DCN 587

NOV 14 91

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1913

SEN. ARLEN SPECTER, et al.,

Appellants,

v.

H. LAWRENCE GARRETT, III,
Secretary of the Navy, et al.,

Appellees.

APPEAL FROM THE ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA DATED NOVEMBER 1, 1991
AT CIVIL ACTION NO. 91-4322

BRIEF FOR APPELLANTS

Bruce W. Kauffman
David H. Pittinsky
Camille Wolf Spinello
Patrick T. Davish
Mark A. Nation
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094

Attorneys for Appellants

OF COUNSEL:

Senator Arlen Specter
Green Federal Bldg., Room 9400
Sixth and Arch Streets
Philadelphia, PA 19106

Ernest D. Preate, Jr.
Attorney General for Pennsylvania
Louis J. Rovelli,
Executive Deputy Attorney General
for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1100

Attorneys for the Commonwealth of Pennsylvania
and Ernest D. Preate, Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
The State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
(609) 633-1971

Attorneys for the State of New Jersey,
Governor James J. Florio and Robert J. Del Tufo

Charisse Lillie
Solicitor for the City of
Philadelphia
Room 1520
Municipal Services Building
Philadelphia, PA 19102-1692

Attorneys for the City of Philadelphia

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 6

STATEMENT OF RELATED CASES AND PROCEEDINGS 9

STATEMENT OF THE STANDARD OF REVIEW 9

ARGUMENT 9

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BASE CLOSURE ACT PRECLUDES JUDICIAL REVIEW 9

A. Appellees' Bold Violations of the Procedures Mandated By the Base Closure Act Are Subject to Judicial Review 9

B. The Base Closure Act Does Not Preclude Judicial Review of Appellees' Violations of the Procedures Mandated By the Act or Appellees' Violations of Their Own Procedures 15

C. Even if the Legislative History of the Base Closure Act Were Relevant, It Does Not Support A Congressional Intent to Preclude All Judicial Review of Appellees' Procedural Violations 20

D. The District Court Erred in Concluding That There are Other Indicia of Intent to Preclude Judicial Review 26

E. The United States Senate Has Definitively Confirmed that Judicial Review is Appropriate 31

II. THE DISTRICT COURT ERRED IN HOLDING THAT JUDICIAL REVIEW IS FORECLOSED BY THE POLITICAL QUESTION DOCTRINE 32

III. THE DISTRICT COURT ERRED IN IGNORING AND DISMISSING APPELLANTS' CONSTITUTIONAL CLAIMS 40

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 9

American Friends Service Committee v. Webster,
720 F.2d 29 (D.C. Cir. 1983) 39

Andersen-Myers Co., Inc. v. Roach,
660 F. Supp. 106 (D. Kan. 1987) 40

Armstrong v. Bush,
924 F.2d 282 (D.C. Cir. 1991) 38, 39

Baker v. Carr,
369 U.S. 186 (1962) 32

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 10, 26

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1987) 10, 11, 19, 20

CEC Energy Co., Inc. v. Public Service Commission of the Virgin Islands,
891 F.2d 1107 (3d Cir. 1989) 25

Chevron v. NRDC,
467 U.S. 837 (1984) 15

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 401 (1971) 12

Common Cause v. Department of Energy,
702 F.2d 245 (D.C. Cir. 1983) 23

County of Oneida v. Oneida Indian Nation of New York State,
470 U.S. 226 (1985) 33

DKT Memorial Fund, Ltd. v. Agency for International Development,
810 F.2d 1236 (D.C. Cir. 1987) 34

Department of Navy v. Federal Labor Relations Authority,
840 F.2d 1131 (3d Cir. 1988), cert. denied, 488
U.S. 881 (1988) 14

Doe v. Casey,
796 F.2d 1508 (D.C. Cir. 1986) 12

Dunlop v. Bachowski,
421 U.S. 560 (1975) 10

Duva v. World Boxing Association,
548 F. Supp. 710 (D. N.J. 1982) 40

East Oakland-Fruitvale Planning Council v. Rumsfeld,
471 F.2d 524 (9th Cir. 1972) 16

Electricities of North Carolina, Inc. v. Southeastern Power Administration,
774 F.2d 1262 (4th Cir. 1985) 15

First Federal Savings and Loan Association of Lincoln v. Casari,
667 F.2d 734 (8th Cir. 1982) 16, 17, 18

Flynn v. Schultz,
748 F.2d 1186 (7th Cir. 1984) 34

Graham v. Caston,
568 F.2d 1092 (5th Cir. 1978) 16, 17, 18

Heckler v. Chaney,
470 U.S. 821 (1984) 12, 15

Hixon v. Durbin,
560 F. Supp. 654 (E.D. Pa. 1983) 40

Hollingsworth v. Harris,
608 F.2d 1026 (5th Cir. 1979) 16

Hopson v. Kreps,
622 F.2d 1375 (9th Cir. 1980) 34

International Association of Machinists and Aerospace Workers v.

Secretary of the Navy,
915 F.2d 727 (D.C. Cir. 1990) 23

Japan Whaling Association v. American Cetacean Society,
478 U.S. 221 (1986) 32, 33

Johnson v. Robison,
415 U.S. 361 (1974) 41

Kirby v. United States Department of Housing & Urban Development,
675 F.2d 60 (3d Cir. 1982) 10, 19

L. & H. Sanitation, Inc. v. Lake City Sanitation, Inc.,
585 F. Supp. 120 (E.D. Ark. 1984) 40

Marbury v. Madison,
1 Cranch 136, 2 L. Ed. 60 (1803) 10

Markowitz v. Northeast Land Company,
906 F.2d 100 (3d Cir. 1990) 9

McNary v. Haitian Refugee Center,
111 S. Ct. 888 (1991) 19

National Federation of Federal Employees v. United States,
905 F.2d 400 (D.C.Cir. 1990) 29, 30

Natural Resources Defense Council, Inc. v. S.E.C.,
606 F.2d 1031 (D.C. Cir. 1979) 13, 14

Natural Resources Defense Council v. Environmental Protection Agency,
790 F.2d 289 (3d Cir. 1986) 13

Ness Investment Corp. v. United States Department of Agriculture,
512 F.2d 706 (9th Cir. 1975) 16

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 18

Peduto v. City of North Wildwood,
878 F.2d 725 (3d Cir. 1989) 9

Population Institute v. McPherson,
797 F.2d 1062 (D.C. Cir. 1986) 34, 37

Ransom v. Marrazzo,
848 F.2d 398 (3d Cir. 1988) 9

Sneaker Circus, Inc. v. Carter,
566 F.2d 396 (2nd Cir. 1977) 34

Society Hill Civic Association v. Harris,
632 F.2d 1045 (3d Cir. 1980) 9

Solar Turbines Incorporated v. Seif,
879 F.2d 1073 (3d Cir. 1989) 25

State of Florida, Department of Business Regulation v. United States Department of Interior,
768 F.2d 1248 (11th Cir. 1985) 12

Teleprompter of Erie, Inc. v. City of Erie,
537 F. Supp. 6 (W.D. Pa. 1981) 40

Thompson v. Clark,
741 F.2d 401 (D.C. Cir. 1984) 18

Three Rivers Cablevision v. City of Pittsburgh,
502 F. Supp. 1118 (W.D. Pa. 1980) 40

Traynor v. Turnage,
485 U.S. 535 (1988) 9

United States v. Decker,
600 F.2d 733 (9th Cir. 1979) 34

United States v. Munoz-Flores,
110 S. Ct. 1964 (1990) 33

Vogelaar v. United States,
665 F. Supp. 1295 (E.D. Mich. 1987) 38

Webster v. Doe,
486 U.S. 592 (1988) 41

Weyerhaeuser Company v. Costle,
590 F.2d 1011 (D.C. Cir. 1978) 14

Winsett v. McGinnes,
617 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1093 (1980) 40

York Bank & Trust Company v. Federal Savings & Loan Insurance Corporation,
851 F.2d 637 (3d Cir. 1988) 9

STATUTES

1988 Defense Base Closure and Realignment Act, Pub. L. No. 100-526 8

1900 Defense Base Closure and Realignment Act, Pub. L. No. 101-510,
Title 10 U.S.C. §2901, et seq. . . . . passim

28 U.S.C. §1291 1

28 U.S.C. §1331 1

28 U.S.C. §1337 1

28 U.S.C. §1341 1

28 U.S.C. §1346 1

Administrative Procedures Act (5 U.S.C. §551 et seq.) . . . . . passim

Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202 1

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b)(6) 7

H. R. Conference Report No. 101-923, 101st Cong., 2d Sess. 705, reprinted in
1990 U.S. Code Cong. & Admin. News 3110, 3258 . . . . . 22, 24

STATEMENT OF JURISDICTION

Federal subject matter jurisdiction is based on 28 U.S.C. §§1331, 1337, 1341 and 1346, and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, because the Verified Amended Complaint alleged violations of (a) the Constitution, (b) the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990) (the "Base Closure Act"),[1] and (c) the Administrative Procedure Act, 5 U.S.C. §§701 et seq. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 because the order on appeal is a final order of the United States District Court for the Eastern District of Pennsylvania.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred as a matter of law in concluding that the Base Closure Act, which is totally silent on the subject, implicitly precludes judicial review of the procedural integrity of agency action?

2. Whether the District Court erred as a matter of law in concluding that the political question doctrine forecloses judicial review of the procedural integrity of agency action under the Base Closure Act?

3. Whether the District Court erred as a matter of law in dismissing appellants' fundamental constitutional claims without even addressing those claims in its opinion?

PRELIMINARY STATEMENT

This appeal, involving the slated closure of the Philadelphia Naval Shipyard ("Shipyard"), the largest employer in the Philadelphia area, is a matter of great national import. The historic role of the independent federal judiciary as the protector of procedural fairness has been abdicated

---

[1] A true and correct copy of the Defense Base Closure and Realignment Act of 1990 is attached hereto as Exhibit 1.

by the erroneous decision of the District Court totally immunizing appellees' disregard for statutory procedural safeguards from any review by any Court.[2] An unprecedented bipartisan coalition of four United States Senators, six members of the House of Representatives, the states of Pennsylvania, New Jersey and Delaware and their Governors, the Attorneys General of New Jersey and Pennsylvania, the City of Philadelphia, and three Shipyard labor unions and their members ("appellants") brought suit in the District Court to challenge the procedural integrity of the base closure process under the 1990 Base Closure and Realignment Act ("Base Closure Act" or "Act"). Appellants do not challenge the substantive merits of discretionary administrative decision making.

The Base Closure Act expressly provides that its "purpose" is to provide a "fair process." The legislative history of the Act reveals unmistakably that its primary purpose was to correct the procedural inequities of the predecessor base closure act. Accordingly, the Act expressly mandates numerous procedural safeguards designed to ensure a fair and procedurally scrupulous base closing process and contains no language precluding judicial review.

For the purposes of considering appellees' Motion to Dismiss the Verified Amended Complaint, appellants' factual allegations must be accepted as true. Nevertheless, the District Court, in a summary seven page opinion, concluded that it lacked jurisdiction even to consider flagrant violations of Congressionally mandated procedural safeguards because (1) the Base Closure Act implicitly precluded any judicial review and (2) the political question doctrine

---

[2] Appellees are Secretary of the Navy H. Lawrence Garrett, III, Secretary of Defense Richard Cheney, the Defense Base Closure and Realignment Commission (the "Commission") and its Commissioners James A. Courter, William L. Ball, III, Howard H. Callaway, Gen. Duane H. Cassidy, USAF (Ret.), Arthur Levitt Jr., James C. Smith, II, P.E. and Robert D. Stuart, Jr.

insulates appellees' admitted procedural violations from any judicial scrutiny. The law is well settled that a federal court has jurisdiction to review claims of procedural irregularities even in the presence of statutory language precluding judicial review, which is strikingly absent from the Base Closure Act. Moreover, the Court failed even to address appellants' constitutional claim in Count III of the Verified Amended Complaint that appellees' conduct constituted government action which has resulted in the deprivation of the appellant Shipyard workers' and unions' property rights without due process of law.

Though appellants repeatedly emphasized in their briefing on the motion to dismiss and at oral argument that their challenge to appellees' actions was procedural, and made no effort to question or second guess any military or strategic judgments, the District Court did not refer even once in its opinion to the critical and well recognized distinction between procedural and substantive challenges to agency action. This failure plainly constitutes an error of law requiring reversal.

The District Court's alternate holding, that the political question doctrine forecloses judicial review over the appellees' bold violations of the procedural mandates of the Base Closure Act, is likewise erroneous. On this issue, the District Court once again inexplicably failed even to mention the critical point made repeatedly by appellants - that their challenge is to the procedural integrity of the base closure process under the procedurally oriented Base Closure Act. It is axiomatic that the political question doctrine forecloses only challenges to substantive policy choices and value judgments made by coordinate branches. Though the District Court's opinion is silent on this issue, the fact is that the political question doctrine simply does not foreclose procedural challenges to an agency's violation of a statutory command.

Appellees have repeatedly sought to obfuscate the issue presented here, calling it a challenge to Congress and the President. That simply is not true. Congress, the President, and the appellants 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 appellants is a scrutiny of appellees' failure to adhere to the procedural safeguards of the Base Closure Act. The fact that the President and Congress had a limited oversight function over appellees' actions does not suffice to constitute a "blank check" to the bureaucracy and remove the procedural integrity of such actions from judicial scrutiny.[3]

Moreover, the United States Senate has made clear that it undertook no procedural review of appellees' actions. See infra at 31-32. It was not the duty of Congress or the President to review the procedural integrity of the base closure process or whether the Department of Defense ("DoD"), Navy and Commission complied with the procedural mandates of the Act. As the Senate recognized, review over such matters is manifestly the province of the federal courts.

Absent judicial scrutiny, the "fair process" mandated by the Act could be ignored, as it was here, by an unrestrained beaucracy. Nothing in the Act, its legislative history or the political question doctrine allows the DoD, Navy and Commission -- charged with carrying out the express procedural safeguards mandated by the 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.

---

[3] Unless and until appellees recommended closure, neither the President nor Congress had anything to act on. Thus, the Shipyard would not have been slated for closure but for the illegal conduct of appellees.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania (Buckwalter, J.) entered on November 1, 1991, dismissing with prejudice the Verified Amended Complaint filed by appellants U.S. Sen. Arlen Specter, U.S. Sen. Harris Wofford, U.S. Sen. Bill Bradley, U.S. Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Governor James J. Florio, the State of New Jersey, New Jersey Attorney General Robert J. Del Tufo, Governor Michael N. Castle, the State of Delaware, U.S. Rep. Curt Weldon, U.S. Rep. Thomas Foglietta, U.S. Rep. Robert E. Andrews, U.S. Rep. R. Lawrence Coughlin, U.S. Rep. Peter H. Kostmayer, U.S. Rep. Robert A. Borski, the City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil, Metal Trades Council, Local 687 Machinists, Ronald Warrington, the Planners Estimators Progressman & Schedulers Union, Local No. 2.

Appellants filed their original Complaint on July 8, 1991 and a Verified Amended Complaint on July 19, 1991. Also on July 19, appellants filed motions for preliminary injunction and expedited discovery. The motion for preliminary injunction was necessitated by the actions of the Navy designed to ensure that the closure of the Shipyard was rendered a fait accompli before the District Court could hear the merits of the case. For example, the Verified Amended Complaint alleges that the Navy had removed several vessels from the Shipyard's workload, failed to award work for which the Shipyard was the lowest bidder, and attempted to redirect the scheduled USS KENNEDY to another shipyard. [App.53-56].

On August 16, 1991, in the midst of intensive discovery conducted by appellants, appellees belatedly filed a motion to dismiss the Verified Amended Complaint and a motion to stay discovery. The District Court declined to stay discovery, and appellants took 17 depositions. After a day long hearing on October 25, 1991, the Court issued its Order and opinion dismissing the Verified Amended Complaint with prejudice on November 1, 1991. Appellants filed their Notice of Appeal on November 4, 1991.

STATEMENT OF THE FACTS

Appellants challenge the procedural integrity of the base closure process which resulted in the recommendation to close the most efficient and cost-effective Naval shipyard in the United States.[4] Appellants do not challenge the substantive merits of administrative decision making. The genesis, structure and objectives of the 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 the timely closure and realignment of military installations." 10 U.S.C. §2901(b)(emphasis supplied).[5]

To this end, the Base Closure Act provides numerous procedural safeguards which were absent from predecessor base closure statutes including, inter alia: the requirement that the Commission hold public hearings on the Secretary of Defense's closure recommendations [10

---

[4] 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.

[5] A more complete exposition of the facts underlying this matter is set forth in the Appendix ("App.") at Plaintiffs' Proposed Findings of Fact and Conclusions of Law. [App.83-185].

U.S.C. §2903(d)(1)]; the requirement 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 requirement that the Secretary of Defense consider all military installations "equally without regard to whether or not the installation has been previously considered or proposed for closure or realignment" [10 U.S.C. §2903(c)(3)]; the requirement that the Secretary of Defense transmit to the General Accounting Office ("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 DoD 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 DoD's recommendations and compliance with the Base Closure Act [10 U.S.C. §§ 2903(d)(5)(A) and (B)].

Appellees acknowledge that these procedures were expressly required by the Act and, for the purposes of their motion to dismiss, this Court must accept as true that appellees violated virtually every Congressionally mandated procedural safeguard.[6]

Ironically, the very procedural deficiencies caused by appellees here pervaded prior base closure processes, and indeed provoked enactment of the 1990 Base Closure Act. The procedural

---

[6] The District Court nevertheless concluded that it lacked jurisdiction even to consider the most intentional and flagrant violations of Congressionally mandated procedural safeguards. For purposes of reviewing the District Court's decision to grant the appellees' motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), the allegations in the Verified Amended Complaint must be taken as true.

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. [App. 90-91; 299-300]. 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 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. [App. 91].

Following on the heels of the questionable recommendations of the 1988 base closure ommission, 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. [App. 91-92]. 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.[7] Under these circumstances, it is unthinkable that Congress would have enacted a remedial statute only to have the procedural safeguards mandated therein ignored without any recourse to any Court.

---

[7] The Base Closure Act explicitly provides that its "purpose" is "to provide a fair process ...." 10 U.S.C. §2901(b) (emphasis supplied).

STATEMENT OF RELATED CASES AND PROCEEDINGS

There have been no previous appeals arising out of the same cases or proceedings, and there are no related cases or proceedings currently pending in this Court or any other United States District Court or Court of Appeals.

STATEMENT OF THE STANDARD OF REVIEW

This Court's review of the District Court's dismissal of the Verified Amended Complaint is plenary. Peduto v. City of North Wildwood, 878 F.2d 725, 727 (3d Cir. 1989); York Bank & Trust Company v. Federal Savings & Loan Insurance Corporation, 851 F.2d 637, 638 (3d Cir. 1988). Since appellees' motion sought dismissal under Rule 12(b)(6), this Court "must accept as true the facts alleged in the 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).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BASE CLOSURE ACT PRECLUDES JUDICIAL REVIEW

A. Appellees' 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); 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, and places a "heavy burden" on the party seeking to overcome the presumption. See Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); 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."). This presumption in favor of judicial review "may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent." Traynor, 485 U.S. at 542 (quoting Abbott Laboratories, 387 U.S. at 141).[8]

In Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1987), the Supreme Court elaborated on the history and nature of the strong presumption in favor of judicial review:

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

[8] In its abbreviated opinion, the District Court cited Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984) for the undisputed general proposition that the presumption favoring judicial review "may be overcome by the appropriate showing of congressional intent." Slip Op. at 1 (emphasis supplied). The Supreme Court in Block, however, did not abandon the requirement of a "strong" showing of congressional intent to preclude judicial review, as subsequent pronouncements have made abundantly clear. See, e.g., Traynor, 485 U.S. at 542; Bowen, 475 U.S. at 670-672. Furthermore, while the Supreme Court in Block held that the presumption favoring review may be overcome where congressional intent to preclude review is "fairly discernible in the statutory scheme," the Court also confirmed that that standard is not at variance with the traditional requirement that there be "clear and convincing evidence" of an intent to preclude review. Block, 467 U.S. at 351-352. Indeed, the Court explicitly recognized in Block that "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." 467 U.S. at 351.

certainly consists in the right of every individual to claim the protection of the laws."

* * *

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

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

* * *

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

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

476 U.S. at 670-671 (emphasis supplied).

Section 702 of the APA thus provides with 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.")(emphasis supplied); State of Florida, Dept. of Business Regulation v. United States Dept. of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985).

Appellees conceded in the District Court that the second exception, for agency action "committed to agency discretion by law," has no applicability to the instant matter,[9] and limited their claim of immunity from judicial scrutiny to the first exception, i.e., that the Base Closure Act itself precludes judicial review of their wrongful actions. This was likewise the basis for the District Court's conclusion that judicial review under the APA is precluded. Slip Op. at 1-2. In support of this extreme position, appellees and the District Court relied not on the language of the Act itself, which does not preclude judicial review, but on an excerpt of the legislative history. In fact, the legislative history lends no support to appellees' claim that their intentional

[9] 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." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 401, 410 (1971) (quoting legislative history of the APA). Given the elaborate procedural safeguards established by the Base Closure Act, appellees had little choice but to concede that there is manifestly "law to apply."

disregard of the express procedural requirements of the Base Closure Act is totally unreviewable.[10]

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). As the actions of the appellees 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.

---

[10] See infra at 20-26.

Environmental Protection Agency, 790 F.2d 289, 297 (3d Cir. 1986) (emphasis supplied). As this Court emphasized in Natural Resources Defense Council:

> [W]hile reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, . . . they must not 'rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'

790 F.2d at 297 (emphasis supplied) (quoting Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983)).

Thus, the District Court had the duty to invalidate agency actions which, like those of appellees 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 likewise emphasized the paramount 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.

Weyerhaeuser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis supplied); 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.").

This Circuit, consistent with the holding of the Supreme Court, has also recognized that in reviewing agency action, "[s]tatutory interpretation is one of the traditional functions of courts." Natural Resources Defense Council, 790 F.2d at 297. Thus, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron v. NRDC, 467 U.S. 837, 843 n. 9 (1984). In the instant matter, appellants seek review of appellees' erroneous and cynical construction of the Base Closure Act -- which the District Court implicitly adopted -- that DoD, Navy and Commission literally had a "blank check" to disregard the procedural safeguards mandated by the Act. See infra at 34, n.19. Such an arrogant abuse of power cries out for judicial review, and falls squarely within the province of the federal judiciary's historic role as the exponent of procedural fairness.

B. The Base Closure Act Does Not Preclude Judicial Review of Appellees' Violations of the Procedures Mandated By the Act or Appellees' Violations of Their Own Procedures

The Supreme Court has made clear 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, appellees have not only ignored the procedures expressly required by the Base Closure Act, but have even failed to follow their own promulgated procedures.

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 same principle, 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. Failing even to cite Graham, Hollingsworth or Casari, the District Court totally ignored the legislative history revealing that the 1990 Act was designed specifically to rectify the procedural shortcomings of the previous base closure act [see supra at 8] and, that the "purpose" of the Act, as expressly stated by Congress, was "to provide a fair process." 10 U.S.C.

§2901(b)(emphasis supplied). Relying instead on a simplistic interpretation of a selected piece of the legislative history, the Court held that judicial review of procedural and statutory violations had been precluded by the Act.

As Graham, Hollingsworth and Casari demonstrate, even express statutory provisions precluding review cannot bar judicial scrutiny 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).[11] A fortiori, a statute like the Base Closure Act, which was adopted for the "purpose" of providing a "fair process" and which does not expressly preclude review, cannot bar appellants' challenge of the procedural integrity of the base closing process.

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," (5 U.S.C. §701(a)(2)), this Circuit has explicitly adopted the principle applied in Graham, Hollingsworth and Casari. Thus, this Court

---

[11] In the District Court, appellees cited Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984) for the proposition that Congress has the authority to preclude judicial review of procedural claims if it so chooses. In Thompson, the statute specifically provided that "the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review." 741 F.2d at 405. It was only as a result of this precise language specifically precluding judicial review of the agency's compliance with the statute's procedures that the Thompson Court concluded that judicial review was barred. Obviously this holding, even if correct, is irrelevant to appellants' challenge herein, as the Base Closure Act is not only devoid of specific language precluding judicial review of procedural violations, but the Act does not expressly preclude any type of review, substantive or procedural. Furthermore, though the issue was neither raised nor briefed in Thompson, there is persuasive reason to believe this holding is incorrect, as the absolute withholding of procedural review would be unconstitutional. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n. 23 (1982) (When Congress assigns "public rights" matters to administrative agencies, "it has generally provided, and we have suggested that it may be required to provide, for Article III judicial review.").

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). There is absolutely no reason to confine this reasoning to the APA exception for agency action "committed to agency discretion", as the other exception likewise circumscribes judicial review only "to the extent that...statutes preclude judicial review...." 5.U.S.C. §701(a)(2) (emphasis supplied).

The Supreme Court has also recognized the analogous principle that a statute precluding judicial review of substantive agency determinations does not preclude review of the method by which such determinations are made. See Bowen, 476 U.S. at 674-678; McNary v. Haitian Refugee Center, 111 S. Ct. 888 (1991). For example, Bowen involved a challenge by an organization of physicians and several individual doctors to the validity of a regulation authorizing the payment of benefits under Part B of the Medicare program in different amounts for similar physicians' services. The physicians challenged the regulation on the grounds that it contravened several provisions of the statute governing the Medicare program.

The sole issue before the Supreme Court was whether the physicians' challenge to the regulation was precluded by the Medicare statute, which expressly precludes judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. 476 U.S. at 669. A unanimous Supreme Court concluded that despite the statute's express preclusion, judicial review was nevertheless available to challenge the method by which determinations of benefits were made, as distinguished from the determinations themselves. 476 U.S. at 675.

Thus, the Supreme Court has recognized the core principle applied in Graham, Hollingsworth and Casari, namely that though a statute may expressly preclude judicial review of agency determinations, that preclusion is limited narrowly to substantive determinations, and does not extend to discrete challenges to procedural integrity, correctness of methodology, or any other collateral matter not implicating the substantive expertise or discretion of the agency. As already shown, this principle applies with special force to the instant matter because, unlike the statutes involved in all of these cases, the Base Closure Act does not by its terms preclude judicial review.

Accordingly, the District Court's finding totally precluding judicial review of appellees' admitted procedural violations of the Base Closure Act and the Constitution is erroneous and must be reversed.

C. Even if the Legislative History of the Base Closure Act Were Relevant, It Does Not Support A Congressional Intent to Preclude All Judicial Review of Appellees' Procedural Violations

Given the facts that the very purpose of the Base Closure Act was to provide for a fair process and that no provision of the Base Closure Act expressly precludes judicial review, the

District Court amazingly relied simply on an excerpt from a Conference Report in the legislative history to overcome the strong presumption in favor of judicial review.[12] Even if the legislative history of an Act specifically adopted to provide a fair process were relevant to determining Congressional intent to preclude judicial review of procedural flaws and statutory violations by the bureaucracy, the legislative history here simply does not reveal any such intent.

Nothing in the Conference Report or any other part of the legislative history of the Base Closure Act even remotely suggests that its procedural safeguards might be disregarded or that the DoD, Navy and Commission -- charged with carrying out the express procedural mandates with fairness -- could with impunity make a mockery of the process. Contrary to the District Court's holding, the portion of the Conference Report excerpted in the Court's opinion does not even suggest, let alone compel, this anomalous conclusion. At best, the excerpt in question only exempts the substantive administrative actions undertaken by certain of appellees from the rulemaking and adjudication provisions of the APA, but clearly does not insulate appellees 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 the District Court premised its holding. The APA essentially has two functions: Chapter 5 prescribes specific procedures for a federal agency 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

---

[12] The relevant provision of the Conference Report is set forth at page 24, infra.

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 to 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 broad right to judicial review:

> 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, inter alia, "without observance of procedure required by law" or "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. §706(2). See, e.g., Common Cause v. Department of Energy, 702 F.2d 245, 249 n. 30 (D.C. Cir. 1983) ("[T]he fact that the 10-year plan is not subject to notice-and-comment rulemaking requirements does not sufficiently indicate a congressional intent to bar judicial review altogether.")

One important 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.[13] Accordingly, a particular agency action may be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function, 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).

---

[13] These exceptions to judicial review, discussed supra at 11-12, are contained in Section 701 of the APA:

> (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).

Given this structure of the APA, the provision of the Conference Report heavily relied on by the District Court clearly does not suggest an intention to preclude judicial review of procedural integrity of bureaucracy action:

> 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 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 at most indicates only that the agency actions involved herein would be exempt from 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 appellees' 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. Accordingly, this provision of the Conference Report does not indicate a congressional intent to curtail appellants' 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 of the integrity of the process. 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 process. Plainly, the omission of the Commission itself could not have been an oversight, and demonstrates that the actions of the Commission itself were intended to be subject to judicial review under the APA.[14] At the very least, this passage in the legislative history leaves "substantial doubt" that Congress intended to preclude all judicial review; therefore the "general

---

[14] The Committee Report's reference to there being no "final agency action" also supports the interpretation that, at best, Congress meant only to foreclose judicial review at certain junctures in the process. The determination of whether an agency action is "final" within the meaning of the APA (5 U.S.C. §704) is a judicial function entailing essentially the same inquiry as ripeness, and involving the same prudential considerations. See CEC Energy Co., Inc. v. Public Service Commission of the Virgin Islands, 891 F.2d 1107, 1109-1110 (3d Cir. 1989); Solar Turbines Incorporated v. Seif, 879 F.2d 1073, 1079-1080 (3d Cir. 1989). Accordingly, the reference to "no final agency action" is at best an indication that judicial review at certain points in the process would, in Congress' view, be premature, but not that judicial review would never be available. Indeed, it seems highly dubious that Congress could or would dictate that an agency action is never final and therefore never ripe for review. Here, the agency action obviously became final when the list of recommended closures was forwarded to the President. There was nothing else for the agency to do. If the Commission had not slated the Shipyard for closure, its continued existence would not be now threatened. If appellees had failed to make a recommendation on base closures, neither the President nor Congress would have any basis to act.

presumption favoring judicial review of administrative action is controlling." Block, 467 U.S. at 351.

D. The District Court Erred in Concluding That There are Other Indicia of Intent to Preclude Judicial Review

The District Court also referred to "[o]ther indicia of statutory intent to preclude judicial review":

> Other indicia of statutory intent to preclude judicial review is [sic] the Act's concern with "the timely closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." [citation omitted]. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner."

Slip Op. at 3.

The District Court's strained observations are overwhelmingly contradicted 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. See supra at 6-8. If quick closures were the goal, the 1990 Act would have been totally unnecessary. Ironically, the exact procedural deficiencies being charged here pervaded prior base closure processes, and indeed provoked enactment of the 1990 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. See supra at 7-8. Congressional critics also charged that faulty data had been 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. See supra at 8. In light of these serious criticisms, 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 very same Conference Report relied on by the District Court to overcome the presumption in favor of judicial review states that the Base Closure Act was intended 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." 10 U.S.C. §2901(b) (emphasis supplied). To this end, the Act mandates numerous procedural safeguards absent from the 1988 Act. Thus, the 1990 Act:

(a) Required that the Commission conduct open public hearings on the recommended closures and 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) and 2903(d)];

(b) 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)];

(c) 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)];

(d) 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

(e) 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 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(d)(5)(A) and 2903(d)(5)(B)].

Appellees admit that these procedural safeguards were expressly mandated by the Base Closure Act and, for the purposes of their motion to dismiss, that virtually all of these procedures were disregarded.[15]

Considering the genesis, purpose and nature of this procedurally oriented statute, it is unthinkable that Congress would have established these procedural safeguards only to have them ignored without any recourse to the courts. See Heckler, supra, 470 U.S. at 839 ("Congress did

[15] 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 the District Court would have jurisdiction to ensure the procedural integrity of the process?

not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."). As previously discussed, even interpreting the Conference Report in the manner adopted by the District Court, 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 25. However, to conclude that even the procedural integrity of the Commission's final recommendations are insulated from any judicial scrutiny whatsoever would render the Base Closure Act a nullity.

If, as the District Court held, Congress's paramount objective in the Base Closure Act had been quick closures, Slip Op. at 3, why would Congress 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 clearly this commitment to rectifying the procedural inequities of the 1988 Act that provoked passage of the Base Closure Act.

The District Court also erroneously focused on language in the legislative history which "indicates that there was a concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner." Slip Op. at 4. In the most noteworthy case under the 1988 Act, National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C.Cir. 1990) ("NFFE"), the District of Columbia Circuit upheld the lower court's dismissal of a party's substantive challenge.[16] Integrity of the process was never an issue.

---

[16] The appellees cited NFFE in the District Court as precedent for their claim that the 1990 Base Closure Act precludes judicial review. However, as appellants pointed out to the District Court, the Court's dismissal of the claim in NFFE has absolutely no bearing on appellants'

Thus, the holdings by the lower and appellate courts in NFFE dismissing challenges under the 1988 Act refute any claim that Congress was concerned in the 1990 Act with foreclosing legal challenges to the integrity of the base closure process.

Moreover, if the District Court's conclusion were correct that one of the main reasons for enacting the 1990 Act was to insulate all aspects of the base closure process from judicial review, why would Congress not have taken the simple step of expressly precluding judicial

---

challenge to appellees' wrongful actions. The NFFE appellants 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 appellants' substantive challenge to the Secretary of Defense's recommendations for closure and realignment, the Court necessarily concluded:

> 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. By contrast, the relief sought by appellants herein 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. Indeed, even the appellees and the District Court agreed that the APA exception involved in NFFE, 5 U.S.C. §701(a)(2), has no relevance to this case.

review in the language of the statute? To the contrary, Congress expressly stated that the purpose of the Act was to provide a "fair process." [17]

Accordingly, the District Court's conclusion that there were "other indicia of statutory intent to preclude judicial review" is erroneous.

E. The United States Senate Has Definitively Confirmed that Judicial Review is Appropriate

If there were any doubt on the issue, the United States Senate has confirmed that judicial review of the procedural integrity of the base closure process is manifestly the province of the federal judiciary. Thus, the Senate enacted the following Resolution:

> 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 Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

S. Res. 1216, 102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781-13811 (emphasis supplied).[18]

---

[17] Obviously, Congress itself could not conduct the discovery and hearings necessary to uncover and prove a scheme to flout the procedural mandates of the Act in the forty-five days it allowed itself under the Act. Thus, the only forum for review of the procedural deficiencies asserted here is the federal court.

[18] A true and correct copy of the Senate Resolution is attached hereto as Exhibit 2.

Accordingly, it is indisputable that the "strong presumption" in favor of judicial review has not been overcome.

II. THE DISTRICT COURT ERRED IN HOLDING THAT JUDICIAL REVIEW IS FORECLOSED BY THE POLITICAL QUESTION DOCTRINE

The District Court alternatively premised its dismissal of the Verified Amended Complaint on the ground that the "political question doctrine forecloses judicial intervention." Slip. Op. at 4. In this regard, the District Court held that "the present case represented one which was impossible for the Court to resolve independently without expressing lack of respect due to coordinate branches of government." Id. at 5; see also Baker v. Carr, 369 U.S. 186, 210 (1962).

The District Court made reference to the Supreme Court's formulation of the political question doctrine in Baker v. Carr:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments of government.

369 U.S. at 217 (emphasis supplied). The District Court's holding is erroneous under this formulation of the political question doctrine, and under abundant authority since Baker.

The Supreme Court has repeatedly emphasized that "Baker carefully pointed out that not every matter touching on politics is a political question . . . ." Japan Whaling Association v.

American Cetacean Society, 478 U.S. 221, 229 (1986); see also United States v. Munoz-Flores, 110 S.Ct. 1964, 1968-1971 (1990); County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 248-250 (1985).

In Japan Whaling Association, the Supreme Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." 478 U.S. at 230 (emphasis supplied). The Court emphasized, however, that if judicial review would not involve "policy choices and value determination", as the instant case clearly does not, the political question doctrine does not bar federal courts from performing their normal review function:

> As Baker plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision . . . presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognized the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.

106 S.Ct. at 2860 (emphasis supplied).

In the same vein, appellants here seek an interpretation of the "nature and scope of the duty imposed upon" the DoD, Navy and Commission, "a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below." 106 S.Ct. at 2866. This Court is asked to assume nothing more than its traditional and indispensable role of protecting the procedural integrity of agency action. Since this type of review clearly does not require the District Court to review any "policy choices and value determinations committed for resolution to the halls of Congress or the confines of the Executive Branch," it is not foreclosed by the political question doctrine.[19]

Federal Courts of Appeals have consistently applied the political question doctrine as did the Supreme Court in Japan Whaling Association: the doctrine does not foreclose review of agency action which is alleged to violate statutory command or to be procedurally deficient. See, e.g., DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D.C. Cir. 1987); Population Institute v. McPherson, 797 F.2d 1062, 1068-1070 (D.C. Cir. 1986); Flynn v. Schultz, 748 F.2d 1186, 1191-1192 (7th Cir. 1984); Hopson v. Kreps, 622 F.2d 1375, 1380-1382 (9th Cir. 1980); United States v. Decker, 600 F.2d 733, 737 (9th Cir. 1979); Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 401-402 (2nd Cir. 1977).

---

[19] There can be little doubt that much of the controversy on the merits between the parties before the District Court involved arguments over statutory construction. For example, appellees argued that the Commission had no responsibility to ensure that the GAO performed its statutorily mandated analysis of the Navy's closure recommendations, a question clearly implicating statutory construction. [App. 198-199; 271-273]. Similarly, the Navy argued that it did in fact meet the statutory requirement that all installations be considered "equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department," a conclusion appellants vigorously disagree with as a matter of law. [10 U.S.C. §2903(c)(3)] [App. 186-197; 248-260; 262-270].

For example, the appellants in DKT Memorial Fund challenged the lawfulness of the Agency for International Development's ("AID") implementation of the Policy Statement of the United States of America at the United Nations International Conference on Population (the "Policy"). The Policy commits the United States not to contribute funds to foreign nongovernmental organizations that perform or actively promote abortion as a method of family planning abroad. Id. Appellants challenged AID's actions on the grounds that they violated certain federal statutes, appellants' constitutional rights, and were arbitrary and capricious under the APA. Appellee AID asserted that appellants' challenge to AID's actions presented nonjusticiable political questions. 810 F.2d at 1238.

The District of Columbia Circuit squarely rejected AID's invocation of the political question doctrine because the appellants were not questioning the substance and wisdom of AID's policies:

> As an initial point, we reject the district court's suggestion that appellants' challenges to AID's actions present nonjusticiable political questions. This court recently held that whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs. [citation omitted.] Appellants do not seek to litigate the political and social wisdom of AID's foreign policy. They challenge the legality of AID's implementation of the Policy. We thus hold that the issues presented in appellants' complaint are not nonjusticiable political questions.

810 F.2d at 1238 (emphasis supplied).

Thus, the Court recognized the well settled principle that challenges to an agency's implementation of a Congressional policy which do not seek to litigate the political or social wisdom underlying the policy are not nonjusticiable political questions. The application of this

principle to appellants' challenge herein plainly compels the conclusion that the political question doctrine does not foreclose judicial review of appellants' claims. Appellants do not challenge the wisdom of the policy that military installations must be closed; they seek only a review of the procedural integrity of the base closure process under the Base Closure Act.

The D.C. Circuit's opinion in Population Institute v. McPherson even more dramatically demonstrates the inapplicability of the political question doctrine to this case. The appellants in McPherson were private entities who received grants from the United Nations Fund for Population Activities ("UNFPA"), which receives funds from the United States through the Agency for International Development. The federal act which earmarked funds for UNFPA prohibited funding for any country which included involuntary abortion as part of its population planning program. The Administrator of AID, McPherson, decided to withhold $10 million earmarked by Congress for UNFPA, on the grounds that UNFPA supported China, which some believed includes as part of its population planning programs which include involuntary abortion.

The Administrator's decision caused widespread controversy in Congress and between the President and Congress, as many Congressmen believed China was not engaging in forbidden activities and that the Administrator had acted wrongly. Congress reacted by passing an amendment (the "amendment") to the statute earmarking funds for UNFPA, which amendment sought directly to involve the President in the determination of whether China was engaging in forbidden activity:

> [N]one of the funds available in this bill nor any unobligated balances from prior appropriations may be available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization.

797 F.2d at 1064-1065 (emphasis supplied).

Pursuant to this amendment, the President expressly delegated to McPherson the authority to determine which organization or program supports or participates in the management of a program of coercive abortion or involuntary sterilization. 797 F.2d at 1066. McPherson decided to adhere to his original decision to withhold the $10 million earmarked for UNFPA on the same grounds he had earlier. Appellants filed suit challenging McPherson's determination. The District Court dismissed the action on the grounds that the Administrator's action presented nonjusticiable political questions, as it would involve the judiciary in a political dispute between Congress and the President and would require foreign policy determinations the Court was ill-equipped to make. 797 F.2d at 1066.

The D.C. Circuit rejected the district court's political question holding. In particular, the Court found that the challenge to the Administrator's action, like appellants' challenge herein, expressed no lack of respect due the executive branch. In words equally applicable to the instant matter, the Court held:

> We think it clear that none of the indicia specified by the Baker Court, nor the policy considerations that underlie the political question doctrine, support a finding of non-justiciability here. Certainly there has been no constitutional commitment of this to a coordinate branch. Nor is the judiciary incapable of interpreting statutes. Our review of the Administrator's action no more involves a policy judgment or expresses a lack of respect due the executive than does any other question of statutory interpretation.

797 F.2d at 1070 (emphasis supplied). Likewise in the instant matter, the District Court was not called on to make any policy judgment regarding the issue of base closures or which bases should be closed. Rather, appellants seek only a proper construction of the Base Closure Act and a finding that appellees have wrongly thwarted the Congressional policy behind the Act.

Indeed, the case for applying the political question doctrine was even stronger in McPherson, as there was an active political controversy on the very issue -- whether China was engaging in the activities in question -- on which the Court's determination would necessarily impinge. In the instant matter, there is no such controversy between the Congress and the President.

Furthermore, appellees consistently sought in the District Court to cloak their actions in the mantle of military affairs in order to preclude judicial review on political question grounds. However, it is indisputable that appellants have never challenged any strategic military decisions involved in base closure, but rather only the procedural integrity of the base closure process and appellees' statutory violations. As the Court emphasized in Vogelaar v. United States, 665 F.Supp. 1295 (E.D. Mich. 1987):

> Just because a case arises in a military context, however, does not mean it is nonjusticiable . . . . This is particularly true when actions of the military affect the domestic population during peacetime. Those controversies involving the military that are dismissed as nonjusticiable political questions typically challenge strategic military decisions.

665 F. Supp. at 1303 (citations omitted).

The District Court in this case also concluded that the political question doctrine barred judicial review of the agency action involved herein because Congress and the President reviewed the Commission's recommendations and failed to disapprove them. This 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, 924 F.2d 282 (D.C. Cir. 1991). The government appellees in Armstrong argued that the Federal Records Act ("FRA") impliedly precluded judicial review. In particular, the Armstrong appellees, like the appellees herein, argued that Congress chose to ensure compliance with the FRA through

Indeed, the case for applying the political question doctrine was even stronger in McPherson, as there was an active political controversy on the very issue -- whether China was engaging in the activities in question -- on which the Court's determination would necessarily impinge. In the instant matter, there is no such controversy between the Congress and the President.

Furthermore, appellees consistently sought in the District Court to cloak their actions in the mantle of military affairs in order to preclude judicial review on political question grounds. However, it is indisputable that appellants have never challenged any strategic military decisions involved in base closure, but rather only the procedural integrity of the base closure process and appellees' statutory violations. As the Court emphasized in Vogelaar v. United States, 665 F.Supp. 1295 (E.D. Mich. 1987):

> Just because a case arises in a military context, however, does not mean it is nonjusticiable . . . . This is particularly true when actions of the military affect the domestic population during peacetime. Those controversies involving the military that are dismissed as nonjusticiable political questions typically challenge strategic military decisions.

665 F. Supp. at 1303 (citations omitted).

The District Court in this case also concluded that the political question doctrine barred judicial review of the agency action involved herein because Congress and the President reviewed the Commission's recommendations and failed to disapprove them. This 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, 924 F.2d 282 (D.C. Cir. 1991). The government appellees in Armstrong argued that the Federal Records Act ("FRA") impliedly precluded judicial review. In particular, the Armstrong appellees, like the appellees 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, appellees' 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 appellees' 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. However, the District Court did not cite any case -- nor do any exist -- 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. As the Senate Resolution discussed above confirms, under the Base Closure Act it is not the role of Congress or the President to police the procedural correctness and fairness of appellees' 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. THE DISTRICT COURT ERRED IN IGNORING AND DISMISSING APPELLANTS' CONSTITUTIONAL CLAIMS

Count III of the Verified Amended Complaint alleges that the appellant Shipyard workers and unions have been deprived of their property interest without due process in violation of the Due Process Clause of the Fifth Amendment.[20] Though the District Court dismissed the entire Verified Amended Complaint, it did not so much as mention the constitutional issues raised, which failure constitutes reversible error. The Supreme Court has consistently held that constitutional violations committed by federal agencies are reviewable notwithstanding a statute

---

[20] The appellant Shipyard workers and unions demonstrated in the District Court that they possess a property interest under the Base Closure Act in 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 this Circuit and District Courts in this Circuit. See, e.g., Winsett v. McGinnes, 617 F.2d 996, 1004-1008 (3d Cir.), 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).

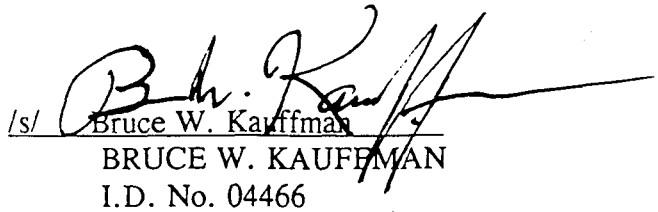
ostensibly precluding review. See, e.g., Webster v. Doe, 486 U.S. 592, 603 (1988); Johnson v. Robison, 415 U.S. 361, 373-374 (1974).

Because the District Court failed even to consider appellants' constitutional claims, the Court's Order dismissing the Verified Amended Complaint must be reversed.

CONCLUSION

The independent federal judiciary is called upon once again to perform its historic role as the exponent of procedural fairness. Appellees' shocking pattern of intentional disregard for Congressionally mandated procedural safeguards literally cries out for this Court to assert its jurisdiction and restore procedural integrity to the base closing process.

Respectfully submitted,



/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN
I.D. No. 04466
DAVID H. PITTINSKY
I.D. No. 04552
CAMILLE WOLF SPINELLO
I.D. No. 47307
PATRICK T. DAVISH
I.D. No. 50400
MARK A. NATION
I.D. No. 59150
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215)875-7000

AND

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

Attorneys for Appellants

AND

ERNEST D. PREATE, JR.
Attorney General for
Pennsylvania
LOUIS J. ROVELLI,
Executive Deputy Attorney
General for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1100

Attorneys for the Commonwealth of Pennsylvania and Ernest D. Preate, Jr.

AND

ROBERT J. DEL TUFO
Attorney General of New Jersey
JACK M. SABATINO
Assistant Attorney General of
the State of New Jersey
HOWARD J. McCOACH
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
(609) 633-1971

Attorneys for the State of New Jersey, Governor James J. Florio and Robert J. Del Tufo

CHARISSE LILLIE
Solicitor for the City of
Philadelphia
Room 1520
Municipal Services Bldg.
Philadelphia, PA 19102-1692

Attorneys for the City of Philadelphia

Dated: November 15, 1991

Appendix A

Public Law 101-510, Title XXIX, Nov. 5, 1990

Defense Base Closure and Realignment Act of 1990

TITLE XXIX—DEFENSE BASE CLOSURES AND REALIGNMENTS

PART A—DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Defense Base Closure and Realignment Act of 1990.
10 USC 2687 note.

SEC. 2901. SHORT TITLE AND PURPOSE

(a) SHORT TITLE.—This part may be cited as the "Defense Base Closure and Realignment Act of 1990".

(b) PURPOSE.—The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

10 USC 2687 note.

SEC. 2902. THE COMMISSION

(a) ESTABLISHMENT.—There is established an independent commission to be known as the "Defense Base Closure and Realignment Commission".

(b) DUTIES.—The Commission shall carry out the duties specified for it in this part.

(c) APPOINTMENT.—(1)(A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

President.

(B) The President shall transmit to the Senate the nominations for appointment to the Commission—

(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with—

(A) the Speaker of the House of Representatives concerning the appointment of two members;

(B) the majority leader of the Senate concerning the appointment of two members;

(C) the minority leader of the House of Representatives concerning the appointment of one member; and

(D) the minority leader of the Senate concerning the appointment of one member.

(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1)(B), the President shall designate one such individual who shall serve as Chairman of the Commission.

(d) TERMS.—(1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

(2) The Chairman of the Commission shall serve until the confirmation of a successor.

(e) MEETINGS.—(1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

Public information.

(2)(A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

(B) All the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(iii) The Chairmen and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

(f) VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

(g) PAY AND TRAVEL EXPENSES.—(1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(h) DIRECTOR OF STAFF.—(1) The Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(i) STAFF.—(1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(3) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the Commission to assist the Commission in carrying out its duties under this part.

(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(j) OTHER AUTHORITY.—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

(2) The Commission may lease space and acquire personal property to the extent funds are available.

(k) FUNDING.—(1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526. Such funds shall remain available until expended.

(l) TERMINATION.—The Commission shall terminate on December 31, 1995.

10 USC 2687 note.

SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

(a) FORCE-STRUCTURE PLAN.—(1) As part of the budget justification documents submitted to Congress in support of the budget for the Department of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan—

(A) a description of the assessment referred to in paragraph (1);

(B) a description (i) of the anticipated force structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based (with a justification thereof) during and at the end of each such period; and

(C) a description of the anticipated implementation of such force-structure plan.

(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

Federal Register, publication.

(b) SELECTION CRITERIA.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an

opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that opportunity in the publication required under the preceding sentence.

(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

Federal Register, publication.

(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than February 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15 of the year concerned.

(c) DOD RECOMMENDATIONS.—(1) The Secretary may, by no later than April 15, 1991, April 15, 1993, and April 15, 1995, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installations inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

Federal Register, publication.

(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation.

(3) In considering military installations for closure or realignment, 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.

(4) The Secretary shall 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.

(d) REVIEW AND RECOMMENDATIONS BY THE COMMISSION.—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

Public information.

(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

Reports.

(B) In making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially

from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense committees on the same date on which it transmits its recommendations to the President under paragraph (2).

(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

Reports.

(5) The Comptroller General of the United States shall—

(A) assist the Commission, to the extent requested, in the Commission's review and analysis of the recommendations made by the Secretary pursuant to subsection (c); and

(B) by no later than May 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.

Reports.

(e) REVIEW BY THE PRESIDENT.—(1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations.

(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

10 USC 2687 note.

SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

(a) IN GENERAL.—Subject to subsection (b), the Secretary shall—

(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

(2) realign all military installations recommended for realignment by such Commission in each such report;

(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments.

(b) CONGRESSIONAL DISAPPROVAL.—(1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of—

(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

(B) the adjournment of Congress sine die for the session during which such report is transmitted.

(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period.

SEC. 2905. IMPLEMENTATION

10 USC 2687 note.

(a) IN GENERAL.—(1) In closing or realigning any military installation under this part, the Secretary may—

(A) take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design as may be required to transfer functions from a military installation being closed or realigned to another military installation, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for use in planning and design, minor construction, or operation and maintenance;

(B) provide—

Community action programs.

(i) economic adjustment assistance to any community located near a military installation being closed or realigned, and

(ii) community planning assistance to any community located near a military installation to which functions will be transferred as a result of the closure or realignment of a military installation,

if the Secretary of Defense determines that the financial resources available to the community (by grant or otherwise) for such purposes are inadequate, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for economic adjustment assistance or community planning assistance;

(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for environmental restoration and mitigation;

Environmental protection.

(D) provide outplacement assistance to civilian employees employed by the Department of Defense at military installations being closed or realigned, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for outplacement assistance to employees; and

(E) reimburse other Federal agencies for actions performed at the request of the Secretary with respect to any such closure or realignment, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense and available for such purpose.

Environmental protection.

(2) In carrying out any closure or realignment under this part, the Secretary shall ensure that environmental restoration of any property made excess to the needs of the Department of Defense as a result of such closure or realignment be carried out as soon as possible with funds available for such purpose.

(b) MANAGEMENT AND DISPOSAL OF PROPERTY.—(1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property and facilities located at a military installation closed or realigned under this part—

(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483);

(B) the authority of the Administrator to dispose of surplus property under section 203 of that Act (40 U.S.C. 484);

(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)); and

(D) the authority of the Administrator to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with the Act of May 19, 1948 (16 U.S.C. 667b).

(2)(A) Subject to subparagraph (C), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

(i) all regulations in effect on the date of the enactment of this Act governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949; and

(ii) all regulations in effect on the date of the enactment of this Act governing the conveyance and disposal of property under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)).

(B) The Secretary, after consulting with the Administrator of General Services, may issue regulations that are necessary to carry out the delegation of authority required by paragraph (1).

(C) The authority required to be delegated by paragraph (1) to the Secretary by the Administrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

(D) The Secretary of Defense may transfer real property or facilities located at a military installation to be closed or realigned under this part, with or without reimbursement, to a military department or other entity (including a nonappropriated fund instrumentality) within the Department of Defense or the Coast Guard.

(E) Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installa-

tion to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned.

(c) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

(2)(A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider—

(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

(ii) the need for transferring functions to any military installation which has been selected as the receiving installation; or

(iii) military installations alternative to those recommended or selected.

(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

(d) WAIVER.—The Secretary of Defense may close or realign military installations under this part without regard to—

(1) any provision of law restricting the use of funds for closing or realigning military installations included in any appropriations or authorization Act; and

(2) sections 2662 and 2687 of title 10, United States Code.

SEC. 2906. ACCOUNT

10 USC 2687 note.

(a) IN GENERAL.—(1) There is hereby established on the books of the Treasury an account to be known as the "Department of Defense Base Closure Account 1990" which shall be administered by the Secretary as a single account.

(2) There shall be deposited into the Account—

(A) funds authorized for and appropriated to the Account;

(B) any funds that the Secretary may, subject to approval in an appropriation Act, transfer to the Account from funds appropriated to the Department of Defense for any purpose, except that such funds may be transferred only after the date on which the Secretary transmits written notice of, and justification for, such transfer to the congressional defense committees; and

(C) proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part.

(b) USE OF FUNDS.—(1) The Secretary may use the funds in the Account only for the purposes described in section 2905(a).

(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project may be carried out without regard to section 2802(a) of title 10, United States Code.

(c) REPORTS.—(1) No later than 60 days after the end of each fiscal year in which the Secretary carries out activities under this part, the Secretary shall transmit a report to the congressional defense committees of the amount and nature of the deposits into, and the expenditures from, the Account during such fiscal year and of the amount and nature of other expenditures made pursuant to section 2905(a) during such fiscal year.

(2) Unobligated funds which remain in the Account after the termination of the Commission shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

(3) No later than 60 days after the termination of the Commission, the Secretary shall transmit to the congressional defense committees a report containing an accounting of—

(A) all the funds deposited into and expended from the Account or otherwise expended under this part; and

(B) any amount remaining in the Account.

10 USC 2687 note.

SEC. 2907. REPORTS

As part of the budget request for fiscal year 1993 and for each fiscal year thereafter for the Department of Defense, the Secretary shall transmit to the congressional defense committees of Congress—

(1) a schedule of the closure and realignment actions to be carried out under this part in the fiscal year for which the request is made and an estimate of the total expenditures required and cost savings to be achieved by each such closure and realignment and of the time period in which these savings are to be achieved in each case, together with the Secretary's assessment of the environmental effects of such actions; and

(2) a description of the military installations, including those under construction and those planned for construction, to which functions are to be transferred as a result of such closures and realignments, together with the Secretary's assessment of the environmental effects of such transfers.

10 USC 2687 note.

SEC. 2908. CONGRESSIONAL CONSIDERATION OF COMMISSION REPORT

(a) TERMS OF THE RESOLUTION.—For purposes of section 2904(b), the term "joint resolution" means only a joint resolution which is introduced within the 10-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), and—

(1) which does not have a preamble;

(2) the matter after the resolving clause of which is as follows: "That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ———", the blank space being filled in with the appropriate date; and

(3) the title of which is as follows: "Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission.".

(b) REFERRAL.—A resolution described in subsection (a) that is introduced in the House of Representatives shall be referred to the Committee on Armed Services of the House of Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

(c) DISCHARGE.—If the committee to which a resolution described in subsection (a) is referred has not reported such resolution (or an identical resolution) by the end of the 20-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), such committee shall be, at the end of such period, discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the House involved.

(d) CONSIDERATION.—(1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been discharged (under subsection (c)) from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution (but only on the day after the calendar day on which such Member announces to the House concerned the Member's intention to do so). All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint resolution without intervening motion, order, or other business, and the resolution shall remain the unfinished business of the respective House until disposed of.

(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the resolution. An amendment to the resolution is not in order. A motion further to limit debate is in order and not debatable. A motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to is not in order.

(3) Immediately following the conclusion of the debate on a resolution described in subsection (a) and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as

the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

(e) CONSIDERATION BY OTHER HOUSE.—(1) If, before the passage by one House of a resolution of that House described in subsection (a), that House receives from the other House a resolution described in subsection (a), then the following procedures shall apply:

(A) The resolution of the other House shall not be referred to a committee and may not be considered in the House receiving it except in the case of final passage as provided in subparagraph (B)(ii).

(B) With respect to a resolution described in subsection (a) of the House receiving the resolution—

(i) the procedure in that House shall be the same as if no resolution had been received from the other House; but

(ii) the vote on final passage shall be on the resolution of the other House.

(2) Upon disposition of the resolution received from the other House, it shall no longer be in order to consider the resolution that originated in the receiving House.

(f) RULES OF THE SENATE AND HOUSE.—This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

10 USC 2687 note.

SEC. 2909. RESTRICTION ON OTHER BASE CLOSURE AUTHORITY

(a) IN GENERAL.—Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

(b) RESTRICTION.—Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a)—

(1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned or as an installation under consideration for closure or realignment; or

(2) to carry out any closure or realignment of a military installation inside the United States.

(c) EXCEPTION.—Nothing in this part affects the authority of the Secretary to carry out—

(1) closures and realignments under title II of Public Law 100-526; and

(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and

realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

SEC. 2910. DEFINITIONS

10 USC 2687 note.

As used in this part:

(1) The term "Account" means the Department of Defense Base Closure Account 1990 established by section 2906(a)(1).

(2) The term "congressional defense committees" means the Committees on Armed Services and the Committees on Appropriations of the Senate and of the House of Representatives.

(3) The term "Commission" means the Commission established by section 2902.

(4) The term "military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.

(5) The term "realignment" includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.

(6) The term "Secretary" means the Secretary of Defense.

(7) The term "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

SEC. 2911. CLARIFYING AMENDMENT

Section 2687(e)(1) of title 10, United States Code, is amended—

(1) by inserting "homeport facility for any ship," after "center,"; and

(2) by striking out "under the jurisdiction of the Secretary of a military department" and inserting in lieu thereof "under the jurisdiction of the Department of Defense, including any leased facility,".

Part B—Other Provisions Relating to Defense Base Closures and Realignments

SEC. 2921. CLOSURE OF FOREIGN MILITARY INSTALLATIONS

10 USC 2687 note.

(a) SENSE OF CONGRESS.—It is the sense of the Congress that—

(1) the termination of military operations by the United States at military installations outside the United States should be accomplished at the discretion of the Secretary of Defense at the earliest opportunity;

(2) in providing for such termination, the Secretary of Defense should take steps to ensure that the United States receives, through direct payment or otherwise, consideration equal to the fair market value of the improvements made by the United States at facilities that will be released to host countries;

(3) the Secretary of Defense, acting through the military component commands or the sub-unified commands to the combatant commands, should be the lead official in negotiations relating to determining and receiving such consideration; and

(4) the determination of the fair market value of such improvements released to host countries in whole or in part by

the United States should be handled on a facility-by-facility basis.

(b) RESIDUAL VALUE.—(1) For each installation outside the United States at which military operations were being carried out by the United States on October 1, 1990, the Secretary of Defense shall transmit, by no later than June 1, 1991, an estimate of the fair market value, as of January 1, 1991, of the improvements made by the United States at facilities at each such installation.

(2) For purposes of this section:

(A) The term "fair market value of the improvements" means the value of improvements determined by the Secretary on the basis of their highest use.

(B) The term "improvements" includes new construction of facilities and all additions, improvements, modifications, or renovations made to existing facilities or to real property, without regard to whether they were carried out with appropriated or nonappropriated funds.

(c) ESTABLISHMENT OF SPECIAL ACCOUNT.—(1) There is established on the books of the Treasury a special account to be known as the "Department of Defense Overseas Military Facility Investment Recovery Account". Any amounts paid to the United States, pursuant to any treaty, status of forces agreement, or other international agreement to which the United States is a party, for the residual value of real property or improvements to real property used by civilian or military personnel of the Department of Defense shall be deposited into such account.

(2) Money deposited in the Department of Defense Overseas Military Facility Investment Recovery Account shall be available to the Secretary of Defense for payment, as provided in appropriation Acts, of costs incurred by the Department of Defense in connection with facility maintenance and repair and environmental restoration at military installations in the United States. Funds in the Account shall remain available until expended.

SEC. 2922. MODIFICATION OF THE CONTENT OF BIANNUAL REPORT OF THE COMMISSION ON ALTERNATIVE UTILIZATION OF MILITARY FACILITIES

(a) USES OF FACILITIES.—Section 2819(b) of the National Defense Authorization Act, Fiscal Year 1989 (Public Law 100-456; 102 Stat. 2119; 10 U.S.C. 2391 note) is amended—

(1) in paragraph (2), by striking out "minimum security facilities for nonviolent prisoners" and inserting in lieu thereof "Federal confinement or correctional facilities including shock incarceration facilities";

(2) by striking out "and" at the end of paragraph (3);

(3) by redesignating paragraph (4) as paragraph (5); and

(4) by inserting after paragraph (3) the following new paragraph (4):

"(4) identify those facilities, or parts of facilities, that could be effectively utilized or renovated to meet the needs of States and local jurisdictions for confinement or correctional facilities; and".

10 USC 2391 note.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect with respect to the first report required to be submitted under section 2819 the National Defense Authorization Act, Fiscal Year 1989, after September 30, 1990.

SEC. 2923. FUNDING FOR ENVIRONMENTAL RESTORATION AT MILITARY INSTALLATIONS SCHEDULED FOR CLOSURE INSIDE THE UNITED STATES

(a) AUTHORIZATION OF APPROPRIATIONS.—There is hereby authorized to be appropriated to the Department of Defense Base Closure Account for fiscal year 1991, in addition to any other funds authorized to be appropriated to that account for that fiscal year, the sum of $100,000,000. Amounts appropriated to that account pursuant to the preceding sentence shall be available only for activities for the purpose of environmental restoration at military installations closed or realigned under title II of Public Law 100-526, as authorized under section 204(a)(3) of that title.

(b) EXCLUSIVE SOURCE OF FUNDING.—(1) Section 207 of Public Law 100-526 is amended by adding at the end the following:

10 USC 2687 note.

"(b) BASE CLOSURE ACCOUNT TO BE EXCLUSIVE SOURCE OF FUNDS FOR ENVIRONMENTAL RESTORATION PROJECTS.—No funds appropriated to the Department of Defense may be used for purposes described in section 204(a)(3) except funds that have been authorized for and appropriated to the Account. The prohibition in the preceding sentence expires upon the termination of the authority of the Secretary to carry out a closure or realignment under this title.".

(2) The amendment made by paragraph (1) does not apply with respect to the availability of funds appropriated before the date of the enactment of this Act.

10 USC 2687 note.

(c) TASK FORCE REPORT.—(1) Not later than 12 months after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report containing the findings and recommendations of the task force established under paragraph (2) concerning—

(A) ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and

(B) ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

(2) There is hereby established an environmental response task force to make the findings and recommendations, and to prepare the report, required by paragraph (1). The task force shall consist of the following (or their designees):

(A) The Secretary of Defense, who shall be chairman of the task force.

(B) The Attorney General.

(C) The Administrator of the General Services Administration.

(D) The Administrator of the Environmental Protection Agency.

(E) The Chief of Engineers, Department of the Army.

(F) A representative of a State environmental protection agency, appointed by the head of the National Governors Association.

(G) A representative of a State attorney general's office, appointed by the head of the National Association of Attorney Generals.

(H) A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

10 USC 2687 note.

SEC. 2924. COMMUNITY PREFERENCE CONSIDERATION IN CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

In any process of selecting any military installation inside the United States for closure or realignment, the Secretary of Defense shall take such steps as are necessary to assure that special consideration and emphasis is given to any official statement from a unit of general local government adjacent to or within a military installation requesting the closure or realignment of such installation.

SEC. 2925. RECOMMENDATIONS OF THE BASE CLOSURE COMMISSION

(a) NORTON AIR FORCE BASE.—(1) Consistent with the recommendations of the Commission on Base Realignment and Closure, the Secretary of the Air Force may not relocate, until after September 30, 1995, any of the functions that were being carried out at the ballistics missile office at Norton Air Force Base, California, on the date on which the Secretary of Defense transmitted a report to the Committees on Armed Services of the Senate and House of Representatives as described in section 202(a)(1) of Public Law 100-526.

(2) This subsection shall take effect as of the date on which the report referred to in subsection (a) was transmitted to such Committees.

(b) GENERAL DIRECTIVE.—Consistent with the requirements of section 201 of Public Law 100-526, the Secretary of Defense shall direct each of the Secretaries of the military departments to take all actions necessary to carry out the recommendations of the Commission on Base Realignment and Closure and to take no action that is inconsistent with such recommendations.

10 USC 2687 note.

SEC. 2926. CONTRACTS FOR CERTAIN ENVIRONMENTAL RESTORATION ACTIVITIES

(a) ESTABLISHMENT OF MODEL PROGRAM.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall establish a model program to improve the efficiency and effectiveness of the base closure environmental restoration program.

(b) ADMINISTRATOR OF PROGRAM.—The Secretary shall designate the Deputy Assistant Secretary of Defense for Environment as the Administrator of the model program referred to in subsection (a). The Deputy Assistant Secretary shall report to the Secretary of Defense through the Under Secretary of Defense for Acquisition.

Reports.

(c) APPLICABILITY.—This section shall apply to environmental restoration activities at installations selected by the Secretary pursuant to the provisions of subsection (d)(1).

(d) PROGRAM REQUIREMENTS.—In carrying out the model program, the Secretary of Defense shall:

(1) Designate for the model program two installations under his jurisdiction that have been designated for closure pursuant to the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526) and for which

preliminary assessments, site inspections, and Environmental Impact Statements required by law or regulation have been completed. The Secretary shall designate only those installations which have satisfied the requirements of section 204 of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526).

(2) Compile a prequalification list of prospective contractors for solicitation and negotiation in accordance with the procedures set forth in title IX of the Federal Property and Administrative Services Act (Public Law 92-582; 40 U.S.C. 541 et seq., as amended). Such contractors shall satisfy all applicable statutory and regulatory requirements. In addition, the contractor selected for one of the two installations under this program shall indemnify the Federal Government against all liabilities, claims, penalties, costs, and damages caused by (A) the contractor's breach of any term or provision of the contract; and (B) any negligent or willful act or omission of the contractor, its employees, or its subcontractors in the performance of the contract.

(3) Within 180 days after the date of enactment of this Act, solicit proposals from qualified contractors for response action (as defined under section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601)) at the installations designated under paragraph (1). Such solicitations and proposals shall include the following:

(A) Proposals to perform response action. Such proposals shall include provisions for receiving the necessary authorizations or approvals of the response action by appropriate Federal, State, or local agencies.

(B) To the maximum extent possible, provisions offered by single prime contractors to perform all phases of the response action, using performance specifications supplied by the Secretary of Defense and including any safeguards the Secretary deems essential to avoid conflict of interest.

(4) Evaluate bids on the basis of price and other evaluation criteria.

(5) Subject to the availability of authorized and appropriated funds to the Department of Defense, make contract awards for response action within 120 days after the solicitation of proposals pursuant to paragraph (3) for the response action, or within 120 days after receipt of the necessary authorizations or approvals of the response action by appropriate Federal, State, or local agencies, whichever is later.

(e) APPLICATION OF SECTION 120 OF CERCLA.—Activities of the model program shall be carried out subject to, and in a manner consistent with, section 120 (relating to Federal facilities) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620).

(f) EXPEDITED AGREEMENTS.—The Secretary shall, with the concurrence of the Administrator of the Environmental Protection Agency, assure compliance with all applicable Federal statutes and regulations and, in addition, take all reasonable and appropriate measures to expedite all necessary administrative decisions, agreements, and concurrences.

(g) REPORT.—The Secretary of Defense shall include a description of the progress made during the preceding fiscal year in implementing and accomplishing the goals of this section within the annual

report to Congress required by section 2706 of title 10, United States Code.

(h) APPLICABILITY OF EXISTING LAW.—Nothing in this section affects or modifies, in any way, the obligations or liability of any person under other Federal or State law, including common law, with respect to the disposal or release of hazardous substances or pollutants or contaminants as defined under section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601).

Mr. SPECTER. There was then a change in the amendment, which was adopted, which struck the words "the integrity of"—

Mr. INOUYE. Will the Senator yield?

Mr. SPECTER. I will.

Mr. INOUYE. That amendment has already been cleared and adopted by the Senate.

Mr. SPECTER. Yes. I know. I thank the distinguished chairman. I want to make sure that the RECORD is clear on what we have done.

After the original languge had been apparently agreed to, there was some concern, and the language was stricken on "the integrity of" and the word "acceptance" was changed to "approval". Then there was a concern as to the additional words of the base closure process so that, in its final form, the amendment which was accepted reads as follows:

At the appropriate place in the pending bill, add the following:

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 Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

That is the language which was modified in the technical amendment by the managers. I just wanted to be sure—I could not be on the floor when that technical amendment was offered—that this sequence is understood because, as explained before and as agreed to, the purpose is that the recommendations of the base closure commission as to the closure of specific bases has been accepted by the Congress, but the Congress has not taken any position as to whether the procedural requirements of the act have been complied with by the commissioner of the Department of Defense.

So that is a question open yet for judicial interpretation on pending litigation.

I just wanted to make that statement.

I thank the Chair. I thank my distinguished colleague.

Mr. INOUYE. Mr. President, I ask unanimous consent that the pending business, the Roth amendment, be temporarily set aside to permit the submission of an amendment in behalf of Senator KASSEBAUM.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1235

Mr. INOUYE. Mr. President, I send the amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Hawaii [Mr. INOUYE], for Mrs. KASSEBAUM, proposes an amendment numbered 1235.

Mr. INOUYE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place in the bill, add the following section:

"OPERATION AND MAINTENANCE, ARMY

": *Provided further*, That of the funds appropriated under this heading, $6.8 million shall be available for the refurbishment and modernization at existing railyard facilities at Fort Riley, Kansas.".

Mr. INOUYE. Mr. President, this amendment has been cleared by both managers.

The PRESIDING OFFICER. Is there further debate on the amendment? If not, the question is on agreeing to the amendment.

The amendment (No. 1235) was agreed to.

Mr. INOUYE. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. FORD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. INOUYE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INOUYE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RICHARD COLLINS' BIRTHDAY

Mr. INOUYE. Mr. President, I have just been advised that today happens to be the birthday of the subcommittee's staff director, Mr. Richard Collins.

So, if I may, in behalf of the U.S. Senate, I extend to him our congratulations and to thank him for helping us pass this bill.

Mr. STEVENS. I join with that. He is a courageous man. He still has his beard and mustache.

[Laughter.]

The PRESIDING OFFICER. The Chair informs the distinguished manager of the bill that the Senator in the chair, acting in his capacity as a Senator from Connecticut, would also like to join in that recognition since the distinguished gentleman being recognized is from Connecticut. Without objection, the request is granted.

Mr. INOUYE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INOUYE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INOUYE. Mr. President, I ask unanimous consent that the pending business be set aside to permit the Senator from Texas to speak.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAMM. Mr. President, as you know, I am a strong supporter of the V-22 Osprey. I am also a firm believer in the need to continue to modernize our defense forces. For these reasons, I am very concerned about the small level of funding provided for the V-22 in this Defense appropriations bill, and the decision to restart a CH-46E production line that has been closed for nearly 20 years.

This bill will not improve the Marines' medium-lift capability. In fact, it will only delay the V-22 program, increase its cost, and unnecessarily prevent our troops from receiving in a timely fashion the equipment they need. The development team has already accomplished many successful flight and aircraft carrier tests. We need to maintain momentum on this important program. I hope we can resolve this issue in conference and keep the V-22 program moving ahead, rather than resurrecting programs from the distant past.

Mr. INOUYE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INOUYE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INOUYE. Mr. President, I ask unanimous consent that Senator BUMPERS be added as an original cosponsor of amendment 1230.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INOUYE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. INOUYE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1236

Mr. STEVENS. Mr. President, I have an amendment at the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Alaska [Mr. STEVENS] proposes an amendment numbered 1236.

Mr. STEVENS. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

NATIONAL SECURITY EDUCATION TRUST FUND

For the National Security Education Trust Fund established by section 804 of the National Security Act of 1947, $180,000,000 of funds provided elsewhere in this Act, which shall be available for the purposes set out in subsection (b) of such section.

AMENDMENT NO. 1216, AS FURTHER MODIFIED

Mr. STEVENS. Mr. President, I send a modification of amendment No. 1216 to the desk on behalf of Senator SPECTER.

THE PRESIDING OFFICER. The amendment is so modified.

Mr. INOUYE. Mr. President, this matter has been cleared by both sides.

The amendment (No. 1216), as further modified, is as follows:

At the appropriate place in the pending bill, add the following:

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 Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

Mr. INOUYE. Mr. President, I ask unanimous consent that no further amendments be in order.

THE PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. MITCHELL. Mr. President, I have consulted with the managers of the bill and with, through staff, the distinguished Republican leader. I am advised that the current status of the bill is that there are no further amendments in order other than those which had previously been agreed to be excepted, specifically the amendment of the Senator from Delaware, and that there is no request on either side for a rollcall vote on final passage.

I note the presence of the distinguished Republican leader, and I am going to momentarily ask him to comment on and confirm what I have just stated.

If that is the case, and if no other Senator seeks a rollcall vote on final passage, then it is the desire of the managers, with which I concur, and with which I believe the Republican leader concurs, that we can proceed to complete action on this bill momentarily without the necessity of a rollcall vote.

Unless we receive an indication in the next few minutes from a Senator—and I hope there will be no such indication—then it is the intention of the managers to complete action shortly and to pass the bill by voice vote. I would like to invite the distinguish Republican to comment.

Mr. DOLE. I thank the majority leader. The majority leader is correct. I think on this side there is no problem with that, as long as we can be assured there will be a vote on the conference report, a record vote.

Mr. MITCHELL. Yes. It has always been my intention to have a record vote on the conference report, and obviously that would be agreeable at this time. This follows consultation with the managers, and so I inquire of them whether this procedure is agreeable to them.

Mr. STEVENS. It is entirely agreeable with this Senator

Mr. INOUYE. It is agreeable here.

However, if the leader will yield——

Mr. MITCHELL. Yes.

Mr. INOUYE. I ask unanimous consent that I be permitted to vitiate the unanimous consent making all amendments out of order, because I have just been advised there is one remaining amendment to be submitted by Mrs. KASSEBAUM.

Mr. STEVENS. It is a technical amendment.

Mr. INOUYE. It is cleared by both sides.

THE PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. MITCHELL. Mr. President, then Senators should be aware that we will proceed shortly to final passage of the pending bill, and that unless some Senator seeks a rollcall vote, it will be by voice vote. If a Senator does seek it, we will have to bring everybody back. So Senators should be aware that that possibility exists, although I think it is extremely unlikely, we not having received any indication throughout all this period of discussion as to a vote on final passage.

So I encourage the managers to proceed to final passage as soon as possible and complete action on the bill.

Mr. DOLE. Mr. President, I wonder if the majority leader might indicate what the program would be for tomorrow and Monday. I would say in advance we have had a discussion in the Senator's office, and we have sort of set forth some possibilities that could happen. It would probably be good news for some of our colleagues.

We have not received agreement yet, but I can tell the majority leader we are still trying on this side.

Mr. MITCHELL. Mr. President, the distinguished Republican leader and I and others have discussed the schedule prospectively for tomorrow, Monday, and the next several days, and included in the list of items which we earlier described last Friday, and since as the measures to be completed prior to the forthcoming recess are the family and medical leave bill, the Unemployment Compensation Reform Act, which now would be in the form of a conference report, the EPA Cabinet level status bill, and the Federal facilities bill, my hope is that we can get agreement to proceed to one or more of those bills on tomorrow and Monday and do it in a way that would permit us not to have any votes on Monday.

We have not completed our discussions yet—both Senator DOLE and I have been discussing the matter with other Senators—but it is my hope that we can reach an agreement that would make that possible although we do not yet have that understanding. The bills which I have mentioned would be among those to be included for immediate consideration should we be able to reach agreement.

Mr. DOLE. Mr. President, if in fact we could reach an agreement between now and sometime early morning, if it works, we hope it might work, then there probably will not be any rollcall votes tomorrow or Monday.

Mr. MITCHELL. That is possible. But we are not in a position to state that yet because we do not have agreement on any of the measures which we have described, there being a number of Senators to be consulted on each of them.

Mr. DOLE. I thank the majority leader.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER (Mr. DODD). The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, earlier today there had been an agreement on an amendment, the sense-of-the-Senate resolution where there had been a change made after the amendment had been accepted. When a question was raised later, there was a subsequent modification of the amendment. I want to make a very brief statement so that the RECORD is clear on what occurred with the technical amendment which the managers have submitted.

Mr. President, the original amendment provided as follows. Perhaps the best way to handle this is to ask unanimous consent that I may submit the amendment in its original form for the RECORD at this point. I ask unanimous consent that it appear in the RECORD in its original form.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AMENDMENT NO. 12[illegible]

At the appropriate place in the pending bill, add the following:

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 is relying on the integrity of the base closure process and takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the resolution of disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base Closure and Realignment Act of 1990, but only the acceptance of the recommendations issued by the Base Closure Commission.

the Bureau of Radiological Health must rely on Navy personnel to gather water samples.

"I'm confident they can do as good a job," said Foldesi, who witnessed two refuelings as a sailor aboard nuclear-powered submarines from 1970 to 1976. "I know they take elaborate measures to make sure that no materials are released."

But other states are taking more aggressive measures.

The state of Washington, which is home to about 15 nuclear-powered ships, complained last fall about its lack of access to Navy sites. When radiation has been released at Navy yards there, the state has not been allowed to watch the cleanup.

"They are up-front with the fact that incidents have occurred," said Terry R. Strong, director of the Division of Radiation Protection in the Washington state Health Department. "But we don't have any regulatory authority, and they don't invite us onto the base."

If the states had their way, they would exercise more oversight over the military, Strong said.

"I guess that, if we go back to the issue of credibility, it would be to the Navy's benefit to say: 'Y'all come on here,'" Strong said.

Mr. SPECTER. Mr. President, these articles detail the enormous potential environmental hazard which is in the offing from the scraping or overhaul of nuclear powered ships. And the details of these articles, which cite authoritative sources, disclose that the radioactive potential is many, many times the problems at Chernobyl, and that there are many communities in our society in Idaho, in South Carolina, in Nevada, in Washington, and in Oregon where there are enormous risks involved in our failure to deal with this issue of nuclear waste.

Rather than submit the amendment, which would hold up on the funds for the *Enterprise* until this study has been completed, this Senator elected to take the route of the amendment which has been submitted and agreed to calling for the study so we can find out what is gong to be happening.

But I think this is an issue which the Congress and the country will have to face up to because of enormous environmental risk factors, and these reports should shed some very considerable light on a real problem and will enable us to address this issue in an intelligent way in the future.

Mr. President, I thank my colleague from Hawaii, Senator INOUYE, the distinguished chairman, and the ranking member, Senator STEVENS, for their cooperation in working through these amendments, and the staffs for their help with respect to the same amendments.

I thank the chair, and I yield the floor.

AMENDMENT NO. 1217

(Purpose: To set aside $3,000,000 for the New Parent Support Program of the Marine Corps)

Mr. INOUYE. Mr. President, I ask unanimous consent that the pending business be temporarily set aside to consider measures affecting the bill.

I send to the desk an amendment in behalf of Senator SEYMOUR of California, and ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The bill clerk read as follows:

The Senator from Hawaii [Mr. INOUYE], for Mr. SEYMOUR, proposes an amendment numbered 1217.

Mr. INOUYE. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 12, line 3, strike out the period and insert in lieu thereof: ": *Provided further*, That of the funds appropriated in this paragraph, $3,000,000 shall be available for the New Parent Support Program.".

Mr. SEYMOUR. Mr. President, I rise to offer an amendment to the fiscal year 1992 defense appropriations bill that would assist the Marine Corps in its critical search for the most effective methods to arrest the symptoms of child abuse within military families.

Perhaps of all institutions in our society, the armed services are most vulnerable to the pains and disasters of child abuse. Military parents, and especially enlisted personnel, frequently change homes, lifestyles, and schools. Many of their children, therefore, miss the classic American experience of growing up in a stable neighborhood with familiar friends and role models.

To its credit, the Marine Corps has initiated a program at Camp Pendleton, CA that tries to improve these circumstances for young children. Over the last 2 years, the Marines and the Children's Health Center and Hospital of San Diego have cooperated on an effort modeled after the famous Parent Aide Program to furnish a broad range of clinical, educational, in-home, and counseling services to eliminate the potential causes of child abuse. The program now reaches more than 350 children in approximately 200 Camp Pendleton families.

Most of the existing Department of Defense programs that focus on this problem react to the incident of child abuse after it occurs. The Camp Pendleton project, however, reaches out to expectant mothers and those with infants in the interest of preventing the social and psychological causes of this tragedy.

My amendment, Mr. President, provides $3 million out of existing Marine Corps operation and maintenance funds so that the Marine can begin the process of establishing this program at all 18 of their world-wide facilities.

This child abuse prevention miracle of Camp Pendleton, therefore, can become the miracle of the Marine Corps and a model for the entire Department of Defense.

I understand, Mr. President, that this amendment has been cleared by the distinguished managers of the bill. I particularly want to recognize the outstanding leadership that Senator INOUYE has provided in fostering military family advocacy programs. Our All-Volunteer Forces and their dependents have two committed and effective champions in both the chairman and distinguished ranking member of the Defense subcommittee, Senator STEVENS.

Mr. President, I thank the managers once again for their cooperation, and I urge the adoption of the amendment.

Mr. INOUYE. I commend the Senator for his amendment. As he is aware, I have long been interested in the detection and prevention of child abuse. I believe that I may, without being immodest, take some credit for the establishment in the Department of Defense of the Family Advocacy Program, which addresses the detection and prevention of both child and spouse abuse in all the military services. This is a successful program, and I would not like to see its scope or authority weakened by the Marine Corps program which the Senator is proposing.

May I ask the Senator to clarify the intent of his amendment. Do I understand correctly that the amendment is intended to disseminate a child-abuse-prevention program which has proved to be successful at a Marine Corps base in California?

Mr. SEYMOUR. The Senator is correct.

Mr. INOUYE. Do I further understand that the Marine Corps program which the Senator is proposing is in consonance with the Family Advocacy Program now in existence?

Mr. SEYMOUR. Yes; that is correct. This program is intended to supplement and strengthen the Family Advocacy Program.

Mr. INOUYE. As the Senator is aware, the Family Advocacy Program, administered by the Assistant Secretary of Defense for Force Management and Personnel, is the body which establishes policy for child abuse and spouse abuse detection and prevention programs. Is it the Senator's intention that the new Marine Corps program fall under the jurisdiction of the Assistant Secretary, as other Marine Corps child abuse programs do at the present time?

Mr. SEYMOUR. The Senator from Hawaii is correct. I believe that the proposed Marine Corps program will be a welcome addition to the current Department of Defense Family Advocacy Program, and I would certainly expect that it would be administered in the same fashion as other child abuse prevention programs now in existence.

Mr. INOUYE. I thank the Senator.

Mr. President, this measure has been studied by both sides, and we find it acceptable.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The aircraft carrier Enterprise, being refueled in Newport News, offers the most dramatic example. The Enterprise is expected to generate enough waste to throw off at least 25 million curies of radioactivity—about half the roughly 50 million curies the Chernobyl reactor explosion released over the Soviet Union, killing hundreds of people and contaminating more than 2 million homes.

"A severe accident could literally destroy a city, and that's not widely realized," said Dr. W. Jackson Davis, a nuclear physicist at University of California and a native of Portsmouth. ". . . It's not just life that you're risking—you're risking whole cities."

Recognizing the risks at hand, the General Accounting Office, an investigative arm of Congress, this winter began reviewing the Navy's schedule of reactor work.

"With the size of the activity going on," GAO investigator Brad H. Hathaway said, "we felt we should at least take a preliminary look."

That inquiry will inevitably focus on Hampton Roads, said Hathaway, who helped investigate the explosion aboard the battleship Iowa. While politicians boast that the port is host the largest naval complex in the world, public records show that it also handles the most naval reactors and radioactive wastes:

The Norfolk Naval Station is home base to 31 nuclear-powered ships: 23 submarines, four aircraft carriers and four guided-missile cruisers. The ships perform routine reactor maintenance at the base and generate as much as 10,000 cubic feet of radioactive waste a year, according to Navy records. That's enough waste to fill a one-story, two-bedroom home from floor to ceiling.

Newport News Shipbuilding has built 56 nuclear-powered warships—43 subs, seven carriers and six cruisers. It's now building 13 more, including 10 submarines and 3 carriers. Meanwhile, the yard is expected to refuel, overhaul or scrap at least 20 naval reactors in this decade. The yard's increasing work on reactors will dramatically increase its radioactive waste handlings, now running about 15,000 cubic feet a year.

The Norfolk Naval Shipyard in Portsmouth, which has overhauled 34 nuclear-powered subs and cruisers since 1967, has not refueled a reactor since 1973. That has cut its radioactive waste to about 10,000 cubic feet a year. But waste volume will rise sharply with the yard's scheduled refuelings of one ship every two years, beginning with the guided-missile cruiser South Carolina.

The Naval Supply Center in Norfolk, the Naval Weapons Station in Yorktown and other support facilities store and ship radioactive materials. Hampton Roads' military facilities also export and import radioactive waste to and from military bases overseas, records show.

The Military Traffic Management Command, based in Washington, DC., recorded 177 radioactive shipments between Hampton Roads and foreign ports from June 1989 through September 1990. About 100 of the shipments, identified simply as "radioactive material," were not wastes but rather supplies, such as uranium-tipped artillery shells going to Army bases in Europe, records indicated. But at least 50 other shipments were more mysterious, and their contents and destination were not identified in military records made available to this newspaper. Repeated requests over the past 10 months for more details went unmet.

All told, the piers, shipyards and support facilities in Hampton Roads are host to the largest collection of nuclear reactors in the world.

"You have quite a large concentration of reactors in Norfolk. If you proposed to put them on land, people would be appalled, but people don't see ships that way," said Damien Durrant, an activist with Greenpeace, an environmental organization that opposes nuclear reactors and weapons.

The public still does not "see ships for what they are: basically, a smaller nuclear plant," Durrant said. "We kind of regard it as a blind spot in the public's perception."

Ironically, naval reactors are more dangerous—by design—than commercial ones.

Land-base reactors rumble along like eight-cylinder, carbureted muscle cars gulping down leaded gasoline. But oceangoing reactors wind up like four-cylinder, turbocharged speedsters on high-octane fuel. Commercial units can boost electricity output over several days, but naval reactors must propel ships from 6 knots to 30 knots in a matter of minutes.

While the Navy reactors run hotter, they are not as thoroughly protected from overheating and other dangerous conditions. Because they must fit into smaller spaces, such as on submarines, they cannot be shielded behind as many layers of concrete, steel and water.

That leaves little margin for error in the design, construction and operation of oceangoing reactors. The greatest risk however, is refueling them, experts agree.

"Everybody feels most vulnerable during a refueling operation," said Capt. James T. Bush, former commander of the ballistic missile submarine Simon Bolivar.

The Enterprise poses the ultimate challenge. It is the oldest nuclear-powered ship the U.S. has and is propelled by some of the most antiquated reactors on either sea or land. Those reactors, which have been running virtually nonstop since the carrier scrambled jets over Vietnam, are being refueled for the first time in 20 years.

Asked about the process of refueling, officials at Newport News Shipbuilding referred all questions to the Naval Sea Systems Command. The command declined to provide details.

"It's like having eight submarines in there at one time. It's just a massive job," said shipyard retiree Jack B. Davis, who was secretary of the joint military-civilian panel that planned the Enterprise's last refueling, from 1969 to 1971.

Because the "Big E" was the first nuclear-powered surface ship, naval engineers generously endowed it with eight reactors. Designers have since put only one or two reactors in each warship.

"The Enterprise was horribly overbuilt," Davis said. "They never had a nuclear-powered ship, and they didn't know how much power they'd need to push that damned thing."

The Enterprise's reactors also are outdated.

"Nuclear reactors through the years have changed a whole lot," said an engineer involved in the design of the Enterprise reactors, who asked not to be named. "New engineering studies revealed different things . . . Of course, we learned our lessons from that, when the new ones came along."

As the Navy brings its older nuclear-powered warships into port for refueling, however, it inevitably surrenders some control over their reactor operations and radioactive wastes, Navy veterans say. While fewer than 100 sailors control the Enterprise's reactors at sea, for instance, at least 1,000 sailors, shipbuilders and contractors and refueling them in port.

"Being in a shipyard during a refueling, is a real tough time to maintain the controls," said Capt. Yates, former skipper of the sub John Adams. "You've got people coming and going, people on leave, and, during all of that, you've got to keep control of what's going on."

Sailors said such pressures caused problems on at least three nuclear-powered ships during visits to shipyards last year. At Newport News Shipbuilding, sailors have reported radioactive releases during refueling of the reactors on the carrier Enterprise; the Navy and the shipyard had not responded to requests for more details on the claims as of late last week. At the Norfolk Naval Shipyard in Portsmouth and the Puget Sound Naval Shipyard in Bremerton, Wash., sailors said they took shortcuts in running the reactors in the submarine Finback and the carrier Minitz. Publicly, the Navy expresses immense pride in its nuclear safety record, both at sea and on land. But some veterans of the nuclear Navy say that it hides all but the worst accidents—such as the 1963 sinking of the submarine Thresher—behind the curtain of "national security."

"Every time anything went wrong in the Navy program, we had to sign another piece of paper to say we'd never talk about it," said Robert D. Pollard, a former nuclear safety engineer on the sub Sargo, based in Pearl Harbor, Hawaii. Pollard now works for the Union of Concerned Scientists in Cambridge Mass. "They use the security thing not for security reasons but to hide stuff."

Federal agencies, state governments and the public are given few opportunities to verify the Navy's claims of a stellar safety record.

The Environmental Protection Agency, for instance, has jurisdiction to search for radiation leaks around Navy bases and shipyards. And the EPA does periodically analyze water, sediment and algae samples at these sites. But the agency must settle for samples gathered by the military, rather than collecting its own. It also analyzes them according to military standards, rather than more exacting civilian ones.

State governments are equally restricted in their ability to judge safety in the nuclear Navy.

Virginia's state officials express a mixture of confidence and concern. Most say they are confident that naval reactors could meet the safety standards applied to land-based plants. But they also say they are uncomfortable taking that on faith.

The Virginia Department of Emergency Services, for example, is charged with protecting the public from a nuclear accident. The agency keep track of radioactive waste shipments by power plants, hospitals and other civilian outfits. But the agency has no military jurisdiction.

"I guess it makes us nervous," said the department's technological hazards expert, James D. Holloway. "We know what's out there and where we are taking waste from the civilian side. And I guess we would like to be tracking (the military) too."

Like the EPA, the state Department of Health, which monitors radioactivity in the environment, has less access to military sites than to commercial ones.

Every year, for instance, the department's Bureau of Radiological Health takes hundreds of samples from near Virginia Power's reactors at Surry and Lake Anna. But the bureau must settle for only a handful of samples, gathered by Navy personnel, from around naval piers and shipyards in Hampton Roads. And it has never inspected those sites the way it inspects civilian facilities.

"We just don't have the staffing to send people out to those (Navy) sites," said Leslie Foldesi, the bureau's director.

In January, the agency resumed monitoring of the waters around the Norfolk Naval Shipyard, which is preparing to refuel the guided-missile cruiser South Carolina. But

[From the Virginia-Pilot, Apr. 1, 1991]

WASTE SITES FACE MASSIVE CLEANUP TASK

(By Al Roberts)

As the Navy's nuclear-powered warships send more uranium fuels, reactor parts and other radioactive wastes ashore, they're counting on the U.S. Department of Energy to dispose of the material at remote, inland dumps.

But the Energy Department—which traditionally has taken naval wastes to its weapons plants in Idaho Falls, Idaho; Richland, Wash.; and Aiken, S.C.—faces serious environmental problems at those sites.

The government has been stockpiling waste since the 1950s, and the waste is beginning to leak from corroding steel drums and clay trenches and cracked concrete tanks. More than a dozen radioactive elements, from cobalt to plutonium to uranium, have already escaped into the environment.

From the Idaho National Engineering Laboratory in Idaho Falls, where the Navy sends its spent nuclear fuel, a 40-square-mile "plume" of tritium is migrating through groundwater flows toward the Snake River. The Hanford Nuclear Reservation in Washington state, which buries scrapped naval reactors, has dumped millions of gallons of radioactive waste into the ground. And the Savannah River Site in South Carolina, which handles other naval wastes, also is leaking radiation.

Cleaning up those sites and 11 other weapons plants—to make room for more spoils from naval shipyards and other nuclear operations—will be a $200 billion task. But the Energy Department is under rising pressure to allow other groups, such as the Environmental Protection Agency, to accelerate the cleanup.

"Little actual cleanup work has been done," the Office of Technology Assessment, an analytical arm of Congress, said in a 212-page report to the lawmakers in February. ". . . Effective cleanup of the weapons complex in the next several decades is unlikely, and . . . significant policy initiatives are required if those prospects are to be improved."

[From the Virginia-Pilot, Apr. 1, 1991]

"BIG E" REACTORS A BIG PAIN, SAY VETERAN REFUELERS

(By Al Roberts)

NEWPORT NEWS.—Imagine eight nuclear reactors being taken apart—piece by piece—in your back yard.

That's exactly what is happening aboard the aircraft carrier Enterprise, which began refueling its nuclear reactors this winter at Newport News Shipbuilding.

The shipyard won't comment on the process. But shipyard retirees, who refueled the "Big E," from 1969 to 1971, said the refueling and overhaul, which began in November and is expected to continue through May 1994, will be an ordeal.

"You have to pretty much tear the ship up to refuel it," said shipyard retiree Jack B. Davis, who helped plan the previous refueling. "There's a lot of stuff you have to remove, and then you have to put it all back again."

During the 3½-year process, retirees said, teams of workers will spend roughly six months dismantling each reactor plant, take a day or two to refuel it, then spend six months reassembling the system.

Throughout the process, workers will wear awkward body suits and breathe through stifling gas masks to protect themselves from radiation. One false move—turning a wrench one too many times around a valve, or firing a blowtorch one millimeter too far into a pipe—could release harmful doses of radioactivity, retirees said.

First, workers will disconnect the reactors from steam generators, turbines, cooling systems and other related equipment. They'll have to divert thousands of gallons of radioactive liquid and gas, much of it sealed under explosive pressure, into holding areas or disposal tanks. Once the pipes are purged, workers will open up miles of pipeline, break through hundreds of valve seals and dismantle thick steel fixtures to get to the reactor.

Then comes the switching of the uranium fuel core itself, which contains the most deadly levels of radioactivity.

Because the workers will be opening up the reactor for the first time in two decades, exposing themselves to its radioactivity, they'll want to move quickly. Ideally, they'll remove the spent fuel core and place it in a steel shipping cask, then install a fresh fuel core and close up the reactor, in a matter of hours.

While they rebuild the ship's reactors, retirees say, other workers will be dealing with the radioactive wastes sent ashore. The Enterprise is expected to leave behind enough waste to throw off at least 25 million curies of radioactivity. That's half of the roughly 50 million curies the Chernobyl reactor explosion released over the Soviet Union. And it's about 8,000 times as much as Virginia's 600 power plants, hospitals and other nuclear industries ship to disposal sites in a year.

Some of that waste, such as the spent fuel or reactor parts, will be solid and easily managed. Other wastes, such as the cooling water from the reactors, will be liquid. Some will give off intense radiation, enough to kill a worker within days, while some will emit negligible radiation.

The most dangerous wastes, the eight spent fuel cores, will each hold as much as 3 million curies of radioactivity—enough to contaminate all of Newport News or build a nuclear bomb.

To protect the spent fuel from accidents and terrorists, each core will be stashed in a steel cask, and each cask will be set in a railroad boxcar on the grounds of Newport News Shipbuilding. Eventually, the boxcars will form a train to a disposal site in Idaho Falls, Idaho.

The bulk of the waste, however, will be parts, tools, protective clothing, rags and other materials that have been exposed to the reactors and their fuels. Each piece of waste may have absorbed as little as one-millionth of 1 curie of radioactivity and pose a negligible threat. But there will be vast volumes of that low-level waste, which could combine to emit dangerous radiation.

For that reason, the waste will be packaged in special polyethylene barrels or steel boxes. It will then be carried away in tractor trailers, traveling west on Route 58 and south on Interstate 95, to a disposal site near Aiken, S.C.

[From the Virginia-Pilot, Apr. 1, 1991]

NUCLEAR NAVY SAILS IN FOR REPAIRS, RAISES CONCERNS

(By Al Roberts)

NORFOLK.—The Navy plans to refuel, overhaul or scrap about one-third of its nuclear-powered ships in the 1990s, bringing an unprecedented—and potentially dangerous—rush of nuclear work into local naval bases and shipyards.

Among the Navy's 137 nuclear-powered ships afloat, at least 40 are due to bring their reactors into Hampton Roads and other ports for work in this decade. Those reactors, which reportedly suffered few accidents while running at sea, will run much higher risks during operations on land, Navy veterans say.

The metal-shrouded reactors, having contained billions of atomic chain reactions for 15 to 20 years, now literally glow with radioactivity, experts say. As the reactors are dismantled in shipyards the risk increases, experts say, that their pent-up radiation will be accidentally unleashed on sailors, shipbuilders, civilians or the environment.

Naval reactor work also will generate radioactive wastes, like the byproducts of commercial nuclear plants, that must be carefully controlled for centuries to come. But control of such wastes has already proven to be a problem for the Navy, federal studies say.

In 1988, for instance, the Navy's Radiological Affairs Support Office in Yorktown sent out 423 questionnaires to Navy installations, asking about their inventories of radioactive waste. Only 212 replied, and at least one-fourth of those that did not reply are known to store radioactive waste. The survey showed only 9,000 cubic feet of radioactive waste stored at Navy sites. But other federal records show that bases and shipyards generate as much as 58,000 cubic feet every year—at least 20,000 cubic feet of it in Hampton Roads.

"For these reasons," the General Accounting Office concluded in a report to Congress in March 1990, "the Navy does not precisely know the amount and types of waste stored or disposed of by its various installations."

The Navy's future challenges in dealing with radioactive waste go beyond Hampton Roads and its shipyards. The service sends its worst wastes to be recycled, stored or dumped at nuclear weapons factories in South Carolina, Idaho and Washington state. But those sites, as well as 11 others in the nuclear weapons complex, have become environmental disaster zones.

The largest site, near Aiken, S.C., already stores 21 million cubic feet of solid wastes and 35 million gallons of liquid spoils—enough radioactive material to fill the Scope arena in Norfolk 25 times. The material contains at least 800 million curies of radioactivity, or roughly 16 times what the Chernobyl reactor explosion released over the Soviet Union. And much of that radioactivity is slowly leaking into the air, soil, water and sediments on the north bank of the Savannah River.

Last week, the latest evidence of the military's waste problem was reported by the Environmental Protection Agency. The EPA said that engineers, rushing to build nuclear bombs in the 1950s, poured millions of gallons of radioactive waste into the ground at the Hanford Nuclear Reservation near Richland, Wash. Some of that waste, dumped into crude ground trenches, will retain half its radioactivity for 212,000 years, experts say.

Environmentalists, legislators and regulators have reacted to such reports by forcing the weapons plants to launch a $200 billion cleanup. As the sites devote more money and personnel to handle existing wastes, however, they will have fewer resources to accept new wastes being generated by the Navy.

At the same time, the Navy will be generating more waste than ever. The spoils will have to sit in interim storage at bases, shipyards or other support facilities, experts say, until they can be sent for permanent burial at the weapons plants.

"The risks are enormous—no doubt about it—absolutely enormous," said Capt. William K. Yates, former commander of the nuclear-powered submarines Sargo, Snook and John Adams.

Mr. INOUYE. Mr. President, this matter has been cleared by both sides. We find no objection.

The PRESIDING OFFICER. Is there further debate on the amendment?

Mr. INOUYE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, there was also an amendment agreed to when this Senator stepped out of the Chamber for a moment or two relating to an investigation by the Comptroller General of the United States and the issuing of a report on the Navy's current plan for the handling and disposal of all nuclear or radioactively contaminated materials from nuclear-powered aircraft carriers.

That had been agreed to in the absence of the distinguished Senator from Virginia [Mr. WARNER] whom I had contacted in advance of the proposal. But Senator WARNER had to be necessarily absent from the floor for a few minutes. It may be that Senator WARNER has an objection to that. If he does, this Senator will be prepared to vitiate the order of approval of that amendment. I wanted to put that on the record. I have not been able to contact Senator WARNER in the interim.

Mr. President, I need a moment to review slight modifications to the amendment which was just proposed. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, reverting back to the amendment No. 1216, which I had represented had been cleared on both sides of the aisle, that was in fact true. But then a question was raised about striking two words and changing one other word which maintains the same purpose, which is in effect to say that the joint resolution of disapproval of the 1991 Base Closure Commission's recommendations are approved as to the recommendations as to base closures, but the Congress in this resolution is taking no position on whether there has been compliance by the Base Closure Commission and the Department of Defense with the requirements of the statute; that is, the Defense Base Closure and Realignment Act of 1990, which the courts have jurisdiction over to make a determination as to whether or not there has been such compliance.

So at this time, Mr. President, I modify my amendment by sending the modified amendment to the desk.

The PRESIDING OFFICER. The Senator has that right. The amendment is so modified.

The amendment, as modified, is as follows:

At the appropriate place in the pending bill, add the following:

"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 is relying on the base closure process and takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the resolution of disapproval shall not be interpreted to imply congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission."

The PRESIDING OFFICER. Is there further debate on the amendment?

Mr. INOUYE. Mr. President, the Armed Services Committee and the Appropriations Committee both have looked over the amendment. We find it acceptable.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 1216) was agreed to.

Mr. SPECTER. Mr. President, I move to reconsider the vote.

Mr. INOUYE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SPECTER. Mr. President, I would like to take just a few more moments on matters which we had discussed. I had said that the Senate had approved amendment No. 1214, which provides that:

* * * The Comptroller General of the United States shall issue a report no later than July 1, 1992, on the Navy's current plan for the handling and disposal of all nuclear materials and radio actively contaminated materials of the nuclear powered aircraft carriers.

The report shall include cost evaluations and projections for the next 20 years, based on a current Navy plan and a list of specific locations under consideration as disposal or reprocessing sites.

Paragraph B. A report on health effects not later than September 30, 1992. The Secretary of Health and Human Services shall transmit to Congress a report on the human health risks associated with work on nuclear powered aircraft carriers.

Mr. President, this Senator had filed earlier an amendment which provided for a different approach. I ask unanimous consent that at this point there be inserted in the RECORD a copy of the amendment which I decided not to include so that the RECORD will be clear as to the approach which the adopted amendment has taken.

There being no objection, the amendment was ordered to be printed in the RECORD, as follows:

At the appropriate place in the bill insert the following:

SEC. . LIMITATION ON OVERHAUL OF THE U.S.S. ENTERPRISE.

(a) LIMITATION.—No funds shall be obligated for the complex overhaul of the U.S.S. Enterprise (CVN-65) or any other nuclear aircraft carrier until the Secretary of the Navy, the Administrator of the Environmental Protection Agency, and the Secretary of Energy have jointly submitted a comprehensive plan, which includes annual cost estimates for the next 20 years, for the handling and disposal of all nuclear materials and radioactively contaminated materials of the nuclear-powered aircraft carriers. This plan shall include a list of the specific locations under consideration as disposal or reprocessing sites and shall be developed in consultation with the host states and affected states of any potential site. An unclassified report detailing such plans shall be provided to Congress to accompany the notice of certification.

(b) REPORT OF HEALTH EFFECTS.—Not later than September 30, 1992, the Secretary of Health and Human Services, acting through the Assistant Secretary of Labor for Occupational Safety and Health, shall transmit to Congress a report on the human health risks associated with overhaul work on nuclear-powered aircraft carriers.

Mr. SPECTER. Mr. President, the amendment which was not pursued had provisions that no funds would, "be obligated for the complex overhaul of the U.S.S. *Enterprise*, or any other nuclear aircraft carrier, until the Secretary of the Navy, the Administrator of the Environmental Protection Agency, and the Secretary of energy submitted a joint comprehensive plan which included annual cost estimates for the next 20 years for the handling and disposal of all nuclear materials and radio actively contaminated materials of the nuclear powered aircraft carriers."

"The plan should include a list of the specific locations under consideration for disposal or reprocessing sites, and shall be developed in consultation with the host States and affected States of any potential site."

Mr. President, there is an enormous underlying problem in our country today involving nuclear waste, and it is a problem which we have so far pretty much swept under the rug. Rather than make an extensive statement on this issue at this time—and I would not do so unless there is a challenge to the amendment which has been agreed to—I would ask unanimous consent that two articles be printed in the RECORD from the Virginia Pilot dated April 1, 1991.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

know is coming, which is lower defense spending.

I hope that the Senate will accept this amendment. I hope that the information that will be provided from this amendment will help us during next year's appropriations bill. When some people come to the floor to cut defense spending below the level the appropriators want, and I guarantee that is going to be inevitable, they will be making cuts that the Defense Department has identified as they prioritized things. If you are going to cut, these are the areas in which we think the cuts should be made and these are the implications for our capabilities and force structure.

He who has the information often has the power. In this case we are asking the Defense Department who has the information to share their views with us.

Mr. President, I strongly urge the adoption of the amendment. I am prepared to yield back the remainder of my time, if the distinguished Senator from Hawaii is prepared to make his motion.

The PRESIDING OFFICER. The Senator from New Jersey yields back the remainder of his time.

The Chair recognizes the distinguished Senator from Hawaii.

Mr. INOUYE. Mr. President, if any time is remaining I am pleased to yield back the time.

The PRESIDING OFFICER. No time is remaining.

Mr. INOUYE. What is the pending business?

The PRESIDING OFFICER. The pending question is the Bradley amendment.

Mr. INOUYE. Mr. President, I move to table.

Mr. BRADLEY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Hawaii to lay on the table the amendment of the Senator from New Jersey. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. FORD. I announce that the Senator from Ohio [Mr. METZENBAUM] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 58, nays 41, as follows:

[Rollcall Vote No. 210 Leg.]

YEAS—58

Akaka	Cochran	Domenici
Bond	Cohen	Durenberger
Breaux	Craig	Exon
Bryan	D'Amato	Ford
Burdick	Danforth	Garn
Burns	DeConcini	Glenn
Byrd	Dixon	Gore
Chafee	Dodd	Gramm
Coats	Dole	Grassley
Hatch	Mack	Shelby
Heflin	McCain	Simpson
Helms	McConnell	Smith
Hollings	Murkowski	Specter
Inouye	Nickles	Stevens
Johnston	Nunn	Symms
Kassebaum	Pressler	Thurmond
Kasten	Reid	Wallop
Lieberman	Roth	Warner
Lott	Rudman	
Lugar	Seymour	

NAYS—41

Adams	Graham	Packwood
Baucus	Harkin	Pell
Bentsen	Hatfield	Pryor
Biden	Jeffords	Riegle
Bingaman	Kennedy	Robb
Boren	Kerrey	Rockefeller
Bradley	Kerry	Sanford
Brown	Kohl	Sarbanes
Bumpers	Lautenberg	Sasser
Conrad	Leahy	Simon
Cranston	Levin	Wellstone
Daschle	Mikulski	Wirth
Fowler	Mitchell	Wofford
Gorton	Moynihan	

NOT VOTING—1

Metzenbaum

So the motion to lay on the table the amendment (No. 1215) was agreed to.

Mr. INOUYE. Mr. President, I move to reconsider the vote.

Mr. STEVENS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The pending business is the Wirth amendment, No. 1212.

The senior Senator from Hawaii is recognized.

Mr. INOUYE. Mr. President, I ask unanimous consent the pending business be temporarily set aside to permit the Senate to consider other measures related to the bill.

The PRESIDING OFFICER. Is there objection to the request of the senior Senator from Hawaii to set aside amendment No. 1212 by the senior Senator from Colorado to consider other amendments relating to the bill?

Mr. WIRTH. Reserving right to object, and I will not object.

I just want to know what kind of amendments we are talking about. The Senator from Colorado is just concerned about making sure we act upon this amendment.

Mr. INOUYE. These are amendments that have been cleared by both sides and should take no more than 4 minutes.

Mr. WIRTH. I thank the distinguished chairman. I will not object.

Mr. STEVENS. Just returning to the Senator from Colorado, there is a subsequent suggestion that negotiations are ongoing. I am grateful to the Senator from Colorado for his consideration of the suggestions that are coming from the Department of Defense.

I am hopeful we will be able to work this out so we may accept the Senator's amendment very soon. That rests with the Senator from Colorado, however, I might add.

Mr. WIRTH. I will not object. I withdraw my reservation, Mr. President.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Hawaii?

Without objection, it is so ordered.

The Senator from Hawaii is recognized.

Mr. INOUYE. Mr. President, I yield to the Senator from Pennsylvania.

The PRESIDING OFFICER (Mr. KERREY). The Senator from Pennsylvania is recognized.

AMENDMENT NO. 1216

Mr. SPECTER. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER], for himself, Mr. MITCHELL, Mr. COHEN, Mr. WOFFORD, Mr. BRADLEY, and Mr. DIXON, proposes an amendment numbered 1216.

Mr. SPECTER. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place in the pending bill, add the following:

"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 is relying on the integrity of the base closure process and takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the resolution of disapproval shall not be interpreted to imply congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base Closure and Realignment Act of 1990, but only the acceptance of the recommendations issued by the Base Closure Commission.".

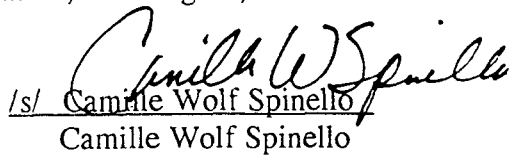
Mr. SPECTER. Mr. President, this amendment is being submitted on behalf of Senator MITCHELL, Senator COHEN, Senator WOFFORD, Senator BRADLEY, and I believe Senator DIXON, and myself. It has been cleared on both sides of the aisle.

By way of a very brief statement, it provides that in acting on the joint resolution of disapproval of the Base Closure Commission's recommendations, the Congress is relying on the integrity of the base closure process and takes no position on whether there has been compliance by the Commission and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act, so that the relevant courts, Federal courts, will have jurisdiction on any challenge on procedural deficiencies.

As I say, I have discussed it broadly in the Senate, with the distinguished chairman and ranking member.

CERTIFICATE OF SERVICE

I, Camille Wolf Spinello, a Member of the Bar of this Court, hereby certify that on this 14th day of November, 1991, I caused true and correct copies of appellants' Brief and Appendix to be federal expressed overnight delivery to Scott R. McIntosh, Appellate Staff - Civil Division, U.S. Department of Justice, Room 3127, Ben Franklin Station, Washington, D.C. 20044.



/s/ Camille Wolf Spinello
Camille Wolf Spinello

NOV 21 91

NO. 91-1932

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DRAFT

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

H. LAWRENCE GARRETT, III, SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLEES

STUART M. GERSON
Assistant Attorney General

MICHAEL M. BAYLSON
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JENNIFER H. ZACKS
(202) 514-4052 / FTS 368-4052
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave. N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . .

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS . . . . . .

STATEMENT OF RELATED CASES . . . . . .

STATEMENT OF STANDARD OF REVIEW . . . . . .

SUMMARY OF ARGUMENT . . . . . .

ARGUMENT . . . . . .

I. The Closure of the Philadelphia Naval Shipyard Is Not Subject To Judicial Review . . . . . .

A. The Defense Base Closure and Realignment Act Precludes Judicial Review . . . . . .

B. The Plaintiffs' Claims Are Barred by the Political Question Doctrine . . . . . .

C. The District Court's Nonreviewability Holding Applies To All of the Plaintiffs' Claims, Including the Due Process Claim . . . . . .

II. None of the Plaintiffs Has Standing To Challenge the Closure of the Shipyard . . . . . .

A. The Congressional Plaintiffs . . . . . .

B. The State and Local Plaintiffs . . . . . .

C. The Union Plaintiffs . . . . . .

CONCLUSION 50

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

1. The plaintiffs asserted the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1337, 1341 and 1346. The district court dismissed the suit for lack of jurisdiction under 5 U.S.C. § 701(a)(1) and the political question doctrine (see pp. __-__ infra).

2. The judgment under appeal is a final decision of the district court and is within this Court's appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The President of the United States, acting pursuant to the Defense Base Closure and Alignment Act of 1990 ("Act" or "1990 Act") and with the concurrence of Congress, has directed the Secretary of Defense to close or realign 82 domestic military installations, including the Philadelphia Naval Shipyard. The plaintiffs are seeking to enjoin the closure of the Shipyard on the ground that the Navy and the Defense Base Closure and Realignment Commission used improper procedures in recommending the Shipyard for closure. The issues presented are:

1. Whether judicial review of the plaintiffs' claims is precluded by the Act.

2. Whether the plaintiffs' claims present a nonjusticiable political question.

3. Whether the plaintiffs lack standing.

4. Whether the union plaintiffs' due process claim fails to state a claim for relief.

STATEMENT OF THE CASE

This is an action to prohibit the Department of Defense from carrying out a decision of the President to close the Philadelphia Naval Shipyard. The plaintiffs-appellants are members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; the City of Philadelphia; and local labor unions and union officials. The defendants-appellees are the Secretary of Defense, the Secretary of the Navy, and the Defense Base Closure and Realignment Commission ("Commission") and its members.

The plaintiffs filed suit on July 8, 1991, asking the district court to "[e]njoin the Secretary of Defense and the Secretary of the Navy * * * from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list" approved by the President (App. 50, 54, 57). The plaintiffs further asked the district court to intervene in the management of the Shipyard by rescheduling the Shipyard's workload, barring Shipyard layoffs, and rescinding awards of repair work to other shipyards (id. at 50-51, 54-55, 57).

In August 1991, the defendants moved to dismiss the plaintiffs' suit on the ground that the suit was barred by the Act itself and by the political question doctrine. The defendants also moved to dismiss on the alternative grounds that the plaintiffs lack standing under Article III and the Administrative Procedure Act ("APA"), and that the union plaintiffs' due process claim fails to state a valid claim for relief.

On November 1, 1991, the district court (Buckwalter, J.) granted the defendants' motion to dismiss. The district court held that judicial review is precluded by the Act and the political question doctrine. The district court did not reach the defendants' standing arguments. This appeal followed.

STATEMENT OF FACTS

I. Statutory Background

A. Procedural Obstacles To Base Closures Prior To 1988

This case arises out of efforts by the President and Congress to close or realign unneeded domestic military installations. Prior to 1988, such efforts were frustrated by a longstanding legal and political impasse that led to the erection of a number of procedural barriers. The district court's decision in this case requires an understanding of the procedural obstacles that obstructed base closures before 1988.

Beginning in the early 1960s and continuing into the 1970s, successive Administrations undertook to reduce unnecessary military expenditures by closing or realigning unnecessary domestic bases. Those efforts were met with considerable opposition among members of Congress. Base closures were resisted because of the feared social and economic impact on surrounding communities. In addition, Congressional opponents contended that the Executive Branch's choice of bases was influenced by improper political considerations. [Cite.]

In 1976, Congress imposed temporary restrictions on the use of appropriated funds for major base closures and realignments. See Military Construction Authorization Act of 1977, Pub. L. No. 94-

431, § 612, 90 Stat. 1349, 1366-67 (1976). In 1977, Congress enacted additional legislation which made the 1976 restrictions permanent. See Military Construction Authorization Act of 1978, Pub. L. No. 95-82, § 612, 91 Stat. 358, 379-80 (1977) (codified at 10 U.S.C. § 2687 (Supp. I 1977)). The 1977 legislation remained in force, without substantial changes, for more than a decade.

The 1977 legislation required the Department of Defense to comply with a variety of procedural requirements before carrying out a major base closure or realignment. The Department was required to provide advance notice to Congress; present Congress with a "detailed justification" of the proposed closure or realignment; and defer action for at least 60 days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b)(1), (3)-(4) (Supp. I 1977). In addition, the Department was required to comply with the provisions of the National Environmental Policy Act of 1969 ("NEPA") with respect to the proposed closure or realignment. Id. § 2687(b)(2).

The 1977 legislation refrained from imposing substantive restrictions on the authority of the Executive Branch to close or realign domestic military installations. However, the procedural requirements of the legislation -- in particular, the requirement that the Department of Defense comply with NEPA, and the concomitant threat of protracted NEPA litigation -- made it effectively impossible to carry out significant base closures or realignments without further enabling legislation by Congress. See App. 299; see also H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) ("1988 Conference Report"), reprinted in 1988 U.S. Code Cong. &

Admin. News ("USCCAN") 3403. Thus, from 1977 to 1988, no major domestic military bases were closed or realigned.

B. The 1988 Act

1. Congress eventually broke the stalemate over domestic military base closures by enacting the Base Closure and Realignment Act of 1988 ("1988 Act"). See Defense Authorization Amendments and Base Closure and Realignment Act, Public Law No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act is the immediate predecessor to the Act involved in this case, and many of the basic features of the present Act are taken directly from the predecessor statute.

The 1988 Act assigned the task of identifying unnecessary military bases to a bipartisan commission, using criteria previously established by the Secretary of Defense. Id. §§ 201(1), 203(b)(1)-(2). The commission's recommendations were to be presented to the Secretary of Defense for approval or disapproval in their entirety. Id. §§ 201(1), 202. If the Secretary approved the commission's recommendations, his decision in turn was subject to direct review by Congress itself, which could override his decision by passing a joint resolution of disapproval within a 45-day period. Id. §§ 202(b), 208.

The 1988 Act's provision for direct Congressional review of the Secretary's decision was designed as an alternative to the procedural barriers of the 1977 legislation (see pp. _-_ supra), and those barriers were eliminated by the 1988 Act. In particular, the 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA, thus

removing the threat of disabling NEPA litigation. Id. § 204(c)(1). The House and Senate conferees endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts," but restricted NEPA's applicability out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." 1988 Conference Report at 23, 1988 USCCAN at 3403.

2. The 1988 base closure commission identified 145 domestic military installations for closure or realignment. In January 1989, the Secretary of Defense notified Congress that he approved the commission's recommendations. In April 1989, the House of Representatives rejected a proposed joint resolution of disapproval by a wide margin, thereby authorizing the Secretary of Defense to proceed with the closures and realignments. [Cite.]

Predictably, parties dissatisfied with the House decision brought suit to block the base closures, seeking to accomplish judicially what Congress had declined to do legislatively. The suits were squarely rejected by the courts, for reasons that bear directly on the present litigation.

In People ex rel. Hartigan v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989), a suit by the State of Illinois was dismissed for lack of standing. Illinois sought to challenge the 1988 Act on constitutional grounds, and further asserted that the Secretary's approval of the commission's recommendations was arbitrary and capricious because the commission had used inaccurate and inadequate information. The district court dismissed the suit, holding that the State lacked standing to sue the federal government as parens

patriae and failed to satisfy the constitutional and prudential requirements for bringing suit on the State's own behalf. 726 F. Supp. at 221-27.

In National Federation of Federal Employees v. United States, 727 F. Supp. 17 (D.D.C. 1989), aff'd, 905 F.2d 400 (D.C. Cir. 1990) (NFFE), a similar suit by a federal employees union and a private contractor was rejected for lack of standing and nonreviewability under the APA. The plaintiffs in NFFE challenged the 1988 Act on constitutional grounds and attacked the base closure decision as arbitrary and capricious under the APA. After dismissing the constitutional claims on the merits, the district court held that the plaintiffs lacked standing to pursue their APA claim because their interest in preventing base closures placed them outside the "zone of interests" of the 1988 Act. See 727 F. Supp. at __. On appeal, the D.C. Circuit affirmed the dismissal of the APA claim on alternative grounds, holding that the base closure decision was "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2), and hence was reviewable. See 905 F.2d at 405-406.

C. The 1990 Act

1. The 1988 Act was not a permanent mechanism for closing and realigning military installations, but rather was a one-time exception to the restrictions of the 1977 legislation. In January 1990, acting without the benefit of the 1988 Act, the Secretary of Defense independently proposed the closure of an additional 36 military facilities. See App. 300. Congress recognized that in light of rapidly changing world events and the prospect of substantial reductions in troop levels, further base closures were

appropriate. See H. R. Rep. 665, 101st Cong., 2d Sess. 341 (1990) ("1990 House Report"), reprinted in 1990 USCCAN 2931, 3067. However, many Members of Congress regarded the Secretary's unilateral announcement as reminiscent of the 1960s and 1970s, charging that the selection of bases reflected partisan considerations. See App. 300. The Secretary's approach was criticized as the "wrong way to close bases" and as having "raised suspicions about the integrity of the base closure selection process." 1990 House Report at 341, 1990 USCCAN at 3067-68; H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705 (1990) ("1990 Conference Report"), reprinted in 1990 USCCAN 3110, 3257.

To accommodate the need for domestic base closures while avoiding the perceived deficiencies in the Secretary's unilateral approach, Congress enacted the Defense Base Closure and Realignment Act of 1990. See Pub. L. No. 510, 101st Cong., §§ 2901-11, 104 Stat. 1808-19. In framing the 1990 Act, Congress insisted on preserving the basic structure of the 1988 Act, maintaining that "a new base closure process will not be credible unless the 1988 base closure process remains inviolate." 1990 House Report at ____, reprinted in 1990 USCCAN at 3068. The Act therefore continues the cooperative relationship between the executive and legislative branches started in 1988 and once again suspends the procedural barriers to base closures put in place by pre-1988 legislation.

The 1990 Act is intended to govern three rounds of base closures in 1991, 1993, and 1995. The Act established an independent Defense Base Closure and Realignment Commission to meet in each of these years. Act § 2902(a), (e). The Act required the Secretary

of Defense to provide the Commission with a six-year force structure plan that assesses national security threats and the force structure needed to meet them. Id. § 2903(a)(1), (2). The Act also required the Secretary to formulate criteria to be used in identifying bases for closure or realignment. The Secretary was required to publish the criteria in the Federal Register for notice and comment and present them to Congress for legislative review. Id. § 2903(b). The Secretary established his final criteria on February 15, 1991, see 56 Fed. Reg. 6374 (Feb. 15, 1991), and Congress did not exercise its authority under the Act to disapprove the criteria by joint resolution. See Act § 2903(b)(2)(A)-(B).

For the first round of base closures, the Act required the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. Act § 2903(c)(1). The Act directed the Secretary to summarize in the Federal Register the process by which each base was recommended for closure or realignment and to provide a justification of each recommendation. Id. § 2903(c)(2).

The Act charges the Commission with reviewing the Secretary's recommendations and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. Act § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations. Id. § 2903(d)(1). The Act authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force-structure plan and final criteria. Id. § 2903(d)(2)(B). The Act also requires the

Comptroller General, the head of the GAO, to analyze the Secretary's recommendations and selection process and permits the Comptroller, to the extent requested, to assist the Commission in its efforts. Id. § 2903(d)(5).

The 1990 Act provides for the Commission's recommendations to be presented to the President for his review. Act § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. Id. § 2903(e)(2), (3). If the President disapproves of any recommendations, the Commission is required to transmit a revised set of recommended closures and realignments to him. Id. § 2903(e)(3). If the President does not approve the revised list of recommendations, the base closing process for that year terminates. Id. § 2903(e)(5).

Like the 1988 Act, the 1990 Act subjects the actions of the Executive Branch to direct review by Congress. If the President approves the Commission's recommendations, Congress has 45 days from the date of approval (or until the adjournment of Congress sine die, whichever is earlier) to pass a joint resolution disapproving of the Commission's recommendations. Act § 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. Id. § 2904(b). Conversely, if a joint resolution of disapproval is not enacted, the Act provides that the Secretary "shall" close and realign all installations chosen by the Commission and the President. Id. § 2904(a).

Under the 1990 Act, as under the 1988 Act, direct Congressional oversight replaces the procedural requirements imposed by pre-1988 base closure legislation (see pp. _-_ supra). The 1990 Act thus authorizes the Secretary of Defense to close or realign military installations "without regard to" the 1977 base closure statute and related legislation. And like the 1988 Act, the 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in carrying out [the Act]."

2. In April 1991, as required by the Act, the Secretary of Defense recommended the closure or realignment of twelve naval facilities. See 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. See id. at 15218. The Secretary also recommended the closure or realignment of a number of army and air force installations. In all, the Secretary recommended that 43 domestic military installations be closed and 29 realigned. See App. 303, 381-82.

The Commission then engaged in an analysis of the Secretary's recommendations. The Commission conducted both public regional hearings and hearings in Washington, D.C. in which it heard testimony from Department of Defense officials, legislators and other experts, including virtually all of the plaintiffs. App. 307, 387-88. The Commissioners visited the major facilities recommended for closure, including the Shipyard. Id. at 307, 389-90. The Committee's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. The GAO forwarded

to the Commission a report on the Secretary's recommendations and assisted the Commission in obtaining, verifying and reviewing data. Id. at 305-306. The Commission reported that it analyzed the Navy's recommendations with particular care. Id. at 308.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open. App. 295, 330-31, 334-35. It further recommended that a portion of one facility which the Secretary recommended remain open be closed. Id. at 328-29. However, the Commission concurred with the Secretary's recommendation that the Shipyard be closed. Id. at 336.

In all, the Commission recommended to the President that 34 installations be closed and 48 be realigned. App. 295-96. The Commission estimated that these closures and realignments will result in net savings of $2.3 billion in fiscal years 1992-1997, after one-time costs of $4.1 billion, and that savings will total $1.5 billion annually. Id. at 295.

On July 10, 1991, President Bush approved the recommendations of the Commission, including the closure of the Shipyard. See 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. Three Commissioners testified at the hearings, as did Navy officials.

On July 30, 1991, the House entertained a proposed resolution to disapprove the Commission's recommendations. 137 Cong. Rec. H6006 (daily ed. July 31, 1991). The House engaged in two hours of floor debate on the proposal. Much of the debate was devoted to alleged errors in the process by which the Shipyard was recommended

for closure. [Cite.] Each of the six plaintiff House members urged passage of the resolution of disapproval, as did other Philadelphia-area members. Nonetheless, the House rejected the proposed resolution by a vote of 364 to 60, thus authorizing the Secretary of Defense to proceed with the closures and realignments. See id. at H6039.

II. The Present Litigation

A. The Suit To Bar the Closure of the Shipyard

The present suit was filed on July 8, 1991, two days before the President approved the Commission's recommendations and three weeks before the House of Representatives acted on the proposed resolution of disapproval. App. 7. The central object of the suit is to prohibit the Secretary of Defense and the Secretary of the Navy from closing the Shipyard. The plaintiffs asked the district court to "[r]equire the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list." App. 50, 54, 57. In conjunction with this request, the plaintiffs asked the district court to regulate the operations of the Shipyard by rescheduling the Shipyard's workload, barring layoffs, and rescinding awards of repair work to other shipyards. Id. at 50-51, 54-55, 57. More broadly, the plaintiffs demanded that the district court "[e]njoin the Secretary of Defense and the Secretary of the Navy * * * from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy," a prayer for relief that

would block the closure or realignment of any naval installation in the United States. Id. (emphasis added).

Although the injunctive relief sought by the plaintiffs is wholly substantive, the plaintiffs framed their claims largely (although not exclusively) in procedural terms. Count I and Count II of the amended complaint, which are advanced by all plaintiffs, allege that the Secretary of Defense, the Secretary of the Navy, and the Commission failed to comply with various procedural requirements of the Act. For example, the plaintiffs alleged that the Secretaries "failed to make available * * * all information which was used by the Navy in making its recommendations to the Commission" and "failed to consider all Naval installations inside the United States equally * * * ." Id. at 58-59.[1] Count III, which is advanced only by the union plaintiffs, asserts that "[t]he defendants' disregard of the procedures set forth in the Base Closure Act, as more fully described in Counts I and II * * * constitute violations of the Due Process Clause of the United States Constitution." Id. at 67. Count III thus restates in constitutional terms the statutory claims underlying Counts I and II.

From the outset of the litigation, the defendants denied both the specific details of the plaintiffs' allegations and the general charge of noncompliance with the Act's procedural requirements. In

---

[1]Not all of the plaintiffs' allegations, it should be noted, are procedural ones. For example, the plaintiffs criticized the Commission for taking account of private shipyard capacity, a criticism that goes to the substance of the Commission's reasoning rather than to the procedures by which the Commission acted. See App. 49, 64.

addition, the defendants noted a variety of jurisdictional and other threshold problems that bar the suit without regard to the merits. These threshold barriers led the defendants to file a motion to dismiss in August 1991, one month after the filing of the plaintiffs' amended complaint.

The motion to dismiss raised four basic issues. First, relying on the legislative history and structure of the Act, the defendants contended that judicial review of the plaintiffs' claims is precluded by the Act itself and hence is not allowed under the APA. Second, the defendants contended that the plaintiffs' claims present a nonjusticiable political question. Third, the defendants contended that none of the plaintiffs satisfies the constitutional and prudential requirements for standing under Article III and the APA. Fourth, the defendants contended that the union plaintiffs' due process claim (Count III) fails to state a valid constitutional claim even if the plaintiffs' factual allegations are taken as true.

Before acting on the motion to dismiss, the district court permitted the plaintiffs to proceed with discovery in support of their request for a preliminary injunction. The plaintiffs conducted almost 20 depositions and requested roughly _____ pages of documents. Following the completion of discovery, both sides presented the district court with proposed findings of fact and conclusions of law relating to the preliminary injunction. The defendants' submission set forth a factual and legal rebuttal of the merits of the plaintiffs' charges. See generally App. 204-28, 230-37, 242-44. However, the defendants' motion to dismiss did not

rely on this showing; the grounds advanced in the motion to dismiss apply regardless of the merits.

B. The District Court's Decision

On October 25, 1991, the district court conducted a hearing on the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. One week later, on November 1, 1991, the district court dismissed the plaintiffs' claims. See App. 277-83. The district court granted the motion to dismiss for two reasons: first, "because * * * the statute precludes judicial review," and second, because "the political question doctrine forecloses judicial intervention." Id. at 277. The district court did not reach the remaining grounds in the motion to dismiss.

The district court began by noting that judicial review under the APA is foreclosed "to the extent that * * * statutes preclude judicial review" (5 U.S.C. § 701(a)(1)). App. 278. Relying on the standards set forth in Block v. Community Nutrition Institute, 467 U.S. 340 (1984), the district court further noted that "[a]s long as the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme,' the presumption favoring judicial review has been overcome." Id. (quoting Block, 467 U.S. at 351).

Applying Block's standards, the court determined that the 1990 Act precludes judicial review of the plaintiffs' claims. App. 278-280. The court pointed to the report of the Senate and House conferees, which expressly states that "'various actions required under the base closure process contained in this bill,'" including the development of a force structure plan and selection criteria

and the Secretary of Defense's recommendation of closures and realignments, "'would not be subject to judicial review.'" Id. at 278-79 (quoting 1990 Conference Report at 706, reprinted in 1990 USCCAN 3258). The court also noted the importance attached by Congress to a prompt and timely base closing process, and Congress's corresponding concern about the delays threatened by "'numerous opportunities for challenge in court.'" Id. at 279 (quoting 1990 Conference Report at 705, reprinted in 1990 USCCAN 3257).

Turning to the political question doctrine, the district court relied on the criteria set forth in Baker v. Carr, 369 U.S. 186 (1962). In particular, the district court looked to "'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.'" App. 281 (quoting Baker, 369 U.S. at 217). Here, the Court noted that the Act "provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations," and that both the President and Congress had approved the recommended closures. Id. at 282. The district court concluded that while the political question doctrine "should be used sparingly," judicial review could not be undertaken in these circumstances without expressing a lack of the respect due the President and Congress. Id. at 281, 283.

STATEMENT OF RELATED CASES

This case has not been before this Court previously. No related cases or proceedings are completed or now pending. A

suit over the planned closure of Loring Air Force Base in Maine is expected to be filed shortly.[2]

STATEMENT OF STANDARD OF REVIEW

An order dismissing a case for lack of subject matter jurisdiction is subject to plenary review. See, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co., 944 F.2d 1149, 1152 (3d Cir. 1991).

SUMMARY OF ARGUMENT

[To be added.]

ARGUMENT

I. The Closure of the Philadelphia Naval Shipyard Is Not Subject to Judicial Review

The President of the United States, with the concurrence of Congress, has decided to close the Philadelphia Naval Shipyard and scores of other military installations around the country. The Act that authorizes this action is an intricate and delicate statutory compromise, one that balances the interests of the Executive Branch and Congress in order to arrive at a consensus on the selection of bases for closure and realignment. The Act assigns Congress the role of passing final judgment on the President's decision. At the same time, the Act eliminates the procedural obstacles that prevented the closure of unnecessary bases prior to 1988.

The private suit now before this Court strikes at the heart of this carefully developed statutory scheme. It invites a federal court to overturn the consensus between the political branches over

---

[2]See States News Service, "Suit To Keep Philadelphia Shipyard Open Dismissed; Effect on Loring Case Unknown," November 1, 1991 (available on NEXIS).

the domestic base closures. It threatens to disrupt the balance struck by the statute, and in so doing, to displace Congress as the final arbiter of the closure process. And it seeks to subject the President's base closure decision to precisely the kinds of procedural obstacles and delays that the Act was meant to eliminate. In light of these consequences, the district court was plainly correct in holding that neither the Act itself nor the political question doctrine permits this action to go forward.

A. The Defense Base Closure and Realignment Act Precludes Judicial Review

The district court's first ground for dismissing this suit was that judicial review of the plaintiffs' claims is precluded by the 1990 Act. In taking issue with this holding, the plaintiffs begin (at pp. 9-13) by stressing the general presumption that agency action is subject to judicial review. But as the Supreme Court has held, "[t]he presumption favoring judicial review of administrative action is just that -- a presumption." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). And the plaintiffs seriously overstate the showing that must be made to overcome that presumption.

To be sure, the Supreme Court has said on various occasions that the presumption in favor of judicial review may be overcome only by "a showing of 'clear and convincing evidence.'" Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). But as the Supreme Court itself has stressed, the Court "has * * * never applied the 'clear and convincing evidence' standard in the strict evidentiary sense * * * ." Block, 467 U.S. at 350. Instead, "the Court has found the standard met, and the presumption favoring

judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 351 (citation omitted). And this "fairly discernible" Congressional intent to preclude judicial review may be found in a variety of sources.

First, the presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block, 467 U.S. at 349. Second, congressional intent "may also be inferred from contemporaneous judicial construction barring review and congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." Id. (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." Id. As long as "the congressional intent to preclude judicial review is 'fairly discernible'" from any of these sources (Block, 467 U.S. at 351), judicial review is foreclosed. When measured against these standards, it is manifest that the Act precludes judicial review of the base closing process.

1. The Legislative History and Structure of the Act Confirm that Congress Meant To Preclude Judicial Review

A. The most direct evidence that Congress intended to preclude judicial review, although by no means the only evidence, comes from the legislative history of the Act. As the district court noted, the Conference Report on the Act addresses the issue of judicial review in explicit terms:

> [V]arious actions required under the base closure process contained in this bill * * * would not be subject to the rulemaking and adjudication requirements [of the APA] and

> would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * * , the issuance of selection criteria * * * , the Secretary of Defense's recommendation of closures and realignments of military installations * * * , and the Secretary's actions to carry out the recommendations of the Commission * * * .

1990 Conference Report at 706, reprinted in 1990 USCCAN at 3258 (emphasis added).

The intent to renounce judicial review of the base closing process could hardly be made more clear than it is in this statement. And this is not an isolated comment by an individual Representative or Senator, or even a committee report of a single House of Congress; it is the joint declaration of the House and Senate conferees responsible for the final terms of the Act. As such, it "carr[ies] greater weight" than other forms of legislative history and "is entitled to great weight in analyzing Congressional intent." American Jewish Congress v. Kreps, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978); San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, 799 F.2d 1268, 1270 (9th Cir. 1986).

Understandably, the plaintiffs struggle to avoid the plain import of this language. First, the plaintiffs argue at length (at __-__) that the language is directed only at freeing the base closure process from the rulemaking and adjudication requirements of Chapter 5 of the APA, not at precluding judicial review in other respects under Chapter 7 of the APA. But that is simply not what the Conference Report says. The report says that the the base closure process "would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to

judicial review" (emphasis added). The Conference Report's statement that the base closure process "would not be subject to judicial review" is an unqualified one; nothing about it suggests that judicial review is precluded in some respects but not in others.[3]

Second, in a related vein, the plaintiffs argue (at pp. __-__) that the Conference Report is directed only at judicial review of substantive challenges to the base closing process, not at procedural challenges. We address the plaintiffs' purported distinction between substantive and procedural challenges in detail below (see pp. __-__ infra). Here, it is sufficient to note that the Conference Report simply does not draw such a distinction. As already noted, the report says that the actions involved in the base closure process "would not be subject to judicial review" -- period. And as explained below, there is every reason to think that the idea of encumbering the base closure process with procedural litigation was especially troubling to Congress (see pp. __-__ infra).

Finally, the plaintiffs point out (at pp. __-__) that the Conference Report's examples of unreviewable actions include

---

[3]Moreover, the Conference Report's discussion of judicial review proceeds from the statement that "no final agency action occurs in the case of various actions required under the base closure process contained in this bill." 1990 Conference Report at 706, reprinted in 1990 USCCAN at 3258 (emphasis added). The concept of "final agency action" is unrelated to the rulemaking and adjudication provisions of Chapter 5 of the APA; it is found instead in Chapter 7, where it defines the scope of agency actions subject to judicial review. The Conference Report's discussion of judicial review is thus tied directly to the terms of the APA's judicial review provisions, not to the provisions of Chapter 5.

actions of the Secretary of Defense and the President, but do not include the actions of the Commission itself. But the language of the Conference Report does not purport to be inclusive in this regard; to the contrary, the report says that "[s]pecific actions which would not be subject to judicial review include" the enumerated examples, implying that other actions are exempt from judicial review as well. Moreover, the Commission's base closure recommendations are the same kinds of actions as those specifically listed by the Conference Report. The plaintiffs make no attempt to explain why Congress would preclude judicial review of every other phase of the base closure process, from the formulation of a force structure plan at the beginning to the President's decision at the end, while leaving an opening for judicial review at a single point in the middle of the process. In sum, none of the plaintiffs' arguments diminishes the plain import of the Conference Report.

B. The explicit message of the Conference Report about the unavailability of judicial review is confirmed by the structure of the Act itself. See Block, 467 U.S. at 349 (presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole"). Two elements of the Act are critical in this respect. The first is the Act's elaborate and carefully balanced mechanisms for reconciling the interests of the Executive Branch and Congress, mechanisms that leave no room for judicial involvement. The second is the Act's rigorous insistence on expediting, rather than delaying, the closure of unnecessary bases.

1. The 1990 Act, like its 1988 predecessor, breaks the pre-1988 impasse over domestic base closures through a comprehensive and carefully structured statutory compromise. The Act balances the interests of the Executive Branch and Congress by vesting the Secretary of Defense and the President with substantial authority over the selection of bases for closure and realignment, while creating detailed mechanisms for Congressional oversight and involvement. See pp. __-__ supra. This balancing process culminates in the Act's provision for a joint Congressional resolution of disapproval. See Act §§ 2904(b), 2908. By subjecting the President's base closure decision to Congressional approval or disapproval in its entirety, the joint resolution mechanism allows Congress to pass a final judgment on the base closure process as a whole while preventing a disappointed minority of legislators from defeating a consensus between the two branches.

Allowing private parties to bring judicial challenges to the base closing process would interfere with this carefully structured mechanism in two basic ways. First, judicial intervention would disrupt the Act's careful balance between the Executive Branch and Congress. And second, permitting recourse to the courts would undermine the statutory role of Congress as the final arbiter of the base closure process.

The D.C. Circuit addressed judicial review under a statute involving a similarly delicate balance between the Executive Branch and Congress in Armstrong v. Bush, 924 F.2d 282 (1991). In Armstrong, the court held that the Presidential Records Act, 44 U.S.C. §§ 2201 et seq. ("PRA"), precluded judicial review of the

President's decision to dispose of certain documents. In a scheme quite similar to the joint resolution of disapproval in the present Act, the PRA required the President to notify the Archivist of the United States before destroying documents. The Archivist would then report to Congress, which could enact legislation to protect the specific documents if it chose.

Although the legislative history of the PRA was unclear, the D.C. Circuit explained that the Act represented a careful political compromise between the desire to preserve Presidential records for later public access, and the separation of powers concern with interfering in the President's day-to-day business. 924 F.2d at 290. The court concluded that "permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." Id. The court therefore held that the PRA impliedly precluded review under 5 U.S.C. § 701(a)(1).

The joint resolution mechanism in the 1990 Act serves the same basic purpose: it gives Congress a specific review mechanism over Executive Branch decisions, but balances that power against other important interests. There is simply no room for judicial intervention in this statutory scheme. Here, as in Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984),

> [t]he lack of any authorization for * * * review at the behest of members of the public, when viewed in the context of * * * the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.

The Act plainly does not contemplate that a few legislators, overwhelmingly defeated in Congress, can request federal courts to dictate a different result to the President and Congress. Instead, the Act provides a political and legislative remedy, designed to serve as the exclusive basis for reviewing the Navy's actions and the Commission's recommendations. "Preclusion of such suits does not pose any threat to realization of the statutory objectives; it means only that those objectives must be realized through the specific remedies provided by Congress." Block, 467 U.S. at 352-53.

2. In addition to reflecting a careful balance of executive and legislative interests, the Act reflects Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work." 1990 House Report at 384, reprinted in 1990 USCCAN at 3077 (emphasis added). Congress thus framed the Act to "considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment." 1990 Conference Report at 707, reprinted in 1990 USCCAN at 3259 (emphasis added). In particular, Congress established a rigid series of deadlines and time limits to expedite the base closure process.

Under the Act, the Secretary of Defense was required to submit his closure recommendations to the Commission by April 15, 1991. Act § 2903(c). The Commission was then required to hold public hearings and deliberations, conduct necessary base visits and other information gathering, and submit its final report to the President by July 1, 1991, six weeks later. Id. § 2903(d). The President,

in turn, was required to make his decision within two weeks, by July 15, 1991. Id. § 2903. Finally, the Act allowed Congress 45 days in which to disapprove the President's decision, after which time the decision would take effect automatically. Id. § 2904(b), 2908.

Allowing private parties to drag the base closure process through a series of judicial challenges, with the protracted delays inherent in such litigation, would be directly antithetical to this expedited process. Indeed, the legislative history of the Act specifically recognizes the role of private litigation in the delays that had undermined pre-1988 base closure efforts. Among the reasons given by the Conference Report for "a new base closure process" was the fact that "under existing law," "closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court." Conference Report at 705, reprinted in 1990 USCCAN at 3257. Nowhere in their brief do the plaintiffs make any attempt to explain how drawn-out private litigation over base closures can be entertained without defeating Congress's interest in expedition.

Judicial review has been held to be precluded under other statutes where the statutory scheme placed a premium on speed. For example, in Morris v. Gressette, 432 U.S. 491 (1977), private plaintiffs challenged the Attorney General's failure to object to a State's amendment of its voting laws under a statutory procedure requiring federal "preclearance" of such amendments. The Supreme Court noted that the legislative history did not expressly address the review issue, but nonetheless held that Congress had not

intended to permit judicial review because the legislative history indicated that Congress had intended the preclearance process to move speedily. 432 U.S. at 503-04; see also Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985) (pre-enforcement judicial review of EPA emergency actions under CERCLA implicitly precluded where structure and legislative history indicate that delay is harmful); Wheaton Industries v. EPA, 781 F.2d 354, 356-57 (3d Cir. 1986) (Lone Pine also precludes review under 5 U.S.C. § 701(a)(1)).

The plaintiffs claim (at p. 26) that "[i]f quick closures were the goal, the 1990 Act would have been totally unnecessary." But that claim is squarely refuted by the legislative history of the 1990 Act, which cites the delays associated with "existing law" as one of the "failings" requiring Congress to adopt "a new base closure process." 1990 Conference Report at 705, reprinted in 1990 USCCAN at 3257. The Secretary of Defense could not rely on the expedited procedures of the 1988 Act, for as explained above, the 1988 Act was a "one shot" statute that authorized only a single round of base closures. To be sure, when Congress framed the 1990 Act, it elaborated on the terms of the 1988 Act in a variety of respects, some of which the plaintiffs seek to rely on (see pp. __-__ infra). But Congress specifically preserved the 1988 Act's insistence on a highly expedited base closure process, and that process cannot be maintained if suits like the plaintiffs' are allowed to proceed.

2. The Procedural Nature of the Plaintiffs' Claims Reinforces, Rather Than Defeats, the District Court's Preclusion Holding

For all of their insistence on the importance of judicial review, the plaintiffs do not seriously dispute that Congress intended to restrict judicial review under the 1990 Act. More specifically, they do not dispute that substantive challenges to the base closure decision are barred from judicial review. As noted above, the D.C. Circuit squarely held with respect to the 1988 Act that the selection of bases for closure and realignment is "committed to agency discretion by law" and therefore is not subject to judicial review under the APA. See NFFE, 905 F.2d at 405-406. The plaintiffs neither question the validity of NFFE nor point to any feature of the current Act that distinguishes it in this regard from the 1988 Act.

Instead, the plaintiffs' challenge to the district court's preclusion holding rests rely entirely upon a distinction between substantive and procedural challenges to the base closing process. The plaintiffs argue that even if judicial review of substantive challenges is foreclosed, procedural challenges must be allowed to go forward. They argue that the 1990 Act imposes a variety of procedural requirements on the Secretary of Defense and the Commission and that Congress could not possibly have intended to foreclose the courts from hearing procedural claims relating to these requirements.

Characterizing the plaintiffs' claims as "procedural" is an oversimplification, both because the claims themselves contain substantive elements (see p._ n._ supra) and because the primary relief sought (a prohibition against the closure of the Shipyard) is substantive rather than procedural. But even taken at face

value, the procedural label fails to justify an exercise of judicial review under the Act. To the contrary, the procedural character of the plaintiffs' claims actually reinforces, rather than undercuts, the case for preclusion of review.

A. We have already noted one problem with the plaintiffs' proposed substantive/procedural distinction, the fact that the legislative history draws no such distinction in discussing judicial review. But the plaintiffs' distinction is subject to another, even more compelling problem: it ignores the procedural nature of the obstacles to base closures prior to 1988 and the explicit steps taken by the 1988 and 1990 Acts to eliminate such procedural barriers.

As explained above (see pp. __-__ supra), the primary barriers to the closing of unneeded domestic military installations prior to 1988 were procedural rather than substantive. For present purposes, the most important of these barriers was the National Environmental Policy Act, which Congress explicitly made applicable to base closures in 1977. See 10 U.S.C. § 2687(b)(2). As the Supreme Court has stressed, the obligations imposed on federal agencies by NEPA "are 'essentially procedural'" ones. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)). "NEPA itself does not mandate particular results, but simply prescribes the necessary process" to be followed in considering the environmental impact of agency actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Thus, "the only role for a court [under NEPA] is to insure that the agency has con-

sidered the environmental consequences" of its intended actions (Strycker's Bay, 444 U.S. at 227) and has satisfied NEPA's specific procedural requirements.

If Congress were concerned only with precluding substantive challenges to base closure decisions, as the plaintiffs assert, it would have had no occasion to restrict NEPA actions, since NEPA suits address only the procedures followed by an agency rather than the substantive validity of the agency's decision. But as pointed out above, the 1988 and 1990 Acts do restrict NEPA actions, and indeed foreclose them altogether, by explicitly exempting closure and realignment decisions from the requirements of NEPA. See pp. __-__ supra.

The 1988 and 1990 Acts do not restrict the availability of NEPA actions out of a lack of concern for NEPA policies. To the contrary, the 1988 House and Senate conferees specifically endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts." 1988 Conference Report at 23, 1988 USCCAN at 3403. Rather, NEPA actions were restricted out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." Id. In short, Congress recognized that procedural challenges under NEPA could have the substantive effect of impeding or defeating base closures altogether, and Congress acted to foreclose this threat.

Precisely the same kind of threat is presented by the plaintiffs' procedural claims in this case. Even if litigants challenge the decision to close a military installation solely on procedural

grounds under the Act, the lesson drawn by Congress from NEPA is that procedural litigation can be as effective as substantive litigation in obstructing the base closure process. If the plaintiffs can maintain the present suit simply by casting their objections in procedural terms, they can accomplish precisely what the 1990 Act and its 1988 predecessor were intended to prevent -- the perpetuation of the base closure impasse through the erection of procedural barriers. Thus, the procedural character of the plaintiffs' claims in no way diminishes the correctness of the district court's decision.[4]

B. In an effort to support their "substantive/procedural" distinction, the plaintiffs give great emphasis to various procedural provisions in the 1990 Act. The plaintiffs argue that Congress placed great importance on the procedural integrity of the base closure process, and hence that judicial review must be available to vindicate that goal. The plaintiffs' premise is correct, but their conclusion is a non sequitur.

It is unquestionably true that when Congress framed the terms of the 1990 Act, one of its major concerns was to ensure the use of fair and unbiased procedures in identifying unneeded domestic mili-

---

[4]It is immaterial that the 1990 Act restricts the availability of NEPA claims in explicit terms, while restricting other kinds of judicial review only implicitly. NEPA was made applicable to the base closure process in 1977 through the adoption of an explicit statutory provision (10 U.S.C. § 2687(b)(2)), and a correspondingly explicit retraction was called for. In contrast, there is no comparable statutory provision specifically authorizing other kinds of procedural challenges to the base closure process, and hence no need for an explicit textual restriction on such suits.

tary bases.[5] But it simply does not follow that Congress meant for private parties to be able to resort to judicial proceedings to enforce these procedures. This is not a conventional case in which judicial review is the only possible mechanism for overseeing the procedural integrity of agency action. Instead, relief is available from Congress, which is empowered under the Act to disapprove the President's decision for any reasons, including procedural ones. The structure of the Act (see pp. __-__ supra) makes manifest that recourse for errors by the Executive Branch, including procedural errors, lies with Congress rather than with the courts.

The plaintiffs summarily assert (at p. 31 n. 17) that Congress lacks the institutional capacity to review and act on procedural objections. This is simply nonsense. The Act allowed Congress 45 days to deliberate over the President's closure decision, during which time both Houses of Congress could -- and did -- hold hear-

---

[5]However, the plaintiffs err when they repeatedly state (see, e.g., p. 27) that the procedural provisions of the 1990 Act were intended to correct shortcomings in the 1988 Act. The legislative history of the 1990 Act repeatedly endorses the 1988 Act. For example, the 1990 House Report states that "[a] new base closure process will not be credible unless the 1988 base closure process remains inviolate" and that "[t]he committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it." 1990 House Report at 342, reprinted in 1990 USCCAN at 3068 (emphasis added); see also id. at 341, reprinted in 1990 USCCAN at 3067 ("The establishment of the Defense Secretary's Commission * * * in 1988 is an example of the right way to close bases."). The procedural criticisms in the legislative history are directed instead at Secretary Cheney's 1990 base closure initiative (see pp. _-_ supra), which was not carried out within the framework of the 1988 Act. See, e.g., 1990 Conference Report at 705, reprinted in 1990 USCCAN at 3257. The plaintiffs' attempts to redirect these criticisms from Secretary Cheney's 1990 initiative to the 1988 Act are inexplicable.

ings to review the base closure recommendations. There is no reason why Congress could not address procedural issues during these hearings and the ensuing floor debates. Indeed, during the deliberations over the proposed joint resolution of disapproval, the plaintiffs themselves took to the floor of the House of Representatives to air their procedural objections to the selection of the Shipyard (see pp. __-__ supra). One can only assume that they did so because they thought that the House was capable of acting on their objections.

Alternatively, the plaintiffs try to demonstrate (at pp. 31-32) that even if Congress could have reviewed their procedural grievances, it did not in fact do so. The sole evidence offered for this argument is a Senate resolution passed in September 1991, almost two months after the joint resolution of disapproval was rejected. But as noted above, the Senate did not act on the joint resolution of disapproval; the House of Representatives did so (see pp. __-__ supra). The plaintiffs thus rely on the "sense" of one House of Congress about the intentions of the other House. The plaintiffs are forced to rely on this second-hand pronouncement because the House of Representatives itself has never passed a comparable one.

Even taken at face value, the Senate resolution simply says that Congress did not approve "all actions" taken by the Department of Defense and the Commission and that Congress "takes no position" on whether the Department and the Commission complied with the requirements of the Act. The resolution does not claim that Congress failed to consider the procedural allegations raised by

the plaintiffs. And in light of the floor debate in the House of Representatives, no such claim is possible. What matters for purposes of judicial review is whether the Act vested Congress with the authority to act on procedural objections, not how Congress ultimately exercised that authority.

C. Finally, the plaintiffs cite a number of cases that are said to support their proposed substantive/procedural distinction. These cases involve different statutes, and the preclusion issue in this case depends on the Act before this Court rather than on some other statute. See Morris, 432 U.S. at 505 n.20 ("[e]very judicial holding with respect to implied preclusion of judicial review is unique; 'the context of the entire legislative scheme' differs from statute to statute") (citation omitted). But even taken on their own terms, the cases cited by the plaintiffs do not undermine the district court's decision.

First, the plaintiffs cite several Court of Appeals decisions for the proposition (at p. 18) that "even express statutory provisions precluding review cannot bar judicial scrutiny of an agency's failure to follow statutory procedures * * * ." If the plaintiffs mean to suggest that Congress cannot preclude judicial review of procedural claims, they are simply wrong. Subject only to constitutional limits, Congress has unlimited discretion to permit or withhold judicial review of agency action. See, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672-73 (1986). None of the cases cited by the plaintiffs suggests that Congress lacks the power to preclude review of procedural claims.

Instead, they hold only that Congress did not exercise that power in the statutes at issue in those cases.

Two of the cases cited by the plaintiffs, First Federal Savings and Loan Ass'n of Lincoln v. Casari, 667 F.2d 734 (8th Cir. 1982), and Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979) (per curiam), involve a Medicare statute providing that HHS's approval of certain state determinations is not subject to judicial review. Both cases turn on the specifics of the Medicare statute, and in one case (Casari) HHS was not even a defendant. The third case, Graham v. Caston, 568 F.2d 1092 (5th Cir. 1978), is even more inapposite, for there the issue was simply whether a statute barring review of an agency decision foreclosed a challenge to the agency's failure to act at all (see 568 F.2d at 1097). Here, of course, the plaintiffs are attacking agency action, not agency inaction.

The plaintiffs suggest that the "principle" applied in these cases was adopted by this Court in Kirby v. HUD, 675 F.2d 60 (1982). But as the plaintiffs themselves concede, Kirby involves 5 U.S.C. § 701(a)(2), a provision of the APA that has no relevance to this case.[6] In contrast, in Wilmington United Neighborhoods v. United States, 615 F.2d 112, 118 (3d Cir. 1980), this Court expressly rejected a proposed "distinction between 'substantive' and 'procedural' determinations" asserted with respect to 5 U.S.C. § 701(a)(1), the APA provision that underlies the district court's

---

[6]5 U.S.C. § 701(a)(2) precludes judicial review to the extent that agency action is "committed to agency discretion by law." The defendants have not invoked this provision in this litigation.

decision in this case. Wilmington refutes the plaintiffs' claim (at p. 19) that Kirby's reasoning extends automatically from Section 701(a)(2) to Section 701(a)(1).

Finally, the plaintiffs point to several Supreme Court cases, chief among them the Court's decision in Bowen v. Michigan Academy, supra. But Bowen does not distinguish between substantive claims on the one hand and procedural claims on the other. Instead, it distinguishes between two different kinds of substantive claims. See Bowen, 476 U.S. at 668-69 (allowing challenge to Medicare reimbursement regulations on ground of conflict with substantive provisions of Medicare statute). Neither Bowen nor any of the other Supreme Court decisions cited by the plaintiffs holds that statutes restricting judicial review must be read to preserve procedural claims.

The broad moral drawn by the plaintiffs from these cases is that if a procedural claim can be pursued even when a statute expressly restricts judicial review, a procedural claim a fortiori can be pursued when (as here) a statute does not explicitly limit judicial review. But that moral is an illusory one. Whether judicial review is precluded does not depend on whether the statute bars judicial review in explicit terms. See Block, 467 U.S. at 351. Instead, the only question is whether Congress's intent to preclude judicial review is "'fairly discernible in the statutory scheme.'" Id. Here, for the reasons given above, Congress's intent to preclude judicial review under the Act is not simply "fairly discernible'" but manifestly obvious.

B. The Plaintiffs' Claims Present a Nonjusticiable Political Question

1. The presence of any one of a number of factors may render a case nonjusticiable under the political question doctrine. See generally Baker v. Carr, 369 U.S. 186, 217 (1962). Among the factors establishing the existence of political question is "the impossibility of a court's undertaking independent resolution [of a case] without expressing lack of the respect due coordinate branches of government." Baker, 369 U.S. at 217. In this case, the district court concluded that it could not entertain the plaintiffs' challenge to the closure of the Shipyard without expressing a lack of the respect owed to the President and Congress.

The plaintiffs raise a variety of objections (at pp. 33-40) to the district court's reasoning, but all of their arguments proceed from a common premise -- namely, that this suit does not challenge the substantive policy decision to close the Shipyard and therefore does not require the district court to place itself in conflict with the judgment of the President and Congress. That premise is incorrect, for at least two reasons.

First, however the plaintiffs may choose to style their claims, the relief sought by the plaintiffs interferes directly with the policy decision to close the Shipyard. As explained above, the plaintiffs seek to enjoin the Department of Defense "from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list." App. 50, 54, 57. More broadly, the plaintiffs seek to bar the Department of Defense "from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy." Id. (emphasis added). The district court

simply cannot grant such relief without directly countermanding the closure decisions of the President and Congress.

Second, quite apart from the substantive nature of the relief sought by the plaintiffs, the lesson of pre-1988 base closure efforts is that even purely procedural litigation can have the substantive effect of preventing the closure of unneeded military installations. As explained above, the President's ability to close domestic bases before 1988 was systematically obstructed by procedural barriers, chief among them the delays associated with NEPA litigation (see pp. __-__ supra). Here too, nominally procedural claims like those advanced by the plaintiffs can serve to defeat the goal of closing military bases. Thus, the substantive decision of the President and Congress to close the Shipyard will be placed in jeopardy if the plaintiffs are allowed to maintain this suit, even if the plaintiffs are right in claiming (at p. 37) that "the District Court was not called on to make any policy judgment regarding * * * which bases to close."

The "lack of respect" that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing final judgment on the base closure decision of the Executive Branch (see pp. __-__ supra). Citing the D.C. Circuit's decision in Armstrong, supra, the plaintiffs argue (at pp. 38-39) that Congressional oversight is not enough to give rise to a political question. But Armstrong is not a political question case, and the D.C. Circuit never was called on to consider the separation-of-powers issues that underlie the political question doctrine. More generally, this case

involves more than mere "Congressional oversight"; it involves an unusual statutory scheme under which Congress was required to act, and did act, as the final arbiter of the base closure process.[7] Judicial intervention in this scheme necessarily involves displacing Congress from the role assigned to it by the Act.

2. There is a second, equally important factor supporting the district court's political question holding: "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker, 369 U.S. at 217. The Constitution establishes the President as Commander in Chief of the Army and Navy and vests Congress with the power to "raise and support Armies," to "make rules for the Government and regulation of the land and naval forces," and to "provide for organizing, arming, and disciplining, the Militia." Const. Art. I, § 8, cls. 12, 16; Art. II, § 2, cl. 1. These provisions commit virtually all decisions concerning military organization to the political branches, and such questions are therefore unreviewable by the judiciary. See Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir.) ("the fundamental division of authority and power established by the Constitution precludes judges from overseeing * * * the use or disposition of military power"), cert. denied, 387 U.S. 945 (1967).

---

[7]The plaintiffs are thus wrong to say (at p. 38) that the district court's reasoning "would result in the preclusion of judicial review over almost all agency actions." The vast majority of agency actions are not subject to the kind of direct, mandatory Congressional scrutiny established by the Act in this case.

The plaintiffs argue (at p. 38) that a case does not present a political question simply because it "'arises in a military context.'" We agree. But more than a mere "military context" is involved here. This case involves a function at the heart of the exclusive constitutional power of the President and Congress over the military -- the physical disposition of the Nation's military forces. That function is irrevocably committed to the political branches of government, and judicial intervention in this case -- under whatever theory -- intrudes impermissibly on that function.

C. The District Court's Nonreviewability Holdings Apply to the Union Plaintiffs' Due Process Claim As Well As the Statutory Claims

When the district court granted the defendants' motion to dismiss, the court dismissed not only the statutory claims (Counts I and II) but the union plaintiffs' due process claim (Count III) as well. The plaintiffs assert (at pp. 40-41) that the district court "failed even to consider [their] constitutional claims" and must be reversed on that ground.

It is obvious from the district court's decision that it did not ignore the due process claim, bur rather concluded that the due process claim, like the statutory claims, is barred from judicial review. That conclusion is an entirely proper one. As explained above, the due process claim is nothing more than a restatement of the statutory claims; it rests entirely on the alleged statutory violations of the Act's procedural requirements (see pp. __-__ supra). It would be curious if the plaintiffs could circumvent the preclusive effects of the Act and the political question doctrine merely by dressing their statutory claims in constitutional garb.

In fact, they cannot do so, for all of the considerations set forth in the preceding sections of this brief apply with equal force to the due process claim.

To be sure, it is unsettled whether judicial review of "colorable constitutional claims" may be barred by an Act of Congress. Webster v. Doe, 486 U.S. 592, 603 (1988) (emphasis added); see id. at 605-606 (O'Connor, J., concurring in part and dissenting in part), and id. at 612-15 (Scalia, J., dissenting). But as explained below, the union plaintiffs' due process claims in this case are not "colorable" ones. And even if they were, questions about the power of Congress to restrict judicial review of constitutional claims have no relevance to the political question doctrine, which itself is grounded in the Constitution. It has long been settled that even constitutional claims are nonjusticiable if they present political questions. See, e.g., Baker, 369 U.S. at 218-24 (political question doctrine bars claims arising under Guaranty Clause of Constitution).

2. Even if the due process claim were subject to judicial review, and even if the union plaintiffs had standing to raise the claim (but see pp. __-__ infra), the claim is a patently meritless one. For that reason, the defendants moved below to dismiss the due process claim under Rule 12(b)(6) as well as Rule 12(b)(1). The district court did not reach the merits of the due process claim, but this Court is free to do so as an alternative grounds for affirmance. See, e.g., Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988).

The most obvious defect in the due process claim is that while it rests on an asserted deprivation of property, the union plaintiffs simply have no cognizable "property interest" in the operation of the Shipyard. Property interests under the Due Process Clause "are defined by existing rules or understandings that stem from an independent source * * * -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Here, nothing in the Act "support[s] claims of entitlement to [the] benefits" of the Shipyard's continued operation. The decision whether to close the Shipyard (or any other installation) belongs to the President and Congress, and the Act does not impose any substantive limitation on their decisions.[8] More generally, the notion that civilian employees of a military base have a "property right" in their continued employment has never been embraced by the courts. See, e.g., American Federation of Government Employees v. Stetson, 640 F.2d 642, 645 (5th Cir. 1981) (rejecting due process claim by Air Force employees laid off when work reassigned to private contractor).

Faced with this obstacle, the plaintiffs have sought to manufacture a substantive property interest out of the procedural requirements of the Act, arguing (at p. 40 n. 20) that they have a "property right" in the continued operation of the Shipyard "until it is determined, pursuant to a fair and non-arbitrary process * * * , that the Shipyard should be closed" (emphasis added). But

---

[8]In particular, nothing in the Act binds the President or Congress to follow the selection criteria used by the Secretary of Defense and the Commission.

this attempt to bootstrap the Act's procedural provisions into a substantive property interest is unavailing. To establish the existence of a protected liberty or property right under the Due Process Clause, the plaintiffs must identify "substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis added) (liberty interest); Clark v. Township of Falls, 890 F.2d 611, 620 n.4 (3d Cir. 1989) (property interest). It is not sufficient merely to identify procedural restrictions on agency action, for "there can be no property interest in a procedure itself." Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1128 (W.D. Pa. 1980); Clark, 890 F.2d at 620 n.4; see Olim, 461 U.S. at 250-51 (purpose of Due Process Clause "is to protect a substantive interest to which the individual has a legitimate claim of entitlement") (emphasis added).[9]

Moreover, even if it were assumed that the union plaintiffs did have a cognizable "property interest" in the operation of the Shipyard, the only process to which they would be entitled was the legislative process entailed in Congress's consideration of the joint resolution of disapproval. It is well-settled that when burdens are imposed on a broad class of persons through legislative action, the only process due under the Due Process Clause is the legislative process itself. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Minnesota State

---

[9]If the bare existence of procedural provisions in applicable statutes or regulations were enough to give rise to a substantive property interest, every challenge to an agency's compliance with procedural statutes and regulations would be transformed into a constitutional claim, even if the statute explicitly left the agency with unfettered substantive discretion.

Board for Community Colleges v. Knight, 465 U.S. 217, 283, 285 (1984); Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980) ("the protections of procedural due process do not extend to legislative actions"); see also Alessi v. Pennsylvania Dep't of Public Welfare, 893 F.2d 1444, 1456 (3d Cir. 1990) (Becker, J., dissenting in part). Thus, the legislative process by which Congress authorized a nationwide base closure plan is the only process to which the union plaintiffs can possibly be entitled.

In sum, the union plaintiffs' due process claim is a frivolous reworking of their statutory objections, one that fails to make out a constitutional violation even if the statutory claims themselves have merit. Because the due process claim is patently without merit, the district court's dismissal of the due process claim may be affirmed even if the district court's nonreviewability holding is set to one side.

II. None of the Plaintiffs Has Standing To Challenge the Closure of the Shipyard

[To be added.]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

MICHAEL M. BAYLSON
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JENNIFER H. ZACKS
(202) 514-4052 / FTS 368-4052
Attorneys, Appellate Staff

Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave. N.W.
Washington, D.C. 20530

November 21, 1991

Document Separator

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

SEN. ARLEN SPECTER, et al.	:	CIVIL ACTION
v.	:	
H. LAWRENCE GARRETT, III, Secretary of the Navy, et al.	:	NO. 91-4322

MEMORANDUM AND ORDER

BUCKWALTER, J. November 1, 1991

I will grant the defendants' motion to dismiss because:

(a) the statute precludes judicial review; and

(b) the political question doctrine forecloses judicial intervention.

A. THE STATUTE PRECLUDES JUDICIAL REVIEW

Plaintiffs have asserted that their right to judicial review for Counts I and II arises under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1977), hereafter APA.

The presumption of judicial review of federal agency action under the APA is well established. See Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). This presumption, like all presumptions used in interpreting statutes, may be overcome by the appropriate showing of congressional intent. Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). The APA specifically provides two methods for overcoming the presumption of judicial review in §701(a). For purposes of this case, we are concerned only with the first

method in §701(a)(1), which provides for no judicial review under the APA "to the extent that - (1) statutes preclude judicial review. . ." 5 U.S.C. §§ 701(a)(1) (1977).

In determining whether a statute precludes judicial review, the Supreme Court has instructed courts to look at "specific language or specific legislative history that is a reliable indicator of congressional intent," "the collective import of legislative and judicial history behind a particular statute," and "inferences of intent drawn from the statutory scheme as a whole." Block, 467 U.S. at 349. As long as the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme," the presumption favoring judicial review has been overcome. Id. at 351.

Applying these standards, the court finds that the Defense Base Closure and Realignment Act of 1990 precludes judicial review for the following reasons. Initially, specific language in the legislative history of the Act indicates a congressional intent to preclude judicial review. The House Conference Report provides:

> 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 function." An action falling within this exception, as the decision to clear 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 Procedure Act, no final agency action occurs in the case of various actions

> required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements, and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan. . . , the issuance of selection criteria. . . , the Secretary of Defense's recommendation of closures and realignments of military installations. . . , the decision of the President. . . , and the Secretary's actions to carry out the recommendations of the Commission. . . .

H.R. Conf. Rep. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258.

This passage in the legislative history expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act.

Other indicia of statutory intent to preclude judicial review is the Act's concern with "the timely closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." H.R. Conf. Rep. 101-923, 101st Cong. 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." Id.

This language in the legislative history indicates that there was concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner. The desire to correct this shortcoming under the then existing law further supports the contention that no judicial review was contemplated by the 1990 Act. While the arguments proposed by both sides on this issue are extensive, I have written this memorandum in a rather summary fashion in the interest of time, but not at the expense of a thorough analysis of the arguments on both sides. In brief, I find that the intent to preclude judicial review is "fairly discernible in the statutory scheme."

B. THE POLITICAL QUESTION DOCTRINE FORECLOSES JUDICIAL INTERVENTION

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine - attributes which, in various settings, diverge, combine, appear and disappear in seemingly disorderliness". Baker v. Carr, 369 U.S. 186, 210 (1962).

Based on my own review of cases as well as treatises on the subject, I believe that Justice Brennan's statement in the Baker case, supra, remains as true today as it was 29 years ago. Nevertheless, the Baker case did describe the attributes of a political question and expressed them in the following manner:

> It is apparent that several formulations which vary slightly according to the settings

> in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In a sense, the invoking of the political question doctrine is no more than a correlative of my first conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review.

On the other hand, the doctrine can stand by itself, it seems to me, as one which recognizes that in certain cases, the concept of separation of powers strongly suggests that the judiciary should defer in certain controversies to one or both of the other branches of government.

In reviewing the formulations in Baker, I felt that the present case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government.

The respect due to the other branches of government comes in part from a recognition that all branches are deeply concerned with conducting their affairs in the manner which is consistent with the constitution. Indeed, all three branches are involved in interpreting it. It is true, of course, that normally the judicial branch undertakes the ultimate review of laws and in so doing will not always agree with the interpretation of the other branches.

Under the political question doctrine, when should the judiciary defer to the other branches' views as opposed to simply undertaking judicial review and stating its own views, whether or not they differ from the other branches?

Unfortunately, there is no particular guidance in case law for determining the answer to that question as the first quotation from Baker indicates. The simple answer is, RARELY. Nevertheless, one must view the particular setting in which the question is raised. The case now before me comes with a significantly long history of attempts to close military bases and the problems resulting from such attempts. The Act of 1990 is the most recent in a series of efforts by Congress to resolve those problems fairly. Among other things, it provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations. As permitted by the Act, both the President and the Congress have approved the recommended base closures. While plaintiffs view defendants' raising of the

political question doctrine as specious, I must disagree. Although I view it as a doctrine which should be used sparingly, this case fairly calls for its invocation.

In conclusion, I believe that it would be impossible to undertake judicial review of the decision on base closures made by the duly elected representatives of this country without expressing a lack of the respect due those branches of government.

Based on the foregoing opinion, the following order is entered:

ORDER

AND NOW, this 1st day of November, 1991, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED; the court enters judgment for the defendants and the plaintiffs' claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

RONALD L. BUCKWALTER, J.

Document Separator

U.S. Department of Justice

SMG:REK:DNL:SRMcIntosh
145-6-3183
514-4052

Washington, D.C. 20530

APR 27 1992

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Specter v. Garrett, No. 91-1932 (3d Cir. April 17, 1992) (Stapleton & Scirica, JJ.; Alito, J., dissenting in part)

TIME LIMITS

A petition for rehearing must be filed by May 1, 1992.[1]

RECOMMENDATIONS

The Department of the Navy and the Department of Defense recommend rehearing en banc by the attached letters of April 23, 1992.

The Defense Base Closure and Realignment Commission (Bob Moore, General Counsel, 624-5916) orally recommends rehearing en banc.

I recommend rehearing en banc on the nonreviewability issue.

QUESTIONS PRESENTED

Whether the Defense Base Closure and Realignment Act of 1990 (Act) precludes judicial review of claims that the Executive Branch has violated the procedural requirements of the Act.

STATEMENT

This is a suit to prevent or delay the planned closure of the Philadelphia Naval Shipyard. The suit alleges that the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure and Realignment Commission violated procedural requirements of the Act in the course of choosing the Shipyard, along with many other

[1]The Third Circuit is extremely reluctant to grant extensions of time for rehearing petitions, and no extension of time has been sought.

installations, for closure. The district court dismissed the suit in its entirety on the ground, inter alia, that judicial review is barred by the Act itself. A divided panel of the Third Circuit has reinstated some but not all of the plaintiffs' procedural claims.

1. For a number of years, efforts to close obsolete domestic military bases were frustrated by a political impasse between the Executive Branch and Congress. In 1977, Congress's opposition to domestic base closures led to the adoption of formal statutory restrictions. See 10 U.S.C. § 2687 (Supp. I 1977). The 1977 legislation required the Department of Defense to comply with a variety of procedural requirements, including the requirements of the National Environmental Policy Act (NEPA), before carrying out a major base closure. The legislation did not impose substantive restrictions, but the law's procedural requirements made it effectively impossible for the Executive Branch to carry out significant base closures without further legislation by Congress.

In 1988, Congress broke the stalemate over domestic military base closures by enacting the Base Closure and Realignment Act of 1988 ("1988 Act"). See Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act assigned the task of identifying unnecessary military bases to an independent commission. The commission's recommendations were presented to the Secretary of Defense for approval or disapproval in their entirety. If the Secretary approved the commission's recommendations, Congress was empowered to override his decision by passing a joint resolution of disapproval within a 45-day period. The 1988 Act suspended the procedural barriers of the 1977 legislation, including the NEPA requirements, on a one-time basis to make the closure of domestic bases feasible.

In 1990, Congress enacted the current Act as a successor to the 1988 Act. Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19. The current Act, which governs three rounds of base closures in 1991, 1993, and 1995, follows the general approach taken by the 1988 Act. The Act establishes an independent Defense Base Closure and Realignment Commission to meet in each of these years. Act § 2902(a), (e). The Act requires the Secretary of Defense to provide the Commission with a six-year force structure plan that assesses national security threats and the force structure needed to meet them. Id. § 2903(a)(1), (2). The Act also requires the Secretary to formulate criteria to be used in identifying bases for closure or realignment. The Secretary is required to publish the criteria in the Federal Register for notice and comment and present them to Congress for legislative review. Id. § 2903(b). The Secretary established his final criteria on February 15, 1991, and Congress did not exercise its authority under the Act to disapprove the criteria by joint resolution.

For the first round of base closures, the Act required the Secretary to recommend base closures and realignments by April 15,

1991, based on the force structure plan and final criteria. Act § 2903(c)(1). The Act then charged the Commission with reviewing the Secretary's recommendations and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. Id. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations. Id. § 2903(d)(1). The Act authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force-structure plan and final criteria. Id. § 2903(d)(2)(B). The Act also requires the Comptroller General, the head of the GAO, to report on the Secretary's recommendations and selection process and permits the Comptroller, to the extent requested, to assist the Commission in its efforts. Id. § 2903(d)(5).

The 1990 Act provides for the Commission's recommendations to be presented to the President for his review. Act § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. Id. § 2903(e)(2), (3).[2] If the President approves the Commission's recommendations, Congress has 45 days from the date of approval (or until Congress adjourns for the session, whichever is earlier) to pass a joint resolution disapproving of the Commission's recommendations. Act § 2904(b), 2908. If such a resolution is enacted, following presentment to the President, the Secretary of Defense may not close the bases approved for closure by the President. Id. § 2904(b).

Under the 1990 Act, as under the 1988 Act, direct Congressional oversight replaces the procedural requirements imposed by pre-1988 base closure legislation. The 1990 Act thus authorizes the Secretary of Defense to close or realign military installations "without regard to" the 1977 base closure statute and related legislation. Act § 2905(d). And like the 1988 Act, the 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in carrying out [the Act]." Id. § 2905(c)(1).

Apart from its restriction on NEPA claims, the 1990 Act does not contain any explicit limitations on judicial review. However, the Conference Report on the Act addresses the issue of judicial review in the following terms (1990 U.S. Code Cong. & Admin. News 3258):

---

[2]If the President disapproves any recommendations, the Commission is required to transmit a revised set of recommendations to him. Id. § 2903(e)(3). If the President does not approve the revised list, the base closing process for that year terminates. Id. § 2903(e)(5).

> [V]arious actions required under the base closure process contained in this bill * * * would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * * , the issuance of selection criteria * * * , the Secretary of Defense's recommendation of closures and realignments of military installations * * * , and the Secretary's actions to carry out the recommendations of the Commission * * * .

2. In April 1991, as required by the Act, the Secretary of Defense recommended the closure or realignment of twelve naval facilities, among them the Shipyard. The Commission then analyzed the Secretary's recommendations. The Commission conducted both public regional hearings and hearings in Washington, D.C. in which it heard testimony from Department of Defense officials, legislators and other experts, including virtually all of the plaintiffs. The Commissioners visited the major facilities recommended for closure, including the Shipyard. Id. at 307, 389-90. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in obtaining, verifying and reviewing data. Id. at 305-306. The Commission reported that it analyzed the Navy's recommendations with particular care. Id. at 308.

The Commission ultimately concurred with the Secretary's recommendation that the Shipyard be closed and forwarded to the President its own recommendations, which covered 82 military installations. Id. at 295-96, 336. On July 10, 1991, President Bush approved all of the recommendations of the Commission, including the closure of the Shipyard. On July 30, 1991, the House entertained a proposed resolution to disapprove the Commission's recommendations. 137 Cong. Rec. H6006 (daily ed. July 30, 1991). The House engaged in two hours of floor debate on the proposal, much of which was devoted to alleged errors in the process by which the Shipyard was recommended for closure. See, e.g., id. at H6008-H6010 (Rep. Weldon); id. at H6010-H6011 (Rep. Foglietta); id. at H6021 (Rep. Andrews). Nonetheless, the House rejected the proposed resolution by a vote of 364 to 60, thus authorizing the Secretary of Defense to proceed with the closures and realignments. See id. at H6039.

3. The present suit was filed on July 8, 1991, three weeks before the House of Representatives acted on the proposed resolution of disapproval. The plaintiffs asked the district court to "[r]equire the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not

on the closure list." App. 50, 54, 57.[3] Although the injunctive relief sought by the plaintiffs is wholly substantive, the plaintiffs framed their claims in nominally procedural terms.

Count I of the three-count complaint alleged that the Secretary of the Navy and the Secretary of Defense failed to comply with various procedural requirements of the Act. Count I alleged, inter alia, that the Navy failed to consider all naval facilities on an equal basis, as required by the Act; that the Navy violated DoD record-keeping regulations; that the Navy used extra-statutory criteria in selecting the Philadelphia shipyard for closure; and that the Navy and DoD failed to transmit the full information underlying their decisions to the Commission and the GAO, as required by the Act.

Count II of the complaint alleged various procedural errors by the Commission. Count II alleged that the Commission itself failed to consider all naval installations on an equal basis; that it accepted inadequately documented recommendations from the Navy; that it used unpublished criteria in reviewing DoD's recommendations and failed to apply published criteria equally; and that it violated its statutory duty to hold public hearings by holding closed-door meetings with the Navy.

Count III, which was advanced only by the union plaintiffs, presented a due process claim. Count III asserted that the defendants' alleged failure to comply with the Act's procedural requirements constituted a denial of due process. Count III did not identify any provision of the Act that gave rise to any substantive entitlement on the part of union members.

The government denied both the specific details of the plaintiffs' allegations and the general charge of noncompliance with the Act's procedural requirements. In addition, the government argued that the suit was barred by a number of jurisdictional and other threshold obtacles.

First, and most important for present purposes, we contended that judicial review of the plaintiffs' claims is implicitly precluded by the Act itself and hence is not allowed under the APA (see 5 U.S.C. § 701(a)(1)). We relied in part on the Act's legislative history, quoted above, which is not conclusive but is nonetheless strongly suggestive. We also relied heavily on the struc-

---

[3]More broadly, the plaintiffs demanded that the district court "[e]njoin the Secretary of Defense and the Secretary of the Navy * * * from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy," a prayer for relief that would block the closure or realignment of any naval installation in the United States. Id. (emphasis added).

ture and policies of the Act. We argued that the Act strikes a delicate balance between the Executive Branch and Congress which would be upset by judicial intervention. We stressed that the Act assigns Congress, not the courts, the role of passing judgment on the Executive Branch's closure decisions. We noted that one of the primary practical and political goals of the Act is to create a unified "bundle" of base closures that must stand or fall together, and judicial review will jeopardize this goal by allowing litigants to pull apart the bundle. Finally, we noted that the Act and its legislative history place a great premium on expediting the base closure process and that judicial review will necessarily compromise this goal.

The plaintiffs essentially conceded that the Act precludes judicial review of substantive challenges, but argued that nothing in the Act bars judicial review of procedural claims. In response, we pointed out that procedural challenges pose many of the same problems for the statutory scheme as substantive challenges do. We also pointed out that the Act explicitly bars almost all NEPA challenges, which are themselves generally procedural rather than substantive.[4]

Based on many of the same considerations underlying our statutory nonreviewability argument, we also argued that the plaintiffs' claims presented a nonjusticiable political question. In addition, we contended that none of the plaintiffs satisfied the constitutional and prudential requirements for standing under Article III and the APA. Finally, we contended that the union plaintiffs' due process claim (Count III) failed to state a valid constitutional claim.

In October 1991, the district court granted a motion by the government to dismiss the suit in its entirety. The district court agreed that the Act implicitly precludes judicial review of the plaintiffs' claims. In the alternative, the district court held that judicial review was barred by the political question doctrine. The plaintiffs pursued an expedited appeal, and the Third Circuit heard argument in January 1992.

4. On April 17, 1992, a divided panel partially affirmed and partially reversed the district court. Judges Stapleton and Scirica voted to reinstate certain elements of the plaintiffs'

---

[4]Moreover, the Act imposes an extremely strict time limit on the narrow class of NEPA suits that are allowed. If Congress actually contemplated judicial litigation over compliance with the Act itself, Congress presumably would have imposed a comparable time limit, yet the Act contains no time limit whatsoever for the kind of suit brought by the plaintiffs here -- evidence that Congress did not expect such suits to be entertained.

claims, while Judge Alito voted to affirm the district court's dismissal of the complaint in its entirety.

The majority held that neither the legislative history nor the structure of the Act bars judicial review of all claims arising under the Act. Slip op. at 16-33. Broadly speaking, the majority held that judicial review is impermissible to the extent that it touches on the merits of the base closure decision, but that judicial review is available to ensure compliance with the purely procedural requirements of the Act. Id. at 22-33. The court explicitly declined to decide what relief, if any, would be available in the event that a procedural violation were shown. Id. at 32-33 & n.13.

Having concluded that the Act did not bar judicial review altogether, the majority turned to the plaintiffs' specific claims. The majority held that judicial review of most of Count I was barred by the Act because the Act did not provide judicially manageable standards and because the Act contemplated that the Commission and the GAO, rather than the courts, would review how DoD reached its recommendations. Slip op. at 33-37. The only element of Count I that the majority reinstated was the claim that DoD failed to provide the Commission and the GAO with the full administrative record on which the Secretary of Defense had relied. Id. at 38-39.

Turning to Count II, the majority held that most of the claims against the Commission were likewise barred from judicial review by the Act. Slip op. at 39-40. The only claim under Count II that the majority reinstated was the claim that the Commission had violated the Act's public-hearing requirement. Id. at 40.

The majority held that the political question doctrine did not bar judicial review of the specific claims that it had reinstated under Counts I and II. Slip op. at 41-45. Then, turning to Count III, the majority affirmed the dismissal of the due process claim on the merits for failure to state a valid claim. Id. at 45-47.

Judge Alito joined the majority's treatment of the political question and due process issues, but he argued that the Act bars judicial review of all of the plaintiffs' statutory claims, including the claims reinstated by the majority. See slip op. at 48-61. His dissent broadly adopts the government's arguments about the significance of the Act's structure and legislative history. In particular, Judge Alito argued that judicial review would fatally interfere with the statutory goals of speed and finality and would threaten the statutory objective of creating a unified package of base closures to be approved or disapproved en masse. Id. at 58-61.

DISCUSSION

Although the panel has barred a number of the plaintiffs' claims, its decision to reinstate the remaining claims poses a continuing threat to the integrity of the statutory scheme. I therefore recommend that rehearing en banc be sought on the basis of our statutory nonreviewability argument. I do not recommend seeking rehearing on the basis of our other arguments.

1. Nonreviewability

A. Legal Considerations

The grounds for our statutory nonreviewability argument are summarized at pp. 5-6 supra and are set forth in detail at pp. 18-37 of the attached brief. In our view, the panel majority made several basic errors in responding to our nonreviewability argument.

First, as suggested by Judge Alito, the majority seriously underestimated the impact of judicial review on Congress's goals of expedition and finality. Second, as Judge Alito again suggests, the majority failed to give sufficient weight to Congress's goal of consolidating base closures in a single, indivisible package, a goal that almost certainly will be compromised by a successful suit. Third, the majority largely failed to respond to our argument that judicial review alters the statutory and political balance struck by the Act between the Executive Branch and Congress. Fourth, the majority failed to recognize the significance of the Act's treatment of NEPA claims, which present very much the same kind of obstacles to the base closure process that are presented by the procedural claims in this case.[5]

Given the strong presumption in favor of judicial review, and given the necessary uncertainties in any nonreviewability argument that does not rest on explicit statutory provisions, we recognize that rational judges could disagree with our position in this case. On balance, however, for the reasons set forth in detail in our brief, we believe strongly that Congress should be found to have implicitly precluded all judicial review of claims arising under the Act.

---

[5]The majority regarded the Act's explicit restrictions on NEPA review as ambiguous because they might just as easily be cited as evidence that Congress meant to allow other kinds of procedural claims. But as we explained in our briefs, NEPA suits had been used in the past as the primary mechanism for blocking base closures, and Congress previously had explicitly made NEPA applicable to the base closure process; Congress therefore had good reason to be more explicit about NEPA claims than about other types of suits.

B. Rehearing Considerations

Despite what we regard as the strength of our legal arguments on nonreviewability, it is far from certain that the Third Circuit will be receptive to an en banc petition. The panel's decision does not conflict with any other decision of the Third Circuit or any other Circuit. The panel has erred in assessing the present statute under the applicable Supreme Court precedents, but we cannot seriously argue that the panel has failed to apply the correct legal standards. Thus far, only one other suit has been brought under the Act (a challenge to the closure of Loring AFB in Maine), and the Court of Appeals therefore may not regard this decision as one that is likely to have general practical importance. Last but not least, because the majority opinion appears to give the government at least "half a loaf" by affirming the the district court's dismissal of a number of individual claims, the Court of Appeals is less likely to give the panel decision rigorous scrutiny.

Notwithstanding these considerations, we believe that a petition for en banc rehearing on the nonreviewability issue is fully warranted. By allowing a judicial challenge to proceed, regardless of how narrowly the suit may be cabined, the panel has struck a dangerous blow to the integrity of the important base closure process. As explained in the Navy's letter (copy attached), even a narrow procedural challenge to the closure of the Philadelphia shipyard has the potential to seriously disrupt the operation of the Act by upsetting planning for future rounds of base closures. Moreover, if plaintiffs are able to pick apart the bundle of bases approved for closure by Congress, one of the most politically important elements of the statutory scheme will be jeopardized.

The fact that only one other suit has thus far been filed under the Act is hardly indicative of the impact of the panel's decision. The absence of other suits may well be due in large part to the expectation that courts would decline to intervene in the base closure process. With the panel decision in hand, the temptation to bring suit over other bases will grow considerably. Thus, it is especially important to seek rehearing in order to prevent this decision from opening the door for a number of new suits.

2. Other Issues

As noted above, we also contended that judicial review is barred by the political question doctrine and that the plaintiffs lack standing. All of the panel members, including Judge Alito, rejected these arguments, and we do not propose to include them in our rehearing petition. Our standing argument is unpersuasive with respect to the union plaintiffs, for the reasons indicated by the majority, and our political question argument is not as strong as the statutory nonreviewability argument. If we are unable to gain

rehearing on the basis of the the nonreviewability argument, the other arguments are quite unlikely to help.

CONCLUSION

For the foregoing reasons, I recommend in favor of rehearing en banc on the nonreviewability issue.

/S/

STUART M. GERSON
Assistant Attorney General
Civil Division

Document Separator

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
I. Statutory Background	2
A. Procedural Obstacles To Base Closures Prior To 1988	2
B. The 1988 Act	4
C. The 1990 Act	6
II. The Present Litigation	11
A. The Suit To Bar the Closure of the Shipyard	11
B. The District Court's Decision	13
STATEMENT OF RELATED CASES	15
STATEMENT OF STANDARD OF REVIEW	15
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. The Closure of the Philadelphia Naval Shipyard Is Not Subject to Judicial Review	17
A. The Defense Base Closure and Realignment Act Precludes Judicial Review	18
1. The Legislative History and Structure of the Act Confirm that Congress Meant To Preclude Judicial Review	20
2. The Procedural Nature of the Plaintiffs' Claims Reinforces, Rather Than Defeats, the District Court's Preclusion Holding	29

B. The Plaintiffs' Claims Present a Nonjusticiable Political Question 37

C. The District Court's Nonreviewability Holdings Apply to the Union Plaintiffs' Due Process Claim As Well As the Statutory Claims 40

II. None of the Plaintiffs Has Standing To Challenge the Closure of the Shipyard 41

A. The State and City Plaintiffs 42

B. The Congressional Plaintiffs 44

C. The Union Plaintiffs 45

III. The Union Plaintiffs' Due Process Clause Is Without Merit As a Matter of Law 48

CONCLUSION 50

CERTIFICATE OF BAR MEMBERSHIP

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 19

AFGE v. Stetson, 640 F.2d 642 (5th Cir. 1981) 49

Air Courier Conf. v. American Postal Workers Union, 111 S. Ct. 913 (1991) 45, 47

Alfred L. Snapp & Sons v. Puerto Rico, ex rel. Barez, 458 U.S. 592 (1982) 42

American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978) 21

Armstrong v. Bush, 924 F.2d 282 (1991) 25, 38, 39

Baker v. Carr, 369 U.S. 186 (1962) 15, 37, 39, 41

Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) 26

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) 50

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) . . . . . passim

Board of Regents v. Roth, 408 U.S. 564 (1972) 49

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1987) 19, 35, 36

CFTC v. Schor, 478 U.S. 833 (1986) 24

Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989) 43

City of Hartford v. Towns of Glastonbury, 561 F.2d 1032 (2d Cir. 1976), cert. denied, 434 U.S. 1034 (1978) 43

Clark v. Township of Falls, 890 F.2d 611 (3d Cir. 1989) 50

Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987) 45, 47

Coleman v. Miller, 307 U.S. 433 (1939) 44

Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984) 44

Department of the Navy v. Egan, 484 U.S. 518 (1987) 18

Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084 (3d Cir. 1988) 41

First Federal Savings and Loan Ass'n of Lincoln v. Casari, 667 F.2d 734 (8th Cir. 1982) 35

Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984) 48

FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990) 43

Georgia v. Pennsylvania Ry. Co. 324 U.S. 437 (1945) 43

Gilligan v. Morgan, 413 U.S. 1 (1973) 39

Graham v. Caston, 568 F.2d 1092 (5th Cir. 1978) 35

Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) 48

Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979) (per curiam) 35

In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973) 43

Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) 38

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) 44

Kirby v. HUD, 675 F.2d 60 (3d Cir. 1982) 35

Lone Pine Steering Comm. v. EPA, 777 F.2d 882 (3d Cir. 1985) 28

Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967) 39

Minnesota State Board for Community Colleges v. Knight, 465 U.S. 217 (1984) 50

Moore v. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) 44, 45

Morris v. Gressette, 432 U.S. 491 (1977) 28

National Federation of Federal Employees v. United States, 727 F. Supp. 17 (D.D.C. 1989), aff'd, 905 F.2d 400 (D.C. Cir. 1990) 6, 46

NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) 46

New Jersey Speech-Language Hearing Ass'n v. Prudential Ins. Co. of America, 724 F.2d 383 (3d Cir. 1983) 46

Olim v. Wakinekona, 461 U.S. 238 (1983) 49, 50

Pennsylvania ex rel. Shapp v. Kleppe, 533 F.2d 668 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976) 43

Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981), cert. denied, 456 U.S. 1121 (1982) 42-44, 51

People ex rel. Hartigan v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989) 6, 43, 44, 46

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 30

Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980) 50

San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986) 21

State of Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985), cert. denied, 478 U.S. 1016 (1986) 43, 44

Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) 30

Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) 50

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co., 944 F.2d 1149 (3d Cir. 1991) 15

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) . . 44

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) 30

Warth v. Seldin, 422 U.S. 490 (1975) 42, 48

Webster v. Doe, 486 U.S. 592 (1988) 41

Wheaton Industries v. EPA, 781 F.2d 354 (3d Cir. 1986) 28

Wilmington United Neighborhoods v. United States, 615 F.2d 112 (3d Cir. 1980) 36

Constitution:

United States Constitution: 39

Art. I, § 8, cls. 12 39
Art. I, § 8, cls. 16 39
Art. II, § 2, cl. 1 39
Art. III 44

Due Process Clause 17, 48, 50

Guaranty Clause 41

Statutes:

Administrative Procedure Act:

5 U.S.C. § 701(a)(1) 1, 14, 36
5 U.S.C. § 701(a)(2) 6, 35

Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623 (1988):

§§ 201-209 4
§ 201(1) 4
§ 202 4
§ 202(b) 5
§ 203(b)(1)-(2) 4
§ 204(c)(1) 5
§ 208 5

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808:

§§ 2901-11 . . . . . 1, 7
§ 2901(b) 46
§ 2902(a) 8
§ 2902(e) 8
§ 2903 27
§ 2903(a)(1) 8
§ 2903(a)(2) 8
§ 2903(b) 8
§ 2903(c) 27
§ 2903(d) 27

§ 2903(d)(1) 8
§ 2903(d)(2)(B) 8
§ 2903(d)(5) 9
§ 2903(e) 9
§ 2903(e)(2) 9
§ 2903(e)(3) 9
§ 2903(e)(5) 9
§ 2904(b) 9, 24, 27
§ 2905(c)(1) 9
§ 2905(d) 9
§ 2908 . . . . . 9, 24, 27

Presidential Records Act, 44 U.S.C. §§ 2201 et seq. 25

Pub. L. No. 94-431, § 612, 90 Stat. 1349 (1976) 3

Pub. L. No. 95-82, § 612, 91 Stat. 358 (1977)
(codified at 10 U.S.C. § 2687 (Supp. I 1977):

10 U.S.C. § 2687(b)(1) (Supp. I 1977) 3
10 U.S.C. § 2687(b)(2) (Supp. I 1977) 4, 30
10 U.S.C. § 2687(b)(3)-(4) (Supp. I 1977) 3

Pub. L. No. 145, § 1202(a), 99 Stat. 716 (1985)
(amending 10 U.S.C. § 2687) 5

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1
28 U.S.C. § 1337 1
28 U.S.C. § 1341 1
28 U.S.C. § 1346 1

Regulations:

56 Fed. Reg. 15184 (April 15, 1991) 10

Rules:

Federal Rules of Civil Procedure:

Rule 12(b)(1) 48
Rule 12(b)(6) 48

Legislative Materials:

136 Cong. Rec. H7459 (daily ed. Sept. 12, 1990) 46, 47

137 Cong. Rec. H6006 (daily ed. July 30, 1991) 11

137 Cong. Rec. H9944 (daily ed. Nov. 13, 1991) 23

137 Cong. Rec. H10394-95 (daily ed. Nov. 18, 1991) 23

137 Cong. Rec. S13717 (daily ed. Sept. 25, 1991) 34

137 Cong. Rec. S17153-70 (daily ed. Nov. 20, 1991) 23

137 Cong. Rec. S17540 (daily ed. Nov. 22, 1991) 23

H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3403 . . . . . 4, 5, 31

H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. (1990), reprinted in 1990 USCCAN 3110 . . . . 7, 20, 21, 23, 27, 28

H.R. Rep. 665, 101st Cong., 2d Sess. (1990), reprinted in 1990 USCCAN 2931 . . . . . 7, 27, 32

Miscellaneous:

27 Weekly Comp. Pres. Doc. 930 (July 15, 1991) 11

STATEMENT OF JURISDICTION

1. The plaintiffs asserted the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1337, 1341 and 1346. The district court dismissed the suit for lack of jurisdiction under 5 U.S.C. § 701(a)(1) and the political question doctrine.

2. The judgment under appeal is a final decision of the district court and is within this Court's appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The President of the United States, acting with the concurrence of Congress pursuant to the Defense Base Closure and Realignment Act of 1990 ("Act" or "1990 Act"), has directed the Secretary of Defense to close or realign 82 domestic military installations, including the Philadelphia Naval Shipyard. The plaintiffs in this case are seeking to enjoin the closure of the Shipyard. The issues presented are:

1. Whether judicial review of the plaintiffs' claims is precluded by the Act.

2. Whether the plaintiffs' claims present a nonjusticiable political question.

3. Whether the plaintiffs lack standing.

4. Whether the union plaintiffs' due process claim fails to state a claim for relief.

STATEMENT OF THE CASE

This is an action to prohibit the Secretary of Defense from carrying out a decision of the President to close the Philadelphia Naval Shipyard. The plaintiffs-appellants are members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New

Jersey, and Delaware, and officials of those States; the City of Philadelphia; and local labor unions and union officials. The defendants-appellees are the Secretary of Defense, the Secretary of the Navy, and the independent Defense Base Closure and Realignment Commission ("Commission") and its members.

The plaintiffs filed suit on July 8, 1991, asking the district court inter alia to "[e]njoin the Secretary of Defense and the Secretary of the Navy * * * from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list" approved by the President (App. 50, 54, 57). In August 1991, the defendants moved to dismiss the plaintiffs' suit on the ground that the Act itself and the political question doctrine barred judicial review. The defendants also moved to dismiss on the alternative grounds that the plaintiffs lack standing and that the union plaintiffs' due process claim fails to state a valid claim for relief.

On November 1, 1991, the district court (Buckwalter, J.) granted the defendants' motion to dismiss. The district court held that judicial review is precluded by the Act and the political question doctrine. The district court did not reach the defendants' alternative arguments. This appeal followed.

STATEMENT OF FACTS

I. Statutory Background

A. Procedural Obstacles To Base Closures Prior To 1988

This case arises out of efforts by the President and Congress to close or realign unneeded domestic military installations. Prior to 1988, such efforts were frustrated by a longstanding legal

and political impasse that led to the erection of a number of procedural barriers. A full understanding of the district court's decision in this case requires an understanding of the procedural obstacles that obstructed base closures before 1988.

Beginning in the early 1960s and continuing into the 1970s, successive Administrations attempted to reduce military expenditures by closing or realigning unnecessary domestic bases. Those efforts were met with considerable opposition among members of Congress, who feared the social and economic impact on their communities. Congressional opponents also contended that the Executive Branch's choice of bases was influenced by improper political considerations. See App. 299.

In 1976, Congress imposed temporary restrictions on the use of appropriated funds for major base closures and realignments. See Pub. L. No. 94-431, § 612, 90 Stat. 1349, 1366-67 (1976). In 1977, Congress enacted additional legislation which made the 1976 restrictions permanent. See Pub. L. No. 95-82, § 612, 91 Stat. 358, 379-80 (1977) (codified at 10 U.S.C. § 2687 (Supp. I 1977)). The 1977 legislation remained in force for more than a decade.

The 1977 legislation required the Department of Defense to comply with a variety of procedural requirements before carrying out a major base closure or realignment. The Department was required to provide advance notice to Congress; present Congress with a "detailed justification" of the proposed closure or realignment; and defer action for at least 60 days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b)(1), (3)-(4) (Supp. I 1977). In addi-

tion, the Department was required to comply with the provisions of the National Environmental Policy Act of 1969 ("NEPA") with respect to the proposed closure or realignment. Id. § 2687(b)(2) (Supp. I 1987).

The 1977 legislation refrained from imposing substantive restrictions on the authority of the Executive Branch to close or realign domestic military installations. However, the procedural requirements of the legislation -- in particular, the requirement that the Department of Defense comply with NEPA, and the concomitant threat of protracted NEPA litigation -- made it effectively impossible to carry out significant base closures or realignments without further enabling legislation by Congress. See App. 299; see also H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) ("1988 Conference Report"), reprinted in 1988 U.S. Code Cong. & Admin. News ("USCCAN") 3403.

B. The 1988 Act

1. Congress broke the stalemate over domestic military base closures by enacting the Base Closure and Realignment Act of 1988 ("1988 Act"). See Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act is the immediate predecessor to the Act at issue in this case, and many of the basic features of the present Act are taken directly from the 1988 Act.

The 1988 Act assigned the task of identifying unnecessary military bases to an independent commission. 1988 Act §§ 201(1), 203(b)(1)-(2). The commission's recommendations were presented to the Secretary of Defense for approval or disapproval in their entirety. Id. §§ 201(1), 202. If the Secretary approved the

commission's recommendations, Congress was empowered to override his decision by passing a joint resolution of disapproval within a 45-day period. Id. §§ 202(b), 208.

The 1988 Act's provision for direct Congressional review of the Secretary's decision was conceived as an alternative to the procedural barriers of the 1977 legislation (see pp. 3-4 supra), and those barriers were eliminated by the 1988 Act. In particular, the 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA, thus removing the threat of disabling NEPA litigation. Id. § 204(c)(1).[1] The House and Senate conferees endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts," but restricted NEPA's applicability out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." 1988 Conference Report at 23, 1988 USCCAN at 3403.

2. The 1988 Act led to a decision to close or realign 145 domestic military installations. Predictably, dissatisfied parties brought suit to block the base closures. The suits were squarely rejected by the courts, for reasons that bear directly on the present litigation.

---

[1]In 1985, in the course of revising the 1977 legislation, Congress omitted the 1977 legislation's NEPA provision. See Pub. L. No. 145, § 1202(a), 99 Stat. 716 (amending 10 U.S.C. § 2687). However, NEPA continued to apply to the base closure process of its own force, thus requiring further Congressional action to free base closures from NEPA review.

In People ex rel. Hartigan v. Cheney, 726 F. Supp. 219, 221-27 (C.D. Ill. 1989), a suit by the State of Illinois was dismissed for lack of standing. Illinois sought to challenge the 1988 Act on constitutional grounds, and further asserted that the Secretary's approval of the commission's recommendations was arbitrary and capricious because the commission had used inaccurate and inadequate information. The district court dismissed the suit, holding that the State lacked standing to sue the federal government as parens patriae and failed to satisfy the requirements for bringing suit on the State's own behalf.

In National Federation of Federal Employees v. United States, 727 F. Supp. 17 (D.D.C. 1989), aff'd, 905 F.2d 400 (D.C. Cir. 1990) (NFFE), a similar suit by a federal employees union and a private contractor was rejected for lack of standing and nonreviewability under the APA. The plaintiffs in NFFE challenged the 1988 Act on constitutional grounds and attacked the base closure decision as arbitrary and capricious under the APA. After dismissing the constitutional claims on the merits, the district court held that the plaintiffs lacked standing to pursue their APA claim because their interest in preventing base closures placed them outside the "zone of interests" of the 1988 Act. See 727 F. Supp. at 21-22. On appeal, the D.C. Circuit held that the base closure decision was "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2), and hence was unreviewable. See 905 F.2d at 405-406.

C. The 1990 Act

1. The 1988 Act was not a permanent mechanism for closing and realigning military installations, but rather was a one-time excep-

tion to the restrictions of the 1977 legislation. In January 1990, acting without the benefit of the 1988 Act, the Secretary of Defense proposed the closure of an additional 36 military facilities. See App. 300. Many Members of Congress regarded the Secretary's unilateral announcement as reminiscent of the 1960s and 1970s, charging that the selection of bases reflected partisan considerations. See App. 300. The Secretary's approach was criticized as the "wrong way to close bases" and as having "raised suspicions about the integrity of the base closure selection process." H. R. Rep. 665, 101st Cong., 2d Sess. 341 (1990) ("1990 House Report"), reprinted in 1990 USCCAN 2931, 3067-68; H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705 (1990) ("1990 Conference Report"), reprinted in 1990 USCCAN 3110, 3257.

To accommodate the need for domestic base closures while avoiding the perceived deficiencies in the Secretary's unilateral approach, Congress enacted the Defense Base Closure and Realignment Act of 1990. Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19. In framing the 1990 Act, Congress insisted on preserving the basic structure of the 1988 Act, maintaining that "a new base closure process will not be credible unless the 1988 base closure process remains inviolate." 1990 House Report at 342, reprinted in 1990 USCCAN at 3068. The Act therefore continues the cooperative relationship between the executive and legislative branches started in 1988, and once again suspends the procedural barriers to base closures put in place before 1988.

The 1990 Act is intended to govern three rounds of base closures in 1991, 1993, and 1995. The Act established an independent

Defense Base Closure and Realignment Commission to meet in each of these years. Act § 2902(a), (e). The Act required the Secretary of Defense to provide the Commission with a six-year force structure plan that assesses national security threats and the force structure needed to meet them. Id. § 2903(a)(1), (2). The Act also required the Secretary to formulate criteria to be used in identifying bases for closure or realignment. The Secretary was required to publish the criteria in the Federal Register for notice and comment and present them to Congress for legislative review. Id. § 2903(b). The Secretary established his final criteria on February 15, 1991, see 56 Fed. Reg. 6374 (Feb. 15, 1991), and Congress did not exercise its authority under the Act to disapprove the criteria by joint resolution. See Act § 2903(b)(2)(A)-(B).

For the first round of base closures, the Act required the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. Act § 2903(c)(1). The Act then charged the Commission with reviewing the Secretary's recommendations and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. Id. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations. Id. § 2903(d)(1). The Act authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force-structure plan and final criteria. Id. § 2903(d)(2)(B). The Act also requires the Comptroller General, the head of the GAO, to report on the Secretary's recommendations and selection process and

permits the Comptroller, to the extent requested, to assist the Commission in its efforts. Id. § 2903(d)(5).

The 1990 Act provides for the Commission's recommendations to be presented to the President for his review. Act § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. Id. § 2903(e)(2), (3).[2] If the President approves the Commission's recommendations, Congress has 45 days from the date of approval (or until Congress adjourns for the session, whichever is earlier) to pass a joint resolution disapproving of the Commission's recommendations. Act § 2904(b), 2908. If such a resolution is enacted, following presentment to the President, the Secretary of Defense may not close the bases approved for closure by the President. Id. § 2904(b).

Under the 1990 Act, as under the 1988 Act, direct Congressional oversight replaces the procedural requirements imposed by pre-1988 base closure legislation (see pp. 3-4 supra). The 1990 Act thus authorizes the Secretary of Defense to close or realign military installations "without regard to" the 1977 base closure statute and related legislation. Act § 2905(d). And like the 1988 Act, the 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in carrying out [the Act]." Id. § 2905(c)(1).

---

[2]If the President disapproves any recommendations, the Commission is required to transmit a revised set of recommendations to him. Id. § 2903(e)(3). If the President does not approve the revised list, the base closing process for that year terminates. Id. § 2903(e)(5).

2. In April 1991, as required by the Act, the Secretary of Defense recommended the closure or realignment of twelve naval facilities. See 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. See id. at 15218. The Secretary also recommended the closure or realignment of a number of Army and Air Force installations. In all, the Secretary recommended that 43 domestic military installations be closed and 29 realigned. See App. 303, 381-82.

The Commission then analyzed the Secretary's recommendations. The Commission conducted both public regional hearings and hearings in Washington, D.C. in which it heard testimony from Department of Defense officials, legislators and other experts, including virtually all of the plaintiffs. App. 307, 387-88. The Commissioners visited the major facilities recommended for closure, including the Shipyard. Id. at 307, 389-90. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in obtaining, verifying and reviewing data. Id. at 305-306. The Commission reported that it analyzed the Navy's recommendations with particular care. Id. at 308.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open. App. 295, 330-31, 334-35. It further recommended that a portion of one facility which the Secretary recommended remain open be closed. Id. at 328-29. However, the Commission concurred with the Secretary's recommendation that the Shipyard be closed. Id. at 336. In

all, the Commission recommended to the President that 34 installations be closed and 48 be realigned. Id. at 295-96.

On July 10, 1991, President Bush approved all of the recommendations of the Commission, including the closure of the Shipyard. 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. Three Commissioners testified at the hearings, as did Navy officials and many of the plaintiffs in this case.

On July 30, 1991, the House entertained a proposed resolution to disapprove the Commission's recommendations. 137 Cong. Rec. H6006 (daily ed. July 30, 1991). The House engaged in two hours of floor debate on the proposal. Much of the debate was devoted to alleged errors in the process by which the Shipyard was recommended for closure. See, e.g., id. at H6008-H6010 (Rep. Weldon); id. at H6010-H6011 (Rep. Foglietta); id. at H6021 (Rep. Andrews). Nonetheless, the House rejected the proposed resolution by a vote of 364 to 60, thus authorizing the Secretary of Defense to proceed with the closures and realignments. See id. at H6039.

II. The Present Litigation

A. The Suit To Bar the Closure of the Shipyard

The present suit was filed on July 8, 1991, three weeks before the House of Representatives acted on the proposed resolution of disapproval. App. 7. The central object of the suit is to prohibit the Secretary of Defense and the Secretary of the Navy from closing the Shipyard. The plaintiffs asked the district court to "[r]equire the Secretary of Defense and the Secretary of the Navy

to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list." App. 50, 54, 57. More broadly, the plaintiffs demanded that the district court "[e]njoin the Secretary of Defense and the Secretary of the Navy * * * from taking <u>any</u> action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy," a prayer for relief that would block the closure or realignment of <u>any</u> naval installation in the United States. <u>Id.</u> (emphasis added).

Although the injunctive relief sought by the plaintiffs is wholly substantive, the plaintiffs framed their claims largely (although not exclusively) in procedural terms. Count I and Count II of the amended complaint, which are advanced by all plaintiffs, allege that the Secretary of Defense, the Secretary of the Navy, and the Commission failed to comply with various procedural requirements of the Act. For example, the plaintiffs alleged that the Secretaries "failed to make available * * * all information which was used by the Navy in making its recommendations to the Commission" and "failed to consider all Naval installations inside the United States equally * * * ." <u>Id.</u> at 58-59.[3] Count III, which is advanced only by the union plaintiffs, asserts that "[t]he defendants' disregard of the procedures set forth in the Base Closure Act, as more fully described in Counts I and II * * *

---

[3]Not all of the plaintiffs' allegations, it should be noted, are procedural ones. For example, the plaintiffs criticized the Navy for "arbitrarily" declining to close any nuclear-capable shipyards, and criticized the Commission for taking account of private shipyard capacity. See App. 27, 49, 64. Such criticism goes to the substance of the reasoning behind the base closure decisions, rather than to the procedures used.

constitute violations of the Due Process Clause of the United States Constitution." Id. at 67. Count III thus restates in constitutional terms the statutory claims underlying Counts I and II.

From the outset of the litigation, the defendants denied both the specific details of the plaintiffs' allegations and the general charge of noncompliance with the Act's procedural requirements. See, e.g., App. 200-245. In addition, the defendants noted a variety of jurisdictional and other threshold problems that bar the suit without regard to the merits. These threshold barriers led the defendants to file a motion to dismiss in August 1991, one month after the filing of the plaintiffs' amended complaint.

The motion to dismiss raised four basic issues. First, relying on the legislative history and structure of the Act, the defendants contended that judicial review of the plaintiffs' claims is precluded by the Act itself and hence is not allowed under the APA. Second, the defendants contended that the plaintiffs' claims presented a nonjusticiable political question. Third, the defendants contended that none of the plaintiffs satisfied the constitutional and prudential requirements for standing under Article III and the APA. Fourth, the defendants contended that the union plaintiffs' due process claim (Count III) failed to state a valid constitutional claim.

B. The District Court's Decision

On October 25, 1991, the district court conducted a hearing on the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. On November 1, 1991, the district court

dismissed the plaintiffs' claims. See App. 277-83. The district court granted the motion to dismiss for two reasons: first, "because * * * the statute precludes judicial review," and second, because "the political question doctrine forecloses judicial intervention." Id. at 277. The district court did not reach the remaining grounds in the motion to dismiss.

The district court began by noting that judicial review under the APA is foreclosed "to the extent that * * * statutes preclude judicial review" (5 U.S.C. § 701(a)(1)). App. 278. Relying on the standards set forth in Block v. Community Nutrition Institute, 467 U.S. 340 (1984), the district court further noted that "[a]s long as the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme,' the presumption favoring judicial review has been overcome." Id.

Applying Block's standards, the court determined that the 1990 Act precludes judicial review of the plaintiffs' claims. App. 278-280. The court pointed to the report of the Senate and House conferees, which expressly states that "'various actions required under the base closure process contained in this bill,'" including the development of a force structure plan and selection criteria and the Secretary of Defense's recommendation of closures and realignments, "'would not be subject to judicial review.'" Id. at 278-79. The court also noted the importance attached by Congress to a prompt and timely base closing process, and Congress's corresponding concern about the delays threatened by "'numerous opportunities for challenge in court.'" Id. at 279.

Turning to the political question doctrine, the district court relied on the criteria set forth in Baker v. Carr, 369 U.S. 186 (1962). In particular, the district court looked to "'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.'" App. 281 (quoting Baker, 369 U.S. at 217). Here, the Court noted that the Act "provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations," and that both the President and Congress had approved the recommended closures. Id. at 282. The district court concluded that judicial review could not be undertaken in these circumstances without expressing a lack of the respect due the President and Congress. Id. at 281, 283.

STATEMENT OF RELATED CASES

This case has not been before this Court previously. No related cases or proceedings are completed or now pending. A suit over the planned closure of Loring Air Force Base in Maine is expected to be filed shortly.

STATEMENT OF STANDARD OF REVIEW

An order dismissing a case for lack of subject matter jurisdiction is subject to plenary review. See, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co., 944 F.2d 1149, 1152 (3d Cir. 1991).

SUMMARY OF ARGUMENT

1. The legislative history and structure of the 1990 Act make it manifest that Congress intended to preclude judicial review

of claims relating to the Act. The legislative history explicitly disavows the availability of judicial review in unqualified terms, a disavowal that Congress has repeated within the past week. The structure of the Act is fundamentally inconsistent with judicial review, for private litigation would disrupt the careful statutory balance between the Executive Branch and Congress, undermine Congress's statutory role in reviewing base closure decisions, and defeat the statutory goal of expediting the base closure process.

The plaintiffs' principal response is that they are raising procedural rather than substantive challenges to the base closure decision. However, the procedural character of the plaintiffs' claims simply reinforces the case against judicial review. Procedural rather than substantive obstacles lay at the heart of the impasse over base closures prior to 1988, and Congress has made special efforts to see that procedural litigation does not interfere with the substantive goal of closing unnecessary bases. Those efforts will be defeated if the plaintiffs are permitted to pursue their procedural claims.

2. In addition to being precluded by the Act itself, the plaintiffs' claims are barred by the political question doctrine. As the district court held, judicial intervention in the base closure process would necessarily entail a lack of the respect constitutionally due the political branches of government in the area of military affairs. The plaintiffs cannot finesse this problem by casting their claims in procedural rather than substantive terms, for the relief they seek is entirely substantive, and the delays inherent in procedural challenges to the base closure

process can frustrate the substantive will of the President and Congress.

3. Even if the claims presented by the plaintiffs were reviewable, the plaintiffs themselves lack standing to pursue the claims. The state and city plaintiffs do not have standing to act as parens patriae in a suit against the federal government, and they have disavowed any claim of standing in their proprietary capacities. The Congressional plaintiffs do not meet Article III standing requirements because they have not suffered any discrete injury that distinguishes them from any other citizens. And the union plaintiffs lack standing because they are outside of the "zone of interests" of the 1990 Act, whose basic purpose of closing military bases is directly antithetical to the union plaintiffs' interests.

4. Finally, the union plaintiffs' due process claim is invalid as a matter of law. Neither the Act itself nor anything else vests the union plaintiffs with a "property interest" in the operation of the Shipyard, and hence the procedural protections of the Due Process Clause never come into play. And even if the union plaintiffs had a cognizable property interest, the only process to which they would be entitled is the legislative process entailed in Congress's review of the Executive Branch's base closure decisions.

ARGUMENT

I. The Closure of the Philadelphia Naval Shipyard Is Not Subject to Judicial Review

The President of the United States, with the concurrence of Congress, has decided to close the Philadelphia Naval Shipyard and scores of other military installations around the country. The Act

that authorizes the President's action is an intricate and delicate statutory compromise, one that balances the interests of the Executive Branch and Congress in order to arrive at a consensus on the selection of bases for closure and realignment. The Act assigns Congress the role of passing judgment on the President's closure decisions. At the same time, the Act eliminates the procedural obstacles that prevented the closure of bases prior to 1988.

The suit now before this Court strikes at the heart of this carefully developed statutory scheme. It invites a federal court to overturn the consensus between the political branches over the domestic base closures. It threatens to disrupt the balance struck by the statute, and in so doing, to displace Congress as an arbiter of the closure process. And it seeks to subject the President's base closure decision to precisely the kinds of procedural barriers and delays that the Act was meant to eliminate. In light of these consequences, the district court was plainly correct in holding that neither the Act itself nor the political question doctrine permits this action to go forward.

A. The Defense Base Closure and Realignment Act Precludes Judicial Review

The plaintiffs' brief begins (at pp. 9-13) with the presumption that federal agency actions are subject to judicial review. At the outset, we seriously question whether that presumption has any applicability in the present setting, for the presumption "runs aground when it encounters concerns of national security * * * ." Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1987). Here, concerns of national security are directly implicated, for the plaintiffs are seeking to prevent the Secretary of Defense from

carrying out a Presidential decision regarding America's military base structure. Moreover, unlike cases like Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1987), on which the plaintiffs rely, this case involves a statute that does not directly regulate individuals and does not purport to grant or withdraw individual rights and benefits. Thus, there are good reasons to dispense with the presumption altogether, if not to start from an opposite presumption.

In any event, "[t]he presumption favoring judicial review of administrative action is just that -- a presumption." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). To be sure, the Supreme Court has said on various occasions that the presumption may be overcome only by "a showing of 'clear and convincing evidence.'" Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). But as the Supreme Court itself has stressed, the Court "has * * * never applied the 'clear and convincing evidence' standard in the strict evidentiary sense * * * ." Block, 467 U.S. at 350. Instead, "the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 351 (citation omitted). And this "fairly discernible" Congressional intent may be found in a variety of sources.

First, the presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block, 467 U.S. at 349. Second, congressional intent "may also be inferred from

contemporaneous judicial construction barring review and congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." Id. (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." Id. As long as "the congressional intent to preclude judicial review is 'fairly discernible'" from any of these sources (Block, 467 U.S. at 351), judicial review is foreclosed. When measured against these standards, it is manifest that the Act precludes judicial review of the base closing process.

1. The Legislative History and Structure of the Act Confirm that Congress Meant To Preclude Judicial Review

A. The most direct evidence that Congress intended to preclude judicial review, although by no means the only evidence, comes from the legislative history of the Act. As the district court noted, the Conference Report on the Act addresses the issue of judicial review in explicit terms:

> [V]arious actions required under the base closure process contained in this bill * * * would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * * , the issuance of selection criteria * * * , the Secretary of Defense's recommendation of closures and realignments of military installations * * * , and the Secretary's actions to carry out the recommendations of the Commission * * * .

1990 Conference Report at 706, reprinted in 1990 USCCAN at 3258 (emphasis added).

The intent to renounce judicial review of the base closing process could hardly be made more clear than it is in this statement. And as a joint declaration of the House and Senate conferees

responsible for the final terms of the Act, this statement "carr[ies] greater weight" than other forms of legislative history and "is entitled to great weight in analyzing Congressional intent," especially sent the report itself was approved by both House. American Jewish Congress v. Kreps, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978); San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268, 1270 (9th Cir. 1986).

Understandably, the plaintiffs struggle to avoid the plain import of this language. First, the plaintiffs argue at length (at pp. 21-24) that the language is directed only at freeing the base closure process from the rulemaking and adjudication requirements of Chapter 5 of the APA, not at precluding judicial review in other respects under Chapter 7 of the APA. But that is simply not what the Conference Report says. The report says that the base closure process "would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to judicial review" (emphasis added). The Conference Report's statement that the base closure process "would not be subject to judicial review" is an unqualified one; nothing about it suggests that review is precluded in some respects but not in others.[4]

Second, in a related vein, the plaintiffs suggest (at p. 21) that the Conference Report is directed only at judicial review of

---

[4]Moreover, the Conference Report's discussion of judicial review proceeds from the statement that "no final agency action occurs in the case of various actions required under the base closure process contained in this bill." 1990 Conference Report at 706, reprinted in 1990 USCCAN at 3258 (emphasis added). The concept of "final agency action" is unrelated to the rulemaking and adjudication provisions of Chapter 5 of the APA; it is found instead in Chapter 7, where it defines the scope of agency actions subject to judicial review.

substantive challenges to the base closing process, not at procedural challenges. We address the plaintiffs' purported distinction between substantive and procedural challenges in detail below (see pp. 29-37 infra). Here, it is sufficient to note that the Conference Report simply does not draw such a distinction. As already noted, the report says that the actions involved in the base closure process "would not be subject to judicial review" -- period. And as explained below, the idea of encumbering the base closure process with procedural litigation was especially troubling to Congress (see pp. 30-32 infra).

Finally, the plaintiffs point out (at pp. 24-25) that the Conference Report's examples of unreviewable actions include actions of the Secretary of Defense and the President, but do not include the actions of the Commission itself. But the language of the Conference Report does not purport to be inclusive in this regard; to the contrary, the report says that "[s]pecific actions which would not be subject to judicial review include" the enumerated examples, implying that other actions are exempt from judicial review as well. Moreover, the Commission's base closure recommendations are the same kinds of actions as those specifically listed by the Conference Report. The plaintiffs make no attempt to explain why Congress would preclude judicial review of every other phase of the base closure process, from the formulation of a force structure plan at the beginning to the President's decision at the end, while leaving an opening for judicial review at a single point in the middle of the process. And because the Commission simply makes recommendations to the President, rather than taking any

final action, the idea that the Commission's actions are meant to be subject to judicial review is especially improbable.

It should be added that within the past week, in the course of enacting the National Defense Authorization Act, Congress has reaffirmed the language of the 1990 Conference Report regarding the unavailability of judicial review. See 137 Cong. Rec. H10394-95 (daily ed. Nov. 18, 1991); id. at S17540 (daily ed. Nov. 22, 1991). The National Defense Authorization Act amends the 1990 Act in a variety of respects. See id. at H9944 (daily ed. Nov. 13, 1991). However, it does not amend the 1990 Act to authorize judicial review of suits relating to the Act. To the contrary, the conference report states that "[i]n recommending these amendments to the Base Closure and Realignment Act of 1990, the conferees reaffirm the view, expressed in the [Conference Report] accompanying the [1990 Act], that actions taken under the Act 'would not be subject to the rulemaking and adjudication requirements [of the Administrative Procedure Act] and would not be subject to judicial review.'" Id. at H10143 (emphasis added).

The National Defense Authorization Act was passed three weeks after the district court dismissed the present suit on nonreviewability grounds, and the plaintiffs themselves made Congress fully aware of the district court's decision. See, e.g., 137 Cong. Rec. S17153-70 (daily ed. Nov. 20, 1991) (Sen. Specter). The fact that Congress amended the 1990 Act in other respects following the district court's decision, but did not make any amendments relating to reviewability, is further confirmation that the 1990 Act pre-

cludes judicial review of the present claims. See Block, 467 U.S. at 349; cf. CFTC v. Schor, 478 U.S. 833, 846 (1986).

B. The explicit message of the 1990 Conference Report about the unavailability of judicial review is confirmed by the structure of the Act itself. See Block, 467 U.S. at 349 (presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole"). Two elements of the Act are critical in this respect. The first is the Act's elaborate and carefully balanced mechanisms for reconciling the interests of the Executive Branch and Congress, mechanisms that leave no room for judicial involvement. The second is the Act's rigorous insistence on expediting, rather than delaying, the closure of unnecessary bases.

1. The 1990 Act, like its 1988 predecessor, breaks the pre-1988 impasse over domestic base closures through a comprehensive and carefully structured statutory compromise. The Act balances the interests of the Executive Branch and Congress by vesting the Secretary of Defense and the President with substantial authority over the selection of bases for closure and realignment, while creating elaborate mechanisms for Congressional oversight and involvement. See pp. 7-9 supra. This balancing process culminates in the Act's provision for a joint Congressional resolution of disapproval. See Act §§ 2904(b), 2908. By subjecting the President's base closure decision to Congressional approval or disapproval in its entirety, the joint resolution mechanism allows Congress to pass judgment on the base closure process as a whole

while preventing a disappointed minority of legislators from defeating a consensus between the two branches.

Allowing private parties to bring judicial challenges to the base closing process would interfere with this carefully structured mechanism in two basic ways. First, judicial intervention would disrupt the Act's careful balance between the Executive Branch and Congress. And second, permitting recourse to the courts would undermine the statutory role of Congress as arbiter of the base closure process.

The D.C. Circuit addressed judicial review under a statute involving a similarly delicate balance between the Executive Branch and Congress in Armstrong v. Bush, 924 F.2d 282 (1991). In Armstrong, the court held that the Presidential Records Act, 44 U.S.C. §§ 2201 et seq. ("PRA"), precluded judicial review of the President's decision to dispose of certain documents. In a scheme quite similar to the joint resolution of disapproval in the present Act, the PRA required the President to notify the Archivist of the United States before destroying documents. The Archivist would then report to Congress, which could enact legislation to protect the specific documents if it chose.

Although the legislative history of the PRA was unclear, the D.C. Circuit explained that the Act represented a careful political compromise between the desire to preserve Presidential records for later public access, and the separation of powers concern with interfering in the President's day-to-day business. 924 F.2d at 290. The court concluded that "permitting judicial review of the President's compliance with the PRA would upset the intricate sta-

tutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." Id. The court therefore held that the PRA impliedly precluded review under 5 U.S.C. § 701(a)(1).

The joint resolution mechanism in the 1990 Act serves the same basic purpose: it gives Congress a specific review mechanism over Executive Branch decisions, but balances that power against other important interests. There is simply no room for judicial intervention in this statutory scheme. Here, as in Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984),

> [t]he lack of any authorization for * * * review at the behest of members of the public, when viewed in the context of * * * the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.

The Act plainly does not contemplate that a few legislators, whose efforts to keep a particular base open have been overwhelmingly defeated in Congress, can request federal courts to dictate a different result to the President and Congress. Instead, the Act provides a political and legislative remedy, designed to serve as the exclusive basis for reviewing the Department of Defense's actions and the Commission's recommendations.[5]

2. In addition to reflecting a careful balance of executive and legislative interests, the Act reflects Congress's recognition that "[e]xpedited procedures * * * are essential to make the base

---

[5]Moreover, the Act is designed to create a single "package" of base closures and realignments, to be approved or disapproved by Congress in its entirety. If litigants can break up this package by contesting individual closures in the courts, one of the basic legal and political premises of the Act will be defeated.

closure process work." 1990 House Report at 384, reprinted in 1990 USCCAN at 3077 (emphasis added). Congress thus framed the Act to "considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment." 1990 Conference Report at 707, reprinted in 1990 USCCAN at 3259 (emphasis added). In particular, Congress established a rigid series of deadlines and time limits to expedite the base closure process.

Under the Act, the Secretary of Defense was required to submit his closure recommendations to the Commission by April 15, 1991. Act § 2903(c). The Commission was then required to hold public meetings and deliberations, conduct necessary base visits and other information gathering, and submit its final report to the President by July 1, 1991, ten weeks later. Id. § 2903(d). The President, in turn, was required to make his decision within two weeks, by July 15, 1991. Id. § 2903. Finally, the Act allowed Congress 45 days in which to disapprove the President's decision, under streamlined procedures designed to eliminate ordinary legislative delays, after which time the decision would take effect automatically. Id. § 2904(b), 2908.

Allowing private parties to drag the base closure process through a series of judicial challenges, with the protracted delays inherent in such litigation, would be directly antithetical to this expedited process. Indeed, the legislative history of the Act specifically recognizes the role of private litigation in the delays that had undermined pre-1988 base closure efforts. Among the reasons given by the Conference Report for "a new base closure

process" was the fact that "under existing law," "closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court." Conference Report at 705, reprinted in 1990 USCCAN at 3257. Judicial review has been held to be precluded under other statutes where the statutory scheme placed a premium on speed. See, e.g., Morris v. Gressette, 432 U.S. 491, 503-504 (1977); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985); Wheaton Industries v. EPA, 781 F.2d 354, 356-57 (3d Cir. 1986).

The plaintiffs claim (at p. 26) that "[i]f quick closures were the goal, the 1990 Act would have been totally unnecessary." But that claim is squarely refuted by the legislative history of the 1990 Act, which cites the delays associated with "existing law" as one of the "failings" requiring Congress to adopt "a new base closure process." 1990 Conference Report at 705, reprinted in 1990 USCCAN at 3257. The Secretary of Defense could not rely on the expedited procedures of the 1988 Act, for as explained above, the 1988 Act was a "one shot" statute that authorized only a single round of base closures. To be sure, when Congress framed the 1990 Act, it elaborated on the terms of the 1988 Act in a variety of respects, some of which the plaintiffs seek to rely on (see pp. 32-33 infra). But Congress specifically preserved the 1988 Act's insistence on a highly expedited base closure process, and that process cannot be maintained if suits like the plaintiffs' are allowed to proceed.

2. The Procedural Nature of the Plaintiffs' Claims Reinforces, Rather Than Defeats, the District Court's Preclusion Holding

For all of their insistence on the importance of judicial review, the plaintiffs do not seriously dispute that Congress intended to restrict judicial review under the 1990 Act. Specifically, they do not dispute that substantive challenges to the base closure decision are barred from judicial review. Instead, the plaintiffs rely entirely upon a distinction between substantive and procedural challenges to the base closing process. The plaintiffs argue that even if judicial review of substantive challenges is foreclosed, procedural challenges must be allowed to go forward. They argue that the 1990 Act imposes a variety of procedural requirements on the Secretary of Defense and the Commission and that Congress could not possibly have intended to foreclose the courts from hearing procedural claims relating to these requirements.

Characterizing the plaintiffs' claims as "procedural" is an oversimplification, both because the claims themselves contain substantive elements (see p. 12 n.3 supra) and because the primary relief sought (a prohibition against the closure of the Shipyard) is substantive rather than procedural. But even taken at face value, the procedural label fails to justify an exercise of judicial review under the Act. To the contrary, the procedural character of the plaintiffs' claims actually reinforces, rather than undercuts, the case for preclusion of review.

A. We have already noted one problem with the plaintiffs' proposed substantive/procedural distinction, the fact that the

legislative history draws no such distinction in discussing judicial review. But the plaintiffs' distinction is subject to another, even more compelling problem: it ignores the procedural nature of the obstacles to base closures prior to 1988 and the explicit steps taken by the 1988 and 1990 Acts to eliminate such procedural barriers.

As explained above (see pp. 3-4 supra), the primary barriers to the closing of unneeded domestic military installations prior to 1988 were procedural rather than substantive. For present purposes, the most important of these barriers was the National Environmental Policy Act, which Congress explicitly made applicable to base closures in 1977. See 10 U.S.C. § 2687(b)(2) (Supp. I 1977); see also p. 12 n.3 supra. As the Supreme Court has stressed, the obligations imposed on federal agencies by NEPA "are 'essentially procedural'" ones. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)). "NEPA itself does not mandate particular results, but simply prescribes the necessary process" to be followed in considering the environmental impact of agency actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

If Congress were concerned only with precluding substantive challenges to base closure decisions, as the plaintiffs assert, it would have had no occasion to restrict NEPA actions, since NEPA suits address only the procedures followed by an agency rather than the substantive validity of the agency's decision. But as pointed out above, the 1988 and 1990 Acts do restrict NEPA actions, and

indeed foreclose them altogether, by explicitly exempting closure and realignment decisions from the requirements of NEPA. See pp. 5, 9 supra.

The 1988 and 1990 Acts do not restrict the availability of NEPA actions out of a lack of concern for NEPA policies. To the contrary, the 1988 House and Senate conferees specifically endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts." 1988 Conference Report at 23, 1988 USCCAN at 3403. Rather, NEPA actions were restricted out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." Id. In short, Congress recognized that procedural challenges under NEPA could have the substantive effect of impeding or defeating base closures altogether, and Congress acted to foreclose this threat.

Precisely the same kind of threat is presented by the plaintiffs' procedural claims in this case. Even if litigants challenge the decision to close a military installation solely on procedural grounds under the Act, the lesson drawn by Congress from NEPA is that procedural litigation can be as effective as substantive litigation in obstructing the base closure process. If the plaintiffs can maintain the present suit simply by casting their objections in procedural terms, they can accomplish precisely what the 1990 Act and its 1988 predecessor were intended to prevent -- the perpetuation of the base closure impasse through the erection of procedural barriers. Thus, the supposedly procedural character of the

plaintiffs' claims in no way diminishes the correctness of the district court's decision.[6]

B. In an effort to support their "substantive/procedural" distinction, the plaintiffs give great emphasis to various procedural provisions in the 1990 Act. The plaintiffs argue that Congress placed great importance on the procedural integrity of the base closure process, and hence that judicial review must be available to vindicate that goal. The plaintiffs' premise is correct, but their conclusion is a non sequitur.

It is unquestionably true that when Congress framed the terms of the 1990 Act, one of its major concerns was to ensure the use of fair and unbiased procedures in identifying unneeded domestic military bases.[7] But it simply does not follow that Congress meant for private parties to be able to resort to judicial proceedings to enforce these procedures. This is not a conventional case in which

---

[6]It is immaterial that the 1990 Act restricts the availability of NEPA claims in explicit terms, while restricting other kinds of judicial review only implicitly. NEPA provides an explicit cause of action and NEPA challenges to base closures had been entertained by the courts in the past; hence an explicit limitation was called for. In contrast, suits resting on the 1988 Act had been held to be nonreviewable (see p. 6 supra), so Congress had no need to include explicit limitations on the authority of the courts to entertain claims based on the 1990 Act.

[7]However, the plaintiffs err when they state (see, e.g., p. 27) that the procedural provisions of the 1990 Act were intended to correct shortcomings in the 1988 Act. The legislative history of the 1990 Act repeatedly endorses the 1988 Act. For example, the 1990 House Report states that "[t]he committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it." 1990 House Report at 342, reprinted in 1990 USCCAN at 3068 (emphasis added). The procedural criticisms in the legislative history are directed instead at Secretary Cheney's 1990 base closure initiative, which was not (and could not be) carried out under the 1988 Act.

judicial review is the only possible mechanism for overseeing the procedural integrity of agency action. Instead, relief is available from Congress, which is empowered under the Act to disapprove the President's decision for any reasons, including procedural ones. The structure of the Act makes manifest that recourse for errors by the Executive Branch, including procedural errors, lies with Congress rather than with the courts.

The plaintiffs summarily assert (at p. 31 n. 17) that Congress lacks the institutional capacity to review and act on procedural objections. This is simply nonsense. The Act allowed Congress 45 legislative days to deliberate over the President's closure decision, during which time both Houses of Congress could -- and did -- hold hearings, take testimony and examine witnesses. There is no reason why Congress could not address procedural issues during these hearings and the ensuing floor debates. Indeed, during the deliberations over the proposed joint resolution of disapproval, the plaintiffs themselves took to the floor of the House of Representatives to air their procedural objections to the selection of the Shipyard (see p. 11 supra). One can only assume that they did so because they thought that the House was capable of acting on their objections.

Alternatively, the plaintiffs try to demonstrate (at pp. 31-32) that even if Congress could have reviewed their procedural grievances, it did not in fact do so. The sole evidence offered for this argument is a "sense of the Congress" resolution passed by the Senate and House in September and November 1991, respectively, several months after the joint resolution of disapproval was

rejected. But the resolution simply says that Congress did not approve "all actions" taken by the Department of Defense and the Commission and that Congress "takes no position" on whether the Department and the Commission complied with the requirements of the Act. The resolution does not state that Congress failed to consider the procedural allegations raised by the plaintiffs. And in light of the floor debate in the House of Representatives, no such claim is possible. What matters for purposes of judicial review is whether the Act vested Congress with the authority to act on procedural objections, not how Congress ultimately exercised that authority.[8]

C. Finally, the plaintiffs cite a number of cases that are said to support their proposed substantive/procedural distinction. First, the plaintiffs cite several Court of Appeals decisions for the proposition (at p. 18) that "even express statutory provisions precluding review cannot bar judicial scrutiny of an agency's failure to follow statutory procedures * * * ." If the plaintiffs mean to suggest that Congress cannot preclude judicial review of procedural claims, and that courts have a duty to entertain such

---

[8]As originally drafted by Senator Specter, one of the plaintiffs, the resolution would have specifically endorsed the availability of judicial review in this case. Senator Specter proposed a "finding" that "[t]he structure and objectives of [the Act] demonstrate the availability of judicial review of the procedural integrity of the base closure and realignment process." 137 Cong. Rec. S13717 (daily ed. Sept. 25, 1991). He also proposed "findings" that the APA "expressly permits judicial review" of agency actions like those of the Commission and the Department of Defense; that the APA allows judicial review of "the procedural integrity of agency actions * * * under all circumstances"; and that the political question doctrine does not bar review of such claims. Id. Tellingly, Congress did not adopt any of Senator Specter's proposed "findings" in the final version of the resolution.

claims regardless of a legislative decision to preclude review, they are simply wrong. Subject only to possible constitutional limits, Congress has unlimited discretion to permit or withhold judicial review of agency action. See, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672-73 (1986). And none of the cases cited by the plaintiffs suggests that Congress lacks the power to preclude review of procedural claims. Instead, they hold only that Congress did not exercise that power in the statutes at issue in those cases.

Two of the cases cited by the plaintiffs, First Federal Savings and Loan Ass'n of Lincoln v. Casari, 667 F.2d 734 (8th Cir. 1982), and Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979) (per curiam), involve a Medicare statute providing that HHS's approval of certain state determinations is not subject to judicial review. Both cases turn on the specifics of the Medicare statute, and in one case (Casari) HHS was not even a defendant. The third case, Graham v. Caston, 568 F.2d 1092 (5th Cir. 1978), is even more inapposite, for there the issue was simply whether a statute barring review of an agency decision foreclosed a challenge to the agency's failure to act at all (see 568 F.2d at 1097). Here, of course, the plaintiffs are attacking agency action, not agency inaction.

The plaintiffs suggest that the "principle" applied in these cases was adopted by this Court in Kirby v. HUD, 675 F.2d 60 (3d Cir. 1982). But as the plaintiffs themselves concede, Kirby involves 5 U.S.C. § 701(a)(2), the APA's "committed to agency discretion" provision, which is not at issue in this case. In

contrast, in Wilmington United Neighborhoods v. United States, 615 F.2d 112, 118 (3d Cir. 1980), this Court expressly rejected a proposed "distinction between 'substantive' and 'procedural' determinations" asserted with respect to 5 U.S.C. § 701(a)(1), the APA provision that underlies the district court's decision in this case.

Finally, the plaintiffs point to several Supreme Court cases, chief among them the Court's decision in Bowen v. Michigan Academy, supra. But Bowen does not distinguish between substantive claims on the one hand and procedural claims on the other. Instead, it distinguishes between two different kinds of substantive claims. See Bowen, 476 U.S. at 668-69. Neither Bowen nor any of the other Supreme Court decisions cited by the plaintiffs holds that statutes restricting judicial review must be read to preserve procedural claims.

Another moral drawn by the plaintiffs from these cases is that if a procedural claim can be pursued even when a statute expressly restricts judicial review, a procedural claim a fortiori can be pursued when (as here) a statute does not explicitly limit judicial review. But that moral is an illusory one. Whether judicial review is precluded does not depend on whether the statute bars judicial review in explicit terms. See Block, 467 U.S. at 351. Instead, the only question is whether Congress's intent to preclude judicial review is "'fairly discernible in the statutory scheme.'" Id. Here, for the reasons given above, Congress's intent to preclude judicial review under the Act is not simply "fairly discernible'" but manifestly obvious.

B. The Plaintiffs' Claims Present a Nonjusticiable Political Question

1. The presence of any one of a number of factors may render a case nonjusticiable under the political question doctrine. See generally Baker v. Carr, 369 U.S. 186, 217 (1962). Among the factors establishing the existence of a political question is "the impossibility of a court's undertaking independent resolution [of a case] without expressing lack of the respect due coordinate branches of government." Baker, 369 U.S. at 217. In this case, the district court concluded that it could not entertain the plaintiffs' challenge to the closure of the Shipyard without expressing a lack of the respect owed to the President and Congress.

The plaintiffs raise a variety of objections (at pp. 33-40) to the district court's reasoning, but all of their arguments proceed from a common premise -- namely, that this suit does not challenge the substantive policy decision to close the Shipyard and therefore does not require the district court to place itself in conflict with the judgment of the President and Congress. That premise is incorrect, for at least two reasons.

First, however the plaintiffs may choose to style their claims, the relief sought by the plaintiffs interferes directly with the policy decision to close the Shipyard and other installations. The plaintiffs seek to enjoin the Department of Defense "from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list." App. 50, 54, 57. More broadly, the plaintiffs seek to bar the Department of Defense "from taking any action based upon the list of closure and realignment proposals

submitted by the Secretary of the Navy." Id. (emphasis added). The district court simply cannot grant such relief without directly countermanding the closure decisions of the President and Congress. Thus, the plaintiffs' claims implicate "policy choices and value determinations constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch." Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229 (1986).

Second, quite apart from the substantive nature of the relief sought by the plaintiffs, the lesson of pre-1988 base closure efforts is that even purely procedural litigation can have the substantive effect of preventing the closure of unneeded military installations. As explained above, the President's ability to close domestic bases before 1988 was systematically obstructed by procedural barriers, chief among them the delays associated with NEPA litigation (see pp. 3-4 supra). Here too, nominally procedural claims like those advanced by the plaintiffs can serve to defeat the goal of closing military bases. Thus, the substantive decision of the President and Congress to close the Shipyard will be placed in jeopardy if the plaintiffs are allowed to maintain this suit.

The "lack of respect" that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive Branch. Citing the D.C. Circuit's decision in Armstrong, supra, the plaintiffs argue (at pp. 38-39) that Congressional oversight is not enough to give rise

to a political question. But Armstrong is not a political question case, and the D.C. Circuit never was called on to consider the separation-of-powers issues that underlie the political question doctrine. More generally, this case involves more than mere "Congressional oversight"; it involves an unusual statutory scheme under which Congress was empowered to act, and did act, as arbiter of the base closure process. Judicial intervention in this scheme necessarily involves displacing Congress from the role retained by it under the Act.

2. A second factor supports the district court's political question holding: "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker, 369 U.S. at 217. The Constitution establishes the President as Commander in Chief of the Army and Navy, and vests Congress with the power to "raise and support Armies," to "make rules for the Government and regulation of the land and naval forces," and to "provide for organizing, arming, and disciplining, the Militia." Const. Art. I, § 8, cls. 12, 16; Art. II, § 2, cl. 1. These provisions commit virtually all decisions concerning military organization to the political branches, and such questions are therefore unreviewable by the judiciary. See Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

The plaintiffs argue (at p. 38) that a case does not present a political question simply because it "'arises in a military context.'" We agree. But more than a mere "military context" is involved here. This case involves a function at the heart of the

exclusive constitutional power of the President and Congress over the military -- the physical disposition of the Nation's military forces. That function is irrevocably committed to the political branches of government, and judicial intervention in this case -- under whatever theory -- intrudes impermissibly on that function.

C. The District Court's Nonreviewability Holdings Apply to the Union Plaintiffs' Due Process Claim As Well As the Statutory Claims

When the district court granted the defendants' motion to dismiss, the court dismissed not only the statutory claims (Counts I and II) but the union plaintiffs' due process claim (Count III) as well. The plaintiffs assert (at pp. 40-41) that the district court "failed even to consider [their] constitutional claims" and must be reversed on that ground.

It is obvious from the district court's decision that it did not ignore the due process claim, bur rather concluded that the due process claim, like the statutory claims, is barred from judicial review. That conclusion is an entirely proper one. As explained above, the due process claim is nothing more than a restatement of the statutory claims; it rests entirely on the alleged statutory violations of the Act's procedural requirements (see pp. 12-13 supra). It would be curious if the plaintiffs could circumvent the preclusive effects of the Act and the political question doctrine merely by dressing their statutory claims in constitutional garb. In fact, they cannot do so, for all of the considerations set forth in the preceding sections of this brief apply with equal force to the due process claim.

To be sure, it is unsettled whether judicial review of "colorable constitutional claims" may be barred by an Act of Congress. Webster v. Doe, 486 U.S. 592, 603 (1988) (emphasis added); see id. at 605-606 (O'Connor, J., concurring in part and dissenting in part), and id. at 612-15 (Scalia, J., dissenting). But as explained below, the union plaintiffs' due process claims in this case are not "colorable" ones. And even if they were, questions about the power of Congress to restrict judicial review of constitutional claims have no relevance to the political question doctrine, which itself is grounded in the Constitution. It has long been settled that even constitutional claims are nonjusticiable if they present political questions. See, e.g., Baker, 369 U.S. at 218-24 (political question doctrine bars claims arising under Guaranty Clause of Constitution).

II. None of the Plaintiffs Has Standing To Challenge the Closure of the Shipyard

As explained above, the defendants moved to dismiss this suit not only because the plaintiffs' claims are nonreviewable, but also because the plaintiffs lack standing to pursue the claims. The Court need not address the issue of standing if it determines that the Act precludes judicial review or that the plaintiffs' claims are barred by the political question doctrine. However, the plaintiffs' failure to satisfy the constitutional and prudential requirements for bringing an action in federal court furnishes an alternative ground for affirming the district court's decision. See, e.g., Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988).

The standing inquiry focuses on the appropriateness of allowing a particular litigant to invoke the federal courts' power. Warth v. Seldin, 422 U.S. 490, 496 (1975). We will address a number of possible grounds for standing and demonstrate that none permits these plaintiffs to bring this suit. For purposes of standing analysis, the plaintiffs may be divided into three groups: (1) the state and city plaintiffs (the states of New Jersey, Pennsylvania and Delaware, their Governors, Attorneys General Preate and Del Tufo and the City of Philadelphia); (2) the congressional plaintiffs (the four United States Senators and six Members of the House of Representatives); and (3) the union plaintiffs (the three labor unions and their presidents). We address each group in turn.

A. The State and City Plaintiffs

Before the district court, the state and city plaintiffs asserted standing to challenge the closing of the Shipyard based on their interest as parens patriae in promoting the welfare of their citizens. See Letter Brief of New Jersey Plaintiffs (8/30/91), at p. 10, n. *; Plaintiffs' Mem. in Opp. To Defendants' Mot. To Dismiss, at p. 37, n. 11 (App. 9, Entry 20) (incorporating letter brief). However, parens patriae cannot serve as a basis for standing in this case, because "[a] State does not have standing as parens patriae to bring an action against the Federal Government." Alfred L. Snapp & Sons v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 610 n.16 (1982); Pennsylvania v. Porter, 659 F.2d 306, 317 (3d Cir. 1981), cert. denied, 456 U.S. 1121 (1982). Where state and federal interests conflict, the federal interest takes precedence: "the United States, not the State, represents the citizens as parens

patriae in their relations to the federal government." Georgia v. Pennsylvania Ry. Co. 324 U.S. 437, 446 (1945).

This well established rule denies parens patriae standing to states where, as here, the state plaintiff claims that a federal instrumentality has violated a statute or improperly administered a federal program. State of Iowa ex rel. Miller v. Block, 771 F.2d 347, 354-55 (8th Cir. 1985), cert. denied, 478 U.S. 1016 (1986); Pennsylvania ex rel. Shapp v. Kleppe, 533 F.2d 668, 673-81 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976). Indeed, a parens patrie claim by Illinois challenging a base closure under the 1988 Act was rejected on precisely this ground. See People ex rel. Hartigan v. Cheney, 726 F. Supp. at 221-27. Nor can the Governors, attorneys general and the city plaintiffs attack the Act under a parens patriae theory, for any interest they may have in the protection of their citizens is identical to that of the state, and standing is similarly precluded. See Chiles v. Thornburgh, 865 F.2d 1197, 1208 (11th Cir. 1989); City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1047 (2d Cir. 1976) (Meskill, J., dissenting), cert. denied, 434 U.S. 1034 (1978); In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).[9]

---

[9]In the district court, the plaintiffs disclaimed reliance on their proprietary interests as a basis for standing. See Letter Brief for New Jersey Plaintiffs (8/30/91), at p. 10, n. *; Plaintiffs' Mem. in Opp. To Defendants' Mot. To Dismiss (9/3/91), at p. 37, n. 11. Any attempt to assert standing on this basis must be rejected, because the state and city plaintiffs do not allege that the states or city themselves will be injured by the closings. See FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 608 (1990) ("standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively

(continued...)

B. The Congressional Plaintiffs

Article III requires "at an irreducible minimum" that a party seeking to invoke the federal courts' authority show "injury in fact," that is a specific and individuated harm arising from the conduct of the other party. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). The four Senators and six Members of Congress lack standing since they fail to demonstrate the requisite "specific and cognizable" injury required to invoke the court's jurisdiction. Moore v. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985). Indeed, the congressional plaintiffs fail even to allege any injury in fact, pleading only their names, positions and office and home addresses. App. 14-15, 16-17.

Nor could the congressional plaintiffs allege an injury that would support standing. Courts have generally found legislators to have standing only where the claim of injury stems from a "distortion of the process by which a bill becomes a law," Moore, 733 F.2d at 952, or from the nullification of or interference with a legislator's voting rights. See Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Coleman v. Miller, 307 U.S. 433 (1939) (plurality).

---

[9](...continued)
appear in the record'") (citations omitted). Even if the states or city expressly alleged that the closing would result in lost tax revenue or greater social service spending, they would nevertheless lack standing in their proprietary capacities. Any such financial injury is not one to the state qua state, or city qua city, but to their taxpayers. Hartigan, 726 F. Supp. at 225; Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985); Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976).

No such allegation has been or could be made here. The legislators cannot contend that the alleged actions of the Navy or Base Closing Commission after passage of the Act somehow interfered with their constitutional prerogatives or the legislative process. At most, the plaintiffs allege that the legislation has not been properly implemented. Yet, any such claim of injury is no more than a "generalized grievance about the conduct of government" (Moore, 733 F.2d at 952), a type of claim repeatedly found insufficient to afford standing.

C. The Union Plaintiffs

1. The union plaintiffs, which serve as collective bargaining representatives for various classes of workers at the Shipyard, and the presidents of these unions sought to enjoin the closing of the Shipyard on APA and due process grounds. To establish standing to sue under the APA, the union plaintiffs must show that they are within the zone of interests sought to be protected by the statute. Air Courier Conf. v. American Postal Workers Union, 111 S. Ct. 913, 917 (1991). Specifically, "the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." Air Courier, 111 S. Ct. at 918. A plaintiff lacks standing if his 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." Clarke v. Securities Industry Ass'n, 479 U.S.

388, 399 (1987); New Jersey Speech-Language Hearing Ass'n v. Prudential Ins. Co. of America, 724 F.2d 383, 385 (3d Cir. 1983).

Here, the interests of the union plaintiffs (and indeed of all the plaintiffs) are flatly inconsistent with the purposes of the statute. The express purpose of the legislation is to create a mechanism "that will result in the timely closure and realignment of military installations." Act § 2901(b). The legislative history further underscores that the object of the act was to close unnecessary bases. See, e.g., 136 Cong. Rec. H7459 (daily ed. Sept. 12, 1990) (Rep. Foglietta); id. at H7458 (Rep. Browder); id. at H7459 (Rep. Mazzoli); id. at H7460 (Rep. Fazio). The interest of the union plaintiffs -- preserving jobs by prohibiting the closure of the Shipyard -- is wholly contrary to the object of the statute. Where, as here, a statute's dominant purpose is saving taxpayer money, its implementation cannot be challenged by plaintiffs whose "real interest in this case [is] the protection of the federal jobs of its members," an interest fundamentally at odds with the statutory purpose. NFFE v. Cheney, 883 F.2d 1038, 1049 (D.C. Cir. 1989).

As noted above, a similar suit by union plaintiffs challenging base closures under the 1988 Act was dismissed for lack of standing by the district court in NFFE, supra. See 727 F. Supp. at 21-22, aff'd on other grounds, 905 F.2d 400 (D.C. Cir. 1989). Like the union that challenged the closures under the 1988 Act, the purpose of which was identical to the 1990 Act, "[p]laintiffs [here] can point to nothing in the language of the Act or its legislative history that suggests that Congress contemplated the protection of federal employees or contractors." NFFE, 727 F. Supp. at 22.

The purpose of the Act is not altered by the fact that "local economic impact" is one of the criteria to be used in the evaluation of military installations. This criterion was only one among many factors to be considered and was intended to aid in the selection of bases for closure, not to require that they be kept open. While Congress recognized that one effect of the closure of military bases would be the short-term loss of jobs, it stressed that the purpose of the statute was not to preserve these jobs, but to fairly and rationally close the bases. See 136 Cong. Rec. H7462 (daily ed. Sept 12, 1990) (Rep. Schroeder). Moreover, as shown above, Congress plainly intended that the political branches of government, not the courts, resolve those issues that may arise from the operation of the Act. Given Congress' intent to preclude judicial interference with the base closing process, it "cannot reasonably be assumed that Congress intended to permit th[is] suit." Clarke, 479 U.S. at 399.

The union plaintiffs cannot bring themselves within the zone of interests of the Act by casting their challenge as procedural rather than substantive. The relief sought by the unions -- enjoining the closure of the Shipyard -- manifestly frustrates the substantive purpose of the Act. Moreover, the Supreme Court's formulation of the zone of interests test requires that the plaintiff's "injury," "aggrievement," or the "adverse effect" upon him fall within the statutory zone of interests. Air Courier, 111 S. Ct. at 918. Here, the relevant injury cannot be the abstract interest in governmental conformity to its procedures since such an interest, "shared in substantially equal measure by all or a large

class of citizens" (Warth v. Seldin, 422 U.S. 490, 499 (1975)) would be inadequate to confer standing. The only possible injury sufficiently concrete and individualized to support the union plaintiffs' standing is the threatened loss of jobs, and, as discussed previously, this interest is entirely antithetical to the purpose of the Act.

2. Since the union plaintiffs' due process claim rests entirely on alleged violations of the procedural protections of the Act, the analysis of the "zone of interests" under the Fifth Amendment is identical to that under the Act. See, e.g., Haitian Refugee Center v. Gracey, 809 F.2d 794, 815 (D.C. Cir. 1987); Fors v. Lehman, 741 F.2d 1130, 1134 (9th Cir. 1984). Accordingly, the union plaintiffs' failure to come within the zone of interests of the Act also puts them outside the zone of interests of the Due Process Clause.

III. The Union Plaintiffs' Due Process Clause Is Without Merit As a Matter of Law

Even if the union plaintiffs' due process claim were subject to judicial review, and even if the union plaintiffs had standing to raise the claim, the due process claim is a patently meritless one. For that reason, the defendants moved below to dismiss the due process claim under Rule 12(b)(6) as well as Rule 12(b)(1) of the Fed. R. Civ. P. The district court did not reach the merits of the due process claim, but this Court is free to do so as an alternative ground for affirmance.

The most obvious defect in the due process claim is that the union plaintiffs simply have no cognizable "property interest" in the operation of the Shipyard. Property interests under the Due

Process Clause "are defined by existing rules or understandings that stem from an independent source * * * -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Here, nothing in the Act "support[s] claims of entitlement to [the] benefits" of the Shipyard's continued operation. The decision whether to close the Shipyard (or any other installation) belongs to the President and Congress, and the Act does not impose any substantive limitation on their decisions.[10] More generally, the notion that civilian employees of a military base have a "property right" in their continued employment has never been embraced by the courts. See, e.g., AFGE v. Stetson, 640 F.2d 642, 645 (5th Cir. 1981).

Faced with this obstacle, the plaintiffs have sought to manufacture a substantive property interest out of the procedural requirements of the Act, arguing (at p. 40 n. 20) that they have a "property right" in the continued operation of the Shipyard "until it is determined, pursuant to a fair and non-arbitrary process * * * , that the Shipyard should be closed" (emphasis added). But this attempt to bootstrap the Act's procedural provisions into a substantive property interest is unavailing. To establish the existence of a protected liberty or property right under the Due Process Clause, the plaintiffs must identify "substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis added) (liberty interest); Clark v. Township

[10]In particular, nothing in the Act binds the President or Congress to follow the selection criteria used by the Secretary of Defense and the Commission.

of Falls, 890 F.2d 611, 620 n.4 (3d Cir. 1989) (property interest). It is not sufficient merely to identify procedural restrictions on agency action, for "there can be no property interest in a procedure itself." Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1128 (W.D. Pa. 1980); Clark, 890 F.2d at 620 n.4; see Olim, 461 U.S. at 250-51.

Moreover, even if it were assumed that the union plaintiffs did have a cognizable "property interest" in the operation of the Shipyard, the only process to which they would be entitled was the legislative process entailed in Congress's consideration of the joint resolution of disapproval. It is well-settled that when burdens are imposed on a broad class of persons through legislative action, the only process due under the Due Process Clause is the legislative process itself. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Minnesota State Board for Community Colleges v. Knight, 465 U.S. 217, 283, 285 (1984); Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JENNIFER H. ZACKS
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF BAR MEMBERSHIP

Counsel for the appellees are federal attorneys and are permitted to practice before this Court without being admitted to the Bar of the Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 1991, I have served the foregoing BRIEF FOR THE APPELLEES by delivering copies to the following persons by overnight mail service:

Camille Wolf Spinello
Conneaut Cellars Winery
Rt. 322, R.D. # 1
Conneaut Lake, PA 16316

Patrick T. Davish
314 N. Providence Road
Wallingford, PA 19086

Justice Bruce Kauffman
Dilworth, Paxson, Kalish
& Kauffman
1820 Rittenhouse Square, Unit 601
Philadelphia, PA 19103

MICHAEL JAY SINGER

Document Separator

5/18/9

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

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; ROBERT D. STUART, JR.,

U.S. Sen. Arlen Specter,
U.S. Sen. Harris Wofford,
U.S. Sen. Bill Bradley,
U.S. Sen. Frank R. Lautenberg,
Governor Robert P. Casey,
the Commonwealth of
Pennsylvania, Pennsylvania
Attorney General Ernest D.
Preate, Jr., Governor James J.
Florio, the State of New Jersey,
New Jersey Attorney General
Robert J. Del Tufo,
Governor Michael N. Castle,
the State of Delaware,
U.S. Rep. Curt Weldon,
U.S. Rep. Thomas Foglietta,
U.S. Rep. Robert E. Andrews,
U.S. Rep. R. Lawrence Coughlin,
U.S. Rep. Peter H. Kostmayer,
U.S. Rep. Robert A. Borski,

/

the City of Philadelphia,
Howard J. Landry, International
Federation of Professional and
Technical Engineers, Local 3,
William F. Reil, Metals Trades
Council, Local 687, Machinists,
Ronald Warrington, the Planners
Estimators Progressman &
Schedulers Union, Local No. 2,

Appellants

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

On Remand from the Supreme Court of the United States
(No. 92-485)

Reargued February 24, 1993

BEFORE: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed May 18, 1993)

Bruce W. Kauffman (Argued)
David H. Pittinsky
Camille Wolf Spiniello
Patrick T. Davish
Mark A. Nation
Dilworth, Paxson, Kalish & Kauffman
2600 The Fidelity Building
Philadelphia, PA 19109-1094

OF COUNSEL:

Senator Arlen Specter (Argued)
Green Federal Building, Room 9400
Sixth and Arch Streets
Philadelphia, PA 19106

Attorneys for Appellants

Ernest D. Preate, Jr.
Attorney General for Pennsylvania
Louis J. Rovelli,
Executive Deputy Attorney General
for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120

Attorneys for the Commonwealth
of Pennsylvania and
Ernest D. Preate, Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
the State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625

Attorneys for the State of
New Jersey, Governor James J.
Florio and Robert J. Del Tufo

Charisse Lillie
Solicitor for the City of Philadelphia
Room 1520
Municipal Services Building
Philadelphia, PA 19102-1692

Attorney for the City of
Philadelphia

Stuart M. Gerson
Assistant Attorney General

Michael M. Baylson
United States Attorney

Douglas N. Letter (Argued)
Scott R. McIntosh
Jennifer H. Zacks
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Attorneys for Appellees

OPINION OF THE COURT

STAPLETON, Circuit Judge:

This action to enjoin the defendants from carrying out a decision to close the Philadelphia Naval Shipyard is before us for the second time. In our initial opinion in this case, Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), we held, inter alia, that plaintiffs' claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Defense Base Closure and Realignment Act of 1990 could proceed in the district court. Our mandate, however, was vacated by the Supreme Court and the case was remanded for reconsideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). After consideration of the impact of Franklin upon our prior holding, we conclude that no change in that holding is warranted. We will therefore remand this matter to the district court for further proceedings consistent with our earlier opinion.

I.

A.

In Franklin, the Supreme Court was presented with a situation at least superficially similar to the one before us; however, it is the differences between the two cases that we find dispositive. Franklin was a suit against the President, the Secretary of Commerce, and a number of other public officials challenging the methods used in the 1990 census and the manner in which the number of seats in the House of Representatives had been allocated to the various states. Plaintiffs' claims were based upon the Administrative Procedure Act (APA) and the Constitution. A three judge panel of the United States District Court for the District of Massachusetts initially found in favor of the plaintiffs and granted the relief sought--relief which included an injunction directing the Secretary of Commerce to alter her reapportionment report and the President to recalculate the number of Representatives per State and transmit the new calculation to Congress. Franklin, 112 S. Ct. at 2770.

The Supreme Court reversed. It first analyzed plaintiff's claim under the APA which allows review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). The Court concluded that the Secretary of Commerce's report to the President on the results of the census does not constitute "final agency action" and is therefore unreviewable under the APA because "[t]he President, not the Secretary takes the final action that affects the

States." Franklin, 112 S. Ct. at 2775; see also id. at 2773 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). Next, the Court held that although the President's calculation of the number of Representatives and forwarding of that calculation to Congress is a final action, the President is not an "agency" within the meaning of the Act and thus, the President's action is not reviewable for abuse of discretion under the APA. Id. at 2775. Finally, the Court noted that there is judicial review of presidential action to determine whether it violates the Constitution; however, it concluded that the action complained of in Franklin was not unconstitutional.

B.

The action currently before us is a suit against the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure Commission seeking to enjoin the closing of the Philadelphia Naval Shipyard.[1] Under the Defense Base Closure and Realignment Act of 1990 ("the Act"), it is the responsibility of the Secretary of Defense to close the bases designated as a result of the process prescribed by the Act, Pub. L. No. 101-510, §§ 2904-2905, 104 Stat. 1808, 1812-14 (1990), and the primary relief sought here is an order enjoining the Secretary from closing the Shipyard. The alleged basis for this relief is that

1. The President is not a defendant in this suit.

the process that resulted in the designation of the Shipyard as a base to be closed did not comply with the requirements set forth in the Act.

In our prior opinion, we first held that there could be no judicial review prior to the end of the process required by the Act because there was no final decision prior to that point that had an adverse impact on the plaintiffs.[2] We also concluded that the decisionmaking of the President under the Act was committed to his discretion and not properly reviewable. Specter, 971 F.2d at 946 ("One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure . . . ."). Similarly, we held that the decisionmaking of other federal officials (i.e. the Secretary of Defense, the members of the Commission) challenged by plaintiffs was committed to their discretion and not judicially reviewable. Id. at 950-53. However, we also held that the district court could review the claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with

2. More specifically, we held that action could be judicially reviewed "only if its impact upon plaintiffs is direct and immediate . . . . One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature." Specter, 971 F.2d at 946.

certain procedural mandates of the Act.[3] Specifically, we concluded:

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

Id. at 947 (footnote omitted).

Although we noted that because "it is the implementation of the President's decision that we have been

---

3. For instance, we held that the allegation that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations" as required by § 2903(c)(4) of the Act was judicially reviewable. Specter, 971 F.2d at 952. Similarly, we also held reviewable the plaintiffs' contention "that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy." Id. at 952-53.

We stressed, however, that the extent of judicial review in this context was very limited and that plaintiffs, while purporting to complain about specific procedural defects, were in large part seeking to get the district court to second guess decisions committed by the Act to executive discretion. Id. at 953. It is apparent to us from plaintiffs' Brief for Appellants on Remand that plaintiffs have failed to acknowledge the limited character of the review our prior opinion permits.

asked to enjoin, . . . at least in one sense, we are here asked to review a presidential decision," id. at 945, we concluded that this would not bar review of plaintiffs' procedural claims:

> Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law, 5 Kenneth C. Davis, Administrative Law 28:4 (1984), cited with approval in Heckler v. Cheney, 470 U.S. 821, 832 (1985); see also ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); see also INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); Nixon v. Fitzgerald, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions--including those taken at the immediate direction of the President--are subject to judicial review"). . . . It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

Id. at 945.

III.

Examination of our prior decision in light of Franklin suggests to us that no change in outcome is required. Franklin's holding that the Secretary of Commerce's report to the President did not constitute a reviewable final action because it did not

have an immediate and direct impact on the plaintiffs confirms our initial conclusion that there was no reviewable final action here until after the President designated the Shipyard as a facility to be closed and Congress failed to overturn that action. See Specter, 971 F.2d at 945 ("We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b).").

More importantly, the Court's conclusion that the President is not an "agency" under the APA, and thus, presidential action is not reviewable for abuse of discretion under the APA's standards is entirely consistent with our prior decision in which we assumed, without deciding, that the President is not an agency within the meaning of the APA.[4] Because our prior holding was not based on the existence of APA abuse of discretion review, but rather on the belief that courts may review actions taken at the direction of the President to determine whether those actions are within applicable constitutional and statutory authority, a modification of our prior mandate only would be warranted if Franklin might be read as foreclosing the limited review we previously upheld.

---

4. As previously noted, we explicitly concluded that our holding permitting review of plaintiffs' claims that the base closing process had violated the specific procedural mandates of the statute would be "the same whether or not the APA applies to presidential decisionmaking." Specter, 971 F.2d at 945.

In Franklin, the Court declined only to review the President's decision under the APA. It expressly sanctioned judicial review of presidential decision making for consistency with the Constitution and said nothing about review of presidential action for consistency with the statute authorizing such action. In concluding in our earlier opinion that judicial review was available here, we relied upon the existence of judicial review prior to the adoption of the APA and upon various authorities indicating that the judicial review provisions of the APA represent a "codification of the common law." Id. at 945. While we there described this extra-APA review as common law review, our reexamination of the relevant authorities in light of Franklin has persuaded us that there is a constitutional aspect to the exercise of judicial review in this case -- an aspect grounded in the separation of powers doctrine. As a result, we believe Franklin provides affirmative support for judicial review in this case. We would, in any event, be reluctant to infer from Franklin's silence on the matter a prohibition of judicial review where presidential action is alleged to be in conflict with non-discretionary mandates of the authorizing statute because the Court had no occasion to consider that issue in Franklin. There, the only non-constitutional allegation made by (and, indeed, available to) plaintiffs was that the proposed action represented an abuse of discretion (i.e., arbitrary and capricious conduct) prohibited by the APA. Here, by contrast, plaintiffs allege that the process underlying the decision to close the Shipyard

violated specific nondiscretionary provisions of the Base Closing Act -- the only authority advanced by the defendants for the closing.

We read Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. See id. at 585; see also United States v. Noonan, 906 F.2d 952, 955 (3d Cir. 1990) ("It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself." (citing Youngstown Steel)); National Treasury Employees Union v. Nixon, 492 F.2d 587, 611 (D.C. Cir. 1974) ("'Youngstown represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. Youngstown represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'" (quoting Nixon v. Sirica, 487 F.2d 700, 793 (Wilkey, J., dissenting)). Youngstown also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. See, e.g., National Treasury Employees Union, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated

by the legislative branch."); see also U.S. Const. Art. II, § 3 ("[T]he President shall take care that the laws be faithfully executed . . . ."). Indeed, we note that the Youngstown Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. Youngstown, 343 U.S. at 585-86. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of Youngstown, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by Franklin. 112 S.Ct. at 2776 (citing Youngstown).

The plaintiffs in this case, unlike the plaintiffs in Franklin, do not ask the court to review under the APA for arbitrary and capricious conduct. Rather, they allege that closing the Shipyard would be inconsistent with specific, nondiscretionary directives of the Base Closing Act -- the only authority advanced by the defendants for their proposed action. The President, no less than his lieutenants, must have statutory or constitutional authority for his actions and where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process,

judicial review exists to determine whether that process has been followed.[5]

IV.

The defendants insist that there can be no judicial review in this case because such review is barred by the doctrine of sovereign immunity. We disagree.

We first note that limited judicial review of federal action has long been available at common law:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949); see also Youngstown Steel, 343 U.S. at 585-87. Although this principle is limited, see, e.g., Larson, 337 U.S. at 690 ("A claim of error in the exercise of [delegated] power is . . . not sufficient."),[6] as counsel for the defendants conceded at oral

---

5. In holding here that the President must have at his disposal information collected in accordance with statutory procedures, we do not hold that the district court may review the entirely distinct question of whether and to what extent the President uses the information. As we previously held, the Act commits that decision to the President's discretion. Specter, 971 F.2d at 946.

6. Larson was essentially a breach of contract action against an agent of the federal government. The Court rejected plaintiff's contention that the agent's breach was ultra vires and thereby stripped of sovereign immunity protection; instead, it held that (continued...)

argument, and as both Youngstown Steel and Franklin make clear, judicial review of the constitutionality of executive action is not barred by the doctrine of sovereign immunity. Thus, where, as here, plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the only statute authorizing such action and has thereby violated the constitutionally-mandated separation of powers, sovereign immunity concerns do not apply.

Even if the inapplicablity of sovereign immunity in this context were not clear from the doctrine enunciated in Larson and Youngstown Steel, however, we believe this case would still be controlled by the express waiver found in the APA:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1988).

---

6. (...continued)
because the agent was authorized to "administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment," his actions were within delegated authority and were therefore protected by sovereign immunity: "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." Larson, 337 U.S. at 695.

Here, plaintiffs do not seek monetary damages; they seek injunctive relief.[7] Plaintiffs also state a claim that the Secretary of the Navy, the Secretary of Defense, and the Base Closure Commission have acted under color of legal authority in violation of the Act and that the Secretary of Defense, similarly acting under color of legal authority, is threatening to close the Shipyard as the final step of an illegal process. This is thus a situation that § 702 literally reads on. It is also a situation that precisely fits the congressional intent behind this waiver of sovereign immunity. See, e.g., H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6121 ("The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action . . . ."); id. at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."); 4 Kenneth C. Davis, Administrative Law Treatise § 23:19, at 192 (2d ed. 1984) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than

7. Effective relief can be granted by an order prohibiting the Secretary of Defense from closing the Shipyard.

money damages is no longer a defense.").[8] Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA. See Johnsrud v. Carter, 620 F.2d 29, 31 (3d Cir. 1980); Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979); see also 4 Davis, supra,
§ 23:19, at 195 ("The abolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.").

The only argument we can conceive against the applicability of § 702 here is that the President was involved at one stage of the process that led to the allegedly illegal action that will injure plaintiffs. While, as we earlier concluded, the nature of the role assigned to the President by the Act makes his decisionmaking unreviewable, the fact that he played a role provides no justification for holding the process and the final executive action immune from review for compliance with the mandatory procedural requirements of the Act. While suits, like Franklin, seeking to secure presidential action or forbearance

---

8. The legislative history of the immunity waiver also indicates congressional recognition of the ultra vires doctrine and the difficulties and complexities involved in its application; it evinces an intent to eliminate the need for "wispy fictions" in favor of a clear waiver. See H.R. Rep. No. 1656, supra, at 5-7, 1976 U.S.C.C.A.N. at 6125-28.

pose special problems, those problems are not presented in the situation before us.[9] As Justice Scalia explained in his opinion in Franklin, the fact that the federal courts "cannot direct the President to take a specified executive act" does not

> in any way suggest that Presidential action is unreviewable. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, e.g., Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 72. S.Ct. 863, 96 L.Ed. 1153 (1952); Panama Refinancing Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)--just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, e.g., Powell v. McCormack, 395 U.S. 486, 503-506, 89 S.Ct. 1944, 1954-1956; 23 L.Ed.2d 491 (1969); Dombrowski v. Eastland, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive.

Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring).

---

9. Indeed, given Franklin's holding that the President is not an "agency" within the meaning of the APA, the waiver of sovereign immunity contained in § 702 may not apply to suits against the President. Nevertheless, this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President--a situation not present here. While we do not regard Franklin as turning on sovereign immunity doctrine, we note that § 702 might not waive sovereign immunity in the situation there before the Court. As the Franklin Court recognized, "it is the President's personal transmittal of the report to Congress that settles the reapportionment." Franklin, 112 S. Ct. at 2775. In Franklin, it appears that the only effective relief was relief that would require the President's forbearance. See Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring) ("[W]e cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush.").

V.

Accordingly, we conclude that nothing in Franklin suggests that our prior approach to this case was incorrect. We reaffirm our prior opinion and we will remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court should conduct those proceedings as expeditiously as possible.

Specter v. Garrett
No. 91-1932

Alito, Circuit Judge, dissenting.

The majority rests its decision on arguments that are not properly before us, since the plaintiff-appellants did not raise them either before or after remand from the Supreme Court. Moreover, I believe that the majority's arguments are wrong on the merits and may have unfortunate future implications. I therefore respectfully dissent.

I.

When this case was initially before us, the majority held that the closing of the Philadelphia Naval Shipyard was subject to judicial review to determine whether certain procedural requirements of the Defense Base Closure and Realignment Act of 1990 had been satisfied. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992). The Supreme Court subsequently decided Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), which concerned, among other things, whether the Administrative Procedure Act authorized review of actions taken under a statutory scheme similar to that in the Defense Base Closure and Realignment Act. The Court held that the Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census is not "final agency action" reviewable under the APA, 5 U.S.C. § 704, and that actions taken

by the President are not subject to APA review. After handing down its decision in Franklin, the Supreme Court vacated this court's prior decision in this case and remanded for reconsideration in light of Franklin. O'Keefe v. Specter, 113 S. Ct. 455 (1992).[10]

On remand, the plaintiffs vigorously contended that the statutory scheme in Franklin is materially different from the scheme involved here and that Franklin therefore does not bar review under the APA. The plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based on either common law or separation of powers principles. Nor had the plaintiffs advanced either of those theories when this case was initially before us or, as far as I can determine, when the case was in the district court. The majority, however, chooses to sidestep the APA argument that the plaintiffs have pressed. Instead, the majority grounds its decision on the common law and separation of powers arguments that it has devised and injected into this case.

---

10. Neither of the arguments suggested by Franklin -- i.e., that the recommendations of the Base Closure Commission do not constitute "final agency action" under the APA and that presidential action is not reviewable under the APA -- was raised by the defendants when this appeal was first before us. The defendants contend that we must nevertheless reach these issues because they are jurisdictional. Whether or not an appellate court would always be compelled to consider issues of this nature even if they are not raised by the parties, I believe it is appropriate for us to reach them here. If we refused to reach these issues now, the case would be remanded, and the defendants could then raise them before the district court. Under these circumstances, our refusal to entertain these issues at the present time might further delay the expeditious disposition of this case.

I cannot endorse this approach. I would address the argument that the plaintiffs have raised and that the parties have briefed -- i.e., whether, despite Franklin, the closing of the Shipyard is reviewable under the APA. The First Circuit recently considered Franklin's effect on judicial review under the Defense Base Closure and Realignment Act. Cohen v. Rice, 92-2427, 1993 LW 131914 (1st Cir. May 3, 1993). The plaintiffs in that case alleged that the process had been tainted by "faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO." Id. at *6. The First Circuit held that under Franklin APA review for these claims was unavailable. Because I agree that the statutory scheme at issue here is not materially distinguishable from the scheme in Franklin, I would hold that APA review is unavailable. And I would go no further.

II.

Since the majority has gone further, however, and since the majority's analysis may affect future cases, I will explain briefly why I believe the majority's analysis is flawed.
The majority opinion, as I understand it, reasons as follows. First, "[t]he President must have constitutional or statutory authority for whatever action he wishes to take." Majority Typescript at 12. Second, judicial review is available outside the APA to determine whether presidential action violates or exceeds that authority. Id. at 12-14. Third, under the Base

Closure and Realignment Act, the President lacks statutory authority to approve or implement the closing of a base if the Base Closure Commission's recommendation regarding that base was tainted by violations of the Act's procedural requirements.[11] Therefore, since the plaintiffs in this case allege that such procedural violations occurred with respect to the Philadelphia Naval Shipyard, the President's approval of the closing of the Shipyard and/or the Secretary of Defense's implementation of the closing are subject to non-APA judicial review.

Putting aside whatever else may be said about this analysis, it seems plain to me that its third step is incorrect, for the Base Closure and Realignment Act does not limit the President's authority in the way the majority suggests. The Act does not require the President to reject the Commission's package of recommendations if the recommendations regarding one or more bases are tainted by procedural violations. Nor does the Act

---

11. The majority puts it as follows (majority typescript at 8), quoting Specter v. Garrett, 971 F.2d 936, 947 (3d Cir. 1992)):

> Congress intended that domestic bases be closed only pursuant to an exercise of presidential discretion informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.

The majority later adds that the President's authority under the Base Closure and Realignment Act to approve or order the closing of a base "has been expressly confined by Congress to action based on a particular type of process." Majority typescript at 13. In addition, the majority states that the President's subordinates are "threatening to close the Shipyard as the final step of an illegal process." Majority typescript at 15.

require or authorize the President or his subordinates to refrain from carrying through with the closing or realignment of such bases following presidential approval of the Commission's package and the expiration of the period for congressional disapproval.

The President's powers and responsibilities under the Base Closure and Realignment Act are clearly set out in Section 2903(e). In brief, the President, after receiving the Commission's package of recommendations by July 1 of the year in question, must decide whether to accept the entire package or return it to the Commission. If, as was the case in 1991, the President decides to accept the package, he must transmit a report containing his approval to the Commission as well as to Congress. He must also transmit a copy of the Commission's recommendations and a certification of his approval to Congress. Section 2903(e)(1), (2). Congress then has 45 days to disapprove the package (Section 2904(b)), and if, as was the case in 1991, Congress does not disapprove, the Secretary of Defense "shall" close and realign bases in accordance with the package. Section 2904(a).

Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the

statutory authority at these stages of the base closure and realignment process.[12]

The Base Closure and Realignment Act calls for three cycles of recommended closures and realignments -- in 1991, 1993, and 1995. In this case, we are still considering a closure that was recommended and approved in the first cycle. In the meantime, the second cycle is already well underway. When Congress enacted the Base Closure and Realignment Act, it knew that unnecessary military installations can waste enormous sums of money and that litigation can effectively delay closings and realignments for years. In my view, Congress clearly wanted to put an end to these delays, but our court, by allowing judicial review of base closings and realignments, is frustrating the implementation of Congress's intent.

