DCN 95

DRAFT

April 21, 1993

The Honorable George J. Mitchell
Majority Leader
S-221 Capitol Building
Washington, D.C. 20510

Dear Senator Mitchell:

Thank you for your recent correspondence. I appreciate your comments that the Defense Base Closure and Realignment Commission should reconsider its 1991 recommendation to close Loring Air Force Base (AFB).

Secretary of Defense Les Aspin transmitted to the Commission on March 12, 1993 his recommendations for domestic base closures and realignments. A recommendation to reopen Loring Air Force Base was not included in Secretary Aspin's recommendations.

The 1991 Commission analyzed Loring AFB in the context of the strategic tanker mission of Strategic Air Command. The closure decision was based on Loring's relatively low ranking among the SAC bases. In addition, transcripts of the final deliberation of the 91 Commission focused on the air refueling mission. On this point Plattsburgh's capability was judged to surpass that of Loring's. Also, Plattsburgh's parking capability was determined to be superior to Loring's. While there was considerable discussion on these issues, the final motion, made by Commissioner Duane Cassidy, was to accept DOD's recommendation for closure of Loring AFB.

The Military Departments have submitted, through OSD, a few 1988 and 1991 closure and realignment decisions for redirect by this Commission. The DOD guidance for these redirects stipulated that they must support changes in force structure, mission, organization, or economic payback. These redirects are currently under review by the Commission.

DRAFT

The base realignment and closure law (Public law 101-510) contains no provision mandating the Commission to accept redirects from local communities. If this were the case, all states and local communities would readdress their closure installations to subsequent Commissions and the country would reverse course back to the closure stalemates experienced from the late 1970s to 1988.

I regret that I must take such a hard stand on this issue not to reopen the case of Loring AFB, but I believe the alternative would be chaotic and detrimental to the best interest of our country.

I hope you will continue to share any additional comments in the coming months. Please contact me if I can be of any assistance to you.

Sincerely,

JIM COURTER
Chairman

cc: Senator William S. Cohen
U.S. Representative Olympia J. Snowe

JAC:jpg

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HOLD

September 12, 1991

MEMO FOR THE RECORD

SUBJ: Senate Armed Services Committee Hearing
Regarding Loring Air Force Base

FROM: Wendi

The following Senators were present throughout the hearing:

Nunn	Cohen
Mitchell	McCain
Dixon	Lott
	Warner

Witnesses included:
Carl Smith
Gen. Getsy (ret.)
Gen. Smith (ret.)
Dep. Asst. Sec. Boatright
Maj. Gen. Habiger

The hearing was chaired by Senator Dixon. The major point of interest to the Commission was Senator Mitchell's comment that there would be a lawsuit to which he, Senator Cohen and the Governor of Maine would be parties. Mitchell stated that, "as a matter of law" it is necessary to review "violated fundamental standards of truth" regarding the review of Loring Air Force Base.

Mitchell continued by saying that it is "our conviction that SAC provided information that was incorrect, imprecise, slanted and evasive." SAC was constantly "shifting facts, changing information." He believes the Air Force provided "flawed data" due to their" biases."

Mitchell stated that it was an "unfair process and result" due to he evaluation of quality of life issues. He believes that the Air rce officially rejected quality of life as a criteria then ested to the Commission that it be used as a basis of nction between Plattsburgh and Loring.

l spoke at length regarding Col. Hefelbower's statement in ession with the Commission that quality of life was a This was supposedly said eleven days prior to Habiger's ing that it was not. He also quoted General Cassidy s saying, "I will vote right now to keep Plattsburgh ing" due to the quality of life issue.

Mitchell, Cohen and Carl Smith all invoked General Cassidy's name several times. They repeated his line about voting against Loring due to quality of life reasons many times. The tone was extremely negative.

Senator Cohen said that the "process was essentially sound." He followed with accusations of "stonewalling, gag rules and a need to file FOIAs" for needed information.

Cohen said Col. Lamont (without using his name) was an "unequal advocate of the Air Force position." Later in the hearing, Carl Smith stated that the Colonel was chosen as one "who would be most highly influential in base closure decisions." Carl Smith continued by showing a graph depicting the number of times the Colonel spoke in comparison to others participating in hearing discussions regarding Loring.

Boatright said that quality of life related to criteria #1 as it relates to retention of a quality force. He said that he concluded, however, that quality of life could not be measured and therefore the Air Force did not formally consider it.

Commissioner Ball's name was mentioned several times as the only one capable of attaining information requested of Loring AFB by Senator Cohen.

The hearing lasted 2 hrs. and 40 minutes.

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DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

ES# 92022802

February 28, 1992

MEMORANDUM TO All Staff

FROM Bob Moore, General Counsel

RE Cohen, et al., v. Rice, et al.; The Loring AFB lawsuit

Today we filed our motion to dismiss this lawsuit in the United States District Court for the District of Maine.

If you would like to see our response to Loring's amended complaint, I have asked Toby to make copies available to those interested (**ES# 920228-02**). If you have any questions regarding the lawsuit, please do not hesitate to ask.

Matt

May 27, 1992

MEMORANDUM FOR CHAIRMAN COURTER

FROM: ROBERT MOORE Bob Moore
OF COUNSEL, SPECTER AND LORING CASES

SUBJECT: Litigation Update

1. LORING CASE - Cohen, et al v. Rice, et al

Last week, Judge Brody of the U.S. District Court, District of Maine, granted our motion to dismiss in part, and denied it in part. He threw out all but two allegations by the Loring plaintiffs, finding that most of their charges were not judicially reviewable. The two issues that the Court found to be subject to judicial review are:

1) Plaintiffs' contention that the Secretary of Defense failed to transmit to the GAO, Members of Congress and the Commission all of the information used in making the base closure recommendation.
2) Plaintiffs' contention that the Commission failed to hold public hearings as required by the act.

Judge Brody stated his intention to hear these issues on an expedited basis and has planned a telephonic scheduling conference for tomorrow that DOJ, Matt and I can participate in. The Department of Justice is very pleased with the decision and successful findings by the Maine Court could be helpful later, as the Philadelphia case unfolds.

2. PHILADELPHIA CASE, Specter, et al v. Garrett, et al

Denying the petition by the Commission, the Navy, DoD, DOJ, and the Solicitor General, the 3rd Circuit voted not to rehear the Specter case en banc. Our options therefore are to litigate in District Court on the limited number of procedural issues the 3rd Circuit found are judicially reviewable, or to file a writ of certiorari with the Supreme Court. DOJ has 90 days to file the writ and they have asked for the Commission's recommendations within the next 30 days. At this time, our codefendants and the Department of Justice staff are pondering whether to seek cert or not. I will develop the pros and cons of that action and will brief you and Matt so that we can make a recommendation to DOJ by the end of June.

I've enclosed the Decision by the Court in Loring. I think you'll find it interesting reading. Commissioner Cassidy will undoubtedly be pleased that the Court found the use of "quality of life" non justiciable (opinion, p. 9). The Philadelphia rehearing denial is enclosed as well.

Please call me if you have any questions. otherwise I'll talk to you and Matt over the next few weeks.

cc: Matt Behrmann

February 10, 1993

MEMORANDUM TO [redacted]MATT, WAYNE, CAROLINE, TOBY,
PAUL, BEN, ALEX AND FRANK
From: Jill
Re: Philadelphia NASY and Loring AFB hearings

I spoke with Jeff Guttman of DOJ this morning he informed me that hearings for Philadelphia NASY will take place on February 24 at 11:00 am, at the Federal Courthouse located near Independence Square (he did not have the exact address). The room has not been determined and will be posted on the 24th at either the Office of the Clerk or near the elevator.

The Loring hearing will take place on March 3rd anytime from 9:00 am on. This will be at the Boston Federal Courthouse located near milk and School Streets. The room has not been determined and will be posted that day at either the Office of the Clerk or near the elevator.

A moot court session will take place at Justice, Scott McIntosh is suppose to contact us with a date.

DRAFT

Loring Memorandum

Re: Correspondence from Senators Cohen and Mitchell and and Congresswoman Snowe, April 5, 1993.

The 1991 Commission analyzed Loring AFB in the context of the strategic tanker mission of Strategic Air Command. The closure decision was based on Loring's relatively low ranking among the SAC bases. In addition, transcripts of the final deliberation of the 91 Commission focused on the air refueling mission. On this point Plattsburgh's capability was judged to surpass that of Loring's. Also, Plattsburgh's parking capability was determined to be superior to Loring's. While there was considerable discussion on these issues, the final motion, made by Commissioner Duane Cassidy, was to accept DOD's recommendation for closure of Loring AFB.

The Military Departments have submitted, through OSD, a few 1988 and 1991 closure and realignment decisions for redirect by this Commission. The DOD guidance for these redirects stipulated that they must support changes in force structure, mission, organization, or economic payback. These redirects are currently under review by the Commission.

There is no provision in the base realignment and closure law that mandates the Commission to accept redirects from local communities. If this were the case, all states and local communities would readdress their closure installations to subsequent Commissions and the country would reverse course back to the closure stalmates experienced from the late 1970s to 1988.

I regret that I must take such a hard stand on this issue not to reopen the case of Loring AFB, but I believe the alternative would be chaotic and detrimental to the best inter[illegible] ur country.

Mary Ann,
This is my proposal for an answer to Cohen & Mitchell. I've given a copy to Jamie.
Rick

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M E M O

TO: STAFF
FROM: GC OFFICE
DATE: MAY 6, 1993
RE: MAY 3 LORING DECISION BY THE COURT OF APPEALS

Case: Cohen v. Rice, No. 92-2427 (1st Cir. May 3, 1993). Argued before the U.S. Court of Appeals for the First Circuit on March 3, 1993; decided May 3, 1993.

Re: Closure of Loring Air Force Base in Limestone, Maine

Plaintiffs: Cohen et al.

Defendants: Secretary of Defense, Secretary of the Air Force, Defense Base Closure and Realignment Commission

Issue: Whether the actions of DoD and DBRAC in preparing recommendations for the President under the 1990 DBRAC Act are "final agency action" subject to judicial review under the Administrative Procedure Act.

Decision: On May 3, 1993, the United States Court of Appeals for the First Circuit affirmed the judgment of the district court in favor of defendants.

Background

Plaintiffs brought this action under the Administrative Procedure Act, 5 U.S.C. 701, ("APA") seeking to enjoin DoD from carrying out the 1991 decision to close Loring Air Force Base. Plaintiffs alleged that defendants (including the Defense Base Closure and Realignment Commission) violated procedural and substantive requirements of the 1990 DBRAC Act. The substantive claims related to the merits of the decision; the procedural claims involved challenges to DoD's and the Commission's procedures, including, for example, an alleged failure to hold public hearings and provide certain information.

In May 1992, the district court dismissed plaintiffs' substantive claims, holding that the 1990 Act precludes judicial review of substantive challenges to base closure decisions.

In September 1992, the district court granted summary judgment in favor of defendants on the remaining procedural claims, relying on the Supreme Court's recent decision in Franklin v. Massachusetts, 112 S.Ct. 2767 (1992). Plaintiffs appealed.

Court of Appeals May 3 Decision

On May 3, 1993, the Court of Appeals for the First Circuit affirmed

the district court's judgment. Again relying on Franklin, the First Circuit held that the actions of DoD and the Commission in preparing base closure and realignment recommendations for the President under the 1990 Act do not constitute "final agency action" for purposes of the APA and therefore are not subject to judicial review under the APA. The court also noted that "whether the complaints are styled as procedural or substantive, our answer to the 'core question' of finality remains the same."

In reaching its decision, the First Circuit wrote:

> "the heart of the instant dispute is whether the actions complained of are final actions within the meaning of APA. We agree with the district court's conclusion that the holding and reasoning of Franklin are directly applicable to the facts of the present controversy. In our view the agency action bears less indicia than that in Franklin where the majority referred to the President's role in reapportionment is admittedly ministerial yet still found that the President's action to be the final action."

The court concluded: "After careful review of the decision below [the district court's decision] the 1990 [DBRAC] Act and Court's pronouncements in Franklin, we affirm the judgment of the district court."

FYI: The Philadelphia case Specter v. Garrett is still pending in the U.S. Court of Appeals for the Third Circuit.

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HQ USAF WASHINGTON DC//MO//

ALMAJCOM-FOA-DRU//CV//

UNCLAS

SUBJECT: COMMANDER-IN-CHIEF'S INSTALLATION EXCELLENCE AWARD PROGRAM

1. WE ARE HAPPY TO ANNOUNCE THE KICKOFF OF THE 1992 COMMANDER-IN-CHIEF'S INSTALLATION EXCELLENCE AWARD PROCESS. THE CINC'S ANNUAL AWARD WAS ESTABLISHED IN 1984 TO RECOGNIZE THE OUTSTANDING EFFORTS OF THE PEOPLE WHO OPERATE AND MAINTAIN DOD INSTALLATIONS.

2. NOMINATION PROCEDURES FOR THIS YEAR'S PROGRAM ARE OUTLINED IN AFR 900-64. THE NOMINATION PACKAGE SHOULD CONCENTRATE ON PROGRAMS OR ACTIONS THAT IMPROVE THE WORK ENVIRONMENT OR PHYSICAL PLANT, LEADS TO A BETTER QUALITY OF LIFE, ENHANCE PRODUCTIVITY OF THE WORK FORCE, INCREASE CUSTOMER SATISFACTION/CUSTOMER SERVICE, FACILITATE BOTTOM-TO-TOP COMMUNICATION, AND/OR PROMOTE UNIT COHESIVENESS. IN ADDITION, OASD/P&L(I) HAS AGAIN REQUESTED WE EMPHASIZE PROGRAMS DESIGNED TO PROTECT OR RESTORE THE ENVIRONMENT.

3. THE SUSPENSE FOR ENTRIES IS 24 NOVEMBER 1991. NOTE: THE DIF

EDMOND B. KEITH, CAPT, AF/MOQ, 54013

UNCLASSIFIED

RELEASER'S SIGNATURE

UNCLASSIFIED

02 02 Z JUL 91 RR RR UUUU

DATE IS EARLIER THAN THE DATE SPECIFIED IN AFR 400-64. IN ADDITION, THE NARRATIVE JUSTIFICATION FOR THE INSTALLATION AWARD MAY BE 5 PAGES VICE FOUR PAGES AS STATED IN THE REGULATION. NOMINATIONS OF INDIVIDUALS, UNITS, PROGRAMS, AND/OR PROJECTS FOR THE COMMANDER-IN-CHIEF'S SPECIAL RECOGNITION FOR INSTALLATION EXCELLENCE AWARD ARE ALSO DUE 29 NOV 91. FINALLY, REQUEST EACH MAJCOM/FOA/DRU IDENTIFY A POC BY 30 AUG 91. HQ USAF POC IS CAPT ED KEITH, AF/MOQ-DMR, DSN 225-4013.

EDMOND B. KEITH, CAPT, AF/MOQ, 54013.

UNCLASSIFIED

RELEASER'S SIGNATURE

Loring AFB Base Visit

June 3, 1991

Lead Commissioner: Mr. Ball

Accompanying Commissioners: Mr. Stuart
Mr. Cassidy

Staff Escort: Steve Kleiman

Elected Officials Attending: Senator Mitchell
Senator Cohen
Representative Snowe
Governor McKernan

Base's Present Mission:

*Host to the 42nd Bombardment Wing currently equipped with 14 B-52Gs (conventional) and 19 KC-135R aerial refueling aircraft.
*Provides long-range, conventional B-52 operations in support of all theater commanders.

Service's Justification For Closure:

*Limited access to required training airspace
*Limited low level training routes in region
*Poor peacetime tanker aircraft utility
-Very few receivers available for peacetime training
-Condition of base is well below average
*Ranked lower in overall military value

Main Facilities Reviewed:

*HQ Command Post ($2M)
*Heat Plant
*Alert Facilities -enlarged and improved bomber and tanker aprons.
*PLS Runway - $16M Alert runway constructed in 1986.
*Weapons Storage Area
*Apron Refueling Support
*Maintenance Complex
*BX
*Commissary - $1.7M upgrade in 1985.
*Hospital - 23 bed capacity constructed in FY 85 for $20.5M
*Bowling Center
*Dorms -3 new dorms and a new dining hall ($18M)
-Fourth dorm, costing $9.2M is hung up in the Milcon moratorium
*Arts and Crafts Center
*VOQ
*T-9 Noise Suppressor Facility
*Wastewater Treatment Plant

Community Arguments Presented During Visit:

*AF failure to include several operationally significant facilities in calculating the cost to upgrade each SAC base to condition code 1.
-Aircraft Hydrant Refueling Systems
-Navigational Traffic Aids
-Airfield Pavement Lighting
-Operational-Buildings
-Operational-Facilities (other than buildings)

*AF failed to account for ongoing MILCON projects resulting in several **RED** ratings for Loring such as:
-POL/Supply Storage: should be **GREEN**
-Heat Plant: should be **GREEN**
-Water Supply: should be **GREEN**

*Inconsistencies in data provided by Loring to SAC and that provided by the AF staff to the BCEG in such areas as:
-POL Supply/Storage
-Cost to upgrade medical facilities to condition code 1.

*Inclusion of a cost to upgrade obsolete buildings to condition code 1 when no replacement cost is required.

*Loring has no quiet hours while Griffiss and Plattsburgh do.

*Geographic location and operational advantages.

*No encroachment problems.

Requests for Staff as a Result of Visit:

*Explore the allegations made by the Loring community and determine if there is any validity to their claims.

*Mr. Ball requests that the AF R&A team validate data on the attached "Capacity Comparison" developed by the Loring representatives.

*These issues will be addressed by the R&A staff and briefed to the Commissioners during the deliberative process.

ControlNumber	From	To	Subject	BASE	ActionAgency	DateRcvd	SuspDate	Status
100 REPEAT	Sens. William Cohen, George Mitchell, and Reps. Olympia Snowe and Thomas Andrews	Chr	Visit Loring AFB	Loring AFB	Senate Liaison	22 Apr 91	25 Apr 91	closed
553	Vicki Smith, Caribou chamber of Commerce	Chr	in reference to a call in show chr participated in	loring AFB	dc	13 may 91	16 may 91	closed
677	Alan Mulherin, American Federation of Govt Employees	com		loring afb	es	15 may 91	20 may 91	closed
793	Chr	Com Levitt	Discusses paper Com Levitt provided on Loring AFB	Loring AFB	es-file copy only	17 may 91		closed
802	Maine Congressional Delegation	Com. Ball	information concerning Loring AFB	Loring AFB	DC	31 May 91	31 May 91	closed
926	Dale Gerry of sen. Cohen office	Wendi petsinger	testimony of Sen. William Cohen, 22 may 91	Loring afb	es file copy	24 may 91	30 may 91	closed
1052	Peter Grossi, National Vice President of AFGE	chr	testimony regarding Loring AFB	Loring AFB	ES	29 May 91	31 May 91	closed
1099	bruce blaisdell	col purser	loring AFB itinerary	Loring AFB	da-she will fax to appropriate people	30 may 91		closed

ControlNumber	From	To	Subject	BASE	ActionAgency	DateRcvd	SuspDate	Status
1203	Com stuart	Sen. mitchell	thanks for breakfast	Loring afb	es file		5 June 91	closed
* 1241 REPEAT	Maine Congressional Delegation	chr	info concerning Loring AFB	Loring AFB	DC		14 June 91	closed
1295	Loring AFB	Paul Hirsch	SAC installations	Loring AFB	es file copy	4 June 91		closed
* 1449 REPEAT	Maine Congressional delegation - cohen, mitchell, andrews, snowe	com stuart	thanks for visiting	loring afb	es		11 june 91	closed
1790	Donald B. Rice, Sec. of Air Force	chr		Loring AFB	sd		20 june 91	closed
* 1888 REPEAT	Maine Delegation	chr	attached report with additional info on Loring afb	Loring AFB	sd/es		24 june 91	closed
1922 REPEAT	Edwin H. Pert, Clerk of House of Maine	chr	Joint Resolution	Loring AFB	es info copy	21 June 91		closed
* 2245	chr	Sen. George Mitchell	info he provided commission for Maine delegation	Loring AFB	ES info only	29 June 91		closed
1698	Rep. David O'B Martin	chr	Plattsburgh v. Loring AFB	Plattsburgh AFB, Loring AFB	dc		17 june 91	closed

ControlNumber	From	To	Subject	BASE	ActionAgency	DateRcvd	SuspDate	Status
2264	Sharon Page, President Limestone Chamber of Commerce	Chr	Extending an invitation to visit quality of life and amenities available to military personnel at Loring AFB	Loring AFB	GC	8 July 91	11 July 91	closed
2505	Sen. William Cohen	chr	Request for info on Loring AFB	Loring AFB	ES	9 sept 91	11 sept 91	closed
2589	Preti, Flaherty, Beliveau & Pachios; Richard S. Cohen, United States Attorney and David R. Collins, Asst. U.S. Attorney	Commission	Verified Complaint for Declaratory Judgment and Preliminary Injunctive Relief per Loring AFB	Loring AFB	Counsel	3 Jan 92		open
2452	USAF	Paul Hirsch	copies of letters from Dept. of Air Force sent to members of congress	primarily Loring afb	es file copy	22 aug 91		closed

LORING AIR FORCE BASE

FACTOR/ISSUE	DoD POSITION	COMMUNITY POSITION	R&A STAFF FINDINGS
LOCATION ADVANTAGE FOR MISSIONS	BASE GIVEN HIGHEST RATING POSSIBLE	DID NOT GIVE ENOUGH WEIGHT FOR LOCATION BENEFITS ON STRATEGIC CONVENTIONAL NORAD STAGING TANKER SEA CONTROL	MISSION EFFECTS STRATEGIC-36 MINUTES 3-5% OF MISSION CONVENTIONAL-36 MINUTES - 3-5% OF MISSION NORAD-WORST CASE SCENARIO, NO WARNING, THERE IS A 0-17% DEGRADATION OF MISSION FROM PLATTSBURGH TANKER-VERY LIMITED BENEFIT, CLOSER TO REFUELING STAGING AREA SEA CONTROL-10% LONGER DURATION
PARKING OF AIRCRAFT	SAME NUMBER OF AIRPLANES CAN BE PARKED AT BOTH BASES	CONTENDS THAT BECAUSE THEY HAVE MORE SPACE THEN CAN DO BETTER THAN PLATTSBURGH	BOTH CAN PARK SAME NUMBER OF PLANES. PLATTSBURGH'S LARGER RAMP ENABLES IT TO HANDLE AND SERVICE AIRPLANES EASIER

LORING AIR FORCE BASE

FACTOR/ISSUE	DoD POSITION	COMMUNITY POSITION	R&A STAFF FINDINGS
OVERALL ASSESSMENT	ONE OF THE LOWEST RATED BASES IN THE STRATEGIC CATEGORY	NOT ADDRESSED	ONE CRITERIA RATING CHANGED IN LORING'S FAVOR. PLATTSBURGH REMAINS HIGHER OVERALL RATING
FORCE STRUCTURE	B-52 STRUCTURE IS BEING REDUCED	IDEAL LOCATION FOR STRATEGIC FORCES	SPREADING FORCE STRUCTURE LEADS TO INEFFECTIVE USE OF FACILITIES
STRATEGIC LOCATION	ONE OF THREE BASES WITH A STRONG STRATEGIC POSITIONING	CLOSEST BASE TO POTENTIAL CONFLICT AREAS EAST OF U.S. & STRATEGIC TARGETS WEST OF THE URALS	BASE GIVEN AS HIGH A RATING AS POSSIBLE FOR STRATEGIC LOCATION
RAMP SPACE	331,477 SQUARE YARDS	1,185,966 SQUARE YARDS BASED ON SAC REAL PROPERTY RECORDS	RAMP SPACE IS 331,477 SQ YARDS. 1.2 M IS AN ERROR IN SAC REAL PROPERTY RECORDS

LORING AIR FORCE BASE

FACTOR/ISSUE	DoD POSITION	COMMUNITY POSITION	R&A STAFF FINDINGS
NUMBER OF RUNWAYS	ONE FULLY OPERATIONAL RUNWAY AND ONE PLS RUNWAY	TWO FULLY OPERATIONAL RUNWAYS	ONE FULLY OPERATIONAL RUNWAY AND ONE PLS RUNWAY
BASE FACILITIES	CAPACITY HIGH. CONDITION BELOW AVERAGE. COST TO IMPROVE HIGH	NOT ENOUGH CREDIT FOR IMPROVEMENTS. POOR FACILITIES INCORRECTLY INCLUDED. COST LOW.	ADJUSTMENTS MADE. LORING'S BASE FACILITIES RATING RAISED FOR CAPACITY, LOWERED FOR CONDITION AND COST
LIMITED PEACETIME TANKER UTILITY	LOCATED FAR FROM AIRCRAFT USED FOR PEACETIME RECEIVER TRAINING	NOT ADDRESSED	LOCATION PUTS THE BASE AT A DISTINCT DISADVANTAGE FOR TANKER TRAINING
POOR ACCESS TO BOMBING RANGES	FURTHEST SAC BASE FROM BOMBING RANGES	NOT A SIGNIFICANT FACTOR BECAUSE IT IS ONLY DONE TWICE A YEAR	DISTANCE IS A DISADVANTAGE FOR PRACTICING BOMBING TRAINING

LORING AIR FORCE BASE

FACTOR/ISSUE	DoD POSITION	COMMUNITY POSITION	R&A STAFF FINDINGS
ECONOMIC IMPACT	CONSIDERED ONE OF THREE WORST AFFECTED BASES ECONOMICALLY	AIR FORCE FAILED TO ADEQUATELY CALCULATE THE ECONOMIC IMPACT	ECONOMIC IMPACT WILL BE SEVERE. COUNTY WILL HAVE TROUBLE RECOVERING
KEEP BOTH BASES OPEN	ONLY 2 OF 3 NORTHEAST BASES NEEDED. EXTRA COST WOULD BE $62M PER YEAR TO KEEP ALL 3	KEEP ALL THREE BASES OPEN TO GIVE SAC MAXIMUM FLEXIBILITY	FORCE STRUCTURE DICTATES THAT ONE OF THREE BE CLOSED
WEATHER CONDITION	ONE OF THE THREE BASES WITH THE WEATHER RATING	NOT ADDRESSED	ADVERSE WEATHER EFFECTS MAY UNDER STATED
AIRSPACE	NO RESTRICTION ON AIRSPACE	NOT ENOUGH EMPHASIS GIVEN	HIGHEST RATING POSSIBLE. COMPETING BASES RATED LOWER

Air Force Team

SUBJECT: GENERAL COMPLIANCE OF AIR FORCE METHODOLOGY

PURPOSE:

- RECOMMENDATIONS TO COMMISSION
- ANSWER " DID AF METHODOLOGY....
  - -- SUPPORT FORCE STRUCTURE PLAN?
  - -- SUPPORT DOD CRITERIA?
  - -- APPLIED CORRECTLY?
  - -- ARE THERE ANY FLAWS?

PROCESS:

- AIR FORCE PROCESS
  - -- STRUCTURED
  - -- BASED ON ACT AND DOD CRITERIA
- TEN MAN EXECUTIVE GROUP
- ALL BASES OVER 300 CIVILIANS
- DATA FROM QUESTIONAIRES
- CATEGORIZATION OF BASES
- CAPACITY ANALYSIS-> EXCLUSIONS
- MILITARY REQUIREMENTS-> EXCLUSIONS
- EIGHT CRITERIA/SUBELEMENTS/COLOR CODING
- RANKING/GROUPING-> SECAF
- SECAF DECISION

FINDINGS:

- ALL BASES CONSIDERED
- SEQUENTIAL APPLICATION
  - -- 300 CIVILIANS
  - -- CATEGORIZATION
  - -- CAPACITY ANALYSIS
  - -- 1-3 CRITERIA
  - -- 1-8 CRITERIA
- 300 CIVILIAN
  - -- 208 -> 108
  - -- DMA?
- CATEGORIZATION
  - -- BY MISSION AND CAPABILITIES/ATTRIBUTES
  - -- CONSISTENT WITH FSP AND SUPPORT REQUIREMENTS
  - -- CATEGORIES REASONABLE
- CAPACITY ANALYSIS
  - -- TOP DOWN BY CATEGORY
    - --- HISTORIC LOADING
    - --- FS PLAN
    - --- PROJECTED LOADING
    - --- MILITARY JUDGEMENT
  - -- FACTORS
    - --- 40/72
    - --- PRODUCTION TO SUPPORT FSP
    - --- 3 TFW EXCESS
    - --- PROJECTED WORK LOAD
  - -- AIR FORCE VALIDITY CHECK (5 TAC, 6 SAC, 1/1 TN)
  - -- OUR REVIEW SUPPORTED AIR FORCE

- 3 MILITARY CRITERIA
  - -- MILITARILY/GEOGRAPH UNIQUE
  - -- MISSION ESSENTIAL
  - -- 12 BASES SUPPORTABLE AND REASONABLE
- ALL EIGHT CRITERIA
  - -- SUBELEMENTS (REPRESENTATIVE)
    - --- SUBJECTIVE/OBJECTIVE
    - --- STANDARDS (REASONABLE)
  - -- CRITERIA RATING CONSENSUS/VOTE
  - -- COBRA (NO SIGNIFICANT FLAWS)
  - -- GROUPING/RANKINGS SUBJECTIVE RATING CONSENSUS
  - -- OPTIONS PROVIDE INDICATOR

CONCLUSIONS:

- CONSIDERED BOTH FORCE STRUCTURE PLAN AND DOD CRITERIA
- SEQUENTIAL PROCESS POTENTIALLY FLAWED
  - -- NO BASES MISSED
  - -- TOP DOWN CAPACITY ANALYSIS NEGATES IMPACT
- CATEGORICAL EXCLUSIONS REASONABLE AND SUPPORTABLE
- CATEGORICAL EXCLUSIONS COMPATIBLE WITH TOP DOWN CAPACITY ANALYSIS
- REMAINING BASES EVALUATED AGAINST ALL CRITERIA
- CLOSURE CANDIDATES BASED ON ALL CRITERIA
- SUBELEMENTS MINIMIZED ONE DTA POINT ISSUE
- DOD GUIDANCE DID NOT FLAW PROCESS

RECOMMENDATION

- COMMISSION SHOULD EMBRACE AIR FORCE METHODOLOGY

GENERAL COMPLIANCE
AIR FORCE TEAM

PURPOSE

To recommend to the Commissioners whether or not the Air Force methodology supports the force-structure plan and the eight Department of Defense (DoD) criteria; whether the methodology was applied properly; whether the methodology was flawed and, if flawed, what course of action is appropriate.

PROCESS

The Air Force developed a structured process founded on the Defense Base Closure and Realignment Act of 1990 and subsequent guidance from the Office of the Secretary of Defense (OSD). The OSD provided guidance to the services through five procedure/policy memorandums, which provided the basic framework for the services' closure and realignment process. The Secretary of the Air Force initiated the Air Force process by appointing a Base Closure Executive Group (BCEG) of ten senior military (general officers) and civilian (Senior Executive Service) officials with a wide cross-section of expertise.

The BCEG reviewed all Air Force bases, from the Active and Reserve Component, that have at least 300 full-time, DoD civilian authorizations. The BCEG based its analysis on data provided by the individual bases in response a standard questionnaire. The BCEG reviewed and approved the content of these questionnaires. This data was validated by the Major Commands, the Air Staff, and through direct challenge by the BCEG members. The Air Force Audit Agency validated the process through on-site consultation with the BCEG.

