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114 S.Ct. 1719

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Page 1

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

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Briefs and Other Related Documents

Supreme Court of the United States
John H. DALTON, Secretary of the Navy, et al.,
Petitioners

v.

Arlen SPECTER et al.
No. 93-289.

Argued March 2, 1994.

Decided May 23, 1994.

Rehearing Denied June 27, 1994.

See 512 U.S. 1247, 114 S.Ct. 2771.

Action was brought to enjoin closing of a Naval shipyard. The United States District Court for the Eastern District of Pennsylvania, Ronald L. Buckwalter, J., dismissed the action, 777 F.Supp. 1226, and the Court of Appeals reversed, 971 F.2d 936. The Supreme Court granted certiorari and vacated judgment, 113 S.Ct. 455. On remand, the Court of Appeals, 995 F.2d 404, adhered to its earlier opinion and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held in Part I that the action of the Defense Base Closure and Realignment Commission in recommending bases for closure was not a final decision and was not reviewable under the Administrative Procedure Act, since ultimate decision on closure rested with President. In Part II, the Chief Justice wrote that the claim that the President violated the Defense Base Closure and Realignment Act of 1990 by accepting flawed recommendations was not a "constitutional" claim subject to judicial review but was simply a statutory claim.

Reversed.

Blackmun, Stevens, Souter and Ginsburg, Justices,
joined in Part II.

Blackmun, Justice, filed opinion concurring in part
and concurring in judgment.

Souter, Justice, filed an opinion concurring in part
and concurring in judgment in which Blackmun,
Stevens and Ginsburg, Justices, joined.

West Headnotes

[1] **Administrative Law and Procedure** ↪704
15Ak704 Most Cited Cases

[1] **Armed Services** ↪28
34k28 Most Cited Cases

[1] **United States** ↪40
393k40 Most Cited Cases

Actions of Secretary of Defense and Defense Base Closure and Realignment Commission in recommending military bases for closure were not reviewable "final agency actions" within meaning of Administrative Procedure Act; the reports submitted by Secretary and Commission carried no direct consequences for base closings; the action that would directly affect the military bases would be taken by President when he submitted his certification of approval to Congress. 5 U.S.C.A. § 704; Defense Base Closure and Realignment Act of 1990, § 2901 et seq., 10 U.S.C.A. § 2687 note.

[2] **Administrative Law and Procedure** ↪5
15Ak5 Most Cited Cases

[2] **United States** ↪26
393k26 Most Cited Cases

[2] **United States** ↪28
393k28 Most Cited Cases

President is not an "agency" and his actions are not reviewable under the Administrative Procedure Act. 5 U.S.C.A. § 704; Defense Base Closure and Realignment Act of 1990, § 2901 et seq., 10 U.S.C.A. § 2687 note.

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

[3] **Administrative Law and Procedure** ↪704
15Ak704 Most Cited Cases

[3] **Armed Services** ↪28
34k28 Most Cited Cases

[3] **United States** ↪40
393k40 Most Cited Cases
Fact that President could not pick and chose among bases recommended for closure by Defense Base Closure and Realignment Commission, and was required to accept or reject entire package offered by Commission, did not mean that Commission's actions were "final" and subject to review under Administrative Procedure Act; the President and not the Commission would make the final determination on closure. 5 U.S.C.A. § 704; Defense Base Closure and Realignment Act of 1990, § 2901 et seq., 10 U.S.C.A. § 2687 note.

[4] **Armed Services** ↪28
34k28 Most Cited Cases

[4] **United States** ↪28
393k28 Most Cited Cases
Claim that President exceeded his authority under Defense Base Closure and Realignment Act by accepting flawed recommendations of Defense Base Closure and Realignment Commission was not a "constitutional" claim subject to judicial review under exception recognized in *Franklin v. Massachusetts*, but was simply statutory claim. Defense Base Closure and Realignment Act of 1990, § 2901 et seq., 10 U.S.C.A. § 2687 note.

[5] **United States** ↪28
393k28 Most Cited Cases
Not every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of Constitution.

[6] **United States** ↪28
393k28 Most Cited Cases
Where statute commits decision making to President's discretion, judicial review of his decision is not available.

[7] **Federal Courts** ↪1.1

170Bk1.1 Most Cited Cases

Judicial power of United States conferred by Article III of Constitution is upheld just as surely by withholding judicial relief where Congress had permissibly foreclosed it, as by granting such relief where authorized by Constitution or by statute. U.S.C.A. Const. Art. 3, § 1 et seq.

**1720 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*462 Respondents filed this action under the Administrative Procedure Act (APA) and the Defense Base Closure and Realignment Act of 1990 (1990 Act), seeking to enjoin the Secretary of Defense (Secretary) from carrying out the President's decision, pursuant to the 1990 Act, to close the Philadelphia Naval Shipyard. The District Court dismissed the complaint on the alternative grounds that the 1990 Act itself precluded judicial review and that the political question doctrine foreclosed judicial intervention. In affirming in **1721 part and reversing in part, the Court of Appeals held that judicial review of the closure decision was available to ensure that the Secretary and the Defense Base Closure and Realignment Commission (Commission), as participants in the selection process, had complied with the procedural mandates specified by Congress. The court also ruled that this Court's recent decision in *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636, did not affect the reviewability of respondents' procedural claims because adjudging the President's actions for compliance with the 1990 Act was a form of constitutional review sanctioned by *Franklin*.

Held: Judicial review is not available for respondents' claims. Pp. 1724- 1728.

(a) A straightforward application of *Franklin* demonstrates that respondents' claims are not reviewable under the APA. The actions of the Secretary and the Commission are not reviewable

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

"final agency actions" within the meaning of the APA, since their reports recommending base closings carry no direct consequences. See 505 U.S., at 798, 112 S.Ct., at 2774. Rather, the action that "will directly affect" bases, *id.*, at 797, 112 S.Ct., at 2773, is taken by the President when he submits his certificate of approval of the recommendations to Congress. That the President cannot pick and choose among bases, and must accept or reject the Commission's closure package in its entirety, is immaterial; it is nonetheless the President, not the Commission, who takes the final action that affects the military installations. See *id.*, at 799, 112 S.Ct., at 2775. The President's own actions, in turn, are not reviewable under the APA because he is not an "agency" under that Act. See *id.*, at 801, 112 S.Ct., at 2775. Pp. 1724-1725.

(b) The Court of Appeals erred in ruling that the President's base closure decisions are reviewable for constitutionality. Every action by *463 the President, or by another elected official, in excess of his statutory authority is not *ipso facto* in violation of the Constitution, as the Court of Appeals seemed to believe. On the contrary, this Court's decisions have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, e.g., *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 69 S.Ct. 1457, 1462, n. 11, 93 L.Ed. 1628; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 587, 72 S.Ct. 863, 865-866, 866-867, 96 L.Ed. 1153, distinguished. Such decisions demonstrate that the claim at issue here--that the President violated the 1990 Act's terms by accepting flawed recommendations--is not a "constitutional" claim subject to judicial review under the exception recognized in *Franklin*, but is simply a statutory claim. The 1990 Act does not limit the President's discretion in approving or disapproving the Commission's recommendations, require him to determine whether the Secretary or Commission committed procedural violations in making recommendations, prohibit him from approving recommendations that are procedurally flawed, or, indeed, prevent him from approving or disapproving recommendations for whatever reason

he sees fit. Where, as here, a statute commits decisionmaking to the President's discretion, judicial review of his decision is not available. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113-114, 68 S.Ct. 431, 437-438, 92 L.Ed. 568. Pp. 1725-1728.

(c) Contrary to respondents' contention, failure to allow judicial review here does not result in the virtual repudiation of *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60, and nearly two centuries of constitutional adjudication. The judicial power conferred by Article III is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute. P. 1728.

995 F.2d 404 (C.A.3, 1993), reversed.

REHNQUIST, C.J., delivered the opinion of the Court, Part II of which was unanimous, and in the remainder of which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined, and in Part II of which BLACKMUN, STEVENS, SOUTER, **1722 and GINSBURG, JJ., also joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 1728. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, *post*, p. 1729.

Drew S. Days, III, for petitioners.

Arlen Specter, for respondent.

*464 Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents sought to enjoin the Secretary of Defense (Secretary) from carrying out a decision by the President to close the Philadelphia Naval Shipyard. [FN1] This decision was made pursuant to the Defense Base Closure and Realignment Act of 1990 (1990 Act or Act), 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (1988 ed., Supp. IV). The Court of Appeals held that

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

judicial review of the decision was available to ensure that various participants in the selection process had complied with procedural mandates specified by Congress. We hold that such review is not available.

FN1. Respondents are shipyard employees and 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. Petitioners are the Secretary of Defense; the Secretary of the Navy; and the Defense Base Closure and Realignment Commission and its members.

The decision to close the shipyard was the end result of an elaborate selection process prescribed by the 1990 Act. Designed "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States," § 2901(b), [FN2] the Act provides for three *465 successive rounds of base closings--in 1991, 1993, and 1995, § 2903(c)(1). For each round, the Secretary must prepare closure and realignment recommendations, based on selection criteria he establishes after notice and an opportunity for public comment. §§ 2903(b) and (c).

FN2. For ease of reference, all citations to the 1990 Act are to the relevant sections of the Act as it appears in note following 10 U.S.C. § 2687 (1988 ed., Supp. IV).

The Secretary submits his recommendations to Congress and to the Defense Base Closure and Realignment Commission (Commission), an independent body whose eight members are appointed by the President, with the advice and consent of the Senate. §§ 2903(c)(1); 2902(a) and (c)(1)(A). The Commission must then hold public hearings and prepare a report, containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures and realignments. §§ 2903(d)(1) and (2). Within

roughly three months of receiving the Secretary's recommendations, the Commission has to submit its report to the President. § 2903(d)(2)(A).

Within two weeks of receiving the Commission's report, the President must decide whether to approve or disapprove, in their entirety, the Commission's recommendations. §§ 2903(e)(1)-(3). If the President disapproves, the Commission has roughly one month to prepare a new report and submit it to the President. § 2903(e)(3). If the President again disapproves, no bases may be closed that year under the Act. § 2903(e)(5). If the President approves the initial or revised recommendations, the President must submit the recommendations, along with his certification of approval, to Congress. §§ 2903(e)(2) and (e)(4). Congress may, within 45 days of receiving the President's certification (or by the date Congress adjourns for the session, whichever is earlier), enact a joint resolution of disapproval. §§ 2904(b); 2908. If such a resolution is passed, the Secretary may not carry out any closures pursuant to the Act; if such a resolution is not passed, the Secretary must close all military installations recommended for closure by the Commission. §§ 2904(a) and (b)(1).

*466 In April 1991, the Secretary recommended the closure or realignment of a number of military installations, including the **1723 Philadelphia Naval Shipyard. After holding public hearings in Washington, D.C., and Philadelphia, the Commission recommended closure or realignment of 82 bases. The Commission did not concur in all of the Secretary's recommendations, but it agreed that the Philadelphia Naval Shipyard should be closed. In July 1991, President Bush approved the Commission's recommendations, and the House of Representatives rejected a proposed joint resolution of disapproval by a vote of 364 to 60.

Two days before the President submitted his certification of approval to Congress, respondents filed this action under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the 1990 Act. Their complaint contained three counts, two of which remain at issue. [FN3] Count I alleged

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

that the Secretaries of Navy and Defense violated substantive and procedural requirements of the 1990 Act in recommending closure of the Philadelphia Naval Shipyard. Count II made similar allegations regarding the Commission's recommendations to the President, asserting specifically that, *inter alia*, the Commission used improper criteria, failed to place certain information in the record until after the close of public hearings, and held closed meetings with the Navy.

FN3. Respondents' third count alleged that petitioners had violated the due process rights of respondent shipyard employees and respondent unions. In its initial decision, the United States Court of Appeals for the Third Circuit held that the shipyard employees and unions had no protectible property interest in the shipyard's continued operation and thus had failed to state a claim under the Due Process Clause. *Specter v. Garrett*, 971 F.2d 936, 955-956 (1992). Respondents did not seek further review of that ruling, and it is not at issue here.

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint in its entirety, on the alternative grounds that the 1990 Act itself precluded *467 judicial review and that the political question doctrine foreclosed judicial intervention. *Specter v. Garrett*, 777 F.Supp. 1226 (1991). A divided panel of the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. *Specter v. Garrett*, 971 F.2d 936 (1992) (*Specter I*). The Court of Appeals first acknowledged that the actions challenged by respondents were not typical of the "agency actions" reviewed under the APA, because the 1990 Act contemplates joint decisionmaking among the Secretary, Commission, President, and Congress. *Id.*, at 944-945. The Court of Appeals then reasoned that because respondents sought to enjoin the implementation of the President's decision, respondents (who had not named the President as a defendant) were asking the Court of Appeals "to review a presidential decision." *Id.*, at 945. The Court of Appeals decided that there could be

judicial review of the President's decision because the "actions of the President have never been considered immune from judicial review solely because they were taken by the President." *Ibid.* It held that certain procedural claims, such as respondents' claim that the Secretary failed to transmit to the Commission all of the information he used in making his recommendations, and their claim that the Commission did not hold public hearings as required by the Act, were thus reviewable. *Id.*, at 952-953. The dissenting judge took the view that the 1990 Act precluded judicial review of all statutory claims, procedural and substantive. *Id.*, at 956-961.

Shortly after the Court of Appeals issued its opinion, we decided *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), in which we 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 requires the Secretary of Commerce to submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled pursuant to *468 a statutory formula. We concluded both that the Secretary's report was not "final agency action" reviewable under the APA, and that the APA does not apply to the President. *Id.*, at 796-801, 112 S.Ct., at 2773-2776. After we rendered our decision in *Franklin*, petitioners sought our review in this case. Because of **1724 the similarities between *Franklin* and this case, we granted the petition for certiorari, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of *Franklin*. *O'Keefe v. Specter*, 506 U.S. 969, 113 S.Ct. 455, 121 L.Ed.2d 364 (1992).

On remand, the same divided panel of the Court of Appeals adhered to its earlier decision, and held that *Franklin* did not affect the reviewability of respondents' procedural claims. *Specter v. Garrett*, 995 F.2d 404 (1993) (*Specter II*). Although apparently recognizing that APA review was unavailable, the Court of Appeals felt that adjudging the President's actions for compliance with the 1990 Act was a "form of constitutional

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

review," and that *Franklin* sanctioned such review. 995 F.2d, at 408-409. Petitioners again sought our review, and we granted certiorari. 510 U.S. 930, 114 S.Ct. 342, 126 L.Ed.2d 307 (1993). We now reverse.

I

We begin our analysis on common ground with the Court of Appeals. In *Specter II*, that court acknowledged, at least tacitly, that respondents' claims are not reviewable under the APA. 995 F.2d, at 406. A straightforward application of *Franklin* to this case demonstrates why this is so. *Franklin* involved a suit against the President, the Secretary of Commerce, and various public officials, challenging the manner in which seats in the House of Representatives had been apportioned among the States. 505 U.S., at 790, 112 S.Ct., at 2770. The plaintiffs challenged the method used by the Secretary of Commerce in preparing her census report, particularly the manner in which she counted federal employees working overseas. The plaintiffs raised claims under both the APA and the Constitution. In reviewing the former, we *469 first sought to determine whether the Secretary's action, in submitting a census report to the President, was "final" for purposes of APA review. (The APA provides for judicial review only of "final agency action." 5 U.S.C. § 704 (emphasis added).) Because the President reviewed (and could revise) the Secretary's report, made the apportionment calculations, and submitted the final apportionment report to Congress, we held that the Secretary's report was "not final and therefore not subject to review." 505 U.S., at 798, 112 S.Ct., at 2774.

We next held that the President's actions were not reviewable under the APA, because the President is not an "agency" within the meaning of the APA. *Id.*, at 801, 112 S.Ct., at 2775 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"). We thus concluded that the reapportionment determination was not reviewable under the standards of the APA. *Ibid.* In reaching our conclusion, we noted that the "President's actions may still be reviewed for constitutionality." *Ibid.* (citing *Youngstown Sheet & Tube Co. v.*

Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)).

[1][2] In this case, respondents brought suit under the APA, alleging that the Secretary and the Commission did not follow the procedural mandates of the 1990 Act. But here, as in *Franklin*, the prerequisite to review under the APA--"final agency action"--is lacking. The reports submitted by the Secretary and the Commission, like the report of the Secretary of Commerce in *Franklin*, "carr[y] no direct consequences" for base closings. 505 U.S., at 798, 112 S.Ct., at 2774. The action that "will directly affect" the military bases, *id.*, at 797, 112 S.Ct., at 2773, is taken by the President, when he submits his certification of approval to Congress. Accordingly, the Secretary's and Commission's reports serve "more like a tentative recommendation than a final and binding determination." *Id.*, at 798, 112 S.Ct., at 2774. The reports are, "like the ruling of a subordinate *470 official, not final and therefore not subject to review." *Ibid.* (internal quotation marks and citation omitted). The actions of the President, in turn, are not reviewable under the APA because, as we concluded in *Franklin*, **1725 the President is not an "agency." See *id.*, at 800-801, 112 S.Ct., at 2775.

[3] Respondents contend that the 1990 Act differs significantly from the Census Act at issue in *Franklin*, and that our decision in *Franklin* therefore does not control the question whether the Commission's actions here are final. Respondents appear to argue that the President, under the 1990 Act, has little authority regarding the closure of bases. See Brief for Respondents 29 (pointing out that the 1990 Act does not allow "the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety"). Consequently, respondents continue, the Commission's report must be regarded as final. This argument ignores the *ratio decidendi* of *Franklin*. See 505 U.S., at 800-801, 112 S.Ct., at 2775-2776.

First, respondents underestimate the President's

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

authority under the Act, and the importance of his role in the base closure process. Without the President's approval, no bases are closed under the Act, see § 2903(e)(5); the Act, in turn, does not by its terms circumscribe the President's discretion to approve or disapprove the Commission's report. Cf. *Franklin, id.*, at 799, 112 S.Ct., at 2774. Second, and more fundamentally, respondents' argument ignores "[t]he core question" for determining finality: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.*, at 797, 112 S.Ct., at 2773. That the President cannot pick and choose among bases, and must accept or reject the entire package offered by the Commission, is immaterial. What is crucial is the fact that "[t]he President, not the [Commission], takes the final action that affects" the military installations. *Id.*, at 799, 112 S.Ct., at 2775. Accordingly, we hold that the decisions made pursuant to the 1990 Act are not reviewable *471 under the APA. Accord, *Cohen v. Rice*, 992 F.2d 376 (CA1 1993).

Although respondents apparently sought review exclusively under the APA, [FN4] the Court of Appeals nevertheless sought to determine whether non-APA review, based on either common law or constitutional principles, was available. It focused, moreover, on whether the President's actions under the 1990 Act were reviewable, even though respondents did not name the President as a defendant. The Court of Appeals reasoned that because respondents sought to enjoin the implementation of the President's decision, the legality of that decision would determine whether an injunction should issue. See *Specter II*, 995 F.2d, at 407; *Specter I*, 971 F.2d, at 936. In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

FN4. See *Specter v. Garrett*, 995 F.2d 404, 412 (1993) (Alito, J., dissenting); see also *Specter v. Garrett*, 777 F.Supp. 1226, 1227 (ED Pa.1991) (respondents "have asserted that their right to judicial review ... arises under the Administrative

Procedure Act").

II

[4] Seizing upon our statement in *Franklin* that Presidential decisions are reviewable for constitutionality, the Court of Appeals asserted that "there is a constitutional aspect to the exercise of judicial review in this case--an aspect grounded in the separation of powers doctrine." *Specter II, supra*, at 408. It reasoned, relying primarily on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. Thus, judicial review must be available to determine whether the President has statutory authority "for whatever action" he takes. 995 F.2d, at 409. In terms of this case, the Court of Appeals concluded that the President's statutory authority to close and realign bases would be lacking if the Secretary and Commission violated the procedural *472 requirements of the Act in formulating their recommendations. *Ibid.*

**1726 [5] Accepting for purposes of decision here the propriety of examining the President's actions, we nonetheless believe that the Court of Appeals' analysis is flawed. Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 650-652, 83 S.Ct. 1441, 1444-1446, 10 L.Ed.2d 605 (1963) (distinguishing between "rights which may arise under the Fourth Amendment" and "a cause of action for abuse of the [statutory] subpoena power by a federal officer"); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397, 91 S.Ct. 1999, 2004-2005, 29 L.Ed.2d 619 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition," and those "merely said to be in excess of the authority delegated ... by the Congress").

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 69 S.Ct. 1457, 1462, n. 11, 93 L.Ed. 1628 (1949), for example, we held that sovereign immunity would not shield an executive officer from suit if the officer acted either "unconstitutionally or beyond his statutory powers." (Emphasis added.) If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, as the Court of Appeals seemed to believe, there would have been little need in *Larson* for our specifying unconstitutional and ultra vires conduct as separate categories. See also *Dugan v. Rank*, 372 U.S. 609, 621-622, 83 S.Ct. 999, 1006-1007, 10 L.Ed.2d 15 (1963); *Harmon v. Brucker*, 355 U.S. 579, 581, 78 S.Ct. 433, 435, 2 L.Ed.2d 503 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' non-constitutional claim that respondent [Secretary of the Army] acted in excess of powers granted him by Congress" (emphasis added)).

*473 Our decision in *Youngstown*, *supra*, does not suggest a different conclusion. In *Youngstown*, the Government disclaimed any statutory authority for the President's seizure of steel mills. See 343 U.S., at 585, 72 S.Ct., at 866 ("[W]e do not understand the Government to rely on statutory authorization for this seizure"). The only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces. *Id.*, at 587, 72 S.Ct., at 866- 867. Because no statutory authority was claimed, the case necessarily turned on whether the Constitution authorized the President's actions. *Youngstown* thus involved the conceded absence of any statutory authority, not a claim that the President acted in excess of such authority. The case cannot be read for the proposition that an action taken by the President in excess of his statutory authority necessarily violates the Constitution. [FN5]

FN5. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the other case (along with *Youngstown*) cited in *Franklin v.*

Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), as an example of when we have reviewed the constitutionality of the President's actions, likewise did not involve a claim that the President acted in excess of his statutory authority. *Panama Refining* involved the National Industrial Recovery Act, which delegated to the President the authority to ban interstate transportation of oil produced in violation of state production and marketing limits. See 293 U.S., at 406, 55 S.Ct., at 242. We struck down an Executive Order promulgated under that Act not because the President had acted beyond his statutory authority, but rather because the Act unconstitutionally delegated Congress' authority to the President. See *id.*, at 430, 55 S.Ct., at 252-253. As the Court pointed out, we were "not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power." *Id.*, at 432, 55 S.Ct., at 253 (footnote omitted). Respondents have not alleged that the 1990 Act in itself amounts to an unconstitutional delegation of authority to the President.

The decisions cited above establish that claims simply alleging that the President has exceeded his statutory authority are not "constitutional" claims, subject to judicial review *474 under the exception recognized in **1727 *Franklin*. [FN6] As this case demonstrates, if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* would be broadened beyond recognition. The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration.

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

FN6. As one commentator has observed, in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no "constitutional question whatever" is raised. J. Choper, *Judicial Review and the National Political Process* 316 (1980). Rather, "the cases concern only issues of statutory interpretation." *Ibid.*

So the claim raised here is a statutory one: The President is said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations. The exception identified in *Franklin* for review of constitutional claims thus does not apply in this case. We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. See *Dames & Moore v. Regan*, 453 U.S. 654, 667, 101 S.Ct. 2972, 2980, 69 L.Ed.2d 918 (1981). But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

As we stated in *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184, 39 S.Ct. 507, 509, 63 L.Ed. 910 (1919), where a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

*475 In a case analogous to the present one, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), an airline denied a certificate from the Civil Aeronautics Board to establish an international air route sought judicial review of the denial. Although the Civil Aeronautics Act, 49 U.S.C. § 646 (1946 ed.), generally allowed for judicial review of the Board's decisions, and did not explicitly exclude

judicial review of decisions involving international routes of domestic airlines, we nonetheless held that review was unavailable. 333 U.S., at 114, 68 S.Ct. at 437-438.

In reasoning pertinent to this case, we first held that the Board's certification was not reviewable because it was not final until approved by the President. See *id.*, at 112-114, 68 S.Ct., at 437 ("[O]rders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval"). We then concluded that the President's decision to approve or disapprove the orders was not reviewable, because "the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." See *id.*, at 114, 68 S.Ct., at 437. We fully recognized that the consequence of our decision was to foreclose judicial review:

"The dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination ... and after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of *unreviewable Presidential discretion.*" *Id.*, at 113, 68 S.Ct., at 437 (emphasis added).

Although the President's discretion in *Waterman S. S. Corp.* derived from the Constitution, we do not believe the result should be any different when the President's discretion derives from a valid statute. See *476 *Dakota Central Telephone Co.*, *supra*, at 184, 39 S.Ct., at 509; **1728 *United States v. George S. Bush & Co.*, 310 U.S. 371, 380, 60 S.Ct. 944, 946-947, 84 L.Ed. 1259 (1940).

The 1990 Act does not at all limit the President's discretion in approving or disapproving the Commission's recommendations. See § 2903(e); see also *Specter II*, 995 F.2d, at 413 (Alito, J., dissenting). The Third Circuit seemed to believe that the President's authority to close bases depended on the Secretary's and Commission's compliance with statutory procedures. This view of the statute, however, incorrectly conflates the

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

duties of the Secretary and Commission with the authority of the President. The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in § 2903(e) requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does § 2903(e) prohibit the President from approving recommendations that are procedurally flawed. Indeed, nothing in § 2903(e) prevents the President from approving or disapproving the recommendations for whatever reason he sees fit. See § 2903(e); *Specter II*, 995 F.2d, at 413 (Alito, J., dissenting).

How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. See *Waterman S. S. Corp.*, *supra*; *Dakota Central Telephone Co.*, *supra*, at 184, 39 S.Ct., at 509. As we stated in *George S. Bush & Co.*, *supra*, at 380, 60 S.Ct., at 947, "[n]o question of law is raised when the exercise of [the President's] discretion is challenged."

III

[6] In sum, we hold that the actions of the Secretary and the Commission cannot be reviewed under the APA because they are not "final agency actions." The actions of the President cannot be reviewed under the APA because the President is not an "agency" under that Act. The claim that the President exceeded his authority under the 1990 Act is not a constitutional *477 claim, but a statutory one. Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.

[7] Respondents tell us that failure to allow judicial review here would virtually repudiate *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), and nearly two centuries of constitutional adjudication. But our conclusion that judicial review is not available for respondents' claim follows from our interpretation of an Act of Congress, by which we and all federal courts are bound. The judicial power of the United States

conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute.

The judgment of the Court of Appeals is

Reversed.

Justice BLACKMUN, concurring in part and concurring in the judgment.

I did not join the majority opinion in *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), and would not extend that unfortunate holding to the facts of this case. I nevertheless agree that the Defense Base Closure and Realignment Act of 1990 "preclud[es] judicial review of a base-closing decision," *post*, at 1732, and accordingly join Justice SOUTER's opinion.

I write separately to underscore what I understand to be the limited reach of today's decision. The majority and concurring opinions conclude that the President acts within his unreviewable discretion in accepting or rejecting a recommended base-closing list, and that an aggrieved party may not enjoin closure of a duly selected base as a result of alleged error in the decisionmaking process. This conclusion, however, does not foreclose judicial review of a claim, for example, that the President added a base to the Defense *478 Base Closure and Realignment Commission's (**1729 Commission's) list in contravention of his statutory authority. Nor does either opinion suggest that judicial review would be unavailable for a timely claim seeking direct relief from a procedural violation, such as a suit claiming that a scheduled meeting of the Commission should be public, see § 2903(d), note following 10 U.S.C. § 2687 (1988 ed., Supp. IV), or that the Secretary of Defense should publish the proposed selection criteria and provide an opportunity for public comment, §§ 2903(b) and (c). Such a suit could be timely brought and adjudicated without interfering with Congress' intent to preclude judicial "cherry pick[ing]" or frustrating the statute's expedited decisionmaking

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

schedule. See *post*, at 1730. I also do not understand the majority's *Franklin* analysis to foreclose such a suit, since a decision to close the Commission's hearing, for example, would "directly affect" the rights of interested parties independent of any ultimate Presidential review. See *ante*, at 1725; cf. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984).

With the understanding that neither a challenge to ultra vires exercise of the President's statutory authority nor a timely procedural challenge is precluded, I join Justice SOUTER's concurrence and Part II of the opinion of the Court.

Justice SOUTER, with whom Justice BLACKMUN, Justice STEVENS, and Justice GINSBURG join, concurring in part and concurring in the judgment.

I join Part II of the Court's opinion because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Base Closure and Realignment Act of 1990 (Act), and because respondents pleaded no constitutional claim against the President, indeed, no claim against the President at all. As the Court explains, the Act grants the President unfettered discretion to accept the Commission's base-closing report or to reject it, for a good reason, a bad reason, or no reason. See *ante*, at 1728.

***479** It is not necessary to reach the question the Court answers in Part I, whether the Defense Base Closure and Realignment Commission's (Commission's) report is final agency action, because the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded. There is, to be sure, a "strong presumption that Congress did not mean to prohibit all judicial review." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672, 106 S.Ct. 2133, 2136, 90 L.Ed.2d 623 (1986) (internal quotation marks and citation omitted). But although no one feature of the Act, taken alone, is enough to overcome that strong presumption, I believe that the combination present in this unusual

legislative scheme suffices.

In adopting the Act, Congress was intimately familiar with repeated, unsuccessful, efforts to close military bases in a rational and timely manner. See generally Defense Base Closure and Realignment Commission, Report to the President 1991. [FN1] That history of frustration is reflected in the Act's text and intricate structure, which plainly express congressional intent that action on a base-closing package be quick and final, or no action be taken at all.

FN1. See also H.R.Conf.Rep. No. 101-923, p. 705 (1990) (Earlier base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"); *id.*, at 707 (Act "would considerably enhance the ability of the Department of Defense ... promptly [to] implement proposals for base closures and realignment"); H.R.Rep. No. 101-665, p. 384 (1990) ("Expedited procedures ... are essential to make the base closure process work").

At the heart of the distinctive statutory regime, Congress placed a series of tight and rigid deadlines on administrative review and Presidential action, embodied in provisions for three biennial rounds of base closings, in 1991, 1993, and 1995 (the "base-closing years"), §§ 2903(b) and (c), note following 10 U.S.C. § 2687 (1988 ed., Supp. IV), with unbending deadlines prescribed for each round. The Secretary is obliged to forward base-closing recommendations to the Commission, ***480** no later, respectively, than April 15, 1991, March 15, 1993, and March 15, 1995. ****1730** § 2903(c). The Comptroller General must submit a report to Congress and the Commission evaluating the Secretary's recommendations by April 15 of each base-closing year. § 2903(d)(5). The Commission must then transmit a report to the President setting out its own recommendations by July 1 of each of those years. § 2903(d)(2). And in each such year, the President must, no later than July 15, either approve or disapprove the Commission's recommendations. § 2903(e)(1). If

DCN 6913

114 S.Ct. 1719

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Page 12

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

the President disapproves the Commission's report, the Commission must send the President a revised list of recommended base closings, no later than August 15. § 2903(e)(3). In that event, the President will have until September 1 to approve the Commission's revised report; if the President fails to approve the report by that date, then no bases will be closed that year. § 2903(e)(5). If, however, the President approves a Commission report within either of the times allowed, the report becomes effective unless Congress disapproves the President's decision by joint resolution (passed according to provisions for expedited and circumscribed internal procedures) within 45 days. §§ 2904(b)(1)(A), 2908. [FN2]

FN2. To enable Congress to perform this prompt review, the Act requires the Secretary, the Comptroller General, and the Commission to provide Congress with information prior to the completion of Executive Branch review. See §§ 2903(a)(1), (b)(2), (c)(1), and (d)(3).

The Act requires that a decision about a base-closing package, once made, be implemented promptly. Once Congress has declined to disapprove the President's base-closing decision, the Secretary of Defense "shall ... close all military installations recommended for closure." § 2904(a). The Secretary is given just two years after the President's transmittal to Congress to begin the complicated process of closing the listed bases and must complete each base-closing round within six years of the President's transmittal. See §§ 2904, 2905.

*481 It is unlikely that Congress would have insisted on such a timetable for decision and implementation if the base-closing package would be subject to litigation during the periods allowed, in which case steps toward closing would either have to be delayed in deference to the litigation, or the litigation might be rendered moot by completion of the closing process. That unlikelihood is underscored by the provision for disbanding the Commission at the end of each base-closing decision round, and for terminating it automatically

at the end of 1995, whether or not any bases have been selected to be closed. If Congress intended judicial review of individual base-closing decisions, it would be odd indeed to disband biennially, and at the end of three rounds to terminate, the only entity authorized to provide further review and recommendations.

The point that judicial review was probably not intended emerges again upon considering the linchpin of this unusual statutory scheme, which is its all-or-nothing feature. The President and Congress must accept or reject the biennial base-closing recommendations as a single package. See §§ 2903(e)(2), (e)(3), (e)(4) (as to the President); §§ 2908(a)(2) and (d)(2) (as to Congress). Neither the President nor Congress may add a base to the list or "cherry pick" one from it. This mandate for prompt acceptance or rejection of the entire package of base closings can only represent a considered allocation of authority between the Executive and Legislative Branches to enable each to reach important, but politically difficult, objectives. Indeed, the wisdom and ultimate political acceptability of a decision to close any one base depends on the other closure decisions joined with it in a given package, and the decisions made in the second and third rounds just as surely depend (or will depend) on the particular content of the package or packages of closings that will have preceded them. If judicial review could eliminate one base from a package, the political resolution embodied in that package would be destroyed; if such review could eliminate *482 an entire package, or leave its validity in doubt when a succeeding one had to be devised, the political resolution necessary to agree on the succeeding package would be rendered the more difficult, **1731 if not impossible. The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled, go far to persuade me that Congress did not mean the courts to have any such power through judicial review.

When combined with these strict timetables for decision, the temporary nature of the Commission, the requirement for prompt implementation, and the all-or-nothing base-closing requirement at the core

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511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

of the Act, two secondary features of the legislation tend to reinforce my conclusion that judicial review was not intended. First, the Act provides nonjudicial opportunities to assess any procedural (or other) irregularities. The Commission and the Comptroller General review the Secretary's recommendations, see §§ 2903(d)(5), 2903(d)(3), and each can determine whether the Secretary has provided adequate information for reviewing the soundness of his recommendations. [FN3] The President may, of course, also take procedural irregularities into account in deciding whether to seek new recommendations from the Commission, or in deciding not to approve the Commission's recommendations altogether. And, ultimately, Congress may decide during its 45-day review period whether procedural failings call the Presidentially approved recommendations so far into question as to justify their substantive rejection. [FN4]

FN3. Petitioners represent, indeed, that as to the round in question, the Comptroller General reported to Congress on procedural irregularities (as well as substantive differences of opinion) and requested additional information from the Secretary (which was provided). See Reply Brief for Petitioners 16, n. 12.

FN4. In approving the base closings for 1991, Congress was apparently well aware of claims of procedural shortcomings, but nonetheless chose not to disapprove the list. See Department of Defense Appropriations Act, 1992, Pub.L. 102-172, § 8131, 105 Stat. 1208.

*483 Second, the Act does make express provision for judicial review, but only of objections under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, as amended, 42 U.S.C. § 4321 *et seq.*, to implementation plans for a base closing, and only after the process of selecting a package of bases for closure is complete. Because NEPA review during the base-closing decision process had stymied or delayed earlier efforts, [FN5] the Act, unlike prior legislation addressed to base

closing, provides that NEPA has no application at all until after the President has submitted his decision to Congress and the process of selecting bases for closure has been completed. See § 2905(c)(1). NEPA then applies only to claims arising out of actual disposal or relocation of base property, not to the prior decision to choose one base or another for closing. § 2905(c)(2). The Act by its terms allows for "judicial review, with respect to any requirement of [NEPA]" made applicable to the Act by § 2905(c)(2), but requires the action to be initiated within 60 days of the Defense Department's act or omission as to the closing of a base. § 2905(c)(3). This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.

FN5. See, *e.g.*, H.R.Conf.Rep. No. 100-1071, p. 23 (1988).

In sum, the text, structure, and purpose of the Act clearly manifest congressional intent to confine the base-closing selection process within a narrow time frame before inevitable political opposition to an individual base closing could become overwhelming, to ensure that the decisions be implemented promptly, and to limit acceptance or rejection to a package of base closings as a whole, for the sake of political feasibility. While no one aspect of the Act, standing alone, *484 would suffice to overcome the strong presumption in favor of judicial review, this structure (combined with the Act's provision for Executive and congressional review, and its requirement of time-constrained judicial review **1732 of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact. I conclude accordingly that the Act forecloses such judicial review.

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62 USLW 4340

(Cite as: 511 U.S. 462, 114 S.Ct. 1719)

I thus join in Part II of the opinion of the Court,
and in its judgment.

511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497, 62
USLW 4340

**Briefs and Other Related Documents (Back to
top)**

- 1994 WL 665084 (Oral Argument) Oral
Argument (Mar. 02, 1994)
- 1994 WL 249494 (Appellate Brief) REPLY
BRIEF FOR PETITIONERS (Feb. 09, 1994)
- 1994 WL 82044 (Appellate Brief) BRIEF FOR
RESPONDENTS (Jan. 05, 1994)
- 1993 WL 13010943 (Appellate Petition, Motion
and Filing) Brief for the Petitioners (Dec. 02,
1993)Original Image of this Document (PDF)
- 1993 WL 664645 (Appellate Brief) BRIEF FOR
THE PETITIONERS (Dec. 02, 1993)
- 1993 WL 13010936 (Appellate Petition, Motion
and Filing) Reply Brief for the Petitioners (Oct. 08,
1993)Original Image of this Document (PDF)
- 1993 WL 13010963 (Appellate Petition, Motion
and Filing) Respondents' Brief in Opposition to
Petition for Writ of Certiorari (Sep. 23,
1993)Original Image of this Document (PDF)
- 1993 WL 13010944 (Appellate Petition, Motion
and Filing) Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit
(Aug. 23, 1993)Original Image of this Document
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FORT MONMOUTH, N.J.
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**STATEMENT OF FACTS AND DOCUMENTATION
SUBMITTED BY
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1904
FORT MONMOUTH, NEW JERSEY 07703**

AUGUST 8, 2005

1. Section 2913(e) of the BRAC Statute requires DoD to consider the costs that will be incurred by non-DoD agencies present on installations identified for closure. The requirement is that a complete profile of the entire costs to the Government related to a recommended BRAC action be obtained (**EXHIBIT A**).
2. The recommendation to close Fort Monmouth was based upon missing data (**EXHIBIT B**). The failure to consider non-DoD agencies is in direct violation of Section 2913(e) as enacted by Congress to insure consideration of all costs to the Federal Government that will be incurred as a result of a BRAC Closure Recommendation.
3. Fort Monmouth includes five non-DoD agencies, specifically the U.S. Post Office (PO), Department of Justice (DoJ), General Services Administration (GSA), Veterans Administration (VA) and the Federal Emergency Management Agency (FEMA). While the recommendation acknowledges the presence of the PO, DoJ and GSA, it failed to address costs associated with these three agencies. More egregiously, it failed to even acknowledge the VA (**EXHIBIT C**) or FEMA (**EXHIBIT D**). These two non-DoD agencies are totally omitted.
4. Congressman Rush Holt queried DoD as to why the non-DoD agencies were not considered before the recommendation to close Fort Monmouth as required by the statute. The response by Geoffrey G. Prosch, Principal Deputy Assistant Secretary of the Army Installations and Environment, stated that since the Department did not have cost data from non-DoD agencies located on installations targeted for closure, they merely noted their presence on such installations and *assumed* they would experience some undetermined increase in costs (**EXHIBIT E**). It is clear that Mr. Prosch's response was predicated upon

TO DO FOR ALL THAT WHICH NONE CAN DO FOR ONESELF



the Policy Memorandum dated December 7, 2004 by the Acting Undersecretary of Defense (Acquisition, Technology & Logistics) (**EXHIBIT F**); it is indisputable that the recommendation failed to comply with the statutory mandate of Congress.

5. In summary, the PO, DoJ and GSA are merely "noted." The recommendation entirely ignores the presence of the Department of Homeland Security, FEMA Region II Contingency Operations Point, an emergency center that has been instrumental in protecting security after the 9/11 attacks. Most ironically, the recommendation to close Fort Monmouth *completely overlooks* the presence of the Veterans Administration Health Facility which services more than 10,000 veterans annually.

It is respectfully requested that the BRAC process regarding Fort Monmouth be stayed until DoD complies with Section 2913(e) of the BRAC Statute.

A handwritten signature in black ink, appearing to read 'J.R. Poitras', written over a horizontal line.

John R. Poitras
President of A.F.G.E.
Local 1904 (AFL-CIO)

DCN 6913

Exhibit A

**DEPARTMENT OF DEFENSE REPORT TO THE DEFENSE BASE
CLOSURE AND REALIGNMENT COMMISSION**



**DEPARTMENT OF THE ARMY
ANALYSIS AND RECOMMENDATIONS
BRAC 2005**

Volume III

May 2005

SEC. 2913. SELECTION CRITERIA FOR 2005 ROUND.

(a) **FINAL SELECTION CRITERIA.**—The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States

under this part in 2005 shall be the military value and other criteria specified in subsections (b)

and (c).

(b) **MILITARY VALUE CRITERIA.**— The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

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

(4) The cost of operations and the manpower implications.

(c) **OTHER CRITERIA.**—The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States

under this part in 2005 are as follows:

(1) 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.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

37

(d) **PRIORITY GIVEN TO MILITARY VALUE.**—The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) **EFFECT ON DEPARTMENT AND OTHER AGENCY COSTS.**—The selection criteria relating

to the cost savings or return on investment from the proposed closure or realignment of military

installations shall take into account the effect of the proposed closure or realignment on the costs

of any other activity of the Department of Defense or any other Federal agency that may be

required to assume responsibility for activities at the military installations.

(f) **RELATION TO OTHER MATERIALS.**—The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment

of military installations inside the United States under this part in 2005.

(g) **RELATION TO CRITERIA FOR EARLIER ROUNDS.**—Section 2903(b), and the selection criteria prepared under such section, shall not apply with respect to the process of making recommendations for the closure or realignment of military installations in 2005.

DCN 6913

Exhibit B

Fort Monmouth, NJ

Recommendation: Close Ft. Monmouth, NJ. Relocate the US Army Military Academy Preparatory School to West Point, NY. Relocate the Joint Network Management System Program Office to Fort Meade, MD. Relocate the Budget/Funding, Contracting, Cataloging, Requisition Processing, Customer Services, Item Management, Stock Control, Weapon System Secondary Item Support, Requirements Determination, Integrated Materiel Management Technical Support Inventory Control Point functions for Consumable Items to Defense Supply Center Columbus, OH, and reestablish them as Defense Logistics Agency Inventory Control Point functions; relocate the procurement management and related support functions for Depot Level Repairables to Aberdeen Proving Ground, MD, and designate them as Inventory Control Point functions, detachment of Defense Supply Center Columbus, OH, and relocate the remaining integrated materiel management, user, and related support functions to Aberdeen Proving Ground, MD. Relocate Information Systems, Sensors, Electronic Warfare, and Electronics Research and Development & Acquisition (RDA) to Aberdeen Proving Ground, MD. Relocate the elements of the Program Executive Office for Enterprise Information Systems and consolidate into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.

Realign Ft. Belvoir, VA by relocating and consolidating Sensors, Electronics, and Electronic Warfare Research, Development and Acquisition activities to Aberdeen Proving Ground, MD, and by relocating and consolidating Information Systems Research and Development and Acquisition (except for the Program Executive Office, Enterprise Information Systems) to Aberdeen Proving Ground, MD.

Realign Army Research Institute, Fort Knox, KY, by relocating Human Systems Research to Aberdeen Proving Ground, MD.

Realign Redstone Arsenal, AL, by relocating and consolidating Information Systems Development and Acquisition to Aberdeen Proving Ground, MD.

Realign the PM Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS) facility at 2511 Jefferson Davis Hwy, Arlington, VA, a leased installation, by relocating and consolidating into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.

Justification: The closure of Ft. Monmouth allows the Army to pursue several transformational and BRAC objectives. These include: Consolidating training to enhance coordination, doctrine development, training effectiveness and improve operational and functional efficiencies, and consolidating RDA and T&E functions on fewer installations. Retain DoD installations with the most flexible capability to accept new missions. Consolidate or co-locate common business functions with other agencies to provide better level of services at a reduced cost.

The recommendation relocates the US Army Military Academy Preparatory School to West Point, NY and increases training to enhance coordination, doctrine development, training effectiveness and improve operational and functional efficiencies.

The recommendation establishes a Land C4ISR Lifecycle Management Command (LCMC) to focus technical activity and accelerate transition. This recommendation addresses the transformational objective of Network Centric Warfare. The solution of the significant challenges of realizing the potential of Network Centric Warfare for land combat forces requires integrated research in C4ISR technologies (engineered networks of sensors, communications, information processing), and individual and networked human behavior. The recommendation increases efficiency through consolidation. Research, Development and Acquisition (RDA), Test and Evaluation (T&E) of Army Land C4ISR technologies and systems is currently split among three major sites – Ft Monmouth, NJ, Ft Dix, NJ, Adelphi, MD and Ft Belvoir, VA and several smaller sites, including Redstone Arsenal and Fort Knox. Consolidation of RDA at fewer sites achieves efficiency and synergy at a lower cost than would be required for multiple sites. This action preserves the Army's "commodity" business model by near collocation of Research, Development, Acquisition, and Logistics functions. Further, combining RDA and T&E requires test ranges – which cannot be created at Ft Monmouth.

The closure of Ft. Monmouth and relocation of functions which enhance the Army's military value, is consistent with the Army's Force Structure Plan, and maintains adequate surge capabilities. Ft. Monmouth is an acquisition and research installation with little capacity to be utilized for other purposes. Military value is enhanced by relocating the research functions to under-utilized and better equipped facilities; by relocating the administrative functions to multi-purpose installations with higher military and administrative value; and by co-locating education activities with the schools they support. Utilizing existing space and facilities at the gaining installations, maintains both support to the Army Force Structure Plan, and capabilities for meeting surge requirements.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$822.3M. The net of all costs and savings to the Department of Defense during the implementation period is a cost of \$395.6M. Annual recurring savings to the Department after implementation are \$143.7M with a payback expected in 6 years. The net present value of the costs and savings to the Department over 20 years is a savings of \$1,025.8M.

This recommendation affects non-DoD Federal agencies. These include, the U.S. Post Office, the Department of Justice and the General Services Administration. In the absence of access to credible cost and savings information for those agencies or knowledge regarding whether those agencies will remain on the installation, the Department assumed that the non-DoD Federal Agencies will be required to assume new base operating responsibilities on the affected installation. The Department further assumed that because of these new base operating responsibilities, the affect of the recommendations on the non-DoD agencies would be an increase in cost. As required by

Section 2913 (d) of the BRAC statute, the Department has taken the effect on the cost of these agencies into account when making this recommendation.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 9,737 jobs (5,272 direct and 4,465 indirect jobs) over the 2006 – 2011 periods in the Edison, NJ Metropolitan Division, which is 0.8 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 20 jobs (11 direct and 9 indirect jobs) over the 2006 – 2011 periods in the Elizabethtown, KY Metropolitan Division, which is 0.03 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,218 jobs (694 direct and 524 indirect jobs) over the 2006 – 2011 periods in the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division, which is 0.04 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 63 jobs (37 direct and 26 indirect jobs) over the 2006 – 2011 periods in the Huntsville, AL Metropolitan Division, which is 0.03 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 9,834 jobs (5,042 direct and 4,792 indirect jobs) over the 2006 – 2011 periods in the Baltimore-Towson, MD Metropolitan Division, which is 0.63 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 422 jobs (264 direct and 158 indirect jobs) over the 2006 – 2011 periods in the Poughkeepsie-Newburgh-Middletown, NY Metropolitan Division, which is 0.1 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 89 jobs (49 direct and 40 indirect jobs) over the 2006 – 2011 periods in the Columbus, OH Metropolitan Division, which is 0.01 percent of economic area employment.

The aggregate economic impact of all recommended actions on these economic regions of influence was considered and is at Appendix B of Volume I.

Community Infrastructure Assessment: A review of community attributes revealed no significant issues regarding the ability of the infrastructure of communities to support forces, missions, and personnel. When moving from Ft. Monmouth to Aberdeen, MD, the following local area capabilities improve: Cost of Living and Medical Health. The following attributes decline: Safety and Transportation. When moving from Ft.

Monmouth to West Point, the following local area capabilities improve: Education and Employment. The following attribute declines: Housing. When moving from Ft. Monmouth to Ft. Belvoir, the following local area capabilities improve: Employment and Medical Health. The following attributes decline: Education and Safety. When moving from Ft. Monmouth to Ft. Meade, the following local area capabilities improve: Cost of Living and Medical Health. The following attributes decline: Education and Safety. When moving from Ft. Monmouth to Columbus, OH, the following local area capabilities improved: Cost of living, Employment, and Medical Health. The following attribute declines: Safety. When moving from Ft. Belvoir to Aberdeen, MD, the following local area capabilities improve: Cost of living and Education. The following attributes decline: Employment, Safety and Transportation. When moving from Ft. Knox to Aberdeen, MD, the following local area capabilities improve: Housing, Employment, and Medical Health. The following attributes decline: Cost of Living, Safety, and Transportation. When moving from Redstone Arsenal to Aberdeen, MD, the following local area capabilities improve: Child Care, Housing, and Medical Health. The following attributes decline: Employment, Safety, Population Center, and Transportation. When moving from Arlington, VA to Aberdeen, MD, the following attributes decline: Population Center, and Transportation.

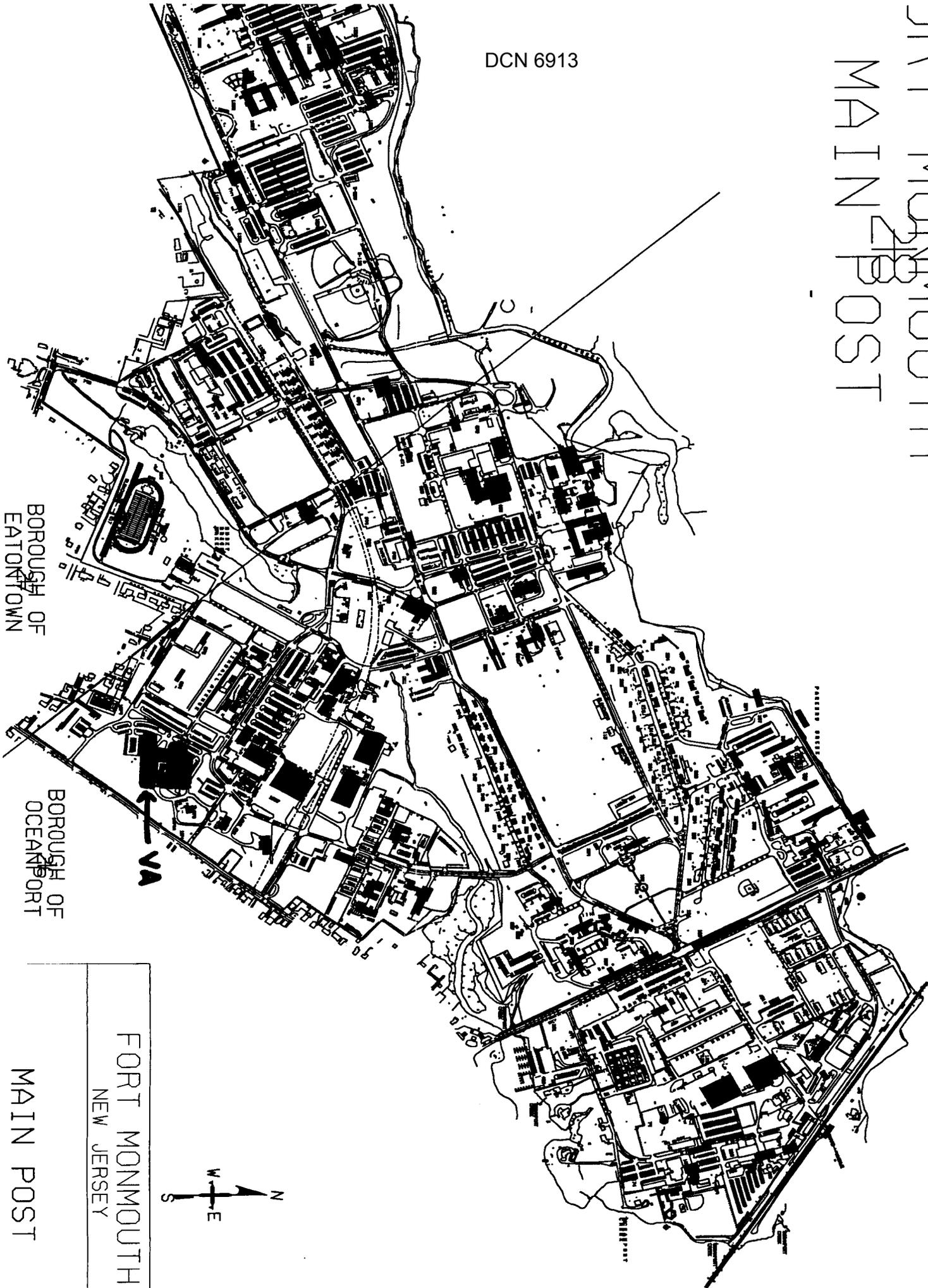
Environmental Impact: Closure of Fort Monmouth will necessitate consultations with the State Historic Preservation Office to ensure that sites are continued to be protected. Fort Monmouth's previous mission-related activities will result in land use constraints/sensitive resource area impacts. An Air Conformity Analysis and a New Source Review and permitting effort is required at Aberdeen, West Point, and Fort Belvoir. The extent of the cultural resources on Aberdeen, West Point, and Fort Belvoir are uncertain. Potential impacts may occur as result of increased times delays and negotiated restrictions. Additional operations at Aberdeen, West Point, and Fort Belvoir may further impact threatened/endangered species leading to additional restrictions on training or operations. Significant mitigation measures to limit releases may be required to reduce impacts to water quality and achieve US EPA water quality standards. Due to the increase in personnel there would be a minimal impact on waste production and water consumption at Defense Supply Center Columbus (DSCC), OH. This recommendation has no impact on dredging; land use constraints or sensitive resource areas; marine mammals, resources, or sanctuaries; noise; or wetlands. This recommendation will require spending approximately \$2.95 million for environmental compliance activities. These costs were included in the payback calculation. Fort Monmouth reports \$2.9 million in environmental restoration costs. Because the Department has a legal obligation to perform environmental restoration regardless of whether an installation is closed, realigned, or remains open, these costs were not included in the payback calculation. This recommendation does not impact the costs of environmental restoration, waste management, and environmental compliance activities. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation has been reviewed. There are no known environmental impediments to implementation of this recommendation.

DCN 6913

Exhibit C

FORT MONMOUTH MAIN POST

DCN 6913



BOROUGH OF
EATONTOWN

BOROUGH OF
OCEANPORT

FORT MONMOUTH
NEW JERSEY

MAIN POST



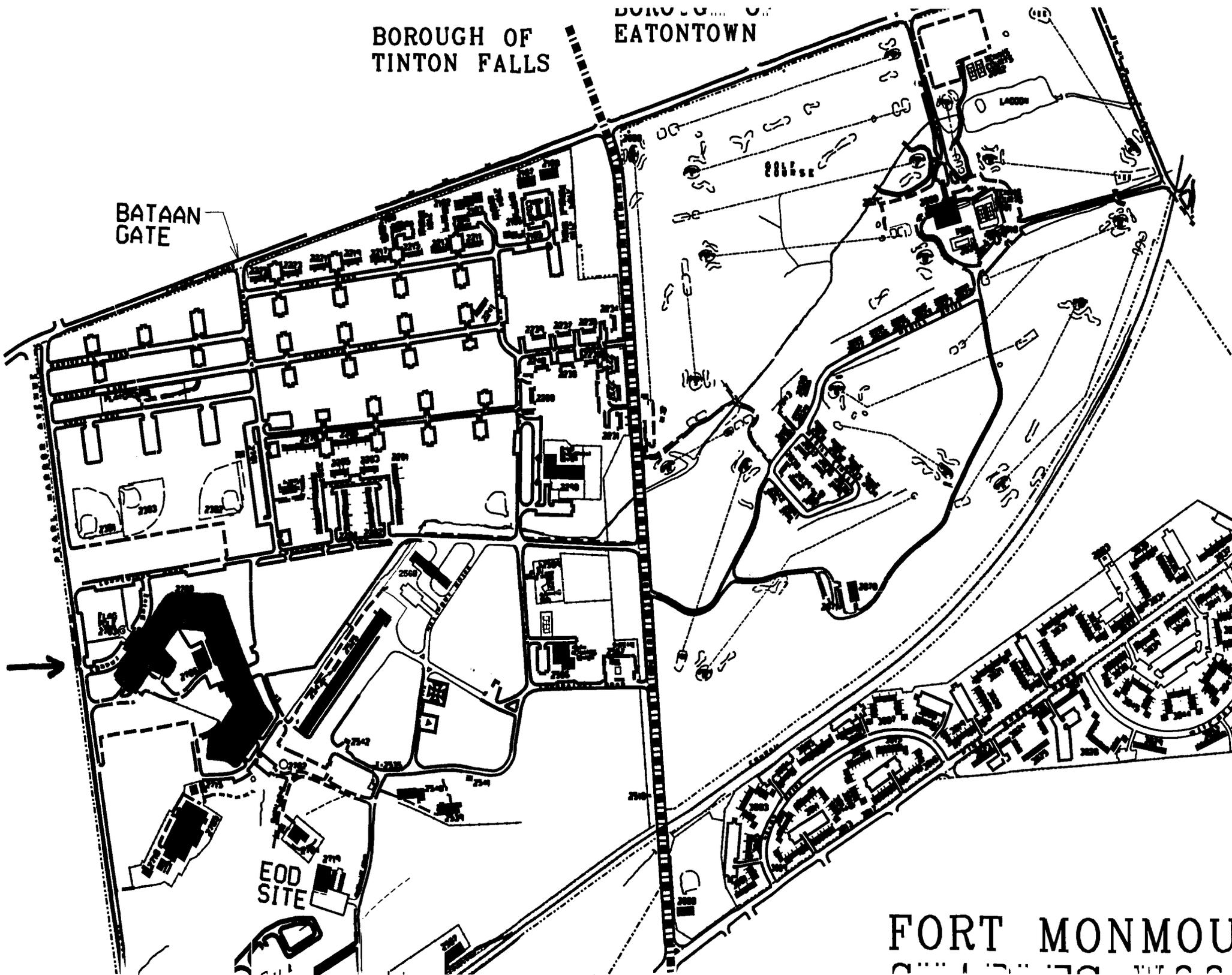
DCN 6913

Exhibit D

BOROUGH OF
TINTON FALLS

BOROUGH OF
EATONTOWN

BATAAN
GATE



FORT MONMOUTH
CAMP

DCN 6913

Exhibit E

For Ft. Monmouth, the technical capability areas that apply are information technology and sensors. A future force adjustment term greater than one means that there should be greater capability required across the entire DoD in the future compared to today.

The future force adjustment term is actually calculated by using the change in funding in the technical area from the present to the end of the estimated program and then adjusted using expert military judgment of the future importance of a particular technical capability area. The specific terms and factors are found in the minutes. In the aggregate, the future force adjustment terms for the important technical areas were:

	Information Systems	Sensors
Research	1.09	1.28
D&A	1.07	1.04
T&E	1.09	1.15

Application of the force structure adjustment indicates that, across the DoD, the TJCSG anticipates an approximately 8% increase in capacity for information systems, and a 10-12 percent increase in sensors (funding in D&A is much larger than the other two functions). The TJCSG capacity measures applied primarily to full time equivalent manpower, so, the capacity measures mean we anticipate slightly more full time equivalent people than today.

Please reference TJCSG minutes for 15 Mar 05, 17 Mar 05, and 20 May 05, found at http://www.defenselink.mil/brac/minutes/brac_minutes.html and following the link for "ZipFiles" under Technical. Additionally, as stated in Volume XII of the DoD BRAC Report, Full-Time-Equivalent man years (FTEs) were adopted as the metric for all three of the technical functions and the data were captured in the TJCSG Capacity Data Calls, found at http://www.defenselink.mil/brac/minutes/brac_scenario.html and following the various "Scenario Data Calls" links under Technical.

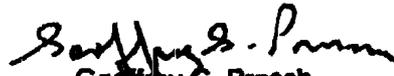
Question: During development of the Land C4ISR center recommendation by the TJCSG, the payback period dropped from 20 years to 4 years, and finally settled to 6 years. There is no explanation for the significant drop that occurred during the period April 1 to April 15, 2005. Provide all data, analyses, assumptions, and records of discussion that address the significant changes in payback period for the Land C4ISR center.

Answer: The difference in payback periods is due to the packaging of the various actions associated with establishing the C4ISR center. The first Land C4ISR center candidate recommendation included realignments of organizations from several installations including Ft. Monmouth, NJ, Adelphi Laboratories, MD, and Ft. Belvoir, VA. The relocation of these research and development organizations required a large amount of costly construction. In addition, the original candidate recommendation, with a 20 year payback, did not propose to close any installations. One of several interim versions of the recommendation closed Ft. Monmouth, but did not relocate any of the organizations on Adelphi Laboratories or Ft. Belvoir. The actions at Adelphi and Ft. Belvoir were instead included in a different candidate recommendation producing a shorter payback period of four years for the Ft. Monmouth recommendation.

The final version recommended the closure of Ft. Monmouth, included several organization relocations from Ft. Belvoir and other sites, but left the Adelphi organizations in place. The addition of the Ft. Belvoir relocations to the Ft. Monmouth closure analysis increased the payback period from four to six years. References for interim versions of this recommendation may be found at http://www.defenselink.mil/brac/minutes/brac_scenario.html, by following the links for "Inactive Draft Recommendations Scenario Data Calls and Other Data " under Technical. The early versions were analyzed by the TJCSG and are found in files containing "TECH-0035" in the filename. The final version is found at http://www.defenselink.mil/brac/minutes/brac_scenario.html, by following the links for "Army Recommendations" and "Recommendation COBRA Files" under Department of the Army. In addition, the deliberative minutes for the TJCSG are located at http://www.defenselink.mil/brac/minutes/minute_files/TECH/tech9.zip with related discussion in the files named 3/21, 3/23, 4/01, 4/05, 4/12, 4/13, 4/14, 4/15, 4/18, 4/20, 4/22, 4/26, 4/28 and 5/3. Army deliberative briefing notes may be found at http://www.defenselink.mil/brac/minutes/minute_files/ArmyMinutes.zip, with related discussion shown in files named for SRGs 30, 31, 33, 34, 35, 36, and 38. The Infrastructure Steering Group deliberative minutes are located at http://www.defenselink.mil/brac/minutes/brac_isg.html, with related discussion shown in the file dated 24 Mar. The Infrastructure Executive Council deliberative minutes are located at http://www.defenselink.mil/brac/minutes/brac_iec.html, with related discussion shown in files dated 7 Feb, 23 Feb, 10 Mar, 25 Apr, 2 May, 9 May, and 10 May.

The Department is continuing to address information requests and is committed to providing timely and accurate information regarding BRAC recommendations to the Congress and the BRAC Commission. We will continue to provide support and assistance to Congressional and Commission staffs as the BRAC process moves forward.

Sincerely,



Geoffrey G. Prosch

Principal Deputy Assistant Secretary of the Army
Installations and Environment

cc: Chair, Senate Committee on Homeland Security and Governmental Affairs
Ranking Member, Senate Committee on Homeland Security and Governmental Affairs
Chair, Senate Committee on Armed Services
Ranking Member, Senate Committee on Armed Services
Chair, House Committee on Armed Services
Ranking Member, House Committee on Armed Services

DCN 6913

Exhibit F



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

DEC 7 2004

MEMORANDUM FOR INFRASTRUCTURE EXECUTIVE COUNSEL MEMBERS
INFRASTRUCTURE STEERING GROUP (ISG) MEMBERS
CHAIRMEN, JOINT CROSS-SERVICE GROUPS (JCSG)

SUBJECT: Transformation Through Base Realignment and Closure (BRAC 2005) Policy
Memorandum Three - Selection Criterion 5

Background

The Secretary of Defense's memorandum of November 15, 2002, established the authorities, organizational structure, goals, and objectives for the Department's development of BRAC 2005 recommendations. Policy Memoranda One and Two provided further guidance on implementing BRAC 2005. This memorandum is the third in a series of Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) policy memoranda implementing BRAC 2005. The USD (AT&L) will issue additional policy guidance, as necessary, throughout the BRAC process.

Purpose

This memorandum describes how BRAC selection criterion 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*" will be implemented during the BRAC process. Selection criterion 5 will be assessed against all scenarios considered during the BRAC scenario analysis process. This memorandum applies to the Military Departments and Joint Cross-Service Groups (JCSGs).

Policy Memorandum One, dated April 16, 2003, directed the Military Departments and the JCSGs to use the Cost of Base Realignment Actions (COBRA) model to calculate costs, savings, and payback (formerly known as return on investment) of proposed realignment and closure actions. Policy Memorandum One also directed the Department of the Army to take the lead in recommending improvements in the COBRA model and in revising standard cost factors used with the model.

COBRA provides a uniform methodology for estimating and itemizing projected costs and savings associated with BRAC closure and realignment scenarios. This guidance, applicable to the Military Departments and the JCSGs, establishes policy and procedures for use of the updated COBRA model when evaluating BRAC selection



criterion 5. It includes policy, responsibilities, and procedures for COBRA use, and discusses how the model's outputs will be used to support the overall BRAC 2005 process. Additionally, this memorandum specifies how the Department will comply with the requirement to take into account the effect of a proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at an affected military installation.

Policy Guidance

General

The Military Departments and JCSGs, hereafter referred to as the "scenario proponents," are required to use the COBRA model in assessing proposed realignment and closure scenarios during their selection criterion 5 assessments. To perform these assessments, proponents must load scenario-specific data into the COBRA model. This data, used in combination with model algorithms and standard cost factors already developed and pre-loaded into the model, will result in an estimate of costs, savings, and payback for the proposed closure/realignment scenario. The COBRA model uses a Windows format and is easily tailored to provide a variety of reports and information, including payback year, one-time costs, 6-year costs and savings, annual recurring costs and savings, and 20-year net present value (NPV).

Due to the complexity of the COBRA model, four documents will be issued that supplement the policies and procedures in this memorandum. To ensure consistent implementation of the COBRA model in support of selection criterion 5 assessments, all users of the model should become familiar with the content of these documents:

- COBRA Users Manual
- COBRA Algorithm Documentation
- COBRA Analyst Template
- COBRA User Checklist

To obtain needed COBRA data input, scenario proponents will develop COBRA related questions that will be included in scenario data calls. These COBRA-related questions focus exclusively on data not previously gathered concerning specific losing and receiving installations. Scenario data calls will be prepared by the scenario proponents and collected by the appropriate Military Department or Defense Agency.

COBRA results may suggest minor changes in the scenario that would reduce costs or improve long term savings. Comparative assessments of COBRA results for scenarios may enable Military Departments and JCSGs to eliminate scenarios that are inferior to others from a cost perspective.

Responsibilities

Proponents will maintain a list of all scenarios evaluated by COBRA as well as a COBRA summary sheet on each scenario evaluated during the deliberative process. COBRA results and recommendations will be presented in the format provided herein.

Because the updated COBRA software contains many pre-loaded base characteristics and standard cost factors designed to simplify BRAC analysis, access to the COBRA model is restricted to internal Department of Defense use until the release of final recommendations.

Key Terms and Procedures

The following guidance provides instructions on key COBRA calculations. More complete and detailed guidance is provided to COBRA users in the four documents listed in the General section above. A review of these documents is required before using the model.

Losing Installation: An installation from which missions, units or activities would cease or be relocated pursuant to a closure or realignment recommendation. An installation can be a losing installation for one recommendation and a receiving installation for a different recommendation.

Receiving Installation: An installation to which missions, units or activities would be relocated pursuant to a closure or realignment recommendation. An installation can be a receiving installation for one recommendation and a losing installation for a different recommendation.

Close: Any action that ceases or relocates all current missions of an installation and eliminates or relocates all current personnel positions (military, civilian and contractor), except for personnel required for caretaking, conducting any ongoing environmental cleanup, or property disposal. Retention of a small enclave, not associated with the main mission of the base, is still a closure. (To ensure the application of a specific COBRA algorithm, users are instructed to use a "deactivate" button for closures where an enclave is going to be maintained).

Realign: Includes any action that 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.

Proposal: A description of one or more potential closure or realignment actions that have not been declared as a scenario for formal analysis by either a JCSG or a Military Department. Normally includes detail on the transfer of units, missions or other

work activity; facilities or locations that would close or lose such effort; facilities or locations that would gain from the losing locations; tenants or other missions or functions that would be affected by the action. A proposal can come from ideas or options derived from Optimization Tools. Proposals must be catalogued at the JCSG or MilDep level for tracking

Scenario: A proposal that has been declared for formal analysis by a Military Department/JCSG deliberative body. The content of a scenario is the same as the content of a proposal. The only difference is that it has been declared for analysis by a deliberative body. Once declared, a scenario is registered at the ISG by inputting it into the ISG BRAC Scenario Tracking Tool.

Scenario Analysis: The process to formally evaluate a scenario against all eight selection criteria.

Candidate recommendations: A scenario that a JCSG or Military Department has formally analyzed against all eight selection criteria and which it recommends to the ISG and IEC respectively for SecDef approval. A JCSG Candidate Recommendation must be approved by the ISG, IEC, and SecDef before it becomes a Recommendation. A Military Department Candidate Recommendation must be approved by the IEC and SecDef before it becomes a Recommendation.

Payback (formerly known as "return on investment")

Scenario proponents will calculate payback (in years) for each proposed closure or realignment recommendation. In accordance with guidance herein, all costs and savings attributable over time to a closure or realignment scenario must be calculated, including costs and/or savings at receiving locations. Costs or savings elements that are identified, but determined insignificant, need not be reported in the recommendation. However, scenario proponents must maintain a record of these determinations with each scenario file to document that these cost or savings elements have been considered during the scenario analysis.

Discount and Inflation Rates

OMB establishes a discount rate for government-wide use in February each year, to be used for the succeeding twelve months. Based on the most current guidance provided in OMB Circular A-94, dated February 2004, COBRA will use the average of the 10-year real discount rate and the 30-year real discount rate to create the required 20-year rate. This average rate is presently 3.15 percent and is already pre-loaded into the COBRA model. If a significant change in the real discount rate is realized in 2005, the OSD BRAC Office will update COBRA standard factors and forward them to scenario proponents to be used to update COBRA results.

Costs and savings data entered into the COBRA model during the scenario analysis process must be entered in fiscal year 2005 dollars. When data is in other than fiscal year 2005 dollars, it must be converted using the table below. To convert then-year dollars to fiscal year 2005 dollars, multiply the then-year dollar by the appropriate adjustment factor. For example, to convert 1999 or 2008 dollars to 2005 dollars, multiply those amounts by 1.163 and 0.929, respectively.

Table for Converting Then-Year Dollars to 2005 Dollars*

	1998	1999	2000	2001	2002	2003	2004
Factor	1.191	1.163	1.133	1.100	1.069	1.044	1.020
	2005	2006	2007	2008	2009	2010	2011
Factor	1.000	0.977	0.953	0.929	0.906	0.88	0.86

* Derived from the "National Defense Budget Estimates for FY 2005," Office of the Under Secretary of Defense (Comptroller), March 2004, Table S-5, Total Column.

Medical Costs

COBRA already incorporates discrete cost assumptions based upon a variety of factors including the type of patient population served and the non-DoD medical care options such as TRICARE and MEDICARE available to the DoD-served population. Scenario proponents must manually enter any costs or savings from hospital contracts.

Homeowners Assistance Program (HAP)

The US Army Corps of Engineers will provide a list of installations that have a reasonable possibility of having a HAP program approved if the installation is selected for closure or realignment. That list will be incorporated into the COBRA model algorithms and HAP costs for these installations will automatically be included in COBRA calculations.

Land Purchases

If scenario proponents plan a land purchase to support a scenario option, this estimated expense must be manually entered as a unique one-time cost.

Force Structure and Manpower Changes

The costs or savings associated with force structure changes are not included in the COBRA calculations because they were previously identified in the Force Structure Plan and are not associated with the BRAC action to close or realign an installation. To

do otherwise would be to inappropriately credit costs or savings to the BRAC action. The manpower costs or savings associated with the BRAC action, however, should be included in the COBRA calculations because they are a direct result of the BRAC recommendation and are not the result of previously identified force structure changes.

Military Construction

When a scenario requires new construction or renovation of an existing facility, scenario proponents will input anticipated construction requirements in terms of facility analysis category (FAC) code, square footage, and other known requirements. The model uses this input to project a military construction cost.

Military Construction Cost Avoidance

When a scenario affects a losing installation where recapitalization resources for an existing facility are programmed, the savings associated with this facility are already captured by the model's recapitalization calculation. Therefore, scenario proponents will not enter any construction cost avoidances (savings) for this type of military construction.

When a scenario affects an installation at which there is a military construction project, authorized and appropriated in Fiscal Year 2005 or earlier, for a new facility that creates new footprint or supports new missions, such that the project is no longer required due to the BRAC action, scenario proponents must manually enter the construction cost avoidance (savings) associated with that project.

Designation of Receiving Bases

When a scenario involves the relocation of 100 or more personnel (any combination of military or civilian), scenario proponents must identify a specific receiving base for that scenario. For scenarios involving relocation of less than 100 personnel, scenario proponents may, but do not have to identify a specific receiving site. If they do not identify a specific receiving location, they must establish a generic "base x" within the COBRA model to act as the surrogate receiving base for these smaller units or activities. The COBRA Users Manual referenced previously highlights the detailed information that must be entered in the model to characterize the BRAC closure or realignment action as it impacts both losing and receiving installations.

DoD Tenants and Enclaves

Scenario proponents (Military Departments and JCSGs) will consider the impact of a scenario on each tenant or supported activity occupying an installation, including Reserve Component organizations, regardless of Military Service. All costs associated with relocating tenants affected by the scenario to receiving sites should be included in

the COBRA calculations. In some cases, the scenario may specify the creation of an installation enclave to avoid the transfer of tenant/supported activities. If an enclave is specified, scenario proponents must enter into COBRA each FAC code for a facility to be included in the enclave, along with required construction and any other costs to outfit the enclave. The candidate recommendation must include an explanation of any planned enclaves, including affected units/activities.

Unemployment Costs

Military Departments and Defense Agencies annually budget unemployment contributions to the Federal Employees Compensation Account for DoD military and civilian employees. COBRA automatically calculates this cost based on the DoD employees whose unemployment is directly attributed to closures and realignments.

Standard Factors for COBRA

All of the standard factors used in COBRA algorithms reflect standard rates which will be applied consistently in all closure and realignment scenario calculations. A single COBRA standard-factors file will be issued with the COBRA model and will not be changed without OSD approval.

Environmental Restoration Costs

Restoration costs are expenses associated with clean up and reclamation of environmentally contaminated areas. Since the Department of Defense has a legal obligation to perform environmental restoration regardless of whether a base is closed, realigned, or remains open, environmental restoration costs at closing bases are not to be considered in the cost of closure calculations. The Department will consider the impact of costs related to potential environmental restoration in its Selection Criterion 8 analysis, through the review of certified data regarding pre-existing, known environmental restoration projects at installations that are identified during scenario development as candidates for closure or realignment. More detailed information on the consideration of environmental restoration costs within BRAC analyses is provided in separate policy guidance.

Other Environmental Costs

Environmental compliance, pollution prevention, and conservation expenses are already captured in the COBRA model through the installation Base Operating Support costs. Other environmental costs that are capacity-related, such as costs associated with increases or changes in the environmental carrying capacity of an installation, must be manually added to the COBRA model. For instance, if a scenario would exceed the capacity of the wastewater treatment plant at the receiving site, then the scenario

proponent must decide whether to upgrade the old facility or build a new wastewater treatment plant to accommodate the scenario. Likewise, the scenario proponent must calculate the impact on landfills, other waste treatment facilities, and pollution control equipment. Scenario proponents will enter such expenses as construction or rehabilitation costs.

BRAC 2005 Effects on other Department of Defense Activities or other Federal Agencies

Section 2913(d) of the Defense Base Closure and Realignment Act of 1990, as amended, requires the Department's cost and savings criteria to "take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations."

By estimating the costs and savings to the Department of Defense associated with a proposed closure or realignment action, the COBRA model takes into account the effect of the proposed closure or realignment action on the costs of all DoD activities, satisfying the requirements of Section 2913(d) with respect to activities of the Department of Defense.

The COBRA model cannot determine the effect of the proposed action on the costs of "any other Federal agency that may be required to assume responsibility for activities" at a closing or realigning installation because it does not include estimates of non-DoD entity costs or savings. Furthermore, independently estimating the costs and savings to these agencies may be inadequate because such information is outside the control of the Department and therefore any effort to estimate these costs would be highly speculative. Additionally, the non-DoD agency may choose to relocate rather than remain and assume base operating responsibilities, potentially achieving savings that would skew any DoD cost estimates. Consequently, the Department cannot rely on the COBRA model or undertake independent estimates of the costs and savings to these agencies in order to take into account the effect on these costs and satisfy the requirements of Section 2913(d) with respect to non-DoD Federal agencies.

In order to satisfy the requirements of Section 2913(d) with respect to non-DoD Federal agencies, when a scenario directly impacts a non-DoD Federal agency, the scenario proponent will first assume that such agency will be required to assume responsibility for base operating activities on the military installation. The scenario proponent will further assume that because such agency will be required to assume base operating responsibilities it did not have before the proposed action, the effect of the action will be to increase that agency's costs. The scenario proponent will document these effects for consideration by decision makers as further described below.

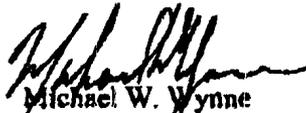
BRAC 2005 COBRA Results and Recommendations

The following format will be used to display scenario COBRA payback projections for each BRAC 2005 candidate recommendation:

The total estimated one-time cost to the Department of Defense to implement this recommendation is \$ _____. The net of all costs and savings to the Department during the implementation period is a cost of \$ _____. Annual recurring savings to the Department after implementation are \$ _____ with a payback expected in _____ years. The net present value of the costs and savings to the Department over 20 years is a savings of \$ _____.

If a proponent's BRAC 2005 scenario affects another Federal agency, the following additional paragraph will be added to the candidate recommendation:

"This recommendation affects _____, a non-DoD Federal agency. In the absence of access to credible cost and savings information for that agency or knowledge regarding whether that agency will remain on the installation, the Department assumed that the non-DoD Federal agency will be required to assume new base operating responsibilities on the affected installation. The Department further assumed that because of these new base operating responsibilities, the effect of the recommendation on the non-DoD agency would be an increase in its costs. As required by Section 2913(d) of the BRAC statute, the Department has taken the effect on the costs of this agency into account when making this recommendation."



Michael W. Wynne
Acting USD (Acquisition, Technology & Logistics)
Chairman, Infrastructure Steering Group