Dissent One judge

12. As I noted in my prior dissent (971 F.2d at 956 n.2), the plaintiffs are not challenging the propriety of anything that occurred after the transmission of the Commission's recommendations to the President. Rather, their claims relate to actions taken at earlier stages. But as the majority itself has recognized, actions taken prior to the end of the process required by the Act had no adverse impact on the plaintiffs and thus are not subject to judicial review under any theory. Majority typescript at 7 & n.2.

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

Dissent

Under the plain language of the Base Closure and Realignment Act, the President's sole responsibility, upon receiving a package of recommendations from the Commission, is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission. After the President has approved a package of recommendations and the time for congressional disapproval has expired, the sole responsibility of the Secretary of Defense is to carry out the indicated closings and realignments. In the case before us, this is precisely what the President did and what the Secretary of Defense wishes to do, and therefore I see no possible ground for arguing that the Executive violated any statutory command or exceeded its

< CONFIRMATION REPORT >

05-18-1993(TUE) 16:43

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
3321	5-18	16:42	6334371	2	0°01'14"	NORMAL	OK
				2	0°01'14"		

Document Separator

WASHINGTON
DEPT. OF JUSTICE, DC
1993 MAY 18 PM 5:12
RECEIPT STAMP

U.S. DEPARTMENT OF JUSTICE WASHDC 20530
TELECOMMUNICATIONS SERVICE CENTER
FAX NUMBERS: 202-514-4371/4372 COMMERCIAL
202-368-4371/4372 FTS
VOICE VERIF: 202-514-4495 COMM
368-4495 FTS

MACHINES ARE XEROX 7017 AUTOMATICS

FACSIMILE OUTGOING TRANSMISSION RECORD

FROM: Scott R. McIntosh (NAME (PRINT)) — Civil Div / App. (DIVISION OR SECTION)

TO: MARY ANN HOOK (NAME (PRINT)) — MAY 18, 1993 (DATE AND TIME)

NUMBER OF PAGES: 27 — Arlington, VA (CITY/STATE)

DESTINATION'S FAX NUMBER 703/696-0550

DESTINATION'S VOICE VERIFICATION NUMBER 703/696-0504

PRECEDENCE -------- (PLEASE CIRCLE ONE) ROUTINE --- PRIORITY --- IMMEDIATE

ARE TRANSMITTED COPIES TO BE RETURNED? ✓ YES ____ NO

IF YES, YOUR PHONE NUMBER: 616-5368 (Anne Smith) IF NO, SIGNATURE ____

SPACE BELOW FOR USE BY TELCOM

CHARGE CODE ____

NUMBER PAGES ____

OPR INITIALS ____

DESTINATION CALLED ____ (DATE & TIME) FOR PICK UP ____ (TSVC OPR INITIAL)

COMMENTS:

TRANSMISSION STAMP

Document Separator

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER, *et al.*,

Appellants,

v.

H. LAWRENCE GARRETT, III,
Secretary of the Navy, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPELLANTS' REPLY BRIEF

Bruce W. Kauffman
David H. Pittinsky
Mark J. Levin
Camille W. Spinello
Patrick T. Davish
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094

Attorneys for Appellants

OF COUNSEL:

Senator Arlen Specter
Green Federal Bldg., Room 9400
Sixth and Arch Streets
Philadelphia, PA 19106

Ernest D. Preate, Jr.
Attorney General for Pennsylvania
Louis J. Rovelli,
Executive Deputy Attorney General
for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1100

Attorneys for the Commonwealth of Pennsylvania
and Ernest D. Preate, Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
The State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
(609) 633-1971

Attorneys for the State of New Jersey,
Governor James J. Florio and Robert J. Del Tufo

Charisse Lillie
Solicitor for the City of
Philadelphia
Room 1520
Municipal Services Building
Philadelphia, PA 19102-1692

Attorneys for the City of Philadelphia

TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF FACTS 2

ARGUMENT 6

I. Appellees' Procedural Violations of the Base Closure Act Are Subject To Judicial Review 6

A. Appellees Cannot Avoid Application of the Strong Presumption Favoring Judicial Review of Agency Action 6

B. Appellees Cannot Overcome the Strong Presumption Favoring Judicial Review of Agency Action 7

1. Appellees Cannot Avoid Application of the Strong Presumption Favoring Judicial Review of Agency Action 9

2. Appellees' Attempt to Abolish the Distinction Between Procedure and Substance is Insupportable 13

3. Permitting Judicial Review of the Procedural Integrity of Appellees' Actions Would Not Upset Any Delicate Balance Between the Executive Branch and Congress 17

4. The Time Limits On Various Actions Required Under The 1990 Act Do Not Suggest A Congressional Intent To Preclude Judicial Review Of The Procedural Integrity Of The Base Closure Process 20

5. Appellees Fail Completely To Distinguish The Abundant Authority Cited By Appellants To Demonstrate The Availability Of Judicial Review For Procedural Violations Of The Act 24

C. Appellees' Claims Concerning the Political Question Doctrine Are Meritless 26

II. Appellants Have Standing to Challenge Appellees' Failures to Comply With The Procedures Mandated By the Base Closure Act 29

A. Appellant Workers and Unions Have Standing Under The APA and the Constitution To Challenge Appellees' Wrongful Actions 30

B. The Standing of Appellant Workers and Unions Precludes Any Challenge to the Standing of the Other Appellants 34

III. Appellants' Sufficiently Stated A Claim For Deprivation Of Their Due Process Rights In The District Court 35

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Air Courier Conference of America v. American Postal Workers Union,
111 S. Ct. 913 (1991) 32

Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592, 102 S. Ct. 3260 (1982) 36

Armstrong v. Bush,
924 F.2d 282 (D.C. Cir. 1991) 17,18,30

Banzhaf v. Smith,
737 F.2d 1167 (D.C.Cir. 1984) 19

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 7,8

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1987) 8,24

Bowsher v. Synar,
478 U.S. 714 (1986) 34,35

Cash Currency Exchanges Inc. v. Shine,
762 F.2d 542 (7th Cir. 1985) 15

City of Milwaukee v. Block,
823 F.2d 1158 (7th Cir. 1987) 30

City of New York v. Heckler,
578 F. Supp. 1109 (E.D. N.Y. 1984), aff'd, 742 F.2d 729 (2d Cir. 1984) 36

Clarke v. Securities Industry Association,
479 U.S. 388 (1987) 30,31,32,34

Coalition on Sensible Transportation, Inc. v. Dole,
642 F. Supp. 573 (D.D.C. 1986) 34

Commonwealth of Pa. v. National Association of Flood Ins.,
520 F.2d 11 (3d Cir. 1975), ... 36

Department of Navy v. Egan,
484 U.S. 518 (1987) 6,7

Falk v. Secretary of the Army,
870 F.2d 941 (2nd Cir. 1989) 27

First Federal Savings and Loan Association of Lincoln v. Casari,
667 F.2d 734 (8th Cir. 1982) 24

Friends of the Earth v. U.S. Navy,
841 F.2d 927 (9th Cir. 1988) 27

Gilligan v. Morgan,
413 U.S. 1 (1973) 28

Glasgow, Inc. v. Federal Highway Administration,
843 F.2d 130 (3d Cir. 1988) 30

Graham v. Caston,
568 F.2d 1092 (5th Cir. 1978) 24

Hollingsworth v. Harris,
608 F.2d 1026 (5th Cir. 1979) 24

Humphrey v. Baker,
665 F. Supp. 23 (D.D.C. 1987) 35

In Re Gerwer,
898 F.2d 730 (9th Cir. 1990) 15

International Associate of Machinists and Aerospace Workers v. Secretary of the Navy,
915 F.2d 727 (D.C. Cir. 1990) 27

Kirby v. United States Department of Housing & Urban Development,
675 F.2d 60 (3d Cir. 1982) 24,25

Lone Pine Steering Committee v. EPA,
777 F.2d 882 (3d Cir. 1985) 20,21

Louisiana v. Lee,
596 F. Supp. 645 (E.D. La. 1984), vacated on other grounds, 758 F.2d 1081 (5th Cir. 1985) 36

Luftig v. McNamara,
373 F.2d 664 (D.C. Cir. 1967) 28

Marbury v. Madison,
1 Cranch 136, 2 L. Ed. 60 (1803) 1

Maryland Department of Human Resources v. U.S. Department of Agriculture,
617 F. Supp. 408 (D. Md. 1985) 36

Massachusetts v. Mellon,
262 U.S. 447, 43 S. Ct. 597 (1923) 36

McDonald Welding v. Webb,
829 F.2d 593 (6th Cir. 1987) 27

McNary v. Haitian Refugee Center,
111 S. Ct. 888 (1991) 24

Moore v. U.S. House of Representatives,
733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469
U.S. 1106 (1985) 35

Morris v. Gressette,
432 U.S. 491 (1977) 21,22,23

National Federation of Federal Employees v. United
States,
727 F. Supp. 17 (D.D.C. 1989), aff'd, 905 F.2d 400
(D.C.Cir. 1990) 33,34

Pennsylvania v. Porter,
659 F.2d 306 (3d Cir. 1981) 36

Pressler v. Simon,
428 F. Supp. 302 (D.D.C. 1976), aff'd sub nom.
Pressler v. Blumenthal, 434 U.S. 1028 (1978) 35

Rylewicz v. Beaton Services, Ltd.,
888 F.2d 1175 (7th Cir. 1989) 15

Secretary of Interior v. California,
464 U.S. 312 (1984) 34,35

Thompson v. Clark,
741 F.2d 401 (D.C. Cir. 1984) 11,25

United States v. Jones,
567 F.2d 965 (10th Cir. 1977) 15

United States v. Nixon,
418 U.S. 683 (1974) 13

Valley Forge Christian College v. Americans United for
Separation of Church & State,
454 U.S. 464 (1982) 33

Watkins v. United States Army,
875 F.2d 699 (9th Cir. 1989) 27

West Virginia University Hospitals, Inc. v. Casey,
111 S. Ct. 1138 (1991) 9,12,13

Weyerhaeuser Company v. Costle,
590 F.2d 1011 (D.C. Cir. 1978) 20,29

Wheaton Industries v. EPA,
781 F.2d 354 (3d Cir. 1986) 20,22

Wilmington United Neighborhoods v. United States,
615 F.2d 112 (3d Cir. 1980) 25,26

CONSTITUTION

United States Constitution

Art. I, § 8, cls. 1, 3, 4, 8, 12, 14, 16 27-28

Due Process Clause 35-36

STATUTES

Administrative Procedure Act:

5 U.S.C. § 701 et. seq. 9,10,13, 30,33

Base Closure and Realignment Act of 1988,
Pub. L. No. 100-526, 102 Stat. 2623 (1988). 3,4

Defense Base Closure and Realignment Act of 1990,
Pub. L. No. 101-510, 104 Stat. 1808 . . . . . passim

Export Regulations of the War and National Defense Act,
50 U.S.C. §2412, Pub.L. 96-72 (1979) 9

Presidential Records Act, 44 U.S.C. §§ 2201 et seq. 17,18

Pub. L. No. 95-82, § 612, 91 Stat. 358 (1977) 2
(codified at 10 U.S.C. § 2687 (Supp. I 1977):

The Regulatory Flexibility Act of 1980,
5 U.S.C. §611(a)-(b)(1982) 9

LEGISLATIVE MATERIALS

137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991) 11

H.R. 2521, 102nd Cong., 1st Sess. (1991) 12

1988 U.S. Code Congressional and Administrative News,
3403 16

PRELIMINARY STATEMENT

Neither the District Court nor appellees have cited a single case in which any court has ever held that judicial review of the procedural integrity of agency action is precluded where the statute, like the Base Closure Act here, is silent on the issue.[1] Such a holding would establish a dangerous precedent because it would encourage the countless government bureaucracies which affect the lives of millions of Americans to violate clear procedural mandates and thwart the will of Congress. Indeed, such a holding undoubtedly would be viewed as a signal that the federal courts have abdicated their historic duty to protect our cherished procedural safeguards, a position they have assumed since the earliest days of the Republic when Chief Justice Marshall declared that "the very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws . . . ."[2] Nothing less is at stake in this case.

Appellees have sought to obfuscate the important issue here presented by characterizing judicial scrutiny of the procedural integrity of the base closing process as a direct affront to "a decision of the President to close the Philadelphia Naval Shipyard." Appellees' Brief at 1. Nothing could be further from the truth. The historic role played by the federal courts in scrutinizing the procedural integrity of agency action is a necessary "check and balance" in our tripartite form of government. The fact that Congress and the President relied on the substantive results of appellees' agency action in this case cannot operate to insulate from judicial review the administrative process which resulted in those recommendations. As Congress made abundantly clear as recently as last month, and as confirmed by the remarks of the Chairman of the Senate subcommittee which reviewed appellees' recommendations, it most emphatically is not the role of Congress to police the procedural integrity of agency action. See

---

[1] The District Court never even addressed those cases cited in appellants' opening brief holding that such review was appropriate even where the statute (unlike the Base Closure Act) expressly precludes judicial scrutiny. See infra at 24.

[2] Marbury v. Madison, 1 Cranch 136, 163, 2 L.Ed 60 (1803).

infra at 12-13, 19. That is the role traditionally and effectively undertaken by the independent federal judiciary.

Appellees totally ignore the preeminent value which Congress has placed on procedural fairness in the 1990 Base Closure Act. Not once do they even acknowledge that the Act expressly declares that its very purpose is "to provide a fair process."[3] As described more fully hereafter, the history and background of the Act demonstrate that Congress incorporated numerous important procedural safeguards which were conspicuously absent from the predecessor base closure statutes in order to achieve fairness in dealing with very controversial -- albeit necessary -- governmental action.

Thus, the 1990 Act contains far more procedural safeguards than any previous base closure statute so that the affected individuals, localities and their political representatives would accept the painful and permanent effects of base closure as unavoidable consequences of a fair and objective process. For purposes of appellees' Motion to Dismiss, it must be accepted as true that virtually every procedural safeguard carefully incorporated by Congress in the 1990 Act has been disregarded by a runaway bureaucracy. To insulate such extreme misconduct from any judicial scrutiny whatsoever under these circumstances would be unconscionable.

SUPPLEMENTAL STATEMENT OF FACTS

In their Brief, appellees have fundamentally misrepresented the background and purpose of the 1990 Base Closure Act. As the evolution of base closure statutes shows, the history of base closures and realignments in the last 15 years is one of increasing emphasis on procedural fairness and integrity, with a concomitant realization on the part of Congress that no effort should be spared in ensuring that the process is perceived as fair, independent, objective and procedurally sound.

---

[3] In a reprehensible effort to mislead this Court, appellees state, "The express purpose of the legislation is to create a mechanism "that will result in the timely closure and realignment of military installations." See Appellees' Brief at 46 (emphasis supplied). The actual language of Congress is: "The purpose of this Act is to provide a fair process that will result in the timely closure and realignment of military installations ...." See 10 U.S.C. §2901(b) (emphasis supplied).

Thus, the base closure legislation enacted in 1977, 10 U.S.C. §2687, provided that the Secretary of Defense could close a particular base by notifying the Committee on Armed Services of the Senate and House of Representatives, and submitting an evaluation of the various consequences of such closure, including the local economic, environmental and strategic consequences. See 10 U.S.C. §2687(b)(1). The closure could be effected after 30 legislative days or 60 calendar days, whichever was longer. 10 U.S.C. §2687(b)(2).

In 1988, Congress enacted the Base Closure and Realignment Act of 1988 ("1988 Act"). See Pub.L. No. 100-526, §§201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act disabled the Secretary of Defense from unilaterally choosing bases for closure and simply notifying Congress of the proposed closure and preparing the requisite evaluation. Instead, that Act vested the power to recommend closure in the first instance exclusively in a new independent commission. 1988 Act, §§201(1), 203(b)(1)-(2). The commission then presented its recommendations to the Secretary of Defense for approval or disapproval in their entirety. Id. §§201(1), 202. If the Secretary approved the recommendations, Congress was given a 45-day period within which to disapprove the recommendations. Id. §§202(b), 208.

Despite the fact that the 1988 Act added these procedural safeguards to restrain the unilateral discretion of the Secretary of Defense, substantial criticism of the process continued. As the Base Closure Commission empaneled under the 1990 Act itself stated:

> After publication of the 1988 list, affected members of Congress leveled three major charges against the Commission process. First, they contended the process had been secretive. In fact, hearings had been closed and information on the ranking of facilities and transcripts of Commission meetings were hard to obtain. Second, Congress noted many of the affected facilities had not been visited by commissioners. Such visits, believed the legislators, might have helped the commissioners verify information included in the staff reports. Finally, they complained that faulty data had been used to reach the final closure recommendations. Congress believed the General Accounting Office (GAO) or another independent organization should have reviewed the information and data for accuracy.

1991 Defense Base Closure and Realignment Report to the President at 1-3 (App. 301).

As a result of these criticisms, Congress enacted the 1990 Base Closure Act for the express purpose of providing a "fair process." To that end, the Act contained a host of procedural safeguards, not a single one of which had appeared either in the 1988 Act or in the 1977 Act. What follows is a partial listing of these procedural safeguards, and a summary description of the manner in which they were violated by appellees in this case:

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 appellees. [App. 102-110]. As the facts demonstrate, the Navy compiled what it has cynically called the "stealth list" of base closings long before the 1990 Act even became law. The Navy's secret list of installations targeted for closure included the Shipyard. [App. 93-94; 102-110]. The Secretary of Navy concurred in the decision to close the Shipyard several weeks before the Navy even first undertook to perform its bogus "fresh" consideration of all naval installations. [App. 107].

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 realignment." (Emphasis supplied). The Navy's determination to disable the GAO from performing its statutory duties is confirmed by the GAO's own conclusion that it could not analyze the closure recommendations made by the Navy or the methodology and data purportedly supporting them because of lack of documentation. [App. 127-136; 145-153]. The evidence amply demonstrates the Navy's determination to stonewall the GAO even as the GAO made repeated unsuccessful attempts to perform its statutory duty. [App. 127-136]. This violation is particularly serious inasmuch as the failure of the GAO to participate under the

1988 Act had been one of the principal criticisms prompting enactment of the 1990 Act. See supra at 3.

c. 10 U.S.C. §2903(d)(5) - requiring 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 reported that fact to Congress and to the Commission. [App. 127-136]. Thus, one of the principle reasons for Congress' adoption of the Act was frustrated. See supra at 3.

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, were to provide the exclusive basis on which recommendations of closure and realignment were to be made. Eight criteria were finally approved. To achieve its predetermined decision to close the Shipyard, the Navy unilaterally created and relied upon an additional unapproved ninth criterion. [App. 119-127]. Furthermore, the Navy went well beyond the six year force-structure plan (1992-1997) and considered its projected needs for the years 1998-2000. [App. 120]. These actions clearly violated the statutory requirement that the DoD base its recommendations exclusively on the "final criteria" and the six year force-structure plan. [App. 98].

e. 10 U.S.C. §2903(d) - requiring that the Commission conduct public hearings on the recommendations for closure and realignment. The Navy egregiously violated the Act's express requirement of open public hearings by concealing 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. Even after appellants received some of this information from other sources, the Commission refused to grant appellants' request to appear at a public hearing to expose the newly obtained materials to public scrutiny. [App. 140-145; 154-155]. This

violation was particularly serious in that the absence of public hearings had been one of the principal criticisms levelled against the 1988 Act.

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 for the purpose of obtaining material necessary to support the Navy's recommendations to close the Shipyard clearly violated this statutory mandate. [App. 140-145]. 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. [App. 140-145]. Again, this violation struck at the very heart of the procedural protections which are the raison d'etre of the 1990 Act.

ARGUMENT

I. Appellees' Procedural Violations of the Base Closure Act Are Subject To Judicial Review

A. Appellees Cannot Avoid Application of the Strong Presumption Favoring Judicial Review of Agency Action

Tacitly conceding that they cannot overcome the "strong presumption" favoring judicial review of agency action, see Appellants' Brief at 9-15, appellees urge this Court in their lead argument to abandon the presumption altogether and, indeed, "to start from an opposite presumption." Appellees' Brief at 19. However, the only authority cited, Department of Navy v. Egan, 484 U.S. 518 (1987), is inapposite.

The Court in Egan explicitly limited its holding to issues of national security, which are not involved in the instant matter. Indeed, the 1990 Base Closure Act itself explicitly exempts from its coverage base closures and realignments "carried out for reasons of national security or a military emergency . . . ." 10 U.S.C. §2909(c)2 (emphasis supplied). Thus, Egan does

not restrict appellants' challenge herein to the procedural integrity of the base closure process and does not alter the traditional strong presumption favoring judicial review.[4]

Far from undermining appellants' argument that judicial review for procedural violations is available in this case, Egan actually supports appellants' position. The Supreme Court in Egan addressed only the question of whether review on the substantive merits was required, and explicitly acknowledged that review of procedural integrity of the agency action was available. Thus, the Court, in framing the issues before it, stated:

> Respondent takes the straightforward position that, inasmuch as this case proceeded under §7513, a hearing before the Board was required. The Government agrees. What is disputed is the subject matter of the hearing and the extent to which the Board may exercise authority. In particular, may the Board, when §7513 is pursued, examine the merits of the security clearance denial, or does its authority stop short of that point, that is, upon review of the fact of denial, of the position's requirement of security clearance, and of the satisfactory provision of the requisite procedural protections.

484 U.S. at 526 (emphasis supplied).

B. Appellees Cannot Overcome the Strong Presumption Favoring Judicial Review of Agency Action

Appellees next contend that even if the strong presumption favoring judicial review of agency action applies in this case, it is overcome by factors identified in Block v. Community Nutrition Institute, 467 U.S. 340 (1984). Thus, while conceding that the Act does not expressly preclude judicial review, appellees argue that a congressional intent to do so should

---

[4] Furthermore, the contrast between the facts in Egan and those involved here could hardly be more dramatic, Egan involved the threatened dissemination of highly classified government information, a concern that has never once been articulated or even hinted at by appellees herein. Egan involved an employee at a naval facility designed to repair and replenish the Trident nuclear powered submarine, which the Court noted was "described as the most sophisticated and sensitive weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system." 484 U.S. at 520. The issue in Egan was whether the employee, who had been denied a security clearance on the grounds of national security, had a right to appellate review on the merits of the security clearance denial. The Supreme Court, relying explicitly on the paramount discretion accorded executive agencies to protect highly sensitive, classified information, held that the employee did not have such a right. 484 U.S. at 529. In complete contrast to Egan, there are simply no matters of national security implicated by appellants' challenge to the procedural integrity of the base closure process under the Act, much less the risk of dissemination of classified information injurious to the national security.

be inferred from the legislative history, the structure and the purpose of the Act. Appellees' Brief at 19-36. In so contending, however, appellees stand Block on its head and misapply controlling principles of statutory construction.

Indeed, in Block, standing to sue was denied to one group, consumers of dairy products, because, inter alia, the statute expressly provided for judicial review by another group, handlers of dairy products. The question presented was whether judicial review should be extended by implication to consumers. The Court held that where Congress expressly provided for handlers, but not for consumers, to have judicial review, "the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process." 467 U.S. at 347. Therefore, Block turned largely on the familiar principle that when a statute expressly provides a particular remedy, courts should not imply additional remedies:

> More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole .... In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.

467 U.S. at 349.

In the present case, by contrast, the Act on its face does not limit judicial review in any respect. Since the right to judicial review exists unless Congress has abrogated it, it cannot be inferred from the silence of the Act that Congress intended to withhold review. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-71 (1986). On the contrary, as discussed herein, in this case the absence of statutory language precluding judicial review should be viewed as affirmative evidence that Congress intended to permit review.

Although appellees also rely heavily on certain legislative history of the Act, the excerpt on which they rely is not "a reliable indicator of congressional intent" as required by Block.

467 U.S. at 349. In addition, appellees fail to demonstrate that either the structure or purpose of the Act constitute grounds for overcoming the strong presumption favoring judicial review.

1. The Absence of Express Statutory Language Precluding Judicial Review, the Legislative History of the Act and the Subsequent Actions of Congress Confirm the Availability of Judicial Review for Procedural Violations of the Act

The traditional strong presumption in favor of judicial review is fortified in the present case by the fact that when Congress passed the Base Closure Act in 1990, it knew (a) that the APA provides a right of judicial review unless precluded by the statute (see Appellants' Brief at 9-12), (b) that the Supreme Court in Bowen, just three years earlier, had reaffirmed the "strong presumption" in favor of judicial review absent clear and convincing evidence of contrary congressional intent and (c) how to include in a statute express unequivocal language precluding judicial review.[5] Indeed, as appellees themselves point out, in the very statute at issue in this case, Congress expressly waived procedural challenges under the National Environmental Policy Act (NEPA), thereby conclusively demonstrating that it knew how to expressly abrogate procedural challenges if it wanted to. See Appellees' Brief at 30-31. Therefore, the complete absence of any language in the Base Closure Act expressly precluding judicial review must be deemed intentional, particularly in light of the express statutory purpose of providing a "fair process". See West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991).[6]

---

[5] See, e.g. The Regulatory Flexibility Act of 1980, 5 U.S.C. §611(a)-(b)(1982)(expressly precluding substantive and procedural judicial review of an agency's compliance with the Act). See also Export Regulations of the War and National Defense Act, 50 U.S.C. §2412, Pub.L. 96-72 (1979)(expressly exempting certain actions taken under the Export Regulation subchapter of the War and National Defense Act from 5 U.S.C. §§ 551, 553-559 of the APA and also expressly exempting such actions from the judicial review sections (5 U.S.C. §§701-706) of the APA).

[6] In WVUH, the Supreme Court held that a federal civil rights statute requiring the losing party to pay "attorney's fees" did not require the losing party to pay "expert fees", where, inter alia, Congress in numerous other prior and contemporaneous statutes had expressly provided for the shifting of both attorney's fees and expert witness fees. The Court explained: "Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction." 111 S. Ct. at 1147. Just as a statutory right cannot be created by implication where Congress knew how to create such a right and could have done so but did not, so the right to judicial review cannot be

Appellees nevertheless contend, based upon a single excerpt from the conference report on the 1990 Act, that an intent by Congress to foreclose judicial review of appellees' procedural violations of the Act should be implied. See Appellees' Brief at 20-21. However, as appellants have previously demonstrated, the excerpt from the conference report upon which appellees rely, when read fairly and in context, at most evinces nothing more than an intent to free the base closure process from the administrative and rulemaking procedural requirements of Chapter 5 of the APA, not the provisions for procedural judicial review contained in Chapter 7 of the APA. See Appellants' Brief at 20-26.

Thus, the conference report, in the sentence preceding the text excerpted by appellees in their Brief, states: "Due to the military affairs exception of 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." (Emphasis supplied). Compare Appellants' Brief at 24 with Appellees' Brief at 20. Appellees conveniently gloss over the fact that it is the "military affairs" exception of the APA which operates to free the process from the procedural hurdles of the rulemaking and adjudication requirements and judicial review for compliance therewith. The "military affairs" exception applies only to Chapter 5 of the APA, not Chapter 7, which governs judicial review and contains its own exceptions, of which "military affairs" is not one. Accordingly, appellants' reading of the conference report is the only one that is faithful to the text.

Furthermore, appellees nowhere explain why, if this section of the conference report evinces a congressional intent to foreclose judicial review altogether, the report states only that "various actions required under the base closure bill" would not be subject to judicial review, and then enumerates certain "[s]pecific actions which would not be subject to judicial review".

---

abrogated by implication where Congress knew how to abrogate the right and knew that the right would be presumed to exist in the absence of clear and convincing evidence of a contrary intent.

If the conferees intended to foreclose judicial review altogether at every juncture in the process, why did they refer only to "various" actions instead of "all" actions or simply "the" actions? Similarly, why did the conferees need to enumerate "specific actions" which would not be subject to review, thereby implying that other specific actions would be subject to review? See also Appellants' Brief at 25-26. The answer is plain: the conferees did not intend to preclude all judicial review, in particular judicial review of procedural integrity. Thus, the excerpt from the conference report relied upon by appellees is hardly "clear and convincing evidence" of a congressional intent to preclude all judicial review, nor does it even make it "fairly discernible" that Congress intended to preclude all judicial review. Block, supra.[7]

Just as appellees have failed to establish that an intention by Congress to preclude judicial review of the procedural integrity of agency action can be inferred from the original conference report on the Act, so they err in contending that such an inference can be drawn from the conference report which accompanied recent amendments to the Act. (See Appellees' Brief at 23). The new conference report simply reiterates verbatim language from the original conference report.[8] Since, as appellants have demonstrated, the strong presumption in favor of judicial review is not overcome by the language in the original conference report, that

---

[7] Appellees also advance the groundless claim that the conference report does not distinguish between substantive and procedural judicial review, and that therefore procedural review is precluded. See Appellees' Brief at 21-22. The fact that no such distinction is drawn is patently irrelevant, as none of the numerous cases cited by appellants where courts have allowed procedural review of agency action required any showing of a congressional distinction between procedural and substantive review. See Appellants' Brief at 13-20. Indeed, there is no authority for appellees' implicit assumption that Congress must specifically distinguish between procedural review and substantive review in order to preserve the historic right to review for procedural integrity of agency action. On the contrary, given the abundant authority holding that judicial review for procedural integrity is available even if the statutory language expressly precludes review (see Appellants' Brief at 15-20), it would at a minimum require unambiguous statutory language expressly precluding procedural review to preclude judicial review of the integrity of the process. Cf. Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984).

[8] See also 137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991)(statements of Senator Nunn, Chairman of the Senate Armed Services Committee).

presumption obviously cannot be defeated by the mere repetition of the same language in the new conference report.[9]

Appellees' attempt to "infer" congressional intent from the prior conference reports must also be rejected because both Houses of Congress have now voted on and adopted a Congressional Resolution expressly providing that in maintaining the limited oversight role envisioned by the Act, Congress did not intend to displace the historical role of the independent judiciary in scrutinizing agency compliance with statutorily prescribed procedural safeguards. Thus, the Congressional Resolution provides:

> It is the sense of the Congress that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendation, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the resolution of disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.[10]

---

[9] Appellees' observation that the recent amendments did "not amend the 1990 Act to authorize judicial review of suits relating to the Act" (Appellees' Brief at 23) is irrelevant since judicial review is presumed to exist unless Congress acts to preclude it. What is pertinent is that the recent amendments did not preclude judicial review. Likewise, the fact that the amendments were passed three weeks after the District Court herein dismissed the present suit (see id.) does not imply that Congress endorsed the result below. The District Court's decision had already been appealed to this Court, and while Congress could have endorsed the result below by amending the Act to preclude judicial review, it did not do so.

[10] At the time appellants filed their opening Brief in this appeal, the quoted language existed only in the form of a Resolution adopted by the Senate. See Appellants' Brief at 31. Subsequently, on November 20, 1991, the same language was adopted by the House of Representatives. See H.R. 2521, 102nd Cong., 1st Sess. (1991). When originally filed with the Senate, the Resolution was preceded by "findings" acknowledging the availability of judicial review of the procedural integrity of the base closure process. The "findings" were included solely in order to explain the purpose of the proposed Resolution. Having accomplished that purpose, and since preliminary findings are not required for a Congressional enactment of this nature, the "findings" were not presented to the Senate for debate or enactment. Thus, appellees err in suggesting that this Court should infer from the fact that the findings were not enacted as part of the Resolution that Congress disapproved them. See Appellees' Brief at 34 n.8. On the contrary, Congress implicitly endorsed the findings in passing the Resolution which addressed the question of judicial review.

H.R. 2521, 102nd Cong., 1st Sess. (1991)(emphasis supplied). This authoritative expression by Congress that it did not intend to preclude the role of the courts in overseeing procedural compliance by the DoD and the Commission is dispositive and clearly outweighs and supersedes any arguably contrary language in the preceding conference reports. As the Supreme Court recently instructed in West Virginia University Hospitals, Inc. v. Casey, 111 S.Ct. 1138 (1991), the "best evidence" of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President" and where statutory language is unambiguous, "we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." 111 S. Ct. at 1147.

Indeed, Congress' resolution that it did not intend to abolish the historic duty of the federal judiciary to protect the procedural integrity of administrative actions conclusively puts to rest appellees' argument that the Act's "elaborate mechanisms for Congressional oversight and involvement" "leave no room for judicial involvement". Appellees' Brief at 24, 26. There can now be no doubt that not only does "room" exist for judicial involvement, but that the judiciary must intervene if there is to be any hope of fulfilling the mandate of the Act to provide a "fair process" in closing bases.[11]

2. Appellees' Attempt to Abolish the Distinction Between Procedure and Substance is Insupportable

In addition to attempting to interpose an incorrect legal standard in order to immunize their wrongful actions from judicial review, appellees also seek to persuade this Court of the counterintuitive and insupportable notion that there is no meaningful distinction between

[11] Even when considered in the abstract, appellees' contention that there is no room in the Act for the involvement of the independent judiciary runs counter to this nation's "check and balance" system of government. As held in United States v. Nixon, 418 U.S. 683 (1974): "Notwithstanding the deference each branch must accord the others, the 'Judicial Power of the United States' vested in the federal courts by Art III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' ...." 418 U.S. at 704-05.

procedure and substance. Thus, appellees claim throughout their Brief that appellants' challenge to appellees' violation of the procedural requirements of the Base Closure Act, though clearly procedural in nature, is nevertheless substantive because the relief sought "is entirely substantive." Appellees' Brief at 16; see also id. at 12, 29, 31, 37-38.

Appellees' distinction between procedural and substantive relief is not supported by any authority whatsoever. Virtually all challenges to agency action seek an order setting aside or invalidating agency action, as the APA specifically empowers federal courts to do. See 5 U.S.C. §706 ("the reviewing court shall * * * hold unlawful and set aside agency action findings and conclusions found to be -- arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .) (emphasis supplied); see also Appellants' Brief at 13-20 (and cases cited therein). This is the same relief sought by appellants herein, and does not transform a clearly procedural challenge into a substantive one. According to appellees' logic, a challenge to procedure simply cannot exist, as all challenges to agency action would ipso facto be substantive. Such logic is at odds with the APA itself, which recognizes the procedural/substantive distinction, and flies in the face of the abundant case law recognizing the distinction. See Appellants' Brief at 13-20.

Appellees also premise their claim of immunity from judicial review on the argument that the 1990 Act was specifically designed to eliminate "procedural barriers," and therefore implicitly precludes review of challenges to the procedural integrity of agency action undertaken pursuant to the Act. See Appellees' Brief at 4, 5, 7, 9, 16, 18, 22, 29-32. To support this argument, appellees assert that the obstacles to base closure prior to the 1988 and 1990 Acts were procedural in nature, and that there were "explicit steps taken by the 1988 and 1990 Acts to eliminate such procedural barriers." Id. at 30. In particular, appellees rely on the fact that the 1988 and 1990 Acts waived the applicability of the National Environmental Policy Act (NEPA) to base closures under the Acts. See Id. at 29-33. However, there is no factual or

legal support for appellees' argument. As appellants have demonstrated, the 1990 Act established more procedural safeguards than any of its predecessor base closure statutes.

As they do throughout their Brief, appellees attempt to ignore that the 1990 Act expressly declared as its purpose: "to provide a fair process . . . ." 10 U.S.C. §2901(b) (emphasis added). However, appellees themselves also admit that "Congress placed great importance on the procedural integrity of the base closure process" under the 1990 Act. Appellees further concede that "[i]t is unquestionably true that when Congress framed the terms of the 1990 Act, one of its major concerns was to ensure the use of fair and unbiased procedures in identifying unneeded domestic military bases." Appellees' Brief at 32. These admissions are clearly inconsistent with and vitiate appellees' claim that the 1990 Act was designed to remove procedural barriers to base closures. On the contrary, as appellees admit, because of the paramount congressional concern for procedural integrity, whatever the 1990 Act did with respect to NEPA, it clearly added other procedural safeguards to the base closure process. See supra at 3-6.

Even if appellees' NEPA argument had any factual basis -- which it clearly does not -- it is legally insupportable. Assuming NEPA is primarily a procedural statute, the fact that Congress waived its applicability to base closures under the 1988 and 1990 Acts plainly does not suggest, let alone compel, the conclusion that Congress therefore intended to preclude all procedural challenges to appellees' actions.

On the contrary, well-established principles of statutory interpretation require that the opposite inference be drawn from Congress' waiver of the applicability of NEPA. The principle of expressio unius est exclusio alterius dictates that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." Cash Currency Exchanges Inc. v. Shine, 762 F.2d 542, 554 (7th Cir.), cert. denied, 474 U.S. 904 (1985); see also, In Re Gerwer, 898 F.2d 730, 732 (9th Cir. 1990); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1181 (7th Cir. 1989); United

States v. Jones, 567 F.2d 965, 967 (10th Cir. 1977). Thus, since Congress expressly circumscribed only one limited type of procedural challenge to the base closure process, i.e., NEPA challenges, the clear inference is that Congress did not intend to prohibit other procedural challenges which might be brought under the general provisions of the APA. If Congress intended to strip away the fundamental right of review for the procedural integrity of agency action broadly granted by the APA, at an irreducible minimum Congress would have expressly waived the applicability of the APA as it did the applicability of NEPA. Congress' failure to do so, far from supporting appellees' arguments against judicial review, only serves to bolster the case for judicial review under well settled principles of statutory construction.

Moreover, the type of procedural review under the APA sought by appellants herein is fundamentally different from the review available under NEPA. As appellees themselves admit, NEPA is explicitly a disclosure statute. 42 U.S.C. §4321. NEPA embodies a congressional judgment on the importance of awareness and preservation of the environment, and operates to require disclosures regarding environmental effects of federal actions. Id.

By contrast, review for procedural conformity to statutory mandate under the APA reflects a wholly different legislative goal of Congress, namely, ensuring the integrity of administrative determinations and procedures, and the adherence of administrative agencies to statutory commands. Setting agencies free to disobey the very laws under which they operate is a far different and infinitely graver matter than Congress' temporarily subordinating the goals of promoting environmental disclosure.[12] Appellees' lumping together of these radically different congressional purposes cannot be justified by law or logic.

---

[12] Furthermore, given that environmental considerations were criteria for closure both under the 1988 and 1990 Acts, Congress was not even necessarily subordinating the goals of NEPA, but rather was satisfied that those goals would be met through the 1988 and 1990 Acts irrespective of NEPA. Indeed, the conference report on the 1988 Act specifically states: "The conferees expect that the Department of Defense will conduct the analysis that is required by the NEPA after the Secretary has made his decision on the closure or realignment of an installation." 1988 U.S. Code Congressional and Administrative News, 3403.

Preclusion of judicial review of agency procedural action raises the haunting specter of an uncontrolled bureaucracy wantonly disregarding the rights of individuals and the commands of Congress. If it were truly the intent of Congress to start down this dangerous slippery slope, Congress at an irreducible minimum would have specifically waived the applicability of the APA to the 1990 Act. It did not, and such an intent cannot be cavalierly implied.

3. Permitting Judicial Review of the Procedural Integrity of Appellees' Actions Would Not Upset Any Delicate Balance Between the Executive Branch and Congress

Appellees repeatedly describe the 1990 Act as a "carefully structured statutory compromise" between Congress and the Executive Branch, and admonish this Court that it would be upsetting that "delicate balance" if it were to permit judicial review of appellees' admittedly wrongful procedural actions. See Appellees' Brief at 24-26; see also id. at 16-18. Thus, appellees argue that "[t]he Act that authorizes the President's action is an intricate and delicate statutory compromise, one that balances the interests of the Executive Branch and Congress in order to arrive at a consensus on the selection of bases for closure and realignment." Id. at 17-18.

Appellees, however, nowhere specify which competing interests of Congress and the Executive Branch regarding base closure and realignment are so "delicately balanced" that any judicial review whatsoever would bring the statutory edifice crashing down. In fact, the Executive Branch and Congress, and indeed appellants herein, agree on the paramount substantive judgment which the 1990 Act embodies, namely, that military bases must be closed and realigned. That objective is not controversial and does not implicate the delicate balancing of competing constitutional and institutional prerogatives.

The case upon which appellees principally rely, Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991), is inapposite. Unlike the present case, the challenge involved in Armstrong was substantive, not procedural. Furthermore, the statute involved in Armstrong, the Presidential Records Act ("PRA"), raised a truly delicate constitutional issue of the balance

between congressional power and presidential prerogative.[13] 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 substantive judicial review." 924 F.2d at 290. The Court reached this conclusion, however, only because the statutory scheme in question kept "in equipoise important competing political and 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).

The instant challenge of the procedural integrity of the base closure process does not involve any competing political or constitutional concerns, as Congress and the President, and indeed even the appellants herein, agree that military bases must be closed and realigned. That

---

[13] 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 in Appellants' Brief at 38-39.

objective is applauded by all and simply does not implicate separation-of-powers concerns or the balance of competing constitutional prerogatives as did the PRA in Armstrong.

The only judicial review here sought by appellants arises from appellees' intentional failure to adhere to the procedural mandates of the Base Closure Act, which has nothing to do with balancing the competing interests of Congress and the Executive Branch. Indeed, as the Congressional Resolution supra at pp. 12-13 confirms, 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. Indeed, the Chairman of the Senate subcommittee reviewing appellees' recommendations specifically stated that "we will leave to the courts the question of the interpretation of the act and the result that took place with respect to [the Philadelphia Shipyard]." Hearing to Receive a Report by the Defense Base Closure and Realignment Commission and to Consider Senate Joint Resolution 175, A Joint Resolution Disapproving the Recommendations of the Defense Base Closure and Realignment Commission, Before the Senate Subcommittee on Readiness, Sustainability and Support of the Senate Armed Services Committee, 102nd Cong., 1st Sess. (statement of Senator Dixon, Subcommittee Chairman).

Appellees' citation of Banzhaf v. Smith, 737 F.2d 1167 (D.C.Cir. 1984), is also misplaced. In fact, far from supporting appellees' argument, Banzhaf undermines it completely. The Banzhaf plaintiffs were members of the public who sought judicial review of the substantive decision of the Attorney General not to seek appointment of independent counsel to investigate allegations of wrongdoing. Even though relevant statutes explicitly precluded review of that determination, the Court went on to analyze whether judicial review was appropriate, observing that "congressional preclusion of some review does not in itself force the conclusion that Congress intended to preclude all review . . . ." 737 F.2d at 1167 (emphasis supplied).

The Banzhaf court then found that judicial review was precluded in that case only because of unique statutory language and structural considerations including, inter alia, "[t]he lack of any authorization for petitions by the public or review at the behest of members of the public"; "explicit provision of congressional oversight to keep the Attorney General to his statutory duty"; Congress' desire to "prevent premature airing of criminal changes that might prove on investigation to be unfounded"; and "the limits on review built into the statute . . . ." 737 F.2d at 1169. Thus, Banzhaf's only relevance to this matter is its application of the principle that even statutory language expressly precluding review is not, without a great deal more, sufficient to cut off all judicial review.

Accordingly, appellees' contention that judicial review of their violations of the procedural requirements of the Base Closure Act would upset a delicate constitutional balance must be rejected.

4. The Time Limits On Various Actions Required Under The 1990 Act Do Not Suggest A Congressional Intent To Preclude Judicial Review Of The Procedural Integrity Of The Base Closure Process

Appellees also contend that the 1990 Act imposes "a rigid series of deadlines and time limits to expedite the base closure process" and that "[a]llowing private parties to drag the base closure process through a series of judicial challenges, with the protracted delays inherent in such litigation, would be directly antithetical to this expedited purpose." Appellees' Brief at 27. Once again, appellees conveniently ignore that the 1990 Act expressly declares as its purpose the providing of a "fair process" as well as their own admission that "Congress placed great importance on the procedural integrity of the base closure process" under the 1990 Act. Appellees' Brief at 32. Given the overriding importance which Congress placed on procedural integrity, it is inconceivable that Congress intended for the federal courts, the "exponents of procedural fairness" in this country, not to play some role in policing the procedural integrity of the process. See Weyerhaeuser Company v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978). On the contrary, the statement of the Chairman of the Senate subcommittee reviewing

appellees' recommendations clearly indicates Congress' expectation that the federal courts would fulfill this function. See supra at 19.

The cases cited by appellees are not only readily distinguishable in several critical respects from the instant case, but also refute appellees' contention that the 1990 Act's purported "premium on speed" precludes judicial review for violations of the Act. In particular, in each of the cases cited by appellees in this regard, Morris v. Gressette, 432 U.S. 491 (1977), Lone Pine Steering Comm. v. EPA, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986) and Wheaton Industries v. EPA, 781 F.2d 354 (3d Cir. 1986), the courts precluded judicial review at some juncture of an administrative process on the explicit understanding that judicial review of some sort would be available, though at a later time. This principle -- that judicial review may be cut off at one juncture in an administrative process so long as some type of judicial review is available at another point -- is similar to the principle applied in the cases cited by appellants holding that procedural review is available notwithstanding explicit statutory language purporting to foreclose judicial review. See Appellants' Brief at 15-20.

Thus, this Circuit in Lone Pine found only pre-enforcement judicial review precluded under CERCLA, but expressly noted that the affected parties would be afforded judicial review after the EPA had responded to the threat to public health. 777 F.2d at 885 ("In some instances, however, particularly when the public health is threatened, an administrative agency is permitted to act first and litigate later."). And in Morris, the Supreme Court likewise emphasized that there would be "no bar to subsequent constitutional challenges to the implemented legislation . . . ." 432 U.S. at 504.

In the same fashion, as appellants have already pointed out, it is conceivable that Congress intended to preclude substantive judicial review under the 1990 Act at certain junctures in the statutory process, as litigation during the process leading up to the Base Closure Commission's final recommendations could possibly delay the selection and

recommendation process in an unintended fashion. See Appellants' Brief at 25, n. 14. However, as in Lone Pine, Wheaton Industries and Morris, delaying judicial review does not suggest that judicial review at a later step -- after the process has run its course and the closure and realignment recommendations have been made to the President and Congress -- would be foreclosed. To the contrary, Lone Pine, Wheaton Industries and Morris indicate that federal courts will find that judicial review is foreclosed at one stage of an administrative process only if there will be judicial review available at a later stage.

Appellees' cases are also inapposite because the statutes involved were entirely different than the 1990 Act, which was expressly designed to provide a "fair process" and was enacted by a Congress which put paramount importance on procedural integrity. See supra at 2-6. This alone is sufficient to distinguish these cases, particularly in light of the Supreme Court's admonition in Morris that "every judicial holding with respect to implied preclusion of judicial review is unique." 432 U.S. at 505 n. 20.

Each of appellees' cases is likewise distinguishable on grounds more specific to each. Both Lone Pine and Wheaton Industries involved the same statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as well as the same basic issue of whether CERCLA authorizes judicial review of the EPA's determination to clean-up a contaminated site, i.e. pre-enforcement judicial review, or whether parties might only litigate with the EPA after the clean-up was instituted. See Lone Pine, 777 F.2d at 884-885; Wheaton Industries, 781 F.2d at 356-357. This Court declined to allow pre-enforcement judicial review in Lone Pine on the grounds that Congress had specifically identified the grave threats to public health which pre-enforcement review might cause, finding that "[i]n some instances, however, particularly when the public health is threatened, an administrative agency is permitted to act first and litigate later." 777 F.2d at 885. This Court explicitly applied this same rationale in Wheaton Industries and likewise found that pre-enforcement judicial review

was unavailable. In both cases, however, judicial review was available after the clean-up was instituted.

In Morris v. Gressette, the Supreme Court addressed the Voting Rights Act, Section 5 of which postponed for 60 days the implementation of validly enacted state legislation regarding reapportionment, during which time the Attorney General was empowered to disapprove the legislation if he found that it had the purpose or effect of discriminating on account of race or color. If the Attorney General did not object within 60 days, the statute provided that the state legislation could then be implemented. The issue on appeal was whether the Voting Rights Act precluded judicial review of the Attorney General's failure to object to the state legislation within the 60 day period.

The Supreme Court found that judicial review of the Attorney General's determination was precluded, as the "unusual" and "severe" procedure established by Section 5 of the Voting Rights Act "strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." 432 U.S. at 501. The Court was particularly troubled by the federal impingement on the state legislative process entailed by Section 5:

> The Congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

432 U.S. at 504 (emphasis supplied).

Obviously there is no draconian federal interference in state legislative matters present in the instant case which would justify precluding procedural review. Likewise, there is no imminent threat to public health or welfare comparable to that which justified precluding pre-enforcement judicial review in Lone Pine and Wheaton Industries. Accordingly, appellees' bald claim that "[j]udicial review has been held to be precluded under other statutes where the statutory scheme placed a premium on speed" utterly fails to take account of the peculiar and

unique circumstances distinguishing each of these cases from the instant matter. Appellees' Brief at 28.

For these reasons, far from demonstrating that the 1990 Act's purported "premium on speed" suggests a congressional intent to totally foreclose judicial review, the authorities cited by appellees demonstrate the appropriateness and necessity of judicial review for procedural integrity in this matter.

5. Appellees Fail Completely To Distinguish The Abundant Authority Cited By Appellants To Demonstrate The Availability Of Judicial Review For Procedural Violations Of The Act

In their Brief, appellants cited several cases explicitly holding that procedural review was available notwithstanding an express statutory preclusion of review. See Appellants' Brief at 16-18; see also First Federal Savings and Loan Association of Lincoln v. Casari, 667 F.2d 734, 739-740 (8th Cir.), cert.denied, 458 U.S. 1106 (1982); Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979); Graham v. Caston, 568 F.2d 1092, 1097 (5th Cir. 1978). Appellants also cited decisions of the Supreme Court and the Third Circuit that strongly support the availability of judicial review in this context. See Appellants' Brief at 18-20; see also McNary v. Haitian Refugee Center, 111 S. Ct. 888 (1991); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); Kirby v. United States Department of Housing & Urban Development, 675 F.2d 60 (3d Cir. 1982). Appellees have failed to rebut these cases in any material way and have relied on purported distinctions which are transparently frivolous.

With regard to Casari and Hollingsworth, appellees merely note that those cases "turn on the specifics of the Medicare statute." Appellees' Brief at 35. To be sure, every case on preclusion of judicial review turns to some extent on the "specifics" of the statute at issue. But that does not suggest that those cases are inapplicable or irrelevant. Moreover, the Eighth Circuit in Casari and the Fifth Circuit in Hollingsworth plainly did not limit their holdings to the Medicare statute, nor is there any special feature of that statute which would render the principle applied in those cases inapplicable to the instant matter. Appellees' purported

distinguishing of Graham on the ground that the challenge therein involved an agency's failure to act, whereas the instant case challenges an agency's manner of acting, is completely ineffectual, and even the Graham court itself placed no emphasis whatsoever on that fact.

Appellees also advance the peculiar argument that the "moral" appellants draw from these cases is an "illusory one", because allegedly under Block, the question is not whether the statute explicitly bars judicial review, but whether Congress' intent to preclude review is "fairly discernible in the statutory scheme." Appellees' Brief at 36. This argument misses the obvious point of these cases and their significance to this matter, namely, that whether a congressional intent to preclude judicial review is "fairly discernible," or even in the extreme case where such preclusion is expressly stated, procedural review will not be cut off absent extraordinary and specific congressional command. Cf. Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984).

Appellees' attempt to explain away Kirby is likewise patently meritless, as they offer not a single reason why the reasoning applied by this Circuit in Kirby with respect to 5 U.S.C. §701(a)(2), the APA's "committed to agency discretion" exception to judicial review, should not apply with equal force to the APA provision involved herein, §701(a)(1). This Court in Kirby held that since the APA exclusion only applies "to the extent that . . . agency action is committed to agency discretion by law," 5 U.S.C. §701 (emphasis supplied), procedural review was available even though substantive review might not be. 675 F.2d at 67. Instead of explaining why they believe this reasoning would not be equally applicable to the APA exception involved herein, appellees merely cite Wilmington United Neighborhoods v. United States, 615 F.2d 112, 118 (3d Cir.), cert. denied, 449 U.S. 827 (1980), for the proposition that this Court has rejected the distinction between procedure and substance in the context of 5 U.S.C. §701(a)(1).

Appellees misread Wilmington. The plaintiffs therein challenged a determination made by the Secretary of Health Education and Welfare pursuant to a statute which explicitly provided that "[a] determination by the Secretary under this section shall not be subject to

administrative or judicial review." 615 F.2d at 115. Seeking to evade this bar to substantive review of the Secretary's determination, the Wilmington plaintiffs simply mislabelled their challenge "procedural," even though it was plainly an attack on the Secretary's substantive determination. This Court easily pierced the thin disguise. 615 F.2d at 118.

Appellants in the present case are plainly aggrieved by procedural violations of the Act. Appellees have not argued, nor could they credibly, that no procedural violations occurred. Indeed, for the purposes of their motion to dismiss, appellees admit the gross procedural flaws alleged by appellants. Accordingly, Wilmington is utterly irrelevant.

Finally, appellees attempt to distinguish Bowen and McNary on a ground which only undercuts their position. According to appellees, Bowen and McNary merely distinguish between two different kinds of substantive review, not between procedural and substantive review. Appellees' Brief at 36. However, appellees do not dispute that in those cases the Supreme Court held that judicial review was available despite the statute's express preclusion of such review. See Appellants' Brief at 19-20. Therefore, if appellees are correct in their contention, the fact that Bowen and McNary permitted judicial review of a substantive determination -- even in the face of express statutory language precluding such review -- can only support appellants' argument in favor of judicial review.

Accordingly, appellees fail in their attempt to distinguish the authorities cited by appellants.

C. Appellees' Claims Concerning the Political Question Doctrine Are Meritless

Appellees also claim that the political question doctrine forecloses judicial review of the procedural integrity of their actions under the Base Closure Act on two alternate bases: that judicial review would show a "lack of respect" due the Executive Branch and Congress, and that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Appellees' Brief at 37-40.

With regard to the "lack of respect" contention, appellants have already cited ample authority holding that federal courts do not show any lack of respect for the Executive Branch or Congress in performing their historical function of ensuring that administrative agencies act in procedural conformity with the mandates of Congress. See Appellants' Brief at 32-37. Appellees do not attempt to distinguish even one of the numerous Supreme Court and Circuit Court holdings recognizing and applying this principle. Instead, in a tacit admission that this ample precedent inters their political question claim, appellees simply revert to their strained and obscure argument that procedure is actually substance in this case because the relief sought is allegedly "substantive." Appellees' Brief at 37-38. As appellants have shown supra at 13-17, this argument is frivolous.[14]

Appellees' next argue that the Constitution commits "virtually all decisions concerning military organization to the political branches, and such questions are therefore unreviewable by the judiciary." Appellees' Brief at 39. In fact, contrary to this extravagant claim, federal courts 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), cert. denied, 111 S.Ct. 384 (1990); 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

[14] Appellees also contend that "[t]he lack of respect that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive Branch." Appellees' Brief at 38. In fact, the Act nowhere "assigns Congress, rather than the Courts" the duty to review the procedural integrity of the base closure process and the adherence by appellees to their statutory duties. On the contrary, as the Congressional Resolution makes clear, it is manifestly not the statutory duty of Congress to pass on procedural questions, nor does Congress have the institutional experience of the federal courts in investigating and determining such procedural matters.

which regulates military organization is non-reviewable is simply wrong and contradicted by abundant case law.

Appellees further 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). It would be patently 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. Appellees' argument is manifestly frivolous.

Furthermore, the instant case bears not even a remote resemblance to the cases cited by appellees 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.), cert. denied, 387 U.S. 945 (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. Appellants 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, appellants 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." Weyerhaeuser 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.

Accordingly, appellees' claim that the political question doctrine insulates their admitted violations of the Base Closure Act's procedures from judicial review is manifestly erroneous and must be rejected.

II. Appellants Have Standing to Challenge Appellees' Failures to Comply With The Procedures Mandated By the Base Closure Act

Though the District Court clearly assumed the standing of the appellants and went on to reach the issue of justiciability, appellees now claim that such standing is lacking. Appellees conceded below that a "court will not adjudicate the standing of all plaintiffs so long as it finds one to have standing." [Reply at 16]. Nevertheless, they assert that none of the appellants has standing to challenge their blatant violations of the Base Closure Act.

A. Appellant Workers and Unions Have Standing Under The APA and the Constitution To Challenge Appellees' Wrongful Actions

Appellees rely on a distortion of the requirements of the zone of interest test, as well as of the purpose of the Base Closure Act, to support their argument that appellant workers and unions lack standing under the APA. This argument is both legally and factually insupportable. First, appellees 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, any claim that appellant 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 a 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 appellant unions and workers are indisputably impacted by, and intimately related to, the Base Closure Act, and are consistent with the purpose of the Act to provide a "fair process". 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).[15]

Appellees' sole argument in opposition to this fact is that the "express purpose" of the Act was to close military bases promptly, not to protect union jobs or otherwise benefit union employees. To the contrary, plaintiffs/appellants need not show that the intent of Congress in passing the Act was "to protect union jobs," but merely that appellants' interests herein are not "so marginally related to or inconsistent with the purposes implicit in the [Act] that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Securities Industry Association, 479 U.S. 388, 399 (1987). This test obviously does not require, as appellees disingenuously claim, that Congress have intended to protect union jobs or benefit union employees. See Appellees' Brief at 46. Indeed, if that were the requirement of the zone of interest test, the Supreme Court would hardly have emphasized in Clarke that the test is "not meant to be especially demanding." 479 U.S. at 399-400.

Moreover, while appellees repeatedly urge that the single overriding purpose of the Act was to close bases, they ignore that the statute itself declares that its purpose 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). If the single overriding purpose of the Act was to close bases -- irrespective of the integrity of the process used to do so -- why did Congress not simply leave in place the 1988 Act which would just as surely and swiftly have resulted in the closure of military bases? The answer is explained in the legislative history of the Base Closure Act: because the 1988 Act was perceived to be riddled with procedural inequities. See supra at 3-6. Accordingly, appellees' repeated claim that closure of bases was the overriding purpose

[15] Indeed, since the procedural provisions of the Act apply only to closure and realignments of military installations which affect in excess of 300 civilians, any argument that Congress was not clearly concerned with protecting civilians, such as the plaintiff union workers, from unfair, improper loss of jobs ignores the very essence of the statute.

of the Base Closure act is a clumsy attempt to conceal the paramount value placed on procedural integrity by Congress, as the Act itself unambiguously states.[16]

Accordingly, the interest of appellant workers and unions in the bureaucracy's 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 appellees are not to the contrary. In Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913 (1991), 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.[17] 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

---

[16] Appellees argue that persons like appellant unions and workers could not have been within the zone of interest of the Base Closure Act since Congress recognized that some workers would lose their jobs if their military facility was closed. Appellees' superficial analysis seeks to obscure the fact that the Base Closure Act is a procedure laden statute, the declared purpose of which is not simply to provide the timely closure and realignment of military installations but "to provide a fair process". 10 U.S.C. §2901(b) (emphasis supplied).

[17] "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.

expressly designed to ensure procedural fairness and protect the integrity of the process established by Congress. The PES contained no equivalent provisions.

Appellees' reliance on district court's opinion in National Federation of Federal Employees v. United States, 727 F.Supp. 17 (D.D.C. 1989), aff'd, 905 F.2d 400 (D.C.Cir. 1990) ("NFFE"), is likewise misplaced. See Appellees' Brief at 46. While the district court in NFFE did find that plaintiff union lacked standing under the APA, appellees 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. Furthermore, with regard to the constitutional standing of the plaintiff union, the Court 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.[18]

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 appellants' 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

---

[18] Appellees do not dispute that appellants' injuries are fairly traceable to their challenged actions. Appellants' allegations -- which must be accepted as true for the purposes of a motion to dismiss -- demonstrate that the Shipyard would not have been closed but for the illegal actions of appellees. [Verified Amended Complaint, ¶¶167-181]. Once having slated the Shipyard for closure, appellees, in particular the Commission, created a powerful political momentum which led directly to the injury appellants seek to have redressed.

union lacked standing -- which holding was not affirmed by the D.C. Circuit -- has no bearing on the instant action.

B. The Standing of Appellant Workers and Unions Precludes Any Challenge to the Standing of the Other Appellants

Given that appellant unions and their members plainly have standing under Article III and the APA to challenge appellees' violations of the Base Closure Act, this Court need not consider the standing of the other appellants, whose position is identical to appellant 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), aff'd, 826 F.2d 60 (D.C. Cir 1987). 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 appellant unions and their members is sufficient to establish the standing of the additional appellants, all of whom are congressmen[19] or governmental entities[20] with a direct stake in the Shipyard, the Philadelphia region, and the procedural integrity of the base closure process.

III. Appellants' Sufficiently Stated A Claim For Deprivation Of Their Due Process Rights In The District Court

Appellees acknowledge that the District Court did not address appellants' constitutional claims, but invite this Court to do so "as an alternate ground for affirmance." Appellees' Brief at 48. Obviously, as appellants' due process claim is not dispositive of their challenge to appellees' actions, the due process claim is likewise not a dispositive issue on appeal.

---

[19] It is equally clear that the congressional and governmental appellants also have independent standing to seek review of defendants' brazen violations of the procedures mandated by the Act. Where, as here, there has been interference with the legislative process, or where a Congressman's vote is rendered "less efficacious" than it would otherwise be, there is injury sufficient to confer standing. See, e.g., Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Humphrey v. Baker, 665 F. Supp. 23, 26 (D.D.C. 1987), aff'd, 848 F.2d 211 (D.C. Cir)., cert. denied, 488 U.S. 966 (1988); Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), aff'd sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978). The procedural safeguards of the Act were literally trashed by appellees. Discovery in this case has revealed a shocking pattern of intentional disregard for Congressional mandates. Under these unusual and compelling circumstances, the congressional appellants clearly have independent standing to challenge the intentional wrongdoing of appellees. Any other result would threaten the very underpinnings of our democracy.

[20] Clear legal precedent, as well as public policy, mandates that the State and City appellants also be allowed to sue as parens patriae on behalf of their citizens to obtain relief where federal instrumentalities and their officials, entrusted with decisions that vitally affect the jobs, environment, and the lives of persons that reside in the state and/or city, have markedly deviated from Congressionally-mandated procedures designed to assure even-handed treatment. Appellees' reliance on Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n. 16 (1982), for the broad proposition that the State and City appellants have no standing, as parens patriae, to sue a federal agency or instrumentality is misplaced. Snapp simply reaffirms the prior Supreme Court holding of Massachusetts v. Mellon, 262 U.S. 447 (1923), which disallowed standing for a state to sue as parens patriae in contesting the constitutionality of a federal statute. However, case law decided after the Snapp decision has continued to afford states standing to sue as parens patriae when the state is contesting the erroneous application or implementation of a federal statute or regulation. See e.g., City of New York v. Heckler, 578 F. Supp. 1109, 1123 (E.D. N.Y. 1984), aff'd 742 F.2d 729 (2d Cir. 1984); Louisiana v. Lee, 596 F. Supp. 645 (E.D. La. 1984), vacated on other grounds, 758 F.2d 1081 (5th Cir. 1985), cert. denied sub nom, 475 U.S. 1044 (1986); Maryland Dept. of Human Resources v. U.S. Dept. of Agriculture, 617 F. Supp. 408, 414 (D. Md. 1985). Accord Commonwealth of Pa. v. National Assn. of Flood Ins., 520 F.2d 11 (3d Cir. 1975)(recognizing the plaintiff state's standing to pursue a mandamus action against an official of a federal agency who failed to perform his statutory duties), cited favorably in Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982).

Appellees' only non-frivolous argument in this regard is their claim that the Act does not impose substantive limitations on the President or Congress, and that therefore appellant Shipyard workers and unions possess no property interest sufficient to trigger due process protection. See Appellees' Brief at 49. This claim conspicuously ignores the fact that it is procedural review of the actions of appellees DoD, Navy and Commission which appellants seek. And the Base Closure Act clearly did impose both procedural and substantive limitations on their discretion, which appellees admit is sufficient to create a property interest. See supra at 4-6.

Accordingly, appellees' attack on appellant Shipyard workers' and unions' due process claim is untenable and must be rejected.

CONCLUSION

Appellees' flagrant procedural violations of the 1990 Base Closure Act cannot be permitted to escape judicial review. Reversal of the District Court's decision is essential not only to effect justice in this particular case, but also to sustain the historic role of the independent federal judiciary as the exponent of procedural fairness.

Respectfully submitted,

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN
DAVID H. PITTINSKY
MARK J. LEVIN
CAMILLE WOLF SPINELLO
PATRICK T. DAVISH
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215)875-7000

Attorneys for Appellants

OF COUNSEL:

Senator Arlen Specter
Green Federal Bldg., Room 9400
Sixth and Arch Streets
Philadelphia, PA 19106

Ernest D. Preate, Jr.
Attorney General for Pennsylvania
Louis J. Rovelli,
Executive Deputy Attorney General
for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1100

Attorneys for the Commonwealth of Pennsylvania
and Ernest D. Preate, Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
The State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
(609) 633-1971

Attorneys for the State of New Jersey,
Governor James J. Florio and Robert J. Del Tufo

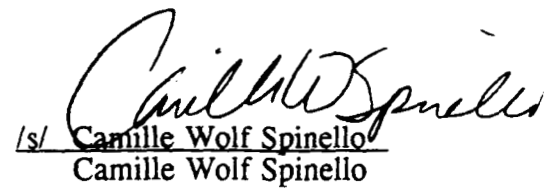
Charisse Lillie
Solicitor for the City of
Philadelphia
Room 1520
Municipal Services Building
Philadelphia, PA 19102-1692

Attorneys for the City of Philadelphia

Dated: December 6, 1991

CERTIFICATE OF SERVICE

I, Camille Wolf Spinello, a Member of the Bar of this Court, hereby certify that on this 6th day of December, 1991, I caused true and correct copies of appellants' Reply Brief to be telecopied and federal expressed overnight Saturday delivery to Scott R. McIntosh, Appellate Staff - Civil Division, U.S. Department of Justice, Room 3127, Ben Franklin Station, Washington, D.C. 20044.



/s/ Camille Wolf Spinello
Camille Wolf Spinello

Document Separator

DEC 9 91
~~NOV~~

LAW OFFICES

DILWORTH, PAXSON, KALISH & KAUFFMAN

2600 THE FIDELITY BUILDING

PHILADELPHIA, PENNSYLVANIA 19109-1094

(215) 875-7000

FAX (215) 875-8540

WASHINGTON, D.C.
LOS ANGELES, CALIFORNIA
SCRANTON, PENNSYLVANIA
HARRISBURG, PENNSYLVANIA
BOCA RATON, FLORIDA
WEST ATLANTIC CITY, NEW JERSEY
CAMDEN, NEW JERSEY

DIRECT DIAL (215) 875-7096

BRUCE W. KAUFFMAN
STEPHEN J. KORN
STEPHEN J. HARMELIN
DAVID H. PITTINSKY
EDWIN M. GOLDSMITH, III
JOHN F. SMITH, III
THEODORE A. YOUNG
STEVEN L. FRIEDMAN
RICHARD B. CUTLER
ROBERT P. SEGELL
PETER J. PICOTTE, III
LAWRENCE D. BERGER
JOHN R. LATOURETTE, JR.
THOMAS E. BLINEY
JAMES F. MONTEITH
EMERYL L. AUERBACH
JUSTIN B. KLEIN
MARK J. LEVIN
THOMAS I. VANASKIE
JOHN W. SCHNEHL
PAUL W. BASKOWSKY
CARL W. HITTINGER
STEPHEN G. BURNS
CHARLES E. CANIFF, JR.
RAYMOND PAUL REPE
STEPHEN L. PARKER
JOHN F. DOONEY
LOUIGA HARDIN COLEMAN, JR.
PAUL R. SALERNO
KARRY T. JACOBS
ELIZABETH L. BENNETT
JOSEPH F. HESSLER
THOMAS J. FOLEY, III
JAMES J. GREENFIELD
HARRY J. CARR
MICHAEL L. KRANCER
JULES I. WHITMANT
WILLIAM J. HENRICH, JR.
JOSEPH H. JACOVINI
JOHN M. FITZPATRICK
CARL H. HANZELIK
RICHARD S. MEYER
STEPHEN J. MATHESZ
THOMAS A. LEONARD
FELICE R. CUTLER
ROSS J. REESE
JOHN PHILIP CRAMPTON
RICHARD M. SEGAL
ROGER F. WOOD
CARL G. ROBERTS
ALAN J. HOFFMAN
MARC A. FELLER
HOPE A. COMISKEY
LAWRENCE G. McMICHAEL
MITCHELL S. KIRSCHNER
PAUL S. DIAMOND
JAMES J. RODGERS
DANIEL S. EVANS
PATRICK M. McCARTHY
ALAN S. GROONITZKY
NELSON C. JOHNSON
DAVID J. LEVENSON
EDWARD N. SARO
NANCY L. DABSOPF
ROBERT A. PHILIPSON
ERIC HEYWOOD ROCKRUM
BARBARA ANISKO
DOUGLAS M. LURIO
VICTORIA M. KOMARNICKI
JAY S. BLUMENKOPF
SCOTT N. SILVER
JAMES T. SMITH
STEVEN E. COHEN
MICHAEL P. GALLAGHER
DOMINIC S. LIBERI
J. ERIC RATHBURN
BARBARA ALDEN BROWN
EDMUNDS J. BROKANS
TIMOTHY S. BRODERICK
BART DELONE
GREGORY F. CIRILLO
CAMILLE J. WOLF
JONATHAN J. BARTT
CHRISTINE S. DUTTON
JANIS ABRAM
J. BRADFORD McILVAINE
JOHN N. ELLISON
VIRGINIA L. FLICK
JEFFREY P. GREENBAUM
KENNETH E. ZEILBERGER
THOMAS E. BROSHENS
BRUCE E. HARTMAN
OLIVER M. JOHNSON, II
MARTIN J. WEIS
ROBERT F. ZIELINSKI
NEIL R. E. CARR
CATHERINE R. O'DONNELL
THOMAS J. FACER
DANIEL H. GOLUB
HEATHER H. HOYER
LYNN A. ROSNER
PENNY H. CONLY
JAYMI L. MYERS
LYNNE A. SITARSKI
KENNETH H. KELLY
WALTER F. CASPER, JR.
MARIA T. DOUGLASS
JAMES P. HANNION
SUSAN H. STERN
RALPH J. KELLY
WILLIAM J. LEONARD
LAWRENCE F. SHAY
VIRGINIA M. MILLER
LAWRENCE A. HUSICK
ROBERT I. FIELDT
MARY T. TOMICH
KATHLEEN M. McADAMS
JOEL L. FRANK
HARRIET J. KOREN
VICTOR P. STABILE
STEVEN L. DANIELS
THOMAS D. BROWN
PATRICK T. DAVISH
MAURA E. FAY
RICHARD L. FOXT
SCOTT R. SHEPHERD
BENJAMIN J. BERGER
GERALD J. GUARDINI
LISA A. O'DONNELL
MARIA R. McGARRY
JAMES J. McHUGH, JR.
MARJORIE L. McMAHON
JOHN P. McLAUGHLIN
MARGARET M. CALLAHAN
AMY A. FORB
DEBORAH PINKLE MITCHELL
KEVIN C. QUINN
STEVEN ROTH
CHRISTOPHER S. HOMJIAN
JOHN V. O'HARA
RANAE B. McELVAINE
GERALD E. BURNS, III
JOSEPH DOMINGUEZ
MARTIN FARRELL
MARK A. NATION
LAURA E. VENDEULES

COUNSEL TO THE FIRM
WILLIAM M. MARUTANI
ALBERT F. BLAUSTEIN

COUNSEL
JAMES A. BUTTON
J. ROGER WILLIAMS, JR.
JAMES W. ARTZ
STEVEN A. TAUBE
STEPHEN SCHAGHMAN
NATHANIEL BUDIN
STANLEY S. MENDELL
LAURENCE S. SHTASELT
PATRICIA N. GILLMAN
LAWRENCE J. MILLER
MARCUS MANOFF
ARNOLD P. KURSINGER
ROBERT D. TYLANDER

* NOT ADMITTED TO PA BAR
** ALSO MEMBER OF FL BAR
*** ALSO MEMBER OF MT BAR
† ALSO MEMBER OF CA BAR
†† ALSO MEMBER OF NY BAR
§ ALSO MEMBER OF DC BAR
△ ALSO MEMBER OF MA BAR
○○ ALSO MEMBER OF DC BAR
◇ ALSO MEMBER OF NJ BAR
P ALSO MEMBER OF PATENT

December 9, 1991

HAND DELIVERY

Sally Mrvos, Clerk
United States Court of Appeals
for the Third Circuit
601 Market Street
Philadelphia, PA 19106

Re: Senator Arlen Specter, et al.
v. H. Lawrence Garrett, III, et al.
U.S. Court of Appeals for the Third Cir. No. 91-1932

Dear Ms. Mrvos:

Enclosed for filing, please find an original and ten copies of Appellants' Errata Sheet to their December 6, 1991 Reply Brief. Please file the original and nine copies, and return a time-stamped copy of the enclosed document to our office in the enclosed self-addressed stamped envelope. As a courtesy to the Court and the appellees, we are also enclosing ten complete copies of Appellants' original Reply brief with the typographical error appearing on page 18 corrected and a conformed table of contents.

Sincerely,

Camille Wolf Spinelli

Camille Wolf Spinelli

WS:bs
enc.
cc: Scott R. McIntosh (w/enc. via telecopy and federal express)
Bruce W. Kauffman

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER, *et al.*,

Appellants,

v.

H. LAWRENCE GARRETT, III,
Secretary of the Navy, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPELLANTS' REPLY BRIEF

ERRATA SHEET

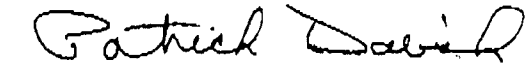
Page 18, lines 9-10, insert brackets around the word "substantive":

> The D.C. Circuit held that the "PRA is one of the rare statutes that does impliedly preclude [substantive] judicial review."

Conformed Table of Contents as follows:

Preliminary Statement 1

1. The Absence of Express Statutory Language Precluding Judicial Review, the Legislative History of the Act and the Subsequent Actions of Congress Confirm the Availability of Judicial Review for Procedural Violations of the Act 9



/s/ Patrick T. Davish
Bruce W. Kauffman
David H. Pittinsky
Mark J. Levin
Camille Wolf Spinello
Patrick T. Davish
DILWORTH, PAXSON, KALISH
& KAUFFMAN
2600 The Fidelity Building
Philadelphia, PA 19109-1094
(215) 875-7000

Attorneys for Appellants

OF COUNSEL:

Sen. Arlen Specter
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

Ernest D. Preate, Jr.
Attorney General for
Pennsylvania
Louis J. Rovelli,
Executive Deputy Attorney
General for Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1100

Attorneys for the Commonwealth of Pennsylvania
and Ernest D. Preate, Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
The State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
(609) 633-1971

Attorneys for the State of New Jersey, Governor
James J. Florio and Robert J. Del Tufo

Charisse [illegible]illie
Solicitor [illegible] the City of
Philadelp[illegible]
Room 1520
Municipal Sen[illegible]es Building
Philadelphia, PA 19102-1692

Attorneys for the City of Philadelphia

Dated: December 9, 1991

CERTIFICATE OF SERVICE

I, Camille Wolf Spinello, a Member of the Bar of this Court, hereby certify that on Monday, this 9th day of December, 1991, I caused true and correct copies of appellants' Errata Sheet to their Friday, December 6, 1991 Reply Brief to be telecopied and federal expressed overnight delivery to Scott R. McIntosh, Appellate Staff - Civil Division, U.S. Department of Justice, Room 3127, Ben Franklin Station, Washington, D.C. 20044.

/s/ Camille Wolf Spinello
Camille Wolf Spinello

Document Separator

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 9/14/93

TO: Dick Eddy Sheila Chestan
(703)602-3245 (703) 696-0550

FAX NUMBER:

FROM: Jeff Gutman
Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 3 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

Take a quick look. Must go out 9/15.

Sorry for the late notice.

-Jeff

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

SEN. ARLEN SPECTER, et al., Plaintiffs,	)	
v.	)	Civil Action No. 91-4332
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
FOR LEAVE TO AMEND THE VERIFIED AMENDED COMPLAINT

By motion served on appellate counsel, plaintiffs have moved to amend their complaint to remove Rep. Thomas Foglietta as a plaintiff in this action. While defendants do not object to plaintiffs' motion in principle, there is a question whether this Court has jurisdiction to grant the motion.

It is well-established that the filing of a notice of appeal "divests the district court of control over those aspects of the case involved in the appeal." Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 379 (1985); Venen v. Sweet, 785 F.2d 117, 120-21 & n.2 (3d Cir. 1985) (instances in which district court retains power to act following filing of a notice of appeal are "limited"). Following the Third Circuit's recent decision in this case, Specter v. Garrett, 995 F.2d 404 (3d Cir. 1993), it granted defendants' motions to stay the issuance of the mandate to this Court. Because defendants have filed a petition for a writ of certiorari, Fed. R. App. P. 41(b) requires the stay to "continue until final disposition by the Supreme Court." As a result, this Court has not been revested with the jurisdiction it

lost when plaintiffs' filed their notice of appeal following the Court's order dismissing this case. Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991).

It therefore appears questionable whether the Court has jurisdiction to grant plaintiffs' motion to amend. Plaintiffs have offered the Court no authority supporting their implicit position that the Court has this power. As a result, the Court may wish to consider holding the motion in abeyance pending the Supreme Court's review of defendants' petition for a writ of certiorari.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
U.S. Department of Justice
Civil Division
901 E St., N.W. Room 952
Washington, D.C. 20530
(202) 514-4775

Dated: September 15, 1993

Attorneys for Defendants

< CONFIRMATION REPORT >

09-15-1993(WED) 08:13

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
6901	9-15	08:11		3	0°01'51"	NORMAL	OK
				3	0°01'51"		

Document Separator

U.S. Department of Justice
Washington DC 20530

Telecommunications Services Center
Facsimile Outgoing Transmission Record

DEPT. OF JUSTICE
1993 MAY 27 AM 9:26

Receipt Stamp

FAX #s: Commercial (202) 514-4371/2

Voice Verification (202) 514-4495

(Both Machines are Xerox 7017 Automatics)

From: Scott McIntosh — Name (Print)
Civil — Division or Section

To: Sheila Cheston — Name (Print)
5/27 9:30 — Date and Time

Number of Pages: 18
Washington/Arlington — City and/or State

Destination FAX Number: (703) 696-0550

Destination Voice Verification Number: (703) 696-0504

Precedence (Circle One) Routine Priority Immediate

Are transmitted pages to be returned?:

If Yes, Your Phone Number _____ If No, Signature [signature]

For Use By Telecommunications Services Center Only

Charge Code: _____ Number of Pages_____ Operator Initials_____

Destination Called _____ for Pickup _____
Date and Time — Operator Initials

Comments:

Transmission Stamp

FORM OBD-243
OCT. 92

U.S. Department of Justice

Washington, D.C. 20530

May 27, 1993

TO: Sheila Cheston
Dick Eddy

FR: Scott McIntosh

RE: Specter v. O'Keefe (3d Cir.)

Here is a draft of our proposed en banc rehearing petition in Specter. Your comments and suggestions are welcome. You can reach me at (202) 514-4052.

As you know, rehearing petitions are subject to a strict 15-page limit. The current draft is 15 pages long, so any additions will require offsetting cuts elsewhere.

The petition must be received by the Third Circuit next Tuesday, June 1. Unfortunately, because next Monday is Memorial Day, we will have to mail the petition by the close of business tomorrow. I therefore have to ask for your comments no later than 2:00 p.m. tomorrow. I apologize for the extremely short turnaround time, but the pace is forced by the 14-day rehearing time limit and the Third Circuit's known reluctance to grant extensions.

NO. 91-1932

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

SEAN O'KEEFE, ACTING SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

STUART E. SCHIFFER
Acting Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530
(202) 514-4052

STATEMENT REQUIRED BY RULE 22

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to a decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of the Supreme Court in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

Scott R. McIntosh

INTRODUCTION

In April 1992, a divided panel of this Court entertained claims that the Secretary of Defense and the Defense Base Closure and Realignment Commission committed procedural errors in preparing nonbinding recommendations for the President under the Defense Base Closure and Realignment Act of 1990. Two months later, in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), the Supreme Court held that (1) nonbinding agency recommendations to the President are not reviewable "final agency action" under the Administrative Procedure Act and (2) the President himself is not an "agency" for purposes of judicial review under the APA. Thereafter, the Supreme Court vacated the panel decision in this case and remanded for this Court to reconsider whether Franklin bars judicial review of the claims.

On remand from the Supreme Court, the panel has now held, over a dissent by Judge Alito, that Franklin does not preclude judicial review of the procedural claims in this case. The panel's decision places this Circuit in direct conflict with the First Circuit, which reached precisely the opposite conclusion within the past month in Cohen v. Rice, 1993 WL 131914. In holding that Franklin does not bar judicial review in this case, the panel majority has transformed a statutory challenge to agency action into a constitutional challenge to Presidential action, and in so doing has rendered Franklin a virtual nullity. The panel decision jeopardizes the integrity of the Base Closure Act, and its potential consequences for judicial review reach far beyond the confines of this case and this statute. For the reasons set forth below and those

given by Judge Alito in his dissent, this appeal should therefore be reheard en banc.

STATEMENT OF THE CASE

1. The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act") creates a statutory mechanism for identifying and closing obsolete domestic military bases. See Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19 (1990) (codified at 10 U.S.C. § 2687 note (Supp. III 1991)). The Act provides for three biennial rounds of base closures, beginning in 1991. Under the terms of the Act, the Secretary of Defense prepares nonbinding recommendations regarding bases to be closed or realigned. Act § 2903(c)(1). The Secretary's recommendations are sent to the Defense Base Closure and Realignment Commission ("Commission"), which reviews the recommendations and which may revise them if they "deviate[] substantially" from specified criteria. Id. § 2903(d)(2). The Commission then sends the revised recommendations to the President. Id. § 2903(e).

The Act vests the President with unqualified discretion to approve or disapprove the Commission's recommendations. Act § 2903(e)(2)-(3). If the President disapproves the recommendations, the Commission must prepare a revised list of recommended closures, which is then resubmitted to the President. Id. § 2903(e)(3). If the President disapproves the revised recommendations, no bases may be closed. Id. § 2903(e)(5). Thus, the recommendations have no legal or practical effect until and unless the President chooses, in his discretion, to approve them.

If the President does approve either the initial or revised recommendations, the Act provides for Congress to review the President's decision by considering a joint resolution of disapproval. Act §§ 2904(b), 2908. If a joint resolution of disapproval is not enacted, the Secretary of Defense is obligated to close all of the bases approved for closure by the President. Id. § 2904(b).

2. During the 1991 round of base closures, the Secretary of Defense recommended the closure or realignment of 72 domestic military installations, including the Philadelphia Naval Shipyard. The Secretary's recommendations were sent to the Commission, which unanimously concurred with the recommendation that the Shipyard be closed. The Commission forwarded its recommendations, covering the Shipyard and 81 other military installations, to the President.

In July 1991, the President approved the recommendations of the Commission. Shortly thereafter, the House of Representatives overwhelmingly rejected a proposed resolution of disapproval, thereby requiring the Secretary of Defense to proceed with the closures and realignments.

The plaintiffs in this case filed a complaint against the Secretary of the Navy, the Secretary of Defense, and the Commission and its members, seeking to enjoin the closure of the Shipyard. App. 50, 54, 57. For present purposes, the complaint alleged that the Secretary of the Navy and the Secretary of Defense failed to comply with various procedural requirements of the Act in the course of preparing the list of recommended closures and realignments. The complaint further alleged that the Commission committed related procedural errors under the Act. The plaintiffs did not

allege, either in their complaint or in any subsequent proceedings, that the President had violated the Act or otherwise acted unlawfully.

The defendants disputed the plaintiffs' allegations of non-compliance with the procedural requirements of the Act. In addition, the government argued that the suit was barred on a variety of jurisdictional grounds. In November 1991, the district court granted a motion by the government to dismiss the suit in its entirety, holding that the Act itself implicitly precludes judicial review of the plaintiffs' claims and that, in the alternative, judicial review was barred by the political question doctrine.

In April 1992, a divided panel of this Court partially reversed the district court's dismissal order, permitting the plaintiffs to proceed with certain of their allegations. 971 F.2d 936 (Stapleton & Scirica, JJ.; Alito, J., dissenting). The panel majority held that judicial review is not allowed under the Act to the extent that it touches on the merits of the base closure decision, but that judicial review _is_ available to ensure compliance with the procedural requirements of the Act. _Id._ at 945-53. Applying this distinction, the majority affirmed the dismissal of most of the complaint, on the ground that the allegations went to the substance of the decision to close the Shipyard, but reinstated allegations that the Secretary of Defense and the Commission had violated specific procedural requirements of the Act. _Id._ at 950-53. In particular, the majority permitted the plaintiffs to pursue claims that the Secretary of Defense violated the Act by "fail[ing] to create and transmit to the Commission and the GAO an administra-

tive record containing all of the information the Secretary relied upon in making his claims" (id. at 952), and that the Commission violated the Act's public-hearing requirement (id. at 952-53).

3. In June 1992, two months after the initial panel decision in this case, the Supreme Court issued its decision in Franklin, supra. Franklin involved a challenge to the reapportionment of the House of Representatives under the 1990 decennial census. Under the applicable federal statutes, the Secretary of Commerce prepared a state-by-state population breakdown for the President, who then sent Congress a statement showing the population of each state and the number of Representatives to which each state was entitled under a specified formula. By statute, each state was entitled to the number of Representatives shown in the President's statement. See Franklin, 112 S. Ct. at 2771.

The state of Massachusetts sued the Secretary of Commerce and the President, among others, asserting that the method used to allocate certain overseas residents to their "home" states was arbitrary and capricious under the APA and was unconstitutional under Article I. 112 S. Ct. at 2770, 2773. The Supreme Court entertained the constitutional challenge, but held that the APA challenge could not be entertained because none of the actions at issue constituted "final agency action" for purposes of 5 U.S.C. § 704. Id. at 2773-76.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is

one that will directly affect the parties." 112 S. Ct. at 2773. In Franklin, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. Id. at 2773-74. "Because the Secretary's report to the President carries no direct consequences," the Court concluded that "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." Id. at 2774 (citations omitted).

The Court then held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," that the APA's definition of "agency" does not include the President. 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2776. The Court acknowledged that "the President's actions may still be reviewed for constitutionality," but held that his actions nonetheless are not subject to judicial review "under the standards of the APA." Id.

4. Because of the obvious procedural parallels between the statutory scheme in this case and the statute involved in Franklin, the defendants petitioned the Supreme Court for a writ of certiorari. In November 1992, the Supreme Court granted the petition, vacated the panel decision, and remanded the case for reconsideration in light of Franklin. [Cite.]

At the direction of this Court, the parties submitted supplemental briefs regarding the effect of Franklin on this case. The defendants contended that the contested actions of the Secretary of Defense and the Commission are not "final" agency action under Franklin, and therefore are not reviewable under the APA, because the Secretary of Defense and the Commission are merely engaged in the preparation of nonbinding recommendations that have no effect unless the President chooses to accept them. In response, the plaintiffs argued that Franklin's finality holding does not apply when the actions of a federal agency are being challenged on procedural, rather than substantive, grounds. The plaintiffs further argued that they were not contesting or otherwise seeking review of the President's actions, and hence that Franklin's holding about the unreviewability of Presidential actions under the APA was irrelevant.

On May 3, 1993, before the panel had acted, the Court of Appeals for the First Circuit decided the identical reviewability issue in Cohen v. Rice, 1993 WL 131914. Cohen involved procedural claims against the Secretary of Defense and the Commission under the Base Closure Act that are essentially indistinguishable from the claims in this case. See id. at *4 (summarizing claims). The First Circuit held in Cohen, as the defendants are urging in this case, that Franklin bars federal courts from entertaining such claims because the actions of the Secretary of Defense and the Commission are not "final" agency action under the APA. Id. at *6-7.[1]

[1]A copy of Cohen is attached to this petition.

5. On May 18, 1993, two weeks after the First Circuit issued its decision in Cohen, the panel issued its second decision in this case. The panel held, again by a divided vote, that Franklin does not preclude judicial review of the procedural claims left open by the initial panel decision.

While the plaintiffs had taken pains not to frame their claims as a challenge to the actions of the President, the panel majority began with the premise that "'at least in one sense, we are here asked to review a presidential decision.'" Majority op. at 8. The majority then pointed out that, even under Franklin, Presidential action is subject to judicial review to determine its constitutionality. Id. at 9-10. Next, the majority reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question, and hence the recognized judicial power to review the constitutionality of Presidential actions extends to review of whether Presidential action violates "non-discretionary [statutory] mandates." Id. at 10-11 (emphasis added). Finally, the majority characterized the plaintiffs' claims in this case as alleging "a failure by the President to remain within statutorily mandated limits" (id. at 11), and concluded that the claims are therefore "constitutional" claims that are still subject to judicial review under Franklin.

Having disposed of Franklin in this fashion, the panel majority then addressed the question of sovereign immunity. Majority op. at 12-15. The majority reasoned that sovereign immunity is not a bar to judicial review, even in the absence of a statutory waiver

of immunity, "where * * * plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the * * * statute authorizing such action and has thereby violated the constitutionally mandated separation of powers." Id. at 13. Alternatively, the majority concluded that sovereign immunity is waived by 5 U.S.C. § 702. Id. at 14-15. The majority acknowledged that 5 U.S.C. § 702 "may not apply to suits against the President," but concluded that "this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President -- a situation not present here." Id. at 15 n.9.

Judge Alito, in dissent, made two principal points. First, he pointed out that the plaintiffs "vigorously contended * * * that Franklin does not bar review under the APA[;] [t]he plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Dissent at 18 (emphasis in original). Judge Alito agreed with the First Circuit in Cohen that Franklin precludes judicial review of the plaintiffs' claims under the APA. Id.

Second, taking the majority's theory on its own terms, Judge Alito explained that the plaintiffs' allegations of procedural errors by the Secretary of Defense and the Commission do not and cannot amount to an allegation that the President himself acted unlawfully. Dissent at 19-21. As Judge Alito explained, "the President's sole responsibility [under the Act] * * * is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommenda-

tions should be accepted or whether the recommendations should be returned to the Commission." Id. at 20. The Base Closure Act does not make the President's statutory rights and responsibilities contingent on the absence of prior procedural errors by the Secretary of Defense or the Commission. Id. Hence, under no view of the matter had the President violated the Base Closure Act, nor had the plaintiffs alleged such a violation.

REASONS WHY THE APPEAL SHOULD BE REHEARD EN BANC

The Supreme Court remanded this case for reconsideration in light of Franklin. On remand, the plaintiffs urged the panel to hold that Franklin does not bar judicial review because the actions of the Secretary of Defense and the Commission are somehow "final" agency action. The panel majority instead held that Franklin does not bar review because the plaintiffs, who thought they were alleging statutory violations by the Secretary of Defense and the Commission, are actually alleging constitutional violations by the President of the United States. This remarkable holding is riddled with errors and inconsistencies, and if it is allowed to stand, it will render Franklin itself a nullity, with consequences reaching far beyond the Base Closure Act. En banc reconsideration is plainly called for, especially in light of the conflict between this decision and the First Circuit's decision in Cohen.

1. The correct application of Franklin to this case should be a straightforward matter. The plaintiffs are alleging that the Secretary of Defense and the Commission committed procedural violations of the Base Closure Act, like failing to forward a complete administrative record, in the course of preparing their recommenda-

tions for the President. The test of finality under Franklin is whether an agency's actions "will directly affect the parties" (112 S. Ct. at 2773), and here, as in Franklin, the nonbinding agency recommendations simply had no effect until the President chose in his discretion to accept them. Accordingly, the acts and omissions of the Secretary of Defense and the Commission in preparing the recommendations are not final agency action and are not subject to judicial review under the APA.

The panel majority avoided this seemingly inescapable conclusion by an extraordinary recharacterization of the plaintiffs' claims. The plaintiffs' claims that the Secretary of Defense and the Commission violated the Base Closure Act were viewed by the majority as claims that the President violated the Act. The majority then characterized the allegations of statutory violations as claims of constitutional violations, on the theory that the plaintiffs were alleging conduct beyond the scope of the President's statutory authority, and that Presidential actions which are statutorily ultra vires are thereby unconstitutional. Having thus reshaped the plaintiffs' claims almost beyond recognition, the panel brought the claims within Franklin's exception for suits challenging the constitutionality of Presidential actions -- an exception that, as Judge Alito points out, the plaintiffs themselves never claimed to be applicable.

This tour de force is not faithful either to the plaintiffs' claims or to Franklin itself. To begin, the plaintiffs have never purported to question the legality of the President's actions in this case. To the contrary, they have gone to great lengths to

make clear that they are contesting only the actions of the Secretary of Defense and the Commission, not those of the President. And as Judge Alito's dissent explains, there is simply no legal basis for assuming, as the majority implicitly assumes, that procedural violations by the Secretary or the Commission somehow rendered the President's subsequent actions unlawful or otherwise invalid. See Dissent at 19-21. The only statutory obligation imposed on the President by the Base Closure Act is to decide in his discretion whether to accept or reject the Commission's recommendations, and it is undisputed that the President discharged that obligation in this case.

Moreover, the plaintiffs do not allege that anyone -- either the President or anyone else -- violated the Constitution.[2] The majority rested on the proposition that, when the President is alleged to have acted in excess of his statutory authority, he is actually alleged to have violated the separation-of-powers doctrine and thereby acted unconstitutionally. Majority op. at 10-11. Taken on its own terms, this proposition is highly debatable, to say the least. But even if it were correct as an abstract matter, the majority has stretched it far beyond the breaking point. If the President is deemed to have acted ultra vires because the Secretary of Defense allegedly did not forward all relevant information to the Commission (see p. _ supra), or because the Commission allegedly did not comply with the Act's public-hearing

[2]At one time, the plaintiffs advanced certain procedural due process claims, but the panel unanimously affirmed the district court's dismissal of those claims in its original decision (see 971 F.2d at 955-56), and the plaintiffs have made no attempt to revive them.

requirement (id.), then the concept of ultra vires action has lost all meaning.

If claims like the ones at issue here are subject to judicial review on the basis of the panel majority's reasoning, then Franklin is simply a dead letter. Under the majority's approach, when the President acts on recommendations of a subordinate agency or officer, virtually any allegation that the subordinate has committed a statutory violation in the course of preparing the recommendations becomes an allegation that the President has violated the Constitution, and hence is subject to non-APA judicial review. Thus, in the majority's hands, Franklin's narrow exception for judicial review of constitutional claims swallows its rule against review of Presidential actions, as well as its rule against review of nonbinding agency recommendations.

The panel majority fares no better in its analysis of sovereign immunity. The majority's reliance on the ultra vires exception to sovereign immunity (majority op. at 13) rests on the same misconception of the ultra vires doctrine described above. And if the plaintiffs in this case are indeed challenging the constitutionality of Presidential action, then 5 U.S.C. § 702 is of no avail, since -- as the majority itself essentially concedes (majority op. at 15 n.9) -- that provision does not apply to the President. The majority was able to escape this dead end only by recasting the suit once more, treating it for purposes of 5 U.S.C. § 702 as a challenge to the actions of the Secretary of Defense and the Commission, rather than a challenge to the legality or statutory authority of Presidential actions. See id. at 13-14. This

characterization is more faithful to the plaintiffs' own presentation of their claims, but precisely for that reason, it is inconsistent with the way the majority characterized the claims for purposes of Franklin.

2. The ultimate holding of the panel in this case is that Franklin does not preclude judicial review of allegations that the Secretary of Defense and the Commission violated the procedural requirements of the Base Closure Act. That holding places this Circuit squarely in conflict with the First Circuit. As explained above, the First Circuit in Cohen affirmed the dismissal of procedural claims indistinguishable from those in this case, on the ground that Franklin does bar review of the procedures used to prepare base closure recommendations. The majority opinion does not acknowledge Cohen, but the conflict cannot be wished away by ignoring it.

The consequences of the panel decision for the operation of the Base Closure Act are potentially severe. As explained in considerable detail in Judge Alito's dissent from the original panel decision (971 F.2d at 956-61), "the statutory scheme [of the Base Closure Act] is grounded in concepts -- speed, finality, and limiting the President and Congress to an all-or-nothing choice on a package of recommendations -- that are inconsistent with judicial review * * * ." Allowing plaintiffs to contest base closures on the basis of alleged procedural errors, thereby delaying closures and extracting individual bases from the unified package approved by the President and Congress, will irreparably damage the govern-

ment's ability to carry out the difficult and politically charged task of closing domestic military bases.

Moreover, the consequences of the panel decision are not confined to the Base Closure Act. As explained above, the panel's handling of Franklin essentially renders Franklin's restrictions on judicial review a nullity. Henceforth, in this Circuit, any statutory scheme under which agencies present recommendations to the President for his consideration will be subject to judicial review, notwithstanding Franklin's holdings that agency recommendations to the President are not final agency action and that the President himself is not subject to judicial review under the APA. Before such a result is accepted, and a Circuit conflict on an issue of this importance is created, this appeal should be reheard en banc.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the appeal should be reheard en banc.

Respectfully submitted,

STUART E. SCHIFFER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530
(202) 514-4052

May 28, 1993

< CONFIRMATION REPORT >

05-27-1993(THU) 08:31

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
3800	5-27	08:23	00	19	0°08'07"	NORM.E	OK
				19	0°08'07"		

Document Separator

May 28, 1993

To: Scott McIntosh
Department of Justice

From: Sheila Cheston, General Counsel
Defense Base Closure and Realignment Commission

Re: Specter v. O'Keefe, Draft Petition for Rehearing and Suggestion of Rehearing en banc

The draft Petition looks very good. We have only a few edits, which are reflected on the enclosed draft. Please call me to discuss these edits after you have had an opportunity to review them.

Thank you for all your help.

NO. 91-1932

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

SEAN O'KEEFE, ACTING SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

STUART E. SCHIFFER
Acting Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530
(202) 514-4052

STATEMENT REQUIRED BY RULE 22

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to a decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of the Supreme Court in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

Scott R. McIntosh

under the APA
Eighth to check

INTRODUCTION

In April 1992, a divided panel of this Court entertained claims that the Secretary of Defense and the Defense Base Closure and Realignment Commission committed procedural errors in preparing nonbinding recommendations for the President under the Defense Base Closure and Realignment Act of 1990. Two months later, in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), the Supreme Court held that (1) nonbinding agency recommendations to the President are not reviewable "final agency action" under the Administrative Procedure Act and (2) the President himself is not an "agency" for purposes of judicial review under the APA. Thereafter, the Supreme Court vacated the panel decision in this case and remanded for this Court to reconsider whether Franklin bars judicial review of the claims.

On remand from the Supreme Court, the panel has now held, over a dissent by Judge Alito, that Franklin does not preclude judicial review of the procedural claims in this case. The panel's decision places this Circuit in direct conflict with the First Circuit, which reached precisely the opposite conclusion within the past month in Cohen v. Rice, 1993 WL 131914. In holding that Franklin does not bar judicial review in this case, the panel majority has transformed a statutory challenge to agency action into a constitutional challenge to Presidential action, and in so doing has rendered Franklin a virtual nullity. The panel decision jeopardizes the integrity of the Base Closure Act, and its potential consequences for judicial review reach far beyond the confines of this case and this statute. For the reasons set forth below and those

given by Judge Alito in his dissent, this appeal should therefore be reheard en banc.

STATEMENT OF THE CASE

1. The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act") creates a statutory mechanism for identifying and closing or realigning obsolete domestic military installations ~~bases~~. See Pub. L. No. 101-510, as amended, §§ 2901-11, 104 Stat. 1808-19 (1990) (codified at 10 U.S.C. § 2687 note (Supp. III 1991)). The Act provides for three biennial rounds of base closures, beginning in 1991. Under the terms of the Act, the Secretary of Defense prepares nonbinding recommendations regarding bases to be closed or realigned. Act § 2903(c)(1). The Secretary's recommendations are sent to the Defense Base Closure and Realignment Commission ("Commission"), which reviews the recommendations and which may change ~~revise~~ them if it determines ~~they~~ that the Secretary "deviate~~d~~ substantially" from the force-structure plan and specified criteria. Id. § 2903(d)(2). The Commission then sends final ~~the revised recommendations to the President. Id. § 2903(e)~~.

The Act vests the President with unqualified discretion to approve or disapprove the Commission's recommendations. Act § 2903(e)(2)-(3). If the President disapproves the recommendations, the Commission must prepare a revised list of recommended closures and realignments, which is then resubmitted to the President. Id. § 2903(e)(3). If the President disapproves the revised recommendations, no bases may be closed. Id. § 2903(e)(5). Thus, the Commission's recommendations have no legal or practical effect until and unless the President chooses, in his discretion, to approve them.

a report ~~to~~ containing its findings and recommendations to the President, Id.

If the President does approve either the initial or revised recommendations, the Act provides for Congress to review the President's decision by considering a joint resolution of disapproval. Act §§ 2904(b), 2908. If a joint resolution of disapproval is not enacted, the Secretary of Defense is obligated to close all of the bases approved for closure by the President. Id. § 2904(b).

2. During the 1991 round of base closures, the Secretary of Defense recommended the closure or realignment of 72 71 domestic military installations, including the Philadelphia Naval Shipyard. The Secretary's recommendations were sent to the Commission, which unanimously concurred with the recommendation that the Shipyard be closed. The Commission forwarded its recommendations, covering the Shipyard and 81 other military installations, to the President.

check

In July 1991, the President approved the recommendations of the Commission. Shortly thereafter, the House of Representatives overwhelmingly rejected a proposed resolution of disapproval, thereby requiring the Secretary of Defense to proceed with the closures and realignments.

focus on claims asserted under APA, if compl't permits. Scott checking.

The plaintiffs in this case filed a complaint against the Secretary of the Navy, the Secretary of Defense, and the Commission and its members, seeking to enjoin the closure of the Shipyard. App. 50, 54, 57. For present purposes, the complaint alleged that the Secretary of the Navy and the Secretary of Defense failed to comply with various procedural requirements of the Act in the course of preparing the list of recommended closures and realignments. The complaint further alleged that the Commission committed related procedural errors under the Act. The plaintiffs did not

allege, either in their complaint or in any subsequent proceedings, that the President had violated the Act or otherwise acted unlawfully.

The defendants disputed the plaintiffs' allegations of non-compliance with the procedural requirements of the Act. In addition, the government argued that the suit was barred on a variety of jurisdictional grounds. In November 1991, the district court granted a motion by the government to dismiss the suit in its entirety, holding that the Act itself implicitly precludes judicial review of the plaintiffs' claims and that, in the alternative, judicial review was barred by the political question doctrine.

In April 1992, a divided panel of this Court partially reversed the district court's dismissal order, permitting the plaintiffs to proceed with certain of their allegations. 971 F.2d 936 (Stapleton & Scirica, JJ.; Alito, J., dissenting). The panel majority held that judicial review is not allowed under the Act to the extent that it touches on the merits of the base closure decision, but that judicial review is available to ensure compliance with the procedural requirements of the Act. Id. at 945-53. Applying this distinction, the majority affirmed the dismissal of most of the complaint, on the ground that the allegations went to the substance of the decision to close the Shipyard, but reinstated allegations that the Secretary of Defense and the Commission had violated specific procedural requirements of the Act. Id. at 950-53. In particular, the majority permitted the plaintiffs to pursue claims that the Secretary of Defense violated the Act by "fail[ing] to create and transmit to the Commission and the GAO an administra-

under the APA ?

tive record containing all of the information the Secretary relied upon in making his claims" (id. at 952), and that the Commission violated the Act's public-hearing requirement (id. at 952-53).

3. In June 1992, two months after the initial panel decision in this case, the Supreme Court issued its decision in Franklin, supra. Franklin involved a challenge to the reapportionment of the House of Representatives under the 1990 decennial census. Under the applicable federal statutes, the Secretary of Commerce prepared a state-by-state population breakdown for the President, who then sent Congress a statement showing the population of each state and the number of Representatives to which each state was entitled under a specified formula. By statute, each state was entitled to the number of Representatives shown in the President's statement. See Franklin, 112 S. Ct. at 2771.

The state of Massachusetts sued the Secretary of Commerce and the President, among others, asserting that the method used to allocate certain overseas residents to their "home" states was arbitrary and capricious under the APA and was unconstitutional under Article I. 112 S. Ct. at 2770, 2773. The Supreme Court entertained the constitutional challenge, but held that the APA challenge could not be entertained because none of the actions at issue constituted "final agency action" for purposes of 5 U.S.C. § 704. Id. at 2773-76.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is

one that will directly affect the parties." 112 S. Ct. at 2773. In Franklin, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. Id. at 2773-74. "Because the Secretary's report to the President carries no direct consequences," the Court concluded that "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." Id. at 2774 (citations omitted).

The Court then held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," that the APA's definition of "agency" does not include the President. 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2776. The Court acknowledged that "the President's actions may still be reviewed for constitutionality," but held that his actions nonetheless are not subject to judicial review "under the standards of the APA." Id.

4. Because of the obvious procedural parallels between the statutory scheme in this case and the statute involved in Franklin, the defendants petitioned the Supreme Court for a writ of certiorari. In November 1992, the Supreme Court granted the petition, vacated the panel decision, and remanded the case for reconsideration in light of Franklin. [Cite.]

At the direction of this Court, the parties submitted supplemental briefs regarding the effect of Franklin on this case. The defendants contended that the contested actions of the Secretary of Defense and the Commission are not "final" agency action under Franklin, and therefore are not reviewable under the APA, because the Secretary of Defense and the Commission are merely engaged in the preparation of nonbinding recommendations that have no effect unless the President chooses to accept them. In response, the plaintiffs argued that Franklin's finality holding does not apply when the actions of a federal agency are being challenged on procedural, rather than substantive, grounds. The plaintiffs further argued that they were not contesting or otherwise seeking review of the President's actions, and hence that Franklin's holding about the unreviewability of Presidential actions under the APA was irrelevant.

On May 3, 1993, before the panel had acted, the Court of Appeals for the First Circuit decided the identical reviewability issue in Cohen v. Rice, 1993 WL 131914. Cohen involved procedural claims against the Secretary of Defense and the Commission under the Base Closure Act that are essentially indistinguishable from the claims in this case. See id. at *4 (summarizing claims). The First Circuit held in Cohen, as the defendants are urging in this case, that Franklin bars federal courts from entertaining such claims because the actions of the Secretary of Defense and the Commission are not "final" agency action under the APA. Id. at *6-7.[1]

[1]A copy of Cohen is attached to this petition.

5. On May 18, 1993, two weeks after the First Circuit issued its decision in Cohen, the panel issued its second decision in this case. The panel held, again by a divided vote, that Franklin does not preclude judicial review of the procedural claims left open by the initial panel decision.

While the plaintiffs had taken pains not to frame their claims as a challenge to the actions of the President, the panel majority began with the premise that "'at least in one sense, we are here asked to review a presidential decision.'" Majority op. at 8. The majority then pointed out that, even under Franklin, Presidential action is subject to judicial review to determine its constitutionality. Id. at 9-10. Next, the majority reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question, and hence the recognized judicial power to review the constitutionality of Presidential actions extends to review of whether Presidential action violates "non-discretionary [statutory] mandates." Id. at 10-11 (emphasis added). Finally, the majority characterized the plaintiffs' claims in this case as alleging "a failure by the President to remain within statutorily mandated limits" (id. at 11), and concluded that the claims are therefore "constitutional" claims that are still subject to judicial review under Franklin.

Having disposed of Franklin in this fashion, the panel majority then addressed the question of sovereign immunity. Majority op. at 12-15. The majority reasoned that sovereign immunity is not a bar to judicial review, even in the absence of a statutory waiver

of immunity, "where * * * plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the * * * statute authorizing such action and has thereby violated the constitutionally mandated separation of powers." Id. at 13. Alternatively, the majority concluded that sovereign immunity is waived by section 702 of the APA (5 U.S.C. § 702). Id. at 14-15. The majority acknowledged that 5 U.S.C. § 702 "may not apply to suits against the President," but concluded that "this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President -- a situation not present here." Id. at 15 n.9.

Judge Alito, in dissent, made two principal points. First, he pointed out that the plaintiffs "vigorously contended * * * that Franklin does not bar review under the APA[;] [t]he plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Dissent at 18 (emphasis in original). Judge Alito agreed with the First Circuit in Cohen that Franklin precludes judicial review of the plaintiffs' claims under the APA. Id.

Second, taking the majority's theory on its own terms, Judge Alito explained that the plaintiffs' allegations of procedural errors by the Secretary of Defense and the Commission do not and cannot amount to an allegation that the President himself acted unlawfully. Dissent at 19-21. As Judge Alito explained, "the President's sole responsibility [under the Act] * * * is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommenda-

tions should be accepted or whether the recommendations should be returned to the Commission." Id. at 20. The Base Closure Act does not make the President's statutory rights and responsibilities contingent on the absence of prior procedural errors by the Secretary of Defense or the Commission. Id. Hence, under no view of the matter had the President violated the Base Closure Act, nor had the plaintiffs alleged such a violation.

REASONS WHY THE APPEAL SHOULD BE REHEARD EN BANC

The Supreme Court remanded this case for reconsideration in light of Franklin. On remand, the plaintiffs urged the panel to hold that Franklin does not bar judicial review because the actions of the Secretary of Defense and the Commission are somehow "final" agency action. The panel majority instead held that Franklin does not bar review because the plaintiffs, who thought they were alleging statutory violations by the Secretary of Defense and the Commission, are actually alleging constitutional violations by the President of the United States. This remarkable holding is riddled with errors and inconsistencies, and if it is allowed to stand, it will render Franklin itself a nullity, with consequences reaching far beyond the Base Closure Act. En banc reconsideration is plainly called for, especially in light of the conflict between this decision and the First Circuit's decision in Cohen.

1. The correct application of Franklin to this case should be a straightforward matter. The plaintiffs are alleging that the Secretary of Defense and the Commission committed procedural violations of the Base Closure Act, like failing to forward a complete administrative record, in the course of preparing their recommenda-

tions for the President. The test of finality under Franklin is whether an agency's actions "will directly affect the parties" (112 S. Ct. at 2773), and here, as in Franklin, the nonbinding agency recommendations simply had no effect until the President chose in his discretion to accept them. Accordingly, the acts and omissions of the Secretary of Defense and the Commission in preparing the recommendations are not final agency action and are not subject to judicial review under the APA.

The panel majority avoided this seemingly inescapable conclusion by an extraordinary recharacterization of the plaintiffs' claims. The plaintiffs' claims that the Secretary of Defense and the Commission violated the Base Closure Act were viewed by the majority as claims that the President violated the Act. The majority then characterized the allegations of statutory violations as claims of constitutional violations, on the theory that the plaintiffs were alleging conduct beyond the scope of the President's statutory authority, and that Presidential actions which are statutorily ultra vires are thereby unconstitutional. Having thus reshaped the plaintiffs' claims almost beyond recognition, the panel brought the claims within Franklin's exception for suits challenging the constitutionality of Presidential actions -- an exception that, as Judge Alito points out, the plaintiffs themselves never claimed to be applicable, and which is not applicable.

This tour de force is not faithful either to the plaintiffs' claims or to Franklin itself. To begin, the plaintiffs have never purported to question the legality of the President's actions in this case. To the contrary, they have gone to great lengths to

make clear that they are contesting only the actions of the Secretary of Defense and the Commission, not those of the President. And as Judge Alito's dissent explains, there is simply no legal basis for assuming, as the majority implicitly assumes, that procedural violations by the Secretary or the Commission somehow rendered the President's subsequent actions unlawful or otherwise invalid. See Dissent at 19-21. The only statutory obligation imposed on the President by the Base Closure Act is to decide in his discretion whether to accept or reject the Commission's recommendations, and it is undisputed that the President discharged that obligation in this case.

Moreover, the plaintiffs do not allege that anyone -- either the President or anyone else -- violated the Constitution.[2] The majority rested on the proposition that, when the President is alleged to have acted in excess of his statutory authority, he is actually alleged to have violated the separation-of-powers doctrine and thereby acted unconstitutionally. Majority op. at 10-11. Taken on its own terms, this proposition is highly debatable, to say the least. But even if it were correct as an abstract matter, the majority has stretched it far beyond the breaking point. If the President is deemed to have acted ultra vires because the Secretary of Defense allegedly did not forward all relevant information to the Commission (see p. _ supra), or because the Commission allegedly did not comply with the Act's public-hearing

[2]At one time, the plaintiffs advanced certain procedural due process claims, but the panel unanimously affirmed the district court's dismissal of those claims in its original decision (see 971 F.2d at 955-56), and the plaintiffs have made no attempt to revive them.

requirement (id.), then the concept of ultra vires action has lost all meaning.

If claims like the ones at issue here are subject to judicial review on the basis of the panel majority's reasoning, then Franklin is simply a dead letter. Under the majority's approach, when the President acts on recommendations of a subordinate agency or officer, virtually any allegation that the subordinate has committed a statutory violation in the course of preparing the recommendations becomes an allegation that the President has violated the Constitution, and hence is subject to non-APA judicial review. Thus, in the majority's hands, Franklin's narrow exception for judicial review of constitutional claims swallows its rule against review of Presidential actions, as well as its rule against review of nonbinding agency recommendations.

The panel majority fares no better in its analysis of sovereign immunity. The majority's reliance on the ultra vires exception to sovereign immunity (majority op. at 13) rests on the same misconception of the ultra vires doctrine described above. And if the plaintiffs in this case are indeed challenging the constitutionality of Presidential action, then (5 U.S.C. § 702) is of no avail, since -- as the majority itself essentially concedes (majority op. at 15 n.9) -- that provision does not apply to the President. The majority was able to escape this dead end only by recasting the suit once more, treating it for purposes of 5 U.S.C. § 702 as a challenge to the actions of the Secretary of Defense and the Commission, rather than a challenge to the legality or statutory authority of Presidential actions. See id. at 13-14. This

characterization is more faithful to the plaintiffs' own presentation of their claims, but ~~precisely for that reason, it is~~ entirely inconsistent with ~~the way~~ how the majority characterized the claims ~~for~~ in its attempt to avoid the Supreme Court's holding in ~~purposes of~~ Franklin.

2. The ultimate holding of the panel in this case is that Franklin does not preclude judicial review of allegations that the Secretary of Defense and the Commission violated the procedural requirements of the Base Closure Act. That holding is inconsistent with Franklin and places this Circuit squarely in conflict with the First Circuit. As explained above, the First Circuit in Cohen affirmed the dismissal of procedural claims indistinguishable from those in this case, on the ground that Franklin does bar review of the procedures used to prepare base closure recommendations. The majority opinion does not acknowledge Cohen, but the conflict cannot be wished away by ignoring it.

Insert (1)

The consequences of the panel decision for the operation of the Base Closure Act are potentially severe. ~~As explained in considerable detail in Judge Alito's dissent from the original panel decision (971 F.2d at 956-61), "the statutory scheme [of the Base Closure Act] is grounded in concepts -- speed, finality, and limiting the President and Congress to an all-or-nothing choice on a package of recommendations -- that are inconsistent with judicial review * * *."~~ Allowing plaintiffs to contest base closures on the basis of alleged procedural errors, thereby delaying closures and extracting individual bases from the unified package approved by the President and Congress, will ~~irreparably damage~~ undermine significantly the govern-

ment's ability to fulfill the statutory purpose and carry out the difficult and politically charged task of closing domestic military bases.

Moreover, the consequences of the panel decision are not confined to the Base Closure Act. As explained above, the panel's handling of Franklin ~~essentially~~ potentially renders Franklin's restrictions on judicial review a nullity. Henceforth, in this Circuit, any statutory scheme under which agencies present recommendations to the President for his consideration ~~will~~ could be subject to judicial review, notwithstanding Franklin's holdings that agency recommendations to the President are not final agency action and that the President himself is not subject to judicial review under the APA. Before such a result is accepted, and a Circuit conflict on an issue of this importance is created, this appeal should be reheard en banc.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the appeal should be reheard en banc.

Respectfully submitted,

STUART E. SCHIFFER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530
(202) 514-4052

May 28, 1993

Ans. (1)

Insert p.14:

The Base Closure Act was enacted against a backdrop of years of frustration with the government's inability to close military installations in a timely, efficient and equitable manner. As discussed in detail in Judge Alito's dissent from the original panel decision (971 F.2d at 956-61), the Act was intended "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." 1990 Act, Sec. 2901(b) (emphasis added); see 1990 Conference Report at 705 (the Act was designed to establish "an independent, outside commission [that] will permit base closures to go forward in a prompt and rational manner").

Document Separator

U.S. Department of Justice

SCC comments

FWH:REK:DNL:SRMcIntosh
145-6-3183
514-4052

Washington, D.C. 20530

JUL 19 1993

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Specter v. Garrett, No. 91-1932 (3d Cir. May 18, 1993) (Stapleton & Scirica, JJ.; Alito, J., dissenting)

TIME LIMITS

The Court of Appeals denied the government's rehearing petition on June 14, 1993. The deadline for filing a petition for certiorari is September 13, 1993. The Court of Appeals has stayed its mandate until July 21, 1993, and a determination regarding certiorari is therefore needed as soon as possible.[1]

RECOMMENDATIONS

The Defense Base Closure and Realignment Commission (Sheila Cheston, General Counsel, 703-696-0504) orally recommends certiorari.

The Department of Defense has not yet made a recommendation but is expected to recommend certiorari.

I recommend certiorari.

QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (Act) establishes standards and procedures for identifying and closing unnecessary domestic military bases. The questions presented are:

---

[1]If certiorari is authorized before July 21, the Civil Division will move for the Third Circuit to extend the stay of the mandate so that we will have time to prepare and file our petition.

1. Whether claims that the Department of Defense and the Defense Base Closure and Realignment Commission violated the procedural requirements of the Act involve "final agency action" under Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

2. Whether the Act itself precludes judicial review of claims that the Department of Defense and the Commission have violated the procedural requirements of the Act.

STATEMENT

This is a suit to prevent or delay the planned closure of the Philadelphia Naval Shipyard. The suit alleges that the Department of Defense and the Defense Base Closure and Realignment Commission violated procedural requirements of the Base Closure Act in the course of choosing the Shipyard, along with many other installations, for closure.

The district court dismissed the suit on the principal ground that judicial review is barred by the Act itself. A divided panel of the Third Circuit reinstated some of the plaintiffs' procedural claims. The Supreme Court vacated the Third Circuit's decision and remanded for further consideration of finality issues in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). On remand, the panel has reinstated its original decision, again by a divided vote, and the Third Circuit has denied rehearing en banc.

1. The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 note) creates standards and procedures for closing unneeded domestic military bases. The Act provides for three biennial closure rounds, beginning in 1991. In each round, the Secretary of Defense prepares closure and realignment recommendations, which are forwarded to the Commission for review. The Commission may change any of the Secretary's recommendations if they "deviate[] substantially" from the governing standards. The Commission forwards its own recommendations to the President, who may accept them or reject them in toto but may not "pick and choose." If the President accepts the Commission's recommendations, the Secretary of Defense must carry them out unless Congress overrides the President by passing a joint resolution of disapproval. Congress, like the President, must treat the recommendations as a package and cannot (without enacting new legislation) accept particular recommendations while rejecting others.

For present purposes, two general points about the Act are significant. First, the structure and policies of the Act are inconsistent in many respects with judicial review of the base closure process. For example, the Act creates a highly expedited process involving a number of extremely strict time limits that would be jeopardized by judicial intervention. The Act also contemplates that the closure process will be "overseen" by the

(For future purposes, useful to remember the President has a little more latitude -- initially, he can disapprove them, in whole or in part, and send back to Commission to prepare a revised list of recs; after that, he must accept or reject in toto.)

President and Congress, rather than by the courts. At the same time, the Act creates a delicate balance of power between the President and Congress that could be disturbed by judicial intervention. In addition, the Act is designed to produce a single "bundle" of base closures that stand or fall together, and judicial intervention regarding individual bases would jeopardize this goal by allowing litigants to "unbundle" the package. Finally, the Act was enacted against a background of failed base closure attempts that were frustrated by, among other things, protracted litigation under NEPA and other statutes. The Act explicitly forecloses NEPA suits, and the legislative history of the Act strongly suggests that Congress was moved by a more general concern about avoiding litigation-driven obstruction and delays. [Act also requires implementation of recs w/in specified time frame.]

Second, the Act places the final decision over base closures and realignments in the hands of the President and Congress, not the Secretary of Defense and the Commission. The recommendations of the Secretary and the Commission have no legal or practical effect until and unless: (1) the President accepts them; and (2) Congress fails to override the President within the time limit prescribed by the Act. Moreover, the Act leaves the President and Congress with unfettered discretion over <u>whether</u> to accept the recommendations; the recommendations may be accepted or rejected for good reasons, bad reasons, or no reasons at all.

2. During the 1991 round, the Secretary of Defense recommended the closure or realignment of a large number of military facilities, one of which was the Philadelphia Naval Shipyard. The Commission concurred with the Secretary's recommendation concerning the Shipyard and forwarded the President its own recommendations. President Bush approved all of the recommendations of the Commission, including the closure of the Shipyard. In July 1991, the House of Representatives rejected a proposed joint resolution of disapproval by a vote of 364 to 60, thus requiring the Secretary of Defense to proceed with the closures and realignments.

The present suit was filed in July 1991 to block the closure of the Shipyard. The plaintiffs alleged that the Navy, the Secretary of Defense, and the Commission had committed a variety of procedural errors in preparing the base closure recommendations. The plaintiffs also alleged that the selection of the Shipyard was invalid for a variety of substantive reasons. With exceptions that are not relevant here, the plaintiffs' claims were statutory rather than constitutional, and they alleged wrongdoing by the Department of Defense and the Commission rather than by the President.

The government moved to dismiss the suit on the principal ground that the Act itself implicitly precludes judicial review of the plaintiffs' claims. The district court granted the government's motion and the plaintiffs appealed to the Third Circuit. In April 1992, the Third Circuit partially affirmed and partially reversed the district court's decision. 971 F.2d 936 (3d Cir.

1992). By a 2-1 vote, the panel held that the Act precludes substantive challenges to base closure decisions, but does not preclude claims that the Secretary of Defense and the Commission violated the Act's procedural requirements.

Judge Alito, in dissent, argued that the Act bars judicial review of all of the plaintiffs' statutory claims, including the procedural claims reinstated by the majority. His dissent broadly adopted the government's arguments about the significance of the Act's structure and legislative history. In particular, Judge Alito argued that judicial review would fatally interfere with the statutory goals of speed and finality and would threaten the statutory objective of creating a unified package of base closures to be approved or disapproved en masse.

3. In June 1992, two months after the panel's initial decision, the Supreme Court issued its decision in Franklin, supra. Franklin involved a challenge to the decennial reapportionment of the House of Representatives. The reapportionment statute in Franklin, like the Base Closure Act, provided for a subordinate federal official (the Secretary of Commerce) to prepare recommendations for the President, who was regarded as having discretion whether or not to accept the recommendations. The Supreme Court held in Franklin that the actions of the Secretary of Commerce were not "final" agency action for purposes of judicial review under the Administrative Procedure Act. The Supreme Court further held that the President is not an "agency" under the APA and therefore is not subject to the APA's judicial review provisions.

Because of the parallels between the statutory scheme in Franklin and the Base Closure Act, Solicitor General Starr authorized petitioning the Supreme Court to vacate and remand for further consideration in light of Franklin. The Supreme Court granted our petition in November 1992. Following the Supreme Court's remand, the Third Circuit directed the parties to submit supplemental briefing on the Franklin issue.

The briefing on remand was influenced in part by the Third Circuit's original decision in this case. In that decision, the panel had addressed the reviewability of the President's actions under the Base Closure Act. The panel had assumed (without deciding) that the President is not an "agency" under the APA, but had held that the President's actions were nonetheless subject to "common law" judicial review. Responding to this reasoning, we argued on remand that the President is not subject to "common law" judicial review and that, under Franklin, his actions are reviewable outside the confines of the APA only to determine whether he has acted unconstitutionally. For their part, the plaintiffs insisted that they were not challenging the President's actions, on constitutional grounds or otherwise, and hence that Franklin's holding regarding the reviewability of Presidential action was irrelevant. The plaintiffs devoted their efforts exclusively to

the question of whether Franklin's "finality" ruling applies to the procedural actions of the Secretary of Defense and the Commission.

On May 18, 1993, the Third Circuit issued its decision on remand. By a 2-1 vote, with Judge Alito again dissenting, the court held that Franklin does not preclude judicial review of the plaintiffs' procedural claims. The panel majority based this holding on a view of Franklin, and a view of the plaintiffs' underlying claims, that the plaintiffs themselves had not advanced.

Quoting its earlier decision, the panel majority began from the premise that "'at least in one sense, we are here asked to review a presidential decision.'" Majority op. at 8. The majority pointed out that, even under Franklin, Presidential action is subject to judicial review to determine its constitutionality. Slip op. at 9-10. The majority then reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question, and hence the judicial power to review the constitutionality of Presidential actions encompasses review of whether Presidential action violates "non-discretionary [statutory] mandates." Id. at 10-11. Finally, the majority characterized the plaintiffs' claims in this case as alleging "a failure by the President to remain within statutorily mandated limits" (id. at 11), and concluded that the claims are therefore "constitutional" claims that are still subject to judicial review under Franklin.

Having disposed (to its satisfaction) of Franklin, the panel majority then addressed what it treated as the distinct question of sovereign immunity. Majority op. at 12-15. The majority reasoned that sovereign immunity is not a bar to judicial review, even in the absence of a statutory waiver of immunity, "where * * * plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the * * * statute authorizing such action and has thereby violated the constitutionally mandated separation of powers." Id. at 13. Alternatively, the majority concluded that sovereign immunity is waived by 5 U.S.C. § 702, which waives sovereign immunity for "action[s] * * * seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority * * * ." Id. at 14-15. The majority acknowledged that 5 U.S.C. § 702 "may not apply to suits against the President," but concluded that "this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President -- a situation not present here." Id. at 15 n.9. For purposes of sovereign immunity, the panel majority treated this suit as primarily a challenge to the actions of the Secretary of Defense and the Commission, not a challenge to the legality or statutory authority of Presidential actions. See id. at 13-14.

Judge Alito, in dissent, made two principal points. First, he pointed out that the plaintiffs "vigorously contended * * * that Franklin does not bar review under the APA[;] [t]he plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Dissent at 18 (emphasis in original). For his part, Judge Alito agreed with us that Franklin precludes judicial review of the plaintiffs' claims under the APA. Id.

Second, taking the majority's theory on its own terms, Judge Alito explained that the plaintiffs' allegations of procedural errors by DoD and the Commission do not and cannot amount to an allegation that the President himself acted unlawfully. Dissent at 19-21. As he explained, "the President's sole responsibility * * * is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission." Id. at 20. The Base Closure Act does not make the President's statutory rights and responsibilities contingent on the absence of prior procedural errors by DoD and the Commission. Id. Hence, under no view of the matter has the President violated the Base Closure Act, nor have the plaintiffs implicitly alleged such a violation.

4. On May 3, 1993, two weeks before the Third Circuit issued its latest decision in this case, the First Circuit decided the identical reviewability issue in Cohen v. Rice, No. 92-2427. The First Circuit held in Cohen that Franklin does bar federal courts from hearing the kinds of procedural claims under the Base Closure Act that are at issue in this case.

The Third Circuit's decision in this case conflicts squarely with the First Circuit's decision in Cohen. The panel majority in this case made no reference to Cohen, although Judge Alito cited Cohen with approval in his dissent. The plaintiffs in Cohen did not petition for rehearing, but in light of the Third Circuit's subsequent decision, we expect them to petition for certiorari.

In light of the conflict between the panel decision here and the First Circuit's decision in Cohen, and given the panel's dubious reasons for distinguishing Franklin, Acting Solicitor General Bryson authorized the Civil Division to seek rehearing en banc. On June 14, 1993, the Third Circuit denied rehearing en banc without opinion by a 7-3 vote.

We moved for a stay of the mandate pending certiorari to avoid the resumption of the district court proceedings. On July 2, the panel stayed the mandate, but its stay expires on July 21. We intend to ask the Third Circuit for an additional 30-day stay of the mandate by July 21.

DISCUSSION

Following the initial panel decision in this case in April 1992, the Department of Defense and the Commission strongly recommended seeking Supreme Court review. The Civil Division joined in that recommendation. The subsequent panel decision, far from diminishing the case for Supreme Court review, actually enhances it, especially since the latest decision creates a direct Circuit conflict. We therefore again recommend petitioning for certiorari in this case.

1. Legal Considerations

A. Franklin and Final Agency Action

In the course of its holding regarding "final agency action," Franklin disallows suits against the President under the APA, but leaves the door open for non-APA suits challenging the constitutionality of Presidential action. The latest panel decision rests on the proposition that the President violates the Constitution, and hence is subject to judicial review under Franklin, whenever his actions "conflict with non-discretionary mandates of [an] authorizing statute." Majority op. at 10.

The proposition that any procedural violation of "non-discretionary mandates of [an] authorizing statute" amounts to a constitutional violation is, at the very least, a highly debatable one. But even if it is correct, it is irrelevant to this case, because the plaintiffs have never alleged that the President has violated the Base Closure Act. To the contrary, the plaintiffs made strenuous efforts throughout this litigation to disavow any challenge to the validity of the President's actions. They emphasized repeatedly that their only quarrel was with the acts and omissions of DoD and the Commission, not with the actions of the President.

– + didn't as Pres has broad discretion

The majority tries to circumvent this problem by treating the plaintiffs' allegations of procedural violations by DoD and the Commission as implicit allegations of illegal action by the President. See majority op. at 12. But as Judge Alito's dissent rightly points out, there simply is no colorable basis for arguing -- and in any event, the plaintiffs themselves do not argue -- that the alleged procedural violations by DoD render the subsequent actions of the President unlawful or ultra vires.

If the panel majority's theory were accepted, Franklin's non-reviewability ruling would become a dead letter. Given the panel's treatment of the allegations in this case, virtually any claim that the President or his subordinates have failed to comply with a statute could be transformed into a claim that the President acted in excess of his statutory authority and hence (in the panel's view) acted unconstitutionally. Not only would this effectively

wipe out Franklin's holding regarding nonreviewability of Presidential actions, but it would also eviscerate Franklin's holding that recommendations to the President by subordinate officials are not "final agency action." A plaintiff whose real grievance was with the supposed errors of the subordinate official would instead sue the President, alleging that the official's statutory violations rendered the subsequent actions of the President unlawful and hence unconstitutional.

The majority opinion is also internally inconsistent. Since the actions of DoD and the Commission are plainly non-final, and hence nonreviewable, under Franklin, the majority opinion sought to get around Franklin by characterizing this case as a challenge to the final actions of the President, rather than a challenge to the preliminary actions of DoD and the Commission. Yet when the panel majority turned to the issue of sovereign immunity, and sought to bring this case within the ambit of 5 U.S.C. § 702, the majority effectively recharacterized the case as an attack on DoD and the Commission, with the President playing only a collateral role. Either this case is "really" a challenge to the legality of Presidential action, or it is not; the majority cannot have it both ways.

For these reasons, if the Supreme Court reviews the Third Circuit's decision, we will be in a strong position to argue that the Court of Appeals has hopelessly misapplied Franklin. Franklin was handed down barely a year ago, we recognize that the Supreme Court ordinarily might not be interested in granting certiorari simply to review how a lower court has applied Franklin in a particular case. However, the decision in this case creates a direct Circuit split; it has implications for the constitutionality of Presidential actions that extend far beyond this case; and, for reasons outlined below, it jeopardizes the operation of a statute and a program that are vital to the ongoing military conversion process. We therefore are confident that the Supreme Court will not regard this as just another dispute over the application of the Court's precedents to a particular case.

B. Preclusion of Review

The earlier panel decision is also deeply flawed in its handling of the issue of whether the Act itself precludes judicial review, an issue that need be reached by the Supreme Court only if we fail to prevail under Franklin. First, as suggested by Judge Alito in his dissent, the majority seriously underestimated the impact of judicial review on Congress's goals of expedition and finality. Second, as Judge Alito again suggests, the majority failed to give sufficient weight to Congress's goal of consolidating base closures in a single, indivisible package, a goal that almost certainly will be compromised by a successful suit. Third, the majority largely failed to respond to our argument that judicial review alters the statutory and political balance struck by

the Act between the Executive Branch and Congress. Fourth, the majority failed to recognize the significance of the Act's treatment of NEPA claims, which present very much the same kind of obstacles to the base closure process that are presented by the procedural claims in this case.[2]

Given the strong presumption in favor of judicial review, and the necessary uncertainties in any preclusion argument that does not rest on explicit statutory provisions, we recognize that our position is not irresistible. On balance, however, we believe strongly that Congress should be found to have implicitly precluded all judicial review of claims arising under the Act.

2. Practical Considerations

Taken together, the two panel decisions in this case threaten to have significant adverse consequences for the Department of Defense in its efforts to close obsolete domestic military bases. To be sure, the panel has allowed only a relatively small class of purely procedural challenges to be heard under the Act. But by allowing a judicial challenge to proceed, regardless of how narrowly the suit may be cabined, the panel has struck a dangerous blow to the integrity of the important base closure process. Even a narrow procedural challenge to the closure of the Philadelphia Shipyard has the potential to seriously disrupt the operation of the Act by upsetting planning for future rounds of base closures. Moreover, if plaintiffs are able to pick apart the bundle of bases approved for closure by Congress, one of the most politically important elements of the statutory scheme will be jeopardized.

Several other suits concerning the 1991 and 1993 rounds of base closures have already been filed, and if the Third Circuit's decision is allowed to stand, the temptation for other affected communities to bring suit regarding other bases will grow considerably. Thus, it is especially important to seek certiorari to prevent this decision from opening the door for a number of new suits.

We expect the plaintiffs in Cohen to file their own petition for certiorari in that case, based on the split between Cohen and the decision here. In our view, this case provides a better

---

[2]The majority regarded the Act's explicit restrictions on NEPA review as ambiguous because they might just as easily be cited as evidence that Congress meant to allow other kinds of procedural claims. But as we explained in our briefs, NEPA suits had been used in the past as the primary mechanism for blocking base closures, and Congress previously had explicitly made NEPA applicable to the base closure process; Congress therefore had good reason to be more explicit about NEPA claims than about other types of suits.

vehicle for Supreme Court review, for at least two reasons. First, our petition can raise both of the principal issues in this litigation (implied preclusion of review under the Act and finality under Franklin), while the plaintiffs in Cohen will be raising only the Franklin issue. Second, precisely because the Third Circuit opinions in this case are so demonstrably wrong, they provide a more attractive backdrop for our arguments than does Cohen. Accordingly, if the plaintiffs in Cohen do petition for certiorari, we suggest inviting the Supreme Court to grant certiorari in this case and hold Cohen for disposition following the eventual decision in this case.

CONCLUSION

For the foregoing reasons, I recommend in favor of certiorari.

/S/

FRANK W. HUNGER
Assistant Attorney General
Civil Division

Document Separator

1993 JUL 30 AM 10 57
RECEIPT STAMP

U.S. DEPARTMENT OF JUSTICE WASHDC 20530
TELECOMMUNICATIONS SERVICE CENTER
FAX NUMBERS: 202-514-4371/4372 COMMERCIAL
202-368-4371/4372 FTS
VOICE VERIF: 202-514-4495 COMM
368-4495 FTS

MACHINES ARE XEROX 7017 AUTOMATICS

FACSIMILE OUTGOING TRANSMISSION RECORD

FROM: Scott McIntosh (NAME (PRINT)) Civil Division/Appellate (DIVISION OR SECTION)

TO: Sheila Cheston (NAME (PRINT)) 7-30-93 10:59 A (DATE AND TIME)

NUMBER OF PAGES: 38 Arlington VA (CITY/STATE)

DESTINATION'S FAX NUMBER 703/696-0550

DESTINATION'S VOICE VERIFICATION NUMBER 703/696-0504

PRECEDENCE -------- (PLEASE CIRCLE ONE) ROUTINE --- PRIORITY --- IMMEDIATE

ARE TRANSMITTED COPIES TO BE RETURNED? _____ YES X NO

IF YES, YOUR PHONE NUMBER: _____ IF NO, SIGNATURE [signature]

SPACE BELOW FOR USE BY TELCOM

CHARGE CODE _____

NUMBER PAGES _____

OPR INITIALS _____

DESTINATION CALLED _____ (DATE & TIME) FOR PICK UP _____ (TSVC OPR INITIAL)

COMMENTS:

TRANSMISSION STAMP

John Manning's draft

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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

v.

ARLEN SPECTER, ET AL.

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

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

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

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

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

II

PARTIES TO THE PROCEEDING

TABLE OF CONTENTS

Page

OPINIONS BELOW . . . . . .

JURISDICTION . . . . . .

STATUTORY PROVISIONS INVOLVED . . . . . .

STATEMENT . . . . . .

REASONS FOR GRANTING THE PETITION . . . . . .

CONCLUSION . . . . . .

TABLE OF AUTHORITIES

Document Separator

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

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

v.

ARLEN SPECTER, ET AL.

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

The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Chairman and members of the Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-25a) is not yet reported. A prior opinion of the court of appeals (App., infra, 31a-87a) is reported at 971 F.2d 936. The opinion of the district court (App., infra, 91a-97a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993.

App., infra, 26a-28a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

STATEMENT

Respondents[2] brought this action in United States District Court for the Eastern District of Philadelphia seeking to enjoin the closure of the Philadelphia Naval Shipyard. C.A. App. 61, 65, 68. In a prior decision, a divided panel of the court of appeals concluded that certain of respondents' procedural claims were subject to judicial review under the APA. App., infra, at 65a, 67a. Subsequently, in Franklin v. Massachusetts, 112 S. Ct. 2676 (1992), a case involving a similar statutory scheme, this Court held that recommendations of subordinate officials to the

---

[1] The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1344-1345, 1544-1546, 1551 (1991); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608 (1992). For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

[2] Respondents are Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware; officials of those States; the City of Philadelphia; shipyard workers; and members of local unions. See App., infra, __ [92-485 Pet. App. 2a].

President are not "final agency action" under the APA, 5 U.S.C. 704, and that the APA does not apply to the President's actions. We petitioned for a writ of certiorari in this case; on November 9, 1992, this Court granted the writ, vacated the court's decision, and remanded the case for further consideration in light of Franklin. App., infra, 29a-30a.

On remand, a divided panel of the court of appeals concluded that Franklin permits judicial review of procedural claims under the Base Closure Act, reasoning that if the Secretary of Defense and the Defense Base Closure and Realignment Commission committed procedural errors, the President acted beyond his constitutional authority in approving the Commission's recommendations. App., infra, 9a-12a. In so doing, the panel's decision on remand (1) evades the holding of Franklin and broadly subjects the President's actions to judicial review despite the limited scope of the APA; (2) conflicts with the First Circuit's recent decision in Cohen v. Rice, 992 F.2d 376 (1993); and threatens the integrity and expedition of the carefully designed process that Congress established in the Base Closure Act.

A. Statutory Background

1. The Defense Base Closure and Realignment Act, Pub. L. No. 101-510, 104 Stat. 1808, established a mechanism for identifying and closing unnecessary domestic military bases. The Act provides for three rounds of base closures,[3] to take place in

---

[3] The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates (continued...)

1991, 1993, and 1995. § 2903(c)(1); App., infra, 106a-107a. For each round, the Secretary of Defense must prepare a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to national security" during that period. § 2903(a); App., infra, 105a The Secretary also must establish, after notice and an opportunity for public comment, selection criteria to be used in making base closure recommendations. § 2903(b); App., infra, 105a-106a. Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c); App., infra, 106a-108a.

The Act requires the Secretary of Defense to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent commission established under the Act. §§ 2902(a) and 2903(c)(1); App., infra, 98a, 106a-107a. The Commission is charged with holding public hearings and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2); App., infra, 108a-110a. The Commission may change the Secretary's recommendations if it determines, after notice and public hearings, that he has "deviated substantially" from the force-structure

---

[3](...continued)
functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5); App., infra, __. For convenience, we use the term "base closures" to refer to base closures and realignments.

plan and selection criteria. § 2903(d)(2)(B) and (C); App., infra, 109a. The Commission must then forward its report to the President for his review. § 2903(e); App., infra, 111a.

The President may approve or disapprove the Commission's recommendations, and he must transmit his determination to Congress and the Commission within two weeks of receiving it. § 2903(e)(1)-(3); App., infra, 111a. If the President disapproves the Commission's recommendations, it must prepare new recommendations and resubmit them to the President within a month. § 2903(e)(3); App., infra, 111a. If the President then disapproves the revised recommendations, no bases may be closed that year under the Act. § 2903(e)(5); App., infra, 111a.

If the President approves the initial or revised recommendations, Congress reviews the President's decision by considering a joint resolution of disapproval. §§ 2904(b), 2908; App., infra, 112a-113a, 122a-125a. If a joint resolution of disapproval is enacted after presentment to the President, the Secretary of Defense may not close or realign the bases approved by the President. § 2904(b); App., infra, 112a-113a. If a joint resolution is not enacted within 45 legislative days or by the date Congress adjourns for the session, whichever is earlier,[4] the Secretary is required to close or realign all of the military installations approved for closure or realignment by the President. § 2904(a); App., infra, 112a.

---

[4] To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate ordinary delays. § 2908; App., infra, __-__.

B. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission with a list of 72 domestic military installations for closure or realignment, including the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184. The Commission held public hearings in Washington, D.C., and Philadelphia, hearing testimony from officials of the Department of Defense, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Shipyard. The Commission's recommendations differed from the Secretary's in several respects, recommending the closure or realignment of 82 bases in its final report. But the Commission concurred in the Secretary's recommendation to close the Philadelphia Shipyard. App., infra, 38a.

On July 10, 1991, the President approved the Commission's recommendations. The Armed Services Committees of both Houses conducted hearings on the recommended closures. App., infra, 38a-39a. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing debate, several of the respondents alleged that the proposed resolution should be passed because of alleged flaws in the procedures by which the Philadelphia Shipyard was recommended for closure. See id. at H6009-H6010 (Rep. Weldon); id. at H6010-H6011 (Rep. Foglietta); id. at H6020 (Rep. Andrews). The House, however, ultimately

rejected the resolution of disapproval by a vote of 364 to 60. Id. at H6039; App., infra, 39a.

b. On July 8, 1991, respondents filed this action under the APA and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. C.A. App. 61, 65, 68. Respondents claimed, among other things, that the Secretary of Defense and the Commission failed to comply with certain procedural requirements alleged to be imposed by the Base Closure Act. See, e.g., id. at 58-59, 67; App., infra, 6a-7a n.3, 40a, 65a, 67a. Respondents did not name the President in their complaint, nor did they allege that he had violated the Act or otherwise acted unlawfully.

On November 1, 1991, the district court granted the government's motion to dismiss the suit in its entirety. App., infra, 91a-97a. The district court concluded that the Base Closure Act itself "precludes judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). App., infra, 91a-94a. It held, in the alternative, that the political question doctrine foreclosed review of the base closure decision. Id. at 94a-97a.

2. a. A divided panel of the court of appeals affirmed in part and reversed in part. See App., infa, 31a-87a.[5] As a preliminary matter, the court of appeals considered whether the

---

[5] The court of appeals held that the plaintiff union members and Philadelphia Shipyard employees had standing to challenge the base closure. Because the positions of all of the plaintiff were the same, the court declined to address the standing of the others. App., infra, __-__ [92-485 Pet. App. 10a-12a].

actions at issue in this case constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. Although respondents were challenging actions or omissions of the Secretary of Defense and the Commission in making their recommendations, the court concluded that "at least in one sense, we are being asked to review a presidential decision. App., infra, 48a. As the majority explained, because the Secretary and the Commission have authority only to make recommendations under the Act, respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. Ibid.

The court of appeals recognized that the APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that statute. App., infra, 48a. Nevertheless, the court concluded that the APA's judicial review provisions "refpresent[] a codification of the common law" and that the actions of the President are not immune from judicial review at common law. Id. at 48a. The court thus explained that its ruling concerning judicial review would "be the same whether or not the APA apples to presidential decisionmaking." Id. at 49a.

Turning to other grounds for preclusion of review under the APA, the court of appeals held that the Base Closure Act precluded judicial review of some, but not other, claims under the Act. For example, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found

that the substance of the base closure decision "is committed by law to presidential discretion." App., infra, 51a; see 5 U.S.C. 701(a)(2) (no judicial review of actions "committed to agency discretion by law"). Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. App, infra, 61a-65a, 66a-67a. At the same time, the court detected no evidence that Congress intended to preclude judicial review of alleged noncompliance with the Act's procedural requirements. Id. at 65a, 67a.[6]

b. Judge Alito dissented, arguing that the Base Closure Act precludes judicial review of all statutory claims, procedural and substantive. App., infra, 74a-87a. Examining the structure and history of the Act, Judge Alito reasoned that judicial review would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved as one package. App., infra, 79a-87a. He also concluded that the legislative history, which discussed the need to eliminate litigation-related obstacles to

---

[6] The court found that judicial review would be available for (1) a claim that the Secretary failed to transmit to the Commission and the Government Accounting Office (GAO) all the information that the Secretary used in making his recommendations; and (2) a claim that the Commission did not hold public hearings as required by the Act. App., infra, 65a, 67a. The court of appeals also reversed the district court's ruling that this lawsuit should be dismissed under the political question doctrine. Id. at 68a-72a. Finally, the court rejected the due process claims of the union and shipyard employees, reasoning that the Act created no property interest in the plaintiffs. Id. at 72-74a.

base closure, supported preclusion of judicial review. Id. at 75a-79a.

4. On May 20, 1992, the court of appeals denied rehearing. App., infra, 88a-90a. On June 26, 1992, this Court issued its decision in Franklin v. Massachusetts, 112 S. Ct. 2767, which addressed the issue of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The census statute provides that the Secretary of Commerce must submit a census report to the President, who certifies to the House of Representatives the number of Representatives for each State. This Court held that the Secretary's report was not "final agency action" because it serves as "a tentative recommendation" and carried "no direct consequences for reapportionment." Id. at 2774. Although the President's action had sufficient indicia of finality, the Court held that it was not "agency" action under the APA. Id. at 2775.

Because of the similarities between this case and Franklin, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of Franklin. App., infra, 29a-30a.

5. a. On May 18, 1993, a divided panel of the court of appeals held on remand that Franklin does not affect the reviewability of respondents' procedural claims. The court reasoned that the Court in Franklin "declined only to review the President's decision under the APA" and that it "expressly sanctioned"

judicial review of the constitutionality of presidential decisions. App., infra, 10a. Although respondents do not challenge the President's actions, on constitutional or other grounds,[7] the court concluded that if the Secretary and the Commission violated the Base Closure Act's procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. App., infra, 10a-12a. Because the President may act only pursuant to constitutional or statutory authority, the majority explained that review of presidential action for consistency with the "non-discretionary mandates of [an] authorizing statute" was "a form of consitutional review" authorized under Franklin. Id. at 10a-12a.

b. Judge Alito again dissented. App., infra, 19a-25a. He noted that that respondents "vigorously contended * * * that Franklin does not bar review under the APA," and did not argue "that they were entitled to non-APA review based either on common law or separation of powers principles." Id. at 20a (emphasis in original). Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the Base Closure Act's procedural requirements. Id. at 21a-25a.

---

[7] In their brief on remand, respondents emphasized that "it is the conduct of [the] defendants -- not that of the President -- that [they] challenge." Resp. C.A. Remand Br. 12. Respondents explained, moreover, that they "do not seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." Id. at 8 (emphasis in original).

c. On June 14, 1993, the court of appeals denied our petition for rehearing and suggestion of rehearing en banc. Judges Hutchinson, Nygaard, and Alito would have granted rehearing en banc. App., infra, 26a-28a.

REASONS FOR GRANTING THE PETITION

By allowing judicial review of alleged procedural errors in the formulation of Commission's nondinding recommendations to the President, the court of appeals' decision in this case conflicts with this Court's decision in Franklin v. Massachusetts, supra. The court's holding that the President's action is reviewable for constitutional error whenever his subordinates commit procedural errors under the statute authorizing the President to act, the court of appeals' decision broadly opened the door to non-APA judicial challenges to presidential action. The court's ruling eviscerates the limits on judicial review recognized by this Court in Franklin. And it creates a conflict with the First Circuit's recent decision in Cohen v. Rice, supra, which dismissed a virtually identical suit challenging a base closure in Maine and specifically held that Franklin precludes judicial review of procedural claims under the Base Closure Act. Further review by this Court is therefore needed to resolve the circuit conflict and provide uniform standards for determining the reviewability of the important process of base closure throughout the Nation.

In addition, the Base Closure Act enacts a carefully designed process to indentify domestic military bases for closure and realignment. The statutory scheme creates a crucial mecha-

nism for the President and Congress to use in undertaking the sensitive task of the restructuring the Nation's military forces in the wake of the Cold War. By allowing private parties to bring procedural challenges to base closure decisions, the court of appeals' ruling undermines the speed and finality of the Act's base closure mechanism and undermines the integrity of a process designed to avoid the political hazards of base closure by having all base closure decisions made in one indivisible package.

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

This Court held that there was "no final agency action that may be reviewed under APA standards." Franklin, 112 S. Ct. at 2773. Turning first to the report prepared by the Secretary of Commerce, the Court explained that the "core question" regarding finality was "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Ibid. Because the Secretary's

report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." Id. at 2774.

By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. Franklin, 112 S. Ct. at 2774.[8] The Court found, however, that it was not final "agency" action covered by the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court held that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." Franklin, 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2776.

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

---

[8] The Court acknowledged that the President's apportionment calclation based on the Secretary's report was largely "ministerial" in nature. 112 S. Ct. at 2775. The Court, however, found it dispositive, for purposes of finality, that nothing in the census statute forced the President "to adhere to the policy decisions reflected in the Secretary's report." Ibid.

of the Commission has "no direct effect" (Franklin, 112 S. Ct. at 2774) unless and until the President forwards it to Congress with his approval. See § 2904(a) and (b); App., infra, 112a-113a; pp. __-__, supra. Because the Commission's report, rather than the Secretary's list of recommended closures, is the agency action on which the President bases his approval or disapproval (§ 2903(e); App., infra, 111a), the actions of the Secretary of Defense are even more "tentative" (Franklin, 112 S. Ct. at 2774). Because the challenged actions of the Commission and the Secretary are merely nonbinding and preliminary to the President's final decision, they do not constitute "final" agency action under Franklin.[9] Accord Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as the comsummation of the administrative process"). And because the President is not an "agency," his action approving the report is not subject to judicial review under the APA. Franklin, 112 S. Ct. at 2775-2776.

b. Although this Court vacated the court of appeals' prior decision and remanded it for further consideration in light of

---

[9] If anything, the agencies' recommendations in this case are more clearly nonfinal than the report of the Secretary of Commerce in Franklin. Whereas the President's role in reapportionment is "admittedly ministerial" (Franklin, 112 S. Ct. at 2775), the Base Closure Act explicitly contemplates that the President must approve or disapprove the Commission's recommendations, and he may end the process entirely by disapproving the Commission's recommendations. § 2903(e)(3) and (5); App., infra, 111a.

the principles articulated in Franklin (see 113 S. Ct. 455), the court of appeals evaded Franklin's holding by recasting respondents' routine statutory claims of procedural irregularity into constitutional claims of ultra vires action by the President. Relying on this Court's observation in Franklin that "the President's actions may * * * be reviewed for constitutionality" (112 S. Ct. at 2776), and the fact that the President's actions must be rooted in constitutional or statutory authority (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)), the court of appeals in this case concluded that review of the President's compliance with the requirements of an authorizing statute is automatically a form of constitutional review. App., infra, 10a-12a. That reasoning, however, is inconsistent with Franklin and traditional precepts governing judicial review of sovereign acts.

First, the court of appeals has applied the concept of ultra vires action so broadly that it effectively does away with Franklin's restrictions on judicial review of presidential action. The court in this case held that respondents stated a constitutional claim of ultra vires presidential action simply by alleging that he approved recommendations formulated in a procedurally flawed manner by his subordinates. If such claims of statutory error are sufficient to trigger "common law" judicial review of the President's actions (App., infra, 8a), nothwithstanding the

limited reach of the APA, then few if any challenges to presidential actions will be unreviewable in practice.[10]

That result would sharply undermine Franklin's concern for "the separation of powers and the unique constitutional role of the President." Franklin, 112. S. Ct. at 2775. By vesting the ultimate decision concerning base closures in the President himself (subject to legislative disapproval), Congress delegated responsibility for final action to a uniquely accountable official, and one whose actions are not reviewable under the APA for routine defects. In light of the separation of powers considerations articulated in Franklin and other decisions of this Court (cf. Nixon v. Fitzgerald, 457 U.S. 731, 747-753 (1982); Harlow v. Fitzgerald, 457 U.S. 800, 811 n.17 (1982)), the court of appeals erred in subjecting the President's final action to broad judicial review for statutory error in the way his subordinates formulated their tentative, nonbinding recommendations under the Base Closure Act.

In approving broad judicial review, moreover, the court of appeals misplaced reliance on Youngstown by conflating claims of

---

[10] Although the court of appeals purported to confine its rationale to alleged noncompliance with nondiscretional statutory procedures, its logic cannot be so readily limited. If, as the court of appeals suggests, the President automatically goes beyond his delegated authority by accepting agency recommendations formulated in a procedurally flawed manner, there is no reason to think that the delegation encompasses authority to adopt agency recommendations formulated using an arbitrary and capricious methodology. The court of appeals' reasoning, if consistently applied, would therefore require a different result in Franklin, in which the plaintiffs alleged in pertinent part that the Secretary's census-taking methodology was arbitrary and capricious.

statutory error and claims of ultra vires executive conduct. At issue in this case are respondents' claims that (1) the Secretary of Defense failed to transmit certain information to the Commission and the GAO; and (2) that the Commission based its decision in part on private meetings rather than public hearings. See App., infra, 6a-7a n.3. By contrast, Youngstown involved an emergency presidential order to seize private steel mills during the Korean War. Although two statutes authorized the seizure of private property under specified conditions, the government in Youngstown conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that it regarded the pertinent statutory authority as "too cumbersome, involved, and time-consuming." 343 U.S. at 586. The claims of ultra vires conduct in Youngstown are therefore a far cry from respondents' routine and contested claims of procedural irregularity in the formulation of tentative, nonbinding recommendations for the President.

The distinction between routine statutory claims, such as respondents' claims here, and claims of ultra vires action is illustrated by this Court's precedents addressing federal and state sovereign immunity.[11] See, e.g., Pennhurst State School & Hosp. v. Pennhurst, 465 U.S. 89 (1984); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Land v. Dollar, 330 U.S. 731 (1947). In those cases, the Court has distinguished

---

[11] The APA now waives sovereign immunity in suits for injunctive relief against the United States. See 5 U.S.C. 702.

between (1) claims that an officer acted "ultra vires his authority," which are the proper subject of specific relief, and (2) mere "claim[s] of error in the exercise of that power," which are barred by sovereign immunity. Larson, 337 U.S. at 690.[12] As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." Larson, 337 U.S. at 691 n.12; see Noble v. Union River Logging R.R., 147 U.S. 165, 179 (1893).[13] Although the distinction is not always simple to apply (see International Primate Protection League v. Administrators of Tulane Education Fund, 111 S. Ct. 1700, 1708 (1991)), a finding of ultra vires executive action requires a "depart[ure] from a plain official duty" (Payne v. Central Pac. Ry., 255 U.S.

---

[12] As this Court explained, the theory underlying such cases was that when "the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." Larson, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his actions "are ultra vires his authority and * * * may be made the object of specific relief." Ibid.

[13] For an illustration of a case that involved mere error, see Goldberg v. Daniels, 231 U.S. 218 (1913), upon which the Court relied heavily in Larson, 337 U.S. at 681-682. In Goldberg, the Secretary of the Navy awarded a contract for a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the surplus vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court later explained in Larson, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind his back and hence must fail." Larson, 337 U.S. at 700-701.

228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, e.g., Pennhurst, 465 U.S. at 110-111 n.20 (collecting cases); Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876) (specific relief against violation of "plain official duty, requiring no discretion").

Under those principles, the court of appeals in this case erred in holding that respondents' procedural allegations against the Secretary of Defense and the Commission automatically state claims of ultra vires presidential action. As the court below acknowledged, "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and "the decision on which bases to close is committed by law to presidential discretion." App., infra, 51a, 74a. That conclusion cannot be reconciled with the court of appeals' subsequent holding that the President acts beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims against the Secretary or the Commission, the President was under no "plain official duty" (Payne, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error and was not disabled from "mak[ing] a decision at all" in the circumstances presented here. Larson, 337 U.S. at 690 n.12.[14] Far

---

[14] The only obligation imposed on the President by the Base Closure Act is to decide, in his discretion, whether to accept or reject the Commission's recommendations and to give notice of his decision to the Commission and Congress. § 2903(e)(1)-(4): App., infra, 111a. As Judge Alito explained in dissent:

(continued...)

from having acted in excess of his authority under the Base Closure Act, the President did precisely what the Act authorized him to do. Accordingly, the court of appeals should have applied the principles articulated in Franklin, rather than Youngstown, in deciding this case.

c. The court of appeals' decision in this case conflicts with the First Circuit's recent decision in Cohen v. Rice, supra. The plaintiffs in that case challenged the closing of the Loring Air Force in Limestone, Maine, and made many of the same allegations against the Secretary and the Commission that respondents have made here. Of specific pertinence here, the plaintiffs in Cohen, like respondents here, alleged that the pertinent service

---

[14](...continued)

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

App, infra, 23a-24a. And if the President adopts the Commission's recommendations, the Act requires the Secretary of Defense to carry out that decision unless it is overridden by Congress. § 2904(a); App., infra, 112a.

Secretary did not provide all of the required information to the GAO and Congress, and that the Commission failed to hold the public hearings required under the Act. 992 F.2d at 380. The First Circuit affirmed the district court's dismissal of the action in its entirety, agreeing that Franklin was "directly applicable to the facts of the present controversy." 992 F.2d at 381 (quoting Cohen v. Rice, 800 F. Supp. 1006, 1011 (D. Me. 1992)). The court of appeals explicitly rejected the contention that Franklin did not apply because the case before it "involve[d] a challenge to the Commission's faulty procedures" rather than the substance of its recommendations. 992 F.2d at 382. The court emphasized that Franklin drew no such disctinction and that, in any case, it was "a distinction without a legal difference." Ibid. The court of appeals in Cohen, unlike the Third Circuit here, did not reach out to recast the plaintiffs' statutory allegations as reviewable claims of unconstitutional presidential action.

If the Department of Defense and the Commission are to administer the Base Closure Act in a coherent manner that is consistent across the Nation, the same agency actions cannot be reviewable in one circuit and unreviewable in another. Further review is therefore warranted to resolve the conflict between the present decision and Cohen and to determine whether Franklin in fact bars judicial review of procedural claims under the Base Closure Act.

2. The court of appeals also erred in holding in its prior opinion (App., infra, 53a-60a) that the Base Closure Act does not "preclude judicial review" under the APA, 5 U.S.C. 701(a)(2). As discussed (p. __, supra), the district court dismissed this action in its entirety on the ground that the Act implicitly precludes judicial review of all claims arising under the Act. App., infra, 91a-94a. In reversing that decision, the court of appeals seriously misapprehended the extent to which judicial intervention is contrary to the structure and purposes of the Base Closure Act.

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. App., infra, 45-46a. In our view, reliance on that presumption is misplaced in the context of the Base Closure Act, which addresses sensitive questions of national security and military policy. See United States Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1987) (presumption of reviewability "runs aground when it encounters concerns of national security"). As this Court has explained, "unless Congress has specifically provided otherwise, courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." Ibid. (citing cases); see, e.g., Chappell v. Wallace, 462 U.S. 296 (1983) (no constitutional tort remedy available under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for service-related military injuries); Orloff v. Willoughby, 345 U.S. 83,

92-94 (1953) (no habeas corpus review of plaintiff's duty assignment); Feres v. United States, 340 U.S. 135 (1950) (Federal Tort Claims Act has no application to service-related torts). Because the base closure process necessarily involves sensitive judgments of military policy (see, e.g., § 2903(a), (c)(1) and (d)(2); App., infra, 104a-105a, 106a-107a, 108a-109a), we believe that the court of appeals erred in applying the ordinary administrative law presumption that Congress desires judicial review of the outcome of an administrative process.[15]

Even if the general presumption applies in this setting, moreover, it may be rebutted "whenever [a] congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984) (citation omitted). The pertinent congressional intent may be found in a variety of sources. The presumption "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." The pertinent congressional intent "may also be inferred from contemporaneous judicial construction barring review and congressional acquiescence in it, or from the collective import of

---

[15] Although the court of appeals purports to limit its holding to the Secretary's and the Commission's violations of mandatory statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. As discussed, the Act provides that the President can approve or disapprove the Commission's recommendations for any reason at all (App., infra, 51a, 74a); the court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his subordinates have not observed every procedural particular alleged to be required under the Act.

legislative and judicial history behind a particular statute." Ibid. Most importantly, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." Ibid. When measured against those standards, the Base Closure Act precludes judicial review of the base closure process under the foregoing standards.

First, the structure of the Base Closure Act indicates that judicial review is incompatible with the statutory scheme. Like its immediate predecessor, the Defense Authorization Amendments and Defense Base Closure Act of 1988 (1988 Act), Pub. L. No. 100-526, 102 Stat. 2623,[16] the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases.[17] H.R. Rep. No.

---

[16] Like the 1990 Act, the 1988 Act established an independent Commission on Base Realignment and Closure. § 203, 102 Stat. 2627-2628. The Commission submitted a report recommending base closures to the Secretary of Defense, who was not authorized not close bases under the 1988 Act unless he approved the report and transmitted it to Congress. §§ 201(1) and 202(a)(1), 102 Stat. 2627. The 1988 Act provided a waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627. The 1988 Act provided authority for only one round of base closures.

[17] Previous legislation prohibited base closures unless the Department of Defense provided Congress and the public with prior notice; gave a "detailed justification" for the action, including "statements of the estimated fiscal, local economic, budgetary, environmental, strategic, and operational consequences" of the proposed base closure; and allowed Congress 60 days to halt the process. Military Construction Authorization Act, 1978, Pub. L. No. 95-82, § 612(a), 91 Stat. 379 (1977) (codified at 10 U.S.C. 2687(b) (Supp. I 1977)). Moreover, the 1977 legislation made base closure decisions subject to the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 et seq. See 10 U.S.C. 2687(b)(3) (Supp. I 1977). For a variety of reasons (including protracted NEPA litiga-

(continued...)

923, 101st Cong., 2d Sess. 705 (1990); see H.R. Rep. No. 735 (Part 2), 100th Cong., 2d Sess. 8 (1988). At the same time, it was recognized that base closure legislation should address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735 (Part 2), supra, at 8-9; see H.R. Rep. No. 923, supra, at 705; 1991 Report at 1-1 to 1-2; App., infra, 82a-84a (Alito, J., dissenting).

Accordingly, the 1990 Act is structured to minimize the avenues through which political maneuvering can delay or derail the base closure process. The Act does so in part by striking a careful balance between the role of the President and Congress in the process. Although the Act vests the Executive Branch with substantial control over the selection of bases for closure, it also provides for extensive congressional involvement throughout the process. For example, the Act requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the development of base closure recommendations for the President. See, e.g., § 2903(a)(1), (b)(2), (c)(1) and (d)(3); App., infra, 104a-105a, 106a-107a, 108a. And the process facilitates substantial congressional oversight by adopting streamlined legislative procedures designed to eliminate usual delays and

---

[17](...continued)
tion), the 1977 statute "effectively prevented [the Department of Defense] from closing any major military installation." Defense Base Closure and Realignment Commission, Report to the President 1991 at 1-1 [hereinafter 1991 Report]; see H.R. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988).

opportunities for strategic maneuvering. §§ 2904(b) and 2908; App., infra, 112a-113a, 122a-125a.

A critical aspect of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 655, 101st Cong., 2d Sess 341 (1990). To safeguard the Commission's role in the process, the Act provides that its base closure recommendations must be considered as an indivisible package. H.R. Rep. No. 923, supra, at 704. The President may trigger base closures under the Act only by approving "all the recommendations" of the independent Commission. See § 2903(e)(2) and (4); App., infra, 111a.[18] The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approved for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2); App., infra, 122a, 124a.

By allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove a package of base closures, the court of appeals has struck at the heart of the carefully balanced statutory mechanism enacted by Congress. Under the court's decision, private parties -- whose representatives failed achieve their goals through the Act's streamlined legislative procedures -- will be able to pick

---

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

apart the results of the carefully crafted political process. If litigants can sue to extract an individual base (like the Philadelphia Shipyard) from the package of closures and require the Commission to redo its recommendation for such a base, then "the President and Congress will be placed in precisely the situation that the new scheme was designed to avoid -- deciding whether to close or spare a single base." App., infra, 87a (Alito, J., dissenting). That result is inconsistent with Congress's objective, evident on the face of the Act, to break the political stalemate through the use of a unitary process of base closures superintended by both political Branches.

Second, the availability of procedural challenges threatens to reintroduce into the base closure process a significant hazard that the 1988 and 1990 Acts were designed to avoid -- protracted delays from litigation. Prior to the enactment of those 1988 and 1990 Acts, litigants litigants effectively blocked base closures by mounting procedural challenges to base closures under NEPA. See H.R. Rep. No. 1071, supra, at 23; note 16, supra. Accordingly, the Base Closure Act forecloses all NEPA actions relating to the base selection process, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c); App., infra, 116a-117a. Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Rep. No. 1071, supra, at 23. Congress recognized that NEPA challenges could impede or

defeat base closures despite the procedural nature of the litigation, and Congress acted to the eliminate the threat of disruptive procedural litigation. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring NEPA challenges to the selection decision while allowing broad procedural attacks on the way the Commission formulates its nonbinding recommendations to the President.[19]

Third, the the court of appeals' ruling jeopardizes the Act's insistence on expedition and finality. See App., infra, 80a-82a,86a-87a (Alito, J., dissenting). Based on Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, supra, at 384), the Act imposes a series of strict time limits that are designed to bring the base selection process to a prompt conclusion.[20] Congress recognized that delay had been one of the

---

[19] Contrary to the court of appeals (App., infra, __ [92-485 Pet. App. 23a]). it is not plausible that Congress's disallowance of NEPA suits carries the negative implication that other types of procedural claims are available under the Act. As discussed, NEPA cases were the primary litigation-related impediments to base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. 10 U.S.C. 2687(b)(3) (Supp. I 1977). Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3); App., infra, __); hence, it was it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

[20] The Act requires the Secretary of Defense to submit his base closure recommendations to the Commission by April 15, 1991, and by March 15 in 1993 and 1995. § 2903(c)(1); App., infra, 106a-107a. The Commission must conclude its deliberations and submit its final report to the President by July 1 in each of those years. Section 2903(d)(2)(A); App., infra, 108a-109a. The President, in

(continued...)

primary causes of the stalemate over base closures. See App., infra, 80a-82a (Alito, J., dissenting); H.R. Rep. No. 923, supra, at 705 (noting that prior base closures had "take[n] a considerable period of time, and involve[d] numerous delays"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and Congress." App., infra, 80a (Alito, J., dissenting). Congress's strong emphasis on expedition in the process of selection is incompatible with the availability of protracted litigation to displace the results of the process thereafter.[21]

That conclusion is reinforced by the cyclical nature of the base closure process under the Act. The Act provides for three successive biennial rounds of base closures (see p. __, supra), and the finality of the decisions in each round is critical to planning in the following round. Delay caused by litigation over the bases closed during one round will inevitably interfere with successive rounds by creating uncertainty about the existing base structure and capacity of the Armed Services.

---

[20](...continued)
turn, must act within two weeks, by July 15. Section 2903(e); App., infra, 111a. If a joint resolution of disapproval is not enacted within 45 legislative days or the end of the legislative session, whichever is earlier, the President's decision takes effect. § 2904(a) and (b); App., infra, 112a-113a.

[21] Even after the base selection process is complete, the Base Closure Act places a continuing premium on expedition and finality. While the Act permits a limited class of NEPA suits concerning the implementation of final base closure decisions, the Act subjects such suits to a 60-day time limit. § 2905(c)(3); App., infra, 117a. That strict time limit is inexplicable if speed and finality lose their significance once closure decisions have become final.

Fourth, the Act's legislative history supports the conclusion that Congress intended to preclude all judicial review. As Judge Alito explained in dissent, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." App., infra, 78a; see H.R. Rep. No. 923, supra, at 706 ("Specific actions that would not be subject to judicial review include the issuance of a force structure plan * * * , the issuance of selection criteria * * * , the Secretary of Defense's recommendation of closures and realignments * * * , the decision of the President * * * , and the Secretary's actions to carry out the recommendations of the Commission.").[22] Moreover, the Act's legislative history undercuts the court of appeals' distinction between the reviewability of substantive and procedural claims; as discussed, it evinces a clear concern for the ability of procedural litigation to derail the selection of obsolete bases for closure. See App., infra, 75a-77a (Alito, J., dissenting) (discussing legislative history on NEPA's applicability). Although the legislative history is not itself conclusive, it nevertheless tends to confirm the strong inferences of preclusion drawn from the structure and purposes of the statutory scheme.

---

[22] Although the court of appeals concluded that that legislative history referred only to instances of nonfinal agency action (App., infra, 58a-59a), the court acknowledged that some of the actions described by the report as unreviewable "concededly do not fit" that explanation. Id. at 59a.

Fifth, the court's decision creates significant remedial concerns.[23] Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recommendations to the Secretary and Commission for further proceedings in accordance with the Act. App., infra, 60a n.13. The Commission, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members expire at the end of the session of Congress in which they were appointed. § 2902(d)(1) and (e)(1); App., infra, 100a. Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been assembled for the next biennial round. At that point, the Commission is occupied with the next set of base closures. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is unlikely that Congress intended to permit judicial review of the base closure decisions at all.

* * * * *

For the foregoing reasons, the court of appeals erred in holding that the Act does not preclude judicial review of respondents' procedural claims. The court's ruling threatens to drain this Court's recent decision Franklin of meaning, by subjecting

---

[23] In addition, although the court of appeals purported to limit its decision to procedural matters, judicial review will inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Shipyard and other naval installations.

the President's action to sweeping non-APA review for statutory errors. It also creates a direct conflict with the First Circuit's recent decision in Cohen v. Rice, supra, which properly applied Franklin to foreclose judicial review of an identical procedural challenge to a base closure in Maine. Finally, the court of appeals' decision undermines the authority of the President and Congress to close unneeded military bases in the manner prescribed by Congress in the Base Closure Act. Further review is therefore warranted to restore the integrity of the Act's processes and vindicate the substantial public interest in a rational and expeditious base closure mechanism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys

AUGUST 1993

< CONFIRMATION REPORT >

07-30-1993(FRI) 09:13

[TRANSMIT]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
6450	7-30	09:11	9088528225	2	0°01'24"	NORMAL	OK
				2	0°01'24"		

Document Separator

QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and the Commission's members—James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

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

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
A. Statutory background	3
B. The proceedings in this case	5
Reasons for granting the petition	10
Conclusion	29
Appendix A	1a
Appendix B	26a
Appendix C	83a
Appendix D	85a
Appendix E	92a
Appendix F	95a
Appendix G	98a
Appendix H	129a

TABLE OF AUTHORITIES

Cases:

Block v. *Community Nutrition Institute,* 467 U.S. 340 (1984) 21, 22

Board of Liquidation v. *McComb,* 92 U.S. 531 (1876) 18

Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.,* 333 U.S. 103 (1948) 12-13

Cohen v. *Rice:*

800 F. Supp. 1006 (D. Me. 1992) 19

992 F.2d 376 (1st Cir. 1993) 3, 11, 19, 20

Commonwealth v. *Mosbacher,* 785 F. Supp. 230 (D. Mass.), rev'd *sub nom. Franklin* v. *Massachusetts,* 112 S. Ct. 2767 (1992) 15

Department of the Navy v. *Egan,* 484 U.S. 518 (1988) 20, 21

Cases—Continued: Page

Franklin v. *Massachusetts*, 112 S. Ct. 2767 (1992) .. 2, 9, 10, 11, 12, 13, 14, 15, 16
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 14
International Primate Protection League v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700 (1991) 17
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 17, 18
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 14
Noble v. *Union River Logging R.R.*, 147 U.S. 165 (1893) 17
Payne v. *Central Pac. Ry.*, 255 U.S. 228 (1921) 18
Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 18
United States ex rel. Goldberg v. *Daniels*, 231 U.S. 218 (1913) 17
United States Dep't of Commerce v. *Montana*, 112 S. Ct. 1415 (1992) 16
Webster v. *Doe*, 486 U.S. 592 (1988) 16
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 13, 16

Constitution and statutes:

Amend. V (Due Process Clause) 8, 16
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 701 .....2, 129a
5 U.S.C. 701(a)(1) 6, 129a
5 U.S.C. 701(a)(2) 8, 20, 129a
5 U.S.C. 704 .....2, 3, 7, 130a
5 U.S.C. 706(1) 15
Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623:
§ 201(1), 102 Stat. 2627 22
§ 202(a)(1), 102 Stat. 2627 22
§ 202(b), 102 Stat. 2627 22
§ 203, 102 Stat. 2627-2628 22
Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808 (10 U.S.C. 2687 note (Supp. IV 1992)) 2, 3, 98a

Statutes—Continued: Page

§ 2902(a) 4, 98a
§ 2902(d) (1) 28, 100a
§ 2902(e) (1) 28, 100a
§ 2903(a) 4, 21, 104a
§ 2903(a) (1) 23, 104a
§ 2903(b) 4, 105a
§ 2903(b) (2) 23, 106a
§ 2903(c) 4, 106a
§ 2903(c) (1) 3, 4, 21, 23, 106a-107a
§ 2903(c) (4) 4, 107a
§ 2903(d) (1) 4, 108a
§ 2903(d) (2) 4, 21, 108a
§ 2903(d) (2) (B) 4, 108a
§ 2903(d) (2) (C) 4, 109a
§ 2903(d) (3) 23, 110a
§ 2903(e) 4, 111a
§ 2903(e) (1)-(3) 4, 111a
§ 2903(e) (1)-(4) 18, 111a
§ 2903(e) (2) 24, 111a
§ 2903(e) (3) 4, 12, 24, 111a
§ 2903(e) (4) 24, 111a
§ 2903(e) (5) 4, 12, 24, 111a
§ 2904(a) 5, 12, 28, 112a
§ 2904(b) 5, 7, 12, 23, 112a
§ 2905(c) 25, 116a
§ 2905(c) (3) 25, 26, 117a
§ 2908 ..... 5, 23, 122a
§ 2908(a) (2) 24, 122a
§ 2908(d) (2) 24, 123a
§ 2910(5) 3, 127a

Military Construction Authorization Act of 1978, Pub. L. No. 95-82, § 612(a), 91 Stat. 379 (10 U.S.C. 2687(b) (Supp. I 1977)) 22

National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190:

Tit. III, 105 Stat. 1331:

§ 344(b) (1), 105 Stat. 1345 2

Tit. XXVIII, 105 Stat. 1537:

§ 2821, 105 Stat. 1544-1546 2
§ 2827(a), 105 Stat. 1551 2

Statutes—Continued: Page

National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315:
Tit. X, § 1054(b), 106 Stat. 2502 2
Tit. XXVIII, § 2821(b), 106 Stat. 2607-2608 2
National Environmental Policy Act, 42 U.S.C. 4331 *et seq.* 22
10 U.S.C. 2687(b)(3) (Supp. I 1977) 22, 25

Miscellaneous:

137 Cong. Rec. (daily ed. July 30, 1991):
pp. H6006-H6039 5
pp. H6009-H6010 6
pp. H6010-H6011 6
p. H6021 6
p. H6039 6
Defense Base Closure and Realignment Commission, *Report to the President 1991* 22-23
56 Fed. Reg. 15,184 (1991) 5
H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) 23, 25
H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. (1990) 22-23, 26, 27
H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 2 (1988) 23
H.R. Rep. No. 665, 101st Cong., 2d Sess. (1990) 23, 26

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

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

v.

ARLEN SPECTER, ET AL.

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

The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Chairman and members of the Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (App., *infra,* 26a-82a) is reported at 971 F.2d 936. The opinion of the district court (App., *infra,* 85a-91a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. App., *infra,* 92a-94a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

STATEMENT

Respondents brought this action seeking to enjoin the closure of the Philadelphia Naval Shipyard under the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. C.A. App. 61, 65, 68.[2] A divided panel of the court of appeals concluded that certain of respondents' procedural objections to base-closure recommendations made by the Secretary of Defense to the Defense Base Closure and Realignment Commission—and by the Commission to the President—are subject to judicial review under the APA. App., *infra,* 60a-62a. Subsequently, in *Franklin* v. *Massachusetts,* 112 S. Ct. 2767 (1992), a case involving a similar statutory scheme, this Court held that recommendations of subordinate officials to the President do not

---

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

[2] Respondents are Members of Congress from Pennsylvania and New Jersey; Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; Philadelphia Naval Shipyard workers; and local unions. See App., *infra,* 28a.

constitute "final agency action" under the APA, 5 U.S.C. 704, and that the APA does not apply to the President's actions. We accordingly petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the court of appeals' decision, and remanded the case for further consideration in light of *Franklin*. App., *infra,* 83a-84a.

On remand, a divided panel of the court of appeals concluded that *Franklin* permits judicial review of procedural claims under the Base Closure Act, reasoning that if the Secretary of Defense and the Commission committed procedural errors, the President acted beyond his constitutional authority in approving the Commission's recommendations. App., *infra,* 9a-12a. In so doing, the panel's decision on remand (1) evades the holding of *Franklin* and broadly subjects the President's actions to judicial review despite the limited scope of the APA; (2) squarely conflicts with the First Circuit's recent decision in *Cohen* v. *Rice,* 992 F.2d 376 (1993); and (3) threatens the integrity and expedition of the carefully designed process that Congress established in the Base Closure Act.

A. Statutory Background

The Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, established a mechanism for identifying and closing unnecessary domestic military bases. The Act provides for three rounds of base closures,[3] to take place in 1991, 1993, and 1995. § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to the

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

national security" during that period. § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria to be used in making base closure recommendations. § 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c).

The Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent commission established under the Act.[4] §§ 2902 (a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2). The Commission may make changes in the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. § 2903(d)(2)(B) and (C). The Commisison must then forward its report to the President by July 1. § 2903(e).

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

If the President approves the initial or revised recommendations, Congress then reviews the President's decision

---

[4] The Secretary must make available to the Commission and the Comptroller General (*viz.* the General Accounting Office (GAO)) all the information used in making his recommendations. § 2903 (c)(4).

through the mechanism of considering a joint resolution of disapproval. §§ 2904(b), 2908. If a joint resolution of disapproval is enacted (after presentment to the President for signing), the Secretary of Defense may not close or realign the bases approved by the President. § 2904 (b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,[5] the Secretary is required to close or realign all of the military installations approved by the President for closure or realignment. § 2904(a).

B. The Proceedings In This Case

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

On July 10, 1991, the President approved the Commission's recommendations. C.A. App. 52. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. App., *infra,* 33a-34a. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing

[5] To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate ordinary delays. § 2908.

debate, several of the respondent Members of Congress contended that the proposed resolution should be passed because of alleged flaws in the procedures by which the Philadelphia Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The House, however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; App., *infra,* 34a.

b. On July 8, 1991, respondents filed this action under the APA and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. C.A. App. 7, 61, 65, 68. Respondents claimed, among other things, that the Secretary of Defense and the Commission failed to comply with certain procedural requirements alleged to be imposed by the Base Closure Act. See, *e.g., id.* at 58-59, 67; App., *infra,* 6a-7a n.3 35a, 60a, 62a. Respondents did not name the President as a defendant, nor did they allege that he had violated the Act or otherwise acted unlawfully.

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

2. a. A divided panel of the court of appeals affirmed in part and reversed in part. See App., *infra,* 26a-82a.[6]

---

[6] The court of appeals held that the plaintiff union members and Philadelphia Shipyard employees had standing to challenge the base closure. Because the positions of all the plaintiffs were the same, the court declined to address the standing of the others. App., *infra,* 36a-39a.

As a preliminary matter, the court of appeals considered whether the actions at issue in this case constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. Although respondents were challenging actions or omissions of the Secretary of Defense and the Commission in making their recommendations, the court acknowledged that "at least in one sense, we are being asked to review a presidential decision." App., *infra,* 43a. As the court explained, because the Secretary and the Commission have authority only to make recommendations under the Act, respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. *Id.* at 42a. The court of appeals recognized that the APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. *Id.* at 43a. Nevertheless, the court concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, automatically immune from judicial review at common law. *Ibid.*

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

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found that the substance of the President's base closure decision "is committed by law to presidential dis-

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

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

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the Base Closure Act violated their rights under the Due Process Clause. The court reasoned that the Act created no property interest in the plaintiffs. App., *infra,* 67a-69a.[7]

b. Judge Alito dissented, concluding that the Base Closure Act precludes judicial review of all statutory claims, procedural and substantive. App., *infra,* 69a-82a. After examining the structure and history of the Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also

---

[7] The court of appeals also reversed the district court's ruling that this lawsuit should be dismissed under the political question doctrine. App., *infra,* 63a-67a.

concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

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

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

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that *Franklin* does not affect the reviewability of respondents' procedural claims. App., *infra,* 1a-25a. The court reasoned that the Court in *Franklin* "declined only to review the President's decision under the APA" and that it "expressly sanctioned" judicial review of the constitutionality of Presidential decisions. App., *infra,* 10a. The majority concluded that if the Secretary and the Commission violated the Base Closure Act's

procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. *Id.* at 10a-12a. The majority further reasoned that because the President may act only pursuant to constitutional or statutory authority, review of Presidential action for consistency with the "non-discretionary mandates of [an] authorizing statute" was "a form of constitutional review" authorized under *Franklin*. *Ibid.*

b. Judge Alito again dissented. App., *infra,* 19a-25a. He noted that respondents "vigorously contended * * * that *Franklin* does not bar review *under the APA,*" and did not argue "that they were entitled to non-APA review based either on common law or separation of powers principles." *Id.* at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the Base Closure Act's procedural requirements. *Id.* at 21a-25a.

c. On June 14, 1993, the court of appeals denied petitioners' petition for rehearing and suggestion of rehearing en banc. Judges Hutchinson, Nygaard, and Alito would have granted rehearing en banc. App., *infra,* 92a-94a.

REASONS FOR GRANTING THE PETITION

Because it allows judicial review of alleged procedural errors in the formulation of the Commission's nonbinding recommendations to the President, the court of appeals' decision in this case cannot be reconciled with this Court's decision in *Franklin* v. *Massachusetts, supra.* By holding that the President's action is reviewable—for *constitutional* error—whenever his subordinates allegedly commit procedural errors under the statute authorizing the President to act, the court of appeals' decision opens the door to

broad non-APA judicial challenges to Presidential action. The ruling below therefore eviscerates the limits on judicial review recognized by this Court in *Franklin.* It also creates a direct conflict with the First Circuit's recent decision in *Cohen* v. *Rice, supra,* which dismissed a virtually identical suit challenging a base closure in Maine and specifically held that *Frankiln* precludes judicial review of all claims under the Base Closure Act.

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

This Court held that there was no "final agency action" that may be reviewed under the APA. *Franklin,* 112 S. Ct. at 2773. Turning first to the report prepared by the Secretary of Commerce, the Court explained that the "core question" regarding finality was "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Ibid.* Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774.

By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. *Franklin,* 112 S. Ct.

at 2775. The Court held, however, that it was not final "agency" action for purposes of the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court held that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." *Ibid.* Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." *Id.* at 2775-2776.

A straightforward application of *Franklin* makes clear that there likewise is no "final agency action" reviewable under the APA in this case. As relevant here, respondents' complaint challenges the validity of the procedures used by the Secretary of Defense and the Commission to prepare their base closure recommendations. Like the Secretary's report in *Franklin,* the base closure report of the Commission is only tentative and has "no direct effect" (*Franklin,* 112 S. Ct. at 2774), until after the President certifies his approval of the report to Congress. See § 2904(a) and (b); pp. 4-5, *supra.* The actions of the Secretary of Defense, which precede those of the Commission in the decision-making process, are even more "tentative." *Franklin,* 112 S. Ct. at 2774. In short, because the challenged actions of the Commission and the Secretary are merely nonbinding and preliminary to the President's final decision, they do not, under *Franklin,* constitute "final agency action" that is subject to judicial review under the APA.[8] See also *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.,* 333

[8] If anything, the Secretary's and the Commission's recommendations in this case are more clearly nonfinal than the report of the Secretary of Commerce in *Franklin.* Whereas the President's role in reapportionment is "admittedly ministerial" (*Franklin,* 112 S. Ct. at 2775), the Base Closure Act explicitly contemplates that the President must approve or disapprove the Commission's recommendations, and he may end the process entirely by disapproving the Commission's recommendations. § 2903(e)(3) and (5).

U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process"). And because the President is not an "agency," his action in approving the Commission's recommendations and certifying that approval to Congress is not subject to judicial review under the APA. *Franklin,* 112 S. Ct. at 2775-2776.

b. Although this Court vacated the court of appeals' prior decision and remanded it for further consideration in light of the principles articulated in *Franklin* (see 113 S. Ct. 455; App., *infra,* 83a-84a), the court of appeals evaded *Franklin*'s holding by recasting respondents' routine statutory claims of procedural error by subordinate officials into constitutional claims of ultra vires action by the President.[9] Relying on this Court's observation in *Franklin* that "the President's actions may * * * be reviewed for constitutionality" (112 S. Ct. at 2776), and citing *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), for the proposition that the President's actions must be rooted in constitutional or statutory authority, the court of appeals in this case held that allegations of defects in the President's subordinates' compliance with the requirements of an authorizing statute automatically raise constitutional questions that are reviewable under *Franklin.* App., *infra,* 10a-12a. That reasoning, however, is inconsistent with *Franklin* and traditional precepts governing judicial review of governmental acts.

---

[9] In fact, respondents did not purport to challenge the President's actions, on constiutional or other grounds. In their brief on remand, respondents emphasized that "it is the conduct of [the] defendants —not that of the President—that [they] challenge." Resp. C.A. Remand Br. 12 (emphasis omitted). Respondents explained, moreover, that they "do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." *Id.* at 8.

First, the court of appeals has applied the concept of ultra vires action so broadly that it effectively does away with *Franklin*'s restrictions on judicial review of Presidential action. The court in this case held that respondents stated a constitutional challenge to Presidential action in approving recommendations that allegedly were formulated in a procedurally flawed manner by his subordinates. If such claims of garden-variety statutory error by subordinates are sufficient to trigger "common law" judicial review of the President's actions (App., *infra,* 8a)—notwithstanding *Franklin* and the limited reach of the APA—then few if any challenges to Presidential actions will be unreviewable in practice.

That result would sharply undermine *Franklin*'s concern for "the separation of powers and the unique constitutional position of the President." *Franklin,* 112 S. Ct. 2775. By vesting the ultimate decision concerning base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a uniquely accountable official, and one whose actions are not reviewable under the APA for routine defects. In light of the separation of powers considerations articulated in *Franklin* and other decisions of this Court (cf. *Nixon* v. *Fitzgerald,* 457 U.S. 731, 747-753 (1982); *Harlow* v. *Fitzgerald,* 457 U.S. 800, 811 n.17 (1982)), the court of appeals erred in subjecting the President's final action to broad judicial review for alleged statutory error in the way his subordinates formulated their tentative, nonbinding recommendations under the Base Closure Act.

In approving broad judicial review, moreover, the court of appeals misplaced reliance on *Youngstown* by conflating claims of statutory error and claims of ultra vires Executive conduct, and then by characterizing all challenges to ultra vires conduct as raising constitutional claims. At issue in this case are respondents' claims that (1) the Secretary of Defense failed to transmit certain

information to the Commission and the GAO; and (2) that the Commission based its decision in part on private meetings rather than public hearings. See App., *infra*, 6a-7a n.3. The court of appeals did not suggest that those routine allegations of statutory error on the part of the Secretary or the Commission were themselves of constitutional dimension. If they were, virtually every claim of statutory error by any federal agency would fall in that category, thereby constitutionalizing the entire body of law governing judicial review of agency action. That result would be a radical departure from the long-settled view that judicial review of an agency's compliance with statutory standards and limitations is itself subject to regulation and preclusion by Act of Congress—now, through the APA. Such a dispute arising under a federal statute is not automatically transformed into one arising under the Constitution whenever it is alleged that the President exercised his statutory authority on the basis of recommendations that were formulated by federal agencies in a manner that departed from statutory standards.[10]

By contrast, *Youngstown* involved an emergency Presidential order to seize private steel mills during the Korean War. Although two statutes authorized the seizure of

---

[10] In *Franklin*, the plaintiffs challenged the counting of overseas military personnel on the ground that it was inconsistent with the Census Act, as well as with the APA and the Constitution. See *Commonwealth* v. *Mosbacher*, 785 F. Supp. 230, 231 n.31 (D. Mass. 1992); *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); Brief for Appellees at 74-76. Although the majority did not specifically refer to that claim in this Court, its holding that the appellees had no right of judicial review to raise their statutory challenge under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(1) (allowing court to set aside agency actions that are "arbitrary and capricous," "an abuse of discretion," or "in excess of statutory * * * authority"), and the absence of "final agency action" therefore precludes judicial review of both.

private property under specified conditions, the government in *Youngstown* conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that it regarded the pertinent statutory authority as "too cumbersome, involved, and time-consuming." 343 U.S. at 586. The government instead relied on the President's inherent power under the Constitution as authority for the seizure, and this Court held that the Constitution did not furnish that authorization. The claims of ultra vires conduct in *Youngstown* are therefore a far cry from respondents' routine and contested claims of procedural irregularity in the formulation of tentative, nonbinding recommendations for the President under a statute that concededly *does* authorize the President to take the action respondents challenge. Moreover, the action challenged in *Youngstown* directly invaded property rights of the plaintiffs that were independently protected by the Constitution. In this case, by contrast, the court of appeals acknowledged that respondents have no property rights protected by the Constitution in the base closure setting. App., *infra,* 67a-69a. There can be no serious doubt that Congress can decline to provide for judicial challenges to actions of the President or other Executive officials at the behest of individuals whose own constitutional rights are not at stake.[11]

The distinction between routine statutory claims, such as those advanced by respondents here, and claims of

---

[11] In *Franklin,* the Court concluded that although judicial review under APA standards was precluded, "that does not dispose of appellees' constitutional claims." 112 S. Ct. at 2776 (citing *Webster* v. *Doe,* 486 U.S. 592, 603-605 (1988)). In *Franklin,* the constitutional claim was based on the appellees' own asserted right as voters to an apportionment of Representatives in conformity with the Constitution. See 112 S. Ct. at 2776 (citing *United States Dep't of Commerce* v. *Montana,* 112 S. Ct. 1415 (1992)). And in *Webster* v. *Doe,* it was based on the personal right of the plaintiff under the equal protection component of the Due Process Clause. No such individual rights are at issue in this case.

ultra vires action is illustrated by this Court's precedents addressing sovereign immunity. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In such cases, the Court has distinguished between (1) claims that an officer acted "*ultra vires* his authority," which are the proper subject of specific relief, and (2) mere "claim[s] of error in the exercise of that power," which are barred by sovereign immunity. *Id.* at 689-690.[12] As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." *Id.* at 691 n.12; see *Noble* v. *Union River Logging R.R.*, 147 U.S. 165, 174 (1893).[13] Although the distinction is not always simple to apply (see *International Primate Protection League* v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700, 1708 (1991)), a finding of ultra vires executive action re-

[12] As this Court explained, the theory underlying such cases was that when "the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his actions "are *ultra vires* his authority and * * * may be made the object of specific relief." *Ibid.*

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

quires a "depart[ure] from a plain official duty" (*Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); cf. *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1876) (specific relief against violation by state officers of "plain official duty, requiring no exercise of discretion").

Under those principles, the court of appeals in this case erred in holding that respondents' procedural allegation against the Secretary of Defense and the Commission automatically state claims of ultra vires Presidential action. As the court below acknowledged, "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and "the decision on which bases to close is committed by law to presidential discretion." App., *infra*, 46a, 69a. That conclusion cannot be reconciled with the court of appeals' subsequent holding that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (*Payne*, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" in the circumstances presented here. *Larson*, 337 U.S. at 691 n.12.[14] Far from having acted

[14] The only obligation imposed on the President by the Base Closure Act is to decide, in his discretion, whether to approve or disapprove the Commission's recommendations and to give notice of his decision to the Commission and Congress. § 2903(e)(1)-(4). As Judge Alito explained in dissent (App., *infra*, 23a-24a):

> Nothing in the[] provisions of the [Act] suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at

in excess of his authority under the Base Closure Act, the President did precisely what the Act authorized him to do.

c. The court of appeals' decision in this case conflicts with the First Circuit's recent decision in *Cohen* v. *Rice, supra.* The plaintiffs in that case challenged the closing of the Loring Air Force Base in Limestone, Maine, and made many of the same allegations against the Secretary and the Commission that respondents have made here. In particular, the plaintiffs in *Cohen,* like respondents in this case, alleged that the responsible service Secretary did not provide all of the required information to Congress and the GAO, and that the Commission failed to hold the public hearings required under the Act. 992 F.2d at 380. The First Circuit affirmed the district court's dismissal of the action in its entirety, agreeing that *Franklin* was "directly applicable to the facts of the present controversy." 992 F.2d at 381 (quoting *Cohen* v. *Rice,* 800 F. Supp. 1006, 1011 (D. Me. 1992)). The First Circuit explicitly rejected the contention that *Franklin* did not apply because the case before it "involve[d] a challenge to the

---

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

Commission's faulty *procedures*" rather than the substance of its recommendations. 992 F.2d at 382. The court emphasized that *Franklin* drew no such distinction and that, in any case, it was "a distinction without a legal difference." *Ibid.* Thus, the court of appeals in *Cohen*, unlike the Third Circuit in this case, did not reach out to recast the plaintiffs' statutory allegations as reviewable claims of unconstitutional Presidential action.

If the President, the Department of Defense, and the Commission are to administer the Base Closure Act in a coherent manner that is consistent across the Nation—and that treats all closures in a single package in a uniform manner—the same agency actions cannot be reviewable in one circuit and unreviewable in another. Further review is therefore warranted to resolve the conflict between the decision below and *Cohen,* and to establish that *Franklin* in fact bars judicial review of procedural claims under the Base Closure Act.

2. The court of appeals also erred in holding in its prior opinion (App., *infra,* 48a-55a) that the Base Closure Act does not "preclude judicial review" under the APA, 5 U.S.C. 701(a)(2). As discussed above (p. 6, *supra*), the district court dismissed this suit in its entirety on the ground that the Base Closure Act implicitly precludes judicial review of all claims arising under the Act. App., *infra,* 85a-88a. In reversing that decision, the court of appeals seriously misapprehended the extent to which judicial intervention is contrary to the structure and purposes of the Base Closure Act.

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. App., *infra,* 40a-41a. In our view, reliance on that presumption is misplaced in the context of the Base Closure Act, which addresses sensitive questions of national security and military policy. See *Department of the Navy* v. *Egan,* 484 U.S. 518, 527 (1988) (presump-

tion of reviewability "runs aground when it encounters concerns of national security"). As this Court has explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530 (citing cases). Indeed, the Third Circuit acknowledged that the Base Closure Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources." App., *infra,* 46a. Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, *e.g.,* § 2903 (a), (c)(1) and (d)(2)), the court of appeals erred in applying the ordinary administrative law presumption that Congress desires judicial review of the outcome of an administrative process.[15]

Even if the general presumption applies in this setting, moveover, it may be rebutted "whenever [a] congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' " *Block* v. *Community Nutrition Institute,* 467 U.S. 340, 351 (1984). The pertinent congressional intent may be found in a variety of sources. The presumption "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349. The pertinent congressional intent "may also be inferred from contemporaneous judicial construction barring review and congres-

[15] Although the court of appeals purported to limit its holding to the Secretary's and the Commission's alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act provides that the President can approve or disapprove the Commission's recommendations for any reason at all (App., *infra,* 46a, 69a); the court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his subordinates have not observed every procedural particular alleged to be required under the Act.

sional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." *Ibid.* (citation omitted). Most importantly, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Ibid.* When measured against those standards, the Base Closure Act precludes judicial review of the base closure process.

First, the structure of the Base Closure Act indicates that judicial review is incompatible with the statutory scheme. Like its immediate predecessor, the Defense Authorization Amendments and Base Closure and Realignment Act (1988 Act), Pub. L. No. 100-526, 102 Stat. 2623,[16] the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases.[17] H.R. Conf.

---

[16] The 1988 Act provided for an independent Commission on Base Realignment and Closure. § 203, 102 Stat. 2627-2628. The Commission submitted a report recommending base closures to the Secretary of Defense, who was not authorized to close bases under the 1988 Act unless he approved the report and transmitted it to Congress. §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act provided a waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627. The 1988 Act provided authority for only one round of base closures.

[17] Previous legislation prohibited base closures unless the Secretary of Defense provided Congress and the public with prior notice; gave a "detailed justification" for the action, including "statements of the estimated fiscal, local economic, budgetary, environmental, strategic, and operational consequences" of the proposed closure; and allowed Congress 60 days to halt the process. Military Construction Authorization Act, 1978, Pub. L. No. 95-82, § 612(a), 91 Stat. 379 (codified at 10 U.S.C. 2687(b) (Supp. I 1977)). Moreover, the 1977 legislation made base closure decisions subject to the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.* See 10 U.S.C. 2687(b)(3) (Supp. I 1977). For a variety of reasons (including protracted NEPA litigation), the 1977 statute "effectively prevented [the Department of Defense] from closing any major military installation." Defense Base Clo-

Rep. No. 923, 101st Cong., 2d Sess. 705 (1990); see H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 2, at 8 (1988). At the same time, it was recognized that base closure legislation should address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735, *supra*, Pt. 2, at 8-9; see H.R. Conf. Rep No 923, *supra*, at 705; *1991 Report* at 1-1 to 1-2; App., *infra*, 77a-79a (Alito, J., dissenting in part).

Accordingly, the 1990 Act is structured to minimize the ways in which political maneuvering can delay or derail the base closure process. The Act does so in part by striking a careful balance between the roles of the President and Congress in the process. Although the Act vests the Executive Branch with substantial control over the selection of bases for closure, it also provides for extensive congressional involvement throughout the process. For example, the Act requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the development of base closure recommendations for the President. See, *e.g.*, § 2903 (a)(1), (b)(2), (c)(1) and (d)(3). And the process facilitates substantial congressional oversight by adopting streamlined legislative procedures designed to eliminate the usual opportunities for delay and strategic maneuvering. §§ 2904(b), 2908.

A critical aspect of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To safeguard the Commission's role in the process, the Act provides that its recommendations must be considered as an indivisible package. H.R. Conf. Rep. No. 923, *supra*, at 704. The President may trigger base closures under the Act only by approving "all the

---

sure and Realignment Commission, *Report to the President 1991*, at 1-1 [hereinafter *1991 Report*]; see H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988).

recommendations" of the independent Commission. See § 2903(e)(2) and (4).[18] The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approved for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2).

By allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove a package of base closures, the court of appeals has struck at the heart of the carefully balanced statutory mechanism enacted by Congress. Under the court's decision, private parties—whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedure—will be able to pick apart the end product of that process. If litigants can sue to extract an individual base (such as the Philadelphia Naval Shipyard) from the package of closures and require the Commission to redo its recommendation for that base, then "the President and Congress will be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base." App., *infra,* 82a (Alito, J., dissenting in part).[19] That result is inconsistent with Congress's objective, evident on the face of the Act, to break the political stalemate through the use of a unitary process of base closures superintended by both political Branches.

---

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

[19] The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See App., *infra,* 81a (Alito, J., dissenting in part).

Second, the availability of procedural challenges threatens to reintroduce into the base closure process a significant hazard that the 1988 and 1990 Acts were designed to avoid—protracted delays from litigation. Prior to the enactment of those 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges to base closures under NEPA. See H.R. Conf. Rep. No. 1071, *supra,* at 23; note 17, *supra.* Accordingly, the Base Closure Act forecloses all NEPA actions relating to the base selection process, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c). Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra,* at 23. Congress recognized that NEPA challenges could impede or defeat base closures despite the procedural nature of the litigation, and Congress acted to eliminate the threat of such disruptive procedural litigation. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring NEPA challenges to the selection decision while allowing broad procedural attacks on the way the Commission formulates its non-binding recommendations to the President.[20]

---

[20] Contrary to the court of appeals' view (App., *infra,* 51a), it is not plausible that Congress's disallowance of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. As discussed in the text, NEPA cases were the primary litigation-related impediments to base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. 10 U.S.C. 2687(b)(3) (Supp. I 1977). Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

Third, the court of appeals' ruling jeopardizes the Act's insistence on expedition and finality. See App., *infra*, 75a-77a, 81a-82a (Alito, J., dissenting in part). Based on Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, *supra*, at 384), the Act imposes a series of strict time limits that are designed to bring the base selection process to a prompt conclusion. See pp. 4-5, *supra*. Congress recognized that delay had been one of the primary causes of the stalemate over base closures. See App., *infra*, 75a-77a (Alito, J., dissenting in part); H.R. Conf. Rep. No. 923, *supra*, at 705 (noting that prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress." App., *infra*, 75a (Alito, J., dissenting in part). Congress's strong emphasis on expedition in the process of selection is incompatible with the availability of protracted litigation to displace the results of that process thereafter.[21]

That conclusion is reinforced by the cyclical nature of the base closure process under the Act. The Act provides for three successive biennial rounds of base closures (see p. 3, *supra*), and the finality of the decisions in each round is critical to planning in the following round. Delay by litigation over the bases closed during one round will inevitably interfere with successive rounds by creating

---

[21] Even after the base selection process is complete, the Base Closure Act places a continuing premium on expedition and finality. While the Act permits a limited class of NEPA suits concerning implementation of the final base closure decision, the Act subjects such suits to a 60-day time limit. § 2905(c)(3). That strict time limit is inexplicable if speed and finality lose their significance once closure decisions have become final.

uncertainty about the existing base structure and capacity of the Armed Services.

Fourth, the Act's legislative history strongly supports the conclusion that Congress intended to preclude all judicial review. As Judge Alito explained in dissent, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." App., *infra,* 73a; see H.R. Conf. Rep. No. 923, *supra,* at 706 ("Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * *, the issuance of selection criteria * * *, the Secretary of Defense's recommendation of closures and realignments * * *, the decision of the President * * *, and the Secretary's actions to carry out the recommendations of the Commission.").[22] Moreover, the Act's legislative history undercuts the court of appeals' distinction between the reviewability of substantive and procedural claims; it evinces a clear concern for the ability of procedural litigation to derail the selection of obsolete bases for closure. See App., *infra,* 70a-72a (Alito, J., dissenting in part) (discussing legislative history on NEPA's applicability).[23]

Fifth, the court's decision creates significant remedial concerns. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recom-

---

[22] Although the majority concluded that the legislative history referred only to instances of nonfinal agency action (App., *infra,* 53a-54a), it acknowledged that some of the actions described by the report as unreviewable "concededly do not fit" that explanation. *Id.* at 54a.

[23] In addition, although the court of appeals purported to limit its decision to procedural matters, judicial review will inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Shipyard and other naval installations.

mendations to the Secretary and Commisison for further proceedings in accordance with the Act. App., *infra,* 55a n.13. The Commission itself, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been assembled for the next biennial round. At that point, the Commission is occupied with the next set of base closures. Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval of the President's report and certification, the Secretary of Defense "*shall* * * * close all military installations recommended for closure by the President pursuant to section 2903 (e)." § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

AUGUST 1993

APPENDIX A

Filed May 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL No. 2

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; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

(D.C. Civil Action No. 91-4322)

On Remand from the Supreme Court
of the United States
(No. 92-485)

Reargued February 24, 1993

BEFORE: STAPLETON, SCIRICA and ALITO, *Circuit Judges*

(Opinion Filed May 18, 1993)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This action to enjoin the defendants from carrying out a decision to close the Philadelphia Naval Shipyard is before us for the second time. In our initial opinion in this case. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992), we held, *inter alia*, that plaintiffs' claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Defense Base Closure and Realignment Act of 1990 could proceed in the district court. Our mandate, however, was vacated by the Supreme Court and the case was remanded for reconsideration in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). After consideration of the impact of *Franklin* upon our prior holding, we conclude that no change in that holding is warranted. We will therefore remand this matter to the district court for further proceedings consistent with our earlier opinion.

I.

A.

In *Franklin*, the Supreme Court was presented with a situation at least superficially similar to the one before us; however, it is the differences between the two cases that we find dispositive. *Franklin* was a suit against the President, the Secretary of Commerce, and a number of other public officials challenging the methods used in the 1990 census and the manner in which the number of seats in the House of Representatives had been allocated to the various states. Plaintiffs' claims were based upon the Administrative Procedure Act (APA) and the Constitution. A three judge panel of the United States District Court for the District of Massachusetts initially found in favor of the plaintiffs and granted the relief sought—relief which included an injunction directing the Secretary of Commerce to alter her reapportionment report and the President to recalculate the number of Representatives per State and transmit the new calculation to Congress. *Franklin*, 112 S. Ct. at 2770.

The Supreme Court reversed. It first analyzed plaintiff's claim under the APA which allows review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). The Court concluded that the Secretary of Commerce's report to the President on the results of the census does not constitute "final agency action" and is therefore unreviewable under the APA because "[t]he President, not the Secretary takes the final action that affects the States." *Franklin*, 112 S. Ct.

at 2775; *see also id.* at 2773 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). Next, the Court held that although the President's calculation of the number of Representatives and forwarding of that calculation to Congress is a final action, the President is not an "agency" within the meaning of the Act and thus, the President's action is not reviewable for abuse of discretion under the APA. *Id.* at 2775. Finally, the Court noted that there is judicial review of presidential action to determine whether it violates the Constitution; however, it concluded that the action complained of in *Franklin* was not unconstitutional.

B.

The action currently before us is a suit against the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure Commission seeking to enjoin the closing of the Philadelphia Naval Shipyard.[1] Under the Defense Base Closure and Realignment Act of 1990 ("the Act"), it is the responsibility of the Secretary of Defense to close the bases designated as a result of the process prescribed by the Act, Pub. L. No. 101-510, §§ 2904-2905, 104 Stat. 1808, 1812-14 (1990), and the primary relief sought here is an order enjoining the Secretary from closing the Shipyard. The alleged basis for this relief is that the process that resulted in the designation of the Shipyard as a base to be closed did not comply with the requirements set forth in the Act.

---

[1] The President is not a defendant in this suit.

In our prior opinion, we first held that there could be no judicial review prior to the end of the process required by the Act because there was no final decision prior to that point that had an adverse impact on the plaintiffs.[2] We also concluded that the decisionmaking of the President under the Act was committed to his discretion and not properly reviewable. *Specter*, 971 F.2d at 946 ("One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure . . . ."). Similarly, we held that the decisionmaking of other federal officials (i.e. the Secretary of Defense, the members of the Commission) challenged by plaintiffs was committed to their discretion and not judicially reviewable. *Id.* at 950-53. However, we also held that the district court could review the claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Act.[3] Specifically, we concluded:

---

[2] More specifically, we held that action could be judicially reviewed "only if its impact upon plaintiffs is direct and immediate . . . . One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature." *Specter*, 971 F.2d at 946.

[3] For instance, we held that the allegation that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendation" as required by § 2903(c)(4) of the Act was judicially reviewable. *Specter*, 971 F.2d at 952. Similarly, we also held reviewable the plaintiffs' contention "that the Act requires

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

Id. at 947 (footnote omitted).

Although we noted that because "it is the implementation of the President's decision that we have

---

the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy." *Id.* at 952-53.

We stressed, however, that the extent of judicial review in this context was very limited and that plaintiffs, while purporting to complain about specific procedural defects, were in large part seeking to get the district court to second guess decisions committed by the Act to executive discretion. *Id.* at 953. It is apparent to us from plaintiffs' Brief for Appellants on Remand that plaintiffs have failed to acknowledge the limited character of the review our prior opinion permits.

been asked to enjoin, . . . at least in one sense, we are here asked to review a presidential decision," *id.* at 945, we concluded that this would not bar review of plaintiffs' procedural claims:

> Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law. 5 Kenneth C. Davis, *Administrative Law* 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). . . . It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

Id. at 945.

III.

Examination of our prior decision in light of *Franklin* suggests to us that no change in outcome is required. *Franklin*'s holding that the Secretary of Commerce's report to the President did not constitute a reviewable final action because it did not have an immediate and direct impact on the plaintiffs confirms our initial conclusion that there was no reviewable final action here until after the President designated the Shipyard as a facility to be closed and Congress failed to overturn that action. *See Specter*, 971 F.2d at 945 ("We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b).").

More importantly, the Court's conclusion that the President is not an "agency" under the APA, and thus, presidential action is not reviewable for abuse of discretion under the APA's standards is entirely consistent with our prior decision in which we assumed, without deciding, that the President is not an agency within the meaning of the APA.[4] Because our prior holding was not based on the existence of APA abuse of discretion review, but rather on the belief that courts may review actions taken at the direction of the President to determine whether those actions are within applicable constitutional and statu-

[4] As previously noted, we explicitly concluded that our holding permitting review of plaintiffs' claims that the closing process had violated the specific procedural mandates of the statute would be "the same whether or not the APA applies to presidential decisionmaking." *Specter*, 971 F.2d at 945.

tory authority, a modification of our prior mandate only would be warranted if *Franklin* might be read as foreclosing the limited review we previously upheld.

In *Franklin*, the Court declined only to review the President's decision under the APA. It expressly sanctioned judicial review of presidential decision making for consistency with the Constitution and said nothing about review of presidential action for consistency with the statute authorizing such action. In concluding in our earlier opinion that judicial review was available here, we relied upon the existence of judicial review prior to the adoption of the APA and upon various authorities indicating that the judicial review provisions of the APA represent a "codification of the common law." *Id.* at 945. While we there described this extra-APA review as common law review, our reexamination of the relevant authorities in light of *Franklin* has persuaded us that there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case. We would, in any event, be reluctant to infer from *Franklin*'s silence on the matter a prohibition of judicial review where presidential action is alleged to be in conflict with non-discretionary mandates of the authorizing statute because the Court had no occasion to consider that issue in *Franklin.* There, the only non-constitutional allegation made by (and, indeed, available to) plaintiffs was that the proposed action represented an abuse of discretion (*i.e.*, arbitrary and capricious conduct) prohibited by the APA. Here, by contrast, plaintiffs allege that the process underlying the decision to close the Ship-

yard violated specific nondiscretionary provisions of the Base Closing Act—the only authority advanced by the defendants for the closing.

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ("It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself." (citing *Youngstown Steel*)); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) (" '*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.' " (quoting *Nixon v. Sirica*, 487 F.2d 700, 793 (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g.*, *National Treasury Employees Union*, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."); *see also* U.S. Const. Art. II, § 3 ("[T]he President shall take care that the laws be faithfully executed . . . ."). Indeed,

we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. *Youngstown*, 343 U.S. at 585-86. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*. 112 S.Ct. at 2776 (citing *Youngstown*).

The plaintiffs in this case, unlike the plaintiffs in *Franklin*, do not ask the court to review under the APA for arbitrary and capricious conduct. Rather, they allege that closing the Shipyard would be inconsistent with specific, nondiscretionary directives of the Base Closing Act—the only authority advanced by the defendants for their proposed action. The President, no less than his lieutenants, must have statutory or constitutional authority for his actions and where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.[5]

---

[5] In holding here that the President must have at his disposal information collected in accordance with statutory procedures, we do not hold that the district court may review the entirely distinct question of whether and to what extent the President uses the information. As we previously held, the Act commits that decision to the President's discretion. *Specter*, 971 F.2d at 946.

IV.

The defendants insist that there can be no judicial review in this case because such review is barred by the doctrine of sovereign immunity. We disagree.

We first note that limited judicial review of federal action has long been available at common law:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949); *see also Youngstown Steel*, 343 U.S. at 585-87. Although this principle is limited, *see, e.g., Larson*, 337 U.S. at 690 ("A claim of error in the exercise of [delegated] power is . . . not sufficient."),[6] as counsel for the defendants con-

---

[6] *Larson* was essentially a breach of contract action against an agent of the federal government. The Court rejected pliantiff's contention that the agent's breach was *ultra vires* and thereby stripped of sovereign immunity protection; instead, it held that because the agent was authorized to "administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment," his actions were within delegated authority and were therefore protected by sovereign immunity: "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." *Larson*, 337 U.S. at 695.

ceded at oral argument, and as both *Youngstown Steel* and *Franklin* make clear, judicial review of the constitutionality of executive action is not barred by the doctrine of sovereign immunity. Thus, where, as here, plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the only statute authorizing such action and has thereby violated the constitutionally-mandated separation of powers, sovereign immunity concerns do not apply.

Even if the inapplicability of sovereign immunity in this context were not clear from the doctrine enunciated in *Larson* and *Youngstown Steel*, however, we believe this case would still be controlled by the express waiver found in the APA:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1988).

Here, plaintiffs do not seek monetary damages; they seek injunctive relief.[7] Plaintiffs also state a claim that the Secretary of the Navy, the Secretary of Defense, and the Base Closure Commission have acted under color of legal authority in violation of the Act and that the Secretary of Defense, similarly acting under color of legal authority, is threatening

[7] Effective relief can be granted by an order prohibiting the Secretary of Defense from closing the Shipyard.

to close the Shipyard as the final step of an illegal process. This is thus a situation that § 702 literally reads on. It is also a situation that precisely fits the congressional intent behind this waiver of sovereign immunity. *See, e.g.*, H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6121 ("The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as to a bar to judicial review of Federal administrative action . . . ."); *id.* at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."); 4 Kenneth C. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1984) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense."). [8] Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA. *See Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980); *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *see also* 4 Davis, *supra*, § 23:19, at 195 ("The abolition of sovereign immunity in § 702 is

---

[8] The legislative history of the immunity waiver also indicates congressional recognition of the *ultra vires* doctrine and the difficulties and complexities involved in its application: it envinces an intent to eliminate the need for "wispy fictions" in favor of a clear waiver. *See* H.R. Rep. No. 1656, *supra*, at 5-7, 1976 U.S.C.C.A.N. at 6125-28.

not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.").

The only argument we can conceive against the applicability of § 702 here is that the President was involved at one stage of the process that led to the allegedly illegal action that will injure plaintiffs. While, as we earlier concluded, the nature of the role assigned to the President by the Act makes his decisionmaking unreviewable, the fact that he played a role provides no justification for holding the process and the final executive action immune from review for compliance with the mandatory procedural requirements of the Act. While suits, like *Franklin*, seeking to secure presidential action or forbearance pose special problems, those problems are not presented in the situation before us.[9] As Justice Scalia

---

[9] Indeed, given *Franklin*'s holding that the President is not an "agency" within the meaning of the APA, the waiver of sovereign immunity contained in § 702 may not apply to suits against the President. Nevertheless, this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President—a situation not present here. While we do not regard *Franklin* as turning on sovereign immunity doctrine, we note that § 702 might not waive sovereign immunity in the situation there before the Court. As the *Franklin* Court recognized, "it is President's personal transmittal of the report to Congress that settles the reapportionment." *Franklin*, 112 S. Ct. at 2775. In *Franklin*, it appears that the only effective relief was relief that would require the President's

explained in his opinion in *Franklin*, the fact that the federal courts "cannot direct the President to take a specified executive act" does not

> in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, *e.g.*, *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Panama Refinancing Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503-506, 89 S.Ct. 1944, 1954-1956; 23 L.Ed.2d 491 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive.

Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring).

V.

Accordingly, we conclude that nothing in *Franklin* suggests that our prior approach to this case was incorrect. We reaffirm our prior opinion and we will

---

forbearance. *See Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring) ("[W]e cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush.").

remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court should conduct those proceedings as expeditiously as possible.

Alito, *Circuit Judge*, dissenting.

The majority rests its decision on arguments that are not properly before us, since the plaintiff-appellants did not raise them either before or after remand from the Supreme Court. Moreover, I believe that the majority's arguments are wrong on the merits and may have unfortunate future implications. I therefore respectfully dissent.

I.

When this case was initially before us, the majority held that the closing of the Philadelphia Naval Shipyard was subject to judicial review to determine whether certain procedural requirements of the Defense Base Closure and Realignment Act of 1990 had been satisfied. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992). The Supreme Court subsequently decided *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), which concerned, among other things, whether the Administrative Procedure Act authorized review of actions taken under a statutory scheme similar to that in the Defense Base Closure and Realignment Act. The Court held that the Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census is not "final agency action" reviewable under the APA. 5 U.S.C. § 704, and that actions taken by the President are not subject to APA review. After handing down its decision in *Franklin*, the Supreme Court vacated this court's prior decision in this case and remanded for reconsideration in light of *Franklin*, *O'Keefe v. Specter*, 113 S. Ct. 455 (1992)[1]

[1] Neither of the arguments suggested by *Franklin*—i.e., that the recommendations of the Base Closure Commission do not

On remand, the plaintiffs vigorously contended that the statutory scheme in *Franklin* is materially different from the scheme involved here and that *Franklin* therefore does not bar review *under the APA*. The plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based on either common law or separation of powers principles. Nor had the plaintiffs advanced either of those theories when this case was initially before us or, as far as I can determine, when the case was in the district court. The majority, however, chooses to sidestep the APA argument that the plaintiffs have pressed. Instead, the majority grounds its decision on the common law and separation of powers arguments that it has devised and injected into this case.

I cannot endorse this approach. I would address the argument that the plaintiffs have raised and that the parties have briefed—i.e., whether, despite *Franklin*, the closing of the Shipyard is reviewable under the APA. The First Circuit recently considered *Franklin*'s effect on judicial review under the Defense Base Closure and Realignment Act. *Cohen v.*

---

constitute "final agency action" under the APA and that presidential action is not reviewable under the APA—was raised by the defendants when this appeal was first before us. The defendants contend that we must nevertheless reach these issues because they are jurisdictional. Whether or not an appellate court would always be compelled to consider issues of this nature even if they are not raised by the parties, I believe it is appropriate for us to reach them here. If we refused to reach these issues now, the case would be remanded, and the defendants could then raise them before the district court. Under these circumstances, our refusal to entertain these issues at the present time might further delay the expeditious disposition of this case.

Rice, 92-2427, 1993 LW 131914 (1st Cir. May 3, 1993). The plaintiffs in that case alleged that the process had been tainted by "faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO." *Id.* at *6. The First Circuit held that under *Franklin* APA review for these claims was unavailable. Because I agree that the statutory scheme at issue here is not materially distinguishable from the scheme in *Franklin*. I would hold that APA review is unavailable. And I would go no further.

II.

Since the majority has gone further, however, and since the majority's analysis may affect future cases. I will explain briefly why I believe the majority's analysis is flawed. The majority opinion, as I understand it, reasons as follows. First, "[t]he President must have constitutional or statutory authority for whatever actions he wishes to take." Majority Typescript at 10. Second, judicial review is available outside the APA to determine whether presidential action violates or exceeds that authority. *Id.* at 10-12. Third, under the Base Closure and Realignment Act, the President lacks statutory authority to approve or implement the closing of a base if the Base Closure Commission's recommendation regarding that base was tainted by violations of the Act's procedural requirements.[2] Therefore, since the plaintiffs in this

[2] The majority puts it as follows (majority typescript at 8), quoting *Specter v. Garrett*, 971 F.2d 936, 947 (3d Cir. 1992)):

> Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed*

case allege that such procedural violations occurred with respect to the Philadelphia Naval Shipyard, the President's approval of the closing of the Shipyard and/or the Secretary of Defense's implementation of the closing are subject to non-APA judicial review.

Putting aside whatever else may be said about this analysis, it seems plain to me that its third step is incorrect, for the Base Closure and Realignment Act does not limit the President's authority in the way the majority suggests. The Act does not require the President to reject the Commission's package of recommendations if the recommendations regarding one or more bases are tainted by procedural violations. Nor does the Act require or authorize the President or his subordinates to refrain from carrying through with the closing or realignment of such bases following presidential approval of the Commission's package and the expiration of the period for congressional disapproval.

The President's powers and responsibilities under the Base Closure and Realignment Act are clearly set out in Section 2903(e). In brief, the President, after receiving the Commission's package of recommenda-

---

by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.

The majority later adds that the President's authority under the Base Closure and Realignment Act to approve or order the closing of a base "has been expressly confined by Congress to action based on a particular type of process." Majority typescript at 12. In addition, the majority states that the President's subordinates are "threatening to close the Shipyard as the final step of an illegal process." Majority typescript at 13.

tions by July 1 of the year in question, must decide whether to accept the entire package or return it to the Commission. If, as was the case in 1991, the President decides to accept the package, he must transmit a report containing his approval to the Commission as well as to Congress. He must also transmit a copy of the Commission's recommendations and a certification of his approval to Congress. Section 2903(e)(1), (2). Congress then has 45 days to disapprove the package (Section 2904(b)), and if, as was the case in 1991, Congress does not disapprove, the Secretary of Defense "shall" close and realign bases in accordance with the package. Section 2904 (a).

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

affected base was tainted by prior procedural irregularities.

Under the plain language of the Base Closure and Realignment Act, the President's sole responsibility, upon receiving a package of recommendations from the Commission, is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission. After the President has approved a package of recommendations and the time for congressional disapproval has expired, the sole responsibility of the Secretary of Defense is to carry out the indicated closings and realignments. In the case before us, this is precisely what the President did and what the Secretary of Defense wishes to do, and therefore I see no possible ground for arguing that the Executive violated any statutory command or exceeded its statutory authority at these stages of the base closure and realignment process.[3]

The Base Closure and Realignment Act calls for three cycles of recommended closures and realignments—in 1991, 1993, and 1995. In this case, we are still considering a closure that was recommended and approved in the first cycle. In the meantime, the sec-

---

[3] As I noted in my prior dissent (971 F.2d at 956 n.2), the plaintiffs are not challenging the propriety of anything that occurred after the transmission of the Commission's recommendations to the President. Rather, their claims relate to actions taken at earlier stages. But as the majority itself has recognized, actions taken prior to the end of the process required by the Act had no adverse impact on the plaintiffs and thus are not subject to judicial review under any theory. Majority typescript at 7 & n.2.

ond cycle is already well underway. When Congress enacted the Base Closure and Realignment Act, it knew that unnecessary military installations can waste enormous sums of money and that litigation can effectively delay closings and realignments for years. In my view, Congress clearly wanted to put an end to these delays, but our court, by allowing judicial review of base closings and realignments, is frustrating the implementation of Congress's intent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVNRNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMAYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETATY 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; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

Filed April 17, 1992

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

Argued January 28, 1992

Before: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed April 17, 1992)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is an action to enjoin the Secretary of Defense from carrying out a decision to close the Philadelphia Naval Shipyard ("Shipyard"). The plaintiffs-appellants ("plaintiffs") are Shipyard workers; their unions; members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the City of Philadelphia. The defendants-appellees ("defendants") are the Secretary of Defense, the Secretary of the Navy, and the independent Defense Base Closure and Realignment Commission ("Commission") and its members.

The Defense Base Closure and Realignment Act of 1990 ("the Act") is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. In 1977, Congress passed legislation allowing the Secretary of Defense to close a particular base only after (1) notifying the Committees on Armed Services of the Senate and House of Representatives of the bases seletced for closure; (2) submitting to these Committees an evaluation of the various consequences of the closure (including

the local economic, environmental, budgetary and strategic consequences); and (3) deferring action for at least sixty days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b) (Supp. IV 1980). The statute also required the Secretary to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). *Id.*

Eleven years later, Congress enacted the Base Closure and Realignment Act of 1988, the immediate predecessor of the 1990 Act. Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). Under the 1988 Act, the Secretary of Defense could no longer unilaterally choose bases for closure. Instead, that Act vested a new independent commission with the power to recommend bases for closure. *Id.* §§ 201 (1), 203(b)(1-2), 102 Stat. at 2627-28. These recommendations were to be presented to the Secretary of Defense for approval or disapproval in their entirety. *Id.* §§ 201(1), 202(a)(1), 102 Stat. at 2627. If the Secretary approved the recommendations, the 1988 Act gave Congress 45 days within which to disapprove them. *Id.* § 202(b), 102 Stat. at 2627. The 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA. *Id.* § 204(c)(1), 102 Stat. at 2630. The legislative history of the 1988 Act indicates that Congress dropped the NEPA requirements in an effort to avoid delays.[1]

---

[1] *See* H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realign-

The 1988 Act was not a permanent mechanism for closing and realigning military installations, but was rather a one-time exception to the process set forth in the 1977 legislation. In January 1990, in actions governed only by the 1977 Act, the Secretary of Defense proposed another round of closures. Members of Congress voiced concern about the Secretary's decisionmaking having "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) ("House Conference Report"), *reprinted in* 1990 U.S.C.C.A.N. 3110, 3257. Moreover, House conferees later noted that base closures and realignments under the 1977 legislation took "a considerable period of time and involve[d] numerous opportunities for challenges in court." House Conference Report at 705, 1990 U.S.C.C.A.N. at 3257.

Congress subsequently enacted the Defense Base Closure and Realignment Act of 1990. Section 2901 of this Act declares that the law's purpose "is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Pub. L. No. 101-510, § 2901 (b), 104 Stat. 1808 (1990).[2] The Act, which governs three rounds of base closures (in 1991, 1993, and 1995), retains the basic features of the 1988 Act. An independent Commission, to be appointed by the President with the advice and consent of the Senate, is to meet in each of the three years. § 2902(a), (e).

---

ments under this act. However, they also believe that the NEPA goals of public disclosure and clear identification of potential adverse impacts . . . should be protected").

[2] In the interest of brevity, citations to the Act will hereinafter be limited to the section number only.

The Secretary of Defense must provide Congress and the Commission with a six-year "force structure plan" that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2). The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment; these criteria must be published in the Federal Register for public notice and comment, and they must be presented to Congress which evaluates and may disapprove them. § 2903(b).

For the first round of base closures, the Act requires the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. § 2903(c)(1). The Commission is then charged with reviewing these recommendations and with the preparation of a report for the President containing its assessment of the Secretary's proposal and its own recommendations for base closures. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations, § 2903(d)(1), and authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force structure plan and the final criteria. § 2903(d)(2)(B). In its report to the President, the Commission must justify any departure from the Secretary's list of recommendations. § 2903(d)(3). The Commission is to be assisted in its task by the General Accounting Office ("GAO"), to which the Secretary must give all information used in making his initial recommendations, § 2903(c)(4), and which must report on the Secretary's recommendations to Congress and the Commission, § 2903(d)(5).

Once the Commission has made its recommendations, the Act requires that they be presented to the President for his review. § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. § 2903(e)(2)-(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b). If the President disapproves the Commission's recommendations in whole or in part, he returns them to the Commission. The Commission reconsiders its recommendations in light of the President's actions and resubmits a revised list for the President's consideration. § 2903(e)(3). If the President does not transmit to Congress an approved list of recommendations by September 1 of any year in which the Commission has transmitted recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

The Act contains several important provisions which were absent from predecessor base closure statutes, including, *inter alia*, the requirement that the Commission hold public hearings on the Secretary of Defense's closure recommendations, § 2903(d)(1); the requirement that all meetings of the Commission be open to the public, except where classified information is being discussed, § 2902(e)(2)(A); the requirement that a force structure plan be prepared, § 2903(a); the requirement that final criteria be developed, published and submitted for

congressional consideration, § 2903(b)-(c); the requirement that the Secretary consider all military installations "equally without regard to whether or not the installation has been previously considered or proposed for realignment," § 2903(c)(3); and the requirement that the Secretary transmit to the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments" so that the GAO can analyze the Secretary's recommendations and aid the Commission in its deliberations. §§ 2903 (c)(4), 2903(d)(5)(A)-(B).

In April 1991, the Secretary of Defense recommended the closure or realignment of a long list of domestic bases including twelve naval facilities. *See* 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. The Commission subsequently held public hearings in Washington, D.C., and Philadelphia. During these hearings the Commission heard testimony from Department of Defense officials, legislators, and other experts. The Commissioners visited the major facilities recommended for closure, including the Shipyard. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in its analysis of the Secretary's recommendations.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open, but concurred with the Secretary's recommendation that the Shipyard be closed. In all, the Commission recommended to the President that 34 installations be closed and 48 realigned. 1991 Defense Base Closure and Realignment Report to the President at vii-viii. President Bush approved

all of the recommendations of the Commission, including the closure of the Shiypard. Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. On July 30, 1991, the House rejected a proposed resolution of disapproval of the Commission's recommendations by a vote of 364-60, thus authorizing the Secretary to proceed with the closures and realignments. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

Plaintiffs [3] filed their original complaint in the district court on July 8, 1991, and an amended complaint on July 19, 1991.[4] In the amended complaint,

---

[3] Plaintiffs include United States Senators Arlen Specter and Harris Wofford of Pennsylvania, Bill Bradley and Frank R. Lautenberg of New Jersey; Governors Robert P. Casey of Pennsylvania, James J. Florio of New Jersey, and Michael N. Castle of Delaware; Attorneys General Ernest D. Preate, Jr. of Pennsylvania, and Robert J. Del Tufo of New Jersey; United States Representatives Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer, and Robert A. Borski; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3, and its President Howard J. Landry; the Metal Trades Council, Local 687 Machinists, and its President William F. Reil; and the Planners Estimators Progressman & Schedulers Union, Local No. 2, and its President Ronald Warrington.

[4] Plaintiffs filed their original complaint before President Bush approved the Commission's recommendations. As we shall see, judicial review is not available at this preliminary stage; nevertheless, because the President made his decision while this suit was pending, we are not presented with a jurisdicitional defect. "[I]n this Court, a 'premature appeal taken from an order which is *not final* but which is followed by an order that *is final* may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party.' *Richerson v. Jones,* 551 F.2d 918, 922 (3d

plaintiffs allege that defendants[5] violated various provisions of the Act.

To summarize briefly the allegations: In Count I plaintiffs allege that the Secretaries of Defense and the Navy violated the Act by withholding information pertinent to the decisionmaking process, by failing to apply the final criteria and force structure plan evenhandedly to all installations, and by failing to implement record-keeping and internal controls. In Count II, plaintiffs charge the Commission with violating the Act by basing its decisions on information supplied by the Navy by not made available to the GAO, Congress or the public, by failing to apply the final criteria and force structure plan evenhandedly, and by ignoring the conclusions of the GAO. Finally in Count III, the Shipyard employee and union plaintiffs charge all defendants with violating their due process rights under the Fifth Amendment to the Federal Constitution by disregarding the procedures set forth in the Act in deciding to close the Shipyard.

Cir. 1977) (emphasis in original)." *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759, 766 n.22 (3d Cir. 1979) (noting that court retained jurisdiction where appeal was filed subsequent to preliminary order of Nuclear Regulatory Commission, but before issuance of final NRC order). *See also Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (distinguishing situation where notice of appeal is premature under FRAP 4(a)(4)).

[5] Defendants include the Secretary of the Navy, H. Lawrence Garrett, III; the Secretary of Defense, Richard Cheney; 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.

Plaintiffs filed motions for a preliminary injunction and expedited discovery in July. On August 16, defendants filed a motion to dismiss. After a hearing on October 25, 1991, the district court issued its order dismissing the complaint with prejudice on November 1, 1991. The district court found that the legislative history of the Act, as well as the law's purpose to provide for timely closure of military bases, indicate a clear legislative intent to preclude judicial review. *Specter v. Garrett*, No. 91-4322, slip op. at 1-4 (E.D. Pa. November 1, 1991). As an alternative ground for its holding, the court held that this case is one which is "impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government," *id.* at 5, and as a result presents a nonjusticiable political question. *Id.* at 4-7.[6] Plaintiffs timely filed a notice of appeal.

II.

The threshold issue in this appeal is one of standing. Defendants assert that none of the plaintiffs have standing to litigate the issues raised in the complaint. Because the position of each of the plaintiffs is the same and because we conclude that the Shipyard employees and their union have standing, we need not address the standing of the remaining plaintiffs. *See, e.g., City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

---

[6] In addition to the two issues addressed by the district court, the appellees argued that none of the appellants had standing to bring the suit, and that the unions' due process claim failed to state a valid constitutional claim. The district court did not reach these issues.

A person who seeks standing to challenge agency action must show (1) injury in fact and (2) that his interests are arguably within the zone of interests intended to be protected by the statute or constitutional provisions on which the claim is based. *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). A showing of injury in fact is required by the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The injury must be concrete and one which can be addressed by the court should the plaintiff prevail on the merits. *Id.* at 37-38. This test is intended to ensure that complainants have a "personal stake" in the outcome of the proceedings. *Id.*

There can be no doubt that Shipyard employees have a personal stake in these proceedings. If the shipyard is closed, their jobs will be lost. If they prevail on their claim, it is within the power of the district court to grant effective relief. Thus, the Shipyard employees meet the injury in fact requirement.

To satisfy the zone of interests requirement, a plaintiff must "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. ——, 110 S. Ct. 3177, 3186 (1990) (emphasis in original). As explained by the Supreme Court,

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent

> to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review 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. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (footnote omitted). We must thus inquire whether employees of military bases were within the zone of interests meant to be protected by the Act. *See Air Courier Conference of Am. v. American Postal Workers Union,* 498 U.S. ——, 111 S. Ct. 913, 918 (1991).

The legislative history of the Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live. Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived by them as fair. To further this objective, Congress provided for opportunities for public hearings and comment. *See, e.g.,* §§ 2903(d)(1) and 2903(b). It also provided that, if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition. § 2905(a)(B). Finally, because of this congressional

concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by the Congress include among the eight factors to be considered "the economic impact on communities." 56 Fed. Reg. 6374 (Feb. 15, 1991).

Given Congress' concern and the steps it took to assure consideration of the interests of employees and their communities, we readily conclude that individual Shipyard employees are within the zone of interest sought to be protected by the Act and that they have standing to press the issues raised in the complaint. We reach a similar conclusion with respect to the unions who are seeking to represent the interests of the members. *International Union, UAW v. Broch*, 477 U.S. 274 (1986).

III.

Section 702 of the Administrative Procedure Act ("APA") provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The APA stipulates that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right . . . ; [or] without observance of the procedure required by law." 5 U.S.C. § 706 (2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the "agency action is [not] committed to agency discretion by law." 5 U.S.C. § 701(a).

The defendants insist that the district court had no authority under the APA to conduct a review of

the decision to close the Shipyard because the Act precludes judicial review. Litigants making such a contention have a very substantial burden to shoulder. As the Supreme Court stated in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1987) (emphasis added):

> We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."
>
> * * * * *
>
> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:
>
> "*Very rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a

> case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Because "the very essence of civil liberty" is implicated, courts will presume the availability of judicial review unless there is "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671, quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). This "clear and convincing" standard is not meant in the strict evidentiary sense, but rather as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

The second category of agency action not subject to judicial review under the APA is that which is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is, in essence, a subset of those cases where the statute passed by Congress precludes judicial review. That is, Congress in some instances evidences an intent that there be no judicial review by requiring an agency or official to make a decision in circumstances under which a reviewing court either would have no law to apply or would find itself confronted with judicially unmanageable issues. Because decisions "committed to agency discretion" are but one example of decisions with respect to which Congress has precluded judicial review, the strong presumption favoring such review applies here as well, and review is available unless it is clear that a reviewing court could not con-

duct a meaningful review. *See Davis Enter. v. United States Envtl. Protection Agency*, 877 F.2d 1181, 1185 (3d Cir. 1989) (presumption of reviewability exists in cases interpreting § 701(a)(2) of APA), *cert. denied*, 493 U.S. 1070 (1990).

The availability of judicial review under the APA is thus a matter of congressional intent [7] and we must address the reviewability of each of the issues raised by plaintiffs with that fact in mind. Before turning to that task, however, there is one further preliminary matter to be noted. The actions challenged here are not "agency actions" as usually encountered under the APA. The decisionmaking contemplated by the Act is a joint undertaking. The President, exercising the authority which he here exercised, could not close a base that the Commission had not recommended for closure. On the other hand, the Secretary and the Commission can only make recommendations under the Act. If the President fails to approve the Commission's recommendations, the closure process comes to an end for that year. § 2903(e)(5). While the statutory and constitutional violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense prior to the making of their recommendations, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief; it is the implementation of the President's decision that we have been

[7] It is true, of course, that Congress may limit executive discretion only insofar as it acts within its constitutional grants of enumerated authority. *See* U.S. Const. art. I, § 8 (enumerating the chief powers granted to Congress). Neither party here, however, claims that Congress has acted beyond that authority in drafting the terms of the Act.

asked to enjoin. Thus, at least in one sense, we are here asked to review a presidential decision.

While the issue remains an open one in this Circuit, the APA may not be applicable to presidential decisionmaking. The Court of Appeals for the District of Columbia Circuit held in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) that the APA does not apply to the President. In *Armstrong*, the court reasoned that, while the APA defines "agency" as an "authority of the government," 5 U.S.C. §701(b)(1), Congress adopted this broad language to avoid a formalistic definition of the term and did not intend to subject the President to the APA's requirements. 924 F.2d at 289. The court also noted the longstanding practice of not requiring the President to abide by APA rulemaking procedures when issuing executive orders, and the rule that when Congress sets out to restrict presidential action, it must make its intentions clear. *Id.*

Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represents a codification of the common law, 5 Kenneth C. Davis, *Administrative Law* § 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng's*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) ("[e]xecutive action under legis-

latively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). As explained hereafter, we view the decisionmaking assigned to the President by the Act as clearly committed to his discretion and unreviewable. Congress's intent in this regard is sufficiently clear that our review would be the same whether or not the presumption favoring judicial review under the APA is applicable to presidential decisionmaking. It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

A.

We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b). We say this for two reasons. First, the statutory scheme is inconsistent with there being judicial review prior to this point. The Act sets a very stringent timetable for the various stages of the process it establishes and Congress clearly intended that the final decision on base closing and realignment be reached with alacrity. The Secretary is required to submit his list of recommendations to the Commission by April 15th. § 2903(c). The Commis-

sion is then required to submit its final report to the President by July 1st, ten weeks later. § 2903(d). The President, in turn, is required to make his decision within two weeks, by July 15, 1991. § 2903(e). Finally, the Act allows Congress 45 days in which to disapprove the President's decision. § 2904(b). As the Supreme Court has repeatedly noted, judicial review while an administrative process is on-going is disruptive even where there is no requirement of expedition. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (premature judicial interference with agency processes may prevent agency from functioning efficiently). With a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention. Second, Congress was undoubtedly aware of the rule that the courts may review agency action only if its impact upon plaintiffs is direct and immediate, *see Abbott Labs.*, 387 U.S. at 152. One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decisions are merely preliminary in nature. *See State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) (holding that Congress intended to preclude judicial review of "preliminary decisionmaking activity").

B.

One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure; indeed, plaintiffs do not argue

otherwise. Congress imposed no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources. The Act does not require of the President, as it does of the Secretary and Commission, that he accept the force structure plan and the base-closing criteria. *See* § 2903(e). If the President believes that the assessment of military need by the Secretary is understated or overstated, he can reject the recommendations for that reason. This leaves a court with no law to apply; i.e., the decision on which bases to close is committed by law to presidential discretion, and judicial review cannot be available. *Cf. Chicago and Southern Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948) (under federal statute, applications to engage in foreign air transportation must be approved by President after recommendation by Civil Aeronautics Board; before Presidential approval, no pealable final result exists, and Presidential decision itself is not reviewable because it is committed to his discretion).

C.

This does not end the matter, however. As this court has repeatedly stressed, judicial review is foreclosed only "*to the extent that* statutes preclude" such review and only "*to the extent that* agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see, e.g., Kirby v. United States Govt. Dep't of Hous. and Urban Dev.*, 675 F.2d 60 (3d Cir. 1982); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). Thus, the fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a

clear congressional intention to preclude review exists with respect to other aspects of that same process. There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates concerning the process leading up to the ultimate dicretionary decision. *See, e.g., Bowen,* 476 U.S. at 675-76 (Medicare statute explicitly limits review of benefit determinations, but challenges to method of determination are not so limited and therefore are reviewable); *Kirby,* 675 F.2d at 67-68 (under Housing Act of 1959, decision by Secretary of HUD to provide funding for housing project is unreviewable, but agency's compliance with procedures in Act is subject to review). Accordingly, we must conduct an issue-specific analysis with congressional intent as our loadstar.

In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions,[8] Congress intended that domes-

---

[8] The two other means by which bases may be closed are described in § 2909(c), which provides as follows, in relevant part:

> (c) *Exception.*—Nothing in this part affects the authority of the Secretary to carry out—
>
> (1) closures and realignments under title II of Public Law 100-526 [the 1988 Act]; and
>
> (2) closures and realignments . . . carried out for reasons of national security or a military emergency . . .

tic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made. We must keep this congressional objective in mind as we inquire whether and to what extent Congress intended decisions of the Secretary and Commission to be reviewable when someone aggrieved by a base closing alleges that those decisions and the process underlying them deviated from this congressional model.

D.

The defendants' primary argument is that Congress intended to preclude all judicial review of the base closure process other than the limited and here irrelevant review [9] expressly authorized by the Act.

---

[9] The Act does provide for limited review under NEPA, after the closure decisions have been made. *See* § 2905(c)(2). Specifically, NEPA applies to actions of the Secretary during the process of property disposal and during the process of relocating functions from one installation to another. To the extent it applies, NEPA requires any federal agency considering a "a major federal action significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement identifying the environmental consequences of the proposed action and recommends ways to

The defendants acknowledge that there is no express prohibition of judicial review under the Act. They correctly point out, however, that this does not end the inquiry. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345. Defendants contend that the purpose of the Act, its structure and its legislative history are inconsistent with the existence of any judicial review other than in the narrow area expressly authorized. We disagree. While the defendants have pointed to plausible reasons why Congress might have decided to dispense with all judicial review not expressly authorized, nothing in the statute or its legislative history provides a basis for concluding with confidence that it actually decided to do so.

As we shall see, there are some areas of decision-making under the Act in which Congress did not intend the courts to engage in second-guessing. Whether one classifies those areas as "committed to agency discretion" or simply as areas in which Congress intended to preclude judicial review makes no difference; either way one looks at it, the character and context of the decision required by the Act reflects a clear legislative intention that there be no judicial review. On the other hand, there are other

---

minimize those which are adverse. 42 U.S.C. § 4332(2)(c) (1988). Private parties may bring suit under the APA to challenge violations of NEPA's procedural requirements. *See Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987).

areas where our analysis leaves us with only the strong presumption favoring judicial review and no clear and convincing rebuttal. To hypothesize the paradigm case, if the Commission decided to dispense with public hearings in the interest of expedition, we could point to no clear and convincing evidence that Congress meant either to commit that decision to the Commission's discretion or otherwise to preclude judicial review of it.

Defendants purport to find a host of clear and convincing evidence of review preclusion in the Act and its legislative history. We will comment only on their three most plausible arguments: those pertaining to the timetable established by the Act, its express provision for limited NEPA review, and the cryptic legislative history concerning judicial review.

As we have noted, we agree with the proposition that the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close. However, we see little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decisionmaking progress and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time-consuming, *see* § 2905 (governing implementation of the approved list); bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental actions involving far greater exigency. Finally, we

know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. *See* H.R. Rep. No. 665, 101st Cong., 2d Sess. 385 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3078. In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

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

sional intent with respect to all judicial review under the Act.[10]

Finally, the defendants argue that an intent to preclude judicial review is discernable from the legislative history of the Act. In particular, they point to a paragraph in the House Conference Report which addresses the question of judicial review:

> 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 [APA] 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 [APA], no final agency action occurs in the case of various actions required under the base closure process contained in this

---

[10] Although they did not do so, defendants might have argued that by allowing a very limited class of NEPA claims (§ 2905(c)(2) declares that NEPA "shall apply to actions of the Department of Defense . . . during the process of property disposal, and . . . during the process of relocating") but nowhere else allowing for judicial review, Congress expressed its intent to preclude all other forms of review. But we find this argument, too, ultimately unpersuasive. The mere failure to specify the availability of most forms of judicial review is not enough to overcome the strong presumption that this review may be had. *See State of Illinois Dep't of Public Aid v. Schweiker,* 707 F.2d 273, 277 (7th Cir. 1983) ([n]othing much can be inferred from the fact that Congress did not specify a method for judicial review . . . , even though earlier [in the statute] it had specified such a method).

> 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), [sic.] the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), [sic.] the decision of the President under section 2803(e), [sic.] and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

House Conference Report at 705, 1990 U.S.C.C.A.N. at 3258. The district court concluded that "[t]his passage . . . expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act." *Specter*, slip op. at 3. We disagree.

This passage is at best ambiguous. A fair reading reveals only an intent to preclude judicial review to the extent that there is not yet "final agency action" to review.[11] On its face, this paragraph does not

[11] The reference in this passage to the APA's military affairs exception is especially mystifying. This exception to the general rulemaking and adjudication provisions in Chapter 5 of the APA, 5 U.S.C. §§ 553 and 554, gives agencies involved in military decisions discretion to determine how much public participation, if any, will be available before a final rule is issued, and what evidence will be heard (and by whom) during an agency hearing. The military affairs exception does not, however, determine whether a certain agency action is final within the meaning of Chapter 7 of the APA, 5 U.S.C. § 701 *et seq.*, which governs judicial review.

claim that the Act itself forecloses any judicial review. Its only assertion is that the *APA* will preclude *some* judicial review and the only rationale given for the limited preclusions it contemplates under the APA is the absence of finality. The first three "specific actions" in the following list of illustrative actions that "would not be subject to judicial review" each lack finality and thus fit comfortably with the reading we find most plausible. The reference to the last two unreviewable "specific actions," the President's action on the Commission's recommendation and the Secretary's action in carrying out the ultimate decisions, concededly do not fit as well. At some point both of these types of actions become final. Nevertheless, to the extent the inclusion of reference to these actions is significant at all,[12] they do not provide us with clear evidence that Congress intended to preclude all judicial review not expressly authorized. If Congress anticipated that these particular actions would not be reviewable, it is far more reasonable to attribute this to the fact that both types of actions are clearly committed by the Act to the discretion of the decisionmaker.

Because we find no clear evidence of a congressional intent to preclude all judicial review other than the limited NEPA review, we reject defendants' primary argument.

We recognize that our conclusion that judicial review is not altogether precluded means that there

---

[12] The inclusion of the Secretary's action under § 2905 as "not . . . subject to judicial review" provides further support for the theory that this paragraph reflects little more than imprecise staff work. The Secretary's actions under § 2905 are the only actions under the Act that are expressly made subject to judicial review.

may be cases in which the challenged agency action will be found to fall short of or be inconsistent with the standards of the Act. We hasten to add that such a finding, if and when made, will not necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all of the surrounding circumstances.[13] Thus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one.

E.

Having rejected the thesis that all judicial review is precluded, we now turn to the specific agency actions challenged by the plaintiffs and attempt to determine with respect to each allegation whether or not there is clear and convincing evidence of a congressional intent that there be no judicial review.

[13] Accordingly, it is unwise to speculate about the appropriate form of a remedy without knowing the character of and circumstances surrounding the violation. We do not agree, however, that affording judicial relief would necessarily frustrate Congress's intent to have presidential and congressional action only in the context of a "single package." As we shall see, any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act. Any such additional process could and should be afforded on an expedited basis. If the affording of that further process does not alter the recommendations of the Commission, reconsiderations by the President or Congress might be unnecessary. If that further process would alter the Commission's recommendations, reconsideration of the entire list of recommendations by the President and Congress in accordance with the limited timetable of the Act might be both feasible and appropriate.

Count I, it will be recalled, focuses on alleged deficiencies in the performances of the Secretaries of Navy and Defense.

The Secretary of Defense is required by the Act (a) to develop a force structure plan forecasting military need, (b) to identify criteria to be applied in determining which bases should and should not remain to meet that need, and (c) to formulate specific recommendations by applying that plan and those criteria to the current deployment of military resources throughout the country. § 2903(a)-(c). The Act makes no reference to the Secretary of the Navy and places no restrictions on the Secretary of Defense with respect to his sources of data or advice.

The plaintiffs challenge the decisionmaking process of the Secretary of Defense in fulfilling the above assignments. They allege, *inter alia*, that his force structure plan "lacked sufficient detail"; that his specific recommendations were based on inadequate data; and that he had "decided" to close the Shipyard before developing the criteria and manipulated the criteria so as to justify that result, in violation of § 2903(c)(3) (requiring Secretary to consider all domestic installations "equally without regard to whether [they had] previously been considered for closure"). In addition, plaintiffs allege that the Secretary of Defense relied on advice and data from the Secretary of the Navy that was inadequate, insufficiently explained, and inadequately documented.

We do not think Congress intended for the courts to review this kind of challenge to action under the Act. We say this primarily for two reasons. First, the Secretary's recommendations are clearly committed to his discretion under the Act. While those recommendations are required to be based on the

force structure plan and the base closing criteria and thus, in one sense, there are standards to be applied, the Secretary was assigned the task of formulating those standards because that task required military and other expertise.[14] So, too, do the tasks of applying those standards to the circumstances of each installation and of establishing priorities among them. Review of the Secretary's performance of these tasks

---

[14] The final criteria, for example, are reported in the Federal Register as follows:

> In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:
>
> *Military Value*
>
> 1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.
> 2. The availability and condition of land, facilities and associated airspace 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.
>
> *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 the closure or realignment, for the savings to exceed the costs.
>
> *Impacts*
>
> 6. The economic impact on communities.
> 7. The ability of both the existing and potential receiving communities' infrastructure to supoprt forces, missions and personnel.
> 8. The environmental impact.

56 Fed. Reg. 6344 (Feb. 15, 1991).

would necessarily present issues that simply are not "judicially manageable." In comparable circumstances, courts have concluded, based on the unmanageable nature of the issues that would be presented, that Congress anticipated no judicial review. *See Heckler*, 470 U.S. at 830 ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.' ").

In *National Federation of Federal Employees v. United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) ("*NFFE*"), the Court of Appeals for the District of Columbia was asked to review the decisions of the Commission and the Secretary to close domestic military bases under the 1988 Base Closure Act, the predecessor of the 1990 Act which involved no presidential action. The court concluded that Congress intended no judicial review and we find ourselves in agreement with its reasoning:

> [T]he problem is not that the Act is devoid of criteria; . . . [the Act] sets forth nine specific criteria to be considered in making base closing decisions. Rather the rub is that the subject matter of those criteria is not "judicially manageable.". . . [J]udicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment 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. Such decisions are better left to those more expert in issues of defense.

The second, related ground for our conclusion that Congress contemplated no judicial review of these kinds of decisions, is Congress' provision of alternative methods of review. Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guarantee the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO. These two entities are charged with the assessment of the Secretary's application of the criteria and the force structure plan. Given the nature of this task, it seems clear to us that an additional review by the courts would not contribute to public confidence in this part of the process and accordingly, we doubt that Congress intended an additional level of review.

One further comment is in order in connection with this category of issues. Plaintiffs argue that it takes no military expertise to make a finding of historic fact as to whether the Secretary prejudged the relevant issue by deciding to close the Shipyard prior to establishing the criteria. We conclude that this is an oversimplification. When Congress called upon the Secretary to make recommendations, it was, of course, aware that he necessarily had given prior thought to the subject of base closures. It thus could not have considered prior thinking on the subject or even prior tentative decisionmaking to be a disqualifying fact. Surely, Congress intended nothing more of the Secretary than that he give meaningful, fresh consideration with respect to any issues previously visited. This is significant because judicial review of whether the Secretary has taken a meaningful fresh look necessarily presents the same kind of judicially

unmanageable issues as a review to determine the adequacy of the data utilized by the Secretary.

The Act also provides that the "Secretary shall 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." § 2903(c)(4). The Act thus appears to contemplate that the Commission and the GAO will have access to the Secretary's data base so that they can evaluate his recommendations. The plaintiffs, we think, charge that the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations. If this is what the plaintiffs claim, we conclude that their claim is judicially reviewable. Judicial review of that claim presents the kind of issues with which courts have traditionally dealt and we perceive no other evidence of a congressional intent to preclude judicial review of that claim. Indeed, such a review seems entirely consistent with Congress' desire to assure the integrity of the decisionmaking processes. Accordingly, the presumption favoring judicial review must prevail with respect to this category of issues.

We admit to some confusion, however, as to whether the plaintiffs are complaining about the failure to transmit the data, or the adequacy of the data to support the recommendations. Based on the foregoing analysis, the former is reviewable by a court, the latter is not. Similar ambiguity can be found in several other of the claims here. For example, plaintiffs charge the Secretary with having failed to publish in the Federal Register as required by the Act "a summary of the selection process" and "a justifi-

cation for each recommendation." Complaint at 48. If the point here is that there was no publication and the Act required it, this is clearly a reviewable claim. If the point is that the Act requires individual justification and there were none, this again is reviewable. On the other hand, if the point is that the justifications were unpersuasive or inadequately detailed, this is not a judicially reviewable allegation.

F.

Turning to Count II, the Act requires the Commission to apply the force structure plan and criteria to the current deployment of military forces and make an independent judgment about the Secretary's recommendations. The plaintiffs challenge the decisionmaking process by which the Commission fulfilled this assignment. They charge, for example, that the Commission failed to consider all of the Navy installations equally without regard to previous consideration for closure, that it failed to insist on adequate help from the GAO, that it accepted the recommendation of the Secretary with respect to the Shipyard even though the GAO had concluded that the Navy's decisionmaking was inadequately documented, that it (the Commission) utilized unpublished criteria, and that it failed to apply the published criteria equally to all installations.

We conclude that each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary. We are again in agreement with the court in *NFFE* that the issues raised by a review of the Commis-

sion's recommendations are not judicially manageable ones. We note as well that under the Act the President and Congress review the Commission's recommendations, and both are better suited to the task than are the courts.

The Act does, however, require the Commission to hold public hearings, § 2903(d)(1), and the plaintiffs contend that the Commission failed to do so. Here again we are not certain we understand plaintiffs' argument, but if it is that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy, we believe their contention is judicially reviewable. In so holding, we do not decide that the Act does so require or that a remedy is available under the circumstances of this case even if it does.[15]

---

[15] Plaintiffs also argue that the Navy concealed all evidence favorable to the Shipyard and when the plaintiffs later obtained some of this information and called it to the Commission's attention, the Commission failed to reopen its public hearings to receive that information. This is said to violate § 2903(d)(1) which requires the Commission to hold hearings. If the argument is that § 2903(d)(1) required the Commission to receive all relevant information even that tendered after the close of a duly noticed hearing, judicial review of that claim seems to us entirely consistent with the congressional intent reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with § 2903(d)(1). Plaintiffs also appear to contend that the Navy's concealment of evidence favorable to the Shipyard violated § 2903(c)(4) of the Act which requires 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 recom-

In sum, we conclude that the presumption favoring judicial review is rebutted with respect to a majority of plaintiffs' claims by the fact that the issues presented in such a review would be judicially unmanageable. Where the plaintiffs ask the court to substitute its political and military judgment for that of the Secretary and the Commission, their claims are not reviewable. The plaintiffs do, however, ask for judicial review of issues that the judiciary is entirely competent to address. With respect to those issues we find the presumption in favor of judicial review unrebutted by the other alleged indicia of congressional intent. While our analysis leaves the district court with a line drawing task, it should provide the guidance necessary for disposition of plaintiffs' numerous challenges.

IV.

As an alternative ground for its decision, the district court held that the political question doctrine prevented it from reviewing the actions of the Secretary and the Commission. Noting that the Act is a carefully wrought compromise which provides both the President and Congress with an opportunity to reject the Commission's recommendations, the court reasoned that this case is "one which [is] impossible for the court to resolve independently without expressing a lack of respect due the coordinate branches

---

mendations." If this claim is that the Secretary of Defense failed to forward information considered by him in formulating his recommendations, that claim is reviewable. On the other hand, if this claim is that, because of the Navy's concealment, the Secretary of Defense *failed* to consider evidence that he should have considered, judicial review is not available.

of government." *Specter*, slip op. at 5, *alluding to language in Baker v. Carr*, 369 U.S. 186 (1962).

The Court in *Baker* described the elements that identify a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.[16] More recently, in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." The Court also emphasized, however, that "one of the Judiciary's characteristic roles is to interpret statutes" and determine the obligations of the Executive under relevant statutes,

---

[16] The Court in *Baker* held that an equal protection challenge to the apportionment scheme of the Tennessee General Assembly did not present a nonjusticiable political question.

and "we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

The authorities cited above clearly demonstrate that, while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review. In particular, we do not read those authorities as precluding judicial review of any of the kinds of issues we have previously identified as judicially reversible. If, for example, the statute requires that a decision of the Commission be based solely on the record transmitted by the Secretary and that produced during the public hearing, the political question doctrine, we conclude, would not bar review.

Defendants defend the district court's decision by pointing out that whichever of plaintiffs' claims one addresses, "the *relief* sought by [them] interferes directly with the policy decision to close the Shipyard and other installations." Brief for Appellees at 37. The fact that judicial review might undermine the Commission's policy choices, however, cannot by itself mean that review is not available. Judicial review of agency action almost always holds the potential to disrupt the agency's policy decisions. *Japan Whaling*, for example, involved a challenge to a decision by the Secretary of Commerce not to certify Japan under the Fishery Conservation and Management Act as acting to the detriment of an international whaling agreement. This certification, if made, would have forced the Secretary to repudiate an existing executive agreement with Japan allowing for a more gradual decrease in that country's commercial whaling. The Court, "cognizant of the interplay be-

tween [the statute] and the conduct of this Nation's foreign relations," nevertheless held the case to present a justiciable question of determining whether the Secretary had met his duty under the statute, "a recurring and acceptable task for the federal courts." 478 U.S. at 230.

Defendants also argue that "the lack of respect that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive branch." Brief for Appellees at 38. While we agree that the Act assigns this role to Congress and that this assignment is highly relevant to some of the judicial review issues posed by this case, we cannot agree that Congress's role under the Act precludes all judicial review. If congressional oversight were alone enough to create a nonjusticiable political question, the doctrine would grow to unmanageable dimensions: Congress "exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Armstrong*, 924 F.2d at 292 (quotation omitted) (congressional oversight over agency action does not necessarily indicate intent to preclude judicial review).

Finally, defendants argue that there is "a textually demonstrable constitutional commitment" of the base closing issue "to a coordinate political department." *Baker*, 369 U.S. at 217. That is, decisions concerning military affairs are committed to the political branches under Articles I and II of the Constitution, and the ultimate issue here is the physical disposition of the nation's military forces. Brief for Appellees at

39-40. As plaintiffs point out, however, the fact that one facet of a decisionmaking process involves an exercise of discretion concerning military process affairs does not insulate all aspects of that process from judicial review. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988) (federal environmental statutes require Navy to obtain state permit before constructing port; Navy enjoined from construction until permit issued). The authorities cited by defendants are not to the contrary; in these cases, the courts were asked to involve themselves in matters well beyond judicial competence. *See Luftig v. McNamara*, 373 F.2d 664 (1967) (private in U.S. Army sought to have Vietnam War declared illegal and unconstitutional), *cert. denied*, 387 U.S. 945 (1967); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (in wake of shootings at Kent State, students sought judicial review and continuing surveillance over training, weaponry, and orders of National Guard).

V.

In Count III of the complaint, the union and Shipyard employee plaintiffs allege that the defendants' disregard of the Act constitutes a violation of their rights under the Fifth Amendment Due Process Clause. They assert "that they possess a property interest under the . . . Act in the Shipyard's continued operation unless and until it is determined, pursuant to a . . . process in accordance with the mandates of the . . . Act, that the Shipyard should be closed." Brief for Appellants at 40. In response, defendants argue that these plaintiffs have no cognizable "property interest" in the operation of the Shipyard.

It is well settled that protectable property interests can arise from a statutory scheme which creates legitimate claims of entitlement to particular benefits. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Even where an intent to bestow a benefit on private individuals is clear, however, a statutory requirement that certain procedures be observed before a benefit can be withdrawn does not in itself create a protected property interest. *Olim v. Wakinekonka*, 461 U.S. 238, 249-51 (1983); *Stephany v. Wagner*, 835 F.2d 497, 500 (3d Cir. 1987), *cert. denied*, 487 U.S. 1207 (1988); *see also*, *Hill v. Group Three Housing Dev. Corp.*, 799 F.2d 385, 391 (8th Cir. 1986) (intent to benefit plaintiff not enough to create cognizable property interest). The mere fact that the Shipyard cannot be closed without meeting the requirements of the Act does not mean that Shipyard employees have a valid due process claim when those procedures are not observed. Rather, the dispositive question in deciding whether the statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of shipyard workers. *Stephany*, 835 F.2d at 500, *quoting Olim*, 461 U.S. at 249. The statute must contain "explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow," in order to create a property interest. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989); Put another way, the complainant "must show that particularized standards or criteria guide the [government's] decisionmakers" in order to claim protection under the due process clause. *Olim*, 461 U.S. at 249 (quotation omitted).

While the Act establishes a specific process for closing military installations, it places no substantive limits on any of the decisionmakers. The Secretary is allowed to develop and publish criteria and a force structure plan, without specific guidance from the statute, and has broad discretion in applying those standards to current domestic deployment of military resources. The Commission also is accorded broad discretion in applying those standards and may accept the Secretary's recommendations even if they deviate substantially from the final criteria and force structure plan. *See* § 2903(d)(2)(B). Finally, the President and Congress, of course, may reject the Commission's recommendations for any reason at all. *See* §§ 2903(e), 2904(b).

In sum, the Act specifies a particular process but does not guarantee a particular outcome. As a result, the unions and the Shipyard employees can identify no legitimate claim to entitlement under the Act and Count III fails to state a due process claim upon which relief could be granted.

VI.

The judgment of the district court is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I join parts I, II, IV, and V of the opinion of the court, but I disagree with the court's decision insofar as it holds that some of the challenged administrative actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702.

As the court notes (maj. typescript at 16-17), there is a "general presumption favoring judicial review of administrative action," but this presumption may be overcome by express statutory language, legislative history, or "inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Assuming that this presumption applies in the present context,[1] I conclude that the legislative history and the statutory scheme, considered together, show that Congress meant to preclude review.[2]

I.

The legislative history must be viewed in light of the problems that Congress confronted when it en-

---

[1] The defendants question whether this presumption applies because of the national security ramifications of base closing and realignment decisions.

[2] The majority states that "at least in one sense, we are here asked to review a presidential decision" (maj. typescript at 20). As I interpret the complaint and the plaintiffs' brief, however, they seek review, not of Presidential action, but of actions taken by the named defendants, i.e., the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and its members. Accordingly, I see no need to decide whether actions of the President are reviewable under the APA or under administrative "common law."

Because the plaintiffs do not appear to seek review of Presidential action and because the defendants' actions would not have affected the plaintiffs if the President had not accepted the Commission's recommendations, it could be argued that the defendants' actions did not constitute "final agency action" under 5 U.S.C. § 704. I see no need to decide this question, however, because I conclude that the defendants' actions are not reviewable on other grounds.

acted the Base Closure and Realignment Acts of 1988 and 1990. Congress undoubtedly recognized that objective and prompt decisions concerning base closings are vitally important, particularly at a time of budgetary problems and rapidly changing defense needs.[3] At the same time, Congress was acutely aware that for more than a decade before the passage of these laws, every attempt to close or realign a major base in this country had been blocked by Congress itself or by the courts.[4] The 1988 and 1990 Acts were devised to clear away the major obstacles that had produced this costly impasse.

One of the chief obstacles targeted by Congress was litigation that had obstructed base closing and realignment efforts. *See* H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) [hereinafter 1988 Conf. Rep.], *reprinted in* 1988 U.S. Code Cong. & Admin. News 3403. In 1977, Congress had enacted legislation requiring the Department of Defense to comply with various procedural requirements, including the preparation of an environmental impact statement under the National Environmental Policy Act of 1969 [hereinafter NEPA], before carrying out any major

---

[3] *See* Defense Base Closure and Realignment Commission, *Report to the President 1991* at v-vi [hereinafter *Commission Report*]; Hanlon, *Military Base Closings: A Study of Government by Commission,* 62 U. Colo. L. Rev. 331, 336, 358 (1991).

[4] *See, e.g., Base Closure: Joint Hearings on H.R. 1583 to Establish the Bipartisan Commission on the Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel,* 100th Cong., 2d Sess. 349 (1988) (statement of Rep. Armey) [hereinafter *Joint Hearings*]; *Commission Report* at 1-4.

base closing or realignment. 10 U.S.C. § 2687(b)(1)-(3) (Supp. I 1977). In some instances, NEPA challenges had dragged on in the courts for years and had successfully blocked the closing of assertedly obsolete and unneeded bases. *See* 1988 Conf. Rep. at 23, 1988 U.S. Code Cong. & Admin. News at 3403. Both the 1988 and 1990 Acts dealt directly with this specific problem by generally prohibiting NEPA review.[5] While we are not concerned with NEPA review in this case, this experience is nevertheless instructive for present purposes. It demonstrates that Congress, anxious to remove the impediments that had effectively prevented base closings and realignments for more than a decade, was keenly aware how litigation concerning procedural requirements could be successfully used to stall and ultimately defeat base closing plans.

Unfortunately, while Congress expressly addressed the problem of NEPA review in the body of the 1988 and 1990 Acts, Congress did not confront the question of APA review in the same clear and direct manner. Instead, Congress relegated this question to discussion in the Conference Report. H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706 (1990) [hereinafter 1990 Conf. Rep.] *reprinted in* 1990 U.S. Code Cong. & Admin. News 3258. Moreover, the relevant passage in the Conference Report, which is set out in full in the court's opinion (majority typescript at 29), is not a model of clarity, as the majority points

---

[5] Base Closure and Realignment Act of 1988, Pub. L. No. 100-526 § 202(b), 208, 102 Stat. 2623, 2627 (1988) [hereinafter 1988 Act]; Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c)(1), 104 Stat. 1808-19 [hereinafter 1990 Act].

out (*id.* at 30-31). The passage in the report jumbles together several separate administrative law concepts —the military affairs exception to the APA's general rulemaking and adjudication provisions (5 U.S.C. §§ 553(a)(1), 554(a)(4)), the concept of final agency action (5 U.S.C. § 704), and the availability of judicial review (5 U.S.C. §§ 701(a), 702). No party in this case has been able to provide a fully satisfactory exegesis of this passage—nor can I. Still, I do not think that this passage, particularly when viewed in light of the background recounted above, can be wholly dismissed. The passage does state quite clearly that there would be no APA review of key decisions in the base closing and realignment process, including the President's decision to accept the Commission's package of recommendations and the Secretary of Defense's actions in implementing that package after the 45-day report-and-wait period. Because the issuance of the Commission's package is not included in this list, I agree with the majority that this passage alone is not enough to overcome the strong presumption in favor of judicial review. Nevertheless, I believe that this passage, despite its ambiguities, provides support for the proposition that Congress did not want APA review to interfere with its detailed base closing and realignment scheme.[6]

---

[6] *See also* [sic] Cong. Rec. H100143 (daily ed. Nov. 13, 1991) (in recommending certain amendments to the 1990 Act, the conferees on the 1991 amendments "reaffirm view, expressed in the [Conference Report on the 1990 Act] that actions taken under the Act . . . would not be subject to judicial review."); 137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991) (statement of Sen. Nunn that the conferees' 1991 statement had the same meaning as the passage in the 1990 Conference Report).

II.

"[T]he inferences of intent drawn from [this] scheme" (*Block,* 467 U.S. at 349) point clearly toward the same conclusion. This innovative scheme was designed to obviate the institutional impediments that were thought to have contributed to the decade-long impasse regarding base closings and realignments. Under this scheme, an independent, bipartisan Defense Base Closure and Realignment Commission was created to formulate a package of recommended closings and realignments. 1990 Act § 2902. After receiving submissions from the Department of Defense, the Commission must draw up and send its package of recommendations to the President by July 1 of the year in question. *Id.* § 2903(a)-(d). Within a short time—by July 15—the President must choose between two options: (a) he may approve the entire package and transmit it to Congress or (b) he may disapprove the package in whole or in part and send it back to the Commission for reconsideration. *Id.* § 2903(e). If the President selects the first option and approves the package, Congress may disapprove the entire package by joint resolution within 45 days. *Id.* § 2904(b). If Congress fails to do so, all of the slated closings and realignments may be carried out. *Id.*

If the President selects the second option and sends the package of recommendations back to the Commission, the Commission must issue a revised package by August 15. *Id.* § 2903(c)(3). The President may then approve or disapprove the entire revised package. *Id.* § 2903(e)(4). If he approves, the package is sent to Congress, and the procedure just described is followed. If he disapproves, the process ceases. *Id.* § 2903(e)(5).

This scheme was designed to eliminate at least three obstacles that had thwarted past efforts to close bases. First, the scheme sought to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress. The legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme. The House Conference Report stated that one of the main defects in the prior procedures was that "[c]losures and realignments [have] taken a considerable period of time and [have] involved numerous opportunities for challenges in court." 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News 3257. The Report added that the new scheme was intended to expedite this process.[7] Representative Les Aspin, the chairman of the House Armed Services Committee and one of the sponsors of the 1988 Act,[8] reiterated the same point, stating that the new plan was intended to streamline current law on base closures to allow for expeditious closure of bases once the decision to close had been fully reached under the process." 137 Cong. Rec. H6007 (daily ed. July 31, 1991). Representa-

---

[7] The Report stated (1990 Conf. Rep. at 707, 1990 U.S. Code Cong. & Admin. News at 3257): "A new process involving an independent, outside commission will permit base closure to go forward in a prompt and rational manner. . . . The new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment."

[8] H.R. Rep. No. 100-1071, pt. I, 100th Cong., 2d Sess. 8 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3355, 3357.

tive Dick Armey, one of the architects of the new scheme,[9] stated on the House floor:

> [O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.
>
> Under this procedure, however, all the communities affected [have] a chance to thoroughly make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

Id. at H6008.[10] On another occasion, Representative Armey wrote that "the supporters of obsolete bases . . . by enacting an array of environmental study mandates, advance notice requirements, and gratuitous red tape . . . have simply ground base closings to a halt."[11] He went on to explain that after a proposed closing is delayed for years by litigation "the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the clos-

---

[9] *Id.*

[10] *See also* Armey, *Base Maneuvers—The Games Congress Plays with the Military Pork Barrel, Joint Hearings* at 30, 35, *reprinted from from* Policy Review, Winter 1988, at 70, 75 [hereinafter *Base Maneuvers*].

[11] *Base Maneuvers* at 72.

ing order are all but insurmountable."[12] *See also Joint Hearings* at 19 (statement of Rep. Armey); 134 Cong. Rec. H16715 (daily ed. Apr. 13, 1988) (statement of Rep. Armey).

Second, the new scheme was designed to insulate base closing and realignment decisions from actual or apparent influence by partisan and other political considerations. In the past, Executive Branch recommendations had often been criticized and defeated on the ground that particular bases had been doomed or spared based on improper political factors. For example, Representative Armey said that prior base closing decisions had been "contaminated by unworthy political considerations" and that particular bases had been closed or retained in order to punish or reward members of Congress. 137 Cong. Rec. H6008 (daily ed. July 31, 1991).[13] Other members echoed these sentiments.[14] *See also Commission Report* at 1-1, 1-2.

---

[12] *Id.*

[13] *Joint Hearings*, at 20-21 (statement of Rep. Armey quoting past statement by Senators Bumpers and Heinz); *id.* at 17 (statement of Rep. Armey) ("To put is bluntly, there is a widespread fear in Congress that an Administration with unrestricted base closure power may use that power as a political weapon to intimidate Congress."); *id.* at 349 (statement of Rep. Armey) ("[T]here is a fear that an Administration may use the threat to close particularly military bases in order to influence the votes of members of Congress."). *See also* 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News at 3257; H.R. Rep. 100-735 (II), 100th Cong., 2d Sess. 8-9, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3370, 3372 [hereinafter 1988 House Report pt. II].

[14] *See, e.g.*, 137 Cong. Rec. H6008 (daily ed. July 31, 1991) (statement of Rep. Weldon) ("I supported the base closing

The new scheme sought to remove any possible grounds for such charges by transferring the responsibility for recommending closings and realignments to an independent, nonpartisan body. Furthermore, the new scheme recognized that political considerations might creep back into the decisionmaking process if either the President or the Congress was permitted to add particular bases to or remove particular bases from the list formulated by the Commission. The new scheme therefore prohibited any such additions or deletions, restricting the President's and Congress's options to the acceptance or rejection of the Commission's entire list. The House Report on the 1990 Act explained that the "right way" to close bases is to use "a highly respected bipartisan commission [to] recommend bases for realignment

---

process in the legislation . . . because I wanted to remove [the] politics of the process of closing bases, and I think to a large extent we have done that from the standpoint of Republican versus Democratic politics"); *id.* at H6010 (statement of Rep. Snowe) ("This process was intended to remove the supposed evil of congressional politics from the base closure process"); *id.* at H6038 (statement of Rep. Fazio) ("Many serious and legitimate concerns were raised as to the political nature of the base closure recommendations when Secretary Cheney released his first list in January 1990. Because of these concerns, Congress included legislation as part of the fiscal year 1991 Defense authorization bill which put in place a clear, objective, and fair process for closing bases"). The legislative history of the 1988 Act reflected similar views. *See* 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372 ("[P]olitical pressure has thwarted attempts to effect savings and efficiencies by shutting down unneeded facilities, and the resulting belief that only by creating an expedited and automatic mechanism, insulated from the political pressures of the normal legislative process, will such savings be achieved.").

or closure based on a number of neutral and widely endorsed criteria" and to give Congress the opportunity to accept or reject the recommendations as a whole. H.R. Rep. No. 655, 101st Cong., 2d Sess. 341, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2931, 3067. Likewise, the House Report on the 1988 Act explained: "[A] major concern underlying the 'Base Closure Commission' proposal is that political pressures in the Congress could block the closing of particular facilities. One important element of the Committee's procedure that is designed to allay that concern is the provision that the resolution may not be amended by the Congress." 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372.

Third, the new scheme apparently reflected the belief that Congress, although previously unable to agree on any major base closings, would find it easier to approve a package of recommended closings that had to be accepted or rejected in its entirety. Chairman Aspin repeatedly emphasized this point in public statements,[15] and his predictions proved accurate. While no major closing or alignment had been ac-

[15] *See* Morrison, *Caught Off Base,* 21 Nat'l J. 801, 801 (1989) (quoting Rep. Aspin); Mills, *Base Closings: The Political Pain Is Limited,* 46 Cong. Q. Weekly Rep. 3625 (1988) (quoting Rep. Aspin). *See also* 137 Cong. Rec. H6022 (daily ed. July 31, 1991) (statement of Rep. Holloway); Mills, *Challenge to Base Closings Fizzles on House Floor,* 47 Cong. Q. Weekly Rep. 2062 (1989); Mills, *Pain in Members' Home States Fails to Move Minds on Hill,* 47 Cong. Q. Weekly Rep. 604 (1989); Towell, *Hill Paves Way for Closing Old Base,* 46 Cong. Q. Weekly Rep. 2999 (1988) ("[B]y forcing Congress to deal with the proposal as a package, the new procedure [made] it harder for members to cut deals to protect individual bases in their home district against cutbacks.").

complished since the 1970s, the Commission's 1991 recommendations were approved by the President, and a proposed joint resolution of disapproval lost in the House by an overwhelming margin. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

III.

In my view, judicial review of base closing decisions is inconsistent with this scheme because a successful challenge—i.e., one that at least temporarily invalidates a base closing decision—would thwart the scheme's fundamental objectives.

First, it seems clear that judicial review would undermine the concepts of speed and finality that Congress regarded as vital parts of its plan. *See Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act. The majority acknowledges (maj. typescript at 17) that "the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close," but the majority "sees little tension between that timetable and judicial review after a final list of bases for closure" has been approved by the President and not disapproved by the Congress.

I disagree. The new scheme crafted by Congress contemplates that a truly "final" decision on a package of closings and realignments would be completed within the short time periods set out.[16] The scheme

[16] In providing for very limited NEPA review—of property disposal and relocation actions to be taken after a final closing or alignment decision (1990 Act § 2905(c)(2))—Congress imposed a very short (60-day) statute of limitations. No

did not contemplate that this "final" decision would then be subject to judicial review, possible reversal, and further action by the Commission, the President, and the Congress.

Furthermore, judicial review of one part of a purportedly "final" package will often implicate other parts of the package. Decisions regarding base closings sometimes involve hard choices concerning the relative merits of comparable bases. (In this case, for example, a major theme in the plaintiffs' complaint is the Philadelphia Naval Yard's claimed superiority over other similar naval yards that the Commission evaluated more highly and therefore recommended be retained.) Thus, if the Commission decides to recommend closure of [sic] base A rather than Base B and the decision on Base A is reversed after judicial review of the Commission's procedures, the decision to recommend retention of Base B will logically be called into question. In this way, judicial review of one part of the "final" package may reopen other parts of the package as well—or require the taxpayers to pay for clearly redundant facilities.

Not only would judicial review after a purportedly "final" decision upset the timetable set out in the Act, but such review would undermine the concept that neither the President nor Congress should be permitted to approve or disapprove the closing of a particular base but should instead be restricted to choosing between acceptance or rejection of the Commission's entire package. If the plaintiffs in this case succeed on their underlying APA claims and the

---

statute of limitations was prescribed for a suit of the type as issue here. This seems a clear indication that no such suits were contemplated.

Commission is required to conduct further proceedings and issue a new recommendation regarding the Philadelphia Naval Yard, the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base.

In sum, it seems to me that the statutory scheme is grounded on concepts—speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package or recommendations—that are inconsistent with judicial review under the APA. Certainly I do not suggest that review of the decision regarding the Philadelphia Naval Yard will bring the statutory scheme tumbling down, and I am unable to predict what effect if any the precedent set by this case will have on litigation concerning future attempted closings. I conclude only that judicial review of base closing and realignment decisions is conceptually inconsistent with the innovative scheme enacted by Congress. This analysis, reinforced by the legislative history, leads me to the conclusion that base closing decisions are not reviewable under the APA.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above Court in this cause is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Franklin* v. *Massachusetts*, 505 U.S. —— (1992).

November 9, 1992

SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 9, 1992

The petition herein for writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

APPENDIX D

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

Civil Action No. 91-4322

SEN. ARLEN SPECTER, ET AL.

v.

H. LAWRENCE GARRETT, III,
SECRETARY OF THE NAVY, ET AL.

[Filed November 1, 1991]

MEMORANDUM AND ORDER

BUCKWALTER, J.

I will grant the defendants' motion to dismiss because:

(a) the statute precludes judicial review; and
(b) the political question doctrine forecloses judicial intervention.

A. *THE STATUTE PRECLUDES JUDICIAL REVIEW*

Plaintiffs have asserted that their right to judicial review for Counts I and II arises under the Adminis-

trative Procedure Act, 5 U.S.C. §§ 551-706 (1977), hereafter APA.

The presumption of judicial review of federal agency action under the APA is well established. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). This presumption, like all presumptions used in interpreting statutes, may be overcome by the appropriate showing of congressional intent. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). The APA specifically provides two methods for overcoming the presumption of judicial review in § 701(a). For purposes of this case, we are concerned only with the first method in § 701(a)(1), which provides for no judicial review under the APA "to the extent that—(1) statutes preclude judicial review . . ." 5 U.S.C. §§ 701(a)(1) (1977).

In determining whether a statute precludes judicial review, the Supreme Court has instructed courts to look at "specific language or specific legislative history that is a reliable indicator of congressional intent," "the collective import of legislative and judicial history behind a particular statute," and "inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349. As long as the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme," the presumption favoring judicial review has been overcome. *Id.* at 351.

Applying these standards, the court finds that the Defense Base Closure and Realignment Act of 1990 precludes judicial review for the following reasons. Initially, specific language in the legislative history of the Act indictates a congressional intent to preclude judicial review. The House Conference Report provides:

> 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 function." An action falling within this exception, as the decision to clear 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 Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements, and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan . . . , the issuance of selection criteria . . . , the Secretary of Defense's recommendation of closures and realignments of military installations . . . , the decision of the President . . . , and the Secretary's actions to carry out the recommendations of the Commission. . . .

H.R. Conf. Rep. 101-923, 101st Cong., 2d Sess. 706, *reprinted in* 1990 U.S. Code Cong. & Admin. News 3110, 3258.

This passage in the legislative history expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act.

Other indicia of statutory intent to preclude judicial review is the Act's concern with "the timely

closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." H.R. Conf. Rep. 101-923, 101st Cong. 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." *Id.*

This language in the legislative history indicates that there was concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner. The desire to correct this shortcoming under the then existing law further supports the contention that no judicial review was contemplated by the 1990 Act. While the arguments proposed by both sides on this issue are extensive, I have written this memorandum in a rather summary fashion in the interest of time, but not at the expense of a thorough analysis of the arguments on both sides. In brief, I find that the intent to preclude judicial review is "fairly discernible in the statutory scheme."

B. *THE POLITICAL QUESTION DOCTRINE FORECLOSES JUDICIAL INTERVENTION*

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, di-

verge, combine, appear and disappear in seemingly disorderliness". *Baker v. Carr*, 369 U.S. 186, 210 (1962).

Based on my own review of cases as well as treatises on the subject, I believe that Justice Brennan's statement in the *Baker* case, *supra*, remains as true today as it was 29 years ago. Nevertheless, the *Baker* case did describe the attributes of a political question and expressed them in the following manner:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In a sense, the invoking of the political question doctrine is no more than a correlative of my first

conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review.

On the other hand, the doctrine can stand by itself, it seems to me, as one which recognizes that in certain cases, the concept of separation of powers strongly suggests that the judiciary should defer in certain controversies to one or both of the other branches of government.

In reviewing the formulations in *Baker*, I felt that the present case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government.

The respect due to the other branches of government comes in part from a recognition that all branches are deeply concerned with conducting their affairs in the manner which is consistent with the constitution. Indeed, all three branches are involved in interpreting it. It is true, of course, that normally the judicial branch undertakes the ultimate review of laws and in so doing will not always agree with the interpretation of the other branches.

Under the political question doctrine, when should the judiciary defer to the other branches' views as opposed to simply undertaking judicial review and stating its own views, whether or not they differ from the other branches?

Unfortunately, there is no particular guidance in case law for determining the answer to that question as the first quotation from *Baker* indicates. The simple answer is, RARELY. Nevertheless, one must view the particular setting in which the question is raised. The case now before me comes with a significantly long history of attempts to close military

bases and the problems resulting from such attempts. The Act of 1990 is the most recent in a series of efforts by Congress to resolve those problems fairly. Among other things, it provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations. As permitted by the Act, both the President and the Congress have approved the recommended base closures. While plaintiffs view defendants' raising of the political question doctrine as specious, I must disagree. Although I view it as a doctrine which should be used sparingly, this case fairly calls for its invocation.

In conclusion, I believe that it would be impossible to undertake judicial review of the decision on base closures made by the duly elected representatives of this country without expressing a lack of the respect due those branches of government.

Based on the foregoing opinion, the folllowing order is entered:

ORDER

AND NOW, this 1st day of November, 1991, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED; the court enters judgment for the defendants and the plaintiffs' claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

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; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hutchinson, Judge Nygaard, and Judge Alito would have granted rehearing in banc.

By the Court

/s/ WALTER STAPLETON
Circuit Judge

Dated: June 14, 1993

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETATY 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; ROBERT D. STUART, JR.

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTMEYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: May 20, 1992

APPENDIX G

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, as amended;* 10 U.S.C. 2687 note (Supp. IV 1992).

"SEC. 2901. SHORT TITLE AND PURPOSE

"(a) SHORT TITLE.—This part may be cited as the 'Defense Base Closure and Realignment Act of 1990'.

"(b) PURPOSE.—The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

"SEC. 2902. THE COMMISSION

"(a) ESTABLISHMENT.—There is established an independent commission to be known as the 'Defense Base Closure and Realignment Commission'.

"(b) DUTIES.—The Commission shall carry out the duties specified for it in this part.

"(c) APPOINTMENT.—(1)(A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

"(B) The President shall transmit to the Senate the nominations for appointment to the Commission—

---

* See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1344-1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608.

"(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

"(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

"(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

"(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with—

"(A) the Speaker of the House of Representatives concerning the appointment of two members;

"(B) the majority leader of the Senate concerning the appointment of two members;

"(C) the minority leader of the House of Representatives concerning the appointment of one member; and

"(D) the minority leader of the Senate concerning the appointment of one member.

"(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1)(B), the President shall designate one such individual who shall serve as Chairman of the Commission.

"(d) TERMS.—(1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

"(2) The Chairman of the Commission shall serve until the confirmation of a successor.

"(e) MEETINGS.—(1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

"(2)(A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

"(B) All the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

"(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

"(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

"(iii) The Chairmen and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

"(f) VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

"(g) PAY AND TRAVEL EXPENSES.—(1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

"(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

"(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

"(h) DIRECTOR OF STAFF.—(1) the Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not

served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

"(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

"(i) STAFF.—(1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

"(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

"(3)(A) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

"(B)(i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

"(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

"(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person par-

ticipated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

"(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may—

"(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

"(ii) review the preparation of such a report; or

"(iii) approve or disapprove such a report.

"(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the Commission to assist the Commission in carrying out its duties under this part.

"(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

"(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

"(A) There may not be more than 15 persons on the staff at any one time.

"(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

"(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

"(j) OTHER AUTHORITY.—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

"(2) The Commission may lease space and acquire personal property to the extent funds are available.

"(k) FUNDING.—(1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

"(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526 [set out below]. Such funds shall remain available until expended.

"(*l*) TERMINATION.—The Commission shall terminate on December 31, 1995.

"(m) PROHIBITION AGAINST RESTRICTING COMMUNICATIONS.—Section 1034 of title 10, United States Code, shall apply with respect to communications with the Commission.

"SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

"(a) FORCE-STRUCTURE PLAN.—(1) As part of the budget justification documents submitted to Congress in support of the budget for the Department

of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

"(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan—

"(A) a description of the assessment referred to in paragraph (1);

"(B) a description (i) of the anticipated force structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based, with a justification thereof) during and at the end of each such period; and

"(C) a description of the anticipated implementation of such force-structure plan.

"(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

"(b) SELECTION CRITERIA.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military

installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that oppportunity in the publication required under the preceding sentence.

"(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

"(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than January 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before February 15 of the year concerned.

"(c) DOD RECOMMENDATIONS.—(1) The Secretary may, by no later than April 15, 1991, March 15, 1993, and March 15, 1995, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installa-

tions inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

"(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation.

"(3) In considering military installations for closure or realignment, 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.

"(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

"(5)(A) Each person referred to in subparagraph (B), when submitting information to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that person's knowledge and belief.

"(B) Subparagraph (A) applies to the following persons:

"(i) The Secretaries of the military departments.

"(ii) The heads of the Defense Agencies.

"(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe, regulations which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

"(6) In the case of any information provided to the Commission by a person described in paragraph (5)(B), the Commission shall submit that information to the Senate and the House of Representatives to be made available to the Members of the House concerned in accordance with the rules of that House. The information shall be submitted to the Senate and the House of Representatives within 24 hours after the submission of the information to the Commission. The Secretary of Defense shall prescribe regulations to ensure the compliance of the Commission with this paragraph.

"(d) REVIEW AND RECOMMENDATIONS BY THE COMMISSION.—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

"(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the

Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

"(B) Subject to subparagraph (C), in making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

"(C) In the case of a change described in subparagraph (D) in the recommendations made by the Secretary, the Commission may make the changes only if the Commission—

"(i) makes the determination required by subparagraph (B);

"(ii) determines that the change is consistent with the force-structure plan and final criteria referred to in subsection (c)(1);

"(iii) publishes a notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President pursuant to paragraph (2); and

"(iv) conducts public hearings on the proposed change.

"(D) Subparagraph (C) shall apply to a change by the Commission in the Secretary's recommendations that would—

"(i) add a military installation to the list of military installations recommended by the Secretary for closure;

"(ii) add a military installation to the list of military installations recommended by the Secretary for realignment; or

"(iii) increase the extent of a realignment of a particular military installation recommended by the Secretary.

"(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense committees on the same date on which it transmits its recommendations to the President under paragraph (2).

"(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

"(5) The Comptroller General of the United States shall—

"(A) assist the Commission, to the extent requested, in the Commission's review and analysis of the recommendations made by the Secretary pursuant to subsection (c); and

"(B) by no later than April 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.

"(e) REVIEW BY THE PRESIDENT.—(1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations.

"(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

"(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

"(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

"(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

"(a) IN GENERAL.—Subject to subsection (b), the Secretary shall—

"(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

"(2) realign all military installations recommended for realignment by such Commission in each such report;

"(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

"(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignment.

"(b) CONGRESSIONAL DISAPPROVAL.—(1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of—

"(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

"(B) the adjournment of Congress sine die for the session during which such report is transmitted.

"(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period.

"SEC. 2905. IMPLEMENTATION

"(a) IN GENERAL.—(1) In closing or realigning any military installation under this part, the Secretary may—

"(A) take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design as may be required to transfer functions from a military installation being closed or realigned to another military installation, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for use in planning and design, minor construction, or operation and maintenance;

"(B) provide—

"(i) economic adjustment assistance to any community located near a military installation being closed or realigned, and

"(ii) community planning assistance to any community located near a military in-

stallation to which functions will be transferred as a result of the closure or realignment of a military installation,

if the Secretary of Defense determines that the financial resources available to the community (by grant or otherwise) for such purposes are inadequate, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for economic adjustment assistance or community planning assistance;

"(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and shall use for such purposes funds in the Account;

"(D) provide outplacement assistance to civilian employees employed by the Department of Defense at military installations being closed or realigned, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for outplacement assistance to employees; and

"(E) reimburse other Federal agencies for actions performed at the request of the Secretary with respect to any such closure or realignment, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense and available for such purpose.

"(2) In carrying out any closure or realignment under this part, the Secretary shall ensure that environmental restoration of any property made excess to the needs of the Department of Defense as a result of such closure or realignment be carried out as soon as possible with funds available for such purpose.

"(b) MANAGEMENT AND DISPOSAL OF PROPERTY.—(1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property and facilities located at a military installation closed or realigned under this part—

"(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483);

"(B) the authority of the Administrator to dispose of surplus property under section 203 of that Act (40 U.S.C. 484);

"(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)); and

"(D) the authority of the Administrator to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with the Act of May 19, 1948 (16 U.S.C. 667b).

"(2)(A) Subject to subparagraph (C), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

"(i) all regulations in effect on the date of the enactment of this Act [Nov. 5, 1990] governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949 [40 U.S.C. 471 et seq.]; and

"(ii) all regulations in effect on the date of this Act governing the conveyance and disposal

of property under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)).

"(B) The Secretary, after consulting with the Administrator of General Services, may issue regulations that are necessary to carry out the delegation of authority required by paragraph (1).

"(C) The authority required to be delegated by paragraph (1) to the Secretary by the Administrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

"(D) The Secretary of Defense may transfer real property or facilities located at a military installation to be closed or realigned under this part with or without reimbursement, to a military department or other entity (including a nonappropriated fund instrumentality) within the Department of Defense or the Coast Guard.

"(E) Before any action may be taken with respect to the disposal at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local government concerned for the purpose of considering any plan for the use of such property by the local community concerned.

"(c) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

"(2)(A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of

the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

"(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider—

"(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

"(ii) the need for transferring functions to any military installation which has been selected as the receiving installation; or

"(iii) military installations alternative to those recommended or selected.

"(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

"(d) WAIVER.—The Secretary of Defense may close or realign military installations under this part without regard to—

"(1) any provision of law restricting the use of funds for closing or realigning military in-

stallations included in any appropriations or authorization Act; and

"(2) sections 2662 and 2687 of title 10, United States Code.

"SEC. 2906. ACCOUNT

"(a) IN GENERAL.—(1) There is hereby established on the books of the Treasury an account to be known as the 'Department of Defense Base Closure Account 1990' which shall be administered by the Secretary as a single account.

"(2) There shall be deposited into the Account—

"(A) funds authorized for and appropriated to the Account;

"(B) any funds that the Secretary may, subject to approval in an appropriation Act, transfer to the Account from funds appropriated to the Department of Defense for any purpose, except that such funds may be transferred only after the date on which the Secretary transmits written notice of, and justification for, such transfer to the congressional defense committees; and

"(C) except as provided in subsection (d) proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part.

"(b) USE OF FUNDS.—(1) The Secretary may use the funds in the Account only for the purposes described in section 2905(a).

"(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a

minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project may be carried out without regard to section 2802(a) of title 10, United States Code.

"(c) REPORTS.—(1) No later than 60 days after the end of each fiscal year in which the Secretary carries out activities under this part, the Secretary shall transmit a report to the congressional defense committees of the amount and nature of the deposits into, and the expenditures from, the Account during such fiscal year and of the amount and nature of other expenditures made pursuant to section 2905(a) during such fiscal year.

"(2) Unobligated funds which remain in the Account after the termination of the Commission shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

"(3) No later than 60 days after the termination of the Commission, the Secretary shall transmit to the congressional defense committees a report containing an accounting of—

"(A) all the funds deposited into and expended from the Account or otherwise expended under this part; and

"(B) any amount remaining in the Account.

"(d) DISPOSAL OR TRANSFER OF COMMISSARY STORES AND PROPERTY PURCHASED WITH NONAPPROPRIATED FUNDS.—(1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropri-

ated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act [Pub. L. 100-526] (10 U.S.C. 2687 note).

"(2) The amount so deposited shall be equal to the depreciated value of the investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

"(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving—

"(A) commissary stores; and

"(B) real property and facilities for nonappropriated fund instrumentalities.

"(4) As used in this subsection:

"(A) The term 'commissary store funds' means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code.

"(B) The term 'nonappropriated funds' means funds received from a nonappropriated fund instrumentality.

"(C) The term 'nonappropriated fund instrumentality' means an instrumentality of the

United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

"(e) ACCOUNT EXCLUSIVE SOURCE OF FUNDS FOR ENVIRONMENTAL RESTORATION PROJECTS.—Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

"SEC. 2907. REPORTS

"As part of the budget request for fiscal year 1993 and for each fiscal year thereafter for the Department of Defense, the Secretary shall transmit to the congressional defense committees of Congress—

"(1) a schedule of the closure and realignment actions to be carried out under this part in the fiscal year for which the request is made and an estimate of the total expenditures required and cost savings to be achieved by each such closure and realignment and of the time period in which these savings are to be achieved in each case, together with the Secretary's assessment of the environmental effects of such actions; and

"(2) a description of the military installations, including those under construction and

those planned for construction, to which functions are to be transferred as a result of such closures and realignments, together with the Secretary's assessment of the environmental effects of such transfers.

"SEC. 2908. CONGRESSIONAL CONSIDERATION OF COMMISSION REPORT

"(a) TERMS OF THE RESOLUTION.—For purposes of section 2904(b), the term 'joint resolution' means only a joint resolution which is introduced within the 10-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), and—

"(1) which does not have a preamble;

"(2) the matter after the resolving clause of which is as follows: 'That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ———', the blank space being filled in with the appropriate date; and

"(3) the title of which is as follows: 'Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission.'.

"(b) REFERRAL.—A resolution described in subsection (a) that is introduced in the House of Representatives shall be referred to the Committee on Armed Services of the House of Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

"(c) DISCHARGE.—If the committee to which a resolution described in subsection (a) is referred has

not reported such resolution (or an identical resolution) by the end of the 20-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), such committee shall be, at the end of such period, discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the House involved.

"(d) CONSIDERATION.—(1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been discharged (under subsection (c)) from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. A Member may make the motion only on the day after the calendar day on which the Member announces to the House concerned the Member's intention to make the motion, except that, in the case of the House of Representatives, the motion may be made without such prior announcement if the motion is made by direction of the committee to which the resolution was referred. All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint reso-

lution without intervening motion, order, or other business, and the resolution shall remain the unfinished business of the respective House until disposed of.

"(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the resolution. An amendment to the resolution is not in order. A motion further to limit debate is in order and not debatable. A motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to is not in order.

"(3) Immediately following the conclusion of the debate on a resolution described in subsection (a) and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

"(e) CONSIDERATION BY OTHER HOUSE.—(1) If, before the passage by one House of a resolution of that House described in subsection (a), that House receives from the other House a resolution described in subsection (a), then the following procedures shall apply:

"(A) The resolution of the other House shall not be referred to a committee and may not be

considered in the House receiving it except in the case of final passage as provided in subparagraph (B)(ii).

"(B) With respect to a resolution described in subsection (a) of the House receiving the resolution—

"(i) the procedure in that House shall be the same as if no resolution had been received from the other House; but

"(ii) the vote on final passage shall be on the resolution of the other House.

"(2) Upon disposition of the resolution received from the other House, it shall no longer be in order to consider the resolution that originated in the receiving House.

"(f) RULES OF THE SENATE AND HOUSE.—This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"SEC. 2909. RESTRICTION ON OTHER BASE CLOSURE AUTHORITY

"(a) IN GENERAL.—Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act [Nov. 5, 1990] and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

"(b) RESTRICTION.—Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a)—

"(1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned or as an installation under consideration for closure or realignment; or

"(2) to carry out any closure or realignment of a military installation inside the United States.

"(c) EXCEPTION.—Nothing in this part affects the authority of the Secretary to carry out—

"(1) closures and realignments under title II of Public Law 100-526 [set out below]; and

"(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

"SEC. 2910. DEFINITIONS

"As used in this part:

"(1) The term 'Account' means the Department of Defense Base Closure Account 1990 established by section 2906(a)(1).

"(2) The term 'congressional defense committees' means the Committees on Armed Services and the Committees on Appropriations of the Senate and of the House of Representatives.

"(3) The term 'Commission' means the Commission established by section 2902.

"(4) The term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

"(5) The term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personel or funding levels, or skill imbalances.

"(6) The term 'Secretary' means the Secretary of Defense.

"(7) The term 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

"SEC. 2911. CLARIFYING AMENDMENT

"[Amended this section.]"

[For effective date of amendments by section 344 (b)(1) of Pub. L. 102-190 to section 2906 of Pub. L. 101-510, set out above, see Effective Date of 1991 Amendments by Section 344 of Pub. L. 102-190 note set out above.]

[Section 2821(h)(2) of Pub. L. 102-190 provided that: "The amendment made by paragraph (1) [amending section 2910 of Pub. L. 101-510 set out above] shall take effect as of November 5, 1990, and shall apply as if it had been included in section 2910 (4) of the Defense Base Closure and Realignment Act of 1990 [section 2910 of Pub. L. 101-510] on that date."]

[Section 2827(a)(3) of Pub. L. 102-190 provided that: "The amendments made by this subsection [amending sections 2905 and 2906 of Pub. L. 101-510 set out above] shall take effect on the date of the enactment of this Act [Dec. 5, 1991]."]

[References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.]

APPENDIX H

The Administrative Procedure Act,
5 U.S.C. 551-559 & 701-706

Sec. 701. Application; definitions

(a) This chapter 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.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2

of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1993 342479 60327

Document Separator

Supreme Court, U.S.
FILED
SEP 23 1993
OFFICE OF THE CLERK

No. 93-289

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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

Petitioners,

v.

ARLEN SPECTER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bruce W. Kauffman
(Counsel of Record)
Mark J. Levin
Camille W. Spinello
Daniel H. Wheeler
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 The Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000

Attorneys for Respondents

GLOBAL FINANCIAL PRESS, 1845 WALNUT STREET, PHILA., PA. 19103 (215) 977-7300

10-01-93 08:52 ☎202 633 1151 CIVIL APPELLATE ☑004

Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari.[1]

REASONS FOR DENYING THE PETITION

A. Petitioners Would Render The "Fair Process" Purpose Of The Base Closure Act A Complete Nullity.

The issue presented is clear: Will the Base Closure Act ensure a *"fair process"* — as Congress expressly intended — or will its very purpose be rendered a nullity because there is no way to enforce its procedural mandates?[2] In this case, petitioners have blatantly ignored mandatory

1. Respondents are United States Senators Arlen Specter, Harris Wofford, Bill Bradley and Frank R. Lautenberg; United States Representatives Robert E. Andrews, Curt Weldon, Marjorie Margolies-Mezvinsky, James C. Greenwood and Robert A. Borski; the Commonwealth of Pennsylvania and its Governor Robert P. Casey and Attorney General Ernest D. Preate, Jr.; the State of New Jersey and its Governor James J. Florio and Attorney General Fred DeVesa; the State of Delaware and its Governor Thomas R. Carper; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 8; the Metal Trades Council, Local 687 Machinists; Planners Estimators Progressmen & Schedulers Union, Local No. 2; and Union representatives William F. Reil, Howard J. Landry and Ronald Warrington. *See* Sup. Ct. R. 35.3.

2. Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808. Section 2901(b) of the Act provides:

> "Sec. 2901. Short Title and *Purpose*
>
> * * *
>
> (b) *Purpose.* — *The purpose* of this part is to provide a *fair process* . . . ." (Emphasis added).

10-01-93 08:52 ☎202 633 1151 CIVIL APPELLATE ☑005

procedural requirements of the Act.[3] If judicial review were denied, "fair process" could be defeated every time simply by the bureaucracy's refusal, as in this case, to adhere to fundamental statutory safeguards.

Had it so chosen, Congress easily could have vested the President with unrestricted discretion to close bases unilaterally, using any criteria he desired or no criteria at all. However, Congress chose instead to promulgate the Base Closure Act, with the *express purpose* of ensuring a "*fair process*". §2901(b) (emphasis added).

To achieve a fair process, the Secretary of Defense and the Base Closure Commission are mandated to follow non-discretionary statutory procedures. As petitioners concede:

> "[T]he Secretary of Defense *must* submit a six-year 'force-structure plan . . . based on an assessment . . . of the probable threats to the national security' during that period. §2903(a). The Secretary also *must* establish, *after notice and an opportunity for public comment*, selection criteria to be used in making base closure recommendations. §2903(b). *Based on* the force-structure plan and selection criteria . . ., the Secretary must prepare base closure recommendations . . . §2903(c).
>
> The Act *requires* the Secretary of Defense . . . to forward his recommendations to Congress and to the . . . Commission . . . §§2902(a), 2903(c)(1). The Secretary *must* make available to the Commission and the Comptroller General . . . all the information used in making his recommendations. §2903(c)(4). The Commission *is charged with holding public hearings* and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. §2903(d)(1) and (2)". (Pet. at 3-4) (emphasis added).[4]

3. Because the District Court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6), respondents' factual allegations of blatant procedural violations by petitioners must be deemed true. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). *See* note 4 *infra* at p. 3.

The proposed list of closures — required to have been formulated in accordance with the fair process mandated by Congress — then goes to the President, who has a mere 15 days to review it and accept or reject it *in its entirety*. (Pet. at 4-5, 23-24).

As the Third Circuit emphasized, the procedures mandated by the Act are not mere window-dressing, but rather are the heart of the legislation. The President *must* rely upon the integrity of the process that resulted in the recommended closure list since he has neither the time nor the resources to verify independently that the process was fair.[5] Moreover, he has *no authority* to act if the mandated statutory process was violated:

> " '[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish *exclusive means* for closure of domestic bases. §2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of*

4. Respondents' allegations, which must here be accepted as true, establish, *inter alia*, that (a) petitioners deliberately disabled the Comptroller General from performing his statutory duties by withholding key information; (b) in the proceedings before the Commission, all information favorable to respondents was suppressed from the public and closed-door meetings with the Navy were held after the completion of public hearings in order to gather information necessary to support the Navy's predetermined decision to close the Philadelphia Naval Shipyard; and (c) the Navy compiled a "stealth list" of base closings from a prior base closure list and manipulated the base closure criteria to close the Shipyard. All of these allegations must be deemed to be true. *See* note 3 *supra*.

5. Thus, the actions of the Secretary of Defense and the Commission indisputably are "final agency action" for purposes of judicial review. *See* pp. 11-14 *infra*.

10/01/93 08:53 ☎202 633 1151 CIVIL APPELLATE 006

the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.[7]

* * *

[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process." (App. 7a, 12a) (emphasis added).

It follows inexorably that judicial review must exist to determine whether the procedures mandated by Congress have been followed. Historically, only the federal courts have performed this critical check-and-balance function.[6]

Petitioners argue that there is no judicial review because the Secretary of Defense's and the Commission's reports are not "final agency action" in that they are merely "tentative", "preliminary" and "nonbinding" and have "no direct effect". (Pet. at 12, 18-19). Clearly, however, the agencies' reports *are* "final" from an administrative perspective, since there is nothing left for the agencies to do, and they *do* have a direct effect because the President must rely upon them and, indeed, has no authority to act

6. Petitioners err in contending that the need for judicial review is supplanted by the provision in the Base Closure Act for congressional disapproval of proposed closures by joint resolution. (Pet. at 4-5). First, Congress has only a mere 45 days in which to act. §2904(b). Second, accepting *arguendo* petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. at 5), the President would have total power to decide base closures. If that is what Congress had intended, the Base Closure Act would have been unnecessary.

unless the integrity of the process which produced them was maintained.[7]

If, as petitioners contend, it makes no difference whether or not the proposed closures have been determined in accordance with the fair process mandated by Congress, then the purpose of the Base Closure Act has effectively been nullified. Such a conclusion would violate the fundamental precept of statutory construction that legislation must be interpreted in a manner which effectuates, not frustrates, its purpose. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("'The cardinal principle of statutory construction is to save and not to destroy.' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("[w]e must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940) ("[Appellant's] construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question").

The fallacies in petitioners' interpretation that there is no judicial review are illustrated by the following

7. The President must accept or reject the list submitted as a whole. If a military installation does not appear on a list submitted by the Commission to the President, it *cannot be closed* under the Act. §2903(e).

10/01/93 08:54 ☎202 633 1151 CIVIL APPELLATE 007

hypothetical:[8] Assume that: (1) totally ignoring his statutory duty (§2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather on his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) with knowledge of these violations and in violation of its own statutory duties (§2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider and debate a joint resolution of disapproval within 45 days; (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live — all *without* a fair process.

If, as petitioners urge, the federal courts lack jurisdiction even to review the most blatant, unlawful and contemptuous violations of the process expressly mandated by Congress, then not only will public confidence in the integrity of government be shattered,[9] but the very foundation of the Republic will be shaken.

8. The facts stated are only slightly more extreme than those actually alleged, and must be accepted as true, in this case.

9. The Act mandates a "fair process" to ensure that affected individuals and communities will accept the painful and permanent effects of base closure. To that end, the Act contains a host of non-discretionary procedural safeguards, none of which appear in predecessor base closure statutes. *See* 10 U.S.C. §2687 (1977) (Secretary of Defense permitted to select bases for closure unilaterally); Pub. L. No. 100-526, §§201-209, 102 Stat. 2623, 2627-34 (1988) (permitting closures on the basis of secret meetings and unverified information). Thus, not only do the structure, purpose and history of the Act *not* demonstrate an

(footnote continued on next page)

B. The Third Circuit's Opinions Are Consistent With *Franklin*.

Although this Court declined in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), to permit review of the President's decision under the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.* ("APA"),[10] it held that "*the President's actions may still be reviewed for constitutionality*". 112 S. Ct. at 2776 (emphasis added). The Third Circuit, applying *Franklin*, held that judicial review is likewise available here because the President's action in approving the base closure list "failed to comply with the mandatory procedural requirements of the only statute authorizing such action and ... thereby violated the constitutionally-mandated separation of powers". (App. 14a). Accordingly, the Third Circuit found *Franklin* to be "affirmative support" for its holding:

> "[T]here is a constitutional aspect to the exercise of judicial review in this case — an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case." (App. 10a).

Judicial review is also available under the APA because the actions of the Secretary of Defense and the Base Closure Commission were "final" within the meaning of *Franklin*. *See* pp. 11-14 *infra*.

(footnote continued from preceding page)
intent by Congress to preclude judicial review (Pet. at 20-28), but they literally cry out for the judiciary to perform its historic role.

10. The APA subjects the "final" actions of federal agencies to judicial review. *Franklin* held on its unique facts that the final act in question in that case was that of the President, not an administrative agency, and that the President is not an agency subject to the APA. 112 S. Ct. at 2775.

10-01-93 08:55 ☎202 633 1151 CIVIL APPELLATE ☑008

1. The Third Circuit's Opinions Properly Rely Upon and Apply the *Youngstown* Doctrine.

Petitioners argue that their egregious conduct is forever insulated from all judicial review because under the Base Closure Act it is "the President" who acts finally to approve or disapprove bases for closure. Yet even if that were true,[11] the President *must* have constitutional or statutory authority for his actions. Indeed, this Court's seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) — which established that "[t]he President's power ... must stem either from an act of Congress or from the Constitution itself" — was cited with approval in *Franklin*, 112 S. Ct. at 2776. The Third Circuit explained:

> "We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ('It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any ... must stem from an act of Congress or from the Constitution itself.' (citing *Youngstown Steel*); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) ("'*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'" (quoting *Nixon v. Sirica*, 487 F.2d 700, 793 (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g., National Treasury Employees Union*, 492 F.2d at 604 ('[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.'); *see also* U.S. Const. Art. II, §3 ('[T]he President shall take care that the laws be faithfully executed ...')."[12] (App. 11a).

11. As discussed *infra* at pp. 11-14, the "final" action for purposes of judicial review under the APA was taken not by the President, but by the Secretary of Defense and the Base Closure Commission.

In the present case, the President's authority to act with respect to the Commission's recommendations is *linked inextricably* to the integrity of the administrative process which preceded his involvement. The failure of the Secretary of Defense and the Commission to comply with non-discretionary procedural mandates of the Act left the President without authority to act on such recommendations. As the Third Circuit emphasized:

12. Courts have long recognized "general principles of judicial review" where (as here) express statutory procedures have been blatantly ignored. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (recognizing under general principles of judicial review that an agency must articulate a basis for its findings in reports to the President); *Leedom v. Kyne*, 358 U.S. 184, 190-191 (1958) (courts will not lightly infer that Congress does not intend the judiciary to protect rights it confers against agency actions taken in excess of delegated powers); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 551 (1937) ("It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers ... to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority"); *U.S. ex rel. Kansas City So. R. Co. v. Interstate Commerce Commission*, 252 U.S. 178, 187-188 (1920) (court has power to enforce an agency's refusal to discharge duties which a statute exacts). *See also Maple Leaf Fish Co. v. United States*, 598 F. Supp. 1076, 1081 (C.I.T. 1984), *aff'd*, 762 F.2d 86 (Fed. Cir. 1985) (recognizing under general principles of judicial review that an agency must fairly apprise the President, interested parties and the public of the reasoning underlying its recommendations to the President).

10/01/93 08:55 ☎202 633 1151 CIVIL APPELLATE 009

"Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*, 112 S. Ct. at 2776 (citing *Youngstown*) . . . . The President . . . must have statutory or constitutional authority for his actions and *where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.*" (App. 12a) (emphasis added).[13]

Petitioners' contention that the Third Circuit misapplied *Youngstown* by "conflating" constitutional, statutory and ultra vires theories (Pet. at 14-19) is sheer sophistry. *Franklin*, citing *Youngstown*, expressly held that "the President's actions may be reviewed for constitutionality". 112 S. Ct. at 2776. If the President has violated the constitutional separation of powers doctrine by exceeding the authority vested in him by Congress, such unconstitutional conduct "may be reviewed". Nothing in *Franklin* even remotely suggests that the only type of constitutional challenge available is the type of challenge involved there.[14]

Petitioners' *in terrorem* argument that the Third Circuit's decisions will result in a flood of "broad non-APA

13. It is obvious from the structure of the statute that the President *must* rely on the procedural integrity of the process, since he is given a scant *15 days* to review the Commission's report and has neither the time nor the resources to research independently or to verify the integrity of that process.

14. In *Franklin*, a violation of the apportionment standards set forth in Article I, §2, cl. 3 of the Constitution was alleged.

judicial challenges to Presidential action" (Pet. at 11, 14-15) must also be rejected. The Base Closure Act is unique in that it was enacted specifically to provide a "fair process" for a highly specialized function — the closure and realignment of military bases. Moreover, this case does *not* involve what petitioners call "routine allegations of statutory error", "garden-variety statutory error" or "routine defects". (Pet. at 14-15). Petitioners' brazen disregard for the non-discretionary procedures mandated by Congress was, one would hope, unprecedented, unparalleled and certainly not "business as usual" for the government.

2. Petitioners' Actions Were "Final" Within the Meaning of *Franklin* and the APA.

For purposes of determining finality under the APA, *Franklin* stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties". 112 S. Ct. at 2773. The agency action in *Franklin* was not "final" because the Secretary of Commerce's report to the President carried "no direct consequences" and had "no direct effect". *Id.* at 2774.

Franklin and the present case, however, do not share "similar statutory schemes". (Pet. at 2). Here, the actions of the Secretary of Defense and the Base Closure Commission *did* constitute "final" agency action. Congress did not delegate the decision to close military bases to the President. Rather, it set up mandatory non-discretionary agency procedures to ensure a "*fair process*". The fact that the President has a limited oversight function does not detract from the "finality" of the agencies' actions.[15] On the

15. In fact, a multitude of agency decisions are subject to confirmation by the President and/or Congress. To conclude that none of these decisions is ever "final" and therefore insulated from judicial review would encourage agency disregard for procedural fairness. *See*

(footnote continued on next page)

contrary, *only* the agencies are subject to the procedural requirements which are the raison d'etre of the Act, and whether they have complied with those critical requirements directly and materially affects the President's decision. It indisputably is *not* the President's duty to review the procedural integrity of the base closure process or to analyze whether petitioners have complied with the Act's procedural mandates, nor does the Act give him either the time or the resources to do so. *See* §2903(e) (President has only 15 days to review Commission's report). *See also Colorado Environmental Coalition v. Lujan*, 1992 WL 231020 (D. Colo., Sept. 14, 1992) ("Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that ... the challenged agency action is final").

Moreover, under the Base Closure Act, the President cannot revise or amend the Commission's list of closures. His sole authority is to accept or reject the entire list. As petitioners concede:

> "A critical aspect of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard the Commission's role* in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, *supra*, at 704. The President may trigger base closures under the Act only by approving 'all the recommendations' of the independent Commission. See §2903(e)(2) and (4)." (Pet. at 23) (emphasis added).

(footnote continued from preceding page)
Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Colorado Environmental Coalition v. Lujan*, 1992 WL 231020 (D. Colo., Sept. 14, 1992) (all permitting judicial review of an agency's procedural violations of the National Environmental Policy Act where the agency in question only submitted a recommendation to the President for final approval).

Therefore, the President *must* rely on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the non-discretionary mandated procedural safeguards.[16] In *Franklin*, by contrast, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner that the results were specifically changed. *Franklin*, 112 S. Ct. at 2774. The statute in *Franklin* also did "not expressly require the President to use the data in the Secretary's report". *Id.*

To apply *Franklin* with the overly broad brush urged by petitioners would eviscerate 40 years of pre-*Franklin* precedent sustaining judicial review of agency action. This Court has repeatedly and consistently sustained the "strong presumption" of judicial review of final agency action under the APA where — as here — there has been a failure to comply with the procedural mandates of a statute.[17] *See, e.g., Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc.*, 112 S. Ct. 459, 460 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). *Accord Franklin*, 112 S. Ct. at

16. *See* note 7 *supra*.

17. This Court has made it equally clear 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. 821, 830 (1985). In words directly applicable here, the concurrence in *Heckler* observed: "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.

10-01-93 08:57 ☎202 633 1151 CIVIL APPELLATE ☑011

2783-86 (Stevens, J., concurring).[18] As held by the Third Circuit in the present case, the strong presumption favoring judicial review has *not* been rebutted by petitioners. (App. 39a-63a).

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result, which is the antithesis of this nation's tripartite separation-of-powers government, could not have been intended by this Court in *Franklin*.

C. The Third Circuit's Opinion On Remand Does Not Conflict With *Cohen v. Rice*.

In an attempt to create a "direct conflict" between the Third and First Circuits, petitioners mischaracterize *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as precluding judicial review "of *all* claims under the Base Closure Act". (Pet. at 11) (emphasis added). However, *Cohen* addressed *only* the question of the court's jurisdiction to consider a base closure challenge under Section 701 of the APA and (as petitioners concede) did *not* undertake the constitutional review on which the Third Circuit premised its May 18, 1993 opinion. (Pet. at 20). Given this bright line between the two circuit court opinions, petitioners' alleged

18. Guided by this precedent, the federal courts of appeals have consistently held that judicial review is available under the APA for *procedural* violations by an agency. *See, e.g., First Federal Savings and Loan Association of Lincoln v. Casari*, 667 F.2d 734, 739-740 (8th Cir.), *cert. denied*, 458 U.S. 1106 (1982); *Hollingsworth v. Harris*, 608 F.2d 1026 (5th Cir. 1979); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978); *Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). *See also Kirby v. United States Department of Housing & Urban Dev.*, 675 F.2d 60, 67 (3d Cir. 1982) (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").

"conflict" is artificial and illusory and does not provide a basis for granting certiorari. *See Sanchez v. Borras*, 283 U.S. 798 (1931).[19]

Petitioners' alleged need for "uniformity" between the circuits in order to administer the Base Closure Act is a poorly disguised plea for license to disregard the Act. Whether or not their actions are reviewable by a court, petitioners are bound to abide by the mandatory procedures prescribed by Congress. Even if both the Third Circuit and First Circuit decisions remain intact, petitioners' duty to close bases pursuant to a fair process remains the same.[20]

19. Because, as shown *supra*, the agencies' actions under the Base Closure Act *are* "final" within the meaning of the APA, the First Circuit erred in dismissing *Cohen* for lack of jurisdiction under the APA. The *Cohen* court only superficially focused on the critical distinction between procedural and substantive challenges to agency actions under the Base Closure Act and the APA, and completely disregarded this Court's mandate that judicial review *must* be permitted absent clear evidence of congressional intent to preclude such review. *Cohen* encourages agencies to flout congressional mandates and place themselves beyond the reach of law.

20. Petitioners also attempt to resurrect the argument that this case involves national security and the Court should therefore abdicate its responsibility to review agency compliance with the Act. (Pet. at 20). This is an absolute misstatement. As petitioners well know, having raised the point unsuccessfully below, the express language of the statute *excludes* matters of national security. *See* §2909(c)(2).

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION/APPELLATE STAFF

FAX TRANSMITTAL COVER SHEET

NOTICE: OFFICIAL GOVERNMENT BUSINESS

THIS COMMUNICATION IS INTENDED FOR THE SOLE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this communication is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication may be strictly prohibited. If you have received this communication in error, please notify me immediately by FTS or collect telephone call, and return the communication to me at the below address via United States Postal Service. Thank you.

DATE: Oct 1, 1993 TIME:

TO: Sheila Cheston

FAX NO.: 703-696-0550

* * * * * * *

FROM: Scott McIntosh

Civil Division, Appellate Staff
Room 3617
United States Department of Justice
Washington, D.C. 20530

PHONE NO.: (202) 514-4052

FAX NOS.: (202) 514-8151 (Room 3343)

(202) 514-7964 (7400 Corridor)

THERE ARE A TOTAL OF 22 PAGES, INCLUDING THIS COVER PAGE, IN THIS TRANSMISSION.

DRAFT

No. 93-289

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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

v.

ARLEN SPECTER, ET AL.

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

REPLY BRIEF

DREW S. DAYS, III
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-289

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

v.

ARLEN SPECTER, ET AL.

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

REPLY BRIEF

ARGUMENT

Respondents do not dispute that the issues of judicial review and Presidential action in this case are significant enough, in both legal and practical terms, to merit review by this Court. Instead, they argue that the issues were correctly resolved by the court of appeals. In large measure, they defend the court's decision by reciting verbatim from the opinions below (e.g., Opp. 3, 4, 7, 8, 10). We have already discussed the shortcomings of the Third Circuit's reasoning in some detail in our petition, and respondents' recital of the court's opinions does nothing to advance their cause. Only a few points require further discussion.

1. We explained in our petition (Pet. 13-19) that the decision below is fundamentally inconsistent with this Court's recent decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). By transforming garden-variety claims of procedural errors by subordinate officials into claims of unconstitutional conduct by the President, the court of appeals has effectively eviscerated Franklin's limits on judicial review of Presidential action.

Apart from quoting in extenso from the opinion below (Opp. 8-10), respondents have little to say in response. They insist (Opp. 11) that the court below was presented with something more than routine allegations of statutory violations, but they fail to show what that "something more" might be. Instead, they resort to invective, labeling the alleged statutory violations "blatant[]" and "brazen" (Opp. 1, 11). But a claim of "blatant" and "brazen" procedural error is simply a claim of procedural error "with a vituperative epithet." Milwaukee & St. Paul R.R. v. Arms, 91 U.S. 489, 494 (1875). It is not, without more, a claim under the separation of powers doctrine.

As shown in our petition (Pet. 17-18), the court of appeals effectively overrode the distinction between claims that an official has acted "ultra vires his authority," on the one hand, and "claim[s] of error in the exercise of that power" on the other. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949). Respondents make the same error. Setting their epithets to one side, respondents have alleged merely that

the Secretary of Defense and the Commission failed to observe certain procedural requirements of the Base Closure Act in the course of exercising their statutory authority to prepare non-binding base closure recommendations.[1] Assuming arguendo that petitioners violated the Act by transmitting an incomplete administrative record to the General Accounting Office (Pet. App. 6a n.3), or by holding non-public meetings (id. 7a n.3), those procedural defaults do not render the actions of the Secretary or the Commission, much less the subsequent actions of the President, ultra vires in any constitutionally significant sense. The Third Circuit's contrary holding turns this Court's nonreviewability holding in Franklin into a virtual nullity, and further review by this Court is therefore warranted.

2. In the proceedings below, respondents themselves never advanced the ultra vires theory adopted by the court of appeals, and indeed disputed its underlying premises (see Pet. 13 n.9). Instead of relying on Franklin's exception for judicial review of constitutional claims against the President, respondents argued below that the actions of the Secretary of Defense and the Defense Base Closure and Realignment Commission in preparing nonbinding base closure recommendations are "final" agency action. They renew that argument here (Opp. 4, 11-14).

---

[1]In enumerating their claims, respondents include the allegation (Opp. 3 n.4) that the Navy "manipulated the base closure criteria to close the [Philadelphia] Shipyard." That allegation is no longer part of this litigation. The court of appeals affirmed the dismissal of that claim in its original decision, holding that the claim was not subject to judicial review. See Pet. App. 56a.

We explained in our petition (Pet. 12-13) why, contrary to respondents' argument, the actions of the Secretary and the Commission are not final agency action under Franklin. The Base Closure Act vests the final closure decision in the President, who has plenary authority under the Act to accept or reject the Commission's closure recommendations. See § 2903(e). Because the recommendations have no effect whatsoever unless the President chooses to accept them, and Congress fails to pass it res & disapp "the result of th[e] [agency] process is [not] one that will directly affect the parties" (Franklin, 112 S. Ct. at 2773), and hence the agency actions are not final under Franklin. For precisely these reasons, the First Circuit held in Cohen v. Rice, 992 F.2d 376 (1993), that the actions of the Secretary of Defense and the Commission under the Base Closure Act are not final agency action under Franklin. See Pet. 19-20 (discussing Cohen).

Respondents argue (Opp. 4) that the actions of the Secretary and the Commission should be deemed final under Franklin because "there is nothing left for the agencies to do" once they have completed their recommendations. But precisely the same thing was true in Franklin itself: once the Secretary of Commerce forwarded her census report to the President, she too had no further responsibilities under the governing statutes.[2] This Court held

[2]In theory, of course, the President could have returned the census report to the Secretary for modification, thereby extending her participation in the statutory scheme. But the identical possibility exists under the Base Closure Act: the President may return the base closure recommendations to the Commission, requiring the Commission to prepare and submit a revised set of recommendations. See § 2903(e)(3).

that the Secretary's actions were non-final despite that fact. As the Court explained, the test for finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773 (emphasis added). As the result in Franklin itself demonstrates, both parts of this test must be satisfied. See Public Citizen v. United States Trade Representative, No. 93-5212 (D.C. Cir. Sept. 24, 1993), slip op. at 5. The bare fact that an agency has "completed its decisionmaking process" is not sufficient to render its actions final under the Administrative Procedure Act where, as here, the agency's decision is subject to further review and revision by a higher authority before it can take effect.

Respondents try to distinguish Franklin by arguing (Opp. 11) that the President has only "a limited oversight function" under the Base Closure Act. This argument is wholly insubstantial. As already explained, the President enjoys plenary authority to accept or reject the Commission's recommendations, and the recommendations become a nullity if he chooses to reject them. See § 2903(e)(5). The President's unqualified power to accept or reject the recommendations can hardly be characterized as a "limited oversight function."

Contrary to respondents' suggestion (Opp. 12-13), the fact that President must accept or reject the Commission's recommendations in their entirety, rather than being able to accept some recommendations and reject others, is irrelevant to the finality

issue. The question under Franklin is whether the Commission's recommendations bind the President and thereby "directly affect" respondents. As long as the President has the statutory right to review the Commission's recommendations and the statutory power to reject them, that question can only be answered in the negative. In this case, just as in Franklin, the agency's recommendations have no effect until and unless the President chooses to accept them, and the inherent "tentative[ness]" of the recommendations (112 S. Ct. at 2774) settles the finality issue.

3. We explained in our petition (Pet. 3, 19-20) that the Third Circuit's latest decision in this case conflicts with the recent decision of the First Circuit in Cohen v. Rice, supra. In Cohen, the First Circuit was presented with virtually identical procedural claims under the Base Closure Act, and the court held squarely that Franklin precludes judicial review of such claims. 992 F.2d at ___-__.

Respondents argue that the conflict between this case and Cohen is "artificial and illusory" (Opp. 14-15) because the First Circuit was not called upon to decide the reviewability of constitutional claims against the President. But neither was the Third Circuit in this case. As noted in our petition (Pet. 13 n.9), respondents here never challenged the actions of the President on constitutional (or, indeed, non-constitutional) grounds. What divides the First Circuit and the Third Circuit is not the claims they addressed, but their response to those claims. The First Circuit took the claims on their own terms, as

statutory challenges to the procedural actions of the Secretary and the Commission, and forthrightly concluded that Franklin barred judicial review. The Third Circuit, in contrast, chose to circumvent Franklin by recharacterizing the same claims in constitutional terms. Nothing in Cohen suggests that the First Circuit would have ruled any differently if the identical claims were presented in the constitutional guise imposed by the court of appeals in this case. In short, it is idle to suggest that the decision in Cohen and the decision in this case can be reconciled.

The First Circuit's reasoning in Cohen has subsequently been reinforced by the recent decision of the D.C. Circuit in Public Citizen v. United States Trade Representative, supra. In Public Citizen, the D.C. Circuit relied on Franklin to hold that the preparation of the North American Free Trade Agreement ("NAFTA") is not subject to judicial review under the National Environmental Policy Act ("NEPA"). Under the governing trade statutes, responsibility for negotiating NAFTA was assigned to the Office of the United States Trade Representative ("OTR"), but the final decision whether to submit the agreement to Congress for approval rested with the President. Writing for a unanimous panel, Chief Judge Mikva explained why Franklin precluded judicial review of a NEPA challenge to NAFTA:

> Even though the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen's members unless and until the President submits it to Congress. Like the reapportionment statute in Franklin, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. The President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

Public Citizen, slip op. at 6 (citation omitted). This reasoning squarely aligns the D.C. Circuit with the First Circuit in Cohen regarding the availability of judicial review in "cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." Public Citizen, slip op. at 7.

4. The Third Circuit's mishandling of Franklin is one of two issues raised by our petition. The court's original decision in this case (Pet. App. 26a-69a) presents an alternative, equally important question: whether the Base Closure Act itself precludes judicial review of claims arising under the Act. As explained in our petition (Pet. 20-28), the structure of the Act, its policies, and its legislative history all strongly suggest that Congress did not intend for the final base closure decisions of the President and Congress to be subject to judicially mandated reopening at the behest of private litigants.

Aside from referring this Court to the Third Circuit's original opinion in its entirety (Opp. 14), respondents do not deal directly with our preclusion analysis. They do assert (Opp.

2-3, 4) that the procedural requirements of the Base Closure Act are a vital component of the Act (Opp. 2-3), and that it "follows inexorably" (id. at 4) that claims of procedural violations are subject to judicial review. But if this assertion is meant as a response to our preclusion argument, it is hardly a sufficient one.

Procedural fairness is undoubtedly one of the objects of the Base Closure Act, but it is hardly the only one.[3] As shown in our petition, the Act is also designed to vindicate a number of other interests that would be fatally compromised by judicial intervention. Among other things, the Act is designed to expedite the base closure process; to establish an indivisible "package" of closures that stand or fall together; to leave the final decision over base closures in the hands of the President and Congress; and to avoid the kind of protected litigation that had doomed prior efforts to close obsolete domestic bases. See Pet. 22-26. Judicial intervention, whether in the name of the Act's procedural requirements or under some other rubric, is antithetical to all of these goals. can stalemate efforts of BRAC — since each round of closures, 1991, 1993, 1995 builds upon finality of previous BRAC decisions.

political intervention parochial

In these circumstances, the bare fact that Congress imposed procedural requirements on the Secretary and the Commission says nothing about whether Congress intended for those requirements to

[3]Section 2901(b) of the Act provides that "[t]he purpose of this [act] is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States" (emphasis added). Respondents bowdlerize this provision by quoting only the reference to "fair process" (Opp. 1 n.2), omitting the underscored language concerning the goal of "timely" closures and realignments.

be enforceable in court. By subjecting the base closure recommendations to plenary review by the President, and by providing a special legislative mechanism for the legislature to express its agreement or disagreement, Congress left the political branches with the power and opportunity to override the actions of the Secretary and the Commission for any reason, including any procedural concerns. In this case, Congress was fully apprised of respondents' procedural objections to the selection of the Philadelphia Shipyard (see Pet. 6), but it nonetheless chose not to disapprove the President's decision. To judicially countermand the decisions of the President and Congress, in the name of procedural objections that Congress itself did not regard as weighty enough to sacrifice the base closure process, would fundamentally subvert the integrity of the statutory scheme.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

October 1993

Dec 92

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

H. LAWRENCE GARRETT, III,
Secretary of the Navy, et al.,

Defendants-Appellees.

ON REMAND FROM THE ORDER OF THE UNITED STATES
SUPREME COURT DATED NOVEMBER 9, 1992

REPLY BRIEF OF APPELLANTS ON REMAND

Bruce W. Kauffman
Mark J. Levin
Camille Wolf Spinello
DILWORTH, PAXSON, KALISH
& KAUFFMAN
3200 The Mellon Bank Center
Philadelphia, PA 19103

Attorneys for Plaintiffs-Appellants

PRELIMINARY STATEMENT

Totally unlike Franklin v. Massachusetts, 505 U.S. __, 122 S.Ct. 2767 (1992), the only judicial review sought here by plaintiffs concerns defendants' abject failure to adhere to the procedural safeguards of the Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act"). Defendants persist in ignoring this critical distinction. Not once do they even acknowledge the preeminent value which Congress placed on procedural fairness in the Act, which expressly provides that its "purpose" is to provide a "fair process". §2901(b)(emphasis added). Indeed, defendants attempt to obfuscate this fundamental issue by mischaracterizing plaintiffs' action as a direct challenge to a decision by the President. However, the fact that the President relied on a substantive final report of the defendant agencies cannot operate to insulate from judicial review the administrative process which resulted in that final report. Whatever one could argue about the substance of a decision of the Base Closure Commission at the time it is communicated to the President, the process mandated by the Act is over, finished, final. There is no process provided for either before the President or before the Congress. If you did not get your public hearing before the Commission, you never will. The recommendation of the Commission -- one could argue -- is not final until accepted by the President, but the process through which that recommendation was reached is indisputably final.

Defendants have failed to cite a single case in which any court, including the United States Supreme Court, has ever held that judicial review of the procedural integrity of agency action is precluded simply because a statute, like the Base Closure Act, provides for some presidential or Congressional oversight. This is understandable, since the historic role played by the independent federal judiciary in scrutinizing the procedural integrity of agency action is a

necessary "check and balance' in our tripartite form of government. As recognized by Chief Justice Marshall in 1803, "the very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws ...." Marbury v. Madison, 1 Cranch 136, 163, 2 L.Ed. 60 (1803).

Since Marbury v. Madison, the federal courts have steadfastly protected our procedural safeguards. Nothing in Franklin alters this historic role of the independent federal judiciary as the protector of procedural fairness. Nor does Franklin allow a federal agency -- especially one specifically charged by Congress with carrying out express procedural safeguards mandated by a federal statute -- to disregard that process. Accordingly, Franklin has no significance in the context of this case and does not affect this Court's April 17 decision. To hold otherwise would establish dangerous precedent that would encourage countless government agencies which affect the lives of millions of Americans to violate clear procedural mandates and thwart the express dictates of Congress.

ARGUMENT

I. THE SUPREME COURT'S DECISION IN *FRANKLIN* HAS NO SIGNIFICANCE IN THE CONTEXT OF THIS CASE: THE "PROCESS" WAS FINAL AT THE TIME THE PRESIDENT RECEIVED THE LIST OF CLOSURES FROM THE COMMISSION.

For purposes of determining finality under the Administrative Procedure Act ("APA"), the Supreme Court in Franklin stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Id., 112 S.Ct. at 2773.[1] Unlike the present case, however, Franklin

---

[1] With regard to the "core question": (a) the agency indisputably has completed its decisionmaking process; and (b) the result of that completed process -- which was promulgated

did not involve a challenge to the integrity of the process, but rather a challenge to presidential abuse of discretion. The Franklin Court reviewed the legislative history and structure of the statute to determine if the President's actions were reviewable under the APA. The Court concluded that Congress had vested the President with the decisionmaking power to determine the representatives allocated to each state and that the President's action was not agency action subject to review under the APA.[2]

By contrast, in the present case, Congress did not delegate the decision to close military bases exclusively to the President. Rather, it set up explicit agency procedures to ensure a fair and balanced decision. As emphasized by this Court in its April 17 opinion:

> ".... Congress intended that domestic bases be closed only pursuant to an exercise of Presidential discretion informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made." 971 F.2d at 946-47 (footnote omitted; emphasis added and in original).

---

to the public in the Federal Register -- directly affected the parties, inter alia, because the President could not revise or amend the Commissions' list of closures even though the Act's procedural mandates were ignored.

[2] Indeed, Franklin establishes no "new" law for the Supreme Court. In its April 17 opinion, this Court distinguished Chicago and Southern Airlines v. Waterman S.S. Co., 333 U.S. 103 (1948), wherein the Supreme Court held that there was no judicial review under the APA of the President's substantive decision. This Court correctly concluded that the fact that some aspects of a decisionmaking process are not subject to judicial review does not preclude review of other aspects, i.e. the integrity of the process. Specter v. Garrett, 971 F.2d at 946.

Thus, for the base closure process to function as Congress intended, and for the President's decision to be responsible, the Act's procedural mandates must be complied with at the agency level.

Unlike the statute in Franklin, the Base Closure Act clearly establishes both that the actions of the agencies with respect to adequate procedures are final and that they are distinct from the limited decisionmaking powers of the President. The fact that the President has a limited oversight function over defendants' actions does not mean that the defendant agencies' actions are not "final."[3] It is simply not the President's duty to review the procedural integrity of the base closure process or to analyze whether the defendants have complied with the Act's procedural mandates.

Indeed, it is indisputable that at the time the list was communicated to the President, the administrative process was final: the agencies had purported to complete all that they were statutorily required to do. The timing under the Act makes it clear that no process was intended once the agencies transmit their final closure report to the President and publish the list of closures in the Federal Register. The President is given only a scant 15 days to review the Commission's report and, unlike his role under the statute in Franklin, he cannot under the Base

---

[3] Indeed, a multitude of agency decisions are subject to confirmation by the President and/or Congress. To conclude that none of these decisions is ever "final" and therefore insulated from judicial review would encourage agency disregard for procedural fairness. See Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); California v. Block, 690 F.2d 753 (9th Cir. 1982); Colorado Environmental Coalition v. Lujan, 1992 WL 231020 (D.Colo., Sept. 14, 1992) (all permitting judicial review of an agency's procedural violations of the National Environmental Policy Act where the agency in question only submitted a recommendation to the President for final approval).

Closure Act revise or amend the Commission's list of closures.[4] His sole function is to accept or reject the list of base closures. §2903(e); Specter v. Garrett, 971 F.2d at 940. The President must therefore rely exclusively on the final report of the agencies in making his decision, the legitimacy of which hinges entirely on the agencies' adherence to the mandated procedural safeguards.

As set forth in plaintiffs' original Brief on Remand, a strikingly similar case under the National Environmental Protection Act, Colorado Environmental Coalition v. Lujan, 1992 WL 231020 (D. Colo., Sept. 14, 1992), recently addressed this very issue, concluding that

> "Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that ... the challenged agency action is final."

Here, as in Colorado Environmental Coalition, once the Commission's recommendations were transmitted to the President based on "inadequate procedures," there was no opportunity for any further recommendations. Thus, the challenged process was final, and whatever conclusion the President reached was based on fundamentally inadequate and unfair procedures.

Defendants refuse to acknowledge that there is any distinction between judicial review of substance and judicial review of procedure. [Appellees Supp. Brief at p. 7]. Defendants' argument not only ignores but would have the effect of reversing four decades of

---

[4] The Supreme Court in Franklin recognized that the decision to allocate federal overseas employees and the method used to do so were a "moving target", and that the President could amend or instruct the Secretary of Commerce to reform the census in such a manner that the results are specifically changed. Franklin, 112 S.Ct. at 2774. The Supreme Court also noted in Franklin that the statute did "not expressly require the President to use the data in the Secretary's report." Id.

administrative law in this Circuit and the Supreme Court which has repeatedly and consistently sustained judicial review of final agency action under the APA where -- as in the present case -- there has been a failure to comply with the procedural mandates of a statute. See. e.g., Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc., 112 S. Ct. 459, 460 (1991); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-71 (1986); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Leedom v. Kyne, 358 U.S. 184, 190 (1958). Accord Franklin, 112 S. Ct. at 2783-86 (Stevens, J., concurring). See also Kirby v. U.S. Government, Dept. of Housing & Urban Dev., 675 F.2d 60, 67 (3rd Cir. 1982). Nothing in Franklin eviscerates this sound judicial precedent. To the contrary, the Franklin Court expressly relied on Abbott Laboratories, 378 U.S. 136 -- which stands for the proposition that the strong presumption of judicial review of administrative actions is not overcome absent "clear and convincing evidence" of a contrary legislative intent -- to support its decision.

Indeed, even where no final agency action within APA contemplation is evident, courts have recognized "general principles of judicial review" where (as here) express statutory procedures have been blatantly ignored. See. e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (recognizing under general principles of judicial review that an agency must articulate basis for its findings in reports to the President); Leedom v. Kyne, 358 U.S. 184, 190-191 (1958)(courts will not lightly infer that Congress does not intend the judiciary to protect rights it confers against agency actions taken in excess of delegated powers); Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 551 (1937)("It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers ... to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority"); U.S.

ex rel. Kansas City So. R. Co. v. Interstate Commerce Commission, 252 U.S. 178, 187-188 (1920) (court has power to enforce an agency's refusal to discharge duties which a statute exacts.) See also Maple Leaf Fish Company v. United States, 596 F.Supp. 1076, 1081 (C.I.T. 1984) (recognizing under general principles of judicial review that an agency must fairly apprise the President, interested parties and the public of the reasoning underlying its recommendations to the President), aff'd, 762 F.2d 86 (Fed. Cir. 1985).[5]

Thus, even where a statute expressly provides for no judicial review, the integrity of the process is still subject to judicial scrutiny. Indeed, there can be no doubt that if the Commission had said, "we choose to ignore the Congressional mandate of public hearings," the federal judiciary would have the power to stop the runaway bureaucracy. That is precisely what plaintiffs claim here and is the reason why this Court sustained the judicial review sought by plaintiffs. See Specter v. Garrett, 971 F.2d at 952-53.[6]

Because the purpose of the Act is to ensure a "fair process" for base closures, the only method of ensuring the fulfillment of Congress' mandate is to permit judicial review of the actions of the defendants as the only governmental bodies statutorily charged with procedural obligations. If the federal courts refrain from reviewing defendants' total failure to comply with

---

[5] On appeal, the Federal Circuit recognized that. although international trade controversies are of a "highly discretionary kind -- involving the President and foreign affairs", decisions of the ITC are reviewable to determine if there has been "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." 762 F.2d at 88-89 and n.2.

[6] Defendants also attempt to resurrect the argument that this case involves national security and the Court should therefore abdicate its responsibility to review agency compliance with the Act. [Appellees Supp. Brief at p. 10 n.5]. This argument ignores the express language of the statute, which excludes matters of national security (see, e.g. §2900(c)(2)), and was unsuccessfully argued by defendants in the original appeal.

the procedural requirements of the Act, no review of that unlawful conduct will ever be possible. Accordingly, review of procedural compliance with a statute historically has been, and continues to be even after Franklin, the exclusive province of the federal courts.

II. DEFENDANTS HAVE WAIVED ANY RIGHT TO ARGUE THAT JUDICIAL REVIEW IS PRECLUDED UNDER THE APA ON THE BASIS THAT THE CHALLENGED CONDUCT IS THAT OF THE PRESIDENT, NOT THAT OF A FINAL "AGENCY" ACTION.

Despite defendants' claim to the contrary, the requirement that agency action be final for purposes of judicial review can be and was waived by defendants in this case. Squillicote v. United States, 747 F.2d 432, 438 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Cal-Almond, Inc. v. Yeutter, 756 F.Supp. 1351, 1355 (E.D. Cal. 1991); Mansfield v. Weinberger, 398 F.Supp. 965, 967 (D.D.C. 1975). In Squillicote, the court reasoned that although finality may be treated as a "jurisdictional" issue, it "assumes the same footing of other issues a party may raise" and can be waived. Squillicote, 747 F.2d at 438. Thus, defendants' attempt to escape waiver by characterizing finality as a jurisdictional issue carries no significance. As the Squillicote court instructs, issues of "statutory competence", like finality, are not afforded the same status as concerns of federalism and the constitutional limitations of courts under Article III. Id. Accordingly, defendants' failure to raise this issue either below or on appeal prevents them from so doing now.

CONCLUSION

If the defendant agencies' flouting of procedural mandates is not "final" for purposes of judicial review, then the whole purpose of the Act --to provide for a "fair process" -- crumbles. Accordingly, this Court should reinstate its April 17, 1992 opinion and order.

Because of the national importance of the issues being considered on Remand, oral argument is respectfully requested.

Respectfully submitted,

/w/ Bruce W. Kauffman

Bruce W. Kauffman
I.D. No. 04466
Mark J. Levin
I.D. No. 26601
Camille W. Spinello
I.D. No. 47307
DILWORTH, PAXSON, KALISH
& KAUFFMAN
3200 Mellon Bank Center
Philadelphia, PA 19103
(215) 575-7000

DATED: December 18, 1992

Attorneys for Plaintiffs-Appellants

Dec 92

NO. 91-1932

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

SEAN O'KEEFE, ACTING SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEES

STUART M. GERSON
Assistant Attorney General

MICHAEL M. BAYLSON
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
(202) 514-4052
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave. N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page

I. The Actions Challenged by the Plaintiffs Are Not "Final Agency Action" under Franklin 1

A. The Department of Defense and the Commission 1

B. The President 10

II. The Issue of Final Agency Action Is Properly before this Court 10

CONCLUSION 11

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992), appeal pending, No. 92-2335 (1st Cir.) 5

Colorado Environmental Coalition v. Lujan, 1992 WL 231020, 803 F. Supp. 364 (D. Colo. 1992) 7

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) . . . . passim

Kirby v. HUD, 675 F.2d 60 (3d Cir. 1982) 6

Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), vacated and remanded, No. 92-486 (U.S. Nov. 9, 1992) 10

Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) . . . 6

Statutes:

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19 . . passim

§ 2903(e)(2) 3
§ 2903(e)(3) 3
§ 2903(e)(5) 3

5 U.S.C. § 701(a)(1) 6
5 U.S.C. § 701(a)(2) 6
5 U.S.C. § 704 . . . . . passim

Legislative History

137 Cong. Rec. H6008-6010 (daily ed. July 30, 1991) 8
137 Cong. Rec. H6010-6011 (daily ed. July 30, 1991) 8
137 Cong. Rec. H6021 (daily ed. July 30, 1991) 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

SEAN O'KEEFE, ACTING SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEES

I. The Actions Challenged by the Plaintiffs Are Not "Final Agency Action" under Franklin

A. The Department of Defense and the Commission

1. The "core question" in determining whether agency action is "final" under Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. We showed in our opening brief (at 5-7) why the actions of the Commission and the Department of Defense are not "final" under this test. The plaintiffs make

several attempts to meet Franklin's finality criteria, but none has any merit.

The plaintiffs assert that the challenged actions of the Commission and the Department of Defense constitute "final" agency action under Franklin because, in the plaintiffs' words (at 9), those actions "directly and materially affect[] the President's decision." The test under Franklin, however, is not whether the agency actions directly affect the President, but instead whether those actions "directly affect the parties." 112 S. Ct. at 2773 (emphasis added). And as explained in our supplemental brief, the actions of the Commission and the Department of Defense do not directly affect the plaintiffs here, for the same reason that the actions of the Secretary of Commerce did not directly affect the plaintiffs in Franklin -- because those actions are a practical and legal nullity until and unless the President chooses in his discretion to accept the recommendations placed before him.

In an apparent attempt to overcome this legal obstacle, the plaintiffs claim (at 10) that the President "cannot * * * revise or amend the Commission's list of [recommended] closures." This claim fundamentally distorts the relationship between the President and the Commission. While the President cannot directly revise or amend the Commission's list, the Base Closure Act expressly authorizes him to reject the list in whole or in part, and if the Commission does not take adequate account of his views in preparing a revised list, the Act further authorizes him to reject the list a second time and thereby terminate the base closure process

altogether. Act § 2903(e)(2), (3), (5). Thus, both legally and practically speaking, the Act vests the President with considerable power over the ultimate selection of bases for closure and realignment -- far more power than the census statute explicitly granted the President in Franklin.

In a related vein, the plaintiffs argue (at 8) that, while the role of the President in Franklin contributed to the "integrity of the process" (112 S. Ct. at 2775), the President plays no role in maintaining the integrity of the process under the Base Closure Act. This argument is wrong on two counts. First, the President does play a role in maintaining the integrity of the base closure process. In Franklin, Congress provided for the President to transmit the reapportionment report in order to further the constitutional and political legitimacy of the ultimate reapportionment decision. See 112 S. Ct. at 2775. The Base Closure Act involves the President in the base closure process for similar reasons -- to accommodate the President's constitutional role in the Nation's military affairs (see Const. Art. II, § 2, ¶ 1) and to facilitate the development of a mutually acceptable base closure plan between the two political branches of the federal government. And as discussed further below (see p. 8 infra), the President is free to exercise his authority under the Act not only to affect the substantive content of the base closure decision, but also to redress any procedural errors; nothing in the Act restricts his reasons for accepting or rejecting the Commission's recommendations.

Second, the plaintiffs misapprehend the significance of the President's role in Franklin. The President's contribution to the "integrity of the [reapportionment] process" was noted by the Supreme Court in Franklin simply to confirm that the President's role was not merely "ceremonial or ministerial" (112 S. Ct. at 2775), and hence that the actions of the Secretary of Commerce were not themselves "final" actions (id.). In this case, it cannot conceivably be claimed that the President is confined to a "ceremonial or ministerial" role in the base closure process. Even the plaintiffs stop short of making such a claim. Because the President's role is far more than ministerial, the actions of the Commission and the Department of Defense that precede his decision are not "final" under Franklin's construction of the APA.

In an final effort to transform the actions of the Commission and the Department of Defense into "final" agency action, the plaintiffs baldly assert (at 10) that the President "relies exclusively on the recommendations of the [defendant] agencies." The plaintiffs identify no authority for this assertion, and none exists. Nothing in the Act limits in any way the sources on which the President may rely when he reviews the list presented by the Commission. The President is free to consult his defense and domestic policy advisors, other federal agencies, and members of Congress, among others, in evaluating the Commission's recommendations and deciding whether to accept them. Whether he chooses to engage in these kinds of consultation is, of course, for him alone to decide. But the fact is that nothing in the Act restricts the

President, as the plaintiffs imply, to the information and views placed before him by the Commission itself.

2. The plaintiffs argue at length that Franklin is distinguishable because the administrative actions at issue there were not subject to procedural requirements and were challenged solely on substantive grounds, while the actions of the Commission and the Department of Defense involve procedural mandates and are being challenged in this case on procedural grounds. As we explained in our supplemental brief (at 7), and as the district court expressly pointed out in Cohen v. Rice, 800 F. Supp. 1006, 1011-12 (D. Me. 1992), this "distinction" is simply irrelevant under Franklin. The legal test for finality under Franklin and the APA is whether the action directly affects the complaining parties, not why the parties object to the action.

Under the plaintiffs' reasoning, if an agency action were challenged on both substantive and procedural grounds, it could simultaneously be "non-final" (as to the substantive claim) and "final" (as to the procedural claim). The illogic of such a result is self-evident. Under Franklin and 5 U.S.C. § 704, an agency action is either final or non-final. It cannot be both at the same time.

Perhaps because they recognize that their substance/procedure distinction cannot be squared with Franklin itself, the plaintiffs cite a variety of other cases that supposedly offer them support. First, they assert (at 5-6) that the Supreme Court "has repeatedly

and consistently sustained judicial review of final agency action where * * * there has been a failure to comply with the procedural mandates of a statute" (emphasis added). We have no quarrel with this proposition, but as the underscored language shows, it begs the question. If the agency actions in this case were final, and no other obstacles to judicial review existed, those actions obviously could be reviewed under the APA for conformity to any procedural requirements. But the present question is whether the actions are final, and the Supreme Court cases cited by the plaintiffs cast no light on this question, as the plaintiffs' own characterization of those cases indicates.

Second, the plaintiffs cite several Court of Appeals decisions (at 7 n.5) for the proposition that judicial review of procedural claims is available under the APA even when judicial review of other claims is barred. But none of these cases involves the question of "final agency action" under 5 U.S.C. § 704. Instead, they involve the entirely distinct questions of whether judicial review of concededly final agency action is barred by the underlying statute itself (see 5 U.S.C. § 701(a)(1)) or by the breadth of the agency's discretion under the statute (see id. § 701(a)(2)). See, e.g., Kirby v. HUD, 675 F.2d 60, 67 (3d Cir. 1982) (analyzing effect of 5 U.S.C. § 701(a)(2)).[1] Those questions were addressed in this Court's earlier opinion and are no longer at issue in this

[1]One of the cases cited by the plaintiffs, Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978), is not about the availability of judicial review at all, but instead addresses the standards for judicial review. See 590 F.2d at 1027.

appeal. None of these appellate cases purports to hold, as the plaintiffs would have this Court hold, that otherwise non-final agency action is subject to judicial review despite 5 U.S.C. § 704 as long as it is being challenged on procedural grounds.

Third, the plaintiffs invoke (at 11-12) the interlocutory district court decision in Colorado Environmental Coalition v. Lujan, 1992 WL 231020, 803 F. Supp. 364 (D. Colo. 1992). The government respectfully disagrees with the decision in Colorado. But even if that decision were assumed to be correct, it would not assist the plaintiffs' finality arguments here, because the statutory scheme at issue there (as interpreted by the district court) gave far greater effect to agency recommendations than the Base Closure Act gives to the recommendations of the Commission and the Department of Defense.[2]

---

[2]Colorado involves the statutory procedures for identifying potential wilderness areas under Section 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782. Under that provision, the Secretary of the Interior prepares recommendations for the President regarding the designation of certain federal lands as wilderness areas, and the President in turn presents recommendations to Congress for its consideration. Under the district court's reading of Section 603, "if the wilderness areas here at issue are not recommended [by the Secretary] to the President for wilderness protection, they will not proceed to be designated as wilderness areas by Congress," and "there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question." 1992 WL 231020 at ___, 803 F. Supp. at ____ (page citation not available on Westlaw). Thus, the Secretary's recommendations effectively control the ultimate decisions about designation of wilderness areas under the statute. Here, in contrast, the recommendations of the Commission do not effectively control the ultimate decision of the President under the Base Closure Act, since the President is free to reject those recommendations in whole or in part and to require the Commission to prepare revised recommendations.

3. The plaintiffs suggest repeatedly that if judicial review of their procedural claims against the Commission and the Department of Defense is foreclosed, catastrophe will result. They claim (at 2, 8, 11, 12) that the Act contains no alternative to judicial review and that withholding judicial review in this case will allow agencies "in a wide range of future cases" to escape accountability to Congress and the public.

This parade of horribles is thoroughly misconceived. First, it is false that judicial review is the only means of enforcing the procedural requirements of the Act. The President and Congress both have the power under the Act to terminate the base closure process for any reason, <u>including procedural concerns</u>. Indeed, the plaintiffs themselves presented their procedural objections to Congress when the House of Representatives debated (and ultimately rejected) the proposed joint resolution of disapproval. See, <u>e.g.</u>, 137 Cong. Rec. H6008-6010 (daily ed. July 30, 1991) (Rep. Weldon); <u>id.</u> at H6010-H6011 (Rep. Foglietta); <u>id.</u> at H6021 (Rep. Andrews). If the President and Congress choose to proceed with base closures in the face of such procedural complaints, that counsels <u>against</u> judicial intervention, not for it.

Second, withholding judicial review in this case will in no way permit agencies "in a wide range of future cases" to avoid their statutory responsibilities toward Congress and the public. The central feature of the Base Closure Act that renders the agency actions here non-final -- namely, statutorily mandated review by the President -- is exceedingly rare in other federal administra-

tive and regulatory statutes. And even if it were common, the requirement of finality under 5 U.S.C. § 704 is purely a statutory requirement, one that Congress is free to dispense with under any statutory scheme if it believes that judicial review of non-final actions is needed to further the aims of the statute. Here, however, Congress did not dispense with the requirement of finality under the Base Closure Act, and because the actions of the Commission and the Department of Defense are not final under the standards of Franklin, judicial review is unavailable in this case.

In conjunction with their predictions of disaster if judicial review is withheld, the plaintiffs renew their underlying allegations in this case by asserting (at 4-5) that "[the] [d]efendants made a mockery of th[e] congressional mandate" of procedural fairness. Since the validity of these allegations is irrelevant to the issue of final agency action, we confine ourselves to two comments. The first is that the plaintiffs' allegations of procedural misconduct are precisely that -- allegations. The defendants have vigorously contested these allegations, and the resulting dispute over the factual and legal underpinnings of the plaintiffs' allegations has never been resolved by the district court or this Court in this litigation. Second, in at least one significant respect, the specific allegations presented in the plaintiffs' supplemental

brief have already been held to be unreviewable by this Court in its earlier decision.[3]

B. The President

We explained in our opening brief that, to the extent that this suit effectively seeks relief on non-constitutional grounds against the President, it is barred under Franklin because the President is not an "agency" under the APA. The plaintiffs do not take issue with the proposition that Franklin precludes them from seeking relief against the President. Instead, they only argue (at 8) that they are not seeking relief against the President. As noted in our supplemental brief (at 9), that characterization of their claims was refuted by this Court itself in its earlier opinion in this case. The plaintiffs do not address this Court's analysis, and nothing in their supplemental brief calls the Court's reasoning on this score into question.

II. The Issue of Final Agency Action Is Properly before this Court

In our supplemental brief (at 13-15), we explained that the issue of "final agency action" under 5 U.S.C. § 704 was raised below and on appeal; that the issue would be properly before this Court in any event because it is jurisdictional; and that the issue could be entertained as an alternative ground for affirmance even

---

[3]The plaintiffs allege (at 4) that the Department of Defense violated its statutory obligation to "consider all military installations * * * equally" (Act § 2903(c)(3)) because the Navy (in the plaintiffs' words) "attempted to manipulate the base closure criteria [in order] to close the Shipyard." This Court held squarely in its earlier decision that such a claim is not subject to judicial review. See 971 F.2d at 950-51; see also id. at 953 n.15.

if it had not been raised below and were not jurisdictional. The plaintiffs' supplemental brief does not call for any further elaboration on these points, and we therefore refer the Court to the discussion in our supplemental brief.

CONCLUSION

For the foregoing reasons and the reasons given in the government's supplemental brief, the judgment of the district court should be affirmed on the basis of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

MICHAEL M. BAYLSON
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
(202) 514-4052
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave. N.W.
Washington, D.C. 20530

December 18, 1992

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 1992, I have served the foregoing SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEES by causing copies to be delivered to the following persons in the specified manner:

By fax and express mail:

Bruce W. Kauffman
Mark J. Levin
Camille W. Spinello
Dilworth, Paxson, Kalish & Kauffman
3200 The Mellon Bank Center
Philadelphia, PA 19103

By regular mail:
Sen. Arlen Specter
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

_____
Scott R. McIntosh

Document Separator

U. S. Department of Justice

Washington, DC 20530

July 28, 1993

TO: Sheila Cheston
Dick Eddy

FR: Scott McIntosh SKM

RE: Dalton v. Specter (Philadelphia Shipyard case)

Attached is a draft of the cert petition in Specter. This draft has been sent upstairs to the Solicitor General's office, which will take over the drafting responsibility from here on out. If you have any comments or suggestions, your best bet is to speak directly to John Manning, the assistant in the SG's office who is handling the case. John will be preparing and circulating a revised draft shortly, so you may prefer to wait for his draft and direct your comments toward that. (Dick: I'm assuming that you will distribute copies of this draft to interested persons in Navy and DoD.)

QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 governs the identification and closure of unneeded domestic military bases. Under the Act, the Secretary of Defense and an independent commission make closure recommendations that may be accepted or rejected by the President and Congress. The questions presented are:

1. Whether the actions of the Secretary of Defense and the commission in preparing their nonbinding recommendations, and the actions of the President in accepting or rejecting the recommendations, are subject to judicial review under the principles of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

2. Whether judicial review of statutory claims arising under the Act is precluded by the Act itself.

NO. 93-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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

Petitioners,

v.

ARLEN SPECTER, et al.

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

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

PARTIES TO THE PROCEEDING

TABLE OF CONTENTS

Page

OPINIONS BELOW . . . . . .

JURISDICTION . . . . . .

STATUTORY PROVISIONS INVOLVED . . . . . .

STATEMENT . . . . . .

REASONS FOR GRANTING THE PETITION . . . . . .

CONCLUSION . . . . . .

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO. 93-

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

Petitioners,

v.

ARLEN SPECTER, et al.

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

The Solicitor General, on behalf of the Secretary of Defense, the Acting Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Commission's Chairman and members, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. __-__) is not yet reported. A prior opinion of the court of appeals (App. __-__) is reported at 971 F.2d 936. The opinion of the district court (App. __-__) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A timely petition for rehearing was denied on June 14, 1993 (App. __-__). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Defense Base Closure and Realignment Act of 1990 is reproduced at App. __-__ infra.

STATEMENT

This case involves a challenge to procedures used by the Secretary of Defense and an independent commission in preparing nonbinding recommendations for the President under the Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act"). During the 1992 Term, this Court vacated a prior decision of the court of appeals in this case that had entertained procedural claims under the Act, and remanded the case for further consideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). On remand, the court of appeals has held that Franklin does not preclude judicial review of procedural claims under the Act, a holding that conflicts directly with Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993).

1. The Base Closure Act creates a statutory mechanism for identifying and closing or realigning obsolete domestic military bases. Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19 (1990) (codified as amended at 10 U.S.C. § 2687 note (Supp. III 1991)). The Act provides for three biennial rounds of base closures,

beginning in 1991. Under the terms of the Act, the Secretary of Defense prepares nonbinding recommendations regarding bases to be closed or realigned. Act § 2903(c)(1). The Secretary's recommendations are sent to the independent Defense Base Closure and Realignment Commission ("Commission"), which reviews the recommendations and which may change them if it determines that the Secretary "deviated substantially" from specified standards. Id. § 2903(d)(2). The Commission then sends a report containing its findings and recommendations to the President. Id. § 2903(e).

The Act vests the President with unqualified discretion to approve or disapprove the Commission's recommendations. Act § 2903(e)(2)-(3). If the President disapproves the recommendations, the Commission must prepare a revised list of recommended closures, which is then resubmitted to the President. Id. § 2903(e)(3). If the President disapproves the revised recommendations, no bases may be closed. Id. § 2903(e)(5). Thus, the Commission's recommendations have no legal or practical effect until and unless the President exercises his discretion to adopt them.

If the President does approve either the initial or revised recommendations, the Act provides for Congress to review the President's decision by considering a joint resolution of disapproval. Act §§ 2904(b), 2908. Congress, like the President, must act on the recommendations on an all-or-nothing basis. If a joint resolution of disapproval is not enacted, the Act requires the Secre-

tary of Defense to close all of the bases approved for closure by the President. Id. § 2904(b).

2. During the first round of this statutory scheme, in 1991, the Secretary of Defense recommended the closure or realignment of 71 domestic military installations, including the Philadelphia Naval Shipyard. The Secretary's recommendations were sent to the Commission, which unanimously concurred with the recommendation that the Shipyard be closed. The Commission forwarded its recommendations, covering the Shipyard and 81 other military installations, to the President.

In July 1991, the President approved the recommendations of the Commission. Shortly thereafter, the House of Representatives rejected a proposed joint resolution of disapproval, thus requiring the Secretary of Defense to proceed with the closures and realignments.

Respondents brought suit under the Administrative Procedure Act and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, and the Commission and its members, seeking to enjoin the closure of the Shipyard. C.A. App. 21, 50, 54, 57. The complaint alleged that the Secretary of the Navy and the Secretary of Defense failed to comply with various requirements of the Act in the course of preparing their list of recommended closures and realignments. The complaint further alleged that the Commission committed related errors under the Act. Respondents did not name the President as a defendant, nor did they allege that the President had violated the Act or otherwise acted unlawfully.

Petitioners disputed respondents' allegations of noncompliance with the Act. In addition, petitioners argued that the suit was barred on a variety of jurisdictional grounds. In November 1991, the district court granted a motion by the government to dismiss the suit, holding principally that the Act itself implicitly precludes judicial review of respondents' claims. App. __-__.

In April 1992, a divided panel of the Third Circuit partially reversed the district court's dismissal order, permitting respondents to proceed with certain of their statutory claims. App. __-__.[1] The court held that judicial review is not allowed under the Act to the extent that it touches on the merits of base closure decisions, but that judicial review is available to review compliance with the procedural requirements of the Act. Id. at __-__ [971 F.2d at 945-53]. Applying this distinction between substantive and procedural claims, the court affirmed the dismissal of most of the complaint on the ground that the allegations went to the substance of the decision to close the Shipyard, but reinstated allegations that the Secretary of Defense and the Commission had violated specific procedural requirements of the Act. Id. at __-__ [971 F.2d at 950-53]. In particular, the court permitted respondents to pursue claims that the Secretary of Defense violated the Act by "fail[ing] to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations," (id. at __

[1]The court affirmed, on the merits, the district court's dismissal of all constitutional claims in the case. App. __-__.

[971 F.2d at 952]), and that the Commission violated the Act's public-hearing requirement. Id. at __-__ [971 F.2d at 952-53]. Judge Alito, in dissent, concluded that the Act precludes judicial review of all statutory claims arising under the Act, procedural as well as substantive. Id. at __-__.

Originally, respondents advanced certain procedural due process claims against the Secretary and the Commission, but the district court dismissed those claims, and the court of appeals affirmed the dismissal on the merits in its original decision. See App. __-__ [971 F.2d at 955-56]. As a result, there were no longer any constitutional claims before the court of appeals when it issued the present decision.

3. In June 1992, two months after the initial decision of the court of appeals, this Court issued its decision in Franklin v. Massachusetts. Franklin involved a challenge to the reapportionment of the House of Representatives under the 1990 decennial census. Under the applicable federal statutes, the Secretary of Commerce prepared a state-by-state population breakdown for the President, who then sent Congress a statement showing the population of each state and the number of Representatives to which each state was entitled under a specified formula. By statute, each state was entitled to the number of Representatives shown in the President's statement. See Franklin, 112 S. Ct. at 2771.

The state of Massachusetts sued the Secretary of Commerce and the President, among others, asserting that the method used to allocate certain overseas residents was arbitrary and capricious

under the APA and was unconstitutional under Article I. 112 S. Ct. at 2770, 2773. This Court entertained the constitutional challenge, but held that the APA challenge could not be entertained because none of the actions at issue constituted "final agency action" for purposes of 5 U.S.C. § 704. Id. at 2773-76.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. In Franklin, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. Id. at 2773-74. "Because the Secretary's report to the President carries no direct consequences," the Court concluded that "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." Id. at 2774 (citations omitted).

The Court then held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," that the APA's definition of "agency" does not include the President. 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2776. The Court acknowledged that "the President's actions may

still be reviewed for constitutionality," but held that his actions are not subject to judicial review "under the standards of the APA." Id.

4. Because of the parallels between this case and Franklin, petitioners asked this Court to vacate the decision of the court of appeals and remand for further consideration in light of Franklin. The Court granted the petition and remanded the case to the court of appeals in November 1992. 113 S. Ct. 455.

On remand, petitioners contended that the actions of the Secretary of Defense and the Commission are not final agency action under Franklin, and therefore are not reviewable under the APA, because the Secretary and the Commission are engaged in the preparation of nonbinding recommendations that have no effect unless the President chooses to accept them. Respondents argued that Franklin does not apply when the actions of a federal agency are being challenged on procedural, rather than substantive, grounds. Respondents further argued that they were not contesting or otherwise seeking review of the President's actions, and hence that Franklin's holding about the unreviewability of Presidential actions under the APA was irrelevant.

On May 18, 1993, the court of appeals held, by a divided vote, that Franklin does not preclude judicial review of respondents' procedural claims. Although the court held in respondents' favor, it did not adopt respondents' argument that the actions of the Secretary of Defense and the Commission are final agency action under Franklin. Instead, the court concluded that respondents'

statutory claims against the Secretary and the Commission are actually constitutional claims against the President, and therefore come within Franklin's proviso that "the President's actions may still be reviewed for constitutionality" (112 S. Ct. at 2776).

In their complaint and subsequent filings, respondents had taken care not to challenge the actions of the President, either on constitutional or any other grounds.[2] Nonetheless, the court reasoned that, if the Secretary and the Commission had violated the Base Closure Act's procedural requirements, as respondents allege, then the President's subsequent approval of the Commission's recommendations violated the Act as well. App. __-__. The court then reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question under the separation of powers doctrine. Id. at __-__. Under this analysis, when Franklin acknowledged the judicial power to review the constitutionality of Presidential actions, it was authorizing courts to review whether Presidential actions violate "non-discretionary [statutory] mandates." Id. at __-__.

Judge Alito, in dissent, concluded that Franklin bars judicial review of respondents' claims. App. __ [Dissent at 18]. He noted

---

[2]In their brief on remand, respondents reminded the court of appeals that "it is the conduct of [the] defendants -- not that of the President -- that [they] challenge." Plaintiffs' Remand Br. at 12. Respondents explained that they "do not seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." Id. at 8 (emphasis in original).

that respondents "vigorously contended * * * that Franklin does not bar review under the APA[;] [respondents] did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Id. (emphasis in original). He also faulted the court's reasoning that respondents, by alleging statutory violations by the Secretary of Defense and the Commission, were implicitly alleging unconstitutional conduct by the President. Id. at __-__ [Dissent at 19-21].

On June 14, 1993, the court of appeals denied a petition for rehearing and suggestion of rehearing en banc by a 7-3 vote. On June 21, 1993, the court of appeals stayed its mandate pending the filing of this petition.

5. Two weeks before the court of appeals issued its current decision in this case, the court of appeals for the First Circuit decided the identical issue in Cohen v. Rice, supra. Cohen involves procedural claims against the Secretary of Defense and the Commission under the Base Closure Act that are essentially indistinguishable from the claims in this case. See id. at [*4] (summarizing claims). The First Circuit, in contrast to the court of appeals, held that Franklin does bar federal courts from entertaining such claims. Id. at [*6-7].

REASONS FOR GRANTING THE PETITION

The Defense Base Closure and Realignment Act of 1990 is a vital tool for the President and Congress to reform the Nation's military force structure following the end of the Cold War. By allowing private parties to seek to delay the closure of bases by

bringing procedural challenges under the Act, the court of appeals has placed the operation of the Act in serious jeopardy. The decision below effectively countermands the limits on judicial review recognized by this Court in Franklin v. Massachusetts, and it underestimates the extent to which judicial review is inconsistent with the structure and policies of the Base Closure Act itself. The decision conflicts squarely with the First Circuit's recent decision in Cohen v. Rice, which holds that Franklin precludes judicial review of procedural claims under the Act. Action by this Court is needed to resolve the circuit conflict and to protect the base closure decisions of the President and Congress from disruption and delay.

I. The Court of Appeals Has Nullified the Limitations on Judicial Review Recognized in Franklin v. Massachusetts

This Court's decision in Franklin holds that nonbinding agency recommendations to the President do not constitute "final action" under the Administrative Procedure Act. The proper application of Franklin to this case should have been a straightforward matter. Respondents are alleging that the Secretary of Defense and the Commission violated certain of the Base Closure Act's procedural requirements in the course of preparing their recommendations for the President. The basic test of finality under Franklin is whether an agency's actions "will directly affect the parties." 112 S. Ct. at 2773. Here, as in Franklin, the nonbinding recommendations of the Secretary and the Commission simply had no effect until the President chose in his discretion to accept them. Accordingly, as the First Circuit recognized in Cohen, the actions

of the Secretary and the Commission in preparing the recommendations are not "final" agency actions under 5 U.S.C. § 704, and are not subject to judicial review under the APA. Cohen, [1993 WL 131914 at *6-7.]

The court of appeals in this case avoided this result by turning to Franklin's separate discussion of challenges to Presidential action (112 S. Ct. at 2775-76), and looking to Franklin's acknowledgement that "the President's actions may * * * be reviewed for constitutionality" (id. at 2776). Respondents themselves had made no attempt to rely on this aspect of Franklin, for two seemingly obvious reasons: their claims are directed at the actions of the Secretary of Defense and the Commission, not the actions of the President, and the claims are solely statutory, not constitutional.[3] But in a remarkable tour de force, the court of appeals transformed this Court's proviso about constitutional challenges to Presidential action into a source of authority for courts to review statutory challenges to agency action. App. __-__ [slip op. at 10-11].

Citing the "steel seizure" case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the court of appeals started from the premise that "the President must have constitutional or statutory authority for whatever action he wishes to take," and that

---

[3]Originally, respondents advanced certain procedural due process claims against the Secretary and the Commission, but the district court dismissed those claims, and the court of appeals affirmed the dismissal on the merits in its original decision. See App. __-__ [971 F.2d at 955-56]. As a result, there were no longer any constitutional claims before the court of appeals when it issued the present decision.

actions beyond the limits of the President's authority are unconstitutional under the separation of powers doctrine. App. __-__ [slip op. at 10-11]. Therefore, the court reasoned, "review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review" under Franklin. Id. at __ [slip op. at 11]. Here, the court observed, respondents are alleging that "the process underlying the decision to close the [Philadelphia] Shipyard violated specific nondiscretionary provisions" of the Base Closure Act. Id. at __ [slip op. at 10]. The court reasoned that, if the Secretary of Defense and the Commission did not comply with the Act's mandatory procedural requirements when they prepared their base closure recommendations, then the President was acting without legal authority -- and hence, in the court's view, unconstitutionally -- when he approved the Commission's recommendations. Id. at __-__ [slip op. at 10-11].

The court of appeals' initial premise, that the President violates the separation of powers doctrine when he acts without affirmative constitutional or statutory authorization, is a debatable one. But even if that premise were correct as an abstract matter, the court has stretched it far past the breaking point. It is one thing to hold that the separation of powers is violated when the President orders the seizure of a national industry without constitutional or statutory authority. See Youngstown, 343 U.S. at 585-89. It is an entirely different matter to hold, as the court of appeals has done here, that the separation

of powers is violated when an agency is alleged to have done nothing more than fail to comply with garden-variety procedural requirements. If the President is deemed to have acted unconstitutionally because the Secretary of Defense allegedly did not forward all relevant information to the Commission (see pp. _-_ supra), or because the Commission allegedly did not comply with the Act's public-hearing requirement (id.), then the concept of ultra vires action no longer has any meaningful limits.

In reality, as Judge Alito explained in his dissent, respondents' claims against the Secretary of Defense and the Commission simply do not imply that the President's approval of the Commission's recommendations was in any way legally infirm, much less unconstitutional. See App. __-__ [dissent at 19-21]. The only obligation imposed on the President by the Base Closure Act is to decide in his discretion whether to accept or reject the Commission's recommendations and to give notice of his decision to the Commission and Congress. Act § 2904(e)(1)-(4). As Judge Alito pointed out, the Act does not require the President to determine whether any procedural violations occurred at any prior stage of the process, nor does it prohibit him from approving the Commission's recommendations in the event that procedural violations occurred. App. __-__ [slip op. at 20]. And if the President adopts the Commission's recommendations, the Act requires the Secretary of Defense to carry out the President's decision unless it is overridden by Congress; the Secretary is not permitted, much less required, to "refuse to carry out a base closing or realign-

ment * * * on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities." Id. Far from having acted in excess of his statutory authority under the Base Closure Act, the President did precisely what the Act authorized him to do, and hence the Third Circuit's invocation of Youngstown is utterly misconceived.

For reasons set forth below, the decision of the court of appeals would have grave consequences even if it were confined to claims under the Base Closure Act. See pp. __-__ infra. But the consequences of the court's mishandling of Franklin in fact reach much further. Under the court's reasoning, whenever a statute provides for the President to act on recommendations of a subordinate agency or official, virtually any allegation that the subordinate has violated the statute becomes an allegation that the President himself has violated the Constitution. Thus, Franklin's rule against judicial review of nonbinding agency recommendations is swallowed by Franklin's exception for review of constitutional claims against the President. And at the same time, a potentially broad class of statutory claims against federal agencies and officials are transformed into constitutional claims against the President.

Faced with the identical reviewability issue in Cohen v. Rice, the First Circuit reached the straightforward conclusion that Franklin does not permit judicial review of procedural claims against the Secretary of Defense and the Commission under the Base Closure Act. [Cite.] The decision in this case allows courts in

the Third Circuit to entertain precisely the same kinds of claims that the First Circuit has foreclosed in Cohen. If the Department of Defense and the Commission are to administer the Base Closure Act in a coherent manner, and if similar statutory schemes are to be administered consistently as well, the same agency actions cannot be subject to judicial review in one Circuit and unreviewable in another. Certiorari should issue to resolve the conflict between this decision and Cohen, and to decide whether Franklin bars judicial review of procedural claims under the Base Closure Act.

II. The Defense Base Closure and Realignment Act Precludes Judicial Review of Claims arising under the Act

The requirement of final agency action under Franklin is not the only barrier to judicial review in this case. As noted above, the district court dismissed this suit in its entirety on the ground that the Act implicitly precludes judicial review of all claims arising under the Act. App. __-__. In its initial decision, the court of appeals reversed, holding that while the merits of base closure decisions are not subject to judicial review, the Act does not preclude courts from hearing challenges to the procedures used in selecting bases. Id. at __-__. In so holding, the court of appeals seriously misgauged the extent to which judicial intervention is contrary to the policies and structure of the Base Closure Act.

The court of appeals began from the general presumption in favor of judicial review of administrative actions. App. __ [971 F.2d at 944]. It is questionable whether that presumption applies to litigation over the closure of military bases, a subject that involves fundamental issues of national security and military policy. Cf. Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1987) (presumption of reviewability "runs aground when it encounters concerns of national security * * * ."). But even if the presumption does apply in this setting, it must yield "whenever [a] congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984) (citation omitted). The presumption "may be overcome by specific language or specific

legislative history that is a reliable indicator of congressional intent." Id. at 349. Congressional intent to preclude review "may also be inferred from contemporaneous judicial construction barring review and congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." Id. (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." Id.

When measured against these standards, the Base Closure Act manifestly precludes judicial review of the base closing process. As shown by Judge Alito in his dissent from the court's first decision (App. __-__ [971 F.2d at 957-60]), the Act strikes a delicate balance between the Executive Branch and Congress, a balance designed to produce a package of base closures that is militarily and politically acceptable to both Branches. The Act vests the Executive Branch with a substantial measure of control over the selection of bases for closure and realignment. At the same time, the Act provides for direct Congressional involvement and oversight, a process that begins with consultations over the membership of the Commission (Act § 2902(c)(2)), continues through the deliberations preceding the President's decision (e.g., id. 2902(e)(2)(B)), and culminates in the consideration of a joint resolution of disapproval. As an integral part of this balance between the Executive Branch and Congress, the Act mandates the creation of a single, indivisible package of base closures that stand or fall together. See App. __-__ (Alito, J., dissenting).

The decisionmaking process carried out by the President and Congress under the Act is political in a way that ordinary administrative decisionmaking is not, and it touches on basic issues concerning the makeup of the Nation's defense establishment.

By allowing litigants to contest individual base closures after the President and Congress have jointly agreed on a package of bases to be closed, the court of appeals has struck at the heart of this elaborate and carefully balanced statutory mechanism. The court's decision allows private parties, and individual legislators who failed to accomplish their goals through the legislative process established by the Act, to subvert the compromise worked out between the political branches. It effectively disregards the Act's unique mechanisms for Congressional oversight, which militate strongly against an additional layer of oversight by the courts. Finally, it jeopardizes the statutory goal of creating a single, indivisible package of base closures that stand or fall together. If individual bases like the Philadelphia Shipyard can be extracted from the statutory package through litigation by individual legislators and other parties, the military and political assumptions underlying the President's decision and Congress's response will be defeated. See App. __-__ (Alito, J., dissenting) [971 F.2d at 960-61].

The court of appeals sought to limit the impact of judicial review on this statutory scheme by allowing only procedural claims to be heard. But procedural challenges, no less than substantive ones, can effectively disrupt the base closure process. The

history of base closure efforts prior to the enactment of the Base Closure Act is marked by the use of procedural litigation to keep unneeded bases open. In particular, base closures were effectively blocked by the threat of protracted procedural litigation under the National Environmental Policy Act ("NEPA"). [Cite.] Accordingly, when Congress enacted the Base Closure Act, it barred all NEPA suits relating to the base selection process, permitting NEPA litigation only with respect to a narrow class of post-selection implementation actions. See Act § 2905(c). Congress did not restrict NEPA litigation because it was indifferent to the environmental consequences of base closures, but instead because it "recognize[d] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." 1988 Conference Report at 23, 1988 USCCAN at 3403. Congress recognized that NEPA challenges could impede or defeat base closures notwithstanding the procedural character of the litigation, and Congress acted to foreclose that threat. Precisely the same kind of threat is presented by respondents' procedural claims in this case.[4]

---

[4]The court of appeals disparaged the Act's treatment of NEPA claims on the ground that the Act's explicit disallowance of NEPA suits might imply Congressional acceptance, rather than disapproval, of other types of procedural claims under the Act. App. __-__. This reasoning ignores the special role of NEPA suits in the previous stalemate over base closures. NEPA suits were the primary litigation tool for impeding base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. [Cite.] It therefore was incumbent on Congress to deal explicitly with NEPA claims when it enacted the Act. In addition, at the same time that it was barring NEPA suits related to the selection process, Congress wished to preserve a narrow class of NEPA claims (continued...)

The decision of the court of appeals also jeopardizes the Act's insistence on expedition and finality. See App. __-__ (Alito, J., dissenting) [971 F.2d at 958, 960]. The Act imposes a series of strict time limits that are designed to bring the base selection process to a conclusion as quickly as possible. See Act §§ 2903(b)(1), 2903(b)(2)(A), 2903(c)(1), 2903(d)(2)(A), 2903(d)(5)(B), 2903(e)(1), 2904(b)(1). Congress recognized that sheer delay had been one of the primary elements of the prior stalemate over base closures. See App. __-__ (Alito, J., dissenting) [971 F.2d at 958]. Congress further recognized that the prospect of reopening decisions about individual bases was damaging both to the base closure process as a whole and to the communities surrounding affected bases. See id. [971 F.2d at 958-59].

For its part, the court of appeals admitted that judicial intervention before Congress acted on the President's recommendation would fatally compromise the Act's interest in speed and finality, but it assumed that this interest lapses once Congress has acted. See App. __-__ [971 F.2d at 945-46]. Yet even after Congress has acted, the Act places a continuing premium on expedition and finality. For example, while the Act allows a limited class of NEPA suits regarding the implementation of final base closure decisions, the Act subjects such suits to a 60-day time

---

[4](...continued)
regarding implementation decisions (see Act § 2905(c)(3)), and it therefore had to draw an explicit line to distinguish permitted from prohibited NEPA suits.

limit. Act § 2905(c)(3). This strict time limit is inexplicable if, as the court reasoned, expedition and finality lose their statutory significance once closure decisions have become final. At the same time, the fact that the Act imposes a strict time limit on post-selection suits that do not affect the underlying base closure decisions of the President and Congress, while it contains no time for a suit like the present one that strikes at the heart of those decisions, is strong evidence that Congress did not intend for the latter kind of suit to be entertained at all. See App. __ n.16 (Alito, J., dissenting).

The court's reasoning also overlooks the cyclical nature of the base closure process created by the Act. The Act provides for three successive biennial rounds of base closures (see p. _ supra), and the finality of each round's decisions is vital to planning for the following round. Delay caused by litigation over the one round will necessarily interfere with subsequent rounds, by creating uncertainty for the Department of Defense and the Commission over future base structure and capacity. It will also interfere with the steps necessary to carry out the first round itself, for those steps must be commenced long before closures are finally effected. Finally, as a practical matter, the armed services make countless budgetary, scheduling, and personnel decisions in reliance on the finality of the base closures approved by the President and Congress, and post hoc judicial intervention that reopens the political branches' decisions will directly upset these decisions. In short, judicial review, regardless of when it is conducted,

simply cannot be undertaken without jeopardizing the vital statutory interest in speed and finality.

The case against judicial intervention is further buttressed by the Act's legislative history. As explained by Judge Alito, the Conference Report on the Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." App. __-__ [971 F.2d at 957]. Moreover, after the district court dismissed respondents' claims in this case, Congress expressly "'reaffirm[ed] the view * * * that actions taken under the Act * * * would not be subject to judicial review.'" Id. at __ n.6 (quoting Conference Report on 1991 National Defense Authorization Act).

The court of appeals dismissed this legislative history on the ground that it was aimed only at review of non-final agency actions (App. __ [971 F.2d at 949]), yet the court admitted that several of the actions specifically cited by Congress as unreviewable "concededly do not fit" this explanation. Id. Just as important, there is no support in the legislative history for the distinction drawn by the court between judicial review of substantive claims and procedural ones. To the contrary, the legislative history shows a clear concern for the ability of procedural litigation to derail the substantive decision to close obsolete bases. See id. at __-__ (Alito, J., dissenting) [971 F.2d at 956-57]]. The legislative history thus further undermines the court's decision to reinstate this suit.

Finally, the court's decision leads to grave remedial problems. Although the court professed to bar respondents from pursuing any claims that touch on the merits of the base closure decision, review of even procedural claims will effectively lead to judicial intervention in the substance of the base closure decisions. Respondents themselves asked the district court to enjoin not only the closure of the Philadelphia Shipyard, but the closure of all other naval installations selected by the President as well. It is difficult to imagine any form of meaningful relief that will not set aside the base closure decisions chosen by the President and Congress or otherwise intrude on the decisions of the political branches.

The remedial problem is compounded by the fact that the Commission effectively goes out of existence after each of its biennial base closure sessions. By statute, the Commission meets only during 1991, 1993, and 1995. Act § 2902(e). The terms of all members of the Commission other than the Chairman expire with the end of the Congressional session during which the members were appointed. Id. § 2902(d). Each succeeding round of base closures is handled by newly appointed Commission members. Thus, a court cannot simply "remand" a base closure controversy to the Commission for further administrative proceedings; the Commission cannot act at all until the next biennial round, at which time it will already be fully occupied with the next set of base closures. The notion that further proceedings could be held "on an expedited basis," as

the court of appeals suggested (App. __ n.13 [971 F.2d at 950 n.13]), is thus a chimera.

Rather than come to terms with these remedial problems, the court of appeals chose to leave them unresolved. See App. __ & n.13. But the remedial problems cannot be bypassed so easily, for they bear directly on the court's conclusion that the Act does not preclude judicial review. The fact that any meaningful remedy would jeopardize the policies underlying the Act and would undermine the Act's timetable and procedures further weakens the case for judicial review. And the fact that any meaningful remedy would infringe on the merits of the base closure decision undercuts the court's purported distinction between substantive and procedural claims.

For all of these reasons, the court of appeals erred in holding that the Act does not preclude judicial review of procedural claims. That holding, no less than the court's holding regarding Franklin, imperils the ability of the President and Congress to close obsolete military bases under the Act. Review by this Court is imperative to protect the integrity of the Act and to vindicate the substantial public interest in a rational and efficient defense base structure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

August 1993

Document Separator

U.S. Department of Justice

SES:REK:DNL:SRMcIntosh
145-6-3183
514-4052

Washington, D.C. 20530

MAY 26 1993

Please refer to this number when responding 930601-38

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Specter v. Garrett, No. 91-1932 (3d Cir. May 18, 1993) (Stapleton & Scirica, JJ.; Alito, J., dissenting)

TIME LIMITS

A petition for rehearing must be filed by June 1, 1993.

RECOMMENDATIONS

The Defense Base Closure and Realignment Commission (Sheila Cheston, General Counsel, 703-696-0504) orally recommends rehearing en banc.

The Department of the Navy (Dick Eddy, 703-602-3253, ext. 500) has not yet made a recommendation.[1]

I recommend rehearing en banc.

QUESTIONS PRESENTED

Whether Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), precludes judicial review of claims that the Department of Defense and the Defense Base Closure and Realignment Commission violated the procedural requirements of the Defense Base Closure and Realignment Act of 1990 (Base Closure Act).

STATEMENT

This is a suit to prevent or delay the planned closure of the Philadelphia Naval Shipyard. The suit alleges that the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure and Realignment Commission violated procedural requirements of the

[1]We anticipate that the Navy will recommend in favor of rehearing en banc, but no formal recommendation has yet been made.

Base Closure Act in the course of choosing the Shipyard, along with many other installations, for closure. Thus far, the primary issue in the case has been whether the plaintiffs' claims are subject to judicial review. In December 1992, the Supreme Court vacated a partially adverse decision by the Third Circuit and remanded for further consideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). The Third Circuit has now held, by a 2-1 vote, that Franklin does not bar the suit.

1. The statutory and procedural background of this case are spelled out in detail in the Civil Division's previous rehearing memorandum, a copy of which is attached for your reference. From the outset of the litigation, the government has taken the position that the plaintiffs' claims are not subject to judicial review. Following a favorable district court decision, a panel of the Third Circuit held in April 1992 that the Base Closure Act implicitly precludes substantive challenges to base closure decisions, but does not preclude judicial review of claims that the Department of Defense and the Commission have violated the Act's procedural requirements.

In June 1992, two months after the panel's decision, the Supreme Court issued its decision in Franklin, supra. Franklin involved a challenge to the decennial reapportionment of the House of Representatives. The reapportionment statute in Franklin, like the Base Closure Act, provided for a subordinate federal official (the Secretary of Commerce) to prepare recommendations for the President, who was regarded as having discretion whether or not to accept the recommendations. The Supreme Court held in Franklin that the actions of the Secretary of Commerce were not "final" agency action for purposes of judicial review under the APA. The Supreme Court further held that the President is not an "agency" under the APA and therefore is not subject to the APA's judicial review provisions.

Because of the parallels between the statutory scheme in Franklin and the Base Closure Act, you authorized us to petition the Supreme Court to vacate and remand for further consideration in light of Franklin. The Supreme Court granted the petition in November 1992. Following the Supreme Court's remand, the Third Circuit directed the parties to submit supplemental briefing on the Franklin issue. Copies of the government's supplemental briefs are attached for your reference.

The briefing on remand was influenced in part by the Third Circuit's original decision in this case. In that decision, the panel had addressed the reviewability of the President's actions under the Base Closure Act. The panel had assumed (without deciding) that the President is not an "agency" under the APA, but had held that the President's actions were nonetheless subject to "common law" judicial review.

Responding to this reasoning, we argued on remand that the President is not subject to "common law" judicial review and that, under Franklin, his actions are reviewable outside the confines of the APA only to determine whether he has acted unconstitutionally. For their part, the plaintiffs insisted that they were not challenging the President's actions, on constitutional grounds or otherwise, and hence that Franklin's holding regarding the reviewability of Presidential action was irrelevant. The plaintiffs devoted their efforts exclusively to the question of whether Franklin's "finality" ruling applies to the procedural actions of the Secretary of Defense and the Commission.

On May 18, 1993, the Third Circuit issued its decision on remand. By a 2-1 vote (Stapleton and Scirica; Alito dissenting), the court held that Franklin does not preclude judicial review of the plaintiffs' procedural claims. The panel majority based this holding on a view of Franklin, and a view of the plaintiffs' underlying claims, that the plaintiffs themselves had not advanced.

Quoting its earlier decision, the panel majority began from the premise that "'at least in one sense, we are here asked to review a presidential decision.'" Majority op. at 8. The majority pointed out that, even under Franklin, Presidential action is subject to judicial review to determine its constitutionality. Slip op. at 9-10. The majority then reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question, and hence the judicial power to review the constitutionality of Presidential actions encompasses review of whether Presidential action violates "non-discretionary [statutory] mandates." Id. at 10-11. Finally, the majority characterized the plaintiffs' claims in this case as alleging "a failure by the President to remain within statutorily mandated limits" (id. at 11), and concluded that the claims are therefore "constitutional" claims that are still subject to judicial review under Franklin.

Having disposed (to its satisfaction) of Franklin, the panel majority then addressed what it treated as the distinct question of sovereign immunity. Majority op. at 12-15. The majority reasoned that sovereign immunity is not a bar to judicial review, even in the absence of a statutory waiver of immunity, "where * * * plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the * * * statute authorizing such action and has thereby violated the constitutionally mandated separation of powers." Id. at 13. Alternatively, the majority concluded that sovereign immunity is waived by 5 U.S.C. § 702, which waives sovereign immunity for "action[s] * * * seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority * * * ." Id. at 14-15. The majority acknowledged that 5 U.S.C.

§ 702 "may not apply to suits against the President," but concluded that "this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President -- a situation not present here." Id. at 15 n.9. For purposes of sovereign immunity, the panel majority treated this suit as primarily a challenge to the actions of the Secretary of Defense and the Commission, not a challenge to the legality or statutory authority of Presidential actions. See id. at 13-14.

Judge Alito, in dissent, made two principal points. First, he pointed out that the plaintiffs "vigorously contended * * * that Franklin does not bar review under the APA[;] [t]he plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Dissent at 18 (emphasis in original). For his part, Judge Alito agreed with us that Franklin precludes judicial review of the plaintiffs' claims under the APA. Id.

Second, taking the majority's theory on its own terms, Judge Alito explained that the plaintiffs' allegations of procedural errors by DoD and the Commission do not and cannot amount to an allegation that the President himself acted unlawfully. Dissent at 19-21. As he explained, "the President's sole responsibility * * * is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission." Id. at 20. The Base Closure Act does not make the President's statutory rights and responsibilities contingent on the absence of prior procedural errors by DoD and the Commission. Id. Hence, under no view of the matter has the President violated the Base Closure Act, nor have the plaintiffs implicitly alleged such a violation.

2. On May 3, 1993, two weeks before the Third Circuit issued its latest decision in this case, the First Circuit decided the identical reviewability issue in Cohen v. Rice, No. 92-2427. The First Circuit held in Cohen that Franklin does bar federal courts from hearing the kinds of procedural claims under the Base Closure Act that are at issue in this case.

The Third Circuit's decision in this case conflicts squarely with the First Circuit's decision in Cohen. The panel majority in this case made no reference to Cohen, although Judge Alito cited Cohen with approval in his dissent. The plaintiffs in Cohen have not petitioned for rehearing, but in light of the Third Circuit's subsequent decision, we expect them to petition for certiorari.

DISCUSSION

I recommend in favor of asking the Third Circuit to rehear this case en banc. We have a strong argument that the panel deci-

sion is incorrect under Franklin. The decision places the Third Circuit squarely in conflict with the First Circuit, and it has the potential for seriously disrupting the operation of the Base Closure Act. Although Supreme Court review may well be warranted, it is in our interest to seek further review from the Third Circuit first.

1. Franklin disallows suits against the President under the APA, but leaves the door open for non-APA suits challenging the constitutionality of Presidential action. The panel decision rests on the proposition that the President violates the Constitution, and hence is subject to judicial review under Franklin, whenever his actions "conflict with non-discretionary mandates of [an] authorizing statute." Majority op. at 10.

The proposition that any procedural violation of "non-discretionary mandates of [an] authorizing statute" amounts to a constitutional violation is, at the very least, a highly debatable one. But even if it is correct, it is irrelevant to this case, because the plaintiffs have never alleged that the President has violated the Base Closure Act. To the contrary, the plaintiffs made strenuous efforts throughout this litigation to disavow any challenge to the validity of the President's actions. They emphasized repeatedly that their only quarrel was with the acts and omissions of DoD and the Commission, not with the actions of the President.

The majority tries to circumvent this problem by treating the plaintiffs' allegations of procedural violations by DoD and the Commission as implicit allegations of illegal action by the President. See majority op. at 12. But as Judge Alito's dissent rightly points out, there simply is no colorable basis for arguing -- and in any event, the plaintiffs themselves do not argue -- that the alleged procedural violations by DoD render the subsequent actions of the President unlawful or ultra vires.

If the panel majority's theory were accepted, Franklin's non-reviewability ruling would become a dead letter. Given the panel's treatment of the allegations in this case, virtually any claim that the President or his subordinates have failed to comply with a statute could be transformed into a claim that the President acted in excess of his statutory authority and hence (in the panel's view) acted unconstitutionally. This would effectively wipe out not only Franklin's holding regarding nonreviewability of Presidential actions, but also its holding that recommendations to the President by subordinate officials are not "final agency action." A plaintiff whose real grievance was with the supposed errors of the subordinate official would instead sue the President, alleging that the official's statutory violations rendered the subsequent actions of the President unlawful and hence unconstitutional.

The majority opinion is also vulnerable because it is internally inconsistent. Since the actions of DoD and the Commission are plainly non-final, and hence nonreviewable, under Franklin, the majority opinion sought to get around Franklin by characterizing this case as a challenge to the final actions of the President, rather than a challenge to the preliminary actions of DoD and the Commission. Yet when the panel majority turned to the issue of sovereign immunity, and sought to bring this case within the ambit of 5 U.S.C. § 702, the majority effectively recharacterized the case as an attack on DoD and the Commission, with the President playing only a collateral role. Either this case is "really" a challenge to the legality of Presidential action, or it is not; the majority cannot have it both ways.

2. En banc review is warranted not only because the panel decision is wrong, but because it has potentially serious consequences for the base closure process. Our prior memorandum (copy attached) spells out the adverse practical effects of the panel's earlier decision, and the current decision does nothing to mitigate those consequences. To the contrary, the panel's new theory on the reviewability of Presidential actions is even more far-reaching than the earlier opinion, and it may expose the President to suit in a number of settings outside the Base Closure Act. The fact that the current panel decision conflicts with the First Circuit's recent decision in Cohen is still another reason why en banc reconsideration should be invited.

For much the same reasons, a petition for certiorari is likely to be in order if a rehearing petition is unavailing. As a tactical matter, however, it is preferable to apply for rehearing en banc first, rather than proceeding directly to the Supreme Court. An en banc petition gives us "two bites at the apple," and if we succeed before the en banc Third Circuit, we will not need (and probably can forestall) further review by the Supreme Court. While we would expect to prevail in the Supreme Court, there is obviously no guarantee of success, and the Supreme Court would be free -- unlike the Third Circuit -- to revise or "clarify" its holding in Franklin in adverse ways. Moreover, some of the errors of the panel, such as its mischaracterizations of the plaintiffs' claims, are more likely to receive close attention from the Third Circuit itself than from the Supreme Court.

It is possible that the plaintiffs in Cohen will petition for certiorari while our rehearing petition in this case is pending. In that event, we can file a response to the Cohen petition that invites the Supreme Court to hold the petition until the Third Circuit completes its deliberations. If the en banc Third Circuit ultimately overrules the panel decision, the Supreme Court can be urged to deny the Cohen petition because a circuit conflict no longer exists. Conversely, if the en banc Third Circuit leaves the panel decision intact, we can file a cert petition in this case and either acquiesce in cert in Cohen or invite the Court to continue

to hold Cohen, depending on which case appears to provide a better vehicle for Supreme Court review.

CONCLUSION

For the foregoing reasons, I recommend in favor of rehearing en banc.

/S/

STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division

May 18, 93

NO. 91-1932

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Please refer to this number
when responding 930604-19

SENATOR ARLEN SPECTER, et al.,

Plaintiffs-Appellants,

v.

SEAN O'KEEFE, ACTING SECRETARY
OF THE NAVY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

STUART E. SCHIFFER
Acting Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530
(202) 514-4052

Document Separator

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT REQUIRED BY RULE 22	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS WHY THE APPEAL SHOULD BE REHEARD EN BANC	10
CONCLUSION	15
ADDENDA	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page

Cases

Cohen v. Rice, 1993 WL 131914 (1st Cir. May 3, 1993) . . passim

Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991) 4

Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) 4,5,14

O'Keefe v. Specter, 113 S. Ct. 455 (1992) 6

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) . . . . passim

Statutes

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19 (1990) (codified at 10 U.S.C. § 2687 note (Supp. III 1991) . . . . . passim

Section 2903(c)(1) 2
Section 2903(d)(2) 2
Section 2903(e) 2
Section 2903(e)(2)-(3) 2
Section 2903(e)(5) 2
Section 2904(b) 3
Section 2908 3

5 U.S.C. § 702 9,13
5 U.S.C. § 704 5

STATEMENT REQUIRED BY RULE 22

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to a decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of the Supreme Court in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

Scott R. McIntosh

INTRODUCTION

In April 1992, a divided panel of this Court permitted review under the APA of claims that the Secretary of Defense and the Defense Base Closure and Realignment Commission committed procedural errors in preparing nonbinding base closure recommendations for the President. Two months later, in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), the Supreme Court held that (1) nonbinding agency recommendations to the President are not reviewable "final agency action" under the APA and (2) the President himself is not an "agency" for purposes of judicial review under the APA. Thereafter, the Supreme Court vacated the panel decision in this case and remanded for this Court to reconsider whether Franklin bars judicial review of the claims.

On remand from the Supreme Court, the panel has now held, over a dissent by Judge Alito, that Franklin does not preclude judicial review of the procedural claims in this case. The panel's decision places this Circuit in direct conflict with the First Circuit, which reached precisely the opposite conclusion within the past month in Cohen v. Rice, 1993 WL 131914. In holding that Franklin does not bar judicial review in this case, the panel majority has transformed a statutory challenge to agency action into a constitutional challenge to Presidential action, and in so doing has rendered Franklin a virtual nullity. The panel decision jeopardizes the integrity of the Defense Base Closure and Realignment Act of 1990, and its potential consequences for judicial review reach far beyond the confines of this case and this statute. For the

reasons set forth below and those given by Judge Alito in his dissent, this appeal should therefore be reheard en banc.

STATEMENT OF THE CASE

1. The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act") creates a statutory mechanism for identifying and closing or realigning obsolete domestic military bases. See Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19 (1990) (codified as amended at 10 U.S.C. § 2687 note (Supp. III 1991)). The Act provides for three biennial rounds of base closures, beginning in 1991. Under the terms of the Act, the Secretary of Defense prepares nonbinding recommendations regarding bases to be closed or realigned. Act § 2903(c)(1). The Secretary's recommendations are sent to the Defense Base Closure and Realignment Commission ("Commission"), which reviews the recommendations and which may change them if it determines that the Secretary "deviated substantially" from specified standards. Id. § 2903(d)(2). The Commission then sends a report containing its findings and recommendations to the President. Id. § 2903(e).

The Act vests the President with unqualified discretion to approve or disapprove the Commission's recommendations. Act § 2903(e)(2)-(3). If the President disapproves the recommendations, the Commission must prepare a revised list of recommended closures and realignments, which is then resubmitted to the President. Id. § 2903(e)(3). If the President disapproves the revised recommendations, no bases may be closed. Id. § 2903(e)(5). Thus, the recommendations have no legal or practical effect until and unless the President chooses, in his discretion, to adopt them.

If the President does approve either the initial or revised recommendations, the Act provides for Congress to review the President's decision by considering a joint resolution of disapproval. Act §§ 2904(b), 2908. If a joint resolution of disapproval is not enacted, the Secretary of Defense is obligated to close all of the bases approved for closure by the President. Id. § 2904(b).

2. During the 1991 round of base closures, the Secretary of Defense recommended the closure or realignment of 71 domestic military installations, including the Philadelphia Naval Shipyard. The Secretary's recommendations were sent to the Commission, which unanimously concurred with the recommendation that the Shipyard be closed. The Commission forwarded its recommendations, covering the Shipyard and 81 other military installations, to the President.

In July 1991, the President approved the recommendations of the Commission. Shortly thereafter, the House of Representatives overwhelmingly rejected a proposed resolution of disapproval, thereby requiring the Secretary of Defense to proceed with the closures and realignments.

The plaintiffs in this case filed a complaint under the APA and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, and the Commission and its members, seeking to enjoin the closure of the Shipyard. App. 21, 50, 54, 57. For present purposes, the complaint alleged that the Secretary of the Navy and the Secretary of Defense failed to comply with various procedural requirements of the Act in the course of preparing their list of recommended closures and realignments. The complaint further alleged that the Commission committed related procedural

errors under the Act. The plaintiffs did not allege, either in their complaint or in any subsequent proceedings, that the President had violated the Act or otherwise acted unlawfully.

The defendants disputed the plaintiffs' allegations of non-compliance with the procedural requirements of the Act. In addition, the government argued that the suit was barred on a variety of jurisdictional grounds. In November 1991, the district court granted a motion by the government to dismiss the suit, holding, inter alia, that the Act itself implicitly precludes judicial review of the plaintiffs' claims under the APA. 777 F. Supp. 1226.

In April 1992, a divided panel of this Court partially reversed the district court's dismissal order, permitting the plaintiffs to proceed with certain of their allegations. 971 F.2d 936 (Stapleton & Scirica, JJ.; Alito, J., dissenting). The panel majority held that judicial review is not allowed under the Act to the extent that it touches on the merits of the base closure decision, but that judicial review is available under the APA to ensure compliance with the procedural requirements of the Act. Id. at 945-53. Applying this distinction, the majority affirmed the dismissal of most of the complaint, on the ground that the allegations went to the substance of the decision to close the Shipyard, but reinstated allegations that the Secretary of Defense and the Commission had violated specific procedural requirements of the Act. Id. at 950-53. In particular, the majority permitted the plaintiffs to pursue claims that the Secretary of Defense violated the Act by "fail[ing] to create and transmit to the Commission and the GAO an administrative record containing all of the information

the Secretary relied upon in making his recommendations" (id. at 952), and that the Commission violated the Act's public-hearing requirement (id. at 952-53).

3. In June 1992, two months after the initial panel decision in this case, the Supreme Court issued its decision in Franklin, supra. Franklin involved a challenge to the reapportionment of the House of Representatives under the 1990 decennial census. Under the applicable federal statutes, the Secretary of Commerce prepared a state-by-state population breakdown for the President, who then sent Congress a statement showing the population of each state and the number of Representatives to which each state was entitled under a specified formula. By statute, each state was entitled to the number of Representatives shown in the President's statement. See Franklin, 112 S. Ct. at 2771.

The state of Massachusetts sued the Secretary of Commerce and the President, among others, asserting that the method used to allocate certain overseas residents to their "home" states was arbitrary and capricious under the APA and was unconstitutional under Article I. 112 S. Ct. at 2770, 2773. The Supreme Court entertained the constitutional challenge, but held that the APA challenge could not be entertained because none of the actions at issue constituted "final agency action" for purposes of 5 U.S.C. § 704. Id. at 2773-76.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is

one that will directly affect the parties." 112 S. Ct. at 2773. In Franklin, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. Id. at 2773-74. "Because the Secretary's report to the President carries no direct consequences," the Court concluded that "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." Id. at 2774 (citations omitted).

The Court then held, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," that the APA's definition of "agency" does not include the President. 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2776. The Court acknowledged that "the President's actions may still be reviewed for constitutionality," but held that his actions nonetheless are not subject to judicial review "under the standards of the APA." Id.

4. Because of the obvious procedural parallels between the statutory scheme in this case and the statute involved in Franklin, the defendants petitioned the Supreme Court for a writ of certiorari. In November 1992, the Supreme Court granted the petition, vacated the panel decision, and remanded the case for reconsideration in light of Franklin. 113 S. Ct. 455.

At the direction of this Court, the parties submitted supplemental briefs regarding the effect of Franklin on this case. The defendants contended that the contested actions of the Secretary of Defense and the Commission are not "final" agency action under Franklin, and therefore are not reviewable under the APA, because the Secretary of Defense and the Commission are merely engaged in the preparation of nonbinding recommendations that have no effect unless the President chooses to accept them. In response, the plaintiffs argued that Franklin's finality holding does not apply when the actions of a federal agency are being challenged on procedural, rather than substantive, grounds. The plaintiffs further argued that they were not contesting or otherwise seeking review of the President's actions, and hence that Franklin's holding about the unreviewability of Presidential actions under the APA was irrelevant.

On May 3, 1993, before the panel had acted, the Court of Appeals for the First Circuit decided the identical reviewability issue in Cohen v. Rice, 1993 WL 131914. Cohen involved procedural claims against the Secretary of Defense and the Commission under the Base Closure Act that are essentially indistinguishable from the claims in this case. See id. at *4 (summarizing claims). The First Circuit held in Cohen, as the defendants are urging in this case, that Franklin bars federal courts from entertaining such claims because the actions of the Secretary and the Commission are not "final" agency action under the APA. Id. at *6-7. A copy of Cohen is attached as an addendum to this petition.

5. On May 18, 1993, two weeks after the First Circuit issued its decision in Cohen, the panel issued its second decision in this case. The panel held, again by a divided vote, that Franklin does not preclude judicial review of the procedural claims left open by the initial panel decision.

While the plaintiffs had taken pains not to frame their claims as a challenge to the actions of the President, the panel majority began with the premise that "'at least in one sense, we are here asked to review a presidential decision.'" Majority op. at 8. The majority then pointed out that, even under Franklin, Presidential action is subject to judicial review to determine its constitutionality. Id. at 9-10. Next, the majority reasoned that "where Presidential action is alleged to be in conflict with non-discretionary mandates of [an] authorizing statute," the constitutionality of the President's actions is actually being called into question, and hence the recognized judicial power to review the constitutionality of Presidential actions extends to review of whether Presidential action violates "non-discretionary [statutory] mandates." Id. at 10-11 (emphasis added). Finally, the majority characterized the plaintiffs' claims in this case as alleging "a failure by the President to remain within statutorily mandated limits" (id. at 11), and concluded that the claims are therefore "constitutional" claims that are still subject to judicial review under Franklin.

Having disposed of Franklin in this fashion, the panel majority then addressed the question of sovereign immunity. Majority op. at 12-15. The majority reasoned that sovereign immunity is not a bar to judicial review, even in the absence of a statutory waiver

of immunity, "where * * * plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the * * * statute authorizing such action and has thereby violated the constitutionally mandated separation of powers." Id. at 13. Alternatively, the majority concluded that sovereign immunity is waived by Section 10(b) of the APA, 5 U.S.C. § 702. Id. at 14-15. The majority acknowledged that 5 U.S.C. § 702 "may not apply to suits against the President," but held that "this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President -- a situation not present here." Id. at 15 n.9.

Judge Alito, in dissent, made two principal points. First, he pointed out that the plaintiffs "vigorously contended * * * that Franklin does not bar review under the APA[;] [t]he plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based either on common law or separation of powers principles." Dissent at 18 (emphasis in original). Judge Alito agreed with the First Circuit in Cohen that Franklin precludes judicial review of the plaintiffs' claims under the APA. Id.

Second, taking the majority's theory on its own terms, Judge Alito explained that the plaintiffs' allegations of procedural errors by the Secretary of Defense and the Commission do not and cannot amount to an allegation that the President himself acted unlawfully. Dissent at 19-21. As Judge Alito explained, "the President's sole responsibility [under the Act] * * * is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommenda-

tions should be accepted or whether the recommendations should be returned to the Commission." Id. at 20. The Base Closure Act does not make the President's statutory rights and responsibilities contingent on the absence of prior procedural errors by the Secretary of Defense or the Commission. Id. Hence, under no view of the matter had the President violated the Base Closure Act, nor had the plaintiffs alleged such a violation.

REASONS WHY THE APPEAL SHOULD BE REHEARD EN BANC

The Supreme Court remanded this case for reconsideration in light of Franklin. On remand, the plaintiffs urged the panel to hold that Franklin does not bar judicial review because the actions of the Secretary of Defense and the Commission are somehow "final" agency action. The panel majority instead held that Franklin does not bar review because the plaintiffs, who thought they were alleging statutory violations by the Secretary of Defense and the Commission, are actually alleging constitutional violations by the President of the United States. If this remarkable holding is allowed to stand, it will render Franklin itself a nullity, with consequences reaching far beyond the Base Closure Act. En banc reconsideration is plainly called for, especially in light of the conflict between this decision and the First Circuit's decision in Cohen.

1. The correct application of Franklin to this case should be a straightforward matter. The plaintiffs are alleging that the Secretary of Defense and the Commission committed procedural violations of the Base Closure Act (such as failing to forward a complete administrative record) in the course of preparing their

recommendations for the President. The test of finality under Franklin is whether an agency's actions "will directly affect the parties" (112 S. Ct. at 2773), and here, as in Franklin, the nonbinding agency recommendations simply had no effect until the President chose in his discretion to accept them. Accordingly, the acts and omissions of the Secretary of Defense and the Commission in preparing the recommendations are not final agency action and are not subject to judicial review under the APA. See Cohen, 1993 WL 131914 at *6-7.

The panel majority avoided this seemingly inescapable conclusion by a sweeping recharacterization of the plaintiffs' claims for purposes of Franklin. The plaintiffs' claims that the Secretary of Defense and the Commission violated the Base Closure Act were cast by the majority as claims that the President violated the Act. The majority then characterized the allegations of statutory violations as claims of constitutional violations, on the theory that the plaintiffs were alleging conduct beyond the scope of the President's statutory authority, and that Presidential actions which are statutorily ultra vires are thereby unconstitutional. Having thus reshaped the plaintiffs' claims in this fashion, the panel brought the claims within Franklin's exception for suits challenging the constitutionality of Presidential actions -- an exception that, as Judge Alito points out, the plaintiffs themselves never claimed to be applicable.

This tour de force cannot be reconciled either with the plaintiffs' claims or with Franklin itself. To begin, the plaintiffs have never purported to question the legality of the President's

actions in this case. To the contrary, they have gone to great lengths to make clear that they are contesting only the actions of the Secretary of Defense and the Commission, not those of the President. And as Judge Alito's dissent explains, there is simply no legal basis for assuming, as the majority implicitly assumes, that alleged procedural violations by the Secretary or the Commission somehow rendered the President's subsequent actions unlawful or otherwise invalid. See Dissent at 19-21. The only statutory obligation imposed on the President by the Base Closure Act is to decide in his discretion whether to accept or reject the Commission's recommendations, and it is undisputed that the President discharged that obligation in this case.

Moreover, the plaintiffs do not allege that anyone -- either the President or anyone else -- violated the Constitution.[1] The majority reasoned that, when the President is alleged to have acted in excess of his statutory authority, he is actually alleged to have violated the separation-of-powers doctrine and thereby acted unconstitutionally. Majority op. at 10-11. Taken on its own terms, this proposition is highly debatable, to say the least. But even if it were correct as an abstract matter, the majority has stretched it past the breaking point. If the President is deemed to have acted ultra vires and unconstitutionally because the Secretary of Defense allegedly did not forward all relevant information to the Commission (see pp. 4-5 supra), or because the Com-

[1]At one time, the plaintiffs advanced certain procedural due process claims, but the panel unanimously affirmed the district court's dismissal of those claims in its original decision (see 971 F.2d at 955-56), and the plaintiffs have made no attempt to revive them.

mission allegedly did not comply with the Act's public-hearing requirement (id.), then the concept of ultra vires action no longer has any meaningful limits.

If claims like the ones here are subject to judicial review on the basis of the panel majority's reasoning, then the limits on APA review recognized in Franklin are simply a dead letter. Under the majority's approach, when the President acts on recommendations of a subordinate agency or officer, virtually any allegation that the subordinate has committed a statutory violation in the course of preparing the recommendations becomes an allegation that the President has violated the Constitution, and hence is subject to non-APA judicial review. Thus, in the majority's hands, Franklin's narrow exception for judicial review of constitutional claims swallows the APA's rule against review of Presidential actions, as well as its rule against review of nonbinding agency recommendations.

The panel majority fares no better in its analysis of sovereign immunity. The majority's reliance on the ultra vires exception to sovereign immunity (majority op. at 13) rests on the same misconception of the ultra vires doctrine described above. And if the plaintiffs in this case are indeed challenging the constitutionality of Presidential action, then 5 U.S.C. § 702 is of no avail, since -- as the majority itself essentially concedes (majority op. at 15 n.9) -- that provision does not apply to the President. The majority was able to escape this dead end only by recasting the suit once more, treating it for purposes of 5 U.S.C. § 702 as a challenge to the actions of the Secretary of Defense and

the Commission, rather than a challenge to the legality or statutory authority of Presidential actions. See id. at 13-14. This characterization is more faithful to the plaintiffs' own presentation of their claims, but is entirely inconsistent with how the majority characterized those claims when trying to distinguish Franklin.

2. The ultimate holding of the panel in this case is that Franklin does not preclude judicial review of allegations that the Secretary of Defense and the Commission violated the procedural requirements of the Base Closure Act. That holding places this Circuit squarely in conflict with the First Circuit. As explained above, the First Circuit in Cohen affirmed the dismissal of claims indistinguishable from those in this case, on the ground that Franklin does bar review of the procedures used to prepare base closure recommendations. The majority opinion does not acknowledge Cohen, but the conflict cannot be escaped by ignoring it.

The consequences of the panel decision for the operation of the Base Closure Act are potentially severe. As explained in Judge Alito's dissent from the original panel decision (971 F.2d at 956-61), the Base Closure Act was designed to end years of impasses and delays over the closure of domestic military bases, permitting closures finally to go forward in a prompt and orderly fashion. Allowing plaintiffs to contest base closures on the basis of alleged procedural errors, thereby delaying closures and extracting individual bases from the unified package approved by the President and Congress, will significantly undermine the government's ability to fulfill the Act's purposes and carry out the politically charged

task of closing domestic military bases. The damage will be especially great because "the second [biennial] cycle [of base closures] is already well underway" (Dissent at 21), and each round of closures builds on the one before.

Moreover, the consequences of the panel decision are not confined to the Base Closure Act. As explained above, the panel's handling of Franklin potentially renders Franklin's restrictions on judicial review a nullity. Henceforth, in this Circuit, any statutory scheme under which agencies present recommendations to the President for his consideration may be subjected to judicial review, notwithstanding Franklin's holdings that such recommendations are not final agency action and that the President himself is not subject to judicial review under the APA. Before such a result is accepted, and a Circuit conflict on an issue of this importance is created, this appeal should be reheard en banc.[2]

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the appeal should be reheard en banc.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Civil Division
Department of Justice
Washington, D.C. 20530

---

[2]Rehearing is also warranted to reconsider the earlier panel holding that the Base Closure Act itself does not preclude review of procedural claims.

ADDENDUM A

PANEL OPINION

Filed May 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

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; ROBERT D. STUART, JR.,

U.S. Sen. Arlen Specter,
U.S. Sen. Harris Wofford,
U.S. Sen. Bill Bradley,
U.S. Sen. Frank R. Lautenberg,
Governor Robert P. Casey,

the Commonwealth of
Pennsylvania, Pennsylvania
Attorney General Ernest D.
Preate, Jr., Governor James
J. Florio, the State of
New Jersey,
New Jersey Attorney General
Robert J. Del Tufo,
Governor Michael N. Castle,
the State of Delaware,
U.S. Rep. Curt Weldon,
U.S. Rep. Thomas Foglietta,
U.S. Rep. Robert E.
Andrews,
U.S. Rep. R. Lawrence
Coughlin,
U.S. Rep. Peter H.
Kostmayer,
U.S. Rep. Robert A. Borski,
the City of Philadelphia,
Howard J. Landry,
International
Federation of Professional
and Technical Engineers,
Local 3,
William F. Reil, Metals
Trades Council,
Local 687, Machinists,
Ronald Warrington, the
Planners Estimators
Progressman & Schedulers
Union, Local No. 2,
Appellants

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

(D.C. Civil Action No. 91-4322)

On Remand from the Supreme Court of the United States
(No. 92-485)

Reargued February 24. 1993

BEFORE: STAPLETON. SCIRICA and ALITO. *Circuit Judges*

(Opinion Filed May 18. 1993)

Bruce W. Kauffman (Argued)
David H. Pittinsky
Camille Wolf Spiniello
Patrick T. Davish
Mark A. Nation
Dilworth. Paxson. Kalish &
Kauffman
2600 The Fidelity Building
Philadelphia. PA 19109-1094

OF COUNSEL:

Senator Arlen Specter (Argued)
Green Federal Building. Room 9400
Sixth and Arch Streets
Philadelphia. PA 19106
Attorneys for Appellants

Ernest D. Preate. Jr.
Attorney General for Pennsylvania
Louis J. Rovelli.
Executive Deputy Attorney General
for Pennsylvania
15th Floor. Strawberry Square
Harrisburg. PA 17120
Attorneys for the Commonwealth
of Pennsylvania and
Ernest D. Preate. Jr.

Robert J. Del Tufo
Attorney General of New Jersey
Jack M. Sabatino
Assistant Attorney General of
the State of New Jersey
Howard J. McCoach
Deputy Attorney General for
the State of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, NJ 08625
Attorneys for the State of
New Jersey, Governor James J.
Florio and Robert J. Del Tufo

Charisse Lillie
Solicitor for the City of Philadelphia
Room 1520
Municipal Services Building
Philadelphia, PA 19102-1692
Attorney for the City of
Philadelphia

Stuart M. Gerson
Assistant Attorney General

Michael M. Baylson
United States Attorney

Douglas N. Letter (Argued)
Scott R. McIntosh
Jennifer H. Zacks
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Attorneys for Appellees

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This action to enjoin the defendants from carrying out a decision to close the Philadelphia Naval Shipyard is before us for the second time. In our initial opinion in this case, *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992), we held, *inter alia*, that plaintiffs' claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Defense Base Closure and Realignment Act of 1990 could proceed in the district court. Our mandate, however, was vacated by the Supreme Court and the case was remanded for reconsideration in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). After consideration of the impact of *Franklin* upon our prior holding, we conclude that no change in that holding is warranted. We will therefore remand this matter to the district court for further proceedings consistent with our earlier opinion.

I.

A.

In *Franklin*, the Supreme Court was presented with a situation at least superficially similar to the one before us; however, it is the differences between the two cases that we find dispositive. *Franklin* was a suit against the President, the Secretary of Commerce, and a number of other public officials challenging the methods used in the 1990 census and the manner in which the number of seats in the House of Representatives had been allocated to the various states. Plaintiffs' claims were based upon the Administrative Procedure Act (APA) and the Constitution. A three judge panel of the United States District Court for the District of Massachusetts initially found in favor of the plaintiffs and granted the relief sought—relief which included an injunction directing the Secretary of Commerce to alter her reapportionment report and the President to recalculate the

number of Representatives per State and transmit the new calculation to Congress. *Franklin*, 112 S. Ct. at 2770.

The Supreme Court reversed. It first analyzed plaintiff's claim under the APA which allows review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). The Court concluded that the Secretary of Commerce's report to the President on the results of the census does not constitute "final agency action" and is therefore unreviewable under the APA because "[t]he President, not the Secretary takes the final action that affects the States." *Franklin*, 112 S. Ct. at 2775; *see also id.* at 2773 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). Next, the Court held that although the President's calculation of the number of Representatives and forwarding of that calculation to Congress is a final action, the President is not an "agency" within the meaning of the Act and thus, the President's action is not reviewable for abuse of discretion under the APA. *Id.* at 2775. Finally, the Court noted that there is judicial review of presidential action to determine whether it violates the Constitution; however, it concluded that the action complained of in *Franklin* was not unconstitutional.

B.

The action currently before us is a suit against the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure Commission seeking to enjoin the closing of the Philadelphia Naval Shipyard.[1] Under the Defense Base Closure and Realignment Act of 1990 ("the Act"), it is the responsibility of the Secretary of Defense to close the bases designated as a result of the process prescribed by the Act, Pub. L. No. 101-510, §§ 2904-2905, 104 Stat. 1808, 1812-14 (1990), and the primary relief sought here is an order enjoining the Secretary from closing the Shipyard. The alleged basis for this relief is that the process that resulted in the designation of the Shipyard as

1. The President is not a defendant in this suit.

a base to be closed did not comply with the requirements set forth in the Act.

In our prior opinion, we first held that there could be no judicial review prior to the end of the process required by the Act because there was no final decision prior to that point that had an adverse impact on the plaintiffs.[2] We also concluded that the decisionmaking of the President under the Act was committed to his discretion and not properly reviewable. *Specter*, 971 F.2d at 946 ("One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure . . . ."). Similarly, we held that the decisionmaking of other federal officials (i.e. the Secretary of Defense, the members of the Commission) challenged by plaintiffs was committed to their discretion and not judicially reviewable. *Id.* at 950-53. However, we also held that the district court could review the claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Act.[3] Specifically, we concluded:

---

2. More specifically, we held that action could be judicially reviewed "only if its impact upon plaintiffs is direct and immediate . . . . One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature." *Specter*, 971 F.2d at 946.

3. For instance, we held that the allegation that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations" as required by § 2903(c)(4) of the Act was judicially reviewable. *Specter*, 971 F.2d at 952. Similarly, we also held reviewable the plaintiffs' contention "that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy." *Id.* at 952-53.

We stressed, however, that the extent of judicial review in this context was very limited and that plaintiffs, while purporting to complain about specific procedural defects, were in large part seeking to get the district court to second guess decisions committed by the Act to executive discretion. *Id.* at 953. It is apparent to us from plaintiffs' Brief for Appellants on Remand that plaintiffs have failed to acknowledge the limited character of the review our prior opinion permits.

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

Id. at 947 (footnote omitted).

Although we noted that because "it is the implementation of the President's decision that we have been asked to enjoin, . . . at least in one sense, we are here asked to review a presidential decision," *id.* at 945, we concluded that this would not bar review of plaintiffs' procedural claims:

> Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law. 5 Kenneth C. Davis, *Administrative Law* 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S.

> 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). . . . It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

Id. at 945.

III.

Examination of our prior decision in light of *Franklin* suggests to us that no change in outcome is required. *Franklin*'s holding that the Secretary of Commerce's report to the President did not constitute a reviewable final action because it did not have an immediate and direct impact on the plaintiffs confirms our initial conclusion that there was no reviewable final action here until after the President designated the Shipyard as a facility to be closed and Congress failed to overturn that action. *See Specter*, 971 F.2d at 945 ("We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b).").

More importantly, the Court's conclusion that the President is not an "agency" under the APA, and thus, presidential action is not reviewable for abuse of discretion under the APA's standards is entirely consistent with our prior decision in which we assumed, without deciding, that the President is not an agency within the meaning of the APA.[4] Because our prior holding was not based on the existence of APA abuse of discretion review, but rather on the belief that courts may review actions taken at the direction of the President to determine whether those actions are within

---

4. As previously noted, we explicitly concluded that our holding permitting review of plaintiffs' claims that the base closing process had violated the specific procedural mandates of the statute would be "the same whether or not the APA applies to presidential decisionmaking." *Specter*, 971 F.2d at 945.

applicable constitutional and statutory authority, a modification of our prior mandate only would be warranted if *Franklin* might be read as foreclosing the limited review we previously upheld.

In *Franklin*, the Court declined only to review the President's decision under the APA. It expressly sanctioned judicial review of presidential decision making for consistency with the Constitution and said nothing about review of presidential action for consistency with the statute authorizing such action. In concluding in our earlier opinion that judicial review was available here, we relied upon the existence of judicial review prior to the adoption of the APA and upon various authorities indicating that the judicial review provisions of the APA represent a "codification of the common law." *Id.* at 945. While we there described this extra-APA review as common law review, our reexamination of the relevant authorities in light of *Franklin* has persuaded us that there is a constitutional aspect to the exercise of judicial review in this case — an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case. We would, in any event, be reluctant to infer from *Franklin*'s silence on the matter a prohibition of judicial review where presidential action is alleged to be in conflict with non-discretionary mandates of the authorizing statute because the Court had no occasion to consider that issue in *Franklin*. There, the only non-constitutional allegation made by (and, indeed, available to) plaintiffs was that the proposed action represented an abuse of discretion (*i.e.*, arbitrary and capricious conduct) prohibited by the APA. Here, by contrast, plaintiffs allege that the process underlying the decision to close the Shipyard violated specific nondiscretionary provisions of the Base Closing Act — the only authority advanced by the defendants for the closing.

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906

F.2d 952, 955 (3d Cir. 1990) ("It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself." (citing *Youngstown Steel*)); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) ("'*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'" (quoting *Nixon v. Sirica*, 487 F.2d 700, 793 (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g.*, *National Treasury Employees Union*, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."); *see also* U.S. Const. Art. II, § 3 ("[T]he President shall take care that the laws be faithfully executed . . . ."). Indeed, we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. *Youngstown*, 343 U.S. at 585-86. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*, 112 S.Ct. at 2776 (citing *Youngstown*).

The plaintiffs in this case, unlike the plaintiffs in *Franklin*, do not ask the court to review under the APA for arbitrary and capricious conduct. Rather, they allege that closing the Shipyard would be inconsistent with specific, nondiscretionary directives of the Base Closing Act — the only authority advanced by the defendants for their

proposed action. The President, no less than his lieutenants, must have statutory or constitutional authority for his actions and where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.[5]

IV.

The defendants insist that there can be no judicial review in this case because such review is barred by the doctrine of sovereign immunity. We disagree.

We first note that limited judicial review of federal action has long been available at common law:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949); *see also Youngstown Steel*, 343 U.S. at 585-87. Although this principle is limited, *see, e.g.*, *Larson*, 337 U.S. at 690 ("A claim of error in the exercise of [delegated] power is . . . not sufficient."),[6] as counsel for the

---

5. In holding here that the President must have at his disposal information collected in accordance with statutory procedures, we do not hold that the district court may review the entirely distinct question of whether and to what extent the President uses the information. As we previously held, the Act commits that decision to the President's discretion. *Specter*, 971 F.2d at 946.

6. *Larson* was essentially a breach of contract action against an agent of the federal government. The Court rejected plaintiff's contention that the agent's breach was *ultra vires* and thereby stripped of sovereign immunity protection; instead, it held that because the agent was authorized to "administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment," his actions were within delegated authority and were therefore protected by sovereign immunity: "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." *Larson*, 337 U.S. at 695.

defendants conceded at oral argument, and as both *Youngstown Steel* and *Franklin* make clear, judicial review of the constitutionality of executive action is not barred by the doctrine of sovereign immunity. Thus, where, as here, plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the only statute authorizing such action and has thereby violated the constitutionally-mandated separation of powers, sovereign immunity concerns do not apply.

Even if the inapplicablity of sovereign immunity in this context were not clear from the doctrine enunciated in *Larson* and *Youngstown Steel*, however, we believe this case would still be controlled by the express waiver found in the APA:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1988).

Here, plaintiffs do not seek monetary damages: they seek injunctive relief.[7] Plaintiffs also state a claim that the Secretary of the Navy, the Secretary of Defense, and the Base Closure Commission have acted under color of legal authority in violation of the Act and that the Secretary of Defense, similarly acting under color of legal authority, is threatening to close the Shipyard as the final step of an illegal process. This is thus a situation that § 702 literally reads on. It is also a situation that precisely fits the congressional intent behind this waiver of sovereign immunity. *See, e.g.*, H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6121 ("The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign

7. Effective relief can be granted by an order prohibiting the Secretary of Defense from closing the Shipyard.

immunity as a bar to judicial review of Federal administrative action . . . ."); *id.* at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."); 4 Kenneth C. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1984) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense.").[8] Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA. *See Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980); *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *see also* 4 Davis, *supra*, § 23:19, at 195 ("The abolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.").

The only argument we can conceive against the applicability of § 702 here is that the President was involved at one stage of the process that led to the allegedly illegal action that will injure plaintiffs. While, as we earlier concluded, the nature of the role assigned to the President by the Act makes his decisionmaking unreviewable, the fact that he played a role provides no justification for holding the process and the final executive action immune from review for compliance with the mandatory procedural requirements of the Act. While suits, like *Franklin*, seeking to secure presidential action or forbearance pose special problems, those problems are not presented in the situation

---

8. The legislative history of the immunity waiver also indicates congressional recognition of the *ultra vires* doctrine and the difficulties and complexities involved in its application; it evinces an intent to eliminate the need for "wispy fictions" in favor of a clear waiver. *See* H.R. Rep. No. 1656, *supra*, at 5-7, 1976 U.S.C.C.A.N. at 6125-28.

before us.[9] As Justice Scalia explained in his opinion in *Franklin*, the fact that the federal courts "cannot direct the President to take a specified executive act" does not

> in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, *e.g.*, *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 72. S.Ct. 863, 96 L.Ed. 1153 (1952); *Panama Refinancing Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503-506, 89 S.Ct. 1944, 1954-1956; 23 L.Ed.2d 491 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive.

Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring).

V.

Accordingly, we conclude that nothing in *Franklin* suggests that our prior approach to this case was incorrect.

---

9. Indeed, given *Franklin*'s holding that the President is not an "agency" within the meaning of the APA, the waiver of sovereign immunity contained in § 702 may not apply to suits against the President. Nevertheless, this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President—a situation not present here. While we do not regard *Franklin* as turning on sovereign immunity doctrine, we note that § 702 might not waive sovereign immunity in the situation there before the Court. As the *Franklin* Court recognized, "it is the President's personal transmittal of the report to Congress that settles the reapportionment." *Franklin*, 112 S. Ct. at 2775. In *Franklin*, it appears that the only effective relief was relief that would require the President's forbearance. *See Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring) ("[W]e cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush.").

We reaffirm our prior opinion and we will remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court should conduct those proceedings as expeditiously as possible.

Alito, *Circuit Judge*, dissenting.

The majority rests its decision on arguments that are not properly before us, since the plaintiff-appellants did not raise them either before or after remand from the Supreme Court. Moreover, I believe that the majority's arguments are wrong on the merits and may have unfortunate future implications. I therefore respectfully dissent.

I.

When this case was initially before us, the majority held that the closing of the Philadelphia Naval Shipyard was subject to judicial review to determine whether certain procedural requirements of the Defense Base Closure and Realignment Act of 1990 had been satisfied. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992). The Supreme Court subsequently decided *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), which concerned, among other things, whether the Administrative Procedure Act authorized review of actions taken under a statutory scheme similar to that in the Defense Base Closure and Realignment Act. The Court held that the Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census is not "final agency action" reviewable under the APA, 5 U.S.C. § 704, and that actions taken by the President are not subject to APA review. After handing down its decision in *Franklin*, the Supreme Court vacated this court's prior decision in this case and remanded for reconsideration in light of *Franklin*. *O'Keefe v. Specter*, 113 S. Ct. 455 (1992).[1]

1. Neither of the arguments suggested by *Franklin* — i.e., that the recommendations of the Base Closure Commission do not constitute "final agency action" under the APA and that presidential action is not reviewable under the APA — was raised by the defendants when this appeal was first before us. The defendants contend that we must nevertheless reach these issues because they are jurisdictional. Whether or not an appellate court would always be compelled to consider issues of this nature even if they are not raised by the parties, I believe it is appropriate for us to reach them here. If we refused to reach these issues now, the case would be remanded, and the defendants could then raise them before the district court. Under these circumstances, our refusal to entertain these issues at the present time might further delay the expeditious disposition of this case.

On remand, the plaintiffs vigorously contended that the statutory scheme in *Franklin* is materially different from the scheme involved here and that *Franklin* therefore does not bar review *under the APA*. The plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based on either common law or separation of powers principles. Nor had the plaintiffs advanced either of those theories when this case was initially before us or, as far as I can determine, when the case was in the district court. The majority, however, chooses to sidestep the APA argument that the plaintiffs have pressed. Instead, the majority grounds its decision on the common law and separation of powers arguments that it has devised and injected into this case.

I cannot endorse this approach. I would address the argument that the plaintiffs have raised and that the parties have briefed — i.e., whether, despite *Franklin*, the closing of the Shipyard is reviewable under the APA. The First Circuit recently considered *Franklin*'s effect on judicial review under the Defense Base Closure and Realignment Act. *Cohen v. Rice*, 92-2427, 1993 LW 131914 (1st Cir. May 3, 1993). The plaintiffs in that case alleged that the process had been tainted by "faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO." *Id.* at *6. The First Circuit held that under *Franklin* APA review for these claims was unavailable. Because I agree that the statutory scheme at issue here is not materially distinguishable from the scheme in *Franklin*, I would hold that APA review is unavailable. And I would go no further.

II.

Since the majority has gone further, however, and since the majority's analysis may affect future cases, I will explain briefly why I believe the majority's analysis is flawed. The majority opinion, as I understand it, reasons as follows. First, "[t]he President must have constitutional or statutory authority for whatever action he wishes to take." Majority Typescript at 10. Second, judicial review is available outside the APA to determine whether presidential action violates or exceeds that authority. *Id.* at 10-12.

Third, under the Base Closure and Realignment Act, the President lacks statutory authority to approve or implement the closing of a base if the Base Closure Commission's recommendation regarding that base was tainted by violations of the Act's procedural requirements.[2] Therefore, since the plaintiffs in this case allege that such procedural violations occurred with respect to the Philadelphia Naval Shipyard, the President's approval of the closing of the Shipyard and/or the Secretary of Defense's implementation of the closing are subject to non-APA judicial review.

Putting aside whatever else may be said about this analysis, it seems plain to me that its third step is incorrect, for the Base Closure and Realignment Act does not limit the President's authority in the way the majority suggests. The Act does not require the President to reject the Commission's package of recommendations if the recommendations regarding one or more bases are tainted by procedural violations. Nor does the Act require or authorize the President or his subordinates to refrain from carrying through with the closing or realignment of such bases following presidential approval of the Commission's package and the expiration of the period for congressional disapproval.

The President's powers and responsibilities under the Base Closure and Realignment Act are clearly set out in Section 2903(e). In brief, the President, after receiving the

---

2. The majority puts it as follows (majority typescript at 8), quoting *Specter v. Garrett*, 971 F.2d 936, 947 (3d Cir. 1992)):

> Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.*

The majority later adds that the President's authority under the Base Closure and Realignment Act to approve or order the closing of a base "has been expressly confined by Congress to action based on a particular type of process." Majority typescript at 12. In addition, the majority states that the President's subordinates are "threatening to close the Shipyard as the final step of an illegal process." Majority typescript at 13.

Commission's package of recommendations by July 1 of the year in question, must decide whether to accept the entire package or return it to the Commission. If, as was the case in 1991, the President decides to accept the package, he must transmit a report containing his approval to the Commission as well as to Congress. He must also transmit a copy of the Commission's recommendations and a certification of his approval to Congress. Section 2903(e)(1), (2). Congress then has 45 days to disapprove the package (Section 2904(b)), and if, as was the case in 1991, Congress does not disapprove, the Secretary of Defense "shall" close and realign bases in accordance with the package. Section 2904(a).

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

Under the plain language of the Base Closure and Realignment Act, the President's sole responsibility, upon receiving a package of recommendations from the Commission, is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission. After the President has

approved a package of recommendations and the time for congressional disapproval has expired, the sole responsibility of the Secretary of Defense is to carry out the indicated closings and realignments. In the case before us, this is precisely what the President did and what the Secretary of Defense wishes to do, and therefore I see no possible ground for arguing that the Executive violated any statutory command or exceeded its statutory authority at these stages of the base closure and realignment process.[3]

The Base Closure and Realignment Act calls for three cycles of recommended closures and realignments — in 1991, 1993, and 1995. In this case, we are still considering a closure that was recommended and approved in the first cycle. In the meantime, the second cycle is already well underway. When Congress enacted the Base Closure and Realignment Act, it knew that unnecessary military installations can waste enormous sums of money and that litigation can effectively delay closings and realignments for years. In my view, Congress clearly wanted to put an end to these delays, but our court, by allowing judicial review of base closings and realignments, is frustrating the implementation of Congress's intent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

3. As I noted in my prior dissent (971 F.2d at 956 n.2), the plaintiffs are not challenging the propriety of anything that occurred after the transmission of the Commission's recommendations to the President. Rather, their claims relate to actions taken at earlier stages. But as the majority itself has recognized, actions taken prior to the end of the process required by the Act had no adverse impact on the plaintiffs and thus are not subject to judicial review under any theory. Majority typescript at 7 & n.2.

ADDENDUM B

Cohen v. Rice, 1993 WL 131914 (1st Cir. May 3, 1993)

William S. COHEN, et al., Plaintiffs, Appellants,
v.
Donald RICE, Secretary of the Air Force, et al., Defendants, Appellees.
No. 92-2427
United States Court of Appeals, First Circuit.
May 3, 1993

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

Severin M. Beliveau, with whom Ann R. Robinson, Joseph G. Donahue, and Preti, Flaherty, Beliveau & Pachios, were on brief for appellants.

Jacob M. Lewis, with whom Stuart M. Gerson, Acting Attorney General, Richard S. Cohen, United States Attorney, Douglas N. Letter, United States Attorney and Scott R. McIntosh, United States Attorney, were on brief for appellee.

Before Boudin, Circuit Judge, Campbell, Senior Circuit Judge, and Stahl, Circuit Judge.

STAHL, Circuit Judge.

*1 This is an action to enjoin the Department of Defense from carrying out the President's decision to close Loring Air Force Base ("Loring") in Limestone, Maine. Plaintiffs, [FN1] seeking relief under the Administrative Procedure Act ("APA"), 5 U.S.C. s 701 et seq., allege that defendants Secretary of Defense, Secretary of the Air Force, and Base Closure and Realignment Commission ("the Commission") violated procedural and substantive requirements of the Defense Base Closure and Realignment Act of 1990 ("the 1990 Act"). Pub. L. No. 101-510, ss 2901-11, 104 Stat. 1808-19 (codified at 10 U.S.C. s 2687). In dismissing many of the plaintiffs' claims in May 1992, the district court ruled that the 1990 Act precludes judicial review of substantive challenges to base closure decisions. See Cohen v. Rice, 800 F. Supp. 999 (D. Me. 1992) ("Cohen I "). In September of 1992, the district court granted defendants' motion for summary judgment on the remaining claims on the basis of the Supreme Court's intervening decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). See Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992) ("Cohen II "). Plaintiffs' timely appeal focuses on the district court's application of Franklin to this case. After careful review of the decision below, the 1990 Act, and the Court's pronouncements in Franklin, we affirm the judgment of the district court. As this case is apparently the first at the appellate level to mesh the 1990 Act with the recent dictates of Franklin, [FN2] we begin with an overview of the 1990 Act and its predecessors, and then focus on the specifics of the matter at hand.

The 1990 Act

The 1990 Act is the latest attempt by Congress to regulate the process by which domestic military bases are closed or realigned. Throughout the 1960s and 1970s, the Executive Branch attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, ("Commission Report") at 1-1 (1991). Often, however, these attempts were opposed by members of Congress, who feared the economic impact on their constituents, and who suspected the influence of political motivation in the Executive's decisions. Id.

In 1977, Congress passed legislation granting the Secretary of Defense the power to unilaterally close particular bases, but only after (1) notifying the Armed Services Committees of the Senate and House of Representatives of the selected bases; (2) submitting to the committees his evaluation of the economic, environmental, budgetary and strategic consequences of the closings; and (3) deferring action for at least 60 days, during which time Congress could legislate a halt to the closures. See 10 U.S.C. s 2687(b) (Supp. IV 1980). In addition, the proposed closures had

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). Id. While the 1977 legislation imposed few substantive restrictions on the Executive Branch's authority to close bases, the procedural requirements-most notably the mandate to comply with NEPA-made such action difficult. See Commission Report at 1-1; see also H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures....").

*2 Congress next tackled the base closure issue in 1988 by enacting the Defense Authorization Amendments and Base Closure and Realignment Act ("the 1988 Act"). Pub. L. No. 100-526, ss 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act replaced the Secretary of Defense's decision-making power with that of an independent commission, which was granted the power to recommend bases for closure or realignment. 1988 Act ss 201, 203(b)(1)-(2), 102 Stat. at 2627-28. The commission presented its recommendations to the Secretary, who had the power to approve or disapprove the entire group of recommendations. Id. ss 201(1)-(2), 202(a), 102 Stat. 2627. If the Secretary approved the commission's recommendations, Congress was given 45 days to override the Secretary by passing a joint resolution. Id. ss 202(b), 208, 102 Stat. 2627, 2632-34. Finally, in response to the prior difficulties, the 1988 Act explicitly exempted the Secretary and commission's base closure decisions from the requirements of NEPA. Id. s 204(c)(1), 102 Stat. 2630.

Although the newer processes of the 1988 Act led to closure or realignment of 145 domestic military bases, it was not enacted as a permanent mechanism, but was instead a one-time exception to the procedures set forth in the 1977 legislation. See Specter, 971 F.2d at 939. Thus, the Defense Secretary's January 1990 base closure proposals were governed by the 1977 rules. Id. Members of Congress expressed concern over the "considerable period of time and ... numerous opportunities for challenges in court[ ]" presented by the 1977 procedures, and noted that the Secretary's list of bases for study "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2nd Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257.

Congress, in enacting the 1990 Act, attempted to incorporate the procedures of the 1988 Act, without the obstacles of prior legislation. See H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3068 ("a new base closure process will not be credible unless the 1988 base closure process remains inviolate"). The 1990 Act envisioned three rounds of base closures, in 1991, 1993, and 1995, and provided for the establishment of an independent Commission to meet in each of those years. 1990 Act s 2902(a), (e), 104 Stat. 1808 (1990). The Act required the Secretary of Defense to provide Congress and the Commission with a six-year force structure plan that assessed national security threats and the force structure necessary to meet such threats. Id. s 2903(a)(1)-(3), 104 Stat. 1810 (1990). The Secretary was also required to formulate criteria for use in identifying bases for closure or realignment. The criteria had to be published in the Federal Register for public notice and comment, and submitted to Congress which had the power to evaluate and disapprove them. Id. s 2903(b), 104 Stat. 1810-11. [FN3]

*3 For the 1991 cycle, the Act required the Secretary to recommend base closures and realignments to the Commission by April 15, 1991, based on the force structure plan and final criteria. Id. s 2903(c)(1), 104 Stat. 1811. The Act charges the Commission with reviewing the Secretary's recommendations, holding public hearings, and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations. Id. s 2903(d)(1)-(2)(A), 104 Stat. 1811. The Act allows the Commission to change any of the Secretary's recommendations if they "deviate[ ] substantially" from the force structure plan

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

and final criteria. Id. s 2903(d)(2)(B), 104 Stat. 1811-12. However, in its report to the President, the Commission must explain any departure from the Secretary's recommendations. Id. s 2903(d)(3), 104 Stat. 1812. The Secretary must make available to the Comptroller General all information used in making the initial recommendations. The Comptroller General must report on the Secretary's recommendations and selection process to the Commission and Congress, and may, to the extent requested, assist the Commission. Id. s 2903(c)(4), (d)(5), 104 Stat. 1811-12.

Once the Commission completes its report, the Act requires that it be transmitted to the President, who may approve or disapprove the Commission's recommendations, and then must relate his decision to the Commission and Congress. Id. s 2903(e)(1)-(3), 104 Stat. 1812. If the President disapproves the Commission's recommendations, in whole or in part, he returns them to the Commission, which must then reconsider its prior recommendations and submit a revised list to the President. Id. s 2903(e)(3), 104 Stat. 1812. If the President does not approve the revision, and thereby does not submit any recommendations to Congress, the base closure process for that year is terminated. Id. s 2903(e)(5). If, however, the President approves the Commission's recommendations, or its revised version, Congress has 45 days to pass a joint resolution disapproving the Commission's recommendations in their entirety. Id. ss 2908, 104 Stat. 1816-18. If a disapproval resolution is enacted, the Secretary may not close the bases approved for closure by the President. Id. s 2904(b), 104 Stat. 1813. If Congress does not pass such a resolution, the Act calls for the Secretary to close or realign all bases so recommended by the Commission and approved by the President. Id. s 2904(a), 104 Stat. 1812-13

The Loring Decision

In April 1991, the Secretary issued his list of recommended domestic base closures and realignments. See 56 Fed. Reg. 15184 (April 15, 1991). Among the 72 military installations on the list were 20 Air Force bases. Loring was scheduled for closure. Id. at 15252. Pursuant to the Act, the Commission then conducted its analysis and review of the Secretary's recommendations. The Commission conducted public hearings, at which it heard testimony from Department of Defense officials, legislators, and other experts. Commission Report at 4-1, (G-1)-(G-2). Commissioners also visited many of the affected bases, including Loring. Id. at 4-1, H-1. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. In addition, the General Accounting Office ("GAO") issued a report on the Secretary's recommendation and forwarded it to the Commission, while also assisting the Commission in obtaining, verifying and reviewing data. Id. at (3-1)-(3-2). In the end, the Commission recommended that one of the Air Force bases targeted for closure by the Secretary remain open, but the Commission concurred in the recommendation that Loring be closed. Id. at (5- 31)-(5-45).

*4 On July 10, 1991, President Bush approved the recommendations of the Commission, including the closure of Loring. See Cohen I, 800 F. Supp. at 1002; Cohen II, 800 F. Supp. at 1008. On July 30, 1991, pursuant to section 2908 of the 1990 Act, the House considered a resolution, proposed by plaintiff Rep. Snowe, to disapprove the Commission's recommendations. Id. Three Commissioners, Air Force officials, and members of the affected communities testified at the hearings. 137 Cong. Rec. H6006 (daily ed. July 31, 1991). During the course of debate, Representative Snowe urged the House to block Loring's closure, alleging a variety of procedural errors on the part of the Commission. Id. at H6012-H6020. The House rejected the proposed disapproval resolution by a vote of 364 to 60, thus requiring the Secretary to proceed with the 1991 closures and realignments. Id. at H6039.

Prior Proceedings

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Plaintiffs filed the instant suit in December 1991, alleging in Count I that the Air Force failed to adhere to the force structure plan and "deviated substantially" from the published base closure criteria; failed to fairly apply the selection criteria; improperly considered an unapproved selection criterion; acted "arbitrarily and capriciously" in applying the selection criteria to Loring and a rival base; and failed to supply all relevant information to the GAO and Congress. Count II made many of the same allegations against the Commission, and also alleged a failure to comply with the 1990 Act's public hearing requirement.

In February 1992, the defendants moved to dismiss the suit, essentially on the ground that the 1990 Act implicitly precluded judicial review. Cohen I, 800 F. Supp. at 1005. With respect to Count I, the district court dismissed all claims against the Air Force and Secretary, except those containing allegations that the Secretary failed to transmit to the GAO, Congress and the Commission all of the information used in preparing his recommendations, as the 1990 Act requires. Id. The court ruled that the remainder of plaintiffs' challenges were not judicially reviewable because they would require the court to "reevaluate the basis for the Secretaries' decision to close Loring...." Relying on Specter, the court held that such review was precluded by the Act, which "decided to put these questions to rest and guaranty the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission and the GAO." Id. at 1005 (quoting Specter, 971 F.2d at 951). The district court also dismissed most of the claims against the Commission made in Count II, for essentially the same reasons. Id. at 1006. Only the charge that the Commission failed to hold public hearings, in violation of section 2903(d)(1) of the 1990 Act, was left standing. Id.

Subsequent to Cohen I, the Supreme Court, in Franklin, expressed its interpretation of reviewable agency action under the APA. The district court, relying on Franklin, granted defendants' motion for summary judgment on the remaining aspects of the case. See Cohen II. This appeal followed. Before delving into Franklin and its applicability herein, we briefly outline the strictures of the APA.

The Administrative Procedure Act

*5 The APA sets forth the procedures by which federal agencies are held accountable to the public and their actions made subject to judicial review. Franklin, 112 S. Ct. at 2773. Pursuant to the APA, a court may set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or contrary to applicable legal or procedural requirement. 5 U.S.C. s 706(2). Such review, however, is only available " 'to the extent that ... statutes [do not] preclude judicial review' and the agency action 'is [not] committed to agency discretion by law.' " Cohen II, 800 F. Supp. at 1009 (quoting 5 U.S.C. 701(a)). Finally, and perhaps most importantly, the APA authorizes judicial review only of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. s 704 (emphasis added). At the heart of the instant dispute is whether the actions complained of are "final actions" within the meaning of the APA. In Franklin, the Court addressed this critical issue. We turn now to the Court's opinion.

Franklin v. Massachusetts

Franklin involved a challenge to the reapportionment of the House of Representatives following the 1990 census. Article I, s 2, cl. 3, of the Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers...." Section 2 of the Fourteenth Amendment mandates counting the "whole number of persons in each state." Such counting is to be done through "actual Enumeration," conducted every 10 years, "in such Manner as [Congress] shall by Law direct." U.S. Const., art I, s 2, cl. 3. Pursuant to statutory authority, the Secretary of Commerce is directed to conduct the decennial census "in such form and content as he may determine."

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

13 U.S.C. s 141(a). The Secretary then must provide the President with the state-by-state population, necessary for reapportionment. Id. s 141(b). The President then sends Congress a statement, based on the Secretary's report, showing the population of each state, and the number of Representatives to which each state is entitled, according to a specified formula. 2 U.S.C. 2a(a). Each state is entitled to the number of Representatives shown in the President's statement to Congress. Id. s 2a(b). See generally Franklin, 112 S. Ct. at 2771 (outlining historical bases of apportionment and census statutes).

The Commonwealth of Massachusetts challenged the Secretary of Commerce's inclusion of military personnel serving overseas in state population counts for census purposes. The resulting tabulation shifted a Representative from Massachusetts to Washington. Id. Massachusetts claimed that the allocation of overseas personnel was arbitrary and capricious under the APA. A three-judge district court panel agreed. Commonwealth v. Mosbacher, 785 F. Supp. 230 (D. Mass. 1992). The Supreme Court reversed, holding that the action of the Secretary, in reporting the population tabulations, was not "final," within the meaning of the APA, while the actions of the President were not subject to APA review because the President is not an "agency" within the APA. Franklin, 112 S. Ct. at 2773--76.

*6 In assessing the finality of the Commerce Secretary's actions, [FN4] the Court first looked to Abbott Lab. v. Gardner, 387 U.S. 136 (1967). There, the Court stated that the finality of agency action depends on whether its impact ' "is sufficiently direct and immediate' and has a 'direct effect on ... day-to-day business.' " Franklin, 112 S. Ct. at 2773 (quoting Abbott, 387 U.S. at 152). "An agency action is not final if it is only 'the ruling of a subordinate official' or 'tentative.' " Id. (quoting Abbott, 387 U.S. at 151). "The core question is whether the agency has completed its decisionmaking [sic] process, and whether the result of that process is one that will directly affect the parties." Id. In answering this "core question," the Court first reasoned that the census statute, unlike others, does not explicitly require the President to transmit the agency's report to Congress. Id. The Court stated: After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State ... as ascertained under the ... decennial census of the population." 2 U.S.C. s 2a. Section 2a does not expressly require the President to use the data in the <ecretary's report, but, rather, the data from the "decennial census." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. Id. at 2774.

Therefore, according to the Court, the census itself still presents a "moving target" after the Secretary reports to the President, especially since there exists no statutory bar to the President instructing the Secretary to reform the census, even after the President receives the Secretary's report. Id. "It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by s 2a to a particular number of Representatives." Id. Thus, the Court concluded: "Because the Secretary's report to the President carries no direct consequences for the reapportionment ... serv[ing] more like a tentative recommendation than a final and binding determination[,][i]t is, like 'the ruling of a subordinate official,' not final and therefore not subject to review." Id. (quoting Abbott, 387 U.S. at 151).

We agree with the district court's conclusion that "[t]he holding and reasoning of Franklin are directly applicable to the facts of the present controversy." Cohen II, 800 F. Supp. at 1011. In arriving at its decision, the Franklin Court explicitly distinguished statutory schemes whereby the President is required to transmit an agency's report directly to Congress from those in which the President is not so required, holding that the former represent final agency action, under the APA, but that the latter do not.

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Under the 1990 Act, the President is not required to submit the Commission's report to Congress. In addition, the 1990 Act gives the President the power to order the Commission to revise its report, and, in the final analysis, the President has the power to terminate a base closure cycle altogether via a second rejection of a Commission report. In our view, the agency action involved here bears even less indicia of finality than that in Franklin, where the majority referred to the President's role in reapportionment as "admittedly ministerial," id. at 2775, yet still found the President's action to be the "final action." Id.

*7 Plaintiffs seek to avoid Franklin's restrictions by arguing that this case involves a challenge to the Commission's faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO, whereas Franklin, according to plaintiffs, proscribes only challenges to an agency's substantive decisions. As an initial matter, we note that Franklin makes no such distinction. In any event, we view it as a distinction without legal difference. As previously noted, Franklin's finality determination explored whether an agency action has a "sufficiently direct and immediate" impact. Here, if the Commission's report to the President is not a "final action," then the techniques used by the Commission to create the report, which are even more preliminary to the final decision, cannot themselves be "final agency actions." In sum, whether the complaints are styled as procedural or substantive, our answer to the "core question" of finality remains the same. The judgment of the district court is therefore affirmed. [FN5]

FN1. Plaintiffs are: United States Senators William S. Cohen and George J. Mitchell; Maine Governor John R. McKernan, Jr.; United States Representative Olympia J. Snowe; the towns of Limestone, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden and Van Buren, and the cities of Caribou, and Presque Isle, all of which are municipalities of the State of Maine; Aroostook County, a political subdivision of the State of Maine; Save Loring Committee, an organization of individual and corporate citizens residing in the plaintiff towns and cities, and Committee Chairman Paul D. Haines; and American Federation of Government Employees ("AFGE") Local Union Chapter # 2943, the exclusive bargaining representative for approximately 492 Loring employees and Chapter President Alan Mulherin.

FN2. One other appellate court has addressed the issue we face today, deciding, at least partially, in favor of judicial review. See Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992). The district court, in fact, relied on Specter in ruling on defendants' motion to dismiss. Subsequently, however, following the issuance of Franklin, the Court granted the government's petition for certiorari in Specter, vacated the judgment therein, and remanded the case to the Third Circuit for reconsideration in light of Franklin. See O'Keefe v. Specter, 113 S. Ct. 455 (1992).

FN3. On February 15, 1991, the Department of Defense published eight proposed final criteria governing base closure and realignment. 56 Fed. Reg. 6374. The criteria were subject to Congressional review until March 15, 1991, and became final on that date. 1990 Act s 2903(b)(2). The criteria are reported as follows: In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider: Military Value 1. The current and future mission requirements and impact on 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

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

and potential receiving locations. 4. The cost and manpower implications. Return on Investment 5. The extent and timing of potential cost and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the cost. Impacts 6. The economic impact on communities. 7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel. 8. The environmental impact. 56 Fed. Reg. 6374-02 (Feb. 15, 1991).

FN4. Here, plaintiffs have expressly conceded that they are not attacking the actions of the President. Thus, we focus our discussion on Franklin's assessment of the Secretary of Commerce's actions.

FN5. Because we have based our decision on Franklin's finality analysis, we need not address whether the 1990 Act, by its own terms, precludes judicial review.

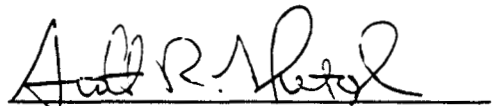
END OF DOCUMENT

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 1993, I have served the foregoing PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC by delivering copies by express mail service to:

Bruce W. Kauffman
David H. Pittinsky
Camille Wolf Spinello
Patrick T. Davish
Dilworth, Paxson, Kalish & Kauffman
Suite 3200, Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000



Scott R. McIntosh

Document Separator

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
AGING
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
ENERGY AND
NATURAL RESOURCES

United States Senate

WASHINGTON, DC 20510-3802

May 21, 1993

The Honorable James A. Courter
Chairman
Base Realignment and Closure Commission
1700 North Moore Street
Suite 1425
Arlington, VA 22209

Please refer to this number when responding 930521-12

Dear Mr. Chairman:

As we discussed yesterday, I am enclosing for you a copy of the Petition for Writ of Mandamus filed in Federal District Court for the Eastern District of Pennsylvania today.

I believe all of the facts should be out in the open regarding the Department of Defense's 1993 recommendation to relocate several military installations in Philadelphia.

After the 1993 Base Closure list was released, we received from a non-DoD source a Navy 1993 base closure study which advised strongly against moving the Aviation Supply Office out of Philadelphia because it would jeopardize anticipated savings of $5 billion. In view of our prior experience with the Department of the Navy in the Philadelphia Navy Yard case, I am concerned that there may be other documentation or information that runs counter to the Secretary of Defense's recommendation. I have personally written the Secretary of Defense requesting all such information, all of which I am entitled to under the Base Closure Act. Unfortunately, I have not received an appropriate response from the Secretary of Defense. Hence, this action.

While I do not know in fact whether other documents or information exists, I feel compelled in view of the foregoing to pursue this legal action. My constituents and I as well as the Commission are entitled to all the facts. I intend to do all that I can to see that all such facts are uncovered.

My best.

Sincerely,

Arlen Specter

AS/bcw

BY TELEFAX

PRINTED ON RECYCLED PAPER

NS

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

SENATOR ARLEN SPECTER, REPRESENTATIVE ROBERT E. ANDREWS, REPRESENTATIVE CURT WELDON, REPRESENTATIVE JAMES C. GREENWOOD, REPRESENTATIVE WILLIAM HUGHES and REPRESENTATIVE MARJORIE MARGOLIES-MEZVINSKY, Petitioners, v. SECRETARY OF DEFENSE LES ASPIN, Respondent.	CIVIL ACTION NO. 93-CV-2679

ORDER

AND NOW, this ____ day of May 1993, upon consideration of the verified Petition of Senator Arlen Specter and Representatives Robert E. Andrews, Curt Weldon, James C. Greenwood, William Hughes and Marjorie Margolies-Mezvinsky for a writ of mandamus and the response thereto, and good cause having been shown, it is hereby

ORDERED that said Petition is GRANTED, and it is further

ORDERED that the Secretary of Defense shall provide to Petitioners all information prepared or used by the United States Navy and/or the United States Department of Defense to make their closure and realignment recommendations regarding Philadelphia, Pennsylvania military installations pursuant to the 1993 Base Closure and Realignment process, including but not limited to all documents and materials that were certified pursuant to the Act and

all documents and materials that do not support the final recommendations.

_____
U.S.D.J.

NS

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

SENATOR ARLEN SPECTER Room 9400 Green Federal Building 6th and Arch Streets Philadelphia, PA 19106 REPRESENTATIVE ROBERT E. ANDREWS 16 Somerdale Square Somerdale, NJ 08083 REPRESENTATIVE CURT WELDON 1554 Garrett Road Upper Darby, PA 19082 REPRESENTATIVE JAMES C. GREENWOOD One Oxford Valley Suite 800 Langhorne, PA 19047 REPRESENTATIVE WILLIAM HUGHES Building 4, Suite 5 Central Park East 222 New Road Linwood, NJ 08221 and REPRESENTATIVE MARJORIE MARGOLIES-MEZVINSKY One Presidential Boulevard Suite 200 Bala Cynwyd, PA 19004 Petitioners, v. SECRETARY OF DEFENSE LES ASPIN Department of Defense Washington, D.C. 20301 Respondent.	CIVIL ACTION NO. 93-CV-2679 PETITION FOR WRIT OF MANDAMUS

To: The United States District Court for the Eastern District of Pennsylvania.

For their Petition for Writ of Mandamus, Senator Arlen Specter and Representatives Robert E. Andrews, Curt Weldon, James C. Greenwood, William Hughes and Marjorie Margolies-Mezvinsky represent as follows:

PARTIES

1. Petitioner Arlen Specter is a member of the United States Senate and 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 19106.

2. Petitioner Robert E. Andrews is a member of the United States House of Representatives and 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.

3. Petitioner Curt Weldon is a member of the United States House of Representatives and 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 19082.

4. Petitioner James C. Greenwood is a member of the United States House of Representatives and is a citizen of the Commonwealth of Pennsylvania with his residence in Bucks County, Pennsylvania, and an office at One Oxford Valley, Suite 800, Langhorne, Pennsylvania 19047.

5. Petitioner William Hughes is a member of the United States House of Representatives and is a citizen of the State of New Jersey with an office at Building 4, Suite 5, Central Park East, 222 New Road, Linwood, New Jersey 08221.

6. Petitioner Marjorie Margolies-Mezvinsky is a member of the United States House of Representatives and is a citizen of the Commonwealth of Pennsylvania with her residence in Montgomery County, Pennsylvania, and an office at One Presidential Boulevard, Suite 200, Bala Cynwyd, Pennsylvania 19004.

7. Respondent Les Aspin is the Secretary of Defense and maintains his principal office at the Department of Defense, Washington, D.C. 20301. Respondent Aspin is sued in his official capacity as Secretary of Defense.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1361.

9. Venue is proper in this Court pursuant to 28 U.S.C. §1391(e).

STATEMENT OF FACTS

10. This action is brought to compel the Secretary of Defense to perform his statutory duty owed directly to Petitioners under the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title XXIX, §§2901-2910 (November 5, 1990), as amended by Public Law 102-190 (December 5, 1991) (the "Act").

11. The Act expressly declares that its purpose is to provide a "fair process" for the closure and realignment of military installations in the United States. §2901(b).

12. The Act required the Secretary of Defense to recommend base closures and realignments by March 15, 1993. Those recommendations are now being reviewed by the Base Closure Commission (the "Commission"), which will make final recommendations for base closures and realignments to the President. §2903(d)(2). The General Accounting Office ("GAO") is also required to review the Secretary of Defense's recommendations and report to Congress and the Commission. §2903(d)(5).

13. On December 5, 1991, the Act was amended specifically to require the Secretary of Defense to make "available to Congress (including any committee or member of Congress)", the Commission and the GAO, no later than March 15, 1993, all of the information, including documents and materials, used "to prepare the recommendations [for closure or realignment]". §2821(e)(2).

14. The Act, as amended, also requires each person who is personally and substantially involved in the preparation and submission of information and recommendations to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation to "certify that such information is accurate and complete to the best of that person's knowledge and belief". §2821(e)(3).

15. The base closure process affects thousands of jobs and the economy of the Philadelphia region. The fairness of that

process -- mandated by the Act itself -- depends upon each step of the process being adhered to faithfully.

16. The duty of the Secretary of Defense to ensure that all information is provided to members of Congress, the Commission and the GAO is ministerial and is not subject to any exercise of discretion.

17. Demand was made that the Secretary of Defense perform as required by the Act and he has refused to do so.

18. On or about March 15, 1993, the Secretary of Defense provided to Congress a copy of the documents that had been provided to the Commission. Those documents purportedly constituted all of the information used or prepared by the United States Navy and/or the Department of Defense in connection with the 1993 Base Closure process.

19. On or about March 23, 1993, a member of Senator Specter's staff learned that an ICP Consolidation Study (the "Study") had been conducted by the Navy to evaluate the merits of closing The Aviation Supply Office in Philadelphia, Pennsylvania and merging its operations with the Ships Parts Control Center in Mechanicsburg, Pennsylvania. The proposed realignment would eliminate nearly 4,000 jobs in Philadelphia. The cover letter to that Study from Rear Admiral J.E. Miller to Vice Admiral Stephen F. Loftus, dated November 12, 1992, concluded that the Philadelphia office should not be closed.

20. The Study established that the data provided to Congress, the Commission and the GAO regarding closure and

realignment of Philadelphia military installations was faulty and that closure or realignment was not advisable.

21. The Study was conducted as part of the 1993 Base Closure and Realignment process and was certified as required by the Act. Nevertheless, the Study was not provided to Petitioners or the Commission as required by the Act.

22. Senator Specter's staff immediately contacted the Navy Senate Liaison's office to obtain the Study.

23. On March 24, 1993, Senator Specter was advised by the Naval Supply Command that the Study would not be made available to him since it was an "internal" Navy document.

24. On March 26, 1993, Senator Specter obtained a copy of the Study through unofficial channels.

25. On March 26, 1993, Senator Specter made a written demand on the Secretary of Defense to turn over all letters, memoranda, reports, documents and other materials concerning closure or realignment of defense installations in Philadelphia pursuant to the 1993 Base Closure process.

26. The Secretary of Defense refused to perform his statutory duty to provide the information requested.

27. On May 11, 1993, Senator Specter again made a written demand on the Secretary of Defense to make available all materials which led to the Department of Defense's recommendations concerning closures and realignments in Philadelphia pursuant to the 1993 Base Closure process.

28. The Secretary of Defense has refused (a) to provide all information, including documents and materials, certified pursuant to the Act or used to prepare the closure and realignment recommendations, or (b) to represent that all such information has in fact been produced.

29. It is believed that other information statutorily required to be made available to Congress is not being provided by the Secretary of Defense.

NEED FOR MANDAMUS RELIEF

30. Petitioners have no plain or speedy remedy other than a writ of mandamus and no adequate remedy at law.

WHEREFORE, Petitioners respectfully request that this Court issue a writ of mandamus compelling the Secretary of Defense to provide all information prepared or used by the United States Navy and/or the United States Department of Defense to make their closure and realignment recommendations regarding Philadelphia military installations pursuant to the 1993 Base Closure and Realignment process, including but not limited to all documents and materials certified pursuant to the Act and all documents and materials that do not support the final recommendations. Petitioners also respectfully request that this Court award the costs of this suit, including reasonable attorneys' fees, and such other and further relief as the Court deems proper.

Respectfully submitted,

/s/ Bruce W. Kauffman

Bruce W. Kauffman #04466
Mark J. Levin #26601
Camille W. Spinello #47307
Dilworth, Paxson, Kalish & Kauffman
3200 The Mellon Bank Center
Philadelphia, PA 19103
(215) 575-7001

Attorneys for Petitioners

OF COUNSEL:
Senator Arlen Specter
Room 9400
Green Federal Building
Sixth and Arch Streets
Philadelphia, PA 19106

May 20, 1993

Document Separator