The Air Force then categorized each base according to its predominant mission and analyzed each base and category for excess capacity according to the DoD force-structure plan. Base categories and subcategories with no excess capacity were recommended to, and approved by, the Secretary of the Air Force for exclusion from further closure study. The BCEG then evaluated all remaining bases according to the first three criteria (military requirements). This analysis highlighted some bases with unique missions and special geographic or military significance. The BCEG similarly recommended these bases to the Secretary of the Air Force for exclusion from further closure study.

The BCEG examined all remaining Active Component bases according to the eight criteria established by OSD, and approximately 80 subelements developed by the Air Force. The Air Force developed subelements to provide specific data points for

each criterion. Each member of the BCEG color-coded every subelement or approved cost estimates for each base. The group then assigned overall criteria color-code scores (by consensus or vote). The group assigned the relatively large Flying-Tactical and Flying-Strategic subcategory of bases to one of three groups in order of desirability to retain. These bases were further analyzed by assessing their relative value according to five or six military criteria options. The BCEG members continually assessed the potenial for intercommand and interservice utilization by meeting periodically with appropriate command and service representatives.

The Secretary of the Air Force, with advice of the Air Force Chief of Staff and in consultation with the BCEG, selected bases for closure from the options developed by the BCEG.

FINDINGS

The Air Force assessed all installations in the United States, its territories and possessions. The methodology involved a sequential application of decision points. Bases eliminated by early steps in the process were not subjected to further closure study, but were considered for possible realignment actions. The steps and decision points in the process were:

- Determination of eligibility for closure consideration (the "300+" civilian authorizations requirement)
- Categorization of bases (force-structure plan)
- Capacity analysis (force-structure plan)
- Assessment of the first three criteria
- Assessment of all eight criteria

300 Civilian Threshhold: The first decision point was the statutory requirement to consider all bases with at least 300 full-time civilian DoD employees. Bases not exceeding the "300+" threshold were eliminated from further consideration. The Air Force is responsible for 208 installations in the United States. Only 108 of these bases exceed the "300+" threshold, and all but one of these was studied for closure or realignment. The one exception was an Air Force-owned, Defense Mapping Agency-operated facility (The DMA Aerospace Center) in St. Louis, Missouri. Because the DMA Aerospace Center is a Defense Mapping Agency facility, the Air Force did not include it in its analysis.

Placement into Categories: The next two steps consisted of evaluating the remaining bases against the force-structure plan. In the base-categorization step, bases with similar missions or capabilities and attributes were grouped into categories and, when appropriate, subcategories. The result was five major categories; three of the major categories had subcategories. The 12 categories/subcategories were consistent with the force-

structure plan and associated support requirements. The BCEG assigned each multimission base to a category based upon subjective judgment of which was the primary mission of the base. The assignment of bases to categories appears reasonable.

Capacity Analysis: The BCEG then used the force-structure plan as a baseline to analyze the capacity by category. It accomplished this with a "top-down" methodology. The specific approach was based upon integration of historical base loading, the effectiveness of current base loading, the force-structure Plan, projected base loading and reasoned military judgment. The Air Force began with the assumption that the current base structure-force structure match is correct. The Air Force then balanced the force structure drawdown, weighed against an optimal average base loading of 72 fighter or 40 "heavy" (bomber, tanker, transport) aircraft per base, to determine the approximate number of bases to close by category. The Air Force determined it had the following excess bases: five Tactical, six Strategic, one Flying Training, and one Technical Training. The Mobility category was excluded since its force structure did not change significantly. Our analysis supports the conclusions of the Air Force's capacity analysis.

To check the validity of the above process, the Air Force reviewed its force structure-base structure match by category to ensure that the remaining bases adequately supported the force structure. During this latter assessment, the Air Force factored in other specific requirements. This included the need to protect an excess capacity in tactical fighter wings of two to three to absorb units currently stationed overseas which may have to return to the CONUS.

In those categories that did not relate directly to force structure, the Air Force analyzed the capacity based on projected work load resulting from the force-structure plan. Categories without excess capacity were excluded from further consideration for closure.

Compliance with Criteria: The next step, assessing the first three criteria, was conducted in response to OSD policy to consider excluding bases because they are "militarily/geographically unique or mission essential." This step was based on the subjective judgement of the BCEG. Bases selected by this process passed both reasonableness and supportability tests (see attachments). This resulted in the exclusion of 12 additional bases from further closure consideration.

The final step, full analysis of the eight criteria, was accomplished for the remaining 72 bases. The process was a combination of subjective and objective assessments. Where applicable, subelements were established for each criteria by

category. These subelements accurately represented the criteria but were not all inclusive. The BCEG established standards to measure each subelement. The standards reasonably measured the base's ability to meet the criteria. The BCEG used these standards to rate each subelement. The BCEG then established criteria ratings by a consensus/voting process. Consistent with DoD direction, the Air Force used the COBRA model to estimate costs.

We have not found any significant flaws in the data used to feed the COBRA model. Additional details on unique aspects of criteria 5-8 are at attachment 2. Once ratings and cost figures for each criteria had been established, overall groupings/ratings for the bases within the category were established by agreed-upon subjective weighing of criteria and a consensus vote of the BCEG. Accuracy and replicatability of this will be checked as part of specific compliance.

In this final step, the Air Force used grouping instead of ranking as a means of showing the natural breaks in the larger categories. Similarly, the development of options for the Flying-Tactical and Flying-Strategic subcategories indicated to the senior Air Force leadership the impact of changing the weight of individual criteria. These two actions, along with the use of color ratings, enabled the Air Force leadership to exercise reasoned military judgement.

The Air Reserve Component (ARC) review was significantly different, reflecting the unique considerations of recruiting and the ARC's special relationship with state authorities and local communities. The BCEG then reviewed current ARC locations for opportunities to consolidate. Consolidations offering the most promise were studied in-depth for savings. In those cases offering the best savings, candidate actions were assessed against the eight criteria prior to submitting the base as a closure candidate.

Consistent with both the DoD guidance and the legislation, all Air Force bases recommended for closure from both the Active Component and the ARC were from categories subject to full evaluation (evaluated against all eight criteria).

CONCLUSION

The Air Force methodology and process adequately considered both the Force-Structure Plan and the eight DoD Criteria. The process was consistent with DoD guidance. The process treated all bases equally in arriving at closure recommendations.

The sequence of the Air Force decision points did create the potential for a flawed recommendation. Specifically, eliminating bases with fewer than 300 civilians before conducting the capacity analysis could have provided an invalid conclusion. However, review of Air Force bases failed to reveal any under-threshhold bases which could have changed the capacity analysis. Also, the top-down capacity methodology would have negated the impact of any omitted base.

In a similar vein, the use of the top-down capacity analysis complemented the exclusion portion of the Air Force methodology. Avoiding a bottom up assessment meant that excluding bases had no effect on the capacity analysis.

The categorical exclusions are consistent with DoD guidance and are reasonable and supportable. In fact, the Air Force decision to follow DoD guidance did not flaw the service methodology.

The Air Force also limited the potential for the omission of one data element to invalidate the process by using more than eighty subelements to represent the important characteristics of the criteria.

RECOMMENDATIONS

1. That the Commission accept the Air Force methodology as meeting requirements of general compliance with the law and with the DoD Criteria.

2. That the Commission request the Department of Defense to review all DoD agencies (Defense Mapping Agency, Defense Logistics Agency, etc) for closure or realignment for the 1993 Commission.

3. The Commission note the potential flaw in the service process in addressing the 300 civilian factor in the final report.

Document Separator

ES 14 June 91 - ES - 001702

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT OF FLORIDA
ORANGE COUNTY, FLORIDA

ANTHONY R. MARTIN

CASE NUMBER CI 91-4407

Plaintiff(s)

vs.

SECRETARY OF DEFENSE,

SECRETARY OF THE NAVY,

DEFENSE BASE CLOSURE COMMISSION

Defendant(s)

Suite 400
1625 K St
ph. 653-0823

SUMMONS:
PERSONAL SERVICE
ON AN INDIVIDUAL

TO: DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
WASHINGTON, DC

IMPORTANT

A lawsuit has been filed against you. You have 20 calendar days after this summons is served on you to file a written response to the attached Complaint in this Court. A phone call will not protect you; your written response, including the above number and named parties, must be filed if you want the Court to hear your case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court you must also mail or take a carbon copy or a photocopy of your written response to the "Plaintiff/Plaintiff's Attorney" named below:

TO EACH SHERIFF OF THE STATE: You are commanded to serve this Summons and a copy of the Complaint in this lawsuit on the above-named Defendant(s).

Dated on May 20 . 19 91 .

FRAN CARLTON
Clerk of the Circuit and County Court
Orange County, Florida

By: LINDA N. AMIO D.C.
CIRCUIT COURT SEAL Deputy Clerk

31-33 CR (9/89)

IMPORTANT: SPANISH AND FRENCH VERSIONS ON THE REVERSE SIDE OF THIS SUMMONS

ES 14 June 91 - ES- 001702

IN THE CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA
Circuit Civil Number:

ANTHONY R. MARTIN.

Plaintiff,

vs.

SECRETARY OF DEFENSE,
SECRETARY OF THE NAVY,
DEFENSE BASE CLOSURE AND
REALIGNMENT COMMISSION,

Defendants.
_____/

COMPLAINT

1. Jurisdiction

This court has jurisdiction pursuant to 5 USCA § 702 and 28 USCA § 1331.

2. Factual Allegations

a. Congress has established the Defense Base Closure and Realignment Commission to process and evaluate which defense facilities in the United States should be closed, moved, or otherwise affected.

b. The procedures of the Commission and the statute creating the Commission impose various administrative and procedural duties on the Secretary of Defense and Secretary of the Navy.

c. It is axiomatic that an agency is bound by its own rules and procedures and must faithfully follow them, see e.g. U.S. ex rel Accardi v.Shaughnessy, 347 U.S. 260 (1954).

d. The Orlando, Florida area is host to a major Naval Training Center ("NTC").

e. There is a proposal to close the Orlando NTC.

f. Defendant Secretary of the Navy has failed to follow proper procedures for placing the NTC on the list of facilities which can be closed.

g. The NTC does not meet the statutory and administrative criteria and parameters for closure, and is erroneously being considered for closure.

3. Legal Claim

The court has the power under § 702 to mandate that the defendants follow their own procedures, and that they review and recalculate the figures on which the NTC was erroneously placed on the potential closure list.

4. Standing

Plaintiff has standing to bring this action and he is within the zone of interests sought to be protected by the relevant, applicable statutes, see e.g. Air Courier Conference v. Am. Postal Workers Union, ____U.S.____,111 S. Ct. 913 (1990).

5. Relief

Plaintiff asks that the court enter a declaratory judgment, and any necessary and appropriate injunctive relief,to mandate that the defendants review their actions and recalculate the figures on which the NTC was erroneously placed on the potential closure list, so that it may removed from the list.

Respectfully submitted,

ANTHONY R. MARTIN
Post Office Box 1132
Palm Beach, FL 33480
(407) 833-2955

May 20, 1991

Document Separator

M E M O R A N D U M

March 17, 1993

To: Chairman Courter

From: Mary Ann Hook, Deputy General Counsel MH

Subject: Decision on Seneca Army Depot

****

Last week, the United States Court of Appeals for the Second Circuit removed the preliminary injunction that was in place stopping the reduction-in-force (RIF) at Seneca Army Depot.

The Court has not yet issued its written opinion. However the opinion of Dave Anderson, Civil Division, Department of Justice is that in removing the injunction the Court has agreed that the RIF proposed by the Army does not fall under the Base Closure Act.

Justice's argument was that the Seneca RIF or reduction-of-force resulted from a workload adjustment and is not within the DBRAC's definition of realignment.

A formal opinion should be issued shortly by the Court.

Memorandum to Sheila Cheston, General Counsel MA.
From: Jeff Patterson, Assistant Counsel JP
Date: June 17, 1993
Re: Opinion of 2d Circuit in Seneca v. Cheney

I spoke with the clerk of the U.S. Court of Appeals for the Second Circuit today and she stated that no opinion was issued with the court's order vacating the district court's decision.

However, the clerk said the court has indicated that an opinion would be "issued in due course." No opinion has been issued as of this date.

COUNTY OF SENECA, SAVE OUR SENECA, KEEP OUR BASE IN ROMULUS ALIVE, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2546, and SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, Plaintiffs, v. RICHARD CHENEY, as the Secretary of Defense, MICHAEL STONE, as the Secretary of the Army, and SUSAN LIVINGSTONE, Assistant Secretary of the Army, Defendants.

92-CV-6380L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

806 F. Supp. 387; 1992 U.S. Dist. LEXIS 17350

November 9, 1992, Decided

COUNSEL: [**1] Attorney for Plaintiffs: Edward F. Premo, II, Esq.

Attorneys for Defendants: Susan Korytkowski, Esq., Brian McCarthy, Assistant United States Attorney.

JUDGES: LARIMER

OPINIONBY: DAVID G. LARIMER

OPINION: [*388] DECISION AND ORDER

Agencies of the Government -- just like ordinary citizens -- must comply with the law regardless of whether it is inconvenient or burdensome to do so. Because I believe that the Secretary of the Army and the Secretary of Defense acted contrary to a statute recently passed by Congress governing the closure or realignment of military installations, I hereby issue an injunction in order to guarantee compliance with the law.

This is an action for declaratory and injunctive relief involving claims under the Defense Base Closure and Realignment Act of 1990 ("BRAC"), Pub. L. 101-510, 104 Stat. 1808, the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. @ 4321 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. @@ 702 & 706(2), and the Declaratory Judgment Act, 28 U.S.C. @ 2201. Plaintiffs n1 seek to enjoin the Secretary [*389] of Defense and the Secretary of the Army (sometimes collectively "the Secretary") from taking [**2] any actions in connection with the elimination and reduction of missions or functions at the Seneca Army Depot ("SEAD" or "the base") in Romulus, New York that would result in the elimination of hundreds of civilian positions at the base.

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n1 Plaintiffs are: the County of Seneca, a political subdivision of the State of New York, and its Board of Supervisors; Save Our Seneca ("SOS"), an unincorporated association of individuals and businesses in Seneca County; Keep Our Base in Romulus Alive ("KOBRA"), an unincorporated association of concerned citizens and civilian employees working at SEAD; American Federation of Government Employees Local 2546 ("Local 2546"), the labor union for non-managerial civilian employees at SEAD; and Seneca County Industrial Development Agency, a public benefit corporation.

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This action was precipitated by the Secretary's decision to change the nature of the work performed at SEAD. This change by any analysis is a major one which would eliminate approximately 70 percent of the authorized civilian [**3] positions at the base. Plaintiffs seek to enjoin this unilateral action by the

Secretary on the grounds that the defendants acted in violation of BRAC and NEPA. In essence, plaintiffs claim that the Secretary is "realigning" SEAD without complying with the rigid procedures established by Congress in BRAC for the closure or realignment of military installations.

Defendants oppose this action on the grounds that their actions are not subject to judicial review, and, alternatively, that BRAC and NEPA do not apply to the actions occurring at SEAD. Pending before me now is plaintiffs' motion for preliminary injunctive relief under Fed.R.Civ.P. 65.

For the reasons discussed below, plaintiffs' motion is granted and a preliminary injunction will issue to bar the Army and the Department of Defense from carrying out the reductions at SEAD.

HISTORY OF SEAD

SEAD, which was built in 1941 and known originally as the Seneca Ordnance Depot, is an Army depot under the command of the Depot System Command ("DESCOM"), one of the subordinate commands of the Army Material Command ("AMC"). DESCOM is responsible for all the Army depots in the United States and abroad, and AMC is the major [**4] Army command responsible for the research, development, acquisition, and logistics for Army material. Historically, SEAD has had two primary missions or functions relating to: (1) special weapons; and (2) the rehabilitation of industrial plant equipment ("IPE"). The special weapons mission required SEAD to store, issue, maintain, and supply special weapons, such as ground-launched nuclear missiles and nuclear artillery shells, n2 and conventional munitions, including bullets, bombs, and shells. There are 442 civilian and 387 military personnel positions associated with this mission. The IPE rehabilitation mission required SEAD to maintain and store industrial equipment, which consists, generally, of large machine tools used by the Department of Defense ("DOD") industrial organizations and contractors, including depots, arsenals and ammunition plants. There are 143 civilian personnel positions associated with this mission. In addition, the 833d Ordnance Company, a munitions maintenance unit, was a tenant organization stationed at SEAD.

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n2 Although the Department of Defense neither confirms nor denies the existence of special weapons at any military installation, it acknowledges that SEAD has special weapons "capability."

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[**5]

Between 1990 and 1991, the DOD and the Army made several decisions that were intended to restructure SEAD. First, in 1990, the DOD planned a gradual reduction in its special weapons that was to start in 1991 and end in 1998. In March 1991, DOD determined the number of special weapons that it wanted to retain. Based on this determination, the Army concluded that its depot system's special weapons missions should be reduced accordingly. AMC therefore ordered DESCOM to design a plan to consolidate the Army's special weapons mission at a single site. The report submitted by DESCOM recommended the consolidation and storage of special weapons at a depot other than SEAD.

Next, on July 25, 1991, Assistant Secretary of Defense Colin McMillan issued a memorandum ordering that all depot IPE [*390] maintenance functions be consolidated in Defense Logistics Agency ("DLA") facilities. SEAD was not such a facility. DLA was scheduled to take the lead in coordinating with the Army the transfer of all IPE depot maintenance workloads to DLA facilities. The consolidation of IPE maintenance was expected to result in the elimination of 122 civilian positions at SEAD by October 1, 1992.

Finally, the [**6] 833d Ordnance Company was scheduled to be inactivated on September 14, 1992. The inactivation was expected to result in the loss of approximately 75 military positions at SEAD.

In light of the proposed actions, on August 27, 1991, AMC directed DESCOM to conduct a study under Army Regulation ("AR") 5-10, which specified the procedures that had to be followed and the documentation that would be required before the Army reduced its civilian employment by 50 persons or 10%, whichever was less. The study's focus was on the DESCOM missions and workloads that would be affected by a reduced special weapons mission, a consolidation of IPE rehabilitation work, and the inactivation of the 833d Ordnance Company. A study team was subsequently organized to begin collecting data.

Not long after the study began, however, President George Bush made a significant announcement concerning this country's use of nuclear weapons. This announcement, which reflected historic international agreements with the Soviet Union, would have significant impact on this country's arsenal of nuclear weapons. President Bush announced "a series of sweeping initiatives affecting every aspect of our nuclear forces [**7] on land, on ships, and on aircraft." Defendants' Memorandum in Opposition to Plaintiffs' Motion ("Defendants' Mem.") at 13 (quoting Address to the Nation on Reducing U.S. and Soviet Nuclear Weapons (Weekly Comp. Pres. Doc.) 1346, 1349 (Sept. 27, 1991)). As part of these initiatives President Bush directed that "the United States eliminate its entire worldwide inventory of ground-launched . . . nuclear weapons." Id. (alterations in original).

Following President Bush's announcement, defendant Richard Cheney, the Secretary of Defense, in a memorandum dated September 28, 1991, directed the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Undersecretaries of Defense and Assistant Secretary of Defense for Command, Control Communications and Intelligence to implement the President's decision. The memorandum ordered that the following actions be completed as soon as possible:

1. The United States armed forces shall eliminate its inventory of ground-launched theater nuclear weapons.

2. Tactical nuclear weapons shall be removed from all surface ships, attack submarines, and land-based naval aircraft bases.

3. United States strategic bombers shall [**8] stand down from their alert postures and their nuclear weapons shall be removed and stored in secure areas.

4. The United States intercontinental ballistic missiles scheduled for deactivation under the terms of the Strategic Arms Reduction Treaty shall stand down from alert.

5. Development of the mobile Peacekeeper ICBM rail garrison system and the mobile portions of the small ICBM program shall be terminated.

6. The nuclear short-range attack missile program (SRAM-II) shall be terminated.

7. A unified Command Plan with a United states strategic Command to which all elements of the U.S. strategic deterrent are to be assigned shall be submitted to [the Secretary].

Declaration of Robert O. Frantz, Ex. A.

As a result of the President's announcement and the Secretary's implementing directives, the prior decisions concerning the realignment of SEAD's special weapons mission were scrapped. It was then determined, according to defendants, that rather than "realign" the special weapons mission, the mission or function was to be eliminated completely. Consequently, AMC ordered DESCOM to change the focus of the [*391] AR 5-10 study that had been ordered earlier to account

for this [**9] change concerning the special weapons mission at SEAD.

DESCOM's study team submitted a preliminary AR 5-10 report on October 31, 1991. According to defendants, AMC found that the report was not properly conducted according to Army regulations. Consequently, AMC compiled additional information and performed further analysis to ensure that the final report conformed to all AR 5-10 requirements.

Defendants claim that as part of this analysis, AMC's Base Realignment and Closure Office analyzed whether BRAC procedures had to be followed. The decision was that BRAC did not apply to the proposed actions for SEAD. AMC subsequently completed the AR 5-10 report and submitted it to the Army on December 16, 1991.

The Army reviewed the final report and performed additional analysis. It concurred in the report's findings and recommendations. In addition, according to defendants, Congressman Frank Horton of New York requested that the General Accounting Office ("GAO") review the Army's proposals concerning SEAD before a final decision was made. The GAO reviewed the proposal and, allegedly, concurred with it.

On July 2, 1992, the Secretary of the Army approved the recommendations which [**10] changed the functions and missions of the base, with the resulting immediate termination of approximately 560 civilian employees. The Army's plan included the elimination of the special weapons mission at SEAD and a large-scale reduction and relocation of the IPE rehabilitation function. The elimination of the special weapons mission resulted in the elimination of 442 civilian and 387 military positions at SEAD. In addition, SEAD was scheduled to be downgraded from a "depot" to a "depot activity." According to plaintiffs, as a result of this downsizing, the number of civilian personnel authorized at SEAD will drop from 847 to 285 -- a reduction of nearly 70 percent -- and the number of military employees will drop from 487 to 3.

Also on July 2, 1992, defendant Susan Livingstone, an Assistant Secretary of the Army, briefed a delegation of New York Congressmen on the AR 5-10 study and the Army's plans to eliminate civilian positions at SEAD. The Army also advised SEAD civilian employees of their rights under reduction-in-force ("RIF") procedures, and it notified those employees who would be adversely affected by the RIFs of their entitlement to participate in the Priority Placement [**11] Program ("PPP"), n3 and voluntary assistance programs. In addition, the Army obtained approval to allow early retirements under the Voluntary Early Retirement Authority ("VERA"), and communities affected by a RIF would be allowed to participate in a number of assistance programs sponsored by the federal government.

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n3 PPP, which is triggered when a RIF is initiated, is a program designed to give displaced DOD employees the opportunity to secure employment at other DOD facilities. Under the PPP, however, if an employee is given a job offer at another facility, he or she must answer within 72 hours, and if the offer is declined, the employee could lose certain benefits, depending on whether the offer was for a local facility or a distant facility.

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According to defendants, as of June 30, 1992, the movement of all special weapons from Europe was complete, and as of July 30, 1992, the special weapons storage mission of SEAD was eliminated. The Army is currently in the process of phasing out military positions associated [**12] with SEAD's special weapons mission.

PROCEDURAL HISTORY

Plaintiffs commenced this action and moved for a preliminary injunction by an Order to Show Cause on September 9, 1992. Oral argument on plaintiffs' motion was held on October 1, 1992. Then, on October 6, 1992, President Bush signed into law the 1993 Defense Appropriations Act ("Appropriations Act"). Pub.L.No. 102-396 (1992). The Senate Report that accompanied the Appropriations Act, S.Rep.No. 408, 102d Cong., 2d Sess. 40 (1992), contained the following language concerning the Army's actions at Seneca:

[*392] The committee is concerned by the piece-by-piece dismantlement of Seneca Army Depot. Therefore, the Committee prohibits the use of any DOD funds to plan for, or implement, the transfer, realignment, alteration, or downsizing of any mission or activity at Seneca Army Depot except as part of the base realignment and closure process.

The joint Conference Report, however, did not contain any language about SEAD, nor did the Appropriations Act itself. The parties were directed to brief the issue as to whether the language in the Senate Report had any effect on the pending litigation.

On October 9, 1992, apparently [**13] in response to the language in the Senate Report, defendant Michael Stone, Secretary of the Army, issued a press release declaring that the civilian reductions-in-force scheduled to be effective at SEAD on November 13, 1992 instead would be effective no earlier than February 11, 1993. n4 The Court held argument after issuance of the press release to clarify its ramifications.

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n4 The press release also noted that the extension will provide additional time to discuss the continuing use of SEAD and the availability of DOD and other federal assistance programs. Finally, the press release noted that the Army intended to explore all possible options for backfill potential at SEAD to replace those missions lost during the past year.

Late on Friday, November 6, 1992, defendants notified the Court that the RIF is now scheduled to take place on March 12, 1993. No VERA deadline has been established, although, the Army is in the process of obtaining a firm date.

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Defendants' counsel confirmed that the RIF would be postponed [**14] to a date no earlier than February 11, 1993, and that the time within which to select early retirement would be similarly postponed, although no exact date for selection was set. Defendants also asserted that participation in the PPP could not be postponed or deadlines extended for those who elected to participate because the program was in effect nationwide and employees at SEAD could not be given a preference.

DISCUSSION

1. Contentions of the Parties.

Plaintiffs claim in this action that defendants cannot reduce the civilian work force at SEAD on such a large scale without following the process and procedures established by BRAC.

Plaintiffs also contend that even if defendants were not bound by BRAC, their actions were still improper because they failed to comply with the requirements of NEPA. Specifically, plaintiffs contend that defendants were required to assess and study the impact their actions would have on the human environment and were obligated to mitigate such impact.

Defendants, in response, contend that their actions are not subject to judicial review. Specifically, defendants contend that their decision that the provisions of BRAC do not apply, [**15] and the decisions taken as a result of that are not subject to judicial review because such review would unduly interfere with the duties and responsibilities of the President as Commander-In-Chief. Therefore, the defendants argue, this action presents a nonjusticiable political question. Defendants further contend that Congress intended to preclude judicial review in the circumstances that exist here.

On the merits, defendants contend that their determination that BRAC does not apply is clearly correct because the reductions do not fit within the statutory requirements or are exempt under BRAC's provisions.

Therefore, defendants contend that plaintiffs have failed to satisfy the requirements for obtaining a preliminary injunction.

2. History Of The Base Closure And Realignment Process.

In 1990, in response to the need for a fair and timely process for closing and realigning military installations, Congress enacted BRAC. BRAC is the latest in a series of congressional attempts to regulate the complete or partial closure of military installations. It is the interpretation of [*393] BRAC that is at the heart of the dispute between the parties.

Congress's first legislative [**16] attempt to permanently regulate the process occurred in 1977, when it enacted 10 U.S.C. @ 2687. At that time, section 2687 prohibited the Secretary of Defense from closing or realigning any military installation, unless he first: (1) notified the Senate and House Armed Services Committees of the installations selected for closure or realignment; and (2) submitted to those committees an evaluation of the consequences of the closure or realignment. The Secretary had to wait at least 60 days before taking action on the closures, during which time Congress could act to prevent the closure or realignment. Congress enacted this provision, in part, because many Congressmen had come to believe that the Executive branch was using its base-closure power to punish uncooperative legislators. See 1991 Defense Base Closure and Realignment Commission Report to the President (hereinafter "1991 Commission Report") at 1-1. Under the 1977 version of section 2687, however, no bases were closed for the next eleven years.

Because of the deadlock created by section 2687, Congress, in 1988, [**17] enacted the Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. 100-526, 102 Stat. 2623 (1988) (the "1988 Act"), the immediate predecessor to BRAC. Under the 1988 Act, the Secretary of Defense no longer had the power to unilaterally choose which bases to close or realign. Instead, that power was vested in an independent commission that was to recommend bases for closure and realignment, and present those recommendations to the Secretary to either accept or reject the entire list of bases selected. If the Secretary approved the recommendations, Congress had 45 days within which to overrule the Secretary and reject the base closure recommendations.

The 1988 Act, however, did not establish a permanent process for closing or realigning military installations. Rather, it created a one-time exception to the process created in 1977 by section 2687.

In 1990, the Secretary of Defense proposed another round of closures. The Secretary's recommendations, however, raised some suspicions in Congress "about the integrity of the base closure selection process." H.R.Conf.Rep.No. 923, 101st Cong., 2d Sess. 705, reprinted in [**18] 1990 U.S.C.C.A.N. 3110, 3257. In fact, the House Report went so far as to note that "Secretary Cheney's announcement of candidates for base closure on January 29, 1990, was an example of the wrong way to close bases." H.Rep.No. 665, 101st Cong, 2d Sess. 341-42, reprinted in 1990 U.S.C.C.A.N. 3067.

As a result, Congress enacted BRAC in 1990. Its stated purpose was "to provide a fair process that will result in the timely closure and realignment of military installations in the United States." BRAC @ 2901(b). Under BRAC, there are scheduled to be three rounds of base closures and realignments, commencing in the years 1991, 1993, and 1995.

The procedure for closure and realignment are similar to the procedures created in the 1988 Act. An independent commission is required to convene in the years scheduled for base closures, and it is to review a list of installations that the Secretary has recommended for closure or realignment. In addition, the Secretary is required to submit to Congress and the Commission, for the fiscal years 1992, 1994, and 1996, a six-year force structure plan based on the assessment of probable threats to national security. @ 2903(a). The Secretary [**19] is also required to publish in the Federal Register, for public notice and comment, criteria to be used by DOD in making its recommendations for base closure or realignment. @ 2903(b).

Once the Commission receives the recommendations of the Secretary, it is required to conduct public hearings. @ 2903(d)(1). The Commission can deviate from the recommendations of the Secretary if the Secretary's proposal deviates from the force structure plan, and the Secretary's final criteria. @ 2903 (d)(2)(B). The Commission must then transmit its recommendations, along with a report explaining the recommendations [*394] that differ from those proposed by the Secretary, to the President for his review. @@ 2903(d)(2)(A) & (d)(3).

The President must then transmit to the Commission his report either accepting or rejecting, in whole or in part, the Commission's recommendations. @2903(e)(1). If the President approves the Commission's recommendations, he must also transmit to Congress a copy of the recommendations. @ 2903(e)(2). If the President disapproves the recommendations, the Commission must then submit a revised recommendation to the President for his consideration. @ 2903(e)(3).

If the President [**20] approves the revised list, he must transmit a copy of the revised recommendations to Congress. @ 2903(e)(4). If the President fails to send his list of recommended base closures to Congress by September 1 of any year in which the Commission sent him recommendations for closure, the base closure process for that year is terminated and no bases may be closed. @ 2903(e)(5).

Also, the Secretary may not carry out any closure or realignment recommended by the Commission if Congress enacts, within 45 days after the President transmitted the recommendations to it, a joint resolution disapproving such recommendations. @ 2904(b).

BRAC, like the 1988 Act, contains a provision exempting the participants in the BRAC process from the requirements of NEPA. BRAC provides that:

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

@ 2905(c)(1). The exception referenced in the above section provides that:

The provisions of the National Environmental Policy Act [**21] of 1969 shall apply to actions of the [DOD] under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated. @ 2905(c)(2)(A).

The base closure and realignment process under BRAC for 1991 began in April, 1991, when the Secretary submitted to the Commission his list of military installations that he recommended should be closed or realigned. SEAD was not

one of the installations on the Secretary's list. After the Secretary's recommendations were reviewed by the Commission, it transmitted its list of bases recommended for closure or realignment to President Bush, who approved all the recommendations. SEAD was not included in this list either. A proposal to disapprove the Commission's recommendations was defeated in Congress. Consequently, the Secretary was then authorized to commence closing and realigning the installations recommended by the Commission.

3. Justiciability.

The threshold issue in this action is one of justiciability. n5 Defendants [**22] contend that this Court lacks authority to review their actions. They contend that the matters in dispute relate to the conduct of foreign and military affairs and are, therefore, not reviewable by the judiciary since those functions are peculiarly within the province of the Executive branch. Defendants suggest that plaintiffs' remedy, if any, lies in either the Legislative or Executive branch of Government and that plaintiffs should seek redress there rather than through the judicial process. Implicit in this argument is defendants' reliance on the so-called political question doctrine.

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n5 Because the defendants do not dispute that plaintiff Local 2546 has standing, I need not address the question of standing on this motion. National Fed'n of Fed. Employees v. U.S., 284 U.S. App. D.C. 295, 905 F.2d 400, 403 n. 4 (D.C. Cir. 1990).

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I am not persuaded by defendants' contentions that this Court lacks jurisdiction to determine the dispute between these parties. The dispute essentially involves an [*395] interpretation [**23] of an act of Congress. There may well be certain decisions made by the President and the independent Commission that are not subject to judicial review, but the decision at issue here, that is, the Secretary's unilateral decision that BRAC did not apply, is certainly subject to judicial review.

It is certainly true, as defendants argue, that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of Navy v. Egan, 484 U.S. 518, 530, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988). Issues bearing directly on our national security and foreign policy have long been recognized as within the "province and responsibility of the Executive." Id. at 529 (quoting Haig v. Agee, 453 U.S. 280, 293-94, 69 L. Ed. 2d 640, 101 S. Ct. 2766 (1981)).

This deference to the Executive in his role as Commander-in-Chief of the Armed Forces, and to a lesser extent to Congress with its "power of the purse," is premised on the recognition that judgment-calls or policy decisions on issues relating to national security or foreign policy are best left to [**24] those with expertise in the area and to the "branches of government which are periodically subject to electoral accountability." Gilligan v. Morgan, 413 U.S. 1, 10, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973). See also Laird v. Tatum, 408 U.S. 1, 14-5, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972). "The Judiciary," the Supreme Court has noted, "is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986) (quoting United States ex rel. Joseph v. Cannon, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (footnote omitted), cert. denied, 455 U.S. 999, 71 L. Ed. 2d 865, 102 S. Ct. 1630 (1982)).

But certainly not every matter concerning the military or touching on politics requires the judiciary to stay its hand. Japan Whaling, 478 U.S. at 230. Although executive decisions relating to foreign relations are generally not subject to judicial review, "it is 'error to suppose that every case or controversy which touches foreign relations [**25] lies beyond judicial cognizance.'" Id. (quoting Baker v. Carr, 369 U.S. 186, 211, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). Similarly, "the fact that one facet of a decisionmaking process involves an exercise of discretion concerning military affairs does not insulate all aspects of that process from judicial review." Specter v. Garrett, 971 F.2d 936, 954 (3d Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3266 (Sept. 17, 1992) (No. 92-485). See also Falk v. Secretary of the Army, 870 F.2d 941, 944 (2d Cir. 1989) (noting that it is now agreed that the judiciary has jurisdiction to decide whether the Secretary of the Army exceeded or disregarded the powers Congress has delegated to him).

Furthermore, it has long been recognized that "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful [**26] activities of the military would go unnoticed or unremedied." Laird, 408 U.S. at 15-6. Indeed, the power of the Judiciary to review activities of the military that are alleged to be in direct violation of the law exists even if the military believes it was acting lawfully in times of war. See Duncan v. Kahanamoku, 327 U.S. 304, 90 L. Ed. 688, 66 S. Ct. 606 (1946) (Habeas corpus petition granted in favor of civilian petitioners imprisoned pursuant to military trials held during period of martial law, in the then Territory of Hawaii, following attack on Pearl Harbor because the military exceeded its authority by closing the civil courts), and Gilligan, 413 U.S. at 12. The mere fact that the Executive is acting in his capacity as Commander-in-Chief, without more, is an insufficient basis to bar review of a claim that the actions were unlawful. See Youngstown [*396] Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952) (upholding injunction against President Truman's seizure of the nation's steel mills).

When the issues presented by an action involve interpreting congressional legislation and protecting [**27] rights believed to have been infringed by an administrative agency's failure to comply with that legislation, the Judiciary is empowered to review the controversy. See 5 U.S.C. @ 702.

Indeed, in a matter such as the one involving SEAD, which revolves essentially around issues of statutory interpretation, the controversy is especially appropriate for review, for "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." Japan Whaling, 478 U.S. at 230. The Judiciary's role is not curtailed simply because the statute in question touches on matters traditionally regarded as belonging in the province of the Executive. Once Congress, acting within the bounds of its constitutional authority, enacts legislation that prescribes or prohibits certain conduct on the part of an administrative agency, it is within the power of the Judiciary, under the right of review granted under the APR, to address whether the agency has complied with the requirements established by Congress.

In Japan Whaling, the Supreme Court squarely addressed this issue. There, the Court [**28] was confronted with the question whether under the Pelly and Packwood Amendments, the Secretary of Commerce was required to certify that Japan's Whaling practices diminished the effectiveness of the International Convention for the Regulation of Whaling because Japan's annual harvest exceeded the quotas established under the Convention. Petitioners, the Japan Whaling Association, challenged the Court's authority to even address the question, on the ground that the issue was a nonjusticiable political question. The Supreme Court rejected petitioners argument noting that, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant

political overtones." Japan Whaling, 478 U.S. at 230.

In the context of BRAC, the issue of justiciability was discussed at length by the Third Circuit in Specter v. Garret, 971 F.2d at 953, a decision relating to the closure of the Philadelphia Naval Shipyard. Plaintiffs in that case claimed, in part, that the Government failed to follow proper procedures under BRAC in [**29] arriving at the decision to close the installation. Defendants, a group that included the Secretary of the Navy and the Secretary of Defense, argued that the court was barred from reviewing the matter because the plaintiffs' claims were nonjusticiable political questions.

The Third Circuit, relying on Japan Whaling, disagreed, noting that "while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review." Specter, 971 F.2d at 954.

The issues raised here, like those in Specter, concern whether or not the Department of Defense and the Department of the Army have acted in accordance with BRAC. Plaintiffs contend that defendants were required to go through the base closure and realignment process established by BRAC before implementing the reductions at SEAD. Defendants, in response, contend that BRAC does not apply because of the nature of the reductions and because of the changes in functions at SEAD. In defendants' view, because the so-called special weapons function has been eliminated pursuant to President [**30] Bush's directive, BRAC's procedures do not apply. Thus, at bottom, this action calls upon the court to engage in the quintessential judicial function of statutory interpretation; namely, whether BRAC applies to the defendants' actions, and, if so, whether defendants have acted in violation of the Act. As was the case in both Japan Whaling and Specter, the issues raised by this case are appropriate for judicial review.

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4. Judicial Review Under the APA.

I turn next to defendants' contention that this court lacks the authority to hear this action because Congress intended to preclude all judicial review under BRAC. Defendants contend that Congress's intent to preclude review is demonstrated not only by the legislative history of the Act, but also by the Act's objectives and the structure of the statutory scheme it created. Defendants focus, in particular, on the fact that BRAC represents a delicate compromise between the Executive and Legislative branches. They contend that this "balance" would be upset if the Judiciary were allowed to intervene.

I disagree. Judicial review under the APA was intended to address precisely the type of alleged non-compliance [**31] with specific statutory provisions which plaintiffs argue exist here, see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-77, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986) (attack on validity of administrative regulation was reviewable), and defendants have not overcome the presumption of judicial review created by the APA.

Not only have defendants failed to point to any expressed intent by Congress in BRAC or its legislative history to bar review of the type of claims brought here, but the statutory scheme created by BRAC weighs in favor of, and not against, allowing judicial review. If the Department of Defense were allowed to circumvent the base closure and realignment process simply by asserting that its actions do not fall under BRAC, the Act would be rendered meaningless, and the balance between the Legislative and Executive branches would be destroyed.

I find that the APA does apply to this action. First, the actions of the Secretary of Defense and the Secretary of the Army constitute the actions of their respective agencies. See Japan Whaling, 478 U.S. at 230 n. 4. In addition, because defendants have already begun the process of [**32] reducing SEAD, there has been final agency action for which there is no other adequate remedy

at law. Finally, plaintiffs' action is essentially one to "hold unlawful and set aside agency action, findings and conclusions found to be - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or, alternatively, "without observance of procedure required by law." 5 U.S.C. @@ 706(2)(A) & (D).

"The 'right of action' in such cases is expressly created by the Administrative Procedure Act (APA), which states that 'final agency action for which there is no other adequate remedy in court [is] subject to judicial review,' @ 704, at the behest of [a] person . . . adversely affected or aggrieved by agency action.'" Japan Whaling, 478 U.S. at 230 n. 4. (alterations in original).

No separate indication of congressional intent to create a private right of action is necessary. Id. Rather, there is a presumption in favor of judicial review that can be rebutted only if there is "clear and convincing" evidence of legislative intent to preclude review. See e.g., Block v. Community Nutrition Inst., 467 U.S. 340, 345, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984). [**33] The clear and convincing evidence requirement is not meant in the strict evidentiary sense, but rather as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Id. at 351.

The presumption in favor of judicial review is strong and well-established. The Supreme Court has noted that "judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the intent of Congress." Bowen, 476 U.S. at 670 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (citing cases)). Indeed, as the Court noted in Bowen, Committees of both Houses of Congress have endorsed this view. During the congressional term that resulted in the passage of the APA, the Senate Judiciary Committee commented:

[*398] Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to [**34] the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Bowen, 476 U.S. at 670 (quoting S.Rep.No. 752, 79th Cong., 1st Sess. 26 (1945)). These sentiments were echoed by the House of Representatives Committee on the Judiciary, which stated:

The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.
476 U.S. at 671 (quoting H.R.Rep.No. 1980, 79th Cong., 2d Sess. 41 (1946)).

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative [**35] action involved." Block, 467 U.S. at 345. In addition, congressional intent to preclude review may be inferred from contemporaneous judicial construction barring review and congressional acquiescence in it. Id. at 349. Thus, the task at hand is to examine BRAC's express language, legislative history, objectives, and statutory scheme "to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the [plaintiff's] belong." Id. at 345-46 (quoting Barlow v. Collins, 397 U.S. 159, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970) (opinion of Brennan, J.)).

In Specter, the Third Circuit considered whether Congress intended to preclude all review under BRAC. The Court engaged in an extensive issue-specific analysis of the availability of judicial review under BRAC. The Third Circuit began its discussion by noting two types of decisions under BRAC that were not subject to review. "We think it can be said with confidence," the court wrote, "that Congress intended no judicial review of decisions under the Act prior to [**36] the effective date of the President's decisions. . ." and "of the manner in which the President has exercised his discretion in selecting bases for closure." Specter, 971 F.2d at 945-46. But, the fact that review was precluded under certain portions of the Act did not foreclose review under other portions of the Act; n6 the Court then proceeded to conduct an issue-specific analysis of reviewability. Id.

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n6 The court rejected defendants' argument that all review was precluded by the Act, finding that:

While defendants have pointed to plausible reasons why Congress might have decided to dispense with all judicial review not expressly authorized, nothing in the statute or its legislative history provides a basis for concluding with confidence that it actually decided to do so. As we shall see, there are some areas of decisionmaking under the Act in which Congress did not intend the courts to engage in second-guessing. . . . On the other hand, there are other areas where our analysis leaves us with only the strong presumption favoring judicial review and no clear and convincing rebuttal. Specter, 971 F.2d at 947.

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The Specter Court ultimately concluded that "where the plaintiffs ask the court to substitute its political and military judgment for that of the Secretary and the Commission, their claims are not reviewable," but that "the plaintiffs do, however, ask for judicial review of issues that the judiciary is entirely competent to address." n7 Id. at 953. The claims that the [*399] court found reviewable included the claim that the Commission violated the provisions of the Act by holding closed-door meetings with the Navy before deciding which bases to recommend for closure, and the claim that the Secretary of Defense failed to meet his statutory obligation to create and transmit to the Commission and the GAO an administrative record containing all of the information he relied upon in making his recommendations.

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n7 The court gave an example of the type of claim that it believed was subject to judicial review. "To hypothesize the paradigm case," the court wrote, "if the Commission decided to dispense with public hearings in the interest of expedition, we could point to no clear and convincing evidence that Congress meant either to commit that decision to the Commission's discretion or otherwise to preclude judicial review of it." Specter, 971 F.2d at 948.

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[**38]

I find the analysis and holding in Specter to be persuasive. n8 A review of BRAC reveals that there is nothing in its express language that would preclude review in this case, and defendants do not contend otherwise. Nor is there anything in BRAC's legislative history that would suggest that Congress intended to foreclose all judicial review of actions relating to the BRAC process. The reference in the House Conference Report to certain decisions which are beyond judicial review is, as the court in Specter found, certainly not clear and convincing evidence of congressional intent to preclude all review under the Act. n9 At most, a "fair reading [of the Report] reveals only an intent to preclude judicial review to the extent that there is not yet 'final agency

action' to review." Specter, 971 F.2d at 949.

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n8 In addition, at least one District Court has addressed the reviewability issue. The District Court for the District of Maine, adopted the Third Circuit's decision in Specter with respect to the question of reviewability, and found that plaintiffs' claim that the Secretary failed to transmit to the GAO, members of Congress and the Commission all of the information used in making the base closure recommendations was reviewable. Cohen v. Rice, 800 F. Supp. 999 (D.Me. 1992). [**39]

n9 The House Conference Report stated that:

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

H.R.Conf.Rep.No. 923, 101st Cong., 2d Sess. 706 (1990), reprinted in 1990 U.S.C.C.A.N. 3110, 3258.

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[**40]

Defendants contend that Congress's failure to include a specific judicial review provision in BRAC indicates an intent to preclude review. According to defendants, Congress was aware that the Court of Appeals for the District of Columbia Circuit had held in June 1990, in National Federation of Federal Employees v. U.S. ("NFFE"), 284 U.S. App. D.C. 295, 905 F.2d 400, that plaintiffs in that action did not have standing to challenge the decision of the Secretary and the Commission to close or realign bases under the 1988 Base Closure and Realignment Act. This contention is without merit. Although defendants are correct that an intent to preclude review can be inferred from a contemporaneous judicial decision barring review and congressional acquiescence in it, the reviewability issue raised in NFFE and the issue raised in this action are sufficiently different that even if I were to assume that Congress acquiesced in the NFFE decision, I could not infer that Congress intended to bar review here.

In NFFE, unlike the situation in this action, the decision on the base closures and realignments that plaintiffs were challenging were made properly in accord with [**41] the procedures of the 1988 Act. Thus, in NFFE the plaintiffs' APA claim would have required the court to decide whether the Commission's recommendations were sound. In other words, in that case, "judicial review of the decisions of the Secretary [*400] and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure." 905 F.2d at 406.

In this case, however, the issue is not whether the Secretary's decision is militarily sound, but whether it was made in accordance with the requirements of BRAC. The distinction is crucial, because even if Congress intended to bar the type of claims raised in NFFE, that fact alone does not give rise to clear and convincing evidence that Congress intended to bar claims of noncompliance with the Act itself.

Finally, contrary to defendants' contention, the statutory framework created by BRAC reflects Congress's intent to allow judicial review of the type of claims raised here. When Congress enacted BRAC, the House Conference Report noted that there were two principal failures with the old system of [**42] base closures and realignments.

The conferees prescribe a new base closure process because closures and realignments under existing law have two failings. First closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. Second, the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raised suspicions about the integrity of the base closure selection process. A new process involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner.

H.R.Conf.No. 923 at 705, 1990 U.S.C.C.A.N. at 3257. In addition, BRAC itself states that "the purpose of the this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." @ 2901(b) (emphasis added).

These concerns led Congress to create a statutory scheme that prescribed specific procedural requirements for the base closure and realignment process. These procedural requirements gave the Secretary, the President, an independent BRAC Commission, and Congress some degree of discretion in the process. But it also [**43] stripped the Secretary of his unilateral authority to recommend military installations for closure and stripped Congress of its ability to block individual closures and realignments. Thus, two of BRAC's consequences were to create a system of shared power in which the ability of the Secretary to unilaterally decide to close or realign a base or of Congress to thwart the closing of a base was diminished, and to create an exclusive means for closing and realigning bases.

Plaintiffs claim here that, in spite of the balance of power created by BRAC, the Secretary unilaterally decided to virtually close SEAD after having determined that BRAC did not apply to the SEAD situation. In other words, plaintiffs contend that the Secretary illegally circumvented the BRAC process. Thus, unlike the case in which the Secretary uses the BRAC process and is then challenged on the ground that he did not comply with all of the procedural requirements of BRAC - which is, in part, what the plaintiffs in Specter charged - this action presents an even more basic question: were the defendants required to go through the exclusive BRAC process before taking the actions they did concerning SEAD. [**44] n10 Nothing in the Act or the [*401] legislative history even remotely suggests that judicial review in such a circumstance would be precluded.

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n10 In this respect, this case is also quite different from one in which a party challenges the propriety of a closure or realignment decision that was made properly under BRAC. As the Third Circuit noted in Specter:

While Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. @ 2909(a). With two exceptions, Congress intended that domestic bases be closed only pursuant to an exercise of presidential discretion informed by recommendations of the nation's military establishment and an independent

commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

Specter, 971 F.2d at 947 (footnote omitted).

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Indeed, it would be contrary to the purposes of the APA to allow the actions of an administrative agency, such as the Department of Defense, to escape judicial review simply because the agency declared that it had complied with its statutory obligations or that the statute did not apply at all.

The APA's review provision was intended to ensure agency compliance with relevant statutory obligations. In challenging defendants' actions, plaintiffs seek to protect the integrity of BRAC and to prevent defendants from circumventing the procedures and requirements of BRAC. Allowing judicial review in this case would ensure that the Secretary acted within his statutory authority. See Natural Resources Defense Council, Inc. v. S.E.C., 196 U.S. App. D.C. 124, 606 F.2d 1031 (D.C. Cir. 1979) (judicial review under NEPA will ensure SEC's statutory duties are implemented).

In sum, defendants have failed to demonstrate that Congress intended to preclude judicial review of the type of claims raised in this action. Therefore, I find that this court has the authority to review this action under the APA. 5 U.S.C. @ 706(2)(A), (C) and (D).

5. The Merits. [**46]

I turn finally to the issue that lies at the heart of this motion: whether defendants should be preliminarily enjoined from proceeding with the restructuring at SEAD, and the concomitant reductions in civilian personnel. The standard for granting a preliminary injunction in this Circuit is, of course, well-known and long standing. "The issuance of a preliminary injunction requires the showing of '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Communications Workers of America v. Nynex Corp, 898 F.2d 887, 891 (2d Cir. 1990) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curium)).

A. Irreparable Harm

Plaintiffs contend that they will suffer irreparable injury if a preliminary injunction is not granted because hundreds of civilian employees will be discharged or forced to transfer to jobs outside of Seneca County, local businesses will lose [**47] government contracts and income generated by SEAD, and SEAD will lose the opportunity to obtain new missions, thereby assuring that it will be downsized without having been fairly assessed in the BRAC process. Plaintiffs also contend that if defendants are not now enjoined from proceeding with the reductions, this Court will be unable to render a meaningful decision on the merits.

Defendants disagree arguing that preliminary relief will not prevent the harm that plaintiffs allege they will suffer, nor preserve the status quo because SEAD's special weapons mission was eliminated on July 31, 1992, Declaration of James Davidson ("Davidson Decl.") at @ 18, SEAD is no longer receiving any new IPE rehabilitation work, and, in their view, neither mission can be revived. Defendants also contend that the threat of irreparable harm from the

reduction-in-force has been diminished, if not eliminated, because the effective date of the RIF has been postponed by order of Secretary Stone to a date no earlier than February 11, 1993. n11 In addition, defendants note that preliminary injunctive relief is generally inappropriate in Government personnel cases, and that plaintiffs have an adequate and [**48] exclusive remedy for their challenge to the RIFs under the Civil Service Reform Act of 1978 ("CSRA"), Pub.L.No. 95-454, 92 Stat. 111 et seq. (codified, as amended, in various sections of 5 U.S.C.). Finally, defendants contend that plaintiffs have exaggerated both the extent of any harm that they may suffer and the extent [*402] to which a preliminary injunction can provide relief.

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n11 When plaintiffs first moved for preliminary relief, the RIF was scheduled to begin on November 13, 1992. On October 9, 1992, Secretary Stone announced that all civilian RIFs scheduled to begin on November 13, 1992, will instead begin no earlier than February 11, 1993.

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"An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982) (quoting Cavanaugh v. Looney, 248 U.S. 453, 456, 63 L. Ed. 354, 39 S. Ct. 142 (1919)). "The purpose of [**49] a preliminary injunction," the Eleventh Circuit has noted, "is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." United States v. State of Alabama, 791 F.2d 1450, 1459 (11th Cir. 1986), cert. denied, 479 U.S. 1085, 94 L. Ed. 2d 144, 107 S. Ct. 1287 (1987).

"'Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.'" Bell & Howell: Mamiya Co. v. Hazel Supply Co. Corp., 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 Charles Wright & Arthur Miller, Federal Practice and Procedure, @ 2948 at 431 (1973) (footnote omitted)). Accord Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990). Whether a particular harm is irreparable turns on its imminence and the lack of an adequate remedy at law. See Reuters, 903 F.2d at 907 (citations omitted) ("Irreparable harm must be shown by the moving party to be imminent, [**50] not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages."). Finally, "in making the determination of irreparable harm, both harm to the parties and to the public may be considered." Long Island R.R. Co. v. International Assoc. of Machinists, 874 F.2d 901, 910 (2d Cir. 1989), cert. denied, 493 U.S. 1042, 107 L. Ed. 2d 831, 110 S. Ct. 836 (1990).

Although courts have traditionally expressed a reluctance to issue a preliminary injunction in Government employee discharge cases, see Sampson v. Murray, 415 U.S. 61, 84, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974), there are circumstances that "may so far depart from the normal situation that irreparable injury might be found." Id. at 92 n. 68. This case, which is much more involved than the usual garden-variety employee-discharge case, presents such an extraordinary circumstance. n12

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n12 Defendants contention that this action is barred by the CSRA is without merit. This action is one that challenges the defendants' compliance with the procedural requirements of BRAC, and NEPA, and, therefore, does not fall exclusively within the category of federal personnel actions.

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[**51]

Several factors support this conclusion. First, although the RIF has been postponed, there is no indication that it will be cancelled. Moreover, despite the postponement, offers under the DOD's priority placement program are still continuing. Under the PPP, civilian employees registered to participate in the program were or soon will be required to decide, within 72 hours of receiving a job offer, whether they will accept the offer. If an employee declines the offer she will lose a variety of benefits, including severance and unemployment benefits, and, in some cases, the right to further participate in the PPP program. Similarly, many civilian employees will be forced to decide, sometime before the RIF becomes effective, whether they will participate in the voluntary early retirement program.

The civilian employees who will be faced with these decisions clearly face the threat of irreparable harm. Cf. Chalk v. U.S. District Court Central District of California, 840 F.2d 701 (9th Cir. 1988) (teacher diagnosed as having AIDS suffered irreparable harm when he was reassigned to administrative position because harm went beyond question of compensation). [**52] The decision that these employees must make are life-altering decisions. "Civilian employees are now being forced to make decisions as to whether they will leave their community, sell their homes, take their children out of schools and seek other employment within 72 hours," and also as to, whether " [*403] they are going to leave the employment of the Department of Defense entirely and take early retirement incentives." Affidavit of Bernard W. Hauf, Jr. ("Hauf Aff.") at PP 5 & 6. Many employees are facing the possibility of accepting a job they do not want or of losing valuable benefits. This is an injury that is real and imminent to the civilian employees, see Affidavit of Laurence Orndorff ("Orndorff Aff.") at P 59, and one that goes beyond mere financial loss.

Second, the local community will suffer irreparable harm. According to the Affidavit of Eugen Baer ("Baer Aff."), the Chairman of the Seneca County Board of Supervisors, the reductions "will have a significant and dramatic negative impact on Seneca County." Baer Aff. at P 2. Baer calculates that the RIF will result, inter alia, in a 30 percent drop in student enrollment in the Romulus Central School District, id. [**53] at P 13, an emigration from Seneca of approximately 15 percent of its current population of 32,000, id. at P 12, and a significant drop in property value. Id. at 15.

Third, and perhaps most significantly, if defendants continue to downsize SEAD, any final relief that plaintiffs may obtain could be rendered meaningless. Through this action, plaintiffs seek to prevent the personnel reductions and partial closure of SEAD on the grounds that the decision to do so was made in violation of BRAC. If plaintiffs prevail, defendants will be prevented from continuing with the restructuring and the RIF unless they comply with the BRAC process. In that case, SEAD will retain its civilian personnel and remain a functioning army depot. But if defendants are allowed to continue to restructure SEAD by dismantling its administrative structure, removing equipment, discharging the civilian employees, and downgrading it to a depot activity during the pendency of this action, plaintiffs' victory will be a hollow one.

Although SEAD's special weapons mission has been eliminated and its IPE rehabilitation mission has been relocated, SEAD is slated to perform 100 "work years" n13 of demilitarization [**54] work associated with the elimination of the United States's ground-launched nuclear missiles. Plaintiffs contend that SEAD could attract new missions if it is not downgraded to a depot activity, including additional demilitarization work, which it has performed in the past. Orndorff Aff. at P 6. However, if defendants are allowed to continue to drastically alter SEAD, its ability to attract these new missions will be severely undermined, and the relief that could be afforded to plaintiffs would be short lived.

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n13 A "work year" is the amount of work that a worker performs in one year. Consequently, 100 "work years" is the amount of work that 100 workers perform in one year.

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The reality of this harm is made evident by Laurence Orndorff, the Chief of Special Weapons at SEAD. According to Orndorff:

If SEAD is to survive, it will be necessary for it to receive other military missions. The defendants' announcement that SEAD is being downgraded from depot to depot activity is having a detrimental effect on SEAD's [**55] ability to receive other missions. Attached hereto as Exhibit V is a June 18, 1992 Draft Memorandum from Headquarters AMC discussing a mission involving demilitarization of depleted uranium munitions. The recommendation of such memorandum is that such activity should be directed to SEAD or Sierra. However, because of the downgrading of Seneca from depot to depot activity, Seneca may lose this opportunity. Attached hereto as Exhibit W is a August 12, 1992 Memorandum for the Record prepared by Kenneth P. Muehl, DESCOM. In such memorandum Mr. Muehl states 'SEAD will become a depot activity under Letterkenny Army Depot. The concept of Depot Activities operation is long-term storage with minimal receipt, issue, maintenance, and demil. Certainly not assigning a new unique mission to a depot activity.' Therefore, Mr. Muehl recommends that SEAD not receive this important new mission. Orndorff Aff. at P 60.

Finally, if defendants are allowed to continue with planned activities during the [*404] pendency of this action that are ultimately found to be in violation of BRAC, allowing them to do so would serve only to undermine the integrity of the BRAC process, which, in turn, would ultimately [**56] harm the public interest. For the BRAC process to work as intended, the Secretary cannot deplete a military installation of its equipment and missions before it is evaluated by the BRAC commission. Yet, if defendants are allowed to continue to downsize SEAD, but plaintiffs ultimately prevail, SEAD will never have been fairly evaluated under the BRAC process, and Congress's intent would have been frustrated.

I am, of course, mindful of the possible harm that defendants may sustain as a result of issuing a preliminary injunction, and that such harm is relevant to the analysis. In this case, however, it is clear that the threat of harm to plaintiffs if an injunction is not issued far outweighs the harm to defendants in maintaining the status quo during the pendency of this action.

In sum, I find, based on the affidavits and other materials submitted by plaintiffs, that they have made a showing of irreparable harm if the injunction is not issued now.

B. Likelihood of Success on the Merits or Sufficiently Serious Questions Going to the Merits

1. Application of BRAC

The question at the heart of this action is whether BRAC applies to the types of reductions authorized [**57] by the Secretary at SEAD. In order for plaintiffs to prevail on their claim under BRAC, they must establish that defendants are required to go through the BRAC process before they start the drastic reductions planned at SEAD. Plaintiffs contend that the Act applies because its numerical threshold has been met. Defendants strenuously disagree, arguing that the Act does not apply because the number of civilian personnel positions reduced as a result of the "realignments," as that term is defined in BRAC and 10 U.S.C. @ 2687 ("section 2687"), has not reached the numerical threshold that would require BRAC's application.

After reviewing the relevant language in BRAC, section 2687, the legislative history of each statute, and the many documents submitted by the parties, I find that plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim under BRAC. The reduction in civilian personnel that will be caused by the Secretary's actions at SEAD is sufficiently large that BRAC's numerical threshold has been easily satisfied. See 10 U.S.C. @ 2687(a)(2). The elimination [**58] of the special weapons mission, the consolidation of the IPE maintenance function at DLA facilities, and the plan to downgrade SEAD from a depot to a depot activity will reduce the number of authorized civilian personnel by 562 positions, which is a reduction of nearly 70 percent of the 847 civilian personnel authorized to be employed at SEAD, Complaint at Ex. F; n14 that drastic reduction is sufficient to trigger BRAC. In my view, it is precisely this kind of action that prompted Congress to enact BRAC in the first place.

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n14 The planned reductions at SEAD, while cutting current civilian employment levels by 562 employees, will actually eliminate 639 permanent civilian personnel positions. Complaint, Ex. E. According to plaintiffs, there are now 924 authorized civilian personnel positions at SEAD. Orndorff Aff. at P 54. Thus, the planned restructuring will result in the elimination of 66 percent of the number of civilians now employed at SEAD and 69 percent of the authorized civilian positions.

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The task of [**59] resolving whether BRAC applies here "begins where all such inquiries must begin: with the language of the statute itself." U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026, (1989). If the "statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklos Drilling Co., 120 L. Ed. 2d 379, 112 S. Ct. 2589, 2594 (1992). Accord Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) ("If the intent of Congress is clear, that is the end of the matter; [*405] for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Japan Whaling, 478 U.S. at 233.

In ascertaining the plain meaning of the statute, the court must look not only to the particular statutory language but also to the "design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988). Accord Crandon v. United States, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990) [**60] (courts look not only to the language of the statute, but also to the design of the statute as a whole and to its object and policy).

Congress enacted BRAC to provide "a fair process that [would] result in the timely closure and realignment of military installations in the United States." BRAC @ 2901(b). To this end, BRAC provides that it is the exclusive authority for closing and realigning military installations in the United States. See BRAC @ 2909(a) & (b). BRAC does, however, create an exception for those closures or realignments to which section 2687 does not apply. See BRAC @ 2909(c). BRAC provides in pertinent part:

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

(b) Restriction. Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified [**61] in subsection (a) -

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

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

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

(1) closures and realignments under title II of public Law 100-526 [note to this section]; n15 and

(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

BRAC @ 2909(a), (b), & (c)

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n15 This is a reference to the bases authorized to be closed or realigned under the 1988 Act.

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Section 2687, [**62] which was originally enacted in 1977, provides:

Notwithstanding any other provision of law, no action may be taken to effect or implement-

(1) the closure of any military installation at which at least 300 civilian employees are authorized to be employed;

(2) any realignment with respect to any military installation referred to in paragraph (1) involving a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed at such military installation at the time the Secretary of Defense of the Secretary of the military department concerned notifies the Congress under subsection (b) of the Secretary's plan to close or realign such installation.
10 U.S.C. @ 2687(a).

Thus, read in connection with section 2687, BRAC plainly states that it is the exclusive authority for closing military installations at which more than 300 civilian employees are authorized to work and for realignments involving a reduction by more than 1,000, or by more than 50% of the civilian personnel authorized to be employed at the installation. The "downsizing" at SEAD will result in the reduction [**63] of [*406] more than 50 percent of the number of civilian personnel authorized to be employed there.

Defendants nevertheless maintain that BRAC does not apply. They contend that the number of civilian personnel being discharged by the elimination of the special weapons mission, which accounts for 442 of the 639 personnel positions being eliminated, should not be included in calculating the number of civilian personnel being reduced as a result of a "realignment."

Defendants contend that the "elimination" of the special weapons mission cannot be characterized as a "realignment," as that term is defined in BRAC and section 2687, because the mission is being "eliminated" but not "relocated."

I am not persuaded by this argument. I do not believe that the fact that a function or mission is "eliminated" as opposed to "relocated" makes a material difference. No matter how you characterize it, the result is the same. Because the President and the Secretary have determined to eliminate the storage and maintenance of a certain type of weapon, approximately 560 civilian employees at this installation face termination. The Army is certainly not going out of business. [**64] Only one of its many functions has been altered. In my view, that fact alone does not justify the Secretary's disregard for the BRAC requirements.

BRAC and section 2687 define "realignment" as follows: "The term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." BRAC @ 2910(5); accord 10 U.S.C. @ 2687(e)(3). Defendants contend that to fall within the definition of "realignment," an action must both reduce and relocate functions and civilian personnel positions. They claim that if an action does not do both then it is not a realignment, and the number of civilian personnel or personnel positions affected by it should not be included in determining whether section 2687's threshold has been met. Consequently, under defendants' calculation, the number of civilian personnel positions or personnel positions being reduced by actions that can be characterized as a "realignment" is, at most, only 197, [**65] which is less than the 50 percent threshold requirement.

I disagree with defendants' interpretation of the term "realignment." Even if I accept as true defendants' contention that the special weapons mission is not being relocated to another installation, n16 their interpretation of BRAC's requirements is based on a narrow and strained reading of the statutory language. Moreover, to confine the definition of "realignment" to the narrow category that defendants propose would produce a result that is contrary to the plain language of BRAC and section 2687 and would be inconsistent with the congressional intent underlying both statutes.

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n16 Plaintiffs strenuously disagree with defendants' contention that the special weapons mission is not being relocated. Plaintiffs, relying on the affidavit of Laurence Orndorff, contend that the special weapons mission is being relocated to Sierra Army Depot in Herlong, California. Defendants deny this, arguing that plaintiffs are relying on outdated information. Because for this motion I am proceeding under the assumption that the mission is not being relocated, I need not address this issue at this time. Moreover, as is discussed below, whether the mission was relocated or eliminated is not a decisive factor in this case.

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[**66]

The first difficulty with defendants' argument is that it ignores Congress's use of the word "includes" in the definition of "realignment" in section 2687, as originally enacted in 1977, and as amended in 1990, and in BRAC. That Congress chose to use the word "includes" rather than the word "means" in this definitional section is most instructive, because "in construing a statute [courts] are obliged to give effect, if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)

When interpreting a statute, it is important to keep in mind "the cardinal rule that a statute is to be read as a whole, since the [*407] meaning of the statutory language, plain or not, depends on context. 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" King v. St. Vincent's

Hospital, 116 L. Ed. 2d 578, 112 S. Ct. 570, 574 (1991) (quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941)) [**67] (other citations omitted).

Generally, when a statute uses the word "includes" to a define a term, it leaves open the possibility that the term encompasses more than those examples specifically enumerated in the definition. Federal Election Commission v. Massachusetts Citizens for Life, 769 F.2d 13, 17 (1st Cir. 1985), aff'd 479 U.S. 238, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986). See also Highway & City Freight Drivers, Etc. v. Gordon Transports, Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002, 58 L. Ed. 2d 678, 99 S. Ct. 612 (1978) (When a statute uses the word "includes" rather than "means," the fact that the statute does not specifically mention a particular condition does not imply that the condition falls outside the definition.); Winterrowd v. David Freedman and Co., Inc., 724 F.2d 823, 825 (9th Cir. 1984) (phrase "and includes" is expansive and not limiting); United States v. City of New York, 481 F. Supp. 4, 6 (S.D.N.Y.) (word "includes" is usually a term of enlargement, and not of limitation), aff'd 614 F.2d 1292 (2d Cir. 1979), [**68] cert. denied, 446 U.S. 936, 64 L. Ed. 2d 789, 100 S. Ct. 2154 (1980). As the First Circuit has noted:

A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means.' It has been said the word 'includes' is usually a term of enlargement, and not of limitation. . . It, therefore, conveys the conclusion that there are other items includeable, though not specifically enumerated. . .

Federal Election Commission, 769 F.2d at 17 (quoting 2A N.Singer, Sutherland Statutes and Statutory Construction 133 (4th ed. 1984) (quoting Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968))) (alterations in original).

What is particularly revealing in this case is that Congress used the word "means" in every other definition in section 2687 when it first enacted it in 1977 and when it amended it in 1990, as well as in every other definition in section 2910 of BRAC. For example, both BRAC and section 2687, as amended in 1990, define the term "military installation" [**69] as follows:

The term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers, and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

BRAC @ 2910(4) and 10 U.S.C. @ 2687(e)(1) (emphasis added). Additionally, section 2687, as originally enacted, defined the term "civilian personnel" as follows: "'Civilian Personnel' means direct-hire permanent civilian employees of the Department of Defense." P.L. 95-82, @ 612, 91 Stat. 379 (1977) (emphasis added). Yet, when Congress defined the term "realignment" it used the word "includes."

That Congress defined all other relevant terms using the word "means" but defined the term "realignment" using the word "includes," suggests strongly that it intended the definition of "realignment" to be expansive rather than limiting, for "it is presumable that Congress legislates with knowledge [**70] of our basic rules of statutory construction. . ." McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888, 898 (1991). It also diminishes the possibility that Congress used the word "includes" inadvertently. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello [*408] v. United States, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). See also U.S. v. Gertz, 249 F.2d

662, 666 (9th Cir. 1957) (the word "includes" is usually a term of enlargement especially if the word "means" is used elsewhere in same statute); City of New York v. Exxon Corp., 697 F. Supp. 677, 684-85 (S.D.N.Y. 1988) (Congress's use of the word "means" in one definition and word "includes" in another definition strengthens conclusion that the latter was meant as a term of enlargement). To read the word "includes" as a term of limitation [**71] "would render Congress' use of different terminology in each definition meaningless." City of New York, 697 F. Supp. at 685.

The legislative history of section 2687 buttresses the conclusion that the term "realignment" should be read expansively rather than restrictively. The definition used in BRAC and amended section 2687 was derived from section 2687, Pub.L.No. 95-79, @ 612, 91 Stat. 358, 379 (1977), as originally enacted in 1977. But section 2687 was not Congress's first attempt to regulate the base realignment process. Enactment of section 2687 was preceded a year earlier, in 1976, by the enactment of section 612 of Military Construction Authorization Act for 1977 ("MCAA"), Pub.L.No. 94-431, @ 612, 90 Stat. 1349, 1366 (1976). n17 Section 612 provided in pertinent part:

(a) notwithstanding any other provision of law, no funds authorized to be appropriated in this Act may be used to effect or implement -

(1) the closure of any military installation;

(2) any reduction in the authorized level of civilian [**72] personnel at any military installation by more than one thousand civilian personnel or 50 per centum of the level of such personnel authorized as of March 1, 1976, or the end of the fiscal year immediately preceding the fiscal year in which the Secretary of Defense or the Secretary of the military department concerned notifies the Congress that such installation is a candidate for closure or significant reduction, whichever occurs later; or . . .

Pub.L.No. 94-431, @ 612(a).

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n17 After it was first passed by Congress, the MCAA was vetoed by President Ford because of the inclusion of section 612. President Ford was concerned about protecting the power Of the Executive to "change or reduce the mission at any military installation if and when that becomes necessary." Letter from President Ford to the House of Representatives dated July 2, 1976 reprinted in S.Rep.No. 1233, 94th Cong., 2d Sess. 5 (1976). The House of Representatives voted to override the veto but the Senate voted to sustain it. Section 612 was then amended to make it effective for only one year, rather than for five years as provided for originally, and the requirement for a minimum study period of 9 months was removed. The MCAA, with the amended section 812 was then passed and signed by the President.

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[**73]

Unlike section 2687, section 612 did not contain a definition of the term realignment, but the entire section was entitled "Base Realignment," implying that by the term "realignment" Congress meant both closures of military installations and reductions in personnel. See I.N.S. v. National Center for Immigrants' Rights, 116 L. Ed. 2d 546, 112 S. Ct. 551, 556 (1991) ("the title of a statute can aid in resolving an ambiguity in the legislation's text"); Berniger v. Meadow Green-Wildcat Corp., 945 F.2d 4, 9 (1st Cir. 1991) ("It is well established that a statute's title may aid in construing any ambiguities in a statute."). Significantly, section 612 contained no reference to a relocation of functions or civilian personnel positions. The focus of the section was on closures and reductions in civilian personnel positions.

The following year, in 1977, Congress sought to enact legislation that would put in place a permanent base realignment process. The result was section 2687. Section 2687 was substantially similar to section 612. When the bill that contained [**74] section 2687 was being considered by the Senate, Senator Strom Thurmond noted:

A significant feature of this bill is the base realignment provision which is very similar to that enacted in the Senate last year. The difference would be that the [*409] current amendment makes this provision permanent law . . .

123 Cong. Rec. 14,683 (1977). Significantly, section 2687 retained section 612's numerical thresholds for reductions in civilian personnel.

One apparent difference, though, between section 2687 and section 612, is that the former prohibited "realignments" while the latter prohibited "reductions." But the difference is more illusory than real; for when the term "realignment" is read in light of section 612's use of the term to encompass both closures and reductions, and section 2687's use of the word "includes" to define the term "realignment," it becomes apparent that Congress did not intend to restrict the meaning of the term to only those situations enumerated in the definition. Rather, the use of the term "realignment" and its definition were intended to expand the [**75] scope of the prohibition of section 2687 to include situations in which actions resulted in both reductions and relocations of functions and civilian personnel positions. Had Congress intended a more restrictive meaning of the term, as defendants argue, it presumably would have used the word "means" as it did as to other terms, since it undoubtedly was aware of section 612 and its use of the term "realignment" when it enacted section 2687. See Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85, 100 L. Ed. 2d 158, 108 S. Ct. 1704 (1988) ("we generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") n18

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n18 In addition, the presence of the second clause in the definition of section 2687 as originally enacted, which states that a realignment "does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, skill imbalances, or other similar causes," makes it more logical to read the first clause as expanding rather than limiting the definition of "realignment."

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[**76]

In sum, the plain language of section 2687 and BRAC, traditional rules of statutory construction, and the legislative history of both statutes all suggest strongly that the term "realignment" should not be confined and restricted as the Secretary contends.

Defendants also contend that the elimination of the special weapons mission is a "workload adjustment," and, therefore, specifically excluded from the definition of the term "realignment." Relying on the Declaration of James Davidson, the Chief of the Base Realignment and Closure Office in the Headquarters of the AMC, defendants argue that because the special weapons mission was eliminated as a direct result of President Bush's directive to eliminate the United States's entire inventory of ground-launched nuclear missiles, the action is properly categorized as a workload adjustment. n19

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n19 According to Davidson:

A workload adjustment is a change in the requirement for a key work output or product of an installation due to either of the following circumstances: (1) reduced or canceled customer demand for the work output/product, and (2) reduced

or canceled funding by the customer for the work output/product. Davidson Decl. at P 26.

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[**77]

This contention is without merit. First of all, there is no definition of "workload adjustment" in BRAC and the legislative history does not address its meaning. By itself, the phrase is broad enough to include almost anything that the Army or the Department of Defense elect to do concerning utilization of its civilian work force. It would, however, be a mistake to view this phrase in isolation from the rest of BRAC and its legislative history. If what is proposed for SEAD excuses the Army from complying with BRAC, then I believe that the Army and the Secretary of Defense can act with impunity when making significant personnel reductions throughout the country.

The design and purpose of BRAC and the concerns expressed throughout the Act's legislative history, all suggest that the BRAC process was meant to apply whenever reductions in personnel of this magnitude are caused by the Government's actions. The fact that the President chose to eliminate one type of weapon from the Army's arsenal does not relieve the Government from complying with BRAC when [*410] that action, together with other contemporaneous actions, causes the elimination of nearly 70 percent of an installation's civilian [**78] work force and permanent civilian positions.

It would be anomalous, in light of Congress's clearly expressed concern about the effects of large-scale reductions, if the term "realignment" did not include the elimination of a mission that reduced civilian personnel by more than 50 percent, as is the case here, even though there is no corresponding relocation of the function and even if it is euphemistically referred to as a "work adjustment."

Congress clearly demonstrated that by enacting section 612 and section 2687 it was targeting reductions in civilian personnel. For example, when section 2687 was enacted, the House Armed Services Committee noted in its report that "these procedures establish a precise reporting requirement for the armed services to follow in any decision to close a military installation or greatly reduce civilian employment at an installation." H.R.Rep.No. 290, 95th Cong. 1st Sess. 6 (1977) (emphasis added). Additionally, as noted above, section 612(a) defines the relevant actions that it was prohibiting as (1) closures of military installations and (2) "reductions in the authorized level of [**79] civilian personnel. . ." (emphasis added). Finally, although it uses the term realignment, section 2687 uses as a threshold for application a reduction in civilian personnel of more than 1,000 or more than 50 percent.

Congress's concern over large-scale reductions in civilian personnel was predicated on its belief that such reductions had a significant negative impact on both the discharged employees and the local communities. When section 2687 was enacted, the Senate Armed Services committee noted that "the committee feels strongly that major base realinements do have significant impact on the surrounding community and therefore decisions concerning base realinements should be made carefully and with adequate public participation. Permanent law in this regard is considered appropriate." S.Rep.No. 125, 95th Cong. 1st Sess. 4
(1977). It later noted that "realinements that may well be justified cannot be made indiscriminately until there has been adequate consideration of the adverse impacts of the action on the surrounding community and the possibilities to mitigate these impacts has been adequately explored." Id. at [**80] 5.

In addition, "the legislative history of [BRAC] demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live." Specter, 971 F.2d at 943. This concern was echoed in the express language of the Act, which required that the BRAC Commission conduct public hearings on the Secretary's recommendations. BRAC @

2903(d)(1). By requiring public hearings, Congress opened up the base closure and realignment process to public scrutiny and input, and gave local communities an opportunity to voice their concerns. The 1991 BRAC Commission traveled to numerous sites and met with members of various local communities that would be affected by the recommended closures and realignments. According to the letter that accompanied the Commission's 1991 Report, the Commission "held 28 hearings across the United States, visited 47 military installations and met face-to-face with hundreds of representatives of the surrounding communities." Complaint, Ex. A, Letter of the 1991 BRAC Commission dated July 1, 1991.

In fact, concern for the "economic impact on local communities" was one of the factors established [**81] by the Secretary of Defense, and left unaltered by Congress, that the BRAC Commission is required to consider in evaluating the Secretary's closure and realignment recommendations. Complaint, Ex. A at C-1; accord Specter, 971 F.2d at 943.

In this case, because the BRAC process was circumvented, the economic impact on Seneca County of the massive reduction in civilian personnel at SEAD was never evaluated by an independent reviewing body, [*411] such as the BRAC Commission. Yet, according to plaintiff, the economic impact on Seneca County will be severe. Plaintiffs allege that Seneca County, its businesses, and residents will suffer a substantial drop in spending and revenue. According to plaintiffs' calculations, at current employment levels, SEAD has an annual financial impact on Seneca County of approximately 134.2 million dollars. Plaintiffs also estimate a substantial drop in the approximately 27 million dollars spent by SEAD employees in the neighboring six-county area. In addition, the Romulus Central School District, which will suffer close to a 30 percent drop in enrollment, is expected to lose approximately $ 478,000 in federal aid and a potential [**82] loss of $ 98,932 in state aid. Baer Aff. at PP 8, 10 and 14. Plaintiffs also allege that SEAD currently operates water and sewer systems that supply such services to the neighboring towns of Varick and Romulus, and it is unclear whether these services will continue. Finally, plaintiffs allege that it is unclear whether they will lose the backup services provided by the SEAD fire department. Id. at PP 16 and 17.

In light of the clear concern that Congress has expressed regarding consideration and mitigation of the negative economic impact on local communities, it would indeed be odd if the Secretary were able to circumvent the BRAC process, despite the significant impact that the reduction of over 560 civilian employees will have on the Seneca County community, simply because he has termed his actions as a "reduction" or a "workload adjustment" as opposed to a "realignment."

In short, there is simply no sound basis to be found in the express language of BRAC or section 2687 that would support differentiating between reductions in personnel caused by elimination of missions and functions and those caused by relocation of missions and functions.

Furthermore, [**83] the design and object of BRAC support curtailing rather than expanding the Secretary of Defense's discretion in deciding which military installations should be closed or realigned. The legislative history of BRAC and the framework it created demonstrate that in enacting BRAC, Congress was motivated in large part by a belief that the Secretary of the Defense should not be given the unilateral authority to select installations that would be recommended for closures and realignments. In enacting BRAC, Congress used as its model the 1988 Base Closure and Realignment process. The House Report accompanying BRAC noted:

The last two years have provided examples of both the right way and the wrong way to close bases. The establishment of the Defense Commission on Base Realignment and Closure in 1988 is an example of the right way to close bases. Under this plan, a highly respected, bipartisan commission recommended bases for realignment or closure based on a number of neutral and widely endorsed criteria. Congress had the opportunity to accept or reject the recommendations

as a whole. Once Congress failed to reject the recommendations of the Commission, their implementation was automatic. [**84]

Secretary Cheney's announcement of candidates for base closure on January 29, 1990, was an example of the wrong way to close bases. The Secretary's list focuses on bases in the United States. The sharpest reductions in American forces are likely to be overseas. It is hard to justify a large number of domestic base closures unless overseas bases are closed at the same time. H.R.Rep.No. 665 at 341-42. See also H.R.Conf.Rep.No. 923 at 705.

Through BRAC, Congress circumscribed the Secretary's ability to select bases for realignment and closure by vesting some of that authority in the BRAC Commission. BRAC expressly provides that the Commission may reject the Secretary's recommendation to close or realign a base if the [*412] recommendation deviates from the Secretary's force-structure plan and final criteria. BRAC @ 2903(d)(2)(B).

In addition, Congress enacted BRAC, in part, because the existing base closure process, which was often delayed by challenges in court and other obstacles, was deemed inadequate. As the House conference Report noted "closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court." H.R.Conf.Rep. [**85] No. 923 at 705. Indeed, Congress passed the 1988 Act primarily because, as the House Report noted, "in testimony before the committee, Honorable Frank C. Carlucci, Secretary of Defense, stated that the Department of Defense is unable to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of current law." H.R.Rep.No. 735(I), 100th Cong., 2d Sess. 8 (1988), reprinted in 1990 U.S.C.C.A.N. 3355, 3356.

By unilaterally "downsizing" SEAD without going through the BRAD process, defendants precipitated just the type of response that BRAD was meant to prevent. Their acts galvanized politicians with ties to SEAD to take action to prevent the closure of the base.

Defendants' also contend that requiring the Secretary to go through the BRAD process infringes on the President's ability to eliminate our arsenal of ground-launched nuclear missiles. This contention is without merit. This court could not, nor would it want to, command the President to bring back the nuclear missiles. But that is not the relevant issue. Rather, it is whether the Secretary can realign a military installation without going through BRAC. The [**86] answer to that question is a resounding "no" if the realignment meets the numerical threshold of section 2687. The President's decision to eliminate ground-launched nuclear missiles does not vest the Secretary with carte blanche authority to circumvent BRAC. If that were the case, the Secretary could close a base at any time without going through the BRAC process if the closure or realignment were deemed a direct result of a presidential decision to cut troop strength, eliminate a squadron of planes, or phase out a particular type of weapon.

For similar reasons, defendants' contention that each action, i.e. the elimination of the special weapons mission, the consolidation of the IPE rehabilitation mission, and the downgrading to a depot activity, should be considered separately rather than collectively is also without merit. Allowing the Secretary to isolate certain segments of a realignment in order to discount the number of civilian positions affected would create a giant loophole in the process. The Secretary could define away a massive reduction in the number of civilian personnel authorized at a base by categorizing large portions of the action [**87] as "reductions" rather than "realignments." To give the Secretary that power simply by dint of semantics is contrary to the expressed intent of Congress to preclude the realignment of a military installation involving a reduction of more than 1,000 or more than 50 percent of the civilian personnel authorized to be employed at a base.

In sum, after reviewing the plain language of BRAC and section 2687 and the legislative history of the two statutes, I find that plaintiffs have demonstrated a likelihood of success on the merits. Based on the statutory language and legislative history there is significant textual support for their claim that defendants were required to go through the BRAC process to effect the type of realignment currently proposed for SEAD.

2. Application of NEPA

Plaintiffs also claim that defendants should be enjoined because they did not comply with the requirements of NEPA. Specifically, plaintiffs contend that defendants did not prepare an environmental impact statement ("EIS") or an environmental assessment ("EA") as required by NEPA. See 42 U.S.C. @ 4332(2)(C). n20 Defendants [*413] strenuously [**88] disagree, arguing that NEPA does not require an EIS or an EA because the Army properly determined that the SEAD reductions would not have significant environmental consequences.

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n20 Section 4332 provides in relevant part:

All agencies of the Federal Government shall -

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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Because [**89] I have decided that plaintiffs have demonstrated a likelihood of success on the merits on their claim under BRAC, I need not address their NEPA claim at this time. BRAC expressly provides that "the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part." BRAC @ 2905(c)(1). Consequently, to the extent that defendants are prohibited from acting without going through BRAC, plaintiffs' claim that defendants have also failed to comply with NEPA is premature.

CONCLUSION

Because plaintiffs have demonstrated the threat of irreparable harm and a likelihood of success on the merits, their motion for preliminary injunctive relief under Fed.R.Civ.P. 65 is granted. I have considered the competing interests of the parties and I decline to require plaintiffs to post a bond. In addition, because of the nature of this action, the Court will hear all dispositive motions and set a trial date on an expedited basis.

Therefore, based on this decision:

IT IS HEREBY ORDERED [**90] that plaintiffs' motion for a preliminary injunction is granted and that pending the conclusion of this action or until further order of the Court, defendants are enjoined as follows:

(1) Defendants, and their agents, servants, officers, and employees, and those persons in active concert or participation with them, are ordered to cease any further action to implement the plan to realign, restructure, eliminate or reduce functions or missions at the Seneca Army Depot as approved on July 2, 1992 by the Secretary of the Army when he approved the AR 5-10 report concerning the Depot; and

(2) Defendants are enjoined from directly or indirectly discharging, requiring the retirement of, or reassigning any civilian personnel authorized to be employed at Seneca Army Depot as of July 1, 1992, or from taking any steps and spending any money to reduce the number of civilian personnel positions authorized at Seneca Army Depot to an amount below the number authorized by the Department of Defense as of July 1, 1992.

IT IS SO ORDERED.

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
November 9, 1992

County of Seneca v. Cheney

92-6296

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1993 U.S. App. LEXIS 8075

March 9, 1993, Decided

NOTICE: [*1]

RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: United States District Court for the Western District of New York. 92-cv-6380.

OPINION: VAC

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No. 92-6296

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SENECA; SAVE OUR SENECA; KEEP OUR BASE IN ROMULUS ALIVE; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2546; SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

Plaintiffs/Appellees,

v.

RICHARD CHENEY, as the Secretary of Defense; MICHAEL STONE, as the Secretary of the Army; SUSAN LIVINGSTONE, as the Assistant Secretary of the Army,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE DEFENDANTS/APPELLANTS

STUART M. GERSON
Assistant Attorney General

DENNIS C. VACCO
United States Attorney

DOUGLAS LETTER
(202) 514-3602
Appellate Litigation Counsel
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

Vince Kleinert (514-3449)
Sue Anderson (514-3354)
(514-8470)

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No. 92-6296

COUNTY OF SENECA; SAVE OUR SENECA; KEEP OUR BASE IN ROMULUS ALIVE; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2546; SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,

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REPLY BRIEF FOR THE DEFENDANTS/APPELLANTS

INTRODUCTION

Plaintiffs' appellate brief raises a number of points, but fails to confront the inescapable fact that is at the heart of this case: the reduction-in-force at Seneca Army Depot is being caused overwhelmingly by the elimination in one fell swoop of the United States Army's special weapons function because of President Bush's nuclear disarmament order.

For this reason, the RIF here does not fall within the Base Closure Act procedures, which take several years and are multi-phased and complex. Those procedures were designed to deal with a different situation by predicting and measuring extended military force requirements, and determining how many bases,

their size, and nature will be needed in the long run to meet those requirements.

By contrast, the RIF at Seneca is being caused primarily by the sudden elimination of an entire nuclear weapons program such that there is no need to study and carefully weigh which bases will be needed for years into the future. For the special weapons mission at Seneca, no installations are needed because there is no longer any mission.

Under these circumstances, it would make no sense for Congress and the Executive to require that unneeded civilian employees continue to be paid scarce public funds to do virtually nothing while the lengthy Base Closure Act procedures wend their way to their biennial conclusion. Yet, that is the result that plaintiffs' arguments urge here.

This is our basic point, and it should be kept foremost in mind. In our reply brief below, we also respond to various contentions raised by plaintiffs in their appellate brief. The most striking feature of that brief is not the arguments that plaintiffs do make, but the fact that they have failed to respond to the two main points we emphasized in our opening brief as to why the Base Closure Act cannot be read as plaintiffs urge. These two points should not be overlooked, and we will thus address them first, and trust that the Court notes the lack of plaintiffs' convincing response.

ARGUMENT

A. Plaintiffs do not refute an essential point we made in our opening brief (at 21-23): the RIF concerning the special weapons mission at Seneca is caused by a "workload adjustment," and is therefore exempt from the Base Closure Act under Section 2910(5) of that statute (reprinted at 10 U.S.C.A. 2687 note).[1]

We pointed out that the district court failed to give any meaning at all to this exception to the coverage of the Base Closure Act, thereby committing the cardinal error of reading it out of the statute.

Obviously, this exception cannot be read so broadly that it makes the Base Closure Act meaningless. Recognizing that point, we contended that, whatever the outside boundaries of this exception are -- which the Court need not definitively resolve in this case -- the RIF here is plainly within them.

As argued already, something special has happened here because the President has eliminated an entire nuclear weapons system all at once. The fall-out from this action is a workload adjustment because there now is no workload at all (except for the temporary and limited demilitarization task that will then end the mission entirely). See infra, at 10-11.

Plaintiffs confront this argument (Br. at 18, 26-27) only by reiterating the indisputable point that this "workload adjust-

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[1] For the convenience of the Court, we have reprinted in an addendum bound with this brief the pertinent provisions of that statute.

ment" exception cannot be given too broad a scope or it will eviscerate the Base Closure Act. This assertion does nothing to show why this case does not involve a workload adjustment, and, if not, why not. Apparently, plaintiffs have no better answer than that this exception must be given no meaning, and thus read out of the Base Closure Act.

Plaintiffs attempt to bolster their argument by proposing (Br. at 27) a silly hypothetical showing that an overbroad application of the "workload adjustment" exception would make no sense under the statutory scheme. We agree. But that form of argument does not provide any hint as to what "workload adjustment" does mean and why it might or might not cover the situation here, in which there has been a sudden elimination of an entire mission.

If the RIF covering the special weapons mission at Seneca is a "workload adjustment," the Court will not have given that term an overbroad reading. The exception would merely be applied to a situation in which work has been eliminated because the entire mission to be accomplished no longer exists. In addition, as described below (infra, at 10-11), no work is being transferred as part of this workload adjustment; the work simply no longer exists.

Moreover, the "workload adjustment" exception is particularly well suited to the type of military function at issue here. As described in the record (App. 597-98), the type of Army organization of which Seneca is a part operates

(4-2006)

financially, by law, much like an enterprise in the private sector. It has customers -- usually other governmental entities -- whom it bills for work, and it must operate on a "break even" basis. App. 597. If the Seneca employees are kept on to do little or nothing, the overall organization must eventually make up for this loss by reducing civilian personnel elsewhere. App. 598.

Under these circumstances, the action planned for Seneca is easily envisioned as a "workload adjustment" in a narrow sense, such that this exception in no way eviscerates the Base Closure Act scheme. Rather, the exception is merely being applied to a RIF caused by a special situation affecting a military industrial facility in which flexibility is essential for the sound and efficient management required by statute.

By contrast, neither the plaintiffs nor the district court proffered any possible meaning for that exception. Under these circumstances, the preliminary injunction should be vacated because it is premised on a plainly impermissible interpretation of the statutory scheme.

B. As our opening brief showed, there is an independent flaw in plaintiffs' view of the Base Closure Act. We pointed out there that the only relevant definitional provision in the Base Closure Act says that a "realignment" for Base Closure Act purposes "includes any action which both reduces and relocates functions and civilian personnel positions, but does not include a reduction in force resulting from workload adjustments." 10

U.S.C.A. 2687 note (Section 2910(5)). If a reduction in force is not within the Base Closure Act definition of a "realignment," it is not covered by that statute's exclusive processes.

Plaintiffs assert that, despite this exclusive definitional provision, "realignment" means any civilian personnel action that solely "reduces" functions and civilian personnel positions; they say that a "realignment" need not also include a relocation of functions and civilian personnel positions.

As we pointed out in our opening brief (at 18-19), plaintiffs' reading of the statutory language makes no sense. If a "realignment" covers an action that causes only a reduction in functions and civilian personnel positions, why would Congress include a specific definitional provision stating that a "realignment" covers an action that reduces and relocates functions and civilian personnel positions?

The definition that plaintiffs posit -- which appears nowhere in the statute -- already covers such an action. Thus, again, why would Congress go out of its way to add a specific definitional provision in order to state that a subset of the larger set of actions that is already covered by the statute is also covered? This would serve no purpose.

Plaintiffs' appellate brief provides no answer to this problem that we posed; indeed, they nowhere mention it, which is odd if they have an answer since we made it our first point in defending the Army's interpretation of the Base Closure Act.

The answer is that the only reasonable way to read this part of the Base Closure Act is that the definition of a "realignment" means what Section 2910(5) naturally and easily says: a realignment is an action that both reduces and relocates functions and civilian personnel positions. The alternative offered by plaintiffs requires the premise that Congress has no idea what it is doing when it legislates.

Plaintiffs rely (Br. at 21-22, 24-26) on the legislative history of the Base Closure Act, and on cases showing that in other legislative schemes Congress has utilized the word "includes" because it intended a definition to have a broader scope and was simply giving one example of the type of action covered.

We do not deny that Congress' use of "includes" can have in other statutory contexts the meaning that plaintiffs urge. But the cases upon which plaintiffs rely do not reveal what Congress had in mind for the only statutory scheme at issue here: the Base Closure Act. Legislative history and maxims of statutory construction such as those cited by plaintiffs are merely tools that courts use in trying to divine what Congress meant in any particular statute; they cannot dictate an answer that is clearly contrary to common sense and the remainder of the statutory scheme. See Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992).

Moreover, plaintiffs' citation to cases interpreting the term "includes" in other statutory schemes fails to note that the

Supreme Court and other courts have recognized that "includes" can be read precisely as we suggest here. See Minnesota v. Probate Court, 309 U.S. 270, 274 (1940) ("the court used the word 'include' as defining the entire class of persons to whom the statute applies and not as describing merely a portion of a larger class"); Helvering v. Morgan's, Inc., 293 U.S. 121, 125 (1934) ("It may be admitted that the term 'includes' may sometimes be taken as synonymous with 'means' * * *"); Montello Salt Co. v. Utah, 221 U.S. 452, 464-65 (1911); In re Midas Coin Co., 264 F. Supp. 193, 198 (E.D.Mo. 1967) ("The term 'including' has various shades of meaning, in some instances operating as a restriction upon and in others as an enlargement of the general language that precedes it and in still others simply as connoting illustrative examples"), aff'd, 387 F.2d 118 (8th Cir. 1968).

Unless plaintiffs can explain why Congress would include a definition of "realignment" -- the only relevant one in the statute -- for no reason, their resort to legislative history and cases interpreting other statutory schemes is of no benefit.

The only legislative history that plaintiffs describe (Br. at 24-25) concerning the actual statute at issue here shows merely that Congress failed to change the term "includes" to "means" at one point in the development of the Base Closure Act. Plaintiffs do not cite to anything showing why Congress did not make this change. Congress often has many reasons for failing to enact a suggested legislative change, but that does not prove that the statutory scheme required that change. See United

States v. Wilson, 112 S. Ct. 1351, 1355 (1992) (Supreme Court concedes that "we do not know what happened" to a phrase that was dropped from a bill, but interprets statute as if it had not been dropped); United States v. Wise, 370 U.S. 405, 411 (1962) ("Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change") (emphasis added). Accord Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 538 (9th Cir. 1985).

Plaintiffs also contend (Br. at 24) that the Army's own regulation AR 5-10 (reprinted at App. 263) -- which was not promulgated to implement the Base Closure Act -- supports their broad reading of the term "realignment." This argument fails because the wording of AR 5-10 shows that it is directed at almost all realignments, by whatever definition (see Section 2.2 (App. 268-69)), and is thus considerably broader than the Base Closure Act, which focuses only on specific types of actions of concern to Congress. Moreover, AR 5-10 separately defines both "reduction" and "realignment" (see Section 1-3 (App. 263)), which further undermines plaintiffs' argument.

Thus, if the Base Closure Act is read properly, plaintiffs must show that the action at Seneca concerning the installation's special weapons mission is being reduced and relocated. The facts in the record demonstrate otherwise.

C. Plaintiffs contend (Br. at 9, 30-31) that the Affidavit of Laurence Orndorff shows that the special weapons mission at Seneca is being relocated elsewhere because some of the demilitarization work that could have been done at Seneca is being sent to Sierra Army Depot, another installation. See App. 212.

The argument misses the point because a "realignment" must include a reduction and relocation of functions and civilian personnel positions. See Section 2910(5) of the Base Closure Act.

The record here demonstrates that the United States Army special weapons mission has been eliminated except for temporary and limited tasks associated with demilitarization work, some of which is being done at Seneca. See App. 522, 588-89, 594-95. The record also contains the Declaration of James Davidson, Chief of the Base Realignment and Closure Office in the Headquarters of the Army Materiel Command, and this declaration was submitted in response to the Orndorff Affidavit. Davidson states unequivocally that "[n]o positions were re-located to Sierra Army Depot nor were any created at Sierra Army Depot as a result of the actions at [Seneca]." App. 526. Accord App. 524 ("The special weapons functions and positions at [Seneca] were reduced (i.e. eliminated), but none were relocated * * *") (emphasis added).

Thus, even assuming that the Orndorff Affidavit is fully accurate in what it says -- that some temporary demilitarization work that could have been done at Seneca is being performed at

Sierra -- his statement means only that; it does not further mean that functions and civilian employee positions have been relocated to Sierra. Davidson swears unequivocally that no positions were relocated to Sierra and no positions were created there. There is no record evidence to contradict these clear statements.

Consequently, the undisputed part of the record refutes any claim that a realignment has occurred here. Civilian employee positions related to special weapons are not being relocated to Sierra or anywhere else. Rather, at most, some temporary special weapons functions associated with demilitarization that could have been assigned to Seneca are being performed by existing civilian personnel at Sierra. This is not a "realignment." See Section 2910(5).

D. Plaintiffs argue (Br. at 28-29) that, in any event, the Base Closure Act requires that all personnel actions planned for an installation be cumulated, and their combined effect considered in determining if the Base Closure Act applies. They offer no real support for this argument.

As we have pointed out, the statute covers realignments, and then defines that term and includes an exception for "workload adjustments." If the actions that plaintiffs wish to challenge as being inconsistent with the Base Closure Act are not governed by that statute pursuant to its terms, it is difficult to see how the Army could be accused of violating the statute.

Thus, plaintiffs with standing and who are not covered by an exclusive remedy elsewhere can attack as violative of the Base Closure Act any realignments that injure them if those actions are covered by the statute. Since, for the reasons given above, that does not include the RIF associated with the elimination of the special weapons mission at Seneca, that RIF cannot be challenged as violating the Base Closure Act. None of the other personnel actions planned for Seneca -- the transfer of the industrial plant equipment rehabilitation mission, and the downgrade from a depot to a depot activity -- violates the Base Closure Act, and plaintiffs have proposed no arguments why they would.

Furthermore, it is telling that on this point plaintiffs try (Br. at 29) to tie their claim to the transfer of military units. As plaintiffs' counsel eventually conceded after repeated questioning from the district court (see App. 610-12), however, the Base Closure Act does not cover military personnel.[2]

In addition, this argument makes it sound as if the relevant military personnel were transferred elsewhere en masse, and are being supported elsewhere by civilian personnel. To the contrary, these personnel were transferred as individuals to vacancies in pre-existing military units elsewhere while their existing units at Seneca were eliminated. See App. 522-23, 591-93. We are not aware of the hiring of any civilian employees

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[2] The status of the military units that were formerly at Seneca is described in the Benchoff Declaration (App. 592-94).

caused by the transfer of individual military personnel from Seneca.

E. Finally, plaintiffs ask (Br. at 13, 33-38) this Court to sustain the preliminary injunction on a ground specifically not relied upon by the district court (see App. 802-03): their claim that the RIF at Seneca violates the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (hereafter "NEPA").

Plaintiffs note (Br. at 13) that this Court has stated that it will uphold a preliminary injunction if "the other grounds would have compelled the issuance of one * * *." IIT v. Vencap, Ltd., 519 F.2d 1001, 1019 (2d Cir. 1975) (emphasis in original). Plaintiffs' NEPA arguments are contrary to the plain language of the statute and Supreme Court precedent; they therefore certainly do not "compel" the issuance of a preliminary injunction here.

Plaintiffs' various NEPA claims have three fatal flaws. However, before discussing these, we note a basic misimpression left by plaintiffs' NEPA argument.

Plaintiffs make it appear that the environmental protection and restoration efforts at Seneca will be abandoned or significantly reduced as a result of the RIF. They also surmise without any support in the record that environmental harm could occur from this action.

The record, however, contains the unequivocal Declaration of Andres Talts, the Chief of the Environmental Quality Division in the Army Materiel Command. Talts explains that environmental restoration efforts are ongoing at Seneca, and that "[t]he Army

is committed both by law and policy to remediate [Seneca]," and that responsibility is not waivable whether Seneca is enlarged, reduced, or closed. App. 600-01. "Even if all missions at [Seneca] were to be eliminated, the Army would still conduct its [environmental] remediation program." App. 601.

Talts also declares that the environmental staff at Seneca is consistent with, if not greater than, the resources committed at other Army Materiel Command installations, and that there is no need for additional staff. App. 601. Finally, Talts explains that the downsizing of Seneca to a depot activity does not involve potential for environmental degradation, and that the Army followed necessary procedures in planning the RIF. App. 601.

Thus, the record in this case should raise no reasonable fears that the RIF and the reduced activity at Seneca will cause any environmental problems.

With regard to the specific problems with plaintiffs' NEPA argument, first, plaintiffs claim (Br. at 34) that they do not have the burden of showing that the proposed reduction at Seneca will significantly affect the physical environment. Instead, plaintiffs posit that, to prevail under NEPA, they need only raise an issue that the Seneca reduction may have a significant environmental impact.

This theory contravenes the language of NEPA. In fact, NEPA governs solely agency action "significantly affecting" the environment. 42 U.S.C. 4332(C). Plaintiffs' theory also

contravenes controlling Supreme Court precedent. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989) (environmental impact statement not required under NEPA unless a proposed action "will affect the human environment in a significant manner") (emphasis added).

Plaintiffs attempt to displace (Br. at 34) this statutory and Supreme Court authority with selected Ninth Circuit cases. Even if this authority were relevant, it cannot overrule the statutory language of NEPA or the Supreme Court's construction of it. Furthermore, the Ninth Circuit itself has undermined these cases in a recent decision. Greenpeace Action v. Franklin, et al, No. 91-36062, slip op. at 14878-81 (9th Cir. Dec. 29, 1992).

Under the correct standard, plaintiffs bear the burden of showing that a proposed action will significantly affect the physical environment; i.e., that it will affect wildlife, air, water, or soils. See Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766, 771-773 (1983); Breckinridge v. Rumsfeld, 537 F.2d 864, 867 (6th Cir. 1976) (NEPA is not "a national employment act" and thus a RIF at an Army installation does not involve the statute), cert. denied, 429 U.S. 1061 (1977).

Plaintiffs fail entirely to meet their burden. They have not demonstrated even in the most superficial way that the Seneca layoffs would precipitate either physical -- not socioeconomic -- effects, and effects that are in a reasonably close -- not an attenuated -- chain of causation. See Metropolitan Edison, 460

U.S. at 773-778 (the obligation to consider a particular "environmental effect" under NEPA "should be read to include a requirement of a reasonably close causal connection between a change in the physical environment and the effect at issue"); Hanly v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972), cert. denied, 412 U.S. 908 (1973) (by using the phrase "significantly affecting" the quality of the human environment in NEPA, "Congress apparently was willing to depend principally upon the agency's good faith determination as to what conduct would be sufficiently serious from an ecological standpoint to require use of the full-scale procedure" of an environmental impact statement). See also Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 731 (2d Cir. 1978) ("The identification of [actions covered under NEPA] is the responsibility of the relevant federal agency to be carried out against the background of its own particular operations").

Plaintiffs also predicate their case on a second flaw. They assume that they can meet their burden under NEPA simply by reciting the fact that certain agency actions at Seneca in the past, unrelated to the agency action at issue here, had physical environmental effects. In doing so, plaintiffs fail to mention the reduction that is at issue here or link that reduction to physical environmental effects.

This fact is fatal to plaintiffs' case. See Metropolitan Edison, 460 U.S. at 779 (NEPA "is not directed at the effects of past accidents and does not create a remedial scheme for past

federal actions. It was enacted to require agencies to assess the future effects of future actions. There is nothing in the language or the history of NEPA to suggest that its scope should be expanded 'in the wake of' any kind of accident") (emphasis added).

In sum, plaintiffs predicate their case principally on unrelated agency actions in the past. They accordingly fail once again to show that the Seneca RIF will precipitate physical, not socioeconomic, effects, and effects that are in a reasonable chain of causation.

Finally, plaintiffs inexplicably ignore our point -- raised and briefed below -- that the RIF here is categorically exempt under NEPA.

The President's Council on Environmental Quality ("CEQ") has issued regulations governing agency compliance with NEPA. 40 C.F.R. 1500.1. Under these regulations, agencies are required to supplement CEQ standards, and thereby define their NEPA obligations, by promulgating their own regulations. See 40 C.F.R. 1507.3(a), and (b)(2)(ii). In doing so, agencies are empowered to define a category of actions for which "neither an environmental assessment nor an environmental impact statement" is required under NEPA ("categorical exclusion"). 40 C.F.R. 1508.4. See, e.g., City of Alexandria, Va. v. Federal Highway Admin., 756 F.2d 1014, 1017-21 (4th Cir. 1985).

A categorical exclusion under NEPA is a "category of

actions" that would not "individually or cumulatively" have significant environmental effects. 756 F.2d at 1018.

Under these standards, the Army defines its categorical exclusions to include certain "reductions and realignments of civilian or military personnel" because these actions would have minimal or no individual or cumulative effects. 32 C.F.R. 651.18, and 651, Appendix A-14.

Accordingly, under both NEPA's mandates and Army regulations, Army personnel reductions are exempt from NEPA because they are "not likely to have a significant effect" on the environment. 32 C.F.R. 651.5(b)(1); see also 42 U.S.C. 4332(C) (NEPA governs only significant environmental effects).[3]

For this reason, plaintiffs' claims fail precisely because the Army properly applied a categorical exclusion under NEPA to its proposed action at Seneca. Under the Army's applicable regulations, this proposal would be categorically excluded if it: (1) is not governed by the public reporting and other threshold standards of different statutes; (2) would not result in the abandonment of facilities or the disruption of environmental safeguards; and (3) is accompanied by a Record of Environmental Consideration ("REC") that would not otherwise require an environmental impact statement or environmental analysis under some other standards. 32 C.F.R. 651.18 and 651, Appendix A-14.

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[3]To demonstrate under NEPA that an agency erred in determining whether a proposed action was or was not significant, or in defining or applying a categorical exemption under NEPA, plaintiffs must demonstrate that an agency acted arbitrarily or capriciously. See Marsh, 490 U.S. at 375-78.

The Army complied here with each of these standards. As shown above, the proposal concerning Seneca is not governed by the reporting or related threshold standards of other statutes, including the Base Closure Act. Similarly, plaintiffs have not shown that the proposed Seneca layoffs would disrupt existing environmental safeguards or that they would result in the abandonment, as opposed to a manpower reduction for, its facilities. Lastly, plaintiffs do not dispute that the Seneca proposal was accompanied by a record of environmental consideration. They can claim only that that document was inadequate.

Under these circumstances, plaintiffs have fallen far short of their burden of showing that a preliminary injunction was compelled here even if the grounds used by the district court are reversed.

* * * * * * *

We wish to emphasize again, as we did in our opening brief (at 28-29), that this case cannot be cast as a melodrama involving a heartless boss casting employees out into the cold because they are no longer needed. As the record here demonstrates, the Federal Government has taken and is taking substantial steps to ease the burdens caused here by a significant nuclear disarmament achievement. These efforts are described at some length in the record. See App. 500-10, 511-12, 604. And, the Defense Economic Adjustment Programs are available to aid the Seneca community, regardless of whether the reduction

at Seneca is a Base Closure Act action or not. See Executive Order 12788 (Jan. 15, 1992) (reprinted in 28 Weekly Compilation of Presidential Documents, at 119) (providing for the Defense Economic Adjustment Programs to render federal economic adjustment assistance necessitated by changes in military activities).

In addition, the preliminary injunction was entered here without a bond, which means that the public will not be able to recover any of its considerable financial loss if the scheduled RIF is not allowed to move forward as planned, but the Government eventually prevails in this litigation. Accordingly, we urge this Court to rule before the RIF is scheduled to occur on March 12, 1993.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the preliminary injunction issued by the district court on November 9, 1992 should be vacated.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DENNIS C. VACCO
United States Attorney

DOUGLAS LETTER
(202) 514-3602
Appellate Litigation Counsel
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530-0001

February 3, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have on February 3, 1993 caused a copy of the foregoing Reply Brief for the Defendants/Appellants to be sent by overnight delivery service and by telefax to:

Edward F. Premo
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604

Douglas Letter

A D D E N D U M

§ 2687. Base closures and realignments

(a) Notwithstanding any other provision of law, no action may be taken to effect or implement—

(1) the closure of any military installation at which at least 300 civilian personnel are authorized to be employed;

(2) any realignment with respect to any military installation referred to in paragraph (1) involving a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed at such military installation at the time the Secretary of Defense or the Secretary of the military department concerned notifies the Congress under subsection (b) of the Secretary's plan to close or realign such installation; or

(3) any construction, conversion, or rehabilitation at any military facility other than a military installation referred to in clause (1) or (2) which will or may be required as a result of the relocation of civilian personnel to such facility by reason of any closure or realignment to which clause (1) or (2) applies,

unless and until the provisions of subsection (b) are complied with.

(b) No action described in subsection (a) with respect to the closure of, or a realignment with respect to, any military installation referred to in such subsection may be taken unless and until—

(1) the Secretary of Defense or the Secretary of the military department concerned notifies the Committees on Armed Services of the Senate and House of Representatives, as part of an annual request for authorization of appropriations to such Committees, of the proposed closing or realignment and submits with the notification an evaluation of the fiscal, local economic, budgetary, environmental, strategic, and operational consequences of such closure or realignment; and

(2) a period of 30 legislative days or 60 calendar days, whichever is longer, expires following the day on which the notice and evaluation referred to in clause (1) have been submitted to such committees, during which period no irrevocable action may be taken to effect or implement the decision.

(c) This section shall not apply to the closure of a military installation, or a realignment with respect to a military installation, if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency.

(d)(1) After the expiration of the period of time provided for in subsection (b)(2) with respect to the closure or realignment of a military installation, funds which would otherwise be available to the Secretary to effect the closure or realignment of that installation may be used by him for such purpose.

(2) Nothing in this section restricts the authority of the Secretary to obtain architectural and engineering services under section 2807 of this title.

(e) In this section:

(1) The term "military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, or Guam. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

(2) The term "civilian personnel" means direct-hire, permanent civilian employees of the Department of Defense.

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

(4) The term "legislative day" means a day on which either House of Congress is in session.

(As amended Pub.L. 98–525, Title XIV, § 1405(41), Oct. 19, 1984, 98 Stat. 2624; Pub.L. 99–145, Title XII, § 1202(a), Nov. 8, 1985, 99 Stat. 717; Pub.L. 100–180, Div. A, Title XII, § 1231(17), Dec. 4, 1987, 101 Stat. 1161; Pub.L. 101–510, Div. A, Title XXIX, § 2911, Nov. 5, 1990, 104 Stat. 1819.)

Defense Base Closure and Realignment Act of 1990

Defense Base Closure and Realignment Commission

Pub.L. 101-510, Div. B, Title XXIX, §§ 2901-2910, Nov. 5, 1990, 104 Stat. 1808, as amended Pub.L. 102-190, Div. A, Title III, § 344(b)(1), Div. B, Title XXVIII, §§ 2821(a)-(h)(1), 2827(a)(1),(2), Dec. 5, 1991,105 Stat. 1345, 1544-1546, 1551, provided that:

"Sec. 2901. Short Title and Purpose

"(a) Short Title.—This part [amending this section and enacting this note] may be cited as the 'Defense Base Closure and Realignment Act of 1990'.

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

"Sec. 2902. The Commission

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

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

* * *

"Sec. 2903. Procedure for making recommendations for base closures and realignments

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

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

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

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

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

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

"(b) Selection criteria.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that opportunity in the publication required under the preceding sentence.

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

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

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

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

"(3) In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.

"(4) The Secretary shall make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments. (4)[So in original.] In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

"(5)(A) Each person referred to in subparagraph (B), when submitting information to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that person's knowledge and belief.

"(B) Subparagraph (A) appiies to the following persons:

"(i) The Secretaries of the military departments.

"(ii) The heads of the Defense Agencies.

"(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe, regulations which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

"(6) In the case of any information provided to the Commission by a person described in para-

graph (5)(B), the Commission shall submit that information to the Senate and the House of Representatives to be made available to the Members of the House concerned in accordance with the rules of that House. The information shall be submitted to the Senate and the House of Representatives within 24 hours after the submission of the information to the Commission. The Secretary of Defense shall prescribe regulations to ensure the compliance of the Commission with this paragraph.

"(d) **Review and recommendations by the commission.**—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

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

"(B) Subject to subparagraph (C), in making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

"(C) In the case of a change described in subparagraph (D) in the recommendations made by the Secretary, the Commission may make the change only if the Commission—

"(i) makes the determination required by subparagraph (B);

"(ii) determines that the change is consistent with the force-structure plan and final criteria referred to in subsection (c)(1);

"(iii) publishes a notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President pursuant to paragraph (2); and

"(iv) conducts public hearings on the proposed change.

"(D) Subparagraph (C) shall apply to a change by the Commission in the Secretary's recommendations that would—

"(i) add a military installation to the list of military installations recommended by the Secretary for closure;

"(ii) add a military installation to the list of military installations recommended by the Secretary for realignment; or

"(iii) increase the extent of a realignment of a particular military installation recommended by the Secretary.

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

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

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

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

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

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

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

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

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

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

"Sec. 2904. Closure and realignment of military installations

"(a) **In general.**—Subject to subsection (b), the Secretary shall—

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

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

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

the recommendations for such closures or realignments; and

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

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

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

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

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

"Sec. 2905. Implementation

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

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

"(B) provide—

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

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

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

"(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and shall use for such purposes funds in the Account;

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

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

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

* * *

"(c) Applicability of National Environmental Policy Act of 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) [section 4321 et seq. of Title 42, The Public Health and Welfare] shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

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

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

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

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

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

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

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

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

"(2) sections 2662 and 2687 of title 10, United States Code [sections 2662 and 2687, respectively, of this title].

* * *

* * *

"Sec. 2907. Reports

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

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

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

"Sec. 2908. Congressional consideration of commission report

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

"(1) which does not have a preamble;

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

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

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

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

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

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

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

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

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

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

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

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

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

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

"(f) Rules of the Senate and House.—This section is enacted by Congress—

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

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

"Sec. 2909. Restriction on other Base Closure Authority

"(a) In general.—Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act [Nov. 5, 1990] and ending on December 31, 1995, this part [amending this section and enacting this note] shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

"(b) Restriction.—Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than

under this part, during the period specified in subsection (a)—

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

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

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

"(1) closures and realignments under title II of Public Law 100–526 [set out as a note under this section]; and

"(2) closures and realignments to which section 2687 of title 10, United States Code [this section], is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

"Sec. 2910. Definitions

"As used in this part [amending this section and enacting this note]:

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

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

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

"(4) The term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

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

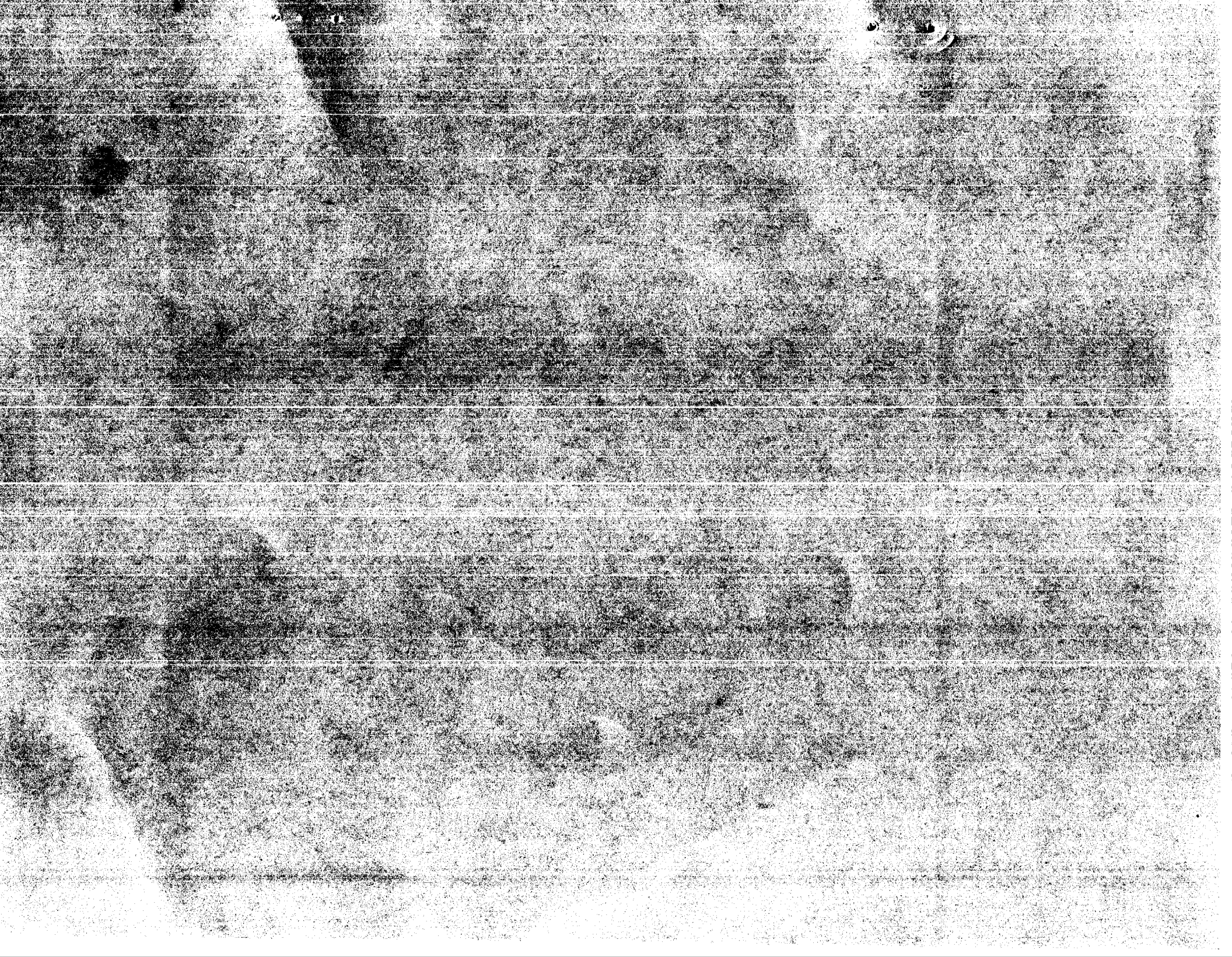
"(6) The term 'Secretary' means the Secretary of Defense.

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

[Amendment by section 344(b)(1) of Pub.L. 102–190 [enacting section 2906(d) of this note] applicable with regard to transfer or disposal of real property or facilities pursuant to Title II of the Defense Authorization Amendments and Base Closure and Realignment Act or the Defense Base Closure and Realignment Act of 1990 occurring on or after Dec. 5, 1991, see section 344(c) of Pub.L. 102–190, set out as a note under this section.]

[Section 2821(h)(2) of Pub.L. 102–190 provided that: "The amendment made by paragraph (1) [amending section 2910(4) of this note] shall take effect as of November 5, 1990, and shall apply as if it had been included in section 2910(4) of the Defense Base Closure and Realignment Act of 1990 [this note] on that date.]"

[Section 2827(a)(3) of Pub.L. 102–190 provided that: "The amendments made by this subsection [enacting section 2906(d) of this note and amending section 2905(a)(1)(C) of this note] shall take effect on the date of the enactment of this Act [Dec. 5, 1991]."



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May 20 92

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,

Plaintiffs,

v.

DONALD RICE,
Secretary of the Air Force,
et al.,

Defendants.

CIVIL NO. 91-0282-B

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiffs, United States Senators William S. Cohen and George J. Mitchell, United States Representative Olympia J. Snowe, Governor John R. McKernan, Jr., the Towns of Limestown, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden, Van Buren, the Cities of Caribou and Presque Isle, Aroostook County, the Save Loring Committee, Paul D. Haines, the American Federation of Government Employees Local Union Chapter # 2943 and Alan Mulherin, seek to enjoin the Secretary of Defense from carrying out the decision to close Loring Air Force Base ("Loring" or the "Base"), and refrain from taking any actions that may interfere with the ability of Loring to operate as if it was not slated for closure. Plaintiffs also request the Court to declare: (i) that the realignment recommendation to close Loring, provided by the Secretaries of the Air Force and Defense, to have been developed in a manner inconsistent with the requirements of the Base Closure

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Act, Pub. L. No. 101-510 Title XXIX ("Base Closure Act" or the "Act"); (ii) that the Secretaries' adoption of the closure recommendation, the findings and conclusions made by the Air Force with respect to the decision to close Loring to have been arbitrary and capricious and otherwise not in conformity with law; and (iii) that the closure and realignment recommendations submitted by the Commission to the President with respect to Loring to have been made in violation of the Act.

I. BACKGROUND

This controversy revolves around the decision to close Loring. Loring, located in Limestone, Maine, is one of twenty-one Strategic Air Command Bases maintained by the Air Force in the continental United States. During April 1991, pursuant to the Base Closure Act, the Secretary of Defense recommended that fourteen Air Force facilities be closed, including Loring, and that six be realigned. See 56 Fed. Reg. 15184 (April 15, 1991). Thereafter, the Base Closing Commission engaged in an analysis and review of the Secretary's recommendations. The Commission ultimately recommended that one of the Air Force facilities recommended for closure by the Secretary remain open, but concurred with the Secretary's recommendation that Loring be closed.

On July 10, 1991, President Bush approved the recommendations of the Commission. See 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House

and Senate Armed Services Committees held hearings on the Commission's recommendations.

On July 30, 1991, as permitted by Section 2908 of the Act, the House considered a resolution, sponsored by Congressional plaintiff Rep. Snowe, to disapprove the Commission's recommendations. See 137 Cong. Rec. H6006 (daily ed. July 31, 1991). The House entertained floor debate on the proposal, including the objections of Rep. Snowe which parallel the allegations here set forth. Id. By a vote of 364 to 60, the House rejected the proposal, thus permitting the closure and realignment process to continue. See 137 Cong. Rec. H6039.

Having exhausted their remedies in the political arena, the plaintiffs brought their challenge to the Court. Defendants moved to dismiss the plaintiffs' complaint on February 28, 1992. The Court heard oral argument on May 4, 1992, and that motion is now before the Court.

II. BALANCING TEST

The issue in this proceeding revolves around two competing interests that must be kept in balance. On the one hand, it is critical that base closings not be subject to the type of political and judicial delays that prompted the passage of the 1990 Act in the first instance. For more than a decade before the passage of the 1990 Act, nearly every attempt to close or realign

a major base had been thwarted by Congress or the Courts.[1] The 1990 Base Closure Act's innovative scheme, utilizing an independent bi-partisan Base Closure Commission, short inflexible time-limits, an all or nothing vote by Congress to accept or reject the President's recommendation package in its entirety, and the exemption of the process from the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., "make it abundantly clear that speed and finality were regarded as indispensable components of the scheme." Specter, U.S. App. LEXIS at 69 (Alito, dissenting). See also 1991 U.S. Code Cong. & Admin. News 3257.

On the other hand, the Court must concern itself with the integrity of the process and the competing principle of fairness. One need look only as far as the Act's stated purpose to find Congress' insistence that the process must be both expeditious and fair. § 2901(b) ("to provided a fair process that will result in the timely closure and realignment of military installations inside the United States."). Basic procedural protections must be preserved in order to insure Congress' stated purpose to ensure that the interests of the communities would be heard and that the process and its consequences would be perceived by the people effected as fair, and would in fact be fair. Fairness must not be sacrificed on the alter of expediency. To the extent that judicial

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1 See, e.g., Base Closure: Joint Hearings on H.R. 1583 to establish the Bipartisan Commission on Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel, 100th Cong. 2d Sess. 349 (1988)(Statement of Rep. Armey).

review is required, therefore, it must be preserved, albeit to a limited extent, to allow the Court to exercise its "balancing" responsibilities.

III. ANALYSIS

This case presents the same issues as were recently decided by the Third Circuit in Specter v. Garrett, No. 91-1932 (slip op. April 17, 1992)(petition for rehearing en banc pending), 1992 U.S. App. LEXIS 6969 (challenging the recommendations of the Secretary of the Navy and the Commission to close the Philadelphia Naval Shipyards), namely: (i) whether the plaintiffs have standing to sue; (ii) whether the controversy presents a nonjusticiable political question; and (iii) whether the decision to close and realign a base pursuant to the Act is subject to judicial review. Although the decision reached in Specter is not binding upon this Court, the Third Circuit's analysis and conclusions, particularly with regard to the questions of the availability of judicial review and the applicability of the political question doctrine, are not without merit. The Court is persuaded by the reasoning of the court in Specter Parts III and IV, and adopts the Third Circuit's holdings with regard to judicial review and the political question doctrine. Specter, U.S. App. LEXIS at *19-33. With regard to the issue of standing, Specter Part II, the Court has written a separate analysis to more fully explain the basis for denying Defendants' motion to dismiss.

A. STANDING TO SUE

(i) The Union

Standing is "the threshold question in every federal case, determining the power of the Court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). In essence, the inquiry into standing seeks to determine "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations in its exercise." Id.

> Art III requires the party who invokes the Court's authority to show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury [2] fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

In this case, the union plaintiffs[2] clearly satisfy the "actual injury" requirement. Many, if not all of the employees represented in this case will lose their jobs if the decision to close Loring is carried out. It is also indisputable that the injury the employees will suffer is exclusively traceable to the

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[2] To attain representative standing the union must show that: its members individually would have standing to bring the same claims; the interests the union protected by bringing the claims are germane to the union's purposes; and neither the claim nor the relief sought requires individual members to participate in the litigation. Hunt v. Washington State Apple Advertising Comm'n 432 U.S. 333, 343 (1977). The Court finds in this case the union has met its burden.

decision to close the Base. If Loring does not close the union's members will, in all likelihood, keep their jobs.

Plaintiffs' allegations demonstrate that Loring would not have been slated for closure but for the actions of the defendants. While it is true that the Act places in the President the authority to accept or reject the Commission's recommendations, the mere possibility that Congress or the President theoretically could have broken the causal link is insufficient to defeat standing in this case. Moreover, it is not correct to characterize the President's decision not to disapprove the Commission's recommendations as an independent decision unrelated to the Commission's recommendations. There is a but/for causation between the Secretary's decision to put Loring on the closure list, the Commission's recommendation to close Loring and the harm that may be visited upon the union plaintiffs.

Finally, it is clear that the harm the employees will suffer would be redressed, if only temporarily, as a result of the decision to close the Base being enjoined. The Base would remain open, at least temporarily, and as a consequence the employees' jobs would be spared for that period of time.

In addition to satisfying the constitutional requirements of injury in fact, fairly traceable causal connection, and redressibility, a plaintiff must also satisfy several prudential concerns regarding the proper exercise of federal jurisdiction. To this end, the Court has required "that a plaintiff's complaint fall

within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751 (1984).

As the Supreme Court stated in Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400, (1987):

> The "zone of interest" test is a guide for deciding whether in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Reviewing the Base Closure Act and its legislative history the Court finds that the Union and its members are within the zone of interests meant to be protected by the Act.

> [T]he Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live. Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived as fair. To further this objective, Congress provided for opportunities for public hearings and comment. It also provided that if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition . . . . [B]ecause of this congressional concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by Congress included among the eight factors to be considered "the economic impact on communities."

Specter, U.S. App. LEXIS at p*17-18 (citations omitted).[3]

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[3] As a matter of judicial economy, generally courts will not adjudicate the standing of each multi-party plaintiff, as long as one plaintiff is found to have standing. Having found such a plaintiff in this case, the Court elects not to resolve the

B. APPLICATION OF SPECTER V. GARRETT TO THE PLAINTIFFS' CLAIMS.

The Court, having adopted the Third Circuit's analysis with regard to the availability of judicial review, is left with the task of line drawing in order to determine which of Plaintiffs' claims are reviewable, and which are not. See Specter, U.S. App. LEXIS at *52.

Count I of Plaintiffs' complaint focuses on the alleged deficiencies in the performances of the Secretaries of the Air Force and Defense. Plaintiffs challenge the decision-making process of the Secretaries and allege that their recommendations deviated from the force structure plan and published criteria; that their recommendations were substantially in error; that they considered an unpublished criterion, "quality of life,"; that they relied on inaccurate and inadequate data and failed to explain these deficiencies to the Commission; that they disregarded their own prioritization schema in evaluating Loring; and that their recommendations were arbitrary and capricious.

Deficiencies in this category are not judicially reviewable. In each case the Court would be required to reevaluate the basis for the Secretaries' decision to close Loring and the relative importance of such data. The Court will not engage in such review for two reasons. First, "the Secretary's recommendations are clearly committed to his discretion under the

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standing issue as to the remaining plaintiffs. The Court notes, however, that this prudential doctrine does not absolve plaintiffs' counsel of its responsibility to ensure that each plaintiff named may properly invoke the jurisdiction of the Court. See Fed. R. Civ. P. 11.

Act." Specter, U.S. App. LEXIS at *43. Second, and perhaps more importantly, Congress provided for alternative methods of review.

> Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guaranty the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO.

Id. at *46. See e.g., § 2903(d)(2)(B) (the Commission shall review the recommendations of the Secretary and may make changes in any of the recommendations "if the Commission determines that the Secretary deviated substantially from the force-structure plan and the final criteria referred to in subsection (c)(1) in making recommendations."); § 2903(d)(2)(5) (the Comptroller General shall "transmit to Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.").

"Given the nature of this task, it seems clear . . . that an additional review by the courts would not contribute to public confidence in this part of the process . . . ." Specter, U.S. App. LEXIS at *46. The Court finds, therefore, that Plaintiffs' allegations in Count I paragraphs 61-67 (first sentence) and 68(B)-(F) to be unreviewable. Accordingly, Defendants' motion to dismiss is GRANTED with respect to these claims.

However, with regard to Plaintiffs' contention that the Secretary failed to transmit to the GAO, members of Congress and the Commission all of the information used in making the base closure recommendations, the Court finds this claim to be

judicially reviewable. The Commission and the GAO are the bodies charged with the review of the Secretary's recommendations. These bodies must, therefore, have access to all of the information the Secretary relied upon. See § 2903(c)(4). The failure to transmit such information "presents the kind of issues with which courts have traditionally dealt . . . . [S]uch a review seems entirely consistent with Congress' desire to assure the integrity of the decision-making processes." Specter, U.S. App. LEXIS at *47-48.[4]

With regard to Count II, the plaintiffs challenge the decision-making process by which the Commission reviewed the Secretary's recommendations. Specifically the plaintiffs charge that the Commission: utilized an unpublished criterion; failed to apply the published criteria equally to all installations; failed to follow the Air Force's priority schema; and utilized data it knew to be in substantial error.

The Court finds that "each of these challenges go to the merits of the recommendations of the Commission and that the merits of these recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary." Id. at *50. Accordingly, the Court finds paragraphs 69, 70(a), (c)-(e) are not judicially reviewable and are hereby DISMISSED.

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[4] However, to the extent that the claim is that because of the Air Forces' concealment or errors, the Secretary of Defense failed to consider evidence that he should have considered, judicial review is not available.

Plaintiffs' contention that the Commission failed to hold public hearings as required by the Act, § 2903(d)(1), is subject to judicial review. Such review is "entirely consistent with the congressional intent, [as] reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with 2903(d)(1)." Specter, U.S. App. LEXIS at *51.

The Court notes that its finding that a small category of claims in this proceeding is subject to judicial review does not

> necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all the surrounding circumstances. Thus judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one.

Id. at *40.

Accordingly, Defendants' motion to dismiss is GRANTED in part, and DENIED, in part. Specifically, Defendants' motion to dismiss is DENIED with respect to paragraphs 64(d), 67 (second sentence), 68(A), 70(a)-(b). Given the nature of the complaint and the issues involved, the Court will hear this case on an expedited basis. The court will hold a scheduling conference within one week from the date of this order.

SO ORDERED.

Morton A. Brody
United States District Judge

Dated at Bangor, Maine this 26th day of May, 1992.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,.

U.S. Sen. Arlen Specter,
U.S. Sen. Harris Wofford,
U.S. Sen. Bill Bradley,
U.S. Sen. Frank R. Lautenberg,
Governor Robert P. Casey,
the Commonwealth of Pennsylvania,
Pennsylvania Attorney General
Ernest D. Preate, Jr., Governor
James J. Florio, the State of New
Jersey, New Jersey Attorney
General Robert J. Del Tufo,
Governor Michael N. Castle,
the State of Delaware,
U.S. Rep. Curt Weldon,
U.S. Rep. Thomas Foglietta,
U.S. Rep. Robert E. Andrews,
U.S. Rep. R. Lawrence Coughlin,
U.S. Rep. Peter H. Kostmayer,
U.S. Rep. Robert A. Borski,
the City of Philadelphia,

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5-20-92

SALLY MRVOS
Clerk

Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Rail, Metals Trades Council, Local 687, Machinists, Ronald Warrington, the Planners Estimators Programmman & Schedulers Union, Local No. 2,

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

Circuit Judge

Dated: MAY 20 1992

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William S. COHEN, et al., Plaintiffs, Appellants,
v.
Donald RICE, Secretary of the Air Force, et al., Defendants, Appellees.
No. 92-2427
United States Court of Appeals,
First Circuit.
May 3, 1993

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

Severin M. Beliveau, with whom Ann R. Robinson, Joseph G. Donahue, and Preti, Flaherty, Beliveau & Pachios, were on brief for appellants.

Jacob M. Lewis, with whom Stuart M. Gerson, Acting Attorney General, Richard S. Cohen, United States Attorney, Douglas N. Letter, United States Attorney and Scott R. McIntosh, United States Attorney, were on brief for appellee.

Before Boudin, Circuit Judge, Campbell, Senior Circuit Judge, and Stahl, Circuit Judge.

STAHL, Circuit Judge.

***1** This is an action to enjoin the Department of Defense from carrying out the President's decision to close Loring Air Force Base ("Loring") in Limestone, Maine. Plaintiffs, [FN1] seeking relief under the Administrative Procedure Act ("APA"), 5 U.S.C. s 701 et seq., allege that defendants Secretary of Defense, Secretary of the Air Force, and Base Closure and Realignment Commission ("the Commission") violated procedural and substantive requirements of the Defense Base Closure and Realignment Act of 1990 ("the 1990 Act"). Pub. L. No. 101-510, ss 2901-11, 104 Stat. 1808-19 (codified at 10 U.S.C. s 2687). In dismissing many of the plaintiffs' claims in May 1992, the district court ruled that the 1990 Act precludes judicial review of substantive challenges to base closure decisions. See Cohen v. Rice, 800 F. Supp. 999 (D. Me. 1992) ("Cohen I "). In September of 1992, the district court granted defendants' motion for summary judgment on the remaining claims on the basis of the Supreme Court's intervening decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). See Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992) ("Cohen II "). Plaintiffs' timely appeal focuses on the district court's application of Franklin to this case. After careful review of the decision below, the 1990 Act, and the Court's pronouncements in Franklin, we affirm the judgment of the district court. As this case is apparently the first at the appellate level to mesh the 1990 Act with the recent dictates of Franklin, [FN2] we begin with an overview of the 1990 Act and its predecessors, and then focus on the specifics of the matter at hand.

The 1990 Act

The 1990 Act is the latest attempt by Congress to regulate the process by which domestic military bases are closed or realigned. Throughout the 1960s and 1970s, the Executive Branch attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, ("Commission Report") at 1-1 (1991). Often, however, these attempts were opposed by members of Congress, who feared the economic impact on their constituents, and who suspected the influence of political motivation in the Executive's decisions. Id.

In 1977, Congress passed legislation granting the Secretary of Defense the power to unilaterally close particular bases, but only after (1) notifying the Armed Services Committees of the Senate and House of Representatives of the selected bases; (2) submitting to the committees his evaluation of the economic, environmental, budgetary and strategic consequences of the closings; and (3) deferring action for at least 60 days, during which time Congress could legislate a halt to the closures. See 10 U.S.C. s 2687(b) (Supp. IV 1980). In addition, the proposed closures had

to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). Id. While the 1977 legislation imposed few substantive restrictions on the Executive Branch's authority to close bases, the procedural requirements-most notably the mandate to comply with NEPA-made such action difficult. See Commission Report at 1-1; see also H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures....").

*2 Congress next tackled the base closure issue in 1988 by enacting the Defense Authorization Amendments and Base Closure and Realignment Act ("the 1988 Act"). Pub. L. No. 100-526, ss 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act replaced the Secretary of Defense's decision-making power with that of an independent commission, which was granted the power to recommend bases for closure or realignment. 1988 Act ss 201, 203(b)(1)-(2), 102 Stat. at 2627-28. The commission presented its recommendations to the Secretary, who had the power to approve or disapprove the entire group of recommendations. Id. ss 201(1)-(2), 202(a), 102 Stat. 2627. If the Secretary approved the commission's recommendations, Congress was given 45 days to override the Secretary by passing a joint resolution. Id. ss 202(b), 208, 102 Stat. 2627, 2632-34. Finally, in response to the prior difficulties, the 1988 Act explicitly exempted the Secretary and commission's base closure decisions from the requirements of NEPA. Id. s 204(c)(1), 102 Stat. 2630.

Although the newer processes of the 1988 Act led to closure or realignment of 145 domestic military bases, it was not enacted as a permanent mechanism, but was instead a one-time exception to the procedures set forth in the 1977 legislation. See Specter, 971 F.2d at 939. Thus, the Defense Secretary's January 1990 base closure proposals were governed by the 1977 rules. Id. Members of Congress expressed concern over the "considerable period of time and ... numerous opportunities for challenges in court[ ]" presented by the 1977 procedures, and noted that the Secretary's list of bases for study "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2nd Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257.

Congress, in enacting the 1990 Act, attempted to incorporate the procedures of the 1988 Act, without the obstacles of prior legislation. See H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3068 ("a new base closure process will not be credible unless the 1988 base closure process remains inviolate"). The 1990 Act envisioned three rounds of base closures, in 1991, 1993, and 1995, and provided for the establishment of an independent Commission to meet in each of those years. 1990 Act s 2902(a), (e), 104 Stat. 1808 (1990). The Act required the Secretary of Defense to provide Congress and the Commission with a six-year force structure plan that assessed national security threats and the force structure necessary to meet such threats. Id. s 2903(a)(1)-(3), 104 Stat. 1810 (1990). The Secretary was also required to formulate criteria for use in identifying bases for closure or realignment. The criteria had to be published in the Federal Register for public notice and comment, and submitted to Congress which had the power to evaluate and disapprove them. Id. s 2903(b), 104 Stat. 1810-11. [FN3]

*3 For the 1991 cycle, the Act required the Secretary to recommend base closures and realignments to the Commission by April 15, 1991, based on the force structure plan and final criteria. Id. s 2903(c)(1), 104 Stat. 1811. The Act charges the Commission with reviewing the Secretary's recommendations, holding public hearings, and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations. Id. s 2903(d)(1)-(2)(A), 104 Stat. 1811. The Act allows the Commission to change any of the Secretary's recommendations if they "deviate[ ] substantially" from the force structure plan

and final criteria. Id. s 2903(d)(2)(B), 104 Stat. 1811-12. However, in its report to the President, the Commission must explain any departure from the Secretary's recommendations. Id. s 2903(d)(3), 104 Stat. 1812. The Secretary must make available to the Comptroller General all information used in making the initial recommendations. The Comptroller General must report on the Secretary's recommendations and selection process to the Commission and Congress, and may, to the extent requested, assist the Commission. Id. s 2903(c)(4), (d)(5), 104 Stat. 1811-12.

Once the Commission completes its report, the Act requires that it be transmitted to the President, who may approve or disapprove the Commission's recommendations, and then must relate his decision to the Commission and Congress. Id. s 2903(e)(1)-(3), 104 Stat. 1812. If the President disapproves the Commission's recommendations, in whole or in part, he returns them to the Commission, which must then reconsider its prior recommendations and submit a revised list to the President. Id. s 2903(e)(3), 104 Stat. 1812. If the President does not approve the revision, and thereby does not submit any recommendations to Congress, the base closure process for that year is terminated. Id. s 2903(e)(5). If, however, the President approves the Commission's recommendations, or its revised version, Congress has 45 days to pass a joint resolution disapproving the Commission's recommendations in their entirety. Id. ss 2908, 104 Stat. 1816-18. If a disapproval resolution is enacted, the Secretary may not close the bases approved for closure by the President. Id. s 2904(b), 104 Stat. 1813. If Congress does not pass such a resolution, the Act calls for the Secretary to close or realign all bases so recommended by the Commission and approved by the President. Id. s 2904(a), 104 Stat. 1812-13

The Loring Decision

In April 1991, the Secretary issued his list of recommended domestic base closures and realignments. See 56 Fed. Reg. 15184 (April 15, 1991). Among the 72 military installations on the list were 20 Air Force bases. Loring was scheduled for closure. Id. at 15252. Pursuant to the Act, the Commission then conducted its analysis and review of the Secretary's recommendations. The Commission conducted public hearings, at which it heard testimony from Department of Defense officials, legislators, and other experts. Commission Report at 4-1, (G-1)-(G-2). Commissioners also visited many of the affected bases, including Loring. Id. at 4-1, H-1. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. In addition, the General Accounting Office ("GAO") issued a report on the Secretary's recommendation and forwarded it to the Commission, while also assisting the Commission in obtaining, verifying and reviewing data. Id. at (3-1)-(3-2). In the end, the Commission recommended that one of the Air Force bases targeted for closure by the Secretary remain open, but the Commission concurred in the recommendation that Loring be closed. Id. at (5-31)-(5-45).

*4 On July 10, 1991, President Bush approved the recommendations of the Commission, including the closure of Loring. See Cohen I, 800 F. Supp. at 1002; Cohen II, 800 F. Supp. at 1008. On July 30, 1991, pursuant to section 2908 of the 1990 Act, the House considered a resolution, proposed by plaintiff Rep. Snowe, to disapprove the Commission's recommendations. Id. Three Commissioners, Air Force officials, and members of the affected communities testified at the hearings. 137 Cong. Rec. H6006 (daily ed. July 31, 1991). During the course of debate, Representative Snowe urged the House to block Loring's closure, alleging a variety of procedural errors on the part of the Commission. Id. at H6012-H6020. The House rejected the proposed disapproval resolution by a vote of 364 to 60, thus requiring the Secretary to proceed with the 1991 closures and realignments. Id. at H6039.

Prior Proceedings

Plaintiffs filed the instant suit in December 1991, alleging in Count I that the Air Force failed to adhere to the force structure plan and "deviated substantially" from the published base closure criteria; failed to fairly apply the selection criteria; improperly considered an unapproved selection criterion; acted "arbitrarily and capriciously" in applying the selection criteria to Loring and a rival base; and failed to supply all relevant information to the GAO and Congress. Count II made many of the same allegations against the Commission, and also alleged a failure to comply with the 1990 Act's public hearing requirement.

In February 1992, the defendants moved to dismiss the suit, essentially on the ground that the 1990 Act implicitly precluded judicial review. Cohen I, 800 F. Supp. at 1005. With respect to Count I, the district court dismissed all claims against the Air Force and Secretary, except those containing allegations that the Secretary failed to transmit to the GAO, Congress and the Commission all of the information used in preparing his recommendations, as the 1990 Act requires. Id. The court ruled that the remainder of plaintiffs' challenges were not judicially reviewable because they would require the court to "reevaluate the basis for the Secretaries' decision to close Loring...." Relying on Specter, the court held that such review was precluded by the Act, which "decided to put these questions to rest and guaranty the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission and the GAO." Id. at 1005 (quoting Specter, 971 F.2d at 951). The district court also dismissed most of the claims against the Commission made in Count II, for essentially the same reasons. Id. at 1006. Only the charge that the Commission failed to hold public hearings, in violation of section 2903(d)(1) of the 1990 Act, was left standing. Id.

Subsequent to Cohen I, the Supreme Court, in Franklin, expressed its interpretation of reviewable agency action under the APA. The district court, relying on Franklin, granted defendants' motion for summary judgment on the remaining aspects of the case. See Cohen II. This appeal followed. Before delving into Franklin and its applicability herein, we briefly outline the strictures of the APA.

The Administrative Procedure Act

*5 The APA sets forth the procedures by which federal agencies are held accountable to the public and their actions made subject to judicial review. Franklin, 112 S. Ct. at 2773. Pursuant to the APA, a court may set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or contrary to applicable legal or procedural requirement. 5 U.S.C. s 706(2). Such review, however, is only available " 'to the extent that ... statutes [do not] preclude judicial review' and the agency action 'is [not] committed to agency discretion by law.' " Cohen II, 800 F. Supp. at 1009 (quoting 5 U.S.C. 701(a)). Finally, and perhaps most importantly, the APA authorizes judicial review only of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. s 704 (emphasis added). At the heart of the instant dispute is whether the actions complained of are "final actions" within the meaning of the APA. In Franklin, the Court addressed this critical issue. We turn now to the Court's opinion.

Franklin v. Massachusetts

Franklin involved a challenge to the reapportionment of the House of Representatives following the 1990 census. Article I, s 2, cl. 3, of the Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers...." Section 2 of the Fourteenth Amendment mandates counting the "whole number of persons in each state." Such counting is to be done through "actual Enumeration," conducted every 10 years, "in such Manner as [Congress] shall by Law direct." U.S. Const., art I, s 2, cl. 3. Pursuant to statutory authority, the Secretary of Commerce is directed to conduct the decennial census "in such form and content as he may determine."

13 U.S.C. s 141(a). The Secretary then must provide the President with the state-by-state population, necessary for reapportionment. Id. s 141(b). The President then sends Congress a statement, based on the Secretary's report, showing the population of each state, and the number of Representatives to which each state is entitled, according to a specified formula. 2 U.S.C. 2a(a). Each state is entitled to the number of Representatives shown in the President's statement to Congress. Id. s 2a(b). See generally Franklin, 112 S. Ct. at 2771 (outlining historical bases of apportionment and census statutes).

The Commonwealth of Massachusetts challenged the Secretary of Commerce's inclusion of military personnel serving overseas in state population counts for census purposes. The resulting tabulation shifted a Representative from Massachusetts to Washington. Id. Massachusetts claimed that the allocation of overseas personnel was arbitrary and capricious under the APA. A three-judge district court panel agreed. Commonwealth v. Mosbacher, 785 F. Supp. 230 (D. Mass. 1992). The Supreme Court reversed, holding that the action of the Secretary, in reporting the population tabulations, was not "final," within the meaning of the APA, while the actions of the President were not subject to APA review because the President is not an "agency" within the APA. Franklin, 112 S. Ct. at 2773--76.

*6 In assessing the finality of the Commerce Secretary's actions, [FN4] the Court first looked to Abbott Lab. v. Gardner, 387 U.S. 136 (1967). There, the Court stated that the finality of agency action depends on whether its impact ' "is sufficiently direct and immediate' and has a 'direct effect on ... day-to-day business.' " Franklin, 112 S. Ct. at 2773 (quoting Abbott, 387 U.S. at 152). "An agency action is not final if it is only 'the ruling of a subordinate official' or 'tentative.' " Id. (quoting Abbott, 387 U.S. at 151). "The core question is whether the agency has completed its decisionmaking [sic] process, and whether the result of that process is one that will directly affect the parties." Id. In answering this "core question," the Court first reasoned that the census statute, unlike others, does not explicitly require the President to transmit the agency's report to Congress. Id. The Court stated: After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State ... as ascertained under the ... decennial census of the population." 2 U.S.C. s 2a. Section 2a does not expressly require the President to use the data in the <ecretary's report, but, rather, the data from the "decennial census." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. Id. at 2774.

Therefore, according to the Court, the census itself still presents a "moving target" after the Secretary reports to the President, especially since there exists no statutory bar to the President instructing the Secretary to reform the census, even after the President receives the Secretary's report. Id. "It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by s 2a to a particular number of Representatives." Id. Thus, the Court concluded: "Because the Secretary's report to the President carries no direct consequences for the reapportionment ... serv[ing] more like a tentative recommendation than a final and binding determination[,][i]t is, like 'the ruling of a subordinate official,' not final and therefore not subject to review." Id. (quoting Abbott, 387 U.S. at 151).

We agree with the district court's conclusion that "[t]he holding and reasoning of Franklin are directly applicable to the facts of the present controversy." Cohen II, 800 F. Supp. at 1011. In arriving at its decision, the Franklin Court explicitly distinguished statutory schemes whereby the President is required to transmit an agency's report directly to Congress from those in which the President is not so required, holding that the former represent final agency action, under the APA, but that the latter do not.

Under the 1990 Act, the President is not required to submit the Commission's report to Congress. In addition, the 1990 Act gives the President the power to order the Commission to revise its report, and, in the final analysis, the President has the power to terminate a base closure cycle altogether via a second rejection of a Commission report. In our view, the agency action involved here bears even less indicia of finality than that in Franklin, where the majority referred to the President's role in reapportionment as "admittedly ministerial," id. at 2775, yet still found the President's action to be the "final action." Id.

*7 Plaintiffs seek to avoid Franklin's restrictions by arguing that this case involves a challenge to the Commission's faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO, whereas Franklin, according to plaintiffs, proscribes only challenges to an agency's substantive decisions. As an initial matter, we note that Franklin makes no such distinction. In any event, we view it as a distinction without legal difference. As previously noted, Franklin's finality determination explored whether an agency action has a "sufficiently direct and immediate" impact. Here, if the Commission's report to the President is not a "final action," then the techniques used by the Commission to create the report, which are even more preliminary to the final decision, cannot themselves be "final agency actions." In sum, whether the complaints are styled as procedural or substantive, our answer to the "core question" of finality remains the same. The judgment of the district court is therefore affirmed. [FN5]

FN1. Plaintiffs are: United States Senators William S. Cohen and George J. Mitchell; Maine Governor John R. McKernan, Jr.; United States Representative Olympia J. Snowe; the towns of Limestone, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden and Van Buren, and the cities of Caribou, and Presque Isle, all of which are municipalities of the State of Maine; Aroostook County, a political subdivision of the State of Maine; Save Loring Committee, an organization of individual and corporate citizens residing in the plaintiff towns and cities, and Committee Chairman Paul D. Haines; and American Federation of Government Employees ("AFGE") Local Union Chapter # 2943, the exclusive bargaining representative for approximately 492 Loring employees and Chapter President Alan Mulherin.

FN2. One other appellate court has addressed the issue we face today, deciding, at least partially, in favor of judicial review. See Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992). The district court, in fact, relied on Specter in ruling on defendants' motion to dismiss. Subsequently, however, following the issuance of Franklin, the Court granted the government's petition for certiorari in Specter, vacated the judgment therein, and remanded the case to the Third Circuit for reconsideration in light of Franklin. See O'Keefe v. Specter, 113 S. Ct. 455 (1992).

FN3. On February 15, 1991, the Department of Defense published eight proposed final criteria governing base closure and realignment. 56 Fed. Reg. 6374. The criteria were subject to Congressional review until March 15, 1991, and became final on that date. 1990 Act s 2903(b)(2). The criteria are reported as follows: In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider: Military Value 1. The current and future mission requirements and impact on operational readiness of the Department of Defense's total force. 2. The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations. 3. The ability to accommodate contingency, mobilization and future total force requirements at both the existing

and potential receiving locations. 4. The cost and manpower implications. Return on Investment 5. The extent and timing of potential cost and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the cost. Impacts 6. The economic impact on communities. 7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel. 8. The environmental impact. 56 Fed. Reg. 6374-02 (Feb. 15, 1991).

FN4. Here, plaintiffs have expressly conceded that they are not attacking the actions of the President. Thus, we focus our discussion on Franklin's assessment of the Secretary of Commerce's actions.

FN5. Because we have based our decision on Franklin's finality analysis, we need not address whether the 1990 Act, by its own terms, precludes judicial review.

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PRETI, FLAHERTY, BELIVEAU & PACHIOS

ATTORNEYS AT LAW

443 CONGRESS STREET
PORTLAND, MAINE 04101-3590

(207) 775-5831
TELEFAX (207) 775-5494

45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167
TELEFAX (207) 623-2914

RUMFORD OFFICE
150 CONGRESS STREET
P.O. DRAWER L
RUMFORD, MAINE 04276-2035
(207) 364-4593
TELEFAX (207) 369-9421

December 24, 1991

Gail Creath, Clerk
Deputy in Charge
U.S. District Court
P.O. Box 1007
Bangor, ME 04402-1007

RE: Senators William S. Cohen, George J. Mitchell, et al. v. Donald Rice, The Secretary Of The Air Force, et al. Civil Action No.

Dear Ms. Creath:

Enclosed for filing please find Plaintiff's Verified Complaint For Declaratory Judgment and Preliminary Injunctive Relief along with our check in the amount of $120.00 to cover the same.

Thank you for your attention to this matter.

Sincerely yours,

Severin M. Beliveau

SMB:lal
Enclosures

cc: David R. Collins, Esq.

81975/AF1

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SENATOR WILLIAM S. COHEN, SENATOR GEORGE J. MITCHELL, GOVERNOR JOHN R. MCKERNAN, JR., REPRESENTATIVE OLYMPIA J. SNOWE, TOWN OF LIMESTONE, TOWN OF ASHLAND, TOWN OF CASWELL, TOWN OF MARS HILL, TOWN OF NEW SWEDEN, TOWN OF VAN BUREN, CITY OF CARIBOU, CITY OF PRESQUE ISLE, AROOSTOOK COUNTY, SAVE LORING COMMITTEE, PAUL D. HAINES, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES and ALAN MULHERIN,	*	
Plaintiffs	*	
v.	*	Civil Action No.
DONALD RICE, The Secretary Of The Air Force, RICHARD CHENEY, The Secretary Of Defense, THE DEFENSE BASE CLOSURE COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	*	
Defendants.	*	

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTIVE RELIEF

NOW COME the Plaintiffs, U.S. Senator William S. Cohen, U.S. Senator George J. Mitchell, Governor John R. McKernan, Jr., U.S. Representative Olympia J. Snowe, the Town of Limestone, the Town of Ashland, the Town of Caswell, the Town of Mars Hill, the Town of New Sweden, the Town of Van Buren, the City of Caribou, the City of Presque Isle, the Aroostook County, the Save Loring

Committee and the American Federation of Employees, by and through their attorneys, PRETI, FLAHERTY, BELIVEAU & PACHIOS, and complain as follows:

PLAINTIFFS

1. Plaintiff United States Senator William S. Cohen is a citizen of the State of Maine with his residence in the City of Bangor, Penobscot County, State of Maine, and an office at 202 Harlow Street, Bangor, Maine.

2. Plaintiff United States Senator George J. Mitchell is a citizen of the State of Maine with his residence in the City of Portland, County of Cumberland, State of Maine, and an office at 202 Harlow Street, Bangor, Maine.

3. Plaintiff Governor John R. McKernan, Jr. is a citizen of the State of Maine with a residence in the City of Auburn, County of Androscoggin, State of Maine and an office at the State House, Augusta, Maine.

4. Plaintiff United States Representative Olympia J. Snowe is a citizen of the State of Maine with a residence in the City of Auburn, County of Androscoggin, State of Maine and an office at One Cumberland Place, Bangor, Maine.

5. Plaintiff Town of Limestone is a municipality of the State of Maine.

6. Plaintiff Town of Ashland is a municipality of the State of Maine.

7. Plaintiff Town of Caswell is a municipality of the State of Maine.

8. Plaintiff Town of Mars Hill is a municipality of the State of Maine.

9. Plaintiff Town of New Sweden is a municipality of the State of Maine.

10. Plaintiff Town of Van Buren is a municipality of the State of Maine.

11. Plaintiff City of Caribou is a municipality of the State of Maine.

12. Plaintiff City of Presque Isle is a municipality of the State of Maine.

13. Plaintiff Aroostook County is a political subdivision of the State of Maine.

14. Plaintiff Save Loring Committee is an organization of individual and corporate citizens resident in the towns and county which are Plaintiffs in this action. The members of the Save Loring Committee will be directly and substantially affected by the closure of Loring Air Force Base ("Loring").

15. Plaintiff American Federation of Government Employees ("AFGE") is the exclusive bargaining representative for approximately 492 employees of Loring. All of these employees are being affected by the Air Force's current conduct and virtually all of these employees will lose their jobs if Loring is closed as a result of the findings of the Defense Base Closure and Realignment Commission.

16. Plaintiff Alan Mulherin is the President of the American Federation of Government Employees and is a resident of Limestone, Maine.

DEFENDANTS

17. Defendant Donald Rice is the Secretary of the Air Force and maintains his principal office at the Department of the Air Force, the Pentagon, Washington, D.C. Defendant Rice is sued in his official capacity as Secretary of the Air Force.

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

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

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

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

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

23. Defendant General Duane H. Cassidy, U.S.A.F. (Retired) is a member of the Commission and is sued in his official capacity.

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

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

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

JURISDICTION AND VENUE

27. This Court has jurisdiction over the subject matter of this lawsuit pursuant to the following statutes:

(i) The Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202;

(ii) 28 U.S.C. §§1331, 1337, 1346 and 1361;

(iii) The Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Div. B, Title XXIX, Part A, §§2901 - 2910 (November 5, 1990); and

(iv) The Administrative Procedure Act, 5 U.S.C. §§701 et seq.

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

FACTUAL ALLEGATIONS

A. Loring Air Force Base

29. Loring Air Force Base ("Loring"), located in Limestone, Maine, is one of 21 Strategic Air Command ("SAC") Bases maintained by the Department of the Air Force within the continental United States. Loring is capable of performing, and has performed, both nuclear and conventional missions.

30. Loring is the nation's premiere SAC Base as most recently evidenced by its having received the 1990 Commander-in-Chief's Installation Excellence Award ("Award"). Air Force Regulation 900-64 (November 29, 1985) states that this Award

"[r]ecognizes the installation that has produced the highest overall return from its resources in support of its mission." This regulation also establishes that Installations receiving the Award are "effective - accomplishing the right things, in the right quantities, at the right time." (Emphasis in the original.) A copy of the Award and the Air Force Regulation 900-64 are attached as Exhibit 1.

31. Loring directly employs at least 1406 civilians and 3304 military employees who reside in other townships in Aroostook County. Loring is one of the largest employer(s) in Aroostook County and infuses approximately $91 million into the local economy each year.

B. The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act")

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

33. In October of 1988, Congress passed and the President signed Public Law 100-526, the Defense Authorization Amendment and Base Closure and Realignment Act.

34. The 1988 Commission recommended that 86 bases be closed and 59 bases be realigned or partially closed.

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

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

37. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 35 military bases in the United States, including 1 SAC base: Eaker Air Force Base in Arkansas.

38. On November 5, 1990, to redress the criticisms raised by the 1988 base closure process, the President signed into law the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act").

39. The Base Closure Act:

(a) Expressly states that its "purpose" is "to provide a fair process that will result in the timely closure and realignment of military installations" [Base Closure Act §2901(b) (emphasis supplied)];

(b) Requires that all meetings of the Commission "be open to the public," except where classified information was being discussed [Base Closure Act §2902(e)(2)(A)];

(c) Mandates the development and application of "final criteria" for making the closure and realignment determinations [Base Closure Act §2903(b)(2)(A) and (c)];

(d) Mandates the creation of a six year force-structure plan for the Armed Forces for making closure and realignment determinations [Base Closure Act §2903(a) and (c)];

(e) Requires the Secretary of Defense to consider all military installations "equally" for closure or realignment [Base Closure Act §2903(c)(3)];

(f) Requires the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [Base Closure Act §2903(c)(2)]; and

(g) Prohibits the Secretary of Defense from carrying out any closure or realignment recommendation before the earlier of (i) the enactment of a joint resolution by Congress disapproving

the closure recommendations, or (ii) the expiration of a 45 day statutory period that commenced on the day that the President transmitted the recommended closure and realignment list to Congress. [Base Closure Act §2904 (b)].

C. The 1991 Defense Base Closure and Realignment Commission

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

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

42. The President nominated and the Senate confirmed James A. Courter as Chairman of the Commission and the following seven as members of the Commission: William L. Ball, III, Howard H. (Bo) Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith II, P.E., Robert D. Stuart, Jr., and Alexander Trowbridge.

43. On May 17, 1991, Alexander Trowbridge resigned from the Commission.

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

45. In violation of the Base Closure Act, Trowbridge's vacancy was never filled.

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

D. The Department of Defense Base Closure Criteria and Process

47. The Base Closure Act directs the Secretary of Defense to: (1) develop selection criteria for making recommendations for the closure of military installations and to finalize such criteria after public comment; (2) provide to Congress (with the Department of Defense's budget request for fiscal year 1992) a six-year, force-structure plan for the Armed Forces; (3) submit to the Commission by April 15, 1991 a list of military

installations recommended for closure or realignment "on the basis of the force-structure plan and the final criteria" [Base Closure Act §2903(c)(1)(emphasis supplied)]; and (4) make available to the Commission, the GAO and Congress "all information used by the Department in making its recommendations to the Commission for closures and realignments" [Base Closure Act §2903(c)(4) (Emphasis supplied).]

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

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

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

51. On December 10, 1990, in response to numerous public comments raising concerns about the order of specific factors to be taken into account and the need to objectively evaluate these factors DOD issued the following "policy guidance" concerning the best closure process:

a. The recommendations in the studies must only be based on the final base closure and realignment selection criteria established under Section 2903 of the Base Closure Act; and

b. The studies must consider all military installations inside the United States...on an equal footing, ...

52. The December 10, 1990 DOD memorandum also set forth "record keeping requirements" which specified that DOD components were to keep:

a. Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;

b. Data, information, and analysis considered in making base closure and realignment selections; and

c. Documentation for each recommendation made to the Secretary of Defense to close or realign a military installation under the Act. (Emphasis supplied.)

53. On February 15, 1991, the DOD published in the Federal Register eight proposed final criteria governing the base closure and realignment process. 56 Fed Reg. 6374.

A. The first four concerned "military value" and were to receive preference:

a1. Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.

a2. The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.

a3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

a4. The cost and manpower implications.

B. The fifth criteria concerned "return on investment":

b1. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

C. The final three criteria concerned the repercussions of base closure realignments:

c1. The economic impact on local communities.

c2. The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.

c3. The environmental impact.

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

E. The Defense Base Closure and Realignment Commission Process

55. On April 12, 1991, Secretary Cheney issued DOD's Base Closure Report. The Report adopted the Air Force's proposals recommending the closure of six SAC bases, including Loring.

56. Pursuant to §2903(d)(2)(B) of the Base Closure Act, the Commission was charged with the responsibility of reviewing the Secretary of Defense's closure recommendations. Section

2903(d)(2)(B) of the Act authorized the Commission to change the recommendations of the Secretary of Defense upon determining that those recommendations deviated substantially from the force structure plan or the eight selection criteria.

57. Between April 12, 1991 and July 1, 1991, the Commission conducted several public hearings throughout the United States. Loring was one of several bases which were the subject of hearings in Washington, D.C. on May 22, 1991 and in Boston, Massachusetts on May 28, 1991.

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

59. The Base Closure Act requires the President to approve or disapprove the Commission's recommendations by July 15, 1991. On July 10, 1991, the President approved the recommendations and, pursuant to the Base Closure Act, transmitted the Report to Congress.

COUNT I

All Plaintiffs

v.

Secretary of Defense and Secretary of the Air Force

60. Plaintiffs reallege Paragraphs 1 through 59 as if fully set forth herein.

61. In contravention of the Base Closure Act, the Air Force deviated substantially from the base closure criteria in recommending the closure of Loring Air Force Base.

62. In contravention of the Base Closure Act, the Air Force failed to adhere to its force-structure plan in formulating its recommendations as to which bases should be closed or realigned.

63. The Air Force and the Commission acted arbitrarily and capriciously in applying the eight selection criteria to Loring Air Force Base and Plattsburgh Air Force Base, to the detriment of Loring. Specifically, the Air Force:

(a) grossly overestimated the cost to upgrade Loring's facilities by utilizing a replacement cost estimate of $144.81 million, rather than the true cost to upgrade of $26.1 million.

(b) miscalculated the amount of available ramp space at Loring to be 331,000 square yards rather than 551,000 square yards and failed to provide the Commission with the accurate figure upon being made aware of the error.

(c) omitted important data regarding air space and encroachment issues with respect to Loring and Plattsburg Air Force Base. Specifically, the Commission staff failed to produce for the Commission at its June 13, 1991 meeting the portions of the air space documentation section of the Air Force Base Closure Report back-up data which reflect that Loring received a green rating in all but one of 14 categories. In contrast, Plattsburg was rated yellow in 10 out of 14 categories and red in one other. Furthermore, the Air Force Base Closure Executive Group has described Plattsburg as having encroachment problems.

Despite a statement by SAC headquarters in its correspondence of February 15, 1991 that Plattsburg has quiet hours from 2200 to 0600, the Commission staff reported to the Commission that neither Plattsburg nor Loring have established quiet hours.

(d) at the final meeting of the Commission on June 30, 1991, approximately one hour before the Commission rendered its final decision, presented to the Commission, for the first time, new data pertaining to potential cost savings based upon a new COBRA model.

(e) failed to explain to the Commission the major discrepancy in the Air Force documentation with respect to the cost to upgrade medical facilities at the 21 SAC bases.

(f) grossly overestimated the cost to upgrade roads at Loring. Air Force back-up materials report the following costs to upgrade roads to Condition Code One at 12 different SAC bases:

Base	Lineal Measurement (Feet)	SAC Reported Cost to Upgrade to Code One
Barksdale AFB	2,210,000	$0m
Beale AFB	940,000	$0m
Carswell AFB	1,344,000	$0m
Dyess AFB	924,000	$0m
Eaker AFB	969,000	$0m
Fairchild AFB	2,347,000	$0m
Grand Forks AFB	4,472,000	$0m
K.I. Sawyer AFB	1,565,000	$0m
Loring AFB	2,223,000	$34m
Malmstrom AFB	2,151,000	$0m
March AFB	2,188,000	$0m
Minot AFB	2,340,000	$0m

Thus, the Air Force concluded that more than $30 million is required to upgrade Loring's roads while, at half the SAC bases (including other northern tier bases, such as Grand Forks, with twice the lineal road footage of Loring), the Air Force reports the cost to upgrade to be zero. The inaccuracy of the Air Force's calculation was confirmed by the testimony of Deputy Assistant Secretary of the Air Force James F. Boatright at the September 12, 1991 hearing of the United States Senate Armed Services Committee wherein he stated that the cost to upgrade the roads would be "$3 million plus."

(g) erroneously reported that Loring is inferior to Plattsburg Air Force Base in terms of its strategic value. In fact, however, Loring is the closest continental U.S. (CONUS) base to virtually every potential conflict area east of the United States, including Europe, Soviet Union (west of Urals), Middle East, Persian Gulf, Mediterranean, Libya and Africa. Further, Loring's proximity to all potential conflict areas east of the United States offers the following military advantages over all other CONUS bases:

(i) shortest response time from a CONUS base;

(ii) the ability to conduct sustained operations (e.g., conventional bombing, sea control) from CONUS;

(iii) longest on-station time from CONUS;

(iv) lowest round-trip fuel requirements from CONUS;

(v) shortest round-trip flight time from CONUS;

(vi) last chance for maintenance/fuel/crew rest in CONUS; and

(vii) first CONUS landfall on return trip.

Indeed, according to the Air Force R & A Staff findings, Loring is superior to Plattsburg in the following missions: strategic bombing, sea control, staging/fighters & special operations and NORAD. (Exhibit 2).

(h) significantly underestimated the economic impact on Aroostook County in the State of Maine of closing Loring. Commission staff not only used an improper methodology for evaluating economic impact but misapplied its own model. The staff's calculations failed to take into account:

- reduction in Aroostook County income of $152 million annually, representing approximately 25% of total County income;

- loss of 7900 jobs in Aroostook County in the first year, 8600 within three years of closure, representing 20% of total County employment and 26% of employment in the sub-County region;

- out-migration of up to 5,000 households or 14,000 people;

- the fact that 1 out of 6 jobs is supported directly or indirectly by Loring; and

- estimates of the Maine Public Service Company that electric rates could rise by as much as 12% as a result of the loss of revenue base provided by Loring and the associated residents.

According to the testimony of Deputy Assistant Secretary of the Air Force, James Boatright, co-chair of the Air Force's Base Closure Executive Group, at the May 10, 1991 Commission hearing, a rural Air Force base "may not be attractive to potential buyers. It may be questionable if such bases can be disposed of at all."

64. The Air Force and the Commission improperly considered "quality of life," a factor which was not among the final eight selection criteria, in its decision to close Loring and to leave open Plattsburgh Air Force Base.

65. According to the Air Force's own prioritization of the various factors which would serve as a basis for its recommendations, the amount of available air space was to be a primary consideration. According to Secretary of the Air Force Donald Rice in his testimony before the Commission on April 15, 1991, "...one factor we focused on more heavily than anything else was air space and air space encroachment." The Air Force blatantly disregarded this established priority in evaluating Loring and in comparing Loring to Plattsburgh Air Force Base.

66. The Air Force failed to base its decision on each of the final selection criteria and failed to apply each of the eight criteria equally, fairly and objectively. The Air Force failed to supply all information used in making its base closure recommendations to the GAO and members of Congress and failed to consider all available information concerning Loring, especially information which would have prevented the BECG from recommending its closure.

67. The Secretary of Defense, by and through his agent the Secretary of the Air Force, adopted the list of closure and realignment recommendations made by the Air Force in violation of the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

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

B. They failed to apply the eight final criteria adopted by DOD equally to all Air Force installations in making their recommendations for Air Force Base closures, in violation of §2903(c)(1) of the Base Closure Act;

C. They utilized a quality of life criterion which was not published and adopted in accordance with §2903 of the Base Closure Act;

D. They failed to adhere to the force structure plan for the Air Force as required by §2903(a) and (c) of the Base Closure Act in making their base closure recommendations;

E. The Secretary of the Air Force and the Secretary of Defense's actions were arbitrary and capricious and not in conformity with the law;

F. The Secretary of the Air Force and the Secretary of the Defense will inflict substantial and irreparable harm on the Plaintiffs for which there is no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request that this Court:

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

B. Find and declare that the Secretary of the Air Force and the Secretary of Defense's adoption of the closure recommendation, findings and conclusions made by the Air Force specifically with respect to Loring was arbitrary and capricious and otherwise not in conformity with law;

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

D. Enjoin the Secretary of Defense and the Secretary of the Air Force and their agents and employees from taking any action upon the closure recommendation specifically with respect to Loring submitted by the Secretary of the Air Force;

E. Require the Secretary of Defense and the Secretary of the Air Force to refrain from taking any action that interferes with Loring Air Force Base's ability to operate as if the Base were not on the closure list;

F. Enjoin the Secretary of the Air Force from implementing any layoffs or "reduction in force" plans at Loring pending a full and final hearing on the merits; and

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

COUNT II

All Plaintiffs

v.

The Base Closure Commission

68. Plaintiffs reallege Paragraphs 1 through 68 as if fully set forth herein.

69. The Commission, in reviewing and making its recommendations regarding the base closure submitted by the Secretary of the Air Force, violated the procedural and substantive requirements of the Base Closure Act, in that:

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

(b) It failed to hold public hearings, in violation of §2903(d)(1) of the Base Closure Act, because it did not include certain dispositive information regarding the Air Force's recommendations and selection process in the record until after the close of the public hearings;

(c) It failed to apply the eight final criteria adopted by DOD equally to all Air Force installations in making its recommendations for Air Force Base closures, in violation of §2903(c)(1) of the Base Closure Act;

(d) It utilized a criterion which was not published and adopted in accordance with §2903 of the Base Closure Act; and

(e) It utilized information and data which it knew to be in substantial error.

70. The Commission's actions were arbitrary and capricious and not in conformity with law.

71. The Commission's actions will inflict substantial irreparable harm on the Plaintiffs for which there is no adequate remedy at law.

72. The Commission's actions in approving the recommendations of the Secretary of the Air Force and the Secretary of Defense constitute final agency action within the meaning of 5 U.S.C. §704.

WHEREFORE, Plaintiffs respectfully request that this Court:

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

B. Find and declare that the Commission's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Air Force with respect to Loring arbitrary and capricious and not otherwise in conformity with law;

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

D. Enjoin the Secretary of Defense and the Secretary of the Air Force and their agents and employees from taking any action based upon the closure proposal with respect to Loring submitted by the Commission;

E. Require the Secretary of Defense and the Secretary of the Air Force to refrain from taking any action that interferes with the ability of Loring Air Force Base to operate as if the Base were not on the closure list;

F. Enjoin the Secretary of the Air Force from implementing any layoffs or "reduction in force" plans at Loring pending a full and final hearing on the merits; and

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

H. In the alternative to Paragraphs A through F, above, remand this action to the Commission for further deliberations and action consistent with the purposes and requirements of the Base Closure Act and the Administrative Procedure Act.

Dated this 24th day of December, 1991, at Augusta, Maine.

Severin M. Beliveau, Esq.
Bar No. 242

Ann R. Robinson, Esq.
Attorneys For the Plaintiffs

PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167

81975/AC4

VERIFICATION

DATED at Limestone, Maine this 9th day of December , 1991.

Paul D. Haines, being duly sworn according to law, deposes and says that he is a plaintiff herein, that he has read the foregoing Verified Complaint and that he knows the contents thereof are true and correct of his own knowledge, information and belief.

Paul D. Haines

STATE OF MAINE
AROOSTOOK,SS.

Personally appeared before me the above-named Paul D. Haines and made oath that the foregoing statements made by him are true to the best of his personal knowledge, information and belief and to the extent that such facts are based on information and belief, he believes them to be true.

Before me,

Notary Public

Print Name: Carolyn J. Adams

Commission Expires: 8-6-95

PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167

81975/AFO

EXHIBIT 1
AF REGULATION 900-64

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330-5000

29 November 1985

Awards, Ceremonies, and Honors

COMMANDER-IN-CHIEF'S ANNUAL AWARD FOR INSTALLATION EXCELLENCE

This publication establishes the Commander-in-Chief's Installation Excellence Award program. It explains eligibility rules, nomination procedures, and selection criteria. It applies to all active duty Air Force, Air Force Reserve, and Air National Guard units.

1. **Background of the Award.** The Commander-in-Chief's Annual Award for Installation Excellence was established by the President in 1984 to recognize the outstanding efforts of the people who operate and maintain our installations.

2. **Purpose of the Award.** The purpose of this presidentially sponsored award is to recognize the outstanding efforts of the people who operate and maintain Air Force installations and to encourage greater efficiencies and higher standards of performance in accomplishing their mission. It recognizes the installation that has produced the highest overall return from its resources in support of its mission. The award is designed to:

a. Recognize the installation leadership and workforce who have made the most outstanding contribution to increased productivity and efficiency of installation management supporting the mission. Excellent installations should be both *effective*—accomplishing the right things, in the right quantities, at the right time—and *efficient*—being effective with the most prudent use of resources.

b. Encourage competition to increase readiness through efficiency of installation management.

c. Promote ways to improve organization, procedures, functions, and policies.

d. Motivate people to advance new ideas for management improvements and innovations.

e. Generate interest in promoting morale and productivity through improved quality of life for all Air Force personnel. Excellent installations provide an excellent "quality of life" for the people who work and live there. Good quality of life fosters wholesome lives for families and communities and is associated with housing, health care, education, pay, facilities maintenance, safe and healthful working conditions, and community morale, welfare, and recreation activities.

3. **Eligibility for the Award.** All host installations, regardless of location or size, are eligible, and host unit commanders of these installations are encouraged to compete for this award.

4. **Description of Award.** The Award for Installation Excellence is a trophy inscribed with the name of the winning installation. It is presented to the host unit commander of the installation.

5. **Submitting Nominations:**

a. The report covers the 12-month period beginning 1 October and ending 30 September.

b. Major Commands (MAJCOM) and equivalents submit a single nominee by letter; subject: Nomination for (Fiscal Year) Commander-in-Chief's Annual Award for Installation Excellence—(Name of MAJCOM). Entries should arrive at HQ USAF/PRPJ, Wash DC 20330-5248, by 31 December.

6. **Selection Procedures.** The Installation Excellence Review Committee (HQ USAF/PR (Chairperson), HQ USAF/AC, HQ USAF/DP, and HQ USAF/LE) reviews written nominations and selects three finalists for an on-site evaluation. Following on-site evaluations of the three finalists, the team nominates one installation for the award to the Air Force Chief of Staff for Secretary of the Air Force approval of the nomination. Upon nomination approval by the Secretary of the Air Force, the recommendation is forwarded to the Deputy Assistant Secretary of Defense for Installations who sends the nominees from each service through the Secretary of Defense to the President for confirmation.

7. **General Criteria.** The criteria used by the MAJCOM for selecting the nominee should focus on imaginative and innovative management actions that have increased the productivity of the workforce and improved the quality of life. Specific areas of interest should include: installation security, maintenance, operations of the physical plant necessary to sustain mission operations, per-

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No. of Printed Pages: 3
OPR: PRPJA (Lt Col Marvin A. Voskuhl)
Approved by: Lt Col Richard C. Marr
Distribution: F

sonnel and financial support necessary to maintain an effective fighting force, and the operations and maintenance of nonweapon system equipment needed to support mission accomplishment.

8. Nomination Content. Each nomination should consist of two parts:

a. Background and Supporting Data:

(1) Names of MAJCOM and installation commanders.

(2) Complete designation of the installation and its location:

(a) Installation mission statement.

(b) Total personnel authorized and assigned by organization.

(c) Total funds budgeted and authorized for the fiscal year for base operating support.

(3) Local Information:

(a) Name of nearest civilian community.

(b) Names of principal local newspapers, radio, and television stations.

(c) Names of interested members of the Congress.

(4) Draft press release, one page, double-spaced

(5) Draft citation, less than 100 words.

(6) Three photographs of nominated installation, 8- by 10-inch color print format.

b. Selection Justification:

(1) Four page maximum, including illustrations.

(2) Key points should include:

(a) Specific evidence of effectiveness

(b) Description of innovative ideas and programs.

(c) Motivational initiatives.

9. Related Awards and Notable Accomplishments. In addition, each MAJCOM and separate operating agency is encouraged to nominate commands, installations, programs, projects, and individuals for special recognition by the Secretary of Defense. Nominees must have demonstrated exemplary achievement in keeping with the spirit of the purpose of the Installation Excellence Award Program. Special recognition nominations must not exceed one page.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

CHARLES A. GABRIEL, General, USAF
Chief of Staff

OFFICIAL

NORMAND G. LEZY, Colonel, USAF
Director of Administration

U.S. GOVERNMENT PRINTING OFFICE: 1985-461-961/20181

EXHIBIT 1

COMMANDER IN CHIEF'S SPECIAL RECOGNITION FOR INSTALLATION EXCELLENCE

I am Pleased to Recognize

The Men and Women of
Loring AFB, Maine

for showing what imaginative and innovative people can do to provide excellent installations that strengthen the nation's defenses. You have excelled in a continuing effort to provide the best possible places to work and to live, as well as excellent base services.

Secretary of Defense

26 JUN 1993
Date

EXHIBIT 2

AIR FORCE TEAM
LORING - PLATTSBURGH LOCATION

R&A STAFF FINDINGS

MISSION	LORING	PLATTSBURGH
STRATEGIC BOMBING	G-CLOSEST TO AREAS WEST OF URALS	G-SECOND CLOSEST
CONVENTIONAL BOMB	G-CLOSEST TO POT TARGET AREAS	G-SECOND CLOSEST
TANKER OPERATIONS	G-NEAR GREAT CIRCLE ROUTE	G-NEAR GREAT CIRCLE ROUTE
SEA CONTROL	G-CLOSEST TO N ATLANTIC	G-SECOND CLOSEST
STAGING/FIGHTERS & SPEC OPS	G-CLOSEST TO POTENTIAL TARGETS	G-SECOND CLOSEST
NORAD	G-FIRST BASE BEFORE EASTERN CITIES	G-NEXT ONE IN LINE
BOMBING RANGES/TRAINING AREAS	R-A LONG WAYS TO THE RANGES G-LOW LEVEL/MAY PHASE OUT	R-ALMOST AS FAR G-LOW LEVEL/MAY PHASE OUT

GG

Document Separator

PRETI, FLAHERTY, BELIVEAU & PACHIOS

ATTORNEYS AT LAW

PORTLAND OFFICE
443 CONGRESS STREET
P.O. BOX 11410
PORTLAND, MAINE 04104-7410
(207) 775-5831
TELEFAX (207) 775-5494

45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167
TELEFAX (207) 623-2914

RUMFORD OFFICE
150 CONGRESS STREET
P.O. DRAWER L
RUMFORD, MAINE 04276-2035
(207) 364-4593
TELEFAX (207) 369-9421

JOHN J. FLAHERTY
ALBERT J. BELIVEAU, JR.
SEVERIN M. BELIVEAU
HAROLD C. PACHIOS
MICHAEL J. GENTILE
RICHARD H. SPENCER, JR.
KEITH A. POWERS
CHRISTOPHER D. NYHAN
ERIC P. STAUFFER
JONATHAN S. PIPER
DANIEL RAPAPORT

JOHN P. DOYLE, JR.
BRUCE C. GERRITY
ANTHONY W. BUXTON
JEFFREY T. EDWARDS
MICHAEL G. MESSERSCHMIDT
RANDALL B. WEILL
JAMES C. PITNEY, JR.
EVAN M. HANSEN
VIRGINIA E. DAVIS
EDWARD R. BENJAMIN, JR.
LEONARD M. GULINO
DENNIS C. SBREGA

ESTELLE A. LAVOIE
GEOFFREY K. CUMMINGS
MICHAEL L. SHEEHAN
SUSAN E. LoGIUDICE
JEFFREY R. BURNS
NELSON J. LARKINS
MICHAEL KAPLAN
STEPHEN E. F. LANGSDORF
JAMES E. PHIPPS
JEANNE T. COHN
JOHN P. McVEIGH
MARILYN E. MISTRETTA
ELIZABETH A. OLIVIER

CRAIG T. BELING
DAVID L. GALGAY, JR.
ANN R. ROBINSON
DEIRDRE M. O'CALLAGHAN
JOSEPH G. DONAHUE
CLAUDIA D. RAESSLER
JILL PELLETIER ALLEN
JEFFREY M. SULLIVAN
DENNIS M. DOIRON
STANLEY W. PIECUCH
KEVIN J. BEAL
DEBORAH L. POPE
PENNY ST. LOUIS

OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

ES# 920316-5 G

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. James C. Smith, II
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Smith:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

ARR:lal
Enclosures
81975/AH1

PRETI, FLAHERTY, BELIVEAU & PACHIOS

ATTORNEYS AT LAW

PORTLAND OFFICE
443 CONGRESS STREET
P.O. BOX 11410
PORTLAND, MAINE 04104-7410
(207) 775-5831
TELEFAX (207) 775-5494

45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167
TELEFAX (207) 623-2914

RUMFORD OFFICE
150 CONGRESS STREET
P.O. DRAWER L
RUMFORD, MAINE 04276-2035
(207) 364-4593
TELEFAX (207) 369-9421

JOHN J. FLAHERTY
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DEBORAH L. POPE
PENNY ST. LOUIS

OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

ES# 920316-5 H

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Robert D. Stuart, Jr.
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Stuart:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

ARR:lal
Enclosures
81975/AH1

PRETI, FLAHERTY, BELIVEAU & PACHIOS

ATTORNEYS AT LAW

PORTLAND OFFICE
443 CONGRESS STREET
P.O. BOX 11410
PORTLAND, MAINE 04104-7410
(207) 775-5831
TELEFAX (207) 775-5494

45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167
TELEFAX (207) 623-2914

RUMFORD OFFICE
150 CONGRESS STREET
P.O. DRAWER L
RUMFORD, MAINE 04276-2035
(207) 364-4593
TELEFAX (207) 369-9421

JOHN J. FLAHERTY
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OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

ES# 920316-5 F

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Arthur Levitt, Jr.
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Levitt:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

ARR:lal
Enclosures
81975/AH1

AO 440 (Rev 1/90) Summons in a Civil Action

United States District Court

DISTRICT OF Maine

SENATOR WILLIAM S. COHEN, et al.

V.

DONALD RICE, THE SECRETARY OF THE AIR FORCE, et al.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: 91-0282-B

TO: (Name and Address of Defendant)

Hon. Arthur Levitt, Jr.
c/o The Defense Base Closure Commission
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Severin M. Beliveau, Esquire
Ann R. Robinson, Esquire
PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058

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

WILLIAM S. BROWNELL

CLERK

March 11, 1992

DATE

Kenneth D Jefferson

BY DEPUTY CLERK

PRETI, FLAHERTY, BELIVEAU & PACHIOS

ATTORNEYS AT LAW

PORTLAND OFFICE
443 CONGRESS STREET
P.O. BOX 11410
PORTLAND, MAINE 04104-7410
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45 MEMORIAL CIRCLE
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OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

ESH 920316-5 E

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Duane H. Cassidy
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Cassidy:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

ARR:lal
Enclosures
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PRETI, FLAHERTY, BELIVEAU & PACHIOS

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OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

ES # 920316-5 D

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Howard H. Callaway
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Callaway:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

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Enclosures
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March 1992

PRETI, FLAHERTY, BELIVEAU & PACHIOS

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PORTLAND OFFICE
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ES# 920316-5 c

March 12, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. William L. Ball, III
c/o The Defense Base Closure Committee
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

RE: Senator William S. Cohen. et al. v.
Donald Rice, Secretary of the Air Force, et al.
Docket No. 91-0282-B

Dear Mr. Ball:

Enclosed please find a copy of the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief and a copy of Civil Action Summons regarding the above-referenced case.

Sincerely yours,

Ann R. Robinson

Ann R. Robinson

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AO 440 (Rev 1/90) Summons in a Civil Action

United States District Court

DISTRICT OF Maine

SENATOR WILLIAM S. COHEN, et al.

V.

DONALD RICE, THE SECRETARY OF THE AIR FORCE, et al.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: 91-0282-B

TO: (Name and Address of Defendant)

Hon. William L. Ball, III
c/o The Defense Base Closure Commission
1625 K St., N.W., Suite 400
Washington, DC 20006-1604

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Severin M. Beliveau, Esquire
Ann R. Robinson, Esquire
PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058

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

WILLIAM S. BROWNELL
CLERK

March 11, 1992
DATE

Harriett D Jefferson
BY DEPUTY CLERK

P[illegible]T, FLAHERTY, BELIVEAU & PAC[illegible]OS

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PENNY ST. LOUIS

OF COUNSEL

ROBERT F. PRETI
ROBERT W. SMITH
DAVID B. VAN SLYKE

February 12, 1992

Gail Baxter Creath
Deputy Clerk in Charge
United States District Court
202 Harlow Street
Bangor, Maine 04401

Re: Senator William S. Cohen, et al. v. Donald Rice, et al.

Dear Gail:

Enclosed for filing please find the Plaintiff's Amended Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief regarding the above captioned matter. Please execute the enclosed Summons and return to me for service upon Richard Cohen.

Thank you for your assistance in this matter.

Very truly yours,

Ann R. Robinson
Bar No. 1286

ARR/lal

Enclosures
81975/AF9

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SENATOR WILLIAM S. COHEN, SENATOR GEORGE J. MITCHELL, GOVERNOR JOHN R. MCKERNAN, JR., REPRESENTATIVE OLYMPIA J. SNOWE, TOWN OF LIMESTONE, TOWN OF ASHLAND, TOWN OF CASWELL, TOWN OF FORT FAIRFIELD, TOWN OF MARS HILL, TOWN OF NEW SWEDEN, TOWN OF VAN BUREN, CITY OF CARIBOU, CITY OF PRESQUE ISLE, AROOSTOOK COUNTY, SAVE LORING COMMITTEE, PAUL D. HAINES, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL UNION CHAPTER #2943 and ALAN MULHERIN,	*	
Plaintiffs	*	
v.	*	Civil Action No.
DONALD RICE, The Secretary Of The Air Force, RICHARD CHENEY, The Secretary Of Defense, THE DEFENSE BASE CLOSURE COMMISSION and its members JAMES A. COURTER, WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II, and ROBERT D. STUART, JR.,	*	
Defendants.	*	

AMENDED VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

NOW COME the Plaintiffs, U.S. Senator William S. Cohen, U.S. Senator George J. Mitchell, Governor John R. McKernan, Jr., U.S. Representative Olympia J. Snowe, the Town of Limestone, the Town of Ashland, the Town of Caswell, the Town of Fort Fairfield, the Town of Mars Hill, the Town of New Sweden, the

Town of Van Buren, the City of Caribou, the City of Presque Isle, the Aroostook County, the Save Loring Committee, the American Federation of Employees and Alan Mulherin, by and through their attorneys, PRETI, FLAHERTY, BELIVEAU & PACHIOS, and complain as follows:

PLAINTIFFS

1. Plaintiff United States Senator William S. Cohen is a citizen of the State of Maine with his residence in the City of Bangor, Penobscot County, State of Maine, and an office at 202 Harlow Street, Bangor, Maine.

2. Plaintiff United States Senator George J. Mitchell is a citizen of the State of Maine with his residence in the City of Portland, County of Cumberland, State of Maine, and an office at 202 Harlow Street, Bangor, Maine.

3. Plaintiff Governor John R. McKernan, Jr. is a citizen of the State of Maine with a residence in the City of Auburn, County of Androscoggin, State of Maine and an office at the State House, Augusta, Maine.

4. Plaintiff United States Representative Olympia J. Snowe is a citizen of the State of Maine with a residence in the City of Auburn, County of Androscoggin, State of Maine and an office at One Cumberland Place, Bangor, Maine.

5. Plaintiff Town of Limestone is a municipality of the State of Maine.

6. Plaintiff Town of Ashland is a municipality of the State of Maine.

7. Plaintiff Town of Caswell is a municipality of the State of Maine.

8. Plaintiff Town of Fort Fairfield is a municipality of the State of Maine.

9. Plaintiff Town of Mars Hill is a municipality of the State of Maine.

10. Plaintiff Town of New Sweden is a municipality of the State of Maine.

11. Plaintiff Town of Van Buren is a municipality of the State of Maine.

12. Plaintiff City of Caribou is a municipality of the State of Maine.

13. Plaintiff City of Presque Isle is a municipality of the State of Maine.

14. Plaintiff Aroostook County is a political subdivision of the State of Maine.

15. Plaintiff Save Loring Committee is an organization of individual and corporate citizens resident in the towns and county which are Plaintiffs in this action. The members of the Save Loring Committee will be directly and substantially affected by the closure of Loring Air Force Base ("Loring").

16. Plaintiff Paul D. Haines is an individual residing in Caribou, Maine, and is Chairman of the Save Loring Committee.

17. Plaintiff American Federation of Government Employees Local Union Chapter #2943 ("AFGE") is the exclusive bargaining representative for approximately 492 employees of Loring. All

of these employees are being affected by the Air Force's current conduct and virtually all of these employees will lose their jobs if Loring is closed as a result of the findings of the Defense Base Closure and Realignment Commission.

18. Plaintiff Alan Mulherin is the President of the Local Union Chapter #2943 of the American Federation of Government Employees and is a resident of Limestone, Maine.

DEFENDANTS

19. Defendant Donald Rice is the Secretary of the Air Force and maintains his principal office at the Department of the Air Force, the Pentagon, Washington, D.C. Defendant Rice is sued in his official capacity as Secretary of the Air Force.

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

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

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

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

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

25. Defendant General Duane H. Cassidy, U.S.A.F. (Retired) is a member of the Commission and is sued in his official capacity.

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

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

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

JURISDICTION AND VENUE

29. This Court has jurisdiction over the subject matter of this lawsuit pursuant to the following statutes:

(i) The Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202;

(ii) 28 U.S.C. §§1331, 1337, 1346 and 1361;

(iii) The Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Div. B, Title XXIX, Part A, §§2901 - 2910 (November 5, 1990); and

(iv) The Administrative Procedure Act, 5 U.S.C. §§701 et seq.

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

FACTUAL ALLEGATIONS

A. Loring Air Force Base

31. Loring Air Force Base ("Loring"), located in Limestone, Maine, is one of 21 Strategic Air Command ("SAC") Bases maintained by the Department of the Air Force within the continental United States. Loring is capable of performing, and has performed, both nuclear and conventional missions.

32. Loring is the nation's premiere SAC Base as most recently evidenced by its having received the 1990 Commander-in-Chief's Installation Excellence Award ("Award"). Air Force Regulation 900-64 (November 29, 1985) states that this Award "[r]ecognizes the installation that has produced the highest overall return from its resources in support of its mission." This regulation also establishes that Installations receiving the Award are "effective - accomplishing the right things, in the right quantities, at the right time." (Emphasis in the original.) A copy of the Award and the Air Force Regulation 900-64 are attached as Exhibit 1.

33. Loring directly employs at least 1406 civilians and 3304 military employees who reside in other townships in Aroostook County. Loring is one of the largest employer(s) in Aroostook County and infuses approximately $91 million into the local economy each year.

B. The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act")

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

35. In October of 1988, Congress passed and the President signed Public Law 100-526, the Defense Authorization Amendment and Base Closure and Realignment Act.

36 The 1988 Commission recommended that 86 bases be closed and 59 bases be realigned or partially closed.

37. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 35 military bases in the United States, including 1 SAC base: Eaker Air Force Base in Arkansas.

38. On November 5, 1990, to redress the criticisms raised by the 1988 base closure process, the President signed into law the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act").

39. The Base Closure Act:

(a) Expressly states that its "purpose" is "to provide a fair process that will result in the timely closure and realignment of military installations" [Base Closure Act §2901(b) (emphasis supplied)];

(b) Requires that all meetings of the Commission "be open to the public," except where classified information was being discussed [Base Closure Act §2902(e)(2)(A)];

(c) Mandates the development and application of "final criteria" for making the closure and realignment determinations [Base Closure Act §2903(b)(2)(A) and (c)];

(d) Mandates the creation of a six year force-structure plan for the Armed Forces for making closure and realignment determinations [Base Closure Act §2903(a) and (c)];

(e) Requires the Secretary of Defense to consider all military installations "equally" for closure or realignment [Base Closure Act §2903(c)(3)];

(f) Requires the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [Base Closure Act §2903(c)(2)]; and

(g) Prohibits the Secretary of Defense from carrying out any closure or realignment recommendation before the earlier of (i) the enactment of a joint resolution by Congress disapproving the closure recommendations, or (ii) the expiration of a 45 day statutory period that commenced on the day that the President transmitted the recommended closure and realignment list to Congress. [Base Closure Act §2904 (b)].

C. The 1991 Defense Base Closure and Realignment Commission

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

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

42. The President nominated and the Senate confirmed James A. Courter as Chairman of the Commission and the following seven as members of the Commission: William L. Ball, III, Howard H. (Bo) Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith II, P.E., Robert D. Stuart, Jr., and Alexander Trowbridge.

43. On May 17, 1991, Alexander Trowbridge resigned from the Commission.

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

45. In violation of the Base Closure Act, Trowbridge's vacancy was never filled.

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

D. The Department of Defense Base Closure Criteria and Process

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

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

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

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

51. On December 10, 1990, in response to numerous public comments raising concerns about the order of specific factors to

be taken into account and the need to objectively evaluate these factors DOD issued the following "policy guidance" concerning the best closure process:

a. The recommendations in the studies must only be based on the final base closure and realignment selection criteria established under Section 2903 of the Base Closure Act; and

b. The studies must consider all military installations inside the United States...on an equal footing, ...

52. The December 10, 1990 DOD memorandum also set forth "record keeping requirements" which specified that DOD components were to keep:

a. Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;

b. Data, information, and analysis considered in making base closure and realignment selections; and

c. Documentation for each recommendation made to the Secretary of Defense to close or realign a military installation under the Act. (Emphasis supplied.)

53. On February 15, 1991, the DOD published in the Federal Register eight proposed final criteria governing the base closure and realignment process. 56 Fed Reg. 6374.

A. The first four concerned "military value" and were to receive preference:

a1. Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.

a2. The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.

a3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

a4. The cost and manpower implications.

B. The fifth criteria concerned "return on investment":

b1. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

C. The final three criteria concerned the repercussions of base closure realignments:

c1. The economic impact on local communities.

c2. The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.

c3. The environmental impact.

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

E. The Defense Base Closure and Realignment Commission Process

55. On April 12, 1991, Secretary Cheney issued DOD's Base Closure Report. The Report adopted the Air Force's proposals recommending the closure of six SAC bases, including Loring.

56. Pursuant to §2903(d)(2)(B) of the Base Closure Act, the Commission was charged with the responsibility of reviewing the Secretary of Defense's closure recommendations. Section 2903(d)(2)(B) of the Act authorized the Commission to change the recommendations of the Secretary of Defense upon determining that those recommendations deviated substantially from the force structure plan or the eight selection criteria.

57. Between April 12, 1991 and July 1, 1991, the Commission conducted several public hearings throughout the United States. Loring was one of several bases which were the subject of hearings in Washington, D.C. on May 22, 1991 and in Boston, Massachusetts on May 28, 1991.

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

59. The Base Closure Act requires the President to approve or disapprove the Commission's recommendations by July 15, 1991. On July 10, 1991, the President approved the recommendations and, pursuant to the Base Closure Act, transmitted the Report to Congress.

60. On September 12, 1991, the United States Senate Armed Services Committee convened a hearing for the purpose of reviewing the numerous substantive and procedural irregularities in the base closure process.

COUNT I

All Plaintiffs

v.

Secretary of Defense and Secretary of the Air Force

61. Plaintiffs reallege Paragraphs 1 through 58 as if fully set forth herein.

62. In contravention of the Base Closure Act, the Air Force deviated substantially from the base closure criteria in recommending the closure of Loring Air Force Base.

63. In contravention of the Base Closure Act, the Air Force failed to adhere to its force-structure plan in formulating its recommendations as to which bases should be closed or realigned.

64. The Air Force and the Commission acted arbitrarily and capriciously in applying the eight selection criteria to Loring Air Force Base and Plattsburgh Air Force Base, to the detriment of Loring. Specifically, the Air Force:

(a) grossly overestimated the cost to upgrade Loring's facilities by utilizing a replacement cost estimate of $144.81 million, rather than the true cost to upgrade of $26.1 million.

(b) miscalculated the amount of available ramp space at Loring to be 331,000 square yards rather than 551,000 square yards and failed to provide the Commission with the accurate figure upon being made aware of the error.

(c) omitted important data regarding air space and encroachment issues with respect to Loring and Plattsburg Air Force Base. Specifically, the Commission staff failed to produce for the Commission at its June 13, 1991 meeting the portions of the air space documentation section of the Air Force Base Closure Report back-up data which reflect that Loring received a green rating in all but one of 14 categories. In contrast, Plattsburg was rated yellow in 10 out of 14 categories and red in one other. Furthermore, the Air Force Base Closure Executive Group has described Plattsburg as having encroachment problems.

Despite a statement by SAC headquarters in its correspondence of February 15, 1991 that Plattsburg has quiet hours from 2200 to 0600, the Commission staff reported to the Commission that neither Plattsburg nor Loring have established quiet hours.

(d) at the final meeting of the Commission on June 30, 1991, approximately one hour before the Commission rendered its final decision, presented to the Commission, for the first time, new data pertaining to potential cost savings based upon a new COBRA model. At no time was this data made available to members of Congress or to the the communities that were seeking to provide comments and information to the Commission.

(e) failed to explain to the Commission the major discrepancy in the Air Force documentation with respect to the cost to upgrade medical facilities at the 21 SAC bases.

(f) grossly overestimated the cost to upgrade roads at Loring. Air Force back-up materials report the following costs to upgrade roads to Condition Code One at 12 different SAC bases:

Base	Lineal Measurement (Feet)	SAC Reported Cost to Upgrade to Code One
Barksdale AFB	2,210,000	$0m
Beale AFB	940,000	$0m
Carswell AFB	1,344,000	$0m
Dyess AFB	924,000	$0m
Eaker AFB	969,000	$0m
Fairchild AFB	2,347,000	$0m
Grand Forks AFB	4,472,000	$0m
K.I. Sawyer AFB	1,565,000	$0m
Loring AFB	2,223,000	$34m
Malmstrom AFB	2,151,000	$0m
March AFB	2,188,000	$0m
Minot AFB	2,340,000	$0m

Thus, the Air Force concluded that more than $30 million is required to upgrade Loring's roads while, at half the SAC bases (including other northern tier bases, such as Grand Forks, with twice the lineal road footage of Loring), the Air Force reports the cost to upgrade to be zero. The inaccuracy of the Air Force's calculation was confirmed by the testimony of Deputy Assistant Secretary of the Air Force James F. Boatright at the September 12, 1991 hearing of the United States Senate Armed Services Committee wherein he stated that the cost to upgrade the roads would be "$3 million plus."

(g) erroneously reported that Loring is inferior to Plattsburg Air Force Base in terms of its strategic value. In fact, however, Loring is the closest continental U.S. (CONUS) base to virtually every potential conflict area east of the United States, including Europe, Soviet Union (west of Urals), Middle East, Persian Gulf, Mediterranean, Libya and Africa. Further, Loring's proximity to all potential conflict areas east of the United States offers the following military advantages over all other CONUS bases:

(i) shortest response time from a CONUS base;

(ii) the ability to conduct sustained operations (e.g., conventional bombing, sea control) from CONUS;

(iii) longest on-station time from CONUS;

(iv) lowest round-trip fuel requirements from CONUS;

(v) shortest round-trip flight time from CONUS;

(vi) last chance for maintenance/fuel/crew rest in CONUS; and

(vii) first CONUS landfall on return trip.

Indeed, according to the Air Force R & A Staff findings, Loring is superior to Plattsburg in the following missions: strategic bombing, sea control, staging/fighters & special operations and NORAD. (Exhibit 2).

(h) significantly underestimated the economic impact on Aroostook County in the State of Maine of closing Loring. Commission staff not only used an improper methodology for evaluating economic impact but misapplied its own model.

The staff's calculations failed to take into account:

- reduction in Aroostook County income of $152 million annually, representing approximately 25% of total County income;
- loss of 7900 jobs in Aroostook County in the first year, 8600 within three years of closure, representing 20% of total County employment and 26% of employment in the sub-County region;
- out-migration of up to 5,000 households or 14,000 people;
- the fact that 1 out of 6 jobs is supported directly or indirectly by Loring; and
- estimates of the Maine Public Service Company that electric rates could rise by as much as 12% as a result of the loss of revenue base provided by Loring and the associated residents.

According to the testimony of Deputy Assistant Secretary of the Air Force, James Boatright, co-chair of the Air Force's Base Closure Executive Group, at the May 10, 1991 Commission hearing, a rural Air Force base "may not be attractive to potential buyers. It may be questionable if such bases can be disposed of at all."

65. The Air Force and the Commission improperly considered "quality of life," a factor which was not among the final eight selection criteria, in its decision to close Loring and to leave open Plattsburgh Air Force Base.

66. According to the Air Force's own prioritization of the various factors which would serve as a basis for its recommendations, the amount of available air space was to be a primary consideration. According to Secretary of the Air Force Donald Rice in his testimony before the Commission on April 15, 1991, "...one factor we focused on more heavily than anything else was air space and air space encroachment." The Air Force blatantly disregarded this established priority in evaluating Loring and in comparing Loring to Plattsburgh Air Force Base. This priority was also ignored by the Commission, which materially affected the Commission's deliberations.

67. The Air Force failed to base its decision on each of the final selection criteria and failed to apply each of the eight criteria equally, fairly and objectively. The Air Force failed to supply all information used in making its base closure recommendations to the GAO and members of Congress and failed to consider all available information concerning Loring, especially information which would have prevented the BCEG from recommending its closure.

68. The Secretary of Defense, by and through his agent the Secretary of the Air Force, adopted the list of closure and realignment recommendations made by the Air Force in violation of the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

A. They failed to make available to the Commission, the GAO and Congress all information which was used by the Air Force

in making its recommendations to the Commission, in violation of §2903(c)(4) of the Base Closure Act;

B. They failed to apply the eight final criteria adopted by DOD equally to all Air Force installations in making their recommendations for Air Force Base closures, in violation of §2903(c)(1) of the Base Closure Act;

C. They utilized a quality of life criterion which was not published and adopted in accordance with §2903 of the Base Closure Act;

D. They failed to adhere to the force structure plan for the Air Force as required by §2903(a) and (c) of the Base Closure Act in making their base closure recommendations;

E. The Secretary of the Air Force and the Secretary of Defense's actions were arbitrary and capricious and not in conformity with the law;

F. The Secretary of the Air Force and the Secretary of the Defense will inflict substantial and irreparable harm on the Plaintiffs for which there is no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Find and declare that the realignment recommendation provided by the Secretary of the Air Force and the Secretary of Defense to the Commission on April 12, 1991 with respect to Loring, was developed in a manner inconsistent with the requirements of the Base Closure Act and is therefore void;

B. Find and declare that the Secretary of the Air Force and the Secretary of Defense's adoption of the closure

recommendation, findings and conclusions made by the Air Force specifically with respect to Loring was arbitrary and capricious and otherwise not in conformity with law;

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

D. Enjoin the Secretary of Defense and the Secretary of the Air Force and their agents and employees from taking any action upon the closure recommendation specifically with respect to Loring submitted by the Secretary of the Air Force;

E. Require the Secretary of Defense and the Secretary of the Air Force to refrain from taking any action that interferes with Loring Air Force Base's ability to operate as if the Base were not on the closure list;

F. Enjoin the Secretary of the Air Force from implementing any layoffs or "reduction in force" plans at Loring pending a full and final hearing on the merits; and

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

COUNT II

All Plaintiffs

v.

The Base Closure Commission

69. Plaintiffs reallege Paragraphs 1 through 66 as if fully set forth herein.

70. The Commission, in reviewing and making its recommendations regarding the base closure submitted by the Secretary of the Air Force, violated the procedural and substantive requirements of the Base Closure Act, in that:

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

(b) It failed to hold public hearings, in violation of §2903(d)(1) of the Base Closure Act, because it did not include certain dispositive information regarding the Air Force's recommendations and selection process in the record until after the close of the public hearings;

(c) It failed to apply the eight final criteria adopted by DOD equally to all Air Force installations in making its recommendations for Air Force Base closures, in violation of §2903(c)(1) of the Base Closure Act;

(d) It utilized a criterion which was not published and adopted in accordance with §2903 of the Base Closure Act; and

(e) It utilized information and data which it knew to be in substantial error.

71. The Commission's actions were arbitrary and capricious and not in conformity with law.

72. The Commission's actions will inflict substantial irreparable harm on the Plaintiffs for which there is no adequate remedy at law.

73. The Commission's actions in approving the recommendations of the Secretary of the Air Force and the Secretary of Defense constitute final agency action within the meaning of 5 U.S.C. §704.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Find and declare that the closure and realignment recommendations submitted by the Commission to the President on July 1, 1991 with respect to Loring was adopted by the Commission in violation of the Base Closure Act and is therefore void;

B. Find and declare that the Commission's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Air Force with respect to Loring arbitrary and capricious and not otherwise in conformity with law;

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

D. Enjoin the Secretary of Defense and the Secretary of the Air Force and their agents and employees from taking any action based upon the closure proposal with respect to Loring submitted by the Commission;

E. Require the Secretary of Defense and the Secretary of the Air Force to refrain from taking any action that interferes with the ability of Loring Air Force Base to operate as if the Base were not on the closure list;

F. Enjoin the Secretary of the Air Force from implementing any layoffs or "reduction in force" plans at Loring pending a full and final hearing on the merits; and

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

H. In the alternative to Paragraphs A through F, above, remand this action to the Commission for further deliberations and action consistent with the purposes and requirements of the Base Closure Act and the Administrative Procedure Act.

DATED at Augusta, Maine this 12th day of February, 1992.

Severin M. Beliveau, Esq.
Bar No. ~~242~~ 272

Ann R. Robinson, Esq.
Attorneys for the Plaintiffs

Paul D. Haines
28 Pioneer Avenue
Caribou, Maine 04736
Plaintiff

PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 MEMORIAL CIRCLE
P.O. BOX 1058
AUGUSTA, MAINE 04332-1058
(207) 623-5167

81975/AF8

STATE OF MAINE
Aroostook, ss.

February 12th, 1992

Personally appeared before me the above-named Paul D. Haines and made oath that the foregoing statements made by him are true to the best of his personal knowledge, information and belief and to the extent that such statements are based upon information and belief, he believes them to be true.

Carolyn J. Adams
Notary Public
(My comm. expires 8/6/95)

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330-5000

AIR FORCE REGULATION 900-64

29 November 1985

Awards, Ceremonies, and Honors

COMMANDER-IN-CHIEF'S ANNUAL AWARD FOR INSTALLATION EXCELLENCE

This publication establishes the Commander-in-Chief's Installation Excellence Award program. It explains eligibility rules, nomination procedures, and selection criteria. It applies to all active duty Air Force, Air Force Reserve, and Air National Guard units.

1. Background of the Award. The Commander-in-Chief's Annual Award for Installation Excellence was established by the President in 1964 to recognize the outstanding efforts of the people who operate and maintain our installations.

2. Purpose of the Award. The purpose of this presidentially sponsored award is to recognize the outstanding efforts of the people who operate and maintain Air Force installations and to encourage greater efficiencies and higher standards of performance in accomplishing their mission. It recognizes the installation that has produced the highest overall return from its resources in support of its mission. The award is designed to:

a. Recognize the installation leadership and workforce who have made the most outstanding contribution to increased productivity and efficiency of installation management supporting the mission. Excellent installations should be both *effective*—accomplishing the right things, in the right quantities, at the right time—and *efficient*—being effective with the most prudent use of resources.

b. Encourage competition to increase readiness through efficiency of installation management.

c. Promote ways to improve organization, procedures, functions, and policies.

d. Motivate people to advance new ideas for management improvements and innovations.

e. Generate interest in promoting morale and productivity through improved quality of life for all Air Force personnel. Excellent installations provide an excellent "quality of life" for the people who work and live there. Good quality of life fosters wholesome lives for families and communities and is associated with housing, health care, education, pay, facilities maintenance, safe and healthful working conditions, and community morale, welfare, and recreation activities.

No. of Printed Pages: 3
OPR: PRPJA (Lt Col Melvin A. Vorsatz)
Approved by: Lt Gen Richard E. Hawley
Distribution: F

3. Eligibility for the Award. All host installations, regardless of location or size, are eligible, and host unit commanders of these installations are encouraged to compete for this award.

4. Description of Award. The Award for Installation Excellence is a trophy inscribed with the name of the winning installation. It is presented to the host unit commander of the installation.

5. Submitting Nominations.

a. The report covers the 12-month period beginning 1 October and ending 30 September.

b. Major Commands (MAJCOM) and equivalent submit a single nominee by letter; subject: Nomination for (Fiscal Year) Commander-in-Chief's Annual Award for Installation Excellence—(Name of MAJCOM). Entries should arrive at HQ USAF/PRPJ, Wash DC 20330-5245, by 31 December.

6. Selection Procedure. The Installation Excellence Review Committee (HQ USAF/PR (Chairperson), HQ USAF/AC, HQ USAF/DP, and HQ USAF/LE) reviews written nominations and selects three finalists for an on-site evaluation. Following on-site evaluation of the three finalists, the team nominates one installation for the award to the Air Force Chief of Staff for Secretary of the Air Force approval of the nomination. Upon nomination approval by the Secretary of the Air Force, the recommendation is forwarded to the Deputy Assistant Secretary of Defense for Installations who sends the nominee from each service through the Secretary of Defense to the President for confirmation.

7. General Criteria. The criteria used by the MAJCOM for selecting the nominee should focus on imaginative and innovative management actions that have increased the productivity of the workforce and improved the quality of life. Specific areas of interest should include: installation security, maintenance, operations of the physical plant necessary to sustain mission operations, pri-

sonnel and financial support necessary to maintain an effective fighting force, and the operation and maintenance of non-aerospace system equipment needed to support mission accomplishment.

2. Nomination Content. Each nomination should consist of two parts:

a. Background and Supporting Data:

(1) Names of MAJCOM and installation commanders.

(2) Complete designation of the installation and its location:

(a) Installation mission statement.

(b) Total personnel authorized and assigned by organization.

(c) Total funds budgeted and authorized for the fiscal year for base operating support.

(3) Local Information:

(a) Name of nearest civilian community.

(b) Names of principal local newspapers, radio, and television stations.

(c) Names of interested members of the Congress.

(d) Draft press release, one page, double-spaced

(e) Draft citation, less than 100 words.

(f) Three photographs of nominated installation, 8- by 10-inch color print format.

b. Selection Justification:

(1) Four page maximum, including illustrations.

(2) Key points should include:

(a) Specific evidence of effectiveness

(b) Description of innovative ideas and programs.

(c) Motivational initiatives.

3. Related Awards and Notable Accomplishments. In addition, each MAJCOM and separate operating agency is encouraged to nominate commands, installations, programs, projects, and individuals for special recognition by the Secretary of Defense. Nominees must have demonstrated exemplary achievement in keeping with the spirit of the purpose of the Installation Excellence Award Program. Special recognition nominations must not exceed one page.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

CHARLES A. GABRIEL, General, USAF
Chief of Staff

OFFICIAL

NORMAND G. LEZY, Colonel, USAF
Director of Administration

EXHIBIT 1

CHIEF OF STAFF
UNITED STATES AIR FORCE
WASHINGTON

Dear General ~~Chain~~ Chain

I am pleased to forward Secretary Cheney's Special Recognition Certificates for Installation Excellence recognizing Major Christopher E. Spade, Capt Howard Roberts, 2Lt Kevin E. Kelly, SSgt Stephen M. Habermann, SSgt Mark G. Vojtko, Mr Jerry W. Anthony, Mrs Jan Dresch, Mr Hans Fehres, Mr Walter Richardson, and the 840th Transportation Squadron, all of Malmstrom Air Force Base, Montana; and Loring Air Force Base, Maine. The men and women of Malmstrom Air Force Base, Montana, as a finalist in this year's installation excellence competition, are also afforded special recognition. Their efforts in providing the best possible environment for our people to work and live enhance productivity and the accomplishment of the Air Force mission.

Please extend my congratulations and thanks to all recipients.

Sincerely

MICHAEL J. DUGAN, General, USAF
Chief of Staff

12 Atch
Certificates of Recognition

General John T. Chain Jr.
CINCSAC
Offutt AFB, NE 68113-5001

EXHIBIT 1

COMMANDER IN CHIEF'S SPECIAL RECOGNITION FOR INSTALLATION EXCELLENCE

I am Pleased to Recognize

The Men and Women of
Loring AFB, Maine

for showing what imaginative and innovative people can do to provide excellent installations that strengthen the nation's defenses. You have excelled in a continuing effort to provide the best possible places to work and to live, as well as excellent base services.

Secretary of Defense

26 JUN 1991
Date

EXHIBIT 2

R&A STAFF FINDINGS

LORING - PLATTSBURGH LOCATION

AIR FORCE TEAM

MISSION	LORING	PLATTSBURGH
STRATEGIC HOMING	C-CLOSEST TO AREAS WEST OF UMATS	C-SECOND CLOSEST
CONVENTIONAL HOMB	C-CLOSEST TO POT TARGET AREAS	C-SECOND CLOSEST
TANKER OPERATIONS	C-NEAR GREAT CIRCLE ROUTE	C-NEAR GREAT CIRCLE ROUTE
SEA CONTROL	C-CLOSEST TO N ATLANTIC	C-SECOND CLOSEST
STAGING/FIGHTERS & SPEC OPS	C-CLOSEST TO POTENTIAL TARGETS	C-SECOND CLOSEST
NORAD	C-FIRST BASE BEFORE EASTERN CITIES	C-NEXT ONE IN LINE
BOMBING RANGES/TRAINING AREAS	R-A-CLOSEST TO THE RANGES C-LOW LEVEL/MAY PHASE OUT R-A-MOST AS FAR	C-SECOND CLOSEST R-ALMOST AS FAR C-LOW LEVEL/MAY PHASE OUT

Document Separator

that battle in this Court seeks to involve the judicial branch in a political dispute committed to the other branches of government.

Second, as described in detail in the defendants' memorandum, all of the plaintiffs in this case lack standing to maintain this action, for reasons unique to each of them. Because the governing law is different for each of the categories of plaintiffs, it is not unreasonable for the defendants to be permitted more than twenty pages to address these various deficiencies.

For these reasons, the defendants respectfully request leave to file a memorandum in support of their motion to dismiss in excess of twenty pages.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

Vincent M. Garvey /MWB
VINCENT M. GARVEY

Mark W. Batten
MARK W. BATTEN
JEFFREY S. GUTMAN
Attorneys
U.S. Department of Justice
901 E Street, N.W., Rm. 918
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-0282-B
	)	
DONALD RICE,	)	
Secretary of the Air Force,	)	
et al.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Pursuant to Rules 12(b)(1), 12(b)(5), and 12(b)(6), Fed. R. Civ. P., defendants respectfully move this Court to dismiss this case for lack of subject matter jurisdiction, insufficiency of service of process, and failure to state a claim upon which relief can be granted. The grounds for this motion are more fully set forth in the supporting memorandum of points and authorities which is submitted herewith.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

Vincent M. Garvey /MWB
VINCENT M. GARVEY

Mark W. Batten
MARK W. BATTEN
JEFFREY S. GUTMAN
Attorneys
U.S. Department of Justice
901 E Street, N.W., Rm. 918
Washington, DC 20530
(202) 514-1285
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-0282-B
	)	
DONALD RICE,	)	
Secretary of the Air Force,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STUART M. GERSON
Assistant Attorney General

DAVID J. ANDERSON
VINCENT M. GARVEY
MARK W. BATTEN
JEFFREY S. GUTMAN
Attorneys
U.S. Department of Justice
901 E Street, N.W., Rm. 918
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

OTHER AUTHORITIES

military bases. Congress, desiring to keep local bases open for the benefit of individual members, for years effectively blocked efforts to close these facilities, while foreign threats diminished and budget deficits soared. The political compromises enacted in 1988 and 1990 reflect Congress' recognition that unneeded military bