKinnon Dep. Ex. at 2; MacKinnon Dep. at 58]. In order to justify closing Philadelphia instead of Portsmouth and Mare Island, the Working Group relied on the "projected workload in fiscal year 1998 through 2000 requir[ing] six nuclear naval shipyards." [MacKinnon Dep. at 59; MacKinnon Dep. Ex. 3 at 3; MacKinnon Dep. Ex. 15 at 6].

63. The years 1998-2000 were outside the six-year force structure period governing base closures under the Base Closure Act. [10 USC §2903 (a) and (c)].

64. By November 16, 1990, the Working Group had already concluded that the new proposed base closure criteria under the Base Closure Act would not change the ranking of the shipyards, that is, Philadelphia would continue to be ranked sixth and Portsmouth and Mare Island would continue to be ranked seventh and eighth. [MacKinnon Dep. at 112-113; MacKinnon Dep. Ex. 8 at 2].

65. On that same date, the Working Group also reaffirmed its proposed "actions" with respect to bases targeted for closure:

> Develop implementation plan and timeline to close Philadelphia Naval Shipyard after completion of CV 64 SLEP.

[MacKinnon Dep. at 101; MacKinnon Dep. Ex. 7 at 3].

66. Totally disregarding the "equal footing" requirement of the Base Closure Act, as of November 20, 1990, the Three Star Admiral Advisory Committee nevertheless made recommendations to the Chief of Naval Operations with respect to base closures and

realignments. [Tzavaras Dep. at 34-35].

67. Ultimately the "stealth list" in its final form, including the Philadelphia Shipyard as a mothballed closure, became a list of recommended base closures made by the Three Star Admiral Advisory Committee to the Secretary of the Navy. [MacKinnon Dep. at 121-122; Loftus Dep. at 22, 29, 31, 36-39; Tzavaras Dep. at 35-36; Hekman Dep. at 18-19, 28, 135-136].

68. The Minutes of the Working Group's December 4, 1990 meeting note that a Three Star Admiral Advisory Committee meeting was scheduled for December 20, 1990 to review the Working Group's preliminary list of base closures and that "OP-44 [Admiral Drennon] will be the primary briefer and will compare the new recommendations to those known as the SECNAV "46" developed during deliberations prior to the new base closure legislation." [MacKinnon Dep. Ex. 11 at 3; Tzavaras Dep. at 40-41].

69. The Working Group's proposed closure list was completed by December 10, 1990. That list included the Philadelphia Shipyard. [MacKinnon Dep. at 144].

70. At a December 10, 1990 Working Group meeting, Capt. Tzavaras noted that the Defense Department had issued its policy directive that day regarding base closure procedures, but that it "doesn't change anything." [MacKinnon Dep. Ex. 12 at 1]. In other words, even though the Defense Department had mandated in its December 10, 1990 directive that all bases be considered for closure "on an equal footing, without regard to whether the installation has been previously considered or proposed for closure or realignment", the Three Star Admiral Advisory Committee and its Working Group would continue with their "stealth list" and its recommended base closures, including the Philadelphia Shipyard. [Nemfakos Dep. Ex.

1 at 2].

71. Thus, the Minutes of the Working Group's December 10, 1990 meetin note that the December 20, 1990 presentation to the Three Star Admiral Advisory Committee c the Working Group's recommended base closures would annotate which base closures were o the "stealth list" or SECNAV 46 list. [MacKinnon Dep. Ex. 13 at 4; Tzavaras Dep. at 42-43

72. Despite repeated attempts by the Navy to rank the Philadelphia Shipyar lower than the other seven shipyard, under the new proposed base closure criteria, applicatio of the criteria consistently ranked other shipyards below Philadelphia. [MacKinnon Dep. Ex. 15 Yellin Dep. Ex. 1].

73. On December 18, 1990, MacKinnon utilized the new base closure criteri proposed under the Base Closure Act to rank the eight Naval shipyards. Under the new criteria Philadelphia ranked sixth, with 274 points, and Portsmouth and Mare Island ranked seventh an eighth, with 263 points and 215 points, respectively. [MacKinnon Dep. at 165-166; MacKinno Dep. Ex. 15 at 1-6].

74. It was only by awarding each nuclear capable shipyard 50 so-called "bonu points" under a bogus criterion <u>not</u> included in the new base closure criteria that Portsmout jumped over Philadelphia. But, even after receiving its 50 so-called "bonus points," Mare Islan was still ranked eighth behind Philadelphia. [MacKinnon Dep. at 167-172; MacKinnon Dep. Ex 15 at 7].

75. Moreover, the award of 50 "bonus points" was expressly based upon th "projected workload for the naval shipyards in 1998-2000," a force structure period clearl <u>beyond</u> the six year 1992-1997 requisite force structure period under the Base Closure Act

[MacKinnon Dep. at 191-192; MacKinnon Dep. Ex. 15 at 6].

76. On December 19, 1990, MacKinnon summarized the status of base closures on the eve of the Three Star Admiral Advisory Committee meeting:

> All industrial activities were reviewed in the last several months, and the decision was made to maintain all activities with the exception of Philadelphia Naval Shipyard.

[MacKinnon Dep. Ex. 16 (first emphasis in original and second emphasis supplied)].

77. Given MacKinnon's summary, it is not surprising that on December 19, 1990 Vice Admiral Hekman, a member of the Advisory Committee and the highest Navy officer supervising the operations of the eight Naval shipyards, wrote to Admiral Loftus, the immediate deputy of Chief of Naval Operations Kelso, stating:

> While I realize that the [Navy] Secretary [Garrett] has been briefed and has concurred with the proposal to mothball Philadelphia Naval Shipyard, I strongly recommend that this decision be reconsidered.

[Hekman Dep. Ex. 2; Hekman Dep. at 17-21, 28 (emphasis supplied)]. Navy Secretary Garrett had previously approved the mothballing of the Philadelphia Shipyard when he approved the SECDEF 17 list in January 1990 and the "stealth list" or SECNAV 46 list in the summer of 1990. [Tzavaras Dep. at 53-54].

78. Hekman's December 19, 1990 "disserting" memorandum to Admiral Loftus was rejected on December 20, 1990 at the Advisory Committee meeting. As Admiral Loftus subsequently stated in his reply memorandum to Vice Admiral Hekman dated January 11, 1991, Vice Admiral Hekman's request for reconsideration "was discussed at the 20 December 1990 meeting of the [Three Star Admiral] Base Closure and Realignment Advisory Committee" and "was not accepted." [Claman Dep. Ex. 5; Loftus Dep. at 37-39; Claman Dep. at 83-86;

Hekman Dep. Ex. 4; Tzavaras Dep. at 57].

79. Indeed, at the December 20, 1990 Advisory Committee meeting, the Working Group presented its list of recommended closures to the Advisory Committee. The Philadelphia Shipyard was on the list. [Loftus Dep. at 38-39; Tzavaras Dep. at 40, 44, 57].

80. Despite the fact that the slate was supposed to be wiped clean by the Base Closure Act, the Working Group list that was presented to the Advisory Committee on December 20, 1990 clearly indicated that the shipyard had been previously recommended for closure. [Tzavaras Dep. at 43-46, 57; MacKinnon Dep. Ex. 14 at 1-2; Loftus Dep. at 39].

81. Thus, the viewgraphs displayed at that Three Star Admiral Advisory Committee meeting showed not only the Working Group base closure recommendations but also the original "stealth list" and SECDEF 17 list base closure recommendations. [Tzavaras Dep. at 46; MacKinnon Dep. at 154-155; MacKinnon Dep. Ex. 14 at 2].

82. On December 20, 1990, the Three Star Admiral Advisory Committee voted to close the Philadelphia Naval Shipyard. [Tzavaras Dep. at 57; Loftus Dep. at 39].

83. The Working Group did not "wipe the slate clean" by presenting to the Advisory Committee recommendations for base closure and realignments that were made prior to the passage of the 1990 Base Closure Act. As one Working Group member testified, however, "those kinds of decisions were way above my pay grade." [MacKinnon Dep. at 156].

84. Moreover, since the Advisory Committee decision was itself <u>not</u> premised on the new base closure criteria promulgated pursuant to the Base Closure Act, not finalized until March, 1991, and <u>not</u> the result of the Navy's base closure process undertaken as a result of the enactment of the Base Closure Act, the decision was yet a <u>third</u> recommendation to close the

Philadelphia Shipyard reached outside the base closure process. [MacKinnon Dep. Ex. 14 at 1-2 and 8 at 2].

85. Indeed, it was not until late December 1990 that the Navy's Base Structure Committee was appointed and it was not until January 28, 1991 that Navy Assistant Secretary Jacqueline Schafer ("Schafer"), the Chair of the Navy's Base Structure Committee, issued her procedures memorandum governing the Navy's base closure process. [Schafer Dep. at 6-7, 9, 11; Meyer Dep. Ex. 1-A at Bates No. 1175; Nemfakos Dep. Ex. 3 at 1]. The first meeting of the Base Structure Committee was not until February, 1991. [Meyer Dep. Ex. at 1-A at Bates No. 1175].

86. The next meeting of the Three Star Advisory Committee was held on January 14, 1991. [Tzavaras Dep. at 59].

87. At that meeting, Vice Admiral Hekman again presented his recommendation to keep the Philadelphia Shipyard open. [Tzavaras Dep. Ex. 1; Hekman Dep. Ex. 5].

88. On January 14, 1991, the Advisory Committee reaffirmed its December 20, 1990 decision to close the Philadelphia Shipyard: "With CNO approval, Philadelphia Naval Shipyard will be proposed to the FY91 Base Closure and Realignment Commission (BCRC) for closure." [Tzavaras Dep. Ex. 1; Tzavaras Dep. at 59-60]

89. On January 28, 1991, the full list of the Three Star Admiral Advisory Committee base closure recommendations, including the recommendation to close the Philadelphia Shipyard, was presented to Chief of Naval Operations Kelso. [Loftus Dep. at 39-41].

90. Admiral Loftus, a member of both the Advisory Committee and the Navy's Base Structure Committee, was present during the CNO's briefing of the Advisory Committee's base closure list. [Loftus Dep. at 40].

91. Loftus fully concurred in the recommendation to close the Philadelphia Shipyard. [Loftus Dep. at 44].

92. In fact, internal Navy documents dated January 25, 1991 demonstrate that Admiral Loftus, who was also a member of the BSC, had by that date recommended that the Philadelphia Shipyard be closed and its drydocks mothballed. [Hekman Dep. Ex. 3; Hekman Dep. at 68-70; Hekman Dep. Ex. 13].

93. The Three Star Admiral Advisory Group went out of existence after it forwarded its report to CNO Kelso and the Secretary of the Navy. [Hekman Dep. at 34]

M. NAVSEA'S DECEMBER 1990 DISSENT FROM CLOSURE OF THE PHILADELPHIA SHIPYARD: "TOO LATE IN PROCESS"

94. The Naval Sea Systems Command ("NAVSEA") is the Naval command in charge of all Naval shipyards in the United States. [Hekman Dep. at 24].

95. The Commander of NAVSEA from September 1, 1988 to on or about April 14, 1991 was Vice Admiral Hekman. Vice Admiral Hekman retired on May 1, 1991. [Hekman Dep. at 10].

96. Vice Admiral Hekman was the individual most knowledgeable about Naval shipyards in the United States during the period from 1990 through April 1991. [Hekman Dep. at 49].

97. Vice Admiral Hekman was a member of the Three Star Admiral Advisory Committee and was invited to participate in the meetings that discussed facilities, such as

shipyards, within his command. [Hekman Dep. at 24-25].

98. On December 17 or 18, 1990, Vice Admiral Hekman was advised by the CNO's office that Admiral Loftus had presented the Advisory Committee's recommendation to close the Philadelphia Shipyard to the Secretary of the Navy and that the Secretary had "concurred" in the Advisory Committee's recommendation. [Hekman Dep. at 18-19].

99. Vice Admiral Hekman immediately telephoned Admiral Lang, a deputy of Admiral Loftus, about the decision of the Advisory Committee. He was advised that the Advisory Committee had made the recommendation to close the Philadelphia Shipyard to the Navy Secretary and that "the Secretary had basically concurred in what we're recommending." [Hekman Dep. at 28].

100. On December 19, 1990, Vice Admiral Hekman wrote to the Chief of Naval Operations urging the Navy's reconsideration of its decision to close the Philadelphia Shipyard:

> While I realize that the [Navy] Secretary [Garrett] has been briefed and has concurred with the proposal to mothball Philadelphia Naval Shipyard, I strongly recommend that this decision be reconsidered.

[Hekman Dep. Ex. 2 (emphasis supplied); Loftus Dep. at 38].

101. Despite the fact that the Navy's Base Structure Committee had not even held its first meeting as of late December 1990, Vice Admiral Hekman acknowledged that the actions being taken late in 1990 by the Navy were "close to the end of the process." [Hekman Dep. at 54].

102. In response to Vice Admiral Hekman's December 19, 1990 memorandum, Admiral Loftus advised him on January 11, 1991 that "NAVSEA's recommendation that

Philadelphia Naval Shipyard not be mothballed and closed, but rather be downsiz approximately the size of a ship repair facility" was discussed at the December 20, 1990 me of the Advisory Committee and "was not accepted." [Hekman Dep. Ex. 4; Hekman Dep. 30]. Rather, "the approved alternative" was to mothball the Philadelphia Shipyard. [He Dep. Ex. 4 (emphasis supplied)].

103. Vice Admiral Hekman recommended to the Advisory Committee ar Navy's BSC that downsizing of the Philadelphia Shipyard not start until fiscal year [Hekman Dep. at 48].

104. Admiral Claman also presented information to justify not closin Philadelphia Shipyard to the Navy's BSC. [He man Dep. at 73]. Admiral Claman conc with Vice Admiral Hekman that the Philadelphia Shipyard should not be closed or reduc size until fiscal year 1995. [Claman Dep. at 77].

105. Despite the fact that Vice Admiral Hekman was Commander of NAV after his initial presentation, he was not invited to attend any meetings with the BSC. [He Dep. at 37-40, 69, 73].

106. Until the "bitter end," Vice Admiral Hekman continued to spea against closure of the Philadelphia Shipyard because he "felt that I owed the Navy ar country loyalty." [Hekman Dep. at 101; Tzavaras Dep. at 80].

107. By memorandum dated March 15, 1991, Hekman again urged A Loftus to reconsider the Advisory Committee's decision to close the Philadelphia Shi Hekman stated that he continued "to take the position that retention of a credible repair cap at Philadelphia for naval ships homeported in the Northeast area is the most cost eff

solution." [Hekman Dep. Ex. 7].

108. In support of his position, Hekman again advised the CNO that "the workload distribution for naval shipyards in the 90's supports full operations at Philadelphia through mid FY 95." Hekman stressed that closure of Philadelphia in 1993 would "cause significant perturbations to carrier overhauling yard assignments." [Hekman Dep. Ex. 7 (emphasis supplied)].

109. Hekman never received a response to his March 15, 1991 memorandum. [Hekman Dep. at 48].

110. Vice Admiral Hekman advised a Base Closure Commission staff member that he "was asked to retire early, in part,... because he persisted in disagreeing with the decision to close the Philadelphia Naval Shipyard." [Yellin Dep. Ex. 6 at 1].

N. THE CREATION OF THE BSC AND THE LACK OF INTERNAL CONTROLS

111. On December 14, 1990, the Secretary of the Navy established a six-member Base Structure Committee, also known as the BSC, allegedly to conduct a base structure review and to determine the Navy's base closure candidates. [Courter Dep. Ex. 14 at 2-2; Nemfakos Dep. Ex. 3 at 1].

112. The BSC was charged with reviewing all installations inside the United States equally, "without regard to whether the installation has been previously considered or proposed for closure or realignment." [Nemfakos Dep. Ex. 1 at 2].

113. The members of the Base Structure Committee were Assistant Secretary Schafer, Admiral Loftus (CNO Kelso's deputy), Lt. Gen. Winglass (Marine Corps), Rear Admiral David Oliver (OP-08), Major General Gardner (Marine Corps) and Charles Nemfakos

(Comptroller's office). [Schafer Dep. at 7, 13-15].

114. Capt. Tzavaras testified that it was his understanding that "Admiral Loftus was the CNO's principal BSC member and he would be able to provide the interface between the CNO and the BSC and insure that the CNO's concerns were addressed." [Tzavaras Dep. at 71-72].

115. The BSC was clearly a facade. By the time that the BSC held its first meeting, the closure decisions had already been made by the "Three Star Admirals" and concurred in by the Secretary of the Navy. [Tzavaras Dep. at 57; Loftus Dep. at 39; Hekman Dep. at 26-28; Hekman Dep. Ex. 2].

116. As a result of numerous public concerns raised about the final criteria's broad nature and the need for objective measures and documentation for the application of the criteria [DoD April 1991 Report at 25], on December 10, 1990, the Defense Department issued a directive setting forth "Policy Guidance" and "Record Keeping" requirements to the Military Departments, the Comptroller and the Assistant Secretaries of Defense as follows:

> Policy Guidance Base closure, realignment, or consolidation studies that could result in a recommendation for base closure or realignment...must meet the following requirements:
>
> - The studies, including their recommendations, must have as their basis the Force Structure Plan required by Section 2903 of the Act;
>
> - The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and
>
> - The studies must consider all military installations inside the United States...on an equal footing, without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department of Defense.

* * *

Record Keeping DoD components shall keep:

- Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;

- Data, information and analyses considered in making base closure and realignment selections; and

- Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act.

[Nemfakos Dep. Ex. 1 at 2 (emphasis supplied)].

117. On February 13, 1991, the Defense Department issued a directive setting forth "Internal Controls" requirements to the Military Departments mandating development and implementation of an "internal control plan" which "at a minimum" was to include:

- Uniform guidance defining data requirements and sources for each category of base,

- Systems for verifying accuracy of data,

- Documentation justifying any changes made to data submissions, and

- Procedures to check the accuracy of the analysis made from the data provided.

[Nemfakos Dep. Ex. 2 at 2].

118. The GAO was unable to review the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. [Yellin Dep. Ex. 2 at 46; Meyer Dep. at 94].

119. Moreover, the GAO concluded that "the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required

by" the Defense Department. [Yellin Dep. Ex. 2 at 46; Meyer Dep. at 101].

O. THE THREE STAR ADMIRAL ADVISORY COMMITTE RECOMMENDATION TO CLOSE THE PHILADELPHIA SHIPYARD WA PRESENTED TO BOTH THE NAVY BSC AND NAVY SECRETAR GARRETT

120. Both Assistant Secretary Schafer, the Chair of the Navy BSC, and Admira Loftus, a member of the Navy BSC and the Advisory Committee as well as the deputy of Chie of Naval Operations Kelso, testified that the Three Star Admiral Advisory Committee's bas closure recommendations (the "stealth list") were presented to the Navy Base Structur Committee during its deliberations. [Schafer Dep. at 40-41; Loftus Dep. at 42].

121. The position of Chief of Naval Operations Kelso on base closures was als presented to the Navy BSC during its deliberations. As Capt. Tzavaras, the head of the BSC' Working Group succinctly stated, there would be no "doubt that it was in the minds of the Bas Structure Committee what CNO wanted to do" with respect to base closures. [Tzavaras Dep. a 65, 75; Tzavaras Dep. Ex. 2].

122. A May 29, 1991 private meeting between the Navy BSC and the staff o the Base Closure Commission, the Navy represented to the Commission staff that Chief of Nava Operations Kelso had directed the Navy BSC to remove the Long Beach Naval Shipyard fron its list of base closure recommendations. [Armfield Dep. at 70; Armfield Dep. Ex. 5 at 2].

123. Significantly, on March 27, 1991, when Assistant Secretary Schafer mad her base closure recommendations to Navy Secretary Garrett, Garrett "requested" the 199 "stealth list". Garrett wanted to "review" the "stealth list" before making his base closur recommendations to Defense Secretary Cheney. [Schafer Dep. Ex. 1 at 1].

124. Thus, it is indisputable that both the Navy BSC and Navy Secretary Garret

considered the 1990 "stealth list" recommendation for closing the Philadelphia Shipyard in violation of the statutory requirement that all bases be considered "equally without regard to whether the installation has been previously considered or proposed for closure or realignment." [10 U.S.C. §2903(c)(3)].

P. THE NAVY BSC'S PROCESS IN ARRIVING AT ITS BASE CLOSURE RECOMMENDATIONS WAS TOTALLY SUBJECTIVE AND "A BLACk HOLE"

125. At a May 20, 1991 private meeting between the Navy BSC and the staff of the Base Closure Commission, Nemfakos -- a member of the Navy BSC -- stated to the Commission staff that the Navy's base closure process had been "subjective." [Armfield Dep. at 16; Armfield Dep. Ex. 1 at 2; Nemfakos Dep. Ex. 8 at 2].

126. A document prepared by the Navy to respond to the GAO's criticisms of the Navy's undocumented base closure process admitted that the process was "ultimately subjective." [Nemfakos Dep. at 70; Nemfakos Dep. Ex. 3 at 7].

127. As the Navy characterized its own process in response to GAO criticisms:

> The assignment of grades to the base closure criteria was the result of a consensus reached by the members of the BSC. The opinions of individual BSC members were not recorded and minutes were not kept at BSC meetings.

[Nemfakos Dep. at 70-71; Nemfakos Dep. Ex. 3 at 1-2 (emphasis supplied)].

128. Because of the absence of any documentation supporting the Navy BSC's process and decisions, the GAO referred to the BSC executive sessions as the "Black Hole" and the Base Closure Commission staff referred to them as the "twenty-two minute gap." [Meyer Dep. at 83-84; Schafer Dep. Ex. 2 at 1].

129. The Navy BSC's treatment of the Philadelphia Shipyard epitomized the

subjective and arbitrary nature of the Navy BSC's base closure process and decisions. [Nemf Dep. Ex. 8 at 2; Armfield Dep. at 14-19, 70].

130. Based upon both the old and new base closure criteria, the Philadel Shipyard ranked sixth and Portsmouth and Mare Island ranked seventh and eighth, respectiv [MacKinnon Dep. at 49-53, 112-119, 165-166; MacKinnon Dep. Ex. 15 at 1-6; MacKin Dep. Ex. 16].

131. It was only by awarding all nuclear capable shipyards 50 "bonus poin because of an alleged need for them during the 1998-2000 period that Portsmouth jumped ahe of Philadelphia. Moreover, even with the 50 "bonus points," Mare Island remained eight [MacKinnon Dep. at 167-172; MacKinnon Dep. Ex. 15 at 6-7; MacKinnon Dep. Ex. 16].

132. The Navy BSC disregarded the numerical rankings of the shipyards durir its deliberations. [Nemfakos Dep. at 43, 95; Nemfakos Dep. Ex. 7 at 3; MacKinnon Dep. a 194-195].

133. Instead, the Navy BSC opted for color coded rankings utilizing green a the highest, yellow as the middle and red as the lowest ranking. [MacKinnon Dep. at 195].

134. However, the Navy's "BSC Rating Worksheet" for Shipyards conclusively demonstrates that, under the BSC's own color coded rankings, the Philadelphia Shipyard was equal to Charleston, Portsmouth and Mare Island and better than Long Beach. [Yellin Dep. at 25-27; Loftus Dep. at 46-47; Yellin Dep. Ex. 1].

135. Thus, based upon the application of the four military criteria, Philadelphia, Charleston, Portsmouth and Mare Island each received two greens and two yellows, whereas Long Beach received only one green and three yellows. Moreover, based upon the application

of the three non-military criteria, Philadelphia received one yellow and two reds, whereas Long Beach received three reds. [Yellin Dep. at 32; Yellin Dep. Ex. 1].

136. Furthermore, Philadelphia, Charleston, Portsmouth and Long Beach were each given overall ratings of yellow. Even though both Mare Island and Philadelphia had two yellows and two greens for the four military criteria, Mare Island was given an overall rating of green. [Yellin Dep. at 25-27; Yellin Dep. Ex. 1].

137. Despite these ratings, the Navy BSC voted to close only Philadelphia based solely upon its subjective, undocumented and unscrutinized private deliberations, including their statement that "not all yellows are equal" and "not all greens are equal." [Meyer Dep. at 90; Yellin Dep. Ex. 2 at 48; Meyer Dep. Ex. 3 at 3 and 5].

138. In fact, even though the Navy has steadfastly maintained that it needs two large carrier drydocks dedicated to Navy use on both coasts, the Navy BSC voted to close Philadelphia, thereby reducing the East Coast dedicated drydocks from three to one since Philadelphia had two of the three dedicated large carrier drydocks on the East Coast. [Yellin Dep. at 184-211; Loftus Dep. at 60, 68; Hekman Dep. at 57, 59-61].

Q. THE BSC'S CREATION OF AN UNLAWFUL "NINTH CRITERIA" TO JUSTIFY CLOSURE OF PHILADELPHIA: THE "STEP 5" PROCEDURE

139. Under the "BSC Rating Worksheet" for Shipyards, the color coded ratings for the four priority military criteria conclusively demonstrated that Philadelphia's color coded rating was equal to Portsmouth, Charleston and Mare Island and better than Long Beach. [Yellin Dep. at 25-27; Loftus Dep. at 46-47; Yellin Dep. Ex. 1].

140. However, based upon a so-called "Step 5" procedure, which was not part of any of the four military criteria, the Navy BSC excluded not only the three nuclear capable

shipyards -- Portsmouth, Charleston and Mare Island -- but also one non-nuclear shipyard -- Long Beach -- from any further base closure consideration. [Armfield Dep. at 55; Yellin Dep. at 178-179; Yellin Dep. Ex. 1; Loftus Dep. at 47, 59-60, 78-79].

141. By using a "Step 5" procedure, which was outside the four military criteria, the Navy BSC rigged the unlawfully predetermined outcome against Philadelphia. [10 USC §2903(b)(2)(A) and (c)].

142. The value to the Navy of having available a nuclear capable shipyard was clearly encompassed by the military criteria: mission suitability and availability of facilities. [MacKinnon Dep. at 277, 294; Courter Dep. at 230-231].

143. Nevertheless, the BSC arbitrarily and without authority created a separate, independent criterion that excluded all nuclear shipyards as well as Long Beach, a non-nuclear shipyard, from base closure consideration under its "Step 5" procedure. [Armfield Dep. at 55; Yellin Dep. Ex. 1; Loftus Dep. at 47, 59-60, 78-79].

144. The Navy BSC claimed that the projected nuclear workload precluded a nuclear shipyard from being closed. [Loftus Dep. at 53, 76].

145. However, internal Navy documents established that there was no capacity problem for nuclear shipyards until 1998, 1999 and 2000 -- a time period which could not be considered under the Base Closure Act's six year Force Structure Plan. [MacKinnon Dep. at 58; MacKinnon Dep. Ex. 3].

146. During the relevant six year period, all nuclear drydocks had excess capacity. [Nemfakos Dep. Ex. 10; Loftus Dep. at 59-60].

147. During the relevant six year period, the projected workload that the BSC

considered at the nuclear shipyards included between 25% and 50% of work on non-nuclear ships. [Loftus Dep. at 56; Nemfakos Dep. at 81-82].

148. Even though between 25% and 50% of the work done in a nuclear shipyard is on non-nuclear ships, the Navy BSC maintained that it could not close any nuclear shipyards. [Nemfakos Dep. at 82].

149. The Navy BSC concluded that, in any event, it was not practical to close a nuclear shipyard since it would have to be re-opened in 1998. [Loftus Dep. at 54; Claman Dep. at 58-59; April 1991 Navy Detailed Analysis, Tab C at 4].

150. However, the BSC never considered or analyzed the cost of closing a nuclear shipyard, the cost of re-opening a nuclear shipyard or the cost of mothballing a nuclear shipyard. [Claman Dep. at 58-59].

151. In fact, NAVSEA has never even generated or reviewed any document within the Navy that attempted to quantify such costs. [Claman Dep. at 58-59].

152. Nevertheless, it is well known within the Navy that the closure of a nuclear shipyard will have a "high unknown cost for the Navy to correct existing environmental liabilities" before the nuclear facilities can be converted to any other post-closure use. [Claman Dep. at 58-59].

153. The cost of closing a nuclear shipyard is high because of the nuclear aspect, i.e. nuclear waste, nuclear reactors, etc. [Claman Dep. at 58-59].

154. The fact that the Navy does not want the closure of a nuclear shipyard subject to Congressional or public scrutiny is not a valid exemption under the Base Closure Act or the final criteria promulgated thereunder. [10 USC §2901 et seq.].

155. The Navy considered the availability of private shipyards with respect to non-nuclear work when it voted to close the Philadelphia Shipyard. [Loftus Dep. at 66-67]. However, it conducted no analysis with respect to the availability of private nuclear shipyards to perform any of the nuclear work projected in 1998, 1999 and 2000.[MacKinnon Dep. at 66-67; Claman Dep. at 39].

156. The Navy was well aware that private nuclear shipyards on the East coast -- Newport News and Electric Boat --could perform the projected work on nuclear ships. [MacKinnon Dep. at 66; Claman Dep. at 39]. Its failure to consider these shipyards in performing its analysis violated the statutory mandate that all bases be considered equally. [10 USC § 2903(c)(3)].

157. Prior to the enactment of the Base Closure Act (and the public scrutiny thereunder), the Navy was examining the possibility of closing Portsmouth. The Navy stated at the beginning of 1990 that refuelings in fiscal year 93 and the out years could be accomplished at another Naval shipyard. [MacKinnon MacKinnon Dep. Ex. 24; MacKinnon Dep. at 260].

158. Because of the "Step 5" procedure, the BSC did not consider whether Portsmouth could be closed and the nuclear work at Portsmouth moved to Charleston and Norfolk. Nor did the BSC consider whether the non-nuclear work at Portsmouth could be moved to Philadelphia. [MacKinnon Dep. at 228-230; Loftus Dep. at 58-59].

159. Retaining a non-nuclear shipyard to perform non-nuclear work is a cost-effective solution for the Government. [Hekman Dep. at 78-80; Clark Dep. at 8-9]. Closure of a nuclear shipyard that has significantly higher man-day rates and overhead should have been considered. [10 USC §2903(a)].

160. The Navy BSC's illegal "Step 5" procedure initially left only Long Beac and Philadelphia as base closure candidates, since they were the only two non-nuclear shipyards [MacKinnon Dep. at 270-271; Yellin Dep. at 178-179; April 1991 Navy Detailed Analysis, Ta C at 8].

161. The Long Beach Shipyard was on the SECDEF 17 list for closure and th BSC originally intended to include Long Beach in its recommendations for closure. [Nemfako Dep. Ex. 8 at Bates No. 591, Armfield Dep. Ex. 5 at 2].

162. Internal Navy notes of a February 14, 1991 BSC meeting disclosed that i was "very obvious" that BSC member Nemfakos "really" wanted to close Long Beach. [Loftu Dep. at 79-80; Nemfakos Dep. Ex. 6 at 1; MacKinnon Dep. at 270-271].

163. In fact, Nemfakos was emphatic about closing Long Beach in lieu of an nuclear shipyard. [MacKinnon Dep. at 271].

164. The Navy "BSC Rating Worksheet" for Shipyards conclusivel demonstrates that Philadelphia had a higher rating than Long Beach, since (a) under the fou military criteria, Philadelphia had two greens and two yellows and Long Beach had only on green and three yellows and (b) under the three non-military criteria, Philadelphia had on yellow and two reds and Long Beach had three reds. [Yellin Dep. Ex. 1; Yellin Dep. at 25 27; Loftus Dep. at 46-47].

165. The COBRA model as of March 25, 1991 demonstrated that it was cheape to close Long Beach than Philadelphia. [MacKinnon Dep. at 297; MacKinnon Dep. Ex. 27].

166. Pursuant to the BSC's own procedures, therefore, Long Beach was a mor appropriate closure candidate than Philadelphia. [Meyer Dep. Ex. 1-B at 2].

167. Prior to its final recommendations to the Secretary of the Navy, the Navy BSC was advised by Chief of Naval Operations Kelso that Long Beach should be removed from the BSC closure list:

> BSC wanted to close Long Beach Naval Shipyard as well until the Chief of Naval Operations said he needed that yard.

[Nemfakos Dep. Ex. 8 at Bates No. 591; see also Armfield Dep. Ex. 5 at 2].

168. To improperly circumvent the fact that Long Beach had the worst rating of all eight Naval shipyards, the BSC simply excluded Long Beach from further consideration because it had one of only two large carrier capable drydocks on the West Coast. Loftus testified that the only basis for the exclusion of Long Beach from consideration for closure was the need for emergent drydock capacity of the West coast. [Loftus Dep. at 72]. He further testified:

> [T]he fact that Long Beach had a carrier size drydock that could be used for emergent work precluded us [from] closing Long Beach.

[Loftus Dep. at 76].

169. Long Beach therefore became part of the BSC's illegal "Step 5" procedure and the "BSC Rating Sheet" for Shipyards was revised to reflect that the three red ratings previously assigned to Long Beach by the BSC were crossed out and Long Beach was marked eliminated from consideration by "Step 5." [Yellin Dep. Ex. 1; Armfield Dep. at 55].

170. This requirement of two carrier capable drydocks on each coast is set forth in a long standing CNO policy known as OPNAVINST 3050.22. [Claman Dep. Ex. 1 at 10; Claman Dep. at 88; Hekman Dep. at 57; Hekman Dep. Ex. 10 at 3; April 1991 Navy Detailed Analysis, Tab C at 1].

171. This Instruction requires two shipyards on each coast that are capable of

repairing aircraft carriers. The purpose for this instruction is to "have a responsive, geographically dispersed, strike-free industrial capacity; have a qualified available workforce whose priorities are controlled by the Navy; ensure support of highly complex and classified work; maintain the immediate capability to repair battle damage on all ship classes; provide an immediate industrial mobilization base." [Nemfakos Dep. Ex. 9 (emphasis supplied); April 1991 Navy Detailed Analysis, Tab C at 1].

172. OPNAVINST 3050.22 was in effect during the Base Closure process. [Hekman Dep. at 57].

173. The closure of Philadelphia violates this longstanding Navy strategic and operational requirement that two Naval shipyards be maintained on each coast that are capable of dock repairing aircraft carriers. [Nemfakos Dep. Ex. 9 at 3; Claman Dep. Ex. 6 at 10; Claman Dep. at 88; Hekman Dep. at 57].

174. The Navy BSC took the position that, although Philadelphia had two large carrier capable drydocks (one more than Long Beach), after Philadelphia was closed there would still be two large carrier capable drydocks available on the East Coast — one at the Norfolk Naval Shipyard and one at the Newport News private Shipyard. [Loftus Dep. at 61-62].

175. However, unlike the dedicated Naval shipyards where the Navy schedules the work, and can make a drydock available for emergent work, the Navy admittedly has no such control over private shipyards. [Loftus Dep. at 67-68; Yellin Dep. at 207-208].

176. The Navy BSC claimed that, by mothballing the two Philadelphia drydocks, it would preserve the Navy's ability for emergent aircraft carrier repairs in the event that the private shipyard at Newport News was not available. [April 1991 Navy Detailed

Analysis, Tab C at 12].

177. However, Vice Admiral Hekman testified that closing a shipyard is "an irreversible decision." He used as examples Hunter's Point and Brooklyn to support his position that, if the Navy mothballs the Philadelphia Shipyard, it will not be able to preserve the drydocks for emergent use and would sacrifice a capital investment facility that the Navy would never be able to restore. [Hekman Dep. at 58-59].

178. Moreover, since Long Beach ranked lower than Philadelphia and was only being retained for "emergent" large aircraft carrier drydock work, i.e. the same theory applicable to Philadelphia, the mothballing of Philadelphia's drydocks was a flagrant violation of the Base Closure Act. [Loftus Dep. at 72, 76]. The BSC did not treat the Philadelphia Shipyard equally in applying OPNAVINST 3050.22 to the non-nuclear Naval shipyards. [10 USC §2903(c)(3)].

179. The Navy's predetermination to close the Philadelphia Shipyard is confirmed by its disparate treatment of the Philadelphia Shipyard during the base closure process.

180. Navy guidelines expressly prohibited non-emergency capital upgrades of any military installations on the 1990 Base Closure List during the 1991 base closure process. [Verified Amended Complaint, ¶¶102-105]. On February 4, 1991, Admiral Claman requested $2,578,000 additional funding for certain items for the Philadelphia Shipyard and $2,425,000 additional funding for the Long Beach Shipyard, including $1,050,000 to upgrade Long Beach to enable that shipyard to obtain nuclear certification. [Claman Dep. Ex. 7; Claman Dep. at 90-92; Verified Amended Complaint ¶¶102-105].

181. In violation of its own guidelines, Admiral Lang endorsed all of Long Beach's shipyards requested additional funding but did not endorse 80% of Philadelphia's

request. [Claman Dep. at 90-92].

R. THE NAVY BSC'S "STONEWALLING": THE GAO'S INABILITY TO PERFORM ITS STATUTORY DUTY OF MONITORING THE NAVY'S PROCESS AS IT OCCURRED

182. The dual role of the GAO under the Base Closure Act was: (1) to review each Service's base closure process as it occurred and to report to the Congress and the Commission by May 15, 1991 on each process, and (2) to provide assistance to the Commission if requested. [Meyer Dep. at 11-12].

183. Although "required by the Base Closure Act to monitor the Navy's base evaluation process as it occurred," the Navy prevented the GAO from performing this statutory role. [Meyer Dep. at 59].

184. The Army and the Air Force fully cooperated with the GAO and provided them with timely access to documents during January, February and March 1991. [Meyer Dep. at 19, 24 and 25]. By reviewing their base closure processes as they occurred, the GAO was able to validate the logic that went into the Air Force and Army's decisional process. [Meyer Dep. at 26-27].

185. Unlike the Army and the Air Force, during its base closure process, the Navy refused to provide the GAO with any meaningful documentation. [Meyer Dep. at 58].

186. On March 11, 1991, a Pentagon memorandum advised Colin McMillan, Assistant Secretary of Defense (Production and Logistics), that:

> [The] GAO is upset with Navy not sharing base closure data. Donna Heivilin has called Dana Berteau seeking his help. Apparently, [Airforce] and [Army] are sharing.

* * *

> You need to convince Jackie [Schafer] to cooperate with GAO; believe the law requires it.

[Nemfakos Dep. Ex. 4 (emphasis in original)].

187. On that same date, the GAO wrote a letter to BSC Chair Schafer:

> ...To effectively monitor the process, my staff needs timely access to specific types of data developed throughout the process. We have been denied access to such data since first requested on February 11, 1991....
>
> The GAO is required by the [Base Closure Act] to monitor the process as it occurs, and report its findings to the Base Closure Commission and the Congress by May 15, 1991.
>
> * * *
>
> The position the Navy Department has taken to this point makes it difficult if not impossible to meet our responsibilities in validating the process. The following data is the minimum we believe we need immediately to be able to perform our legislative mandate:
>
> (1) Functional categories and the Navy activities placed in each category;
>
> (2) The major factors and evaluation components to be used in evaluating activities and the definitions of each;
>
> (3) The capacity analysis, i.e., the data used to determine requirements and the data used to determine existing capacity within the functional categories; and
>
> (4) The data collected on each base, in each functional category where excess capacity was identified.

[Nemfakos Dep. Ex. 5 (emphasis supplied)].

188. Capt. Tzavaras, the head of the BSC Working Group, "expressed frustration about his inability to provide [the GAO] with meaningful data in a timely manner, but reiterated that it [was] out of his hands." [Meyer Dep. Ex. 2 at 1].

189. MacKinnon, the member of the BSC Working Group with responsibili for shipyards, confirmed that, as of March 26, 1991, she had been advised that the GAC requests for information would be deferred until the BSC made its final recommendatior [MacKinnon Dep. Ex. 23 at 2; MacKinnon Dep. at 257].

190. To partially appease the GAO's request for documents, on March 26, 199 Capt. Tzavaras provided the GAO with two boxes of "unindexed, unorganized, miscellaneo documents" which consisted primarily of data which was not responsive to the GAO's reque: [Meyer Dep. Ex. 2 at 2]. When asked who had made the decision to provide the GAO with tl two boxes, Tzavaras "was either unaware or could not say." [Meyer Dep. Ex. 2 at 1]. The GA later discovered that the boxes were essentially a "dump" of Working Group files. [Meyer De at 75; Meyer Dep. Ex. 2 at 3].

191. The GAO concluded that the "bottom line" was that the March 26 data d not "enable GAO to meet its responsibilities as spelled out in the 1990 Base Closure Act [Meyer Dep. at 76-77; Meyer Dep. Ex. 2 at 3]. Rather, the backup information offered w: "poorly organized" and related to a 1990 VCNO study without any explanation of its significan to the instant base closure process. As such, the data was of no use since it would be "lil studying the Vietnam War to learn about the Persian Gulf." [Nemfakos Dep. Ex. 3 at 2].

S. THE GAO'S INABILITY TO TRANSMIT BY MAY 15, 1991 A REPOR TO THE BASE CLOSURE COMMISSION AND CONGRESS THA EVALUATED THE NAVY'S PROCESS AND RECOMMENDATIONS

192. The Army and the Air Force documented their use of the force-structu plan and the military value criteria. The GAO was therefore able to conclude that their ba closure recommendations were "adequately supported." [Yellin Dep. Ex. 2 at 3]

193. In stark contrast, the GAO concluded that the Navy's recommendations and processes were not susceptible to GAO evaluation. [Yellin Dep. Ex. 2 at 5, 46-48].

194. After denying the GAO access to its base closure review process for almost three months, the Navy still failed to offer sufficient documentation to demonstrate that its process followed the force structure and military selection criteria. [Meyer Dep. at 96, 105]. The GAO was therefore prevented from evaluating the Navy's specific recommendations for closure:

> We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.
>
> Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures.

[Meyer Dep. at 105; Yellin Dep. Ex. 2 at 46 (emphasis supplied)].

195. The GAO had advised the BSC of its frustration with the Navy's secretive process and their lack of supporting documentation. As reported to BSC Chair Schafer by her principal deputy Ben Rose:

> Doug [Hanson] said the GAO staffers are referring to the BSC executive sessions as the "Black Hole" and that the Commission staff is referring to them as the "twenty-two minute gap."

[Schafer Dep. Ex. 2 at 1; Meyer Dep. at 35 and 57].

196. The GAO requested a meeting with the BSC on May 7, 1991 to give the Navy one last chance to satisfy the GAO's documentation requirements before the GAO's report was issued. Robert Lawrence Meyer ("Meyer"), Assistant Director of Logistics for the GAO and the GAO person responsible for monitoring each Service's base closure process, testified that

the GAO's objective was specifically stated to the Navy. [Meyer Dep. at 41].

197. At the May 7, 1991 meeting, the GAO provided the Navy BSC with an example of how the Air Force had documented its base closure process. The BSC responded that "They had nothing vaguely in any way resembling that, that they had not documented anything to that extent." [Meyer Dep. at 89-90].

198. At the May 7, 1991 meeting, the Navy BSC informed the GAO that it had not kept any minutes or records of the BSC meetings resulting in base closure decisions and had not documented the Navy's base closure process. [Meyer Dep. at 36].

199. The Defense Department had required each of the Armed Services to establish an internal control plan to ensure the validity and accuracy of information used in their base closure assessments. [Meyer Dep. at 103].

200. Meyer testified that the Air Force had put an auditor in place to assure that its data was correct and the GAO was independently able to validate the data. Similarly, the Army audit agency independently validated the Army's data and the Army established an on-going plan to assure that the data provided to the decision makers was accurate. [Meyer Dep. at 104].

201. The Navy failed to establish an internal control plan as required by the Defense Department. The Navy audit agency was never involved in the Navy's base closure process. [Meyer Dep. at 39 and 103-105]. The GAO therefore had no way of concluding whether any of the Navy's recommendations for base closure were "right" or "wrong", "correct" or "incorrect", or "reasonable" or "unreasonable." [Meyer Dep. at 105].

202. At the May 7 meeting, the GAO advised the BSC that "if there was one,"

its internal control plan was "inadequate." [Meyer Dep. at 39].

203. In addition to the lack of adequate documentation and the absence of any internal control plan, the GAO determined that it could not evaluate the Navy's "methodology" for reviewing air stations, shipyards or labs. [Yellin Dep. Ex. 2 at 46-48].

204. At no time prior to May 15, 1991 did the GAO receive any documentation from the BSC to explain how it gave different overall ratings to bases which had identical ratings on each of the first four military criteria. [Meyer Dep. at 96].

205. In response to GAO questions regarding the rationale for assigning different overall ratings to bases that were given identical ratings on each of the first four military criteria, the BSC inscrutably stated that "not all yellows are equal" and "not all greens are equal." Again, since the BSC's rationale for these decisions was not documented, the GAO could not determine the reasonableness or correctness of the BSC's final decisions. [Meyer Dep. at 95-96].

206. The GAO could not validate whether the Navy's overall ranking of the shipyards corresponded to the evaluations given in the underlying criteria. [Meyer Dep. at 67].

207. There was no way for the GAO to determine what data the BSC had used in making its base closure decisions. [Meyer Dep. at 102].

208. The GAO also identified three additional deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support "the basis for the [BSC's] military value ratings for Navy installations"; (2) the implementation and use of an inconsistent color coding system to rate military bases; and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used

by the Navy in its base structure reviews. [Yellin Dep. Ex. 2 at 48].

209. One of the inconsistencies within the BSC's rating process specific identified by the GAO included the fact that the BSC had given identical ratings to two na bases (Mare Island and Philadelphia) on each of the first four military selection criteria, bu - without any discernible justification -- had arbitrarily assigned an overall rating of green to o (Mare Island) and yellow to the other (Philadelphia). [Yellin Dep. Ex. 2 at 48].

210. Similarly, the BSC had assigned identical ratings to four Naval shipyards, b did not treat such bases equally. Again, the Philadelphia Shipyard was not excluded from t closure process although three other Naval shipyards which received the same rating : Philadelphia were excluded from further review. [Yellin Dep. Ex. 1].

211. Since the BSC "did not document these differences," the GAO "could no determine the rationale for its final decisions" and "could not comment on the [BSC's] closur and realignment recommendations based on the process." [Yellin Dep. Ex. 2 at 48].

212. The GAO also discovered inconsistencies in the Navy's service costs savings estimates, payback calculations and recovery of closure costs. The GAO repor concluded that the result of these inconsistencies was an overstatement of estimated annual savings and a shortening of the payback period for several closures. [Yellin Dep. Ex. 2 at 58].

213. Furthermore, despite Defense Department guidance to the contrary, the Navy used budget data which did not use 1991 dollars as its baseline. [Yellin Dep. Ex. 2 at 55-56].

214. To support its recommendations, the BSC stated that it relied on informal briefings and meetings, most of which were in closed executive sessions. When asked for

minutes of these meetings, the BSC stated that:

> Time constraints and the volume of these meetings did not permit them to write detailed minutes of these meetings or to document every decision.

[Meyer Dep. Ex. 3 at 3; Meyer Dep. at 91]. In fact, the Navy BSC did not write any minutes of its meetings or contemporaneously document any of its decisions. [Meyer Dep. at 92]. Instead, the Navy BSC preferred to operate in a shroud of secrecy far from the analytical eye of the GAO.

215. Nor was there any satisfactory reason as far as the GAO was concerned why the BSC could not have kept some record or minutes of its meetings. [Meyer Dep. at 92].

216. Given the BSC's secretive process, the GAO had no way of validating what the Navy claimed occurred at those meetings or the basis for the BSC's decision at those meetings. [Meyer Dep. at 94-95].

217. The GAO's independent Report, entitled Observations on the Analyses Supporting Proposed Closures and Realignments, was issued on May 16, 1991, in accordance with the statutory mandate of the Base Closure Act. [Yellin Dep. Ex. 2].

218. The GAO Report concluded that the Navy and its BSC:

(a) Had not treated all bases equally, as required by the Base Closure Act;

(b) Had not complied with the Defense Department's "record keeping" and "internal controls" requirements; and

(c) Had prevented the GAO from performing its statutory mandate of (i) reviewing and analyzing the Navy selection process and the recommendations for Naval base closures made by the Secretary of Defense and (ii) transmitting to Congress and the Commission

a report containing a detailed analysis of the Navy selection process and the Secretary of Defense's recommendations for Naval base closures. [Yellin Dep. Ex. 2 at 46-48].

219. Not surprisingly, given their prior "stonewalling" of the GAO, the Chair of the BSC was completely indifferent to the GAO's conclusions. Schafer testified that she did not recall whether or not she read the GAO report, but if she did it was not in any detail:

> If I looked at it, it came through, if it showed up on my desk then I may have picked it up and flipped through it but I did not read this document in detail."

[Schafer Dep. at 71 and 73].

220. It was only after the Commission expressed concern about the GAO's findings on May 20, 1991 that the BSC privately provided the Commission's staff with additional documentation. [Nemfakos Dep. Ex. 7 and Yellin Dep. Ex. 7]. However, the GAO was never given an opportunity to comment on or evaluate the BSC's additional documentation. Nor did the Base Closure Commission ever request the GAO to assess or evaluate the base closure recommendations made by the Navy in light of the additional information. [Meyer Dep. at 106 and 109].

221. Signficantly, the Navy never provided the GAO with any of the following documentation or information:

(a) Detailed information on the bases that were not selected for closure, thereby preventing the GAO from validating the Navy's selection process of base closure candidates [Meyer Dep. at 61-62];

(b) Although Capt. Tzavaras advised the GAO that he was preparing documentation to be shown at meetings between the BSC and certain Navy senior officials, the

GAO was never provided with such documentation [Meyer Dep. at 81-82];

(c) The fact that the Navy had a "stealth list" of base closures which had been prepared in 1990 and approved by the Secretary of the Navy in 1990 [Meyer Dep. at 78-79]; and

(d) The fact that the Secretary of the Navy had concurred with the proposal to mothball the Philadelphia Naval Shipyard in 1990 [Meyer Dep. at 79-80].

222. None of the information submitted by the Navy to the Base Closure Commission as a result of the private meetings between the BSC and the Commission staff from May 20, 1991 to May 29, 1991 was ever made part of the Commission's public hearing process. [Courter Dep. at 29-31 and 39-41].

T. THE BASE CLOSURE COMMISSION STAFF ALSO CONCLUDED THAT THE NAVY BSC COULD NOT JUSTIFY OR RATIONALLY EXPLAIN ITS BASE CLOSURE PROCESS AND DECISIONS

223. The Base Closure Commission staff conducted a compliance review of the Navy BSC base closure process and decisions. [Yellin Dep. at 54-55; Yellin Dep. Ex. 3].

224. Based upon its compliance review, on May 13, 1991 the Commission staff prepared a report which, inter alia, contained the following "conclusions":

> (1) The BSC did not explain the criteria used to determine which functional categories to examine for potential subcategory excess capacity.
>
> (2) Documentation is provided for only some of the data used by the BSC. There is also no record of BSC resolution of conflicting data or institution of a means of verifying data.
>
> (3) Military value (criteria 1-4) evaluation is totally subjective. The only documentation of the BSC rating for any of the criteria is a single color grade (green, yellow, red). No information is provided about the evaluation of any factors which contribute in part to the color grade. Conflicts with grading for similar criteria in the VCNO Working Group input to the BSC are not explained.

> (4) Validation of base exclusions based upon the BSC's overall military value grade of green is very difficult due to the undocumented and subjective nature of the overall grade. Exclusion of bases with yellow overall grades are not consistently documented.
>
> (5) The identification of a target number of base closures based upon the capacity analysis of a functional category is part of the Navy's process description that is not consistently applied. In most categories a limited explanation of the reason for a base's selection is provided. No explanation is provided for its choice over another base. In the same category or subcategory even though other bases may have the same overall military value grade. For most categories no data is provded about remaining excess capacity or an explanation of the reasons for retaining a specific amount of the excess.

[Yellin Dep. Ex. 3 at 3 (emphasis in original)].

225. As a result of its conclusions, the Commission staff, inter "recommended":

> (1) The Navy has not provided sufficient documentation of its process and its implementation to allow the Commission to determine if the Navy methodology is in general compliance with the law and the eight DoD criteria.

[Yellin Dep. Ex. 3 at 4 (emphasis in original)].

226. Thus, like the GAO, the Commission staff found the Navy's base selec process and decisions fatally flawed. [Yellin Dep. Ex. 3].

U. THE 1991 DEFENSE BASE CLOSURE COMMISSION

227. The Base Closure Act provides for an eight member Commissior conduct an independent, lawful and fair process by considering all military installations "equ without regard to whether the installation has been previously considered or proposed for clos or realignment by the Department. [10 U.S.C. §2903(c)(3); Courter Dep. Ex. 14 at V].

228. The President nominated, and the Senate confirmed, former New Jers Congressman James A. Courter as Chairman of the Commission and the following seven members: William L. Ball, III, former Secretary of the Navy; Howard H. (Bo) Callawa former Secretary of the Army; Duane H. Cassidy, former Commander-in-Chief of the Unit States Transportation Command of the Military Airlift Command; Arthur Levitt, Jr., Chairm of the board of Levitt Media Company; James C. Smith II, P.E., an employee of Brown & Ro and formerly a member of the Secretary of Defense's 1988 Base Closure Commission; Robe D. Stuart, Jr., former Chairman of the Board of the Quaker Oats Company; and Alexand Trowbridge, former Secretary of Commerce. [Courter Dep. Ex. 14 E-1 and E-2].

229. The Commission established four "teams" to evaluate compliance with t Defense Department's final criteria: (1) an Army Team, (2) an Air Force Team and (3) a Na Team to evaluate the first four military criteria; and (4) a Special Team to evaluate the remaini four non-military criteria. [Hirsch Dep. at 9].

230. At the recommendation of Commissioner Smith, the Commission hir four additional individuals to supervise each of these teams. [May 17, 1991 BCRC Hearing]. head of the Navy Team, the Commission hired Alex Yellin ("Yellin"), a Vice President of Brown & Root subsidiary that was responsible for procuring federal contracts. [Courter Dep. 266; Yellin Dep. at 9-10].

231. Yellin joined the Commissioner's Staff on May 1, 1991, and he decid that he would personally conduct the review and analysis of the Navy's shipyard base closu decisions. [Yellin Dep. at 10, 18-19].

232. On May 17, 1991, Alexander Trowbridge resigned from the Commissi

because of a conflict of interest arising out of his ownership of a majority of stock in cert companies that had significant Pentagon contracts. At least one other Commissioner, James Smith, II, is employed by a firm that has substantial military construction contracts with t Pentagon. Nevertheless, Trowbridge was the only Commissioner to resign.

233. The Commission established four procedures for gathering evidence review the Defense Department's base closure proposals: (a) 15 public hearings in Washingtc D.C. to receive information from the Defense Department, legislators and other experts; (b) regional and site hearings to obtain public comment related to bases in such regions; (c) s visits by the Commissioners to the major facilities proposed for closure; and (d) review by t Commission's staff of the Armed Services' base closure processes and data. [Courter Dep. E 14 vi-vii, 1-3 and G-1 - G-2].

234. Under the Base Closure Act, the Commission was required to submit Report to the President by July 1, 1991, setting forth its findings, conclusions a recommendations for closures and realignments inside the United States. [10 U.S.(§2903(d)(2)(A)].

V. THE BASE CLOSURE ACT MANDATED THAT THE COMMISSION SE ASIDE ANY BASE CLOSURE RECOMMENDATION THA SUBSTANTIALLY DEVIATED FROM THE FORCE STRUCTURE PLA OR THE FINAL CRITERIA

235. The Base Closure Act provides that the Defense Secretary's recommendatio must be set aside "if the Commission determines that the Secretary deviated substantially fro the force structure plan and the final criteria in making recommendations." [10 U.S.(§2903(d)(2)(B)].

236. The Commission established procedures for determining whether tl

recommendations of the Secretary of Defense "deviated substantially" from the Force Structure Plan and final criteria, as follows:

> (a) Data used for evaluating Force Structure or one or more of the criteria are so inaccurate as to result in a change in an installation's status from a decision based on correct data; or
>
> (b) The methodology is flawed or was applied inconsistently so that the Force Structure or one or more criteria were effectively not considered, resulting in a change in an installation's status when an appropriate methodology is correctly applied.

[Yellin Dep. Ex. 4 at 1]. In sum, the Commission's procedures required that "[g]iven valid data, the methodology used by each Service to evaluate bases must comply with the law [i.e. the Base Closure Act] and regulations [i.e. the Force Structure Plan, the final criteria and the Defense Department directives]. In addition, the methodology must have been applied consistently to like bases at discrete decision points during the process." [Yellin Dep. Ex. 4 at 1].

237. As demonstrated above, the Commission's Navy compliance team concluded on May 13, 1991 that the Navy's base closure process and decisions were fatally flawed and not in compliance with either the law or the regulations. [Yellin Dep. Ex. 3 at 3-4].

W. THE PRIVATE MEETINGS BETWEEN THE BASE CLOSURE COMMISSION AND THE NAVY BSC WERE BEYOND THE SCRUTINY OF THE PUBLIC HEARING PROCESS

238. The Base Closure Act established an independent Base Closure Commission to ensure that "the [base closure] process is open." [Courter Dep. Ex. 14 at 1-3].

239. The Base Closure Act required the Commission to conduct its proceedings in public and to open its records and deliberations to public scrutiny. [Courter Dep. Ex. 14 at

4-1].

240. As a member of Congress, Courter had been critical of the 1988 base closure process and actively involved in the enactment of the new 1990 Base Closure Act. [Courter Dep. at 89-90; Courter Dep. Ex. 7 at 1]. Courter had publicly identified two problems with the work of the prior Commission: "It was a secretive process. Neither the GAO nor members themselves, nor committees felt that they were included or could even follow the work. Courter declared that the new Base Closure Act rectified those two problems: "The GAO has a role, it reports before and after the commission makes their report. Members of Congress will have total access to our work and to the process. The hearings are open to the press, the public and Washington." [Courter Dep. at 91].

241. The Commission expressly invited and received public testimony in Washington, D.C. from members of Congress. [Courter Dep. Ex. 14 at vi-vii].

242. By letter dated April 23, 1991, the Commission established five pages of procedures to govern Congressional testimony at the Commission's hearings. The Commission's procedures provided that:

> All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

[Verified Amended Complaint, ¶156].

243. The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation." [Verified Amended Complaint, ¶157].

244. On May 22, 1991, the Commission received Congressional testimony on the Philadelphia Shipyard in Washington, D.C. A regional hearing was held in Philadelphia on May 24, 1991. [Courter Dep. Ex. 14 at G-1 and G-2].

245. Courter testified that "the whole purpose of the public hearings and the input we received from communities was to scrub the data, was to verify it. To make sure that our conclusions were based on data that was accurate and data that was corroborated." [Courter Dep. at 113 (emphasis supplied)].

246. The data the Commission obtained from the Navy by July 1, 1991 had the same defect as that criticized by Courter under the prior statute: it was largely acquired in secret and the public was not given any opportunity to scrutinize it. [Nemfakos Dep. Ex. 7, 8; Yellin Dep. Ex. 7].

247. In blatant violation of the public hearing process mandated by the Base Closure Act, the Commission's staff and the Navy BSC held private meetings between May 20 and 29, 1991 from which the public and Congress were deliberately excluded. [Nemfakos Dep. Ex. 8].

248. Despite the Act's mandate that the Commission be independent, the purpose of the May 20-29 private meetings was to obtain data to justify the Navy's recommendations after the GAO refused to approve the Navy's closure process. [Courter Dep. Ex. 30-33].

249. At the time that the Commission announced that it intended to hold such meetings to require the Navy to explain its process, Senator Specter's office requested that his staff be permitted to attend these meetings. This request was denied. [Courter Dep. at 87-88].

250. At the first private meeting on May 20, 1991, the BSC advisec Commission staff that the Navy did not operate in the same manner as the Army. They di track their criteria against the Department of Defense criteria. The criteria simply "didn't cu [Armfield Dep. at 28]. BSC member Nemfakos stated that the shipyard process eliminatec green rankings first and then excluded the others "as we thought of them. Didn't make a re of when it happened. Long Beach was a Step 5 because we screwed up." [Armfield Dep. at The Navy advised the Commission that initially the BSC wanted to close Long Beach Philadelphia but they took Long Beach off the list because CNO Kelso "said he needed L Beach, so it received a Step number 5 exclusion." The BSC candidly admitted its clo decisions were "[n]ot a measure of shipyard efficiency." [Armfield Dep. at 70].

251. At the May 20 private meeting, BSC member Nemfakos also informec Commission staff that the Navy's base closure decisions were "subjective. We started with comments of operators and then questioned them. There was a lot of give and take. We c reconstruct that. We didn't use numbers for four criteria and plug them into a machine. answers would make us close the wrong bases. That's the process we used in 1988, and weren't happy with it. You can't reduce such subjective things to numbers." [Nemfakos D Ex. 8 at 2 (emphasis supplied); Armfield Dep. at 14-18].

252. BSC member Loftus similarly stated that there was no way to ass numbers to the criteria. [Armfield Dep. at 15]. Rather, the BSC "deliberately avoi quantifiable things." [Armfield Dep. at 19].

253. Despite the record keeping and internal control requirements in t Defense Department directives, the Navy conceded that there was no documentation of

process because they didn't think they needed it. [Armfield Dep. at 70]. The BSC confirmed that it could not reconstruct its decision process. [Armfield Dep. at 16]. As such, the BSC stated that a somewhat artificial record might be created after the fact. The Commission insisted that, if the Navy did not do it, the Commission would do it for the Navy. The Navy finally agreed that "Whether we want to or not, we'll have to give them a one or two-liner that explains why what looks like a green actually is a yellow or red." [Armfield Dep. at 36].

254. On May 22, 1991, the Commission issued a Press Release stating that, during the May 20 private meeting, the Commission staff learned that "the Navy used a great deal of subjective judgment in drawing up its list of recommendations" for closure and realignment. Despite the fact that the Commission had "repeatedly sought clarification from senior Navy Representatives," including "publicly ask[ing] for minutes, notes and any documentation that would give [the Commission] an idea of how the [Navy] came up with its recommendations," Courter publicly announced that what the Commission had received was "inadequate." [Courter Dep. at 180-183; Courter Dep. Ex. 11 at 1].

255. After the close of the public hearings relating to the Philadelphia Shipyard, the Commission requested that the Navy BSC provide it with additional information to "try to resolve missing gaps in the information provided." [Nemfakos Dep. Ex. 8 at Bates No. 586].

256. The Navy's BSC did provide additional documents and information to the Commission. [See, e.g., Nemfakos Dep. Ex. 7 and Yellin Dep. Ex. 7]. However, some of this data was not provided to the Commission until after it had already concluded its final deliberations and drafted its Report. [June 30, 1991 Navy telecopy to Commission]. Moreover,

the GAO was never afforded an opportunity to review or analyze this additional informatic [Meyer Dep. at 123-124].

257. Senator Specter and Congressman Weldon also obtained key Na documents opposed to the closure of the Philadelphia Shipyard which had not been produced the Navy. [Courter Dep. at 29-31].

258. Despite repeated demands by members of Congress for a public hearing the additional information supplied by the Navy, the Commission refused to allow any pub scrutiny. Furthermore, despite the fact that the Act required the Navy to provide the Commissi with documentation relevant to its base closure deliberations and decisions, the Commissi never held public hearings to ascertain why the Navy did not produce all of its documents a what other documents had been withheld. [Courter Dep. at 29-31 and 39-41].

259. The public and interested members of Congress were never afforded meaningful opportunity for public scrutiny and rebuttal of the Navy's documentation deliberations. [Courter Dep. at 29-31 and 39-41].

X. THE NAVY MISREPRESENTED MATERIAL INFORMATION TO, AN WITHHELD KEY DOCUMENTS AND TESTIMONY FROM, TH COMMISSION

260. The Base Closure Act mandates that the Secretary of Defense mal "available to the Commission and the Comptroller General of the United States all informatic used by the Department in making its recommendations to the Commission for closures ar realignments." [10 U.S.C. § 2903 (c)(4) (emphasis supplied)].

261. Schafer, the Navy BSC Chair, represented to the Commission that "copi of all the data received and considered by the BSC have been previously provided to tl

Commission." [Yellin Dep. Ex. 7 at Bates No. 790 (emphasis supplied)].

262. In violation of the procedural mandates of the Act, the Navy did not provide the Commission or the GAO with all of the data that it had received and considered in recommending closure of the Philadelphia Shipyard. [Courter Dep. at 29-31; Yellin Dep. at 106-11, 157-158, 172, 177; Meyer Dep. at 78-81].

263. The limited discovery permitted in this case establishes that the Navy willfully misrepresented and withheld key information, which the Commission testified it "needed to determine if the Navy's recommendations were valid," regarding the Navy's decision to close the Philadelphia Shipyard. [Courter Dep. at 183]. The following summarizes the most salient of those misrepresentations and concealments:

(a) **PREDETERMINATION TO CLOSE PHILADELPHIA SHIPYARD.** The Navy never informed the Commission that, during its base closure process, it had not considered all bases "equally without regard to whether the installation [had] been previously considered or proposed for closure or realighment," but reaffirmed the decisions to close the Philadelphia Shipyard represented by the "stealth list" and the Three Star Admiral Advisory Committee determination. [10 USC §2903(c)(3); Yellin Dep. at 106-111].

(b) **NET OPERATING PROFITS.** The Navy misrepresented to the Commission that the Philadelphia Shipyard costs the Navy $75 to $100 million each year. [Armfield Dep. at 69]. To the contrary, during fiscal years 1989 and 1990, Philadelphia showed a net operating profit for the Navy while the other seven shipyards were losing millions of dollars collectively. In fiscal year 1989, the Navy's Net Operating Result (NOR) reported that the eight Naval Shipyards lost cumulatively $247 million while Philadelphia showed a profit of

$111 thousand. Similarly, in fiscal year 1990, the Navy's NOR reported that the eight Naval Shipyards lost cumulatively $151 million while Philadelphia made a profit of $243 thousand. [Naval Shipyard Net Operating Results - 1989 and 1990].

(c) **WORKLOAD.** The Defense Department represented to the Commission that changes in the force structure "will reduce ship-repair requirements." [DoD April 1991 Report at 64]. The Commission therefore concluded that "the overall public shipyard workload is falling significantly because of force reductions and budget limitations." [Courter Dep. Ex. 14 at 5-27 and 5-28]. A March 1991 memorandum from NAVSEA's Admiral Claman to the Chief of Naval Operations confirmed, however, that the Navy's utilization of shipyards for large amphibious ships and other large vessels would be between 84.2% and 106.9% for fiscal years 1992 though 1997. [Claman Dep. Ex. 1; April 1991 Navy Detailed Analysis, Tab C at 2]. Since the Navy requires that shipyards reserve 30% of their space for emergency repairs, it is clear that shipyards, such as the Philadelphia Shipyard, servicing large amphibious ships and other large vessels will have no "excess" capacity during the relevant six year period and should have been excluded from further review under the base closure process. [Claman Dep. at 42-43].

(d) **NUCLEAR NAVY.** The BSC represented to the Commission that "Navy carrier forces in the next 10-20 years...will be largely composed of nuclear carriers." [Nemfakos Dep. Ex. 7 at III-3]. There was no support for this assertion in either the Force Structure Plan or any other Navy document presented to the Commission. [Courter Dep. Ex. 14 at B-1].

(e) **NUCLEAR WORKLOAD.** Based on misrepresentations made by the Navy, the Commission erroneously concluded that "the projected workload in nuclear shipyards during the 1990s was found to limit the potential for closing any nuclear shipyard until the late

1990s." [Courter Dep. Ex. 14 at 5-28; Loftus Dep. at 76-77]. To the contrary, durin relevant six year Force Structure period, the drydocks at nuclear shipyards are not being utilized by nuclear workload. [Nemfakos Dep. Ex. 10 at Bates No. 332; Loftus Dep. at 60]. Moreover, the only years that the Navy arguably may fully utilize its nuclear drydocks 1998-2000 -- a time period which could not be considered under the Base Closure Act's six y Force Structure period. Significantly, the Navy's projected workload at nuclear shipya includes between 25-50% of work on non-nuclear ships, that could be scheduled at Philadelphia Shipyard. [Loftus Dep. at 56].

(f) **PHILADELPHIA'S WORKLOAD.** The Navy misrepresented to t Commission that the Philadelphia Shipyard's workload was simply disappearing. [April 19 Navy Detailed Analysis, Tab C at 12]. To the contrary, the Navy manipulated the Shipyard workload by arbitrarily removing ships previously assigned to Philadelphia or refusing to assig additional ships to that yard for work:

> [S]omeone made the decision, for whatever reason, to move workload, of course.

[MacKinnon Dep. at 267-268].

(g) **FEASIBILITY OF CLOSING A NUCLEAR SHIPYARD.** The Navy affirmatively represented to the Commission that it was "not practical to close a nuclear shipyard." [Claman Dep. at 58; Nemfakos Dep. Ex. 7 at III-3]. Absolutely no data was presented to the Commission on the feasibility of utilizing private nuclear shipyards on the East Coast, such as Newport News or Electric Boat. [MacKinnon Dep. at 66-67; Claman Dep. at 39]. Nor was any data presented (or produced during discovery) that analyzed the cost of closing, re-opening or mothballing a nuclear shipyard. [Claman Dep. at 58, 59].

(h) **COST TO RETAIN PHILADELPHIA AS A SHIP REPAIR FACILITY.** Based on Navy misrepresentations that to keep Philadelphia open costs the Navy $75-100 million per year, the Commission concluded that retaining Philadelphia as a Ship Repair Facility would "increase the cost for work performed at Philadelphia over the cost for the same work performed at a public shipyard with a traditional staffing." [Courter Dep. Ex. 14 at 5-28]. The Navy's documents contained no data or analysis that supported this conclusion. To the contrary, MacKinnon testified that, if conventional work was placed into Philadelphia, there would be no cost to operate the facility as a Ship Repair Facility since even "fixed costs" would be offset by the revenues realized from the Shipyard's workload. [MacKinnon Dep. at 261-262, 267]. In fact, documents withheld by the Navy established that shipyard efficiency would decrease, not increase, as a result of work being transferred from Philadelphia. A March 25, 1991 NAVSEA analysis, which was never provided to the Commission, concluded that, for Norfolk to execute the additional carrier workload proposed to be transferred from Philadelphia, Norfolk would have to "significantly increase their employment levels," thereby resulting in a drop in shipyard efficiency and an increased cost to the fleet of approximately $72.8 million, excluding the higher rate differentials for work performed at Norfolk. [Hekman Dep. Ex. 10 at Bates No. 101]. Philadelphia was the most cost-efficient of the eight Naval Shipyards in the county. [Clark Dep. at 8-11; Hekman Dep. Ex. at 7].

(i) **OPNAVINST 3050.22 (EMERGENT SHIPYARD WORK).** The recommendation to close the Philadelphia Shipyard ignored OPNAVINST 3050.22, a long-standing directive that required 2 geographically dispersed (strike-free) Naval shipyards on each coast capable of repairing conventional aircraft carriers in order to maintain immediate repair

capability. [Nemfakos Dep. Ex. 9 at Bates Nos. 91 and 98]. The Navy misrepresented, and the Commission therefore concluded, that the combination of drydocks available at a private shipyard (Newport News) and the mothballing of Philadelphia's drydocks would satisfy this requirement. [Courter Dep. Ex. 14 at 5-27, 5-28].

(A) **Mothball Status.** Vice Admiral Hekman testified that mothballing the Philadelphia Shipyard would not preserve its drydocks for emergent use and would sacrifice a valuable capital investment facility for the Navy. [Hekman Dep. at 58-59]. As such, he repeatedly stated that closing a shipyard is "an irreversible decision." [Hekman Dep. at 59, 89].

(B) **Consideration of Private Shipyards.** The Navy failed to produce key internal Navy documents that described the risks involved in relying on privately owned shipyards for the Navy's emergent carrier requirements. For example, a March 1991 Memorandum from NAVSEA's Admiral Claman to the Chief of Naval Operations -- a document that the Navy failed to produce to the Commission -- clearly recognized that [Claman Dep. Ex. 1 at Bates No. 602]:

> Closure of Philadelphia Naval Shipyard, without retention of the large carrier capable dry docks creates a shortfall in dry dock capability for emergent dockings of aircraft carriers... Without the dry docks available at Philadelphia, the only other dock capable of taking an emergent carrier docking is at Newport News Shipbuilding (NNSB)...This dock is privately owned and its docking schedule is not controlled by the Navy. The cost to have NNSB provide a dedicated dock under contract is considered prohibitive.

The Commission was also not advised that the Atlantic Fleet advised the BSC that they required "Philadelphia Naval Shipyard as a 'safety valve' when the private

sector is unable to successfully complete" repairs. [Hekman Dep. Ex. 10 at Bates Number 98].

(j) **THE FALSE "COST SAVINGS" ASSOCIATED WITH CLOSING PHILADELPHIA.** The Navy misrepresented that it would realize recurring cost savings in the amount of $36 million by closing the Philadelphia Shipyard. [DOD April 1991 Report at 65]. Navy studies, however, clearly proved that there are no "major cost savings" realized by the closure of shipyards.

> Historically, major cost savings for program execution are not realized by the closure of shipyards. In the 1970s, closures of three naval shipyards demonstrated that little if any apparent cost savings can be accomplished on a program basis. This was documented in the 1980 study "U.S. Shipyard Program Planning. A Basis for Current and Long Range Planning for Facilities and Manpower" which reviewed the impacts of the 1970 closures of naval shipyards.

[MacKinnon Dep. Ex. 24 at 3]. Vice Admiral Hekman, then Commander of NAVSEA, concurred that closing the Philadelphia Shipyard would save no more than approximately $5 million because shipyard work is a Navy Industrial Funded ("NIF") activity. [Hekman Dep. at 74]. As such, the work has to be performed and "paid for somewhere. So you don't save program dollars." [MacKinnon Dep. at 262]. "There was a mistaken understanding that if we didn't send ships [to Philadelphia] we would save the money that would normally be spent to overhaul ships. And I said that analysis was wrong. But that was the initial work group's analysis. In order to understand that, you have to understand how the Navy funds [its] shipyards." [Hekman Dep. at 74]. The Navy also concealed the fact that the COBRA model utilized to calculate the recurring cost savings to be realized by closure of the Philadelphia Shipyard did not reflect NIF activities and was therefore unreliable. [MacKinnon Dep. at 182].

On March 25, 1991, the Navy analyst responsible for the Philadelphia Shipyard COBRA analysis concluded that "the economic analysis conducted using COBRA will probably not withstand an outside audit." [MacKinnon Dep. at 301-302].

(k) **COSTS OF CLOSURE.** The Navy originally represented to the Commission that the one-time cost of closing Philadelphia would be $102 million. [Clark Dep. at 117]. There was absolutely no basis in fact for this closure cost figure. In documents never produced to the Commission, NAVSEA had estimated on March 25, 1991 that the one time cost of closing Philadelphia Naval Shipyard was $458 million, excluding environmental costs. [Hekman Dep. at 64]. These numbers were consistent with prior NAVSEA calculations and "were known well before this." [Hekman Dep. at 72]. Other withheld Navy documents estimated that the cost of closing Philadelphia would be $592 million. [Hekman Dep. Ex. 12]. Not surprisingly, the conclusion attached to the evaluation sheets for each of these cost estimates stated: "Remove Philadelphia NSY from base closure list." [Hekman Dep. Ex. 12]. Significantly, it was not until after the President accepted the Commission's closure recommendations that the Navy finally directed the Philadelphia Shipyard to develop actual cost closure data. [Clark Dep. at 113-115, 117; Clark Dep. Ex. 4 at 9]. On July 12, 1991, the Philadelphia Shipyard submitted a "conservative" $1 billion dollar estimate for closure of the Shipyard. [Clark Dep. Ex. 4; Clark Dep. at 118-120].

(l) **DEFENSE DEPARTMENT CRITERION 5: PAYBACK PERIOD.** The Navy originally represented to the Commission that the one-time cost of closing Philadelphia was $129.8 million, with a break-even period of 5 years and a return on investment period of 3 years. The annual savings were projected at $36.0 million, including a $29 million salary savings

calculation from the projected reduction of civilian employees. [April 1991 Navy Detailed Analysis Report, Tab C at 13]. On June 13, 1991, the Navy represented to the Commission that, for purposes of the analysis, the Navy was going to reassign the USS Forrestal to Philadelphia which would reduce the one-time cost figure to $102 million and the payback period to 2 or 3 years. [June 30, 1991 BCRC Hearing at 221].

However, only after the President approved the base closure list did the Navy calculate the actual savings that would result from closing the Philadelphia Shipyard. A Department of Navy FY 1993 Apportionment Review, DOD Base Realignment Closure Program II Report dated August 1, 1991 recognized that there are "no savings" by a reduction of civilian employees at a shipyard since "under NIF, people go with workload." [Navy 1993 Apportionment Review]. The Navy's budget analysis concluded that the annual recurring savings would be only $5 million, not $36 million. [Navy 1993 Apportionment Review]. Significantly, if the true costs of closure, as shown in the FY 1993 Apportionment Review, are applied to COBRA, the payback period to close the Philadelphia Shipyard becomes nearly infinite under the Defense Department's February 13, 1991 guidelines for calculating costs and savings. [DoD April 1991 Report at 150-153].

264. Courter testified that the 1991 base closure process was totally different than the process in 1988 because people who had dissenting and different views had an opportunity to testify before the Commission. [Courter Dep. at 127]. To the contrary, the Admiral who was admittedly the most knowledgeable individual in the Navy with respect to shipyards and whose testimony could have corrected the foregoing misrepresentations, was prevented from testifying before the Commission. [Yellin Dep. Ex. 6; Hekman at 49; Yellin

Dep. at 93-94].

265. On June 18, 1991, Yellin -- the Commission's head of the Navy Team -- telephoned Vice Admiral Hekman to discuss his position on the Naval shipyards. During their telephone conversation, Yellin was advised by Hekman that:

> Hekman had intended to testify at the Philadelphia Regional Hearing but had been asked by a senior Navy official not to testify. Friends, still with the Navy, told him that he was being accused within the Navy of providing documents to Philadelphia officials that were critical of the proposed closure...He believed that his opposition to the proposed closure had and would continue to hurt his civilian employment opportunities.

[Yellin Dep. Ex. 6 (emphasis supplied].

266. Yellin stated that during their conversation, Vice Admiral Hekman advised him that he "was asked to retire early, in part he believes, because he persisted in disagreeing with the decision to close the Philadelphia Naval Shipyard." [Yellin Dep. Ex. 6].

267. The statements made by Vice Admiral Hekman to the Commission's staff were also made to William Angus, the Director of the Chamber of Commerce of Southern New Jersey. Vice Admiral Hekman informed Angus during several telephone conversations prior to May 17, 1991 that "he had been 'retired' early because of views which he held" and that "many [civilian employment] doors have been closed to him, apparently because of his posture on certain issues within the Navy and DoD." Vice Admiral Hekman was very concerned about the public nature of the Commission hearings because he had "yet to be advised of his permanent retirement status." [Courter Dep. Ex. 3 at Bates No. 125-126, 128, 131-132].

268. Yellin and Angus both confirmed the veracity of their letter and memorandum. [Angus Affidavit; Yellin Dep. at 183]

269. Vice Admiral Hekman testified that he was convinced that his testimony

before the Base Closure Commission would alter nothing because the Commission's "conclusions were foreordained" and the Commissioners were "going to give Secretary Cheney what he asked for, regardless of what [he] or anyone else said." [Hekman Dep. at 86, 106]. When asked why he believed this to be true, Vice Admiral Hekman testified that they are "members of the same club... that's sort of the way I felt." [Hekman Dep. at 86].

270. Hekman testified that because of the need for Philadelphia's drydocks, he was convinced the Shipyard would not be closed:

> I felt, and have always felt, as I stated earlier, the Philadelphia Shipyard is not going to close. I have always felt that Congress in the end would stop the Navy from doing what I consider to be an unwise thing. And I still feel that way today.

[Hekman Dep. at 102].

Y. THE BASE CLOSURE COMMISSION'S JULY 1, 1991 BASE CLOSURE REPORT TO THE PRESIDENT

271. On July 1, 1991, the Commission submitted its recommendations for the closure or realignment of U.S. military installations to the President. [Courter Dep. Ex. 14 at 1].

272. The Commission findings with respect to the Philadelphia Shipyard were as follows:

> The Commission found that the overall public shipyard workload is falling significantly because of force reductions and budget limitations. The projected workload in nuclear shipyards during the 1990s was found to limit the potential for closing any nuclear shipyard until the late 1990s.
>
> The largest portion of Philadelphia's recent workload has been CV-SLEP, which the Navy desires to terminate. However, Congress has passed legislation that requires a CV-SLEP at Philadelphia. The Commission found that this CV-SLEP should be

completed in mid-1996, about a year before the required closure date.

Workload is available that could be diverted from public and private East Coast shipyards to Philadelphia to bring its activity up to levels that justify keeping it open. However, this would limit the Navy's ability to meet its target of putting 30 percent of its repair work in private yards ...

* * *

The Commission found that the combination of carrier-capable drydocks at Norfolk Naval Shipyard, [the private] Newport News Shipbuilding, and the mothballed drydocks at Philadelphia provide capacity for unplanned requirements.

[Courter Dep. Ex. 14 at 5-28].

273. There is no written record of the Commission's analysis of the Navy application of its data to the final criteria under the Act. [Courter Dep. at 188-189].

274. Nor is there any record of the Commission's analysis of the Navy procedural compliance with the Act or the criteria. Due to the lack of any written recor Courter was asked to describe the Commission's evaluation:

Q. Now that you know, you say what methodology the Navy used to apply the Department of Defense's eight criteria to all shipyards equally and fairly, would you describe that methodology, please?

A. ...The Base Structure Committee ... made a determination based on all available data, the interviews conducted by the BCS, and the information of the VCNO study as to which --whether there was excess capacity in any particular category.

They determined that there was excess capacity in the shipbuilding category. They examined all of those. They made further analyses; applied color codes to the various yards, shipyards. They showed some of them, having -- perhaps one had all green. Most of them had a mix. They met and had free exchange, and differing points of view, which [] obviously you are

> trying to make an important point out of...They eliminated, after -- they eliminated some yards because of the fact that they were rated so well. They eliminated others because they were very important for repair of nuclear ships, surface ships -- subs, I would imagine. And they looked very carefully at Philadelphia and concluded that,... Philadelphia was the most logical one to be taken off the list.

[Courter Dep. at 219-221].

275. On Wednesday, July 10, 1991, the President transmitted to Congress his approval of the Base Closure Commission's list of recommendations for base closure and realignment.

Z. THE COMMISSION STAFF'S OWN ANALYSIS OF THE PROCESS CONFIRMS THE COMMISSION'S VIOLATION OF THE BASE CLOSURE ACT

276. On July 10, 1991, Paul Hirsch, Director of Review and Analysis for the Commission, requested that each "Team," except for the Navy Team, submit an "After Action Report" to evaluate the Commission's process. The Navy Team was instructed not to finalize its Report until after this litigation was concluded. [Hirsch Dep. at 47, 57-58]. Despite repeated demands that the Commission produce drafts of the Navy After Action Report, the Commission has steadfastly refused.

277. On July 19, 1991, the Special Team responsible for review and analysis of the non-military criteria "for each of the three military service selection processes" submitted a report that represented "the strong consensus of the Special Team members." [Hirsch Dep. Ex. 1 at 1]. This After Action Report aptly summarizes the Commission's defective process.

278. The Special Team concluded that "The Commission did not effectively utilize the time allowed under the defense Base Closure and Realignment Act. " [Hirsch Dep.

Ex. 1 at 3]. "The four days allotted for base briefings, final deliberations and preparation of the final report was TOO SHORT." [Hirsch Dep. Ex. 1 at 3]. The Special Team also concluded that there was not enough time to fully answer all Commissioner questions: "The motion process was rushed. And the extreme efforts people were forced to take to prepare the final report before the statutory deadline was evident in the poor quality of the 'advance copy' of the report." [Hirsch Dep. Ex. 1 at 3].

279. The Special Team also criticized the Commissioner's communication with the staff and characterized communication with the Commissioners as "nearly non-existent":

> The absence of communications with the Commissioners kept the staff frustrated and uncertain of whether their efforts were on track or of any significance. R&A was being conducted with a clear definition of "substantial deviation", yet staff was never able to communicate their findings in this regard to the Commissioners. <u>It is believed that the Commissioners went into the final voting without a clear understanding of the details of the DoD evaluations and the staff analysis results.</u>

[Hirsch Dep. Ex. 1 at 6-7 (emphasis supplied)]. "Many hearings and briefings to the Commission were poorly attended by the Commissioners. This resulted, at best, in many topics and discussions being repeated and, at worst, in some Commissioners making decisions with less information than others." [Hirsch Dep. Ex. 1 at 9].

280. The Special Team also concluded that:

> The concept of "substantial deviation" did not play a predominant role in the review and analysis process. <u>It should have</u>. The Commissioners must thoroughly know the process used by the services to determine that they substantially deviated from force structure or criteria. During deliberations, it often appeared that the Commissioners "bootstrapped" their substantial deviation justifications from conclusions reached for other reasons. Early briefings could have prevented this.

[Hirsch Dep. Ex. 1 at 9 (emphasis supplied)]. Since the "substantial deviation" inquiry was the

Commission's principal means for determining whether the Navy and the Defense Departme had complied with the Base Closure Act, this conclusion is especially devastating to t Commission's conduct herein.

AA. THE SENATE'S DECISION NOT TO DISAPPROVE THE BASE CLOSUR LIST WAS NOT INTENDED TO PASS JUDGMENT ON WHETHER TH NAVY, THE DEPARTMENT OF DEFENSE AND THE BASE CLOSUR COMMISSION PROPERLY COMPLIED WITH THE PROCEDURES SE FORTH IN THE BASE CLOSURE ACT

281. To strike down the Commission's base closure list with respect to th Philadelphia Shipyard, Congress was required to enact a joint resolution disapproving the entir list of military installations recommended for closure and realignment. [10 USC §2904(b)].

282. Although a joint resolution was introduced into both the House and th Senate, Congress failed to enact the required joint resolution.

283. Thereafter, it became apparent that the Navy intended to rely on Congress failure to enact the joint resolution as a finding by Congress that the Navy, the Defens Department and the Commission had complied with the procedural mandates of the Base Closur Act in making base closure recommendations. [Defendants' Reply in Support of Motion t Dismiss the Verified Amended Complaint at pp. 13].

284. To eliminate any possible question raised with respect to Congress' actions on September 26, 1991 the Senate accepted an Amendment to the Defense Appropriations Bil that recognized the jurisdiction of the United States District Court for the Eastern District o Pennsylvania to rule on whether or not the Navy, the Base Closure Commission and the Defens Department complied with the Base Closure Act in ordering the Philadelphia Shipyard closed.

285. Specifically, the Amendment states that:

> It is the sense of the Senate 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 and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

[102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13811].

286. Prior to the Amendment being offered, Senator Specter clarified that the Amendment was intended to eliminate any question that "the relevant courts, federal courts, will have jurisdiction on any challenge on procedural deficiencies ... I have discussed it broadly in the Senate, with the distinguished chairman and the ranking member." [102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781].

BB. THE PHILADELPHIA NAVAL SHIPYARD WILL SUFFER IRREPARABLE HARM AS A RESULT OF THE DEPARTMENT OF DEFENSE'S AND THE BASE CLOSURE COMMISSION'S FAILURE TO FOLLOW THE PROCEDURAL MANDATES OF THE BASE CLOSURE ACT

287. Pursuant to the Base Closure Act, the Philadelphia Shipyard must be completely deactivated by the end of fiscal year 1996. If the Navy is able to reassign the Shipyard's workload, the Navy is permitted to close the Shipyard at an earlier date. [10 USC §2904(a)].

288. The Base Closure Act proscribed, however, the Secretary of Defense from carrying out any closure or realignment recommendation prior to the expiration of the statutory time period for Congressional approval or disapproval of the joint resolution. [10 USC §2094(b)].

289. Flouting this statutory proscription, the Navy unlawfully predetermined that it would close the Philadelphia Shipyard and engaged in egregious and deliberate conduct designed to prevent Congressional or judicial interference with such closure prior to the expiration of the joint resolution time period. [10 USC §2904(b)].

290. The Navy's plan included, inter alia, a scheme to immediately "starve" the Shipyard to death by removing all of its incoming workload. [Claman Dep. Ex. 9 at 3-4].

291. In April 1991 -- before the Base Closure Commission had even commenced its deliberations on the Navy's base closure recommendations -- the Navy removed the following ships and vessels from the Philadelphia Naval Shipyard's workload schedule:

Ship	FY	Est. Overhaul	Reassignment
USS SAIPAN (LHA2)	94	11 months	to Norfolk
USS CANOPUS (AS34)	95	4 months	to Charleston
USS SARATOGA (CV60)	95	12 months	to Norfolk
USS AMERICA (CV66)	96	24 months	to Norfolk
USS SIMON LAKE (AS33)	97	4 months	to Charleston
USS FORRESTAL (AVT59)	98	11 months	to Norfolk

[Claman Dep. Ex. 9 at 3-4].

292. Since Shipyard workers who are employed by the various planning groups typically work on ships and vessels which are not scheduled to arrive at the Shipyard for one to three years, the significance of reassigning the above workload is that Philadelphia will be compelled to immediately begin layoffs of its highly skilled trades people and workers unless compensating workload is assigned. [Clark Dep. at 63-68, 105-106].

293. The above reassignments were made without consideration of whether such shipyards had the necessary drydock space to perform such work, and manifest a clear intent by the Navy to insulate its decision to close the Shipyard from review by Congress and the

Courts. [Yellin Dep. at 185-186].

294. The Navy's intent to make closure of the Philadelphia Shipy irreversible, and its improper manipulation of data, is further established by the Nav misconduct with respect to the Navy's award of ship overhaul contracts that are subject public/private competition under the Competition in Contracting Act. [Clark Dep. at 43-44].

295. Congress has statutorily recommended that 30% of all overhauls a repairs of ships and vessels be subject to public/private competition to reduce costs to t taxpayer and require efficiencies in the Government. This guideline has historically been adhere to by the armed services. [Verified Amended Complaint, ¶195].

296. Pursuant to the Competition in Contracting Act, the Navy recently place five ships up for bid in the public/private sector: USS Sprague, USS Patterson, USS Haley, US Rodgers and the USS Daniels. [Verified Amended Complaint, ¶196].

297. Despite the fact that the Philadelphia Shipyard was the lowest bidder on al but one of the public/private bid packages, the Shipyard was <u>not</u> awarded <u>any</u> of these contracts [Verified Amended Complaint, ¶197].

298. The Navy, through NAVSEA, engineered this unfair result by arbitrarily imposing unprecedented charges on the Shipyard and creating unjustified and specious deficiencies in the Shipyard's bid proposals. [Clark Dep. at 43-44]. For example, the Commander of the Philadelphia Shipyard, Capt. Clark, agreed that the Shipyard's best and final offer was in fact the lowest bid on the USS Sprague. [Clark Dep. at 43-44]. However, the bid was not awarded to Philadelphia because "irrational and wrong" "costs were added into our bid without our knowledge." [Clark Dep. at 44-46].

299. The Navy has also ceased sending information regarding future bids in t public/private competition sector to the Philadelphia Shipyard. [Verified Amended Complai ¶ 199].

300. In April 1991, the Navy also attempted to officially remove from t Philadelphia Shipyard's workload, the USS KENNEDY (CV67), a 24 month SLEP express authorized by Congress to be performed in Philadelphia. [Claman Dep. Ex. 9 at 3-5].

301. Despite the fact that, prior to the enactment of the Base Closure Act, tl Navy consistently maintained the need to perform a "SLEP" -- not an overhaul -- on the US Kennedy, on or about July 10, 1991 the Navy represented to the Senate Armed Servic Committee, of which Senator Warner of Virginia is the ranking minority member, that it onl intended to do a complex overhaul on the USS Kennedy in Norfolk, Virginia. The Nav therefore requested that the Senate Armed Services Committee deauthorize the 1991 and 199 appropriations regarding the SLEP of the USS Kennedy in Philadelphia. [Verified Amende Complaint ¶¶190-193].

302. Clark testified that approximately 6,000 to 7,000 people would b employed if the USS Kennedy SLEP came to Philadelphia. [Clark Dep. at 68 and 106] However, without compensating workloads, if the USS Kennedy was reassigned in 1993 to shipyard other than the Philadelphia Shipyard for a SLEP or an overhaul, the Philadelphi Shipyard for all intents and purposes would be forced to close, irreversibly. [Clark Dep. at 66 67 and 106; Hekman Dep. at 59, 89].

303. Moreover, since a shipyard needs two to three years before a ship actually arrives to start work on the planning stage, the Navy's refusal to fund the advanced planning on

the USS Kennedy has resulted in the Philadelphia Shipyard having a "number of design engineers for whom" the shipyard would have no work. [Clark Dep. at 64 and 68].

304. Specifically, Capt. Clark testified that he had approximately 250 to 300 professional and technical personnel at the shipyard. He estimated that the shipyard would lose at a minimum 100 of those people by the end of the calendar year 1991. He also testified that some of those people could not be easily replaced. [Clark Dep. at 105].

305. The foregoing clearly establishes the Navy's determination to prevent <u>any</u> new work from coming into the Philadelphia Shipyard.

306. As a result of the Navy's announced intention to reassign the USS Kennedy to Norfolk, 1400 layoffs were scheduled during the first half of the next fiscal year with 400 of these layoffs to occur commencing on September 13, 1991. To implement these layoffs, Capt. Clark was required to request the appropriate Reduction in Force ("RIF") [Clark Dep. at 66-70; Verified Amended Complaint, ¶204].

307. Prior to 1991, Capt. Clark had never sought RIF authority at any time during his prior ten years as Commander of the Philadelphia Shipyard. [Clark Dep. at 63].

308. Due to low morale and a belief that the Shipyard could sustain a sufficient workload, Capt. Clark unilaterally announced to the Philadelphia Shipyard workforce that there would be no RIF's at the Shipyard during 1991. [Clark Dep. at 77 and 99-100].

309. Capt. Clark immediately was contacted by Admiral Claman who was extremely upset that Clark had issued the announcement to the workforce without prior approval of the Secretary of the Navy. [Clark Dep. at 77 and 81].

310. Admiral Claman subsequently contacted Captain Clark and advised him that

the Navy had agreed that there would be no RIF in 1991. However, the RIF scheduled for the Spring of 1992 would go forward as planned and that requested force reduction should number at least 800 employees. [Clark Dep. at 85; Claman Dep. at 20-24].

311. Thereafter, due to Congressional and public outcry, the Navy finally rescheduled the USS Kennedy to Philadelphia.

312. Despite the reassignment of the USS Kennedy, the current RIF plan for the spring of 1992 is still approximately 10% of the current workforce of the Philadelphia Shipyard. [Claman Dep. at 24].

313. The foregoing conduct of defendants has caused and will cause plaintiffs to suffer immediate and irreparable harm.

314. According to the Navy's December 1990 Final Environmental Impact Statement for Base Closure/Realignment of the Philadelphia Naval Shipyard ("FEIS"), the direct economic consequence of the proposed closure of the Philadelphia Shipyard includes a reduction in present Navy employment in the metropolitan Philadelphia region (which includes portions of the States of Pennsylvania, New Jersey and Delaware) by 88%, which represents eliminating directly almost 15,000 employment positions and indirectly causing the loss of an additional 7,384 jobs in the Philadelphia area. [FEIS at S-8, S-9].

315. The FEIS states that the proposed closure would add an estimated 16,856 workers to the unemployment rolls (a 17.4% increase) and increase unemployment in the region. [FEIS at S-9].

316. The FEIS also states that "many employees of Philadelphia Naval Shipyard would experience difficulty re-entering the labor force without considerable retraining." [FEIS

at S-9].

317. According to the FEIS, the closing of the Philadelphia Naval Shipyard will cause a substantial increase in unemployment and a migration of Shipyard employees from the Philadelphia region to other states in search of job opportunities along with a consequent decrease in regional and state income and overall tax revenues for these states. [FEIS at 4.PH-10 - 4.PH-18].

318. According to the FEIS, direct income and expenditures that would be withdrawn from the Philadelphia region as a result of the proposed closure would total $536.9 million. [FEIS at S-9].

319. An Economic Impact Report prepared by the Pennsylvania Economy League ("PEL") and submitted to the Naval Facilities Engineering Command on October 17, 1990 by the Commonwealth of Pennsylvania and the State of New Jersey concluded that closing the Philadelphia Shipyard would have a much greater impact on the economy of Philadelphia and the entire tri-state region than that set forth in the FEIS since the Shipyard is the largest employer in the Philadelphia area. [PEL at v-xii].

320. Economic activity connected with the Philadelphia Shipyard accounts for $2.1 billion in gross product in the Philadelphia metropolitan region. [PEL at ix]

321. The PEL's Economic Impact Report concluded that the unemployment rate would jump 16.2% from 7.8% to 9.1% in the Philadelphia region, that the region would suffer a loss of $915 million in wage and salary income and retail sales would decline $382.8 million. [PEL at vii, ix].

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331, 133 1346 and 1361; 28 U.S.C. §§2201 and 2202; and 5 U.S.C. §§701 et seq.

2. Venue is properly laid in the Eastern District of Pennsylvania, pursuant to 2 U.S.C. §1391.

A. STANDARDS FOR GRANTING A PRELIMINARY INJUNCTION

3. To obtain a preliminary injunction in this Circuit, plaintiffs must establish fou essential elements: (1) that they have a reasonable probability of success on the merits of thei underlying claim; (2) that they will be irreparably injured by denial of the requested injunctio relief; (3) that the denial of the preliminary relief will result in greater harm for plaintiffs tha that experienced by defendants; and (4) that the granting of preliminary relief will be in th public interest. Sullivan v. City of Pittsburgh, 811 F.2d 171, 181 (3d Cir. 1987), cert. denied 484 U.S. 849 (1987); SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1980).

4. The Court need only determine that plaintiffs have a fair or reasonable probability of success on the merits. Moteles v. University of Pennsylvania, 730 F.2d 913, 919 (3d Cir. 1984), cert. denied, 469 U.S. 855 (1984); Oburn v. Shapp, 521 F.2d 142, 148 (3d Cir. 1975).

B. PLAINTIFFS HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

5. The Court must set aside agency action if the action was arbitrary and capricious, an abuse of discretion, or not otherwise in accordance with law, or if the action failed to meet statutory, procedural or constitutional requirements. 5 U.S.C. §706; Maxey v. Kadrovach, 890 F.2d 73, 76 (8th Cir. 1989); Makair, Inc. v. Civil Aeronautics Board, 744 F.2 1383, 1385 (9th

Cir. 1984); Great Salt Lake Minerals and Chemicals Corp. v. Marsh, 596 F. Supp. 548, 552 (D. Utah 1984); see also Marshall v. Lansing, 839 F.2d 933, 943 (3d Cir. 1988).

6. An agency's violation of a statute or non-compliance with statutory procedures constitutes arbitrary and capricious agency action and requires the setting aside of agency action. 5 U.S.C. §706; Gloucester County Concerned Citizens v. Goldschmidt, 533 F. Supp. 1222, 1228 (D.N.J. 1982).

7. The Navy, Department of Defense and Base Closure Commission are agencies within the meaning of the Administrative Procedures Act, 5 U.S.C. §551.

8. The express purpose of the Base Closure Act is "to provide a fair process that will result in the timely closure and realignment of military installation..." [10 U.S.C. §2901(b)].

9. The Base Closure Act places specific mandatory, non-discretionary duties on the Department of Navy, Department of Defense and the Base Closure Commission.

10. Defendants' compliance with the procedural requirements of the Base Closure Act was mandatory and non-discretionary.

C. DEFENDANTS' FAILURE TO CONSIDER ALL NAVAL INSTALLATIONS EQUALLY

11. The Base Closure Act imposed a mandatory duty on the defendants to "consider all military installations inside the United States equally without regard to whether the installations have been previously considered or proposed for closure or realignment by the Department [of Defense]." [10 U.S.C. §2903(c)(3)].

12. The Department of Navy had reached the conclusion to recommend closure of the Shipyard to the Base Closure Commission based on the SECDEF 17, "stealth list" and Three Star Admiral Advisory Committee recommendations before the Navy even began any analysis of

installations pursuant to the Base Closure Act.

13. The Navy's use of and reliance on SECDEF 17 and the "stealth list" and the Three Star Admiral Advisory Committee list resulted in the failure of defendants to consider the Shipyard equally without regard to the fact that it had been recommended for closure before the enactment of the Base Closure Act, and therefore violated §2903(c)(3) of the Base Closure Act, and constituted arbitrary and capricious agency action.

14. The Navy Base Structure Committee's manipulation of, and disregard for, data concerning alleged "excess capacity" at the Shipyard, the cost of closure of the Shipyard, and the scheduling of workloads at Naval shipyards, constitute arbitrary and capricious agency action and are inconsistent with the letter and spirit of §2903(c)(3) of the Base Closure Act requiring that all installations be treated equally.

15. The Secretary of the Navy violated §2903(c)(3) of the Base Closure Act by concurring in the recommendations contained in the "stealth list" of the Three Star Admiral Advisory Committee that the Shipyard be closed on the basis of analyses and procedures which predated the passage of the Base Closure Act.

16. The Commission's failure to consider all Naval installations inside the United States equally, without regard to whether the installations had been previously considered or proposed for closure or realignment, violated §2903(c)(3) of the Base Closure Act and constituted arbitrary and capricious agency action.

D. THE NAVY'S IMPERMISSABLE USE OF, AND RELIANCE ON, AN ADDITIONAL CRITERION OUTSIDE THE FINAL CRITERIA

17. Agency action is arbitrary and capricious and must be invalidated if the agency relied on factors which Congress did not intend for the agency to consider. Motor Vehicles

Manufacturers Association v. State Farm Mutual Insurance Company, 463 U.S. 29, 43 (1983).

18. The eight final criteria promulgated by the Secretary of Defense were "final criteria" which, along with the force structure plan, were to be the exclusive basis on which recommendations for closure and realignment of military facilities were to be made. [10 U.S.C. §§2903(b)(2)(A) & 2903(c)].

19. The Navy's use of a ninth criterion not published and adopted in accordance with §2903 of the Base Closure Act, the so-called "Step 5" criterion -- the direct result of which was the recommendation that the Shipyard should be closed -- violated §§2903(b)(2)(A) and 2903(c) of the Base Closure Act, constituted arbitrary and capricious agency action, and was beyond the scope of the Navy's statutory authority. See State Farm, 413 U.S. at 43; Farmworker Justice Fund, Inc.v. Brock, 811 F.2d 613, 622 (D.C. Cir. 1987).

20. The Commission's conclusion that the recommended closure of the Shipyard did not deviate substantially from the Navy's force structure plan and final criteria was arbitrary and capricious and not in accordance with law.

E. DEFENDANTS' "STONEWALLING" PREVENTED THE GAO FROM PERFORMING ITS STATUTORY DUTIES

21. The Base Closure Act imposed a mandatory, non-discretionary duty on the Secretary of Defense and the Secretary of the Navy to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments." [10 U.S.C. §2903(c)(3)].

22. The purpose of this requirement was to allow the GAO to monitor the closure and realignment recommendation process as it occurred and report its findings to Congress.

23. The failure of the Secretary of Defense and the Secretary of the Navy to m information concerning the Navy's deliberations and decisions available to the GAO viola §2903(c)(3) of the Base Closure Act and constituted arbitrary and capricious agency action.

24. The failure of the Secretary of Defense and the Secretary of the Navy to prov the GAO with the data necessary for the GAO to perform its statutorily mandated duty to as the Commission in its review and analysis of the recommendations for base closures made by Navy and the Department of Defense violated §2903(d)(5)(A) of the Base Closure Act a constituted arbitrary and capricious agency action.

25. The requirement that the GAO "transmit to the Congress and to the Commissi a report containing a detailed analysis of the Secretary's recommendations and selection proce: placed a mandatory and non-discretionary duty on the Secretary of the Navy and the Secreta of Defense to provide the data necessary for the GAO to perform this statutory function. [U.S.C. §2903(d)(5)(B)].

26. The failure of the Navy's Base Structure Committee to keep minutes of th deliberations or to document their selection process, as well as their use of an admittec subjective process, disabled the GAO from analyzing the Secretary of Defense recommendations for closures and realignments of Naval installations and therefore violat §§2903(c)(3) and 2903(d)(5)(B) of the Base Closure Act and constituted arbitrary and capricio agency action.

27. The failure of the Base Closure Commission to ensure that the Secretary Defense complied with the GAO requirements, and the Commission's failure to require the GA to submit a revised report analyzing the Navy's recommendation and selection process, violat

§§2903(c)(3) and 2903(d)(5)(B) of the Base Closure Act, and constituted arbitrary and capricious agency action.

28. The private submission of data by the Navy and Defense Department to the Commission after the transmission of the GAO report to Congress and the Commission did not cure the violations of §§2903(c)(3) and 2903(d)(5)(B) of the Base Closure Act, because the GAO was the only statutorily mandated agency authorized to monitor the Navy's selection process as it occurred, and furthermore the GAO never prepared a report analyzing this belatedly-submitted data.

29. The shortcomings in the Navy's process for determining base closures identified by the GAO, including (1) insufficient justification to support the military ratings for Navy installations, (2) the implementation and use of an inconsistent color coding system to rate military bases and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used by the Navy in its base structure reviews, violated §§2903(c)(3) and 2903(d)(5)(B) of the Base Closure Act and constituted arbitrary and capricious agency action.

30. The Commission's going forward to deliberate on the Navy's recommendations for base closure and realignment despite the fact that the GAO had not performed its statutory duty of reviewing and analyzing the Navy's recommendations and selection process violated §§2903(c)(3) and 2903(d)(5)(B) and constituted arbitrary and capricious agency action.

31. The Commission's decision to adopt the list of closure and realignment recommendations made by the Navy's Base Structure Committee, even though the GAO had found that the Navy and its Base Structure Committee (i) had not treated all bases equally, as

required by the Base Closure Act and (ii) had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements, violated §§2903(c)(3) and 2903 (d)(5)(B) of the Base Closure Act and constituted arbitrary and capricious agency action.

F. THE FAILURE OF THE DEFENSE DEPARTMENT TO PUBLISH A SUMMARY OF THE SELECTION PROCESS

32. The failure of the Department of Defense to publish in the Federal Register and transmit to the Congressional defense committees and to the Commission a summary of the selection process that resulted in the recommendation for closure for each installation, together with a justification for each recommendation, violated §§2903(c)(1) and (2) of the Base Closure Act, and constituted arbitrary and capricious agency action.

G. FAILURE OF THE NAVY TO FOLLOW THE DEFENSE DEPARTMENT'S REGULATIONS

33. The Defense Department's "policy guidance" and "record keeping" requirement directive to the Military Departments promulgated on December 10, 1990 and the "internal controls" directive promulgated on February 13, 1991 were the equivalent of regulations for purposes of review under the Administrative Procedure Act. See, Lucas v. Hodges, 730 F.2d 1493, 15047 n. 20 (D.C. Cir. 1984), vacated on other grounds, 738 F.2d 1392 (1984).

34. The failure of the Navy to follow the of Defense Department regulations by failing to implement an "internal control plan" in order to ensure an accurate and fair decision-making process, failing to ensure the accuracy of its data collection and analysis, and failing to prepare minutes of its deliberations on closures and realignments, constituted arbitrary and capricious agency action and was not in accordance with law. See, Bodie v. Dept. of Navy, 827 F.2d 1578, 1580 (Fed. Cir. 1987); Wojciechowicz v. Dept. of Army, 763 F.2d 149, 153 (3d Cir.

1985).

35. The Navy's failure to consider all installations "on an equal footing" violated tl Defense Department's December 10, 1991 regulations, constituted arbitrary and capricio agency action and was not in accordance with law.

36. OPNAVINST 3050.22 expressed a Navy policy requirement that there be tw Naval shipyards on each coast with drydock capability for large conventional aircraft carriers.

37. The Navy's departure from, and violation of, OPNAVINST 3050.22, witho announcing that departure or the reasons supporting it, constituted arbitrary and capricio agency action. See Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807 (3d Cir. 1985)

H. THE NAVY'S FAILURE TO ADOPT OR FOLLOW A PROPER FORCI STRUCTURE PLAN

38. The Navy's failure to adopt a force structure plan in compliance with §2903(a) o the Base Closure Act violated §2903(a) and constituted arbitrary and capricious agency action.

39. The Navy's use of the three year period from 1998-2000 to justify excluding the six nuclear capable Naval Shipyards from base closure consideration under its "Step 5" procedure violated the six year 1992-1997 Force Structure Plan requirements and, therefore, §2903(a) of the Base Closure Act and constituted arbitrary and capricious agency action.

I. THE COMMISSION'S FAILURE TO HOLD MEANINGFUL PUBLIC HEARINGS AND MEETINGS

40. The requirement of public hearings in the Base Closure Act entailed the right to meaningful hearings, necessitating that all data and information relevant to the proposed closure of the Shipyard be made available to interested parties in advance of the hearing. [10 U.S.C. 2903(c)(4)]; see also National Wildlife Federation v. Marsh, 568 F. Supp. 985, 994 (D.D.C.

1983); Joseph v. Adams, 467 F. Supp. 141, 160-61 (E.D. Mich. 1978).

41. By requesting and receiving additional documentation from the Navy relevan the recommended closure of the Shipyard after the close of public hearings, which documentat was therefore not subject to public debate or GAO scrutiny, the Commission violated §2903(c) of the Base Closure Act and its conduct constituted arbitrary and capricious agency action. S National Wildlife Federation, 568 F. Supp. at 994; Joseph v. Adams, 467 F. Supp. at 160-(

42. By withholding documentation opposed to closure of the Shipyard and suppress Vice Admiral Hekman's testimony in opposition to closure of the Shipyard, the Navy viola the requirement of, and right to, open public hearings relative to the closure of the Shipyard, U.S.C. 2903(c)(4), and its conduct constituted arbitrary and capricious agency action.

43. The closed-door meetings between the Commission and the Navy held after t public hearings on the proposed closure of the Shipyard violated the Base Closure Ac requirement that "[e]ach meeting of the Commission, other than meetings in which classifi information is to be discussed, shall be open to the public," constituted arbitrary and capricio agency action, and were beyond the scope of the Commission's statutory authority. [10 U.S.(§2902(e)(2)(A)].

J. DEFENDANTS' DEPRIVATION OF PLAINTIFFS' DUE PROCESS RIGHT

44. Plaintiffs (a) Landry, (b) the International Federation of Professional a Technical Engineers, Local 3, (c) William F. Reil, (d) Metal Trades Council, Local 68 Machinists, (e) Ronald Warrington and (f) Planners Estimators Progessman & Schedulers Unio Local No. 2 (collectively the "Shipyard workers and unions"), possess a property right maintaining their jobs until and unless it is determined through a procedurally correct process ar

fair application of the final criteria and Navy's Force Structure Plan that the Shipyard should l closed. See Winsett v. McGinnes, 617 F.2d 996, 1004-1008 (3d Cir. 1980), cert. denied, 4/ U.S. 1093 (1980); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 113(1132 (W.D. Pa. 1980).

45. Defendants' actions constitute government action which has resulted in th deprivation of the property right possessed by plaintiff Shipyard workers and unions. See, Thre Rivers, supra.

K. "REASONABLE PROBABILITY OF SUCCESS" CONCLUSION

46. Plaintiffs have a reasonable probability of success on the merits of Count I of the Verified Amended Complaint.

47. Plaintiffs have a reasonable probability of success on the merits of Count II of the Verified Amended Complaint.

48. Plaintiffs have a reasonable probability of success on the merits of Count III of the Verified Amended Complaint.

49. Defendants' violations of the Base Closure Act, arbitrary and capricious actions, and actions in excess of their statutory authority have actually prejudiced substantial rights and interests of plaintiffs.

50. Defendants' violations of the Base Closure Act, and the Navy's violations of the Defense Department's regulations, mandate invalidation of the list of closures and realignments submitted to Congress and the President insofar as it relates to Naval installations. See, 5 U.S.C. §706; Maxey v. Kadrovich, 890 F.2d 73, 76 (8th Cir. 1989); Acadian Gas Pipeline System v. F.E.R.C., 878 F.2d 865, 868 (5th Cir. 1989); Esch v. Yeutter, 876 F.2d 976 (D.C.

Cir. 1989).

L. IRREPARABLE HARM AND THE PUBLIC INTEREST

51. Plaintiff Shipyard workers and unions will suffer irreparable injury in the loss their jobs by virtue of the unwarranted closure of the Shipyard resulting from defendan violations of the Base Closure Act and the Defense Department's regulations, and defendan arbitrary and capricious agency actions, and actions beyond their statutory authority.

52. The unwarranted closure of the Shipyard will cause substantial economic inju to the Philadelphia area, including the affected areas in the States of Pennsylvania, New Jers and Delaware, which injury will be irreversible and irreparable.

53. The Navy's actions in redirecting workload to other shipyards, failing to awa bids for work to the Shipyard on arbitrary grounds, and attempting to reassign the USS Kennec overhaul to another shipyard, shows that the Shipyard is threatened with imminent closure if tl injunctive relief sought by plaintiffs is not granted.

54. Plaintiffs have no adequate remedy at law.

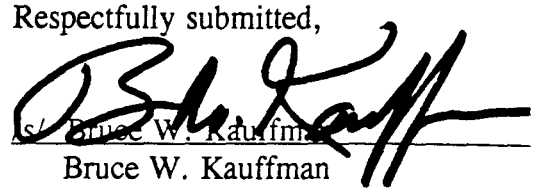
55. The harm plaintiff Shipyard workers and unions will suffer in the absence of tl entry of the preliminary injunctive relief outweighs the harm which defendants will suffer if suc relief is granted.

56. The granting of the preliminary injunctive relief sought by plaintiffs is in th public interest.

57. Plaintiffs are entitled to the preliminary injunctive relief they seek based on th evidence establishing (a) defendants' violations of the Base Closure Act, the Defens Department's own regulations and the Due Process Clause of the Fifth Amendment, (b

defendants' arbitrary and capricious actions, and (c) defendants' actions exceeding their stat authority.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Camille J. Wolf hereby certify that on this 11th day of October, 1991, I cau: a true and correct copy of Plaintiffs' Proposed Findings of Fact and Conclusions of Law a Appendices in Support Thereof to be hand delivered on the following counsel of record: Dav. F. McComb, Assistant United States Attorney for the Eastern District of Pennsylvania, 331 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania 19106; and hand delivered to Mark W. Batten, Trial Attorney, U.S. Department of Justice, Civil Division.

/s/ Camille J. Wolf
Camille J. Wolf

Document Separator

Oct 11 91

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEN. ARLEN SPECTER, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-CV-4322
H. LAWRENCE GARRETT III, Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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H. LAWRENCE GARRETT III, Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION[1]

This action arises out of the decision by the President, pursuant to the Defense Base Closure and Realignment Act of 1990, P.L. 101-510, § 2901, et seq., to approve the closing of the Philadelphia Naval Shipyard. The President's decision, as prescribed by the statute, was preceded by recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission. Those recommendations, and the means by which they were reached, are challenged in this lawsuit. Defendants have previously moved to dismiss this action because there is no provision for judicial review under the statute -- which establishes a quintessentially political process to deal with a subject matter traditionally within the exclusive competence of the political branches -- and because plaintiffs lack standing to

[1] For the Court's convenience, defendants have prepared an appendix containing pertinent excerpts from the voluminous record amassed in this case. Citations in this brief and the findings of fact will be to both the appendix (referred to as "Defs' App.") and the underlying document.

sue. Those arguments will not be repeated in this brief, which deals only with plaintiffs' motion for preliminary injunction and is submitted in conjunction with the accompanying proposed Findings of Fact and Conclusions of Law.

The Amended Complaint alleges that the closure of the Philadelphia Naval Shipyard (the "Shipyard" or "Philadelphia") will cause its workers and the surrounding communities irreparable economic harm. Whatever injuries the closure of the Shipyard may ultimately cause, however, these injuries lack the immediacy required to warrant emergency relief. The closure of the Shipyard will not be completed for years. In the meantime, a requested reduction in force for 1991 has been cancelled. In addition, the Department of Defense has announced that the aircraft carrier USS KENNEDY has been scheduled for a complex overhaul at the Shipyard from 1993 to 1995. The Senate has passed a bill, now pending in a Conference Committee, appropriating funds for this work. Plaintiff Rep. Thomas Foglietta has publicly stated that "this project reduces the need for any layoffs for about a year."[2] Plaintiffs have therefore failed to demonstrate that any action taken by defendants will cause them immediate, irreparable harm. No grounds exist, therefore, for an emergency injunction to block the President's decision, accepted by Congress, to close the Shipyard.

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[2] Press Release from Rep. Thomas Foglietta, September 17, 1991, Defs' App. at 963-64.

In addition, there is no reasonable probability that plaintiffs will succeed on the merits. In the memoranda supporting our motion to dismiss, defendants have shown that plaintiffs' claims are nonjusticiable and that plaintiffs lack standing to bring them. Even if judicial review were available, the thousands of documents plaintiffs have received in expedited discovery and the sixteen depositions they have taken fail to support the factual allegations of the Amended Complaint. Indeed, that discovery establishes that defendants complied with all pertinent statutory requirements. Plaintiffs attempted in the course of the depositions to garner evidence that the Secretary of Defense's recommendation to close the Shipyard was the result of poor military judgment. Plaintiffs may be entirely free to second-guess the military experience and judgment of the Navy, Secretary of Defense, the Base Closure Commission and the President on the floor of Congress. But this Court may not substitute plaintiffs' national defense views for those in the Executive Branch, including the Commander-in-Chief, who are constitutionally charged with making those judgments.

Finally, with regard to the prospective harm to the defendants and the public interest, the President and Congress have determined that the eventual closure of the Shipyard is in the country's national security interest and in the taxpayers' economic interests. This public interest, as determined by the political branches of government, strongly favors denial of any

interim relief in this case. For each of these reasons, plaintiffs' motion for a preliminary injunction should be denied.

STATEMENT OF FACTS

1. Navy Base Closing Recommendations In 1990-91[3]

Nearly a year before the passage of the 1990 Defense Base Closure and Realignment Act of 1990 ("the Act"), as part of the annual budget process, Secretary of Defense Cheney asked each of the military service Secretaries to review the service's force structure and basing requirements. See Deposition of Capt. George Tzavaras at 13-14, Defs' App. at 502-03. On January 29, 1990, Secretary Cheney publicly announced the results of that review and proposed the closure of 43 bases, including fourteen domestic naval installations (one of which was the Shipyard), in connection with the Defense Department's annual request for authorization of appropriations.[4] The only then-existing mechanism for closing military facilities was 10 U.S.C. § 2687.

Pursuant to § 2687, the Secretary could not unilaterally close military bases employing more than 300 employees. Rather, 10 U.S.C. § 2687(b)(1) required the Secretary to notify the Senate and House Armed Services Committees of any proposed

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[3] Defendants' briefs supporting their Motion to Dismiss discuss the prior history of base closing efforts, including the decades-long impasse over the subject between the Executive Branch and Congress, resolved first in 1988 and again in 1990 by legislation creating independent commissions to make closure recommendations.

[4] The proposal also called for the closure or drawdown of three overseas naval facilities. These 17 naval bases have been referred to as the "SECDEF 17" list. See Tzavaras Depo. at 14, Defs' App. at 503.

closings and to evaluate the fiscal, local economic, budgetary, environmental, strategic, and operational consequences of such closure. The Secretary could not proceed to close or realign a military installation covered by § 2687 until 30 legislative days or 60 calendar days, whichever was longer, after submitting this notification and evaluation. 10 U.S.C. §§ 2687(b)(2), (d)(1).

In early February, 1990, shortly after Secretary Cheney's announcement, the Vice Chief of Naval Operations ("VCNO") established a Base Closure Advisory Committee and supporting Working Group.[5] See April, 1991 Navy Base Closure and Realignment Recommendations, Detailed Analysis ("Navy Detailed Analysis") at 39, Defs' App. at 713. Because the SECDEF 17 was prepared under substantial time pressure, the Advisory Committee was formed in anticipation of a need to prepare an additional list of closures at the Secretary's request in light of diminishing foreign threat and increasing budgetary pressures. Tzavaras Depo. at 18, Defs' App. at 506. The Committee was to perform a comprehensive evaluation of all naval installations to determine whether any bases on the SECDEF 17 should remain open and to determine whether any additional installations should be studied for closure. Drennon Depo. at 23, Defs' App. at 178.

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[5] The Advisory Committee is sometimes referred to as the "three star" advisory committee as it was headed largely by three star admirals. The study commissioned by the VCNO is also commonly referred to as the "OPNAV" study. Deposition of Rear Adm. Patrick Drennon at 23, Defs' App. at 178. "OPNAV" is an abbreviation for Naval Operations, and refers to the staff in the Office of the Chief of Naval Operations ("CNO"), currently Admiral Kelso, who is the Navy's representative on the Joint Chiefs of Staff.

Neither the Army nor Air Force conducted a similar comprehensive review of installations shortly before the passage of the Act.

In mid-1990, Secretary Cheney again called on the service Secretaries to recommend additional military facilities for possible closure or realignment for the following year's budget cycle, in light of reduced defense requirements and anticipated defense cuts. Tzavaras Depo. at 15, Defs' App. at 504. In July, 1990, the Secretary of the Navy responded by recommending additional installations for possible closure to the Secretary of Defense. He also recommended that three bases on the SECDEF 17 remain open.

The Secretary of the Navy's recommendations, which have been referred to as the "SECNAV 46 list," were not publicly released. The Secretary of Defense did not publish the SECNAV 46 or the lists prepared by the other services because base closure legislation which would supersede the § 2687 closure process had been introduced in Congress.[6] Id. at 15-16, Defs' App. at 504-05.

On November 5, 1990, President Bush signed the Base Closure Act. Section 2909 provided that the closure mechanism set forth in the Act would supersede § 2687, except for those closures to which § 2687 did not apply, including those carried out for reasons of national security or military emergency. The Working

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[6] Because it was not publicly released, the SECNAV 46 list was also referred to colloquially as the "stealth list." Tzavaras Depo. at 15, Defs' App. at 504. Of course, since Philadelphia had been on the SECDEF 17 list, the recommendation for its closure was already publicly known.

Group then discontinued preparation of the environmental and other reports required by § 2687. Id. at 26-27, Defs' App. at 509-10. The Advisory Committee did continue its comprehensive review of all naval installations, not only because its task was unfinished, but because, in the weeks after the passage of the Act, the Navy had yet to determine precisely which organization would be responsible for the closure recommendations required by the Act. See id. at 34-35, Defs' App. at 513-14.

The Navy could have tasked the already-existing Advisory Committee with developing its initial closure and realignment recommendations. It did not. Instead, to begin anew the study of all domestic naval installations pursuant to the 1990 Act, the Secretary of the Navy appointed a six-person Base Structure Committee ("BSC") on December 14, 1990, chaired by Assistant Secretary of the Navy (Installations and Environment) Jacqueline Schafer. See Dec. 14, 1990 Notice from Secretary Garrett, Defs' App. at 630-31.

While the BSC developed the process by which it would recommend closures, the Advisory Committee's work continued. On December 20, 1990, it reached its recommended list of closures and realignments, which included the Shipyard. See Deposition of Vice Adm. Stephen Loftus at 39, Defs' App. at 313. In late January, 1991, the Advisory Committee reported its recommendations to the CNO. Id. at 40, Defs' App. at 314. The CNO announced that he would merely listen to the recommendations, and not approve or disapprove of them, because the BSC, rather than

the Advisory Committee or CNO, would be in charge of making closure recommendations to the Secretary of the Navy. Id. at 41-42, Defs' App. at 315-16; Drennon Depo. at 31, Defs' App. at 184. The Advisory Committee's work then being finished, it passed out of existence. Loftus Depo. at 41, Defs' App. at 315.

2. The Navy's Process Under The Act

On January 28, 1991, Assistant Secretary Schafer circulated a twenty-five page memorandum which set forth, in detail, the procedure by which the BSC would engage in its structured review and analysis.[7] The memorandum required the BSC to review thoroughly all naval installations for possible closure from square one, regardless of the Navy's prior analyses. The data collected, analysis performed and recommendations reached by the Advisory Committee and its Working Group were provided to the BSC but, as BSC Member Loftus recalled:

> I can tell you unequivocally that list was not used as a marker to start the . . . base structure functions.

Loftus Depo. at 42, Defs' App. at 316; see also Drennon Depo. at 24, Defs' App. at 179.

Finding the VCNO study inadequate for its purposes, the BSC started its evaluation from scratch. When, through application of military experience and judgment, the BSC discerned gaps or possible errors in the data provided to it, or when it sought additional documentation and analysis, it questioned Navy

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[7] That memorandum is found in the Navy Detailed Analysis within the Tab entitled "Base Closure Account," Defs' App. at 726-50.

officials with authority over the particular facility at issue. See Deposition of Assistant Secretary Jacqueline Schafer at 62, Defs' App. at 496; Deposition of Charles Nemfakos at 35-36, 39-40 and Exh. 7, Defs' App. at 462-65, 810-12. With regard to shipyards in particular, the BSC was provided with a completely new analysis. As the admiral whose staff performed this analysis stated:

> We started all over again. . . . we were told to go and consider every facility that we had in the Navy all over again. So we went back to ground zero and I remember having meetings with my people and saying, hey, these are the rules, let's go back to ground zero and start all over again.

Deposition of Rear Adm. James Lang at 62, Defs' App. at 284. The BSC applied its military judgment to an analysis of the data and information received and, in certain cases, found particular elements more or less important than did the VCNO study. Nemfakos Depo. Exh. 7, Defs' App. at 810-12.

After each naval facility was placed into functional categories, such as shipyards, the BSC's work involved two phases containing eleven analytic steps. See Navy Detailed Analysis at 43-46 and January 28, 1991 Memo, Defs' App. at 717-20, 726-50. Phase 1, step 1 required the BSC to compare capacity within each category (obtained from the Navy Facility Assets Data Base) with force structure requirements (using the Shore Facility Planning System). The BSC found that excess capacity existed in the shipyard category. Had it not, the entire category would have been excluded from further consideration.

Step 2 required the collection of detailed information on each base within a category found to have excess capacity. Step 3 called for the analysis of geographic complexes, or groups of facilities within different categories in the same general location. In Step 4, the BSC applied the Secretary of Defense's closure selection criteria 1 through 4 to each base within a category with excess capacity. Step 5 required the BSC to evaluate whether bases in a particular category with excess capacity were distinguished by special factors, such as unique assets, geography, strategic importance or operational value. The BSC applied its military experience and expertise to determine which bases had such unique or essential military value that they should not be closed or realigned. In Step 6, the last step of Phase 1, the BSC identified for further analysis those lowest graded bases in each category not excluded in Step 5.

Phase 2 consisted of an analysis of the bases selected following Phase 1 for possible closure or realignment. Step 7 called on the BSC to identify each base function that would have to be relocated in case of closure. In Step 8, the BSC identified possible receiving bases for such activities. Employing selection criteria 5 through 8, the BSC in Step 9 selected the best options for receiving bases. In Step 10, the BSC performed a detailed cost and savings analysis of closure and in Step 11, the BSC Chairperson recommended bases for closure.

3. Consideration Of The Philadelphia Naval Shipyard

The BSC proceeded to analyze each of the eight public shipyards. In its capacity analysis, the BSC initially determined that the Navy did not require all eight shipyards to service the decreasing number of naval vessels required by the force-structure plan. See Navy Detailed Analysis, Tab C at 5, Defs' App. at 756. By 1995, for example, Navy plans call for a reduction in the number of aircraft carriers from 12 to 11 and the number of battle force ships from 545 to 451. See 56 Fed. Reg. 15207 (Apr. 15, 1991). The BSC did determine, however, that workload requirements during the 1990s for servicing the increasing proportion of the fleet which will be nuclear-powered required that the six nuclear-capable shipyards remain open. Navy Detailed Analysis, Tab C at 3, Defs' App. at 754; see Nemfakos Depo. at 149-50, Defs' App. at 483-84. Of the eight shipyards, only Philadelphia and Long Beach are not equipped to refuel, overhaul or repair nuclear submarines, cruisers, destroyers or aircraft carriers. The six nuclear-capable shipyards were therefore excluded from further closure analysis pursuant to Step 5, explained above, due to their unique military value. Navy Detailed Analysis, Tab C at 8, Defs' App. at 759.

The Long Beach Naval Shipyard, although not nuclear-capable, also has unique military value. See Deposition of Mary MacKinnon Exh. 3, Defs' App. at 617. As is explained in more detail below, the closure of Long Beach would leave only one drydock on the West Coast to service aircraft carriers. In the Navy's military

judgment, one drydock is inadequate to perform scheduled work on Pacific Fleet aircraft carriers. Loftus Depo. at 62, Defs' App. at 333.

In contrast, Philadelphia's primary workload was the performance of major overhauls or "SLEPs" (Service Life Extension Program) on naval vessels to extend their service lives, and the Navy had earlier decided to cancel that program. MacKinnon Depo. at 68, Defs' App. at 374. The closure and mothballing of Philadelphia will leave two drydocks capable of servicing carriers on the East Coast -- at Norfolk Naval Shipyard and Newport News Shipbuilding, a private yard. Philadelphia, moreover, could be activated if necessary, just as the previously mothballed Hunter's Point Naval Shipyard had been successfully activated in the past. The BSC then applied criteria 5 through 8 to Philadelphia, Navy Detailed Analysis, Tab C at 13-21, Defs' App. at 764-772, and recommended that Philadelphia be closed, a recommendation accepted by the Secretary of the Navy and the Secretary of Defense.

Two admirals, including the head of the Naval Sea Systems Command (NAVSEA), the command authority for shipyards, disagreed with the recommendation to close the Shipyard. Neither these admirals, nor anyone else, however, believed that the Shipyard should continue to operate at current levels, or that one of the six nuclear-capable shipyards should be closed at this time. See Deposition of Rear Adm. John S. Claman at 26-27, Defs' App. at 16-16A. Admirals Claman and Hekman argued before the BSC that

the workforce of the Shipyard be slashed from 8,500 workers to 1,200 employees and that the Shipyard be converted to a small ship repair facility. See Claman Depo. at 12, Defs' App. at 13; Deposition of Vice Adm. Peter Hekman (Ret.) at 36, Defs' App. at 201. The BSC was fully apprised of these opinions, see Nemfakos Depo. at 59, Defs' App. at 468A; Drennon Depo. at 43-44, 50-51, Defs' App. at 188-89, 191-92, considered them fully, and decided that the better military judgment was to close the Shipyard entirely.

4. The Role Of The General Accounting Office

The Act provides for participation in the base closure process by the General Accounting Office ("GAO") in two ways. First, the GAO was required to assist the Commission in the Commission's review and analysis of the Secretary's recommendations "to the extent requested" by the Commission. Section 2903(d)(5)(A). Second, the GAO was required to submit to Congress and to the Commission, by May 15, 1991, a report containing a "detailed analysis" of the Secretary's recommendations and selection process. Section 2903(d)(5)(B).

The GAO, on May 15, 1991, submitted a report entitled "Military Bases: Observations on the Analyses Supporting Proposed Closures and Realignments" ("GAO Report"), Deposition of S. Alexander Yellin Exh. 2, Defs' App. at 782. With regard to the Navy's base closure recommendations, the GAO found that, due to the Navy's "limited documentation" of its decision-making process, the GAO was unable to conduct an extensive review of the

Navy's selection process. GAO Report at 46, Defs' App. at 785. The GAO thus recommended that specific details of the manner in which the Navy arrived at its base closure recommendations be submitted to the Commission. GAO Report at 5, Defs' App. at 783. As explained more fully below, the Navy did so.

5. The Formulation Of The Base Closure Commission's Recommendations.

Following receipt of the Secretary of Defense's recommendations, the Base Closure Commission proceeded with its analysis. In just two and a half months, the Commission conducted twenty-eight public hearings, including one in Philadelphia and one in which testimony from the congressional plaintiffs was heard. See Deposition of Paul Hirsch, Exh. 2, Defense Base Closure and Realignment Commission Report to the President, Appendix G, ("Commission Report") Defs' App. at 918-19. All the unclassified information that the Commission received from any source was available to the public. As Jim Courter, the Commission's Chairman, testified:

> The information we received was always made . . . public . . . In fact any reporter at any time could come in our office at any occasion, night or day, and Xerox anything on any desk whatsoever unless it was classified, and we adhered to that principle.

Deposition of Jim Courter at 65-66, Defs' App. at 68-69. The public was freely permitted to provide the Commission information, analysis and argument until its final deliberations. Courter Depo. at 39, Defs' App. at 64A; Deposition of Matthew P. Behrmann at 14-15, Defs' App. at 5-6.

With the assistance of detailed employees of the GAO and a private consultant, the Commission's staff analyzed all the information received by the Commission. The Commission required additional information from the Navy in order to understand the process by which it recommended particular bases for closure. It therefore met with Navy officials on a number of occasions to receive both military data and information relating to its selection process. See Yellin Depo. at 20, 42, 44, 102, Defs' App. at 538, 543, 544, 556.

The Commission received extensive oral briefings and documentation from the Navy and concluded that the Navy used accurate data and a sound process for making its closure recommendations. Chairman Courter recalled that:

> once the record was revealed to us, we were satisfied with the process and satisfied with the accuracy of the information.

Courter Depo. at 132, Defs' App. at 109; see also Courter Depo. at 156, Defs' App. at 126.

Like the Navy, the Commission concluded that there was excess capacity in the naval shipyard category. Courter Depo. at 73-74, Defs' App. at 70-71. After analyzing all eight shipyards, the Commission concluded unanimously that:

> in order to match infrastructure with the force structure, we had to eliminate one of the eight public shipyards and all the evidence pointed that Philadelphia would be the one removed. The Navy made that decision, and we did not find any substantial deviation to change it.

Courter Depo. at 241, Defs' App. at 161.

The President subsequently approved this recommendation. Resolutions to overturn President Bush's approval of the Commission's recommendations were introduced in both Houses of Congress. The House disapproval resolution was defeated 364-60. 137 Cong. Rec. H6006-39 (daily ed. July 31, 1991). The Senate resolution was thereafter not voted upon.

ARGUMENT

The Third Circuit has recognized that the award of preliminary injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." Instant Air Freight Co. v. C. F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). In order to obtain a preliminary injunction, plaintiffs must demonstrate that: (1) they have a reasonable probability of success on the merits, (2) they will suffer irreparable injury in the absence of the injunction, (3) defendants will not suffer even greater harm if the injunction is issued, and (4) award of the injunction is in the public interest. ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citing SI Handling Systems, Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1985)). The plaintiffs have the burden of showing that all four factors favor emergency relief. Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990).

With regard to the irreparable injury factor, the Third Circuit requires movants to show that the alleged injury is not only irreparable, but "imminent," Cerro Metal Products v.

Marshall, 620 F.2d 964, 972 (3d Cir. 1980), or "immediate." ECRI, 809 F.2d at 226; Ammond v. McGahn, 532 F.2d 325, 329 (3d Cir. 1976). As the Third Circuit has stated, "[t]he dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury." Holiday Inns of America, Inc. v. B & B Corp., 409 F.2d 614, 618 (3d Cir. 1969). Immediate and irreparable injury is the most important of the four prerequisites to emergency relief, see Marxe v. Jackson, 833 F.2d 1121, 1128 (3d Cir. 1987); Moteles v. Univ. of Pennsylvania, 730 F.2d 913, 918 (3d Cir. 1984), and without a showing of imminent, irreparable injury, plaintiffs' motion must be denied. Oburn v. Shapp, 521 F.2d 142, 151 (3d Cir. 1975).

Claimed injury which would result regardless of the issuance of an injunction cannot be included in the Court's irreparable injury calculus. See, e.g., Local No. 1 v. International Brotherhood of Teamsters, 419 F. Supp. 263, 287 (E.D. Pa. 1976). If an injunction is not likely to prevent the claimed injury, it should not issue. See United States v. St. Bernard Parish, 756 F.2d 1116, 1123 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986); see Instant Air Freight, 882 F.2d at 801 (the "preliminary injunction must be the only way of protecting the plaintiff from harm").

In balancing any injury to plaintiffs against the hardship to the defendants, the Court should recognize that the

President's decision to close the Shipyard, and Congress's acceptance of that decision, reflect a judgment that the public interest lies with closure. When the proposed preliminary injunction threatens a government program that presumptively benefits the public, the public interest factor must be given particular weight. Cerro, 620 F.2d at 972; Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 358 (3d Cir. 1980); Delaware River Port Auth. v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 924 (3d Cir. 1974). As the Supreme Court has declared:

> where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury.

Hurley v. Kincaid, 285 U.S. 95, 104 n.3 (1932).

I. PLAINTIFFS HAVE NOT DEMONSTRATED THAT AN EMERGENCY INJUNCTION IS NEEDED TO PREVENT IMMEDIATE, IRREPARABLE INJURY

As we have argued, plaintiffs must demonstrate that the injury they seek to prevent is not only irreparable, but immediate or imminent. Because the Shipyard currently has and will continue to have a substantial workload for several years, plaintiffs' burden is an insurmountable one. The only harm alleged in the July 19, 1991 Amended Complaint even approaching the requirement of immediacy was a threatened four hundred-person reduction of force ("RIF") allegedly scheduled for September 13, 1991. Amended Complaint, ¶ 204. These layoffs did

not occur because the Navy cancelled the RIF. September 4, 1991 Declaration of Rear Adm. John S. Claman, Attachment 3.[8] Without this or any other immediate, scheduled layoff of workers, plaintiffs simply cannot demonstrate imminent and irreparable injury.[9] See § 2904(a)(4) (permitting the Secretary of Defense six years to close and realign bases).

Plaintiffs' remaining irreparable injury allegations do not involve imminent injury, but assertions that the Navy has taken or will take actions which may ultimately result in layoffs. Much of the future harm predicted by plaintiffs stemmed from their concern that repair work on the USS KENNEDY, an aircraft carrier, would not take place at the Shipyard. Amended Complaint, ¶¶ 190-92. On September 17, 1991, however, the Defense Department announced that a complex overhaul of the USS

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[8] This Declaration, submitted earlier in this litigation, is found at Defs' App. at 956.

[9] The Commander of the Shipyard has requested approval to conduct a RIF in several months, in the second quarter of fiscal year ("FY") 1992. Sept. 4 Claman Decl., Attachment 3, Defs' App. at 960. This request, however, was based on workload reductions unrelated to the closure and has not been approved by the Assistant Secretary of the Navy for Manpower and Reserve Affairs. Claman Depo., Exh. 9, ¶¶ 5-7, Defs' App. at 948-49. Even if the RIF is approved, workers are given 60 days notice. See 56 Fed. Reg. 43995 (Sept. 6, 1991). Plaintiffs have not shown, however, that the 1992 RIF will still be necessary in light of the work scheduled to be performed on the USS KENNEDY. But, even without the USS KENNEDY, the Shipyard Commander has testified that the 1992 RIF "may never come to pass" and that he is working to avoid having to conduct one. Deposition of Capt. Arthur Clark at 110, Defs' App. at 50.

Kennedy would be done at the Shipyard.[10] On September 26, 1991, the Senate passed, as part of the Defense Department Appropriations bill, a provision which transfers $105 million from the "Aircraft Carrier Surface [sic] Life Extension Program" to the purchase of items to be used for a complex overhaul of the USS KENNEDY at the Shipyard. See H.R. 2521, § 8128, Defs' App. at 976. The forthcoming work on the USS KENNEDY will employ substantial numbers of people for an extended period of time.

Nor have plaintiffs produced any evidence to support their allegations that the Navy is "starving" the Shipyard's workload, is arbitrarily failing to award the Shipyard contracts, or is ceasing to provide the Shipyard information on future contracts. Amended Complaint, ¶¶ 186-87, 195-202. To the contrary, no assigned work for the Shipyard for fiscal years 1991, 1992 or 1993 has been removed, and work on the USS SURIBACHI and USS WISCONSIN has been added to the Shipyard's work for fiscal years 1991 and 1992, respectively. See Claman Depo. Exh. 9, ¶ 4e, Defs' App. at 947-48. Defendants' showings that the rejection of bids offered by the Shipyard were justified and unrelated to closure considerations, and that the Navy has not intentionally failed to send bid information to the Shipyard, are uncontro-

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[10] See transcript of Assistant Secretary of Defense Williams' press briefing, Federal Information Systems Corp., Federal News Service, September 17, 1991, Defs' App. at 965.

verted. See July 23, 1991 Declaration of Lt. Commander James M. Baker.[11]

In short, even without the scheduled complex overhaul of the USS KENNEDY, plaintiffs have rot demonstrated that any action by the defendants threatens to cause them immediate irreparable injury. With the USS KENNEDY, the Shipyard will enjoy years of productive work before its closure. Plaintiffs have failed to carry their burden of showing an immediate, irreparable injury requiring emergency relief.

II. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

In our opening and reply memoranda in support of defendants' motion to dismiss, we demonstrated that plaintiffs' claims are unreviewable and that they lack standing to advance them. We do not repeat these arguments here, except to note that these threshold legal defenses render plaintiffs unlikely to succeed on the merits of their claims.

A. Plaintiffs' Claims Are Unreviewable

Defendants' nonreviewability argument apparently provoked a response from the Senate. As the Court will recall, we argued that the Act's legislative history and structure reflected a clear intent to preclude judicial review of the sorts of claims asserted in this case. Among other things, we noted that the Act relies on legislative, rather than judicial, review of alleged errors in the process by which military bases are selected for

[11] This Declaration, submitted earlier in this litigation, is found at Defs' App. at 951.

closure. The House subsequently voted overwhelmingly not to overturn the President's decision to approve the Commission's closure recommendations. 137 Cong. Rec. H6039 (daily ed. July 31, 1991).

Apparently recognizing the strength of our nonreviewability argument, Senator Specter introduced, and the Senate has passed, a provision within the Defense Appropriations Bill, H.R. 2521, § 8136, which declares:

> It is the sense of the Senate 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 . . . Act, but only the approval of the recommendations issued by the Base Closure Commission.[12]

According to Senator Specter, the purpose of the provision is to provide that "the relevant courts, Federal courts, will have jurisdiction on any challenge on procedural deficiencies." 137 Cong. Rec. S13781 (daily ed. Sept. 26, 1991) (Statement of Sen. Specter).

Section 8136 is not law, of course, because, even if it passes the House of Representatives, it reflects only the sense of the Senate. In addition, the Senate never acted on a Joint Resolution of Disapproval. The House considered and voted down

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[12] This provision is reprinted in Defs' App. at 977.

such a resolution 364-60. Once the House endorsed the President's decision, and by such a decisive margin, no purpose would have been served for the Senate to vote on such a disapproval resolution and it did not do so. Section 8136 therefore purports to offer nothing more than the Senate's sense of what the House did. More significantly, it reflects plaintiffs' recognition that their claims are unreviewable and that legislation is required to remedy a legal deficiency which warrants the dismissal of their lawsuit.

In any event, § 8136 has no legal effect for several reasons. First, a "Sense of the Senate" resolution simply does not have the binding effect of law. See American Federation of Labor v. Kahn, 472 F. Supp. 88, 96 n.17 (D.D.C.), rev'd on other grounds, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).

Second, § 8136 cannot alter the structure of the 1990 Act, which reflected an intent to preclude judicial review of claims of the type presented here. See Colorado Nurses Ass'n. v. F.L.R.A., 851 F.2d 1486, 1490 (D.C. Cir. 1988) ("A law may be amended, superseded, or rescinded by another law, but not by legislative history."). Nor does Senator Specter's characterization of § 8136 change the legislative history of the Act, which clearly demonstrates that claims such as plaintiffs' are unreviewable. See Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) ("The views of members of a later Congress, concerning different sections of [an Act], enacted after this

litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted the [original Act] that controls."). See also Consumer Product Safety Comm. v. GTE Sylvania, 447 U.S. 102, 118 (1980).

Third, the unchanged structure of the Act puts final review authority in the hands of Congress, not the courts. Whether or not the review authority was exercised to approve only the recommendations of the Commission, and not the "process" by which it and the Secretary of Defense made recommendations (as suggested by the sense of the Senate Resolution), § 8136 does not vest the courts with judicial review over plaintiffs' "procedural" claims where they had none before. (Indeed, if Congress approved the recommendations, as suggested by the Resolution, it is difficult to figure out what plaintiffs are fighting about. Judicial review of the procedures by which those legislatively-approved recommendations were reached would be an entirely academic exercise.)

If anything, § 8136 underscores the fundamental weakness in the theory of plaintiffs' case. After being fully apprised of all the relevant facts by the Commission and the GAO, the President determined to close the Shipyard and Congress agreed. The President and Congress have discharged their statutory responsibilities. The Act's procedures have run their course, and the recommendations have been subsumed in the final action of the political branches. If Congress believed that the process by which closure recommendations were developed was flawed, its

recourse was to disapprove of them. The attempt to rewrite legislative history reflected in § 8136 cannot open courthouse doors closed by the Act. And, of course, § 8136 does not and could not overcome defendants' constitutional arguments that the lawsuit should also be dismissed on political question and standing grounds.

Finally, the President approved the Commission's recommendation to close the Shipyard, regardless of the process which preceded that approval. Although the President's determination and Congress's acceptance of it effectively authorize the closure of the Shipyard, plaintiffs do not and cannot challenge the President's and Congress's determinations. What they seek is to overturn the underlying recommendations, rather than the operative determination, through an injunction, relief that is plainly unavailable. Should the Court nevertheless decide that it can entertain plaintiffs' claims, we now demonstrate that these claims are meritless.

B. <u>The Navy Fully Complied With The Base Closure Act</u>

The allegations against the Navy in Count 1 of the Complaint fall into three categories. First, and most substantively, plaintiffs contend that the Navy failed to consider all shipyards for closure equally, arguing that the Navy simply adopted an earlier proposal to close the Shipyard without taking a fresh look at each installation. Second, they allege that the Navy failed to provide sufficient information about its decisionmaking process to the GAO or to the Commission. Third, plaintiffs argue

that the Navy did not implement an internal control plan to verify the accuracy of data used in its selection process.[13] Even if the Court could reach these issues as a matter of law, the facts do not support the plaintiffs' claims.

1. The Navy Considered All Shipyards Equally, Without Regard To Prior Closure Recommendations

In an era of shrinking defense budgets and a reduced foreign threat, the Navy and the other military services face the need to reduce their size. The Secretary of Defense has proposed an entirely new force structure that reflects these conditions, and that plan also requires the Armed Services to reduce their infrastructure to match the new configuration of forces. See, e.g., Loftus Depo. at 53, 79, Defs' App. at 324, 348. It has long been clear to the Navy that, as one consequence of these reductions, there is no longer any justification to maintain eight naval shipyards.

In this round of base closings, Philadelphia was chosen for closure for three compelling reasons that had nothing to do with "prejudgment" or unequal treatment, and everything to do with

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[13] Plaintiffs also allege that the Navy failed to develop an adequate force structure plan, and that the Secretary of Defense failed to publish in the Federal Register a summary of the base closure selection process and a justification of each recommendation. Amended Complaint ¶¶ 125, 217(d), 217(i). There is no evidence in record to support the first of these claims. The second is simply incorrect. On April 15, 1991, the Secretary of Defense published the required summary and justification for each base closure recommendation. See 56 Fed. Reg. 15184, et seq. In particular, the summary of the Navy process is found at 56 Fed. Reg. 15207-08 and the justification for the closure of the Shipyard is at 56 Fed. Reg. 15218.

basic, incontrovertible facts and military judgments. First, Philadelphia is one of only two naval shipyards incapable of performing work on nuclear propulsion plants, which will form an increasing proportion of the fleet over time. Second, the Shipyard is situated on the East Coast, where, unlike the West Coast, there are a number of other shipyards able to perform both nuclear and conventional work. Third, the Navy had earlier determined, in a decision the plaintiffs do not and cannot challenge, to terminate the Service Life Extension Program (SLEP), a program of major overhauls to Navy ships that was the lifeblood of Philadelphia's workload. The Navy had recognized these three critical developments before the Act was passed, but this hardly is evidence of a predetermination to close the Shipyard. Rather, these unchallengeable facts underlie a consistent judgment that Philadelphia was the logical candidate for closure under any reasonable set of criteria.

a. The Basis Of The Navy's Decision

There are eight Naval shipyards in the United States: Pearl Harbor, Puget Sound, Long Beach, Mare Island, Norfolk, Portsmouth, Charleston, and Philadelphia. Navy Detailed Analysis, Tab C at 1, Defs' Appendix at 752. Of these, only Philadelphia and Long Beach lack the authorization, infrastructure, facilities, and specially skilled work force required to perform work on nuclear-powered vessels. Id. at 8, Defs' App. at 759.

Within the Navy, the various components involved in base closure studies had different views on the closure of shipyards. Indeed, much of the plaintiffs' case against the Navy hinges on the particular disagreement between the Office of the Chief of Naval Operations (OPNAV), which believed that the Shipyard should be closed, and the Naval Sea Systems Command (NAVSEA), which argued instead that it should be drastically downsized to a small ship repair facility.[14] On two points, however, each Navy organization has been in complete agreement: none of the six nuclear-capable shipyards can be closed before the year 2000 at the earliest, and there is no justification for retaining Philadelphia at its current size.

Every witness who was asked about the potential to close a nuclear-capable shipyard testified unequivocally that all six of those shipyards are essential to the Navy for nuclear work in the foreseeable future, particularly the refueling of nuclear submarines in the years 1998 to 2000. See Claman Depo. at 26-27, Defs' App. at 16-16A; MacKinnon Depo. at 49, 64-65, 232-34, Defs' App. at 363, 370-71, 418-20; Nemfakos Depo. at 81-82, Defs' App. at 470-71; Loftus Depo. at 47-52, Defs' App. at 319-23. Those witnesses also testified that it was wholly impractical to close a nuclear-capable shipyard temporarily and then reopen it when

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[14] OPNAV is the term given to the large staff of the Office of the Chief of Naval Operations. NAVSEA is one division, or "command," of the Navy that operates under the supervision of the CNO.

the nuclear propulsion plant workload peaks in 1998. See, e.g., Loftus Depo. at 53-54, 81, Defs' App. at 324-25, 350.

The BSC therefore excluded the six nuclear-capable shipyards from further consideration for closure. There is no evidence in the record, either documentary or testimonial, that contradicts or even questions the BSC's military judgment on this issue.[15] Even if there were, the plaintiffs have effectively conceded in their response to the defendants' motion to dismiss that this Court lacks the authority to second-guess the substance of that military decision. See Plaintiffs' Memorandum In Opposition To Motion To Dismiss at 9-10.

After excluding the nuclear-capable shipyards from review, the BSC considered both Long Beach and Philadelphia for closure,

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[15] Nuclear-capable shipyards perform some work on non-nuclear-powered ships. Plaintiffs repeatedly suggested in deposition questions that the Navy close a nuclear-capable shipyard, move that yard's nuclear work to another nuclear-capable shipyard, and the work on conventional ships to Philadelphia. Even if this Court had jurisdiction to second-guess these military decisions, every witness who heard the proposal rejected it out of hand. For example, as Admiral Loftus testified, the non-nuclear work performed in nuclear-capable yards is done in a

> different part of the yard, different dry docks, different water, power, steam. There was enough nuclear work to do in the six shipyards on nuclear piers, dry docks, that we couldn't even consider closing a nuclear shipyard. The fact that some of the yards did non-nuclear work had no bearing on it.

Loftus Depo. at 59, Defs' App. at 330. Moreover, the two nuclear-capable shipyards that had ranked lower than Philadelphia in a preliminary analysis, Portsmouth and Mare Island, do not perform any work on non-nuclear powered ships, so the plaintiffs' theory could not have been implemented in any event. See Lang Depo. at 68, Defs' App. at 287.

and concluded that Philadelphia was a more appropriate candidate for several reasons. See, e.g., MacKinnon Depo Exh. 30, Defs' App. at 789. Most importantly, Long Beach has one of only two drydocks on the West Coast, publicly or privately owned, that is large enough to accommodate an aircraft carrier. See id.; Loftus Depo. at 59-63, Defs' App. at 330-34.[16] As explained by Vice Admiral Loftus, Deputy Chief of Naval Operations for Logistics and the Navy's top logistics official, the BSC concluded that prudent planning required more than one carrier-capable drydock on each coast, so that, if one were filled, the other would remain available to handle unscheduled needs for repairs. See Loftus Depo. at 59-63, Defs' App. at 330-34. Again, there is no evidence in the record that contradicts this judgment. Long Beach had also ranked significantly higher than Philadelphia in every assessment of military value, is the newest naval shipyard, is located near a large concentration of the Fleet, and possesses other unique qualities. See MacKinnon Depo. Exh. 30, Defs' App. at 789.

After excluding Long Beach, Philadelphia remained a candidate for closure, but the decision to close most of the Shipyard was not made simply by default. A third military judgment, which the plaintiffs have never questioned, played a

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[16] On the East Coast, in contrast, even after Philadelphia is closed, the Navy has access to carrier-capable drydocks at Norfolk and at Newport News, a privately owned shipyard. Loftus Dep. at 64-69, Defs' App. at 335-40. Moreover, Philadelphia's two drydocks will be preserved, and therefore available to meet emergent requirements if necessary.

vital role in the determination to close Philadelphia: the Navy's decision to eliminate the Service Life Extension Program ("SLEP"), which had been the source of almost all of Philadelphia's workload. Performing a SLEP on an aircraft carrier extends its useful life for up to 15 years. However, with the sweeping reductions in force structure, including a decline in the number of aircraft carriers, there is simply no longer any need for the SLEP program. See MacKinnon Depo. at 68, 71-72, Defs' App. at 374, 376-77. After SLEPs are discontinued, the Shipyard simply will not have enough work to justify its remaining open, and this factor weighed heavily in the BSC's decision. See MacKinnon Depo. at 68, 72, 186, 189, 225, Defs' App. at 374, 377, 401, 404, 414.

b. The Plaintiffs' Claim That The BSC Ignored Its Own Rating System Is Meritless

Steps 1 to 4 in the BSC process, described above, yielded rankings of shipyards based on the assignment of color codings -- red, yellow, and green -- to the four military criteria issued by the Secretary of Defense. Plaintiffs observe that Long Beach ranked below Philadelphia in this process, and therefore charge that the BSC ignored the ranking into recommending the Shipyard for closure. See, e.g., Amended Complaint ¶¶ 116-17, 120. Plaintiffs fail to recognize that the BSC study did not end after just four steps of analysis. The proper application of Step 5 permitted the BSC to exclude shipyards, whatever their ranking, which possessed unique capabilities that the Navy could not

ignore. As a result, Long Beach and a number of the nuclear-capable shipyards that had been ranked equal to Philadelphia were excluded from further analysis because of their distinguishing features.[17]

Moreover, as Admiral Loftus explained, the red-yellow-green system was never intended to provide a precise comparative ranking. As he testified, there was a "large spectrum" to these rankings, so that, for example, some "yellow" ratings may be "very light yellow" and others "deep." Loftus Depo. at 78, Defs' App. at 347. The Act neither required the Navy to assign numerical values or color-coded rankings to the shipyards, nor mechanically to accept the product of those evaluations without the application of professional judgment.

c. The Navy Had No Pre-Determined Conclusion To Close The Philadelphia Naval Shipyard

The plaintiffs argue that the Navy did not consider all bases "equally," alleging that the Navy had decided to close the Shipyard long before the Act was passed, and that the BSC's review under the Act was an "arbitrary" process "designed to justify a pre-determined conclusion to close the Shipyard." Amended Complaint, ¶ 96. To be sure, the Shipyard was listed on

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[17] Such an exclusion procedure fully complied with guidance from the Department of Defense, which permitted the Navy to "exclude . . . from further analysis" any bases found to be "militarily/geographically unique or mission-essential (such that no other base could substitute for them)." Nemfakos Depo. Exh. 2 at 2, Defs' App. at 685. Department of Defense guidance also expressly authorized the Navy to exclude from analysis any "subcategory" of bases in which the Navy determined that no excess capacity existed. See id.

the SECDEF 17 and recommended for closure by the Advisory Committee. However, simply because the Navy had previously recognized that the loss of Philadelphia's SLEP workload and the unique attributes of the other shipyards suggested that Philadelphia was no longer needed does not mean that the Shipyard was not treated equally by the BSC in their new analysis. The statutory requirement that all installations be treated equally, regardless of whether they were previously selected for closure, does not mean that those bases must be excluded from consideration altogether, or that the Navy was required to ignore persuasive facts that had previously been recognized. All that is required is that such bases not be considered for closure again simply because they were recommended in the past.

The plaintiffs make much of the fact that the pre-existing Advisory Committee continued its study of potential base closures after the Act was passed, voted on its recommendations on December 20, 1990, and briefed CNO Kelso on January 28, 1991. However, Vice Admiral Loftus, the only deponent who attended the meeting with the CNO, testified that Admiral Kelso opened the January 28 meeting by noting that the Secretary of the Navy had chartered the BSC to review base closures from scratch, and that he would therefore listen to the Committee's views but would take no action based on them. As Admiral Loftus testified:

> Admiral Kelso said he wasn't making any decisions, he would listen to the recommendations but they were putting a group together that was chartered to look at each activity separately by law and that was basically the end of the advisory group list.

Loftus Depo. at 41-42, Defs' App. at 315-16.

Moreover, each of the members of the BSC who were deposed testified that the Advisory Committee list played no role in their decision, and that it was offered, at most, as one piece of data among many. See, e.g., Loftus Depo. at 43, Defs' App. at 317 (Committee recommendations "were not used with the new group [the BSC] at all . . . the list was not used for anything. . . . it had no function [in the BSC] at all"); Schafer Depo. at 41-42, Defs' App. at 489-90; Nemfakos Depo. at 41-43, 91, Defs' App. at 465A-C, 473. Nor did the CNO or any of his staff ever convey the CNO's opinion on the closure or realignment of any base. See Loftus Depo. at 85-87, Defs' App. at 352-54; Schafer Depo. at 44, Defs' App. at 491; Tzavaras Depo. at 61, 64-69, Defs' App. at 521-27.

Indeed, the BSC rejected some of the shipyard analysis originally presented by OPNAV, and required the staff to change several elements of the analysis and make a new presentation. See, e.g., MacKinnon Depo. at 200-04, Defs' App. at 405-09; Lang Depo. at 62, Defs' App. at 284 ("we were told to go and consider every facility that we had in the Navy all over again. So we went back to ground zero"); Drennon Depo. at 24, Defs' App. at 179. The BSC also received presentations from numerous organizations within the Navy, including several presentations from NAVSEA in which Admirals Hekman and Claman argued that the Shipyard should be downsized rather than closed. See, e.g., Drennon Depo. at 44-45, Defs' App. at 189-90; Nemfakos Depo. at

99-102, Defs' App. at 474-77; Schafer Depo. at 50, Defs' App. at 492.

It is certainly true that, before the Act was passed, the Navy had recognized the significance of the six nuclear-capable shipyards, the need to retain the West Coast drydock at Long Beach, and the effect of the SLEP cancellation on Philadelphia's workload. See, e.g., MacKinnon Depo. Exh. 3, Defs' App. at 617. It is also true that, before the Act established a new procedure, the Navy had included Philadelphia on more than one list of closure candidates. But it is hardly an indictment of the Navy's procedure that these same factors remained important in the BSC's analysis, and ultimately led to the same conclusion as the earlier studies. The Shipyard was recommended for closure not because of any predetermination to do so, but because certain immutable facts -- a growing need for nuclear-capable shipyards, a rapidly shrinking workload at Philadelphia, and its location on the East Coast -- permitted no other sound conclusion.

d. The Staff Memoranda

Much of the plaintiffs' claim of "predetermination" rests on internal memoranda prepared by Mary O. MacKinnon, a supervisory logistics management specialist in the Office of the Chief of Naval Operations. Plaintiffs are able to rely on these memoranda only by wrenching them from the appropriate context and ignoring clear explanations in the record.

For example, in one memorandum dated November 16, 1990, Ms. MacKinnon wrote that "[t]he 'stealth list' will become the 1991

base closure list . . . our plan is to keep Philadelphia Naval Shipyard on the 1991 list and close/realign as planned." MacKinnon Depo. Exh. 8, Defs' App. at 629. At that time, however, the Secretary of the Navy had not chartered the Base Structure Committee. Some members of the OPNAV staff then believed, incorrectly, that the Advisory Committee's recommendations would be submitted directly to the Secretary of Defense and the Commission; it was only after the BSC was established that the OPNAV staff learned the BSC would reexamine base closure from the beginning. See, e.g., Tzavaras Depo. at 34-35, 51-52, 60-61, Defs' App. at 513-14, 517-18, 520-21. The statement on which the plaintiffs rely therefore has no significance; any "plan" to close the Shipyard as part of an earlier base closure effort was superseded by the creation of the BSC.

Similarly, the plaintiffs rely heavily on Ms. MacKinnon's personal "to-do" lists, in which she lists the development of an implementation plan and timeline for the closure of Philadelphia and disposition of its remaining workload. See MacKinnon Depo. Exhs. 5, 7, Defs' App. at 612, 620. As Ms. MacKinnon testified and the documents reflect, however, she did not even plan to begin these tasks until after the entire base closure process had run its course. See MacKinnon Depo. at 87-89, Defs' App. at 381-83. The few documents on Philadelphia that she was preparing at that time were in support of the Advisory Committee's recommendations, which Ms. MacKinnon believed at that time would

be the Navy's final list. See id. Indeed, on October 31, 1990, when MacKinnon Exh. 5 was prepared, the Act had not even been passed. The document itself states that the closure of Philadelphia was to be implemented "[p]ending Congressional decisions." The fact that Ms. MacKinnon, in her personal notes, had projected possible tasks far into the future, provides no evidence that the Navy had already decided to close the Shipyard. See Tzavaras Depo. at 28 ("what I see here is good staff work, a staffer anticipating"), Defs' App. at 511; id. at 25-29, Defs' App. at 508-12.

2. The Navy Established An Internal Control Plan To Verify The Accuracy Of Data

The plaintiffs also allege that the Navy failed to implement an "internal control plan" to check the accuracy of data and analysis. See Amended Complaint, ¶ 217(h). The Act, of course, contains no such requirement; the plaintiffs rely instead on a February 13, 1991 memorandum from the Assistant Secretary of Defense (Production & Logistics), Nemfakos Depo. Exh. 2, Defs' App. at 684, which directed the Army, Navy and Air Force to establish such a plan. The Navy may be answerable to the Department of Defense for any failure to comply with this internal memorandum, but it does not confer any right on the plaintiffs. Cf. AFGE v. Hoffmann, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976).

In any event, the Navy did not ignore this guidance, as the plaintiffs suggest, but implemented it in three ways. First, the

Assistant Secretary of the Navy (Installations & Environment), who chaired the BSC, established a detailed set of procedures by which information would be collected, verified, and presented to the BSC. See Navy Detailed Analysis, Defs' App. at 726-50; Nemfakos Depo. Exh. 3 at 941, Defs' App. at 798; Schafer Depo. at 80, Defs' App. at 498. Second, much of the raw data on which the Navy relied in assessing the shipyards was drawn from the Naval Facility Assets Data Base, which is regularly checked for accuracy. See Nemfakos Depo. Exh. 3 at 941, Defs' App. at 798; Nemfakos Depo. at 46, Defs' App. at 466. Third, the BSC's process of questioning presenters and requiring further analysis provided a further check on the accuracy of information presented. See Nemfakos Depo. at 34-36, Defs' App. at 461-63; Schafer Depo. at 80, Defs' App. at 498.

An agency's interpretation of its own regulations is entitled to considerable deference. In fact, the agency interpretation must be accorded "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113, 1117 (3d Cir. 1987); see also U.S. Dept. of Labor v. Gardner, 882 F.2d 67, 70 (3d Cir. 1989) ("[t]here is no gainsaying th[is] well-established premise"); Presinzano v. Hoffman-La Roche, Inc., 726 F.2d 105, 111 (3d Cir. 1984). The Navy's implementation of the internal control plan requirement is plainly consistent with Defense Department guidance. The February 13, 1991 memorandum does not require the Navy to establish a formal system for auditing

information, nor even to develop anything in writing. The BSC's carefully delineated process of meetings and analysis of each category of facility, see Navy Detailed Analysis, Defs' App. at 726-50, and the other steps taken to ensure accuracy complied with the internal control plan requirement.

3. The Navy Violated No Provision Of The Act In Its Dealings With The GAO

In its report on the Secretary's base closure recommendations, the GAO found that, due to the Navy's "limited documentation" of its decision-making process, the GAO was unable to conduct an "extensive review" of that process. GAO Report at 46, Defs' App. at 785. The GAO did not conclude, as plaintiffs allege, that "the Navy's recommendations and processes were entirely inadequate." Amended Complaint, ¶ 142.

The gravamen of GAO's criticism of the Navy appears to be that no minutes were taken of the BSC meetings. Deposition of Robert L. Meyer at 92, Defs' App. at 448; Schafer Depo. at 61-62, Defs' App. at 494-96. The "limited documentation" of the Navy's decision-making process was a consequence of its wide-ranging, adversarial nature, involving multiple briefings and meetings between the BSC and "many, many people representing many, many opinions about each one of these particular candidates [for closure]." Meyer Depo. at 91-92, Defs' App. at 447-48. See also Schafer Depo. at 60-62, Defs' App. at 494-96. Some of these opinions were solicited on a confidential basis to ensure their

honesty and candor. Yellin Depo. Exh. 5 at 45, Defs' App. at 794.

There is no dispute, however, that the Navy did provide GAO with whatever documentation of its process was available. Nemfakos Depo. at 64, Defs' App. at 468C; Schafer Depo. Exh. 2., Defs' App. at 776. This included the Detailed Analysis accompanying the Secretary's recommendations to the Commission, and Assistant Secretary Schafer's January 28, 1991 "procedures memo" describing the BSC's review and analysis procedure. Navy Detailed Analysis, Defs' App. at 690-774; Meyer Depo., Exh. 1A and 1B, Defs' App. at 641-83. The Navy also provided the GAO complete access to the Navy's shore facilities computer database, the VCNO study and its supporting information, several volumes of documentation containing detailed information on the installations recommended for closure and their functional categories, documentation of the color coding for each of the eight naval shipyards under the base-closure criteria, documentation and definitions of the major factors and evaluation components to be used in evaluating Navy activities, and information concerning capacity requirements, existing capacity, and identified excess capacity within the functional categories. Meyer Depo. at 30-32, 60-63, 67-68, Defs' App. at 434-36, 441-44, 445-46; Nemfakos Depo. at 64-66, Defs' App. at 468C-468E.

The Navy thus fully complied with the Act's requirement that it make available to the GAO "all information used by the

Department [of Defense] in making its recommendations to the Commission for closures and realignments." Section 2903(c)(4).

At the GAO's request, the Navy met with the GAO on May 7, 1991, to explain how they had arrived at their recommendations. Schafer Depo. at 56, Defs' App. at 493. As described by one of the GAO officials who attended the meeting:

> The Navy basically said: This is the process that we used. This is what we have done. Now, we will provide whatever we have to provide. If what we did was inadequate for you to make a judgment on how we went about our process, we will certainly be very happy to provide whatever you need.

Meyer Depo. at 38, Defs' App. at 438. The GAO's written summary of this meeting states that, as a result of the Navy's explanation of its decision-making process and rationale for its decisions, "it appears that the BSC based its decisions on relevant input from multiple sources, <u>and that their decisions were based on appropriate rationale and sound judgment</u>." Meyer Depo. Exh. 3, Defs' App. at 780 (emphasis added).

The GAO, however, did not feel that it could rely on the Navy's verbal description of its process. Meyer Depo. at 38, Defs' App. at 438. <u>See also</u> Schafer Depo. at 63, Defs' App. at 497 ("[A]t the end of the meeting it is my perception that they were satisfied with our process but . . . questions or concerns remained about our documentation"). The GAO therefore recommended in its Report that written documentation of the Navy's process be provided to the Commission. Meyer Depo. at 38, Defs' App. at 438; GAO Report at 5, Defs' App. at 783. As

explained more fully below, that documentation was in fact provided.

The GAO thus performed the advisory function it was intended to serve under the Act: it brought to the attention of Congress and the Commission the inadequacies it perceived in the Navy's documentation of its base closure recommendations. Congress and the Commission were then able to respond to GAO's report through whatever action they deemed appropriate. Even accepting plaintiffs' interpretation of the GAO's report as expressing an inability to perform its statutory function -- something which the GAO never stated in its report -- the fact remains that Congress and the Commission were free to interpret the report and respond to it as they saw fit. Indeed, in the hearing at which the GAO presented its conclusions to the Commission, Commissioner Ball stated: "I think we ought not necessarily jump to the conclusion that a process that includes provisions for taking information on a confidential basis from field commanders is necessarily flawed if that information is not recorded or presented in a way that can be audited by an external audit agency. . . . I'm not sure that the process was not intended to add a dimension of candor and adversarial scrutiny that is important to the Commission and is important to the public." Yellin Depo., Exh. 5 at 45-47, Defs' App. at 794-96.

C. The Base Closure Commission Did Not Violate The Base Closure Act

Count 2 of the Complaint advances three claims against the Commission. First, plaintiffs contend that the Commission

violated the Act by receiving Navy documents and meeting with Navy officials after the May 24, 1991 regional hearing in Philadelphia. Second, they claim that the Commission failed to ensure that the GAO performed its statutory duties. Third, plaintiffs broadly claim that the Commission illegally approved the Secretary of Defense's recommendation to close the Shipyard despite GAO's assessment of the Navy selection process and certain asserted flaws in the Navy process alleged in Count 1. Each of these claims is either factually unsupported or legally groundless.[18]

1. The Act Does Not Require Commission Staff Meetings To Be Conducted Publicly Nor Does It Prohibit The Commission From Receiving Information After A Particular Regional Hearing

Congress intended the Base Closure Commission to serve as an independent review body, a filter to eliminate the political maneuvering and mistrust between the President and Congress which had characterized earlier and largely unsuccessful base closure efforts. The Commission was not structured as an adjudicatory body with subpoena power or with formal trial-type procedures. To reach its recommendations to the President, the Commission, consistent with its statutory charge, obtained its information

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[18] Plaintiffs also assert that the Commission exceeded its statutory authority by considering privately-owned naval shipyards in its analysis. In their Amended Complaint, plaintiffs cite no provision of the Act they contend has been violated, and for good reason. The Act nowhere prohibits the Commission from considering the existence, capacity, availability or location of privately-owned shipyards in making its recommendations for shipyard closures.

through public hearings, from the military services, and by operation of its policy of openness, through which the public and its political representatives were invited to view all the Commission's unclassified information and to rebut it in face-to-face meetings, written correspondence or phone calls, until the Commission's final deliberations. The Commission's staff obtained, organized and analyzed the multitude of data obtained through this process and provided its analysis to the Commissioners, who then made base closure recommendations to the President.

The Act's provisions on public hearings simply require that each meeting of the Commission, other than those in which classified information is discussed, be open to the public, § 2903(e)(2)(A), and that the Commission conduct public hearings on the Secretary of Defense's recommendations after receiving them on April 15, 1991. Section 2903(d). In accordance with these provisions, each meeting of the seven-person Commission, other than those in which classified information was presented or discussed, was completely open to the public. See Courter Depo. at 146-47, Defs' App. at 117-18. In fact, many of these meetings were shown on C-SPAN.

In addition, between April 15 and June 30, 1991, the day before the Commission presented its recommendations to the President, the Commission conducted twenty-eight public hearings in Washington, D.C. and at regional sites, to obtain information and opinions from citizens, their elected representatives, the

military, the GAO and countless other persons and organizations. See Commission Report at Appendix G, Defs' App. at 918-19. Plaintiffs can hardly contend that the Commission's punishing schedule of conducting public hearings on the average of every three days somehow violated the Act.

Rather, the plaintiffs complain that the Commission, or its staff, obtained information from the Navy and met with Navy officials after the May 24, 1991 regional hearing in Philadelphia. While true, individual Commissioners and/or staff also met with and received information from the plaintiffs, and citizens and organizations in the Philadelphia area until the Commission's final deliberations. Courter Depo. at 29-30, 36-38, Defs' App. at 59-60, 62-64; Behrmann Depo. at 13-14, Defs' App. at 4-5.[19]

There is simply no requirement in the Act that the Commission discontinue its efforts to obtain, or refuse to

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[19] Surely plaintiffs do not mean to suggest that, when individual Commissioners and staff members met with the congressional plaintiffs and their staffs after May 24 to receive additional information, analysis and argument, the Commission violated the Act.

Members of the Commission staff met with members of the Navy's Base Structure Committee and staff on May 20, 22, 24 and 29. See, e.g., Hirsch Depo. at 20, Defs' App. at 258. The Act did not, of course, require meetings of Commission staff to be open to the public, cf. National Anti-Hunger Coalition v. Executive Committee of the President Private Sector Survey on Cost Control, 557 F. Supp. 524, 529 (D.D.C.) (task force or staff to committee are not subject to open meeting requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2, § 10), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). Nonetheless, the Commission's Chairman determined that Members of Congress or their staffs could attend the meetings if they provided a written request to do so. None did. Courter Depo. at 86-87, Defs' App. at 75-76.

receive, information from any military service, or from any citizen, or their elected representatives, after any particular regional hearing. Under the constricted timetable established by Congress, the Commission received the Secretary of Defense's recommendations on April 15 and was required to report to the President on July 1, 1991, a mere ten weeks later. The Commission's first regional hearing took place in San Francisco on May 6, 1991. Commission Report, Appendix G, Defs' App. at 918-19. Congress cannot possibly have intended for the Commission's information gathering efforts suddenly to cease only three weeks into their work simply because it conducted a regional hearing. Nor could Congress have intended the Commission to call a regional hearing every time an additional fact or argument relating to a local military installation was presented to the Commission.

Instead, apart from requiring that the Commission hold some public hearings and that the Commission's meetings be public -- requirements which have indisputably been satisfied -- Congress gave the Commission wide discretion in structuring its information gathering and analysis efforts. With the exception of classified information, the Commission's efforts were remarkably open. Until the final weekend of deliberations, the Commission's files, which contained information from the Navy as well as from the plaintiffs, were open for public inspection and copying. Courter Depo. at 66, 78 and 114, Defs' App. at 69, 73, 97; Behrmann Depo. at 15-16, Defs' App. at 6-7.

Plaintiffs suggest that they could not comment on material received by the Commission from the Navy after May 24 at the regional hearing in Philadelphia. This is inaccurate, but, even if true, would not have violated the statute. The regional hearing was not the only opportunity plaintiffs had to offer the Commission their views. See Courter Depo. at 29-30, 223-24, Defs' App. at 59-60, 148-49. The plaintiffs could, and did, review and copy unclassified documents in the Commission's files, received from the Navy or any other source, at any time, whether before or after May 24, 1991. Behrmann Depo. at 14-15, Defs' App. at 5-6. Indeed, plaintiffs took advantage of the opportunity to comment on these materials and offer responsive information to individual Commissioners and commission staff after May 24 and until the Commission's final deliberations. See Behrmann Depo. at 16, Defs' App. at 7; Courter Depo. at 160, Defs' App. at 130. Any suggestion that plaintiffs were somehow unable to rebut or supplement information provided by the Navy, or any other source, after May 24 is totally disingenuous.

In short, the Commission and its staff did obtain additional information from the Navy, as well as from plaintiffs, after the May 24, 1991 regional hearing in Philadelphia. The Commission would have been derelict in its responsibility to provide the best possible recommendations to the President if it refused to accept helpful information from any source at any time. The Commission's tireless efforts to gather relevant data violated no provision of the Act.

2. Although the General Accounting Office Satisfied Its Statutory Responsibilities, The Commission Had No Statutory Obligation To Ensure That It Did So

Plaintiffs assert that the Commission failed to ensure that the GAO assisted it in its review and analysis of the Secretary's recommendations in violation of § 2903(d)(5)(A) and failed to ensure that the GAO submitted its report to the Commission and Congress in violation of § 2903(d)(5)(B). Plaintiffs misread the Act's requirements and mischaracterize the factual record.

Section § 2903(d)(5)(A) provides that the GAO shall assist the Commission in the Commission's review and analysis of the Secretary's recommendations "to the extent requested" by the Commission. Although the Commission was not required to seek GAO's help, it did so. Courter Depo. at 212, Defs' App. at 143. Upon request, the GAO provided four full-time and one-part time employees to assist the Commission. Behrmann Depo. at 22, Defs' App. at 11. In addition, the GAO complied with the Commission's request that GAO employees in regional GAO offices conduct on-site data verifications in twenty-nine naval facilities, including the Shipyard. Commission Report at 4-2, Defs' App. at 839; Hirsch Depo. at 16, 19, Defs' App. at 256, 257; Yellin Depo. at 229, Defs' App. at 604. The Commission exercised the option in § 2903(d)(5)(A) to call on the GAO for help and the GAO provided this assistance. The Commission therefore did not violate § 2903(d)(5)(A).

Section § 2903(d)(5)(B) requires the GAO to provide to the Congress and the Commission a report containing a detailed

analysis of the Secretary's recommendations and selection process by May 15, 1991. The provision does not require the Commission to assist GAO in this effort nor to ensure that GAO completes the report which is to be submitted to the Commission itself. In any event, the GAO did prepare such a report. See Yellin Depo. Exh. 2, Defs' App. at 782. Plaintiffs appear to suggest that the Commission has a statutory duty to ensure that the military services fully cooperate with GAO's efforts to prepare its report. The statute, however, has no such requirement. The Commission therefore did not violate § 2903(d)(5)(B).

3. The Commission Properly Determined That The Secretary's Recommendation To Close The Philadelphia Naval Shipyard Did Not Substantially Deviate From The Selection Criteria And Force Structure Plan

Finally, plaintiffs sweepingly allege that the Commission violated the Act by accepting the Secretary's recommendation to close the Shipyard despite the GAO's criticism of the Navy process for making closure recommendations and the Navy's alleged failure to follow statutory requirements for making these recommendations. Above, we demonstrated that the Navy's selection process not only complied with the Act, but that its recommendation to close the Shipyard was fully justified. Plaintiffs' attempt to bootstrap their claims against the Navy onto challenges to the Commission's recommendations should be rejected on that ground alone. Nonetheless, plaintiffs' claims against the Commission's work are meritless.

The Commission's statutory charge was to determine whether each of the Secretary's recommendations "substantially deviated" from the force structure plan and selection criteria. § 2903(d)(2)(B).[20] The Commission's efforts to review and analyze the Secretary's recommendations to close naval installations in general and the Shipyard in particular were thorough, reasonable and in full compliance with the Act.

Like the GAO, the Commission believed that it did not initially have sufficient information and documentation from the Navy to analyze the process by which the Navy's BSC arrived at its recommendations. Courter Depo. at 42-44, Defs' App. at 65-67. Plaintiffs will no doubt contend that these initial difficulties suffice to invalidate the Navy's recommendations, but, in doing so, plaintiffs ask this Court simply to ignore the Commission's work.

The GAO report had recommended that the Navy provide documentation relating to its selection process directly to the Commission. Yellin Depo. Exh. 2, Defs' App. at 783-84. Consequently, from May 20 to May 29, Commission staff met with

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[20] Plaintiffs have cited the APA as the basis for review. Even if plaintiffs' claims were reviewable, the APA would require plaintiffs to show that the Commission's recommendations were arbitrary and capricious. 5 U.S.C. § 706(2)(A). In other words, to invalidate the Commission's recommendations, the Court would have to find that the Commission's "no substantial deviation" determination was arbitrary and capricious, an exceedingly narrow window for possible judicial consideration. Indeed, the APA would also limit such review to the administrative record before the agency, which is in part the reason why defendants objected to plaintiffs' wide-ranging discovery. Camp v. Pitts, 411 U.S. 138, 142 (1973).

the BSC and Navy staff in order to better understand the Navy selection process. Behrmann Depo. at 13, 19, Defs' App. at 4, 8; Hirsch Depo. at 37-38, Defs' App. at 267-68. The Commission staff asked the Navy to prepare a "crosswalk" between the criteria it employed in its VCNO study and the criteria required by the Act. Behrmann Depo. at 19, Defs' App. at 8; Hirsch Depo. at 24-25, Defs' App. at 260-61. The Commission also asked the Navy to detail the reasons for any differences between the VCNO study rating and the BSC's recommendations. Yellin Depo. at 143-46, Defs' App. at 568-71. Commission staff met with Navy officials, including employees who dealt with naval shipyards, to obtain additional factual information on naval facilities or explanation of materials already received. Yellin Depo. at 102, Defs' App. at 556.

The Navy fully cooperated with the Commission's efforts to obtain information. Courter Depo. at 149, 157 and Exh. 2 at 11, Defs' App. at 120, 127 and 935. After reviewing and analyzing reams of documents, the Commission and its staff were fully able to understand and evaluate the process by which the Navy selected bases for closure, including the Shipyard. Courter Depo. at 44, 65, 73, 95, 98, 128, 151-52, 155, 156, Defs' App. at 67, 70, 81, 84, 107, 121-22, 125, 126. The Commission concluded that the data upon which the Navy relied was sufficiently accurate to render reasonable closure recommendations. Courter Depo. at 132, 157 and Exh. 2 at 11, Defs' App. at 109, 127 and 935. The Commission also found that the Navy's selection process

was sound and was properly applied. Courter Depo. at 100-01, 117, 132, 140, 226, Defs' App. at 86-87, 99, 109, 114, 150.[21]

With regard to naval shipyards in particular, the Commission's independent analysis revealed that excess capacity existed in the naval shipyard category. Courter Depo. at 73-74, 241, Defs' App. at 70-71, 161; Hirsch Depo. at 103, Defs' App. at 270. The Commission also determined that future workload requirements would not permit the closure of one of the six nuclear-capable naval shipyards. Commission Report at 5-28, Defs' App. at 867. The Commission found that five of the Secretary's recommendations on naval installations substantially deviated from the selection criteria and force-structure plan. See Commission Report at 5-18 to 5-29, Defs' App. at 857-68. But its considered judgment on the Shipyard was that the Secretary of Defense's closure recommendation did not substantially deviate from the selection criteria and force structure plan. Commission Report at 5-28, Defs' App. at 861.[22] The Commission therefore recommended that the Shipyard be closed and that it be preserved for emergent use. Id. It also recommended that the propeller

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[21] The Commission also concluded that the Navy's recommendations were not subjective, Courter Depo. at 137-38, 140, Defs' App. at 111-12, 114; and that the Navy had treated all bases equally, without regard to whether they had been previously recommended for closure. Courter Depo. at 229, Defs' App. at 153.

[22] The Commission considered recommending that the Shipyard be downsized to 1,200 employees, but found that option to be too costly. Id.

facility, Naval Inactive Ships Maintenance Facility, and Naval Ship System Engineering Station remain in active status.

In sum, the Commission conducted an exhaustive analysis of the Secretary's recommendation to close the Shipyard. It received and studied vast quantities of information from the Navy, GAO, the plaintiffs, the Philadelphia community and a host of other sources. Plaintiffs were allowed to review and submit information until the Commission's final deliberations. The Commission properly determined that the recommendation to close the Shipyard did not substantially deviate from the selection criteria and the force structure plan. Nothing in the process by which the Commission reached this conclusion violated the Act or can possibly be regarded as arbitrary and capricious.

III. THE PUBLIC INTEREST REQUIRES DENIAL OF THE PRELIMINARY INJUNCTION

Finally, "in cases such as this, involving important public issues which implicate significant policy considerations," the public interest must be given particular weight. Punnett v. Carter, 621 F.2d 578, 587 (3d Cir. 1980); see also Cerro, 620 F.2d at 972; Continental, 614 F.2d at 358; Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 (2d Cir. 1975) ("courts of equity may go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved"), cert. denied, 426 U.S. 911 (1976); Oburn v. Shapp, 521 F.2d 142, 151-52 (3d Cir. 1970). In particular, plaintiffs seeking to impose a preliminary injunction that "may seriously embarrass the accomplishment of important

governmental ends" must make an especially strong showing that an injunction is essential to prevent imminent irreparable harm. Hurley, 285 U.S. at 104 n.3.

Like all of the other factors, the public interest here requires denial of the preliminary injunction. Both the President and Congress have already determined where that interest lies. The President's approval of the Commission's recommendations and the House of Representative's lopsided vote to permit the Secretary of Defense to implement them both clearly resolve that the closure of these bases is in the public interest. As defendants have argued in the pending motion to dismiss, it would undermine the policies of the Act and rewrite the statute to permit these plaintiffs to overturn all of the decisions concerning Navy bases after the elected branches have considered and rejected their allegations.

The plaintiffs' claim that the public interest favors an injunction rests entirely on the general and abstract notion that compliance with the law benefits the public. See Memorandum of Law In Support Of Plaintiffs' Motion For A Preliminary Injunction at 11-12. That argument adds nothing to the analysis, however, because plaintiffs in any case alleging a violation of law could make the same point. As the Third Circuit has explained, determination of the public interest must rest on something more specific than "vindication of an abstract principle:"

> In all of [our] cases, the effect on the public interest considered by this Court was not that justice be done, but that specific acts presumptively benefiting the public not be halted until the merits could

be reached and a determination made as to what justice required.

Continental, 614 F.2d at 358. Here, the presumption must be that the closure of unneeded military bases benefits the public, especially when the President and Congress have specifically decided that issue. Plaintiffs' proposed injunction is contrary to the public interest and must be denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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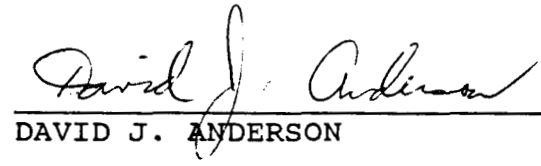

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CERTIFICATE OF SERVICE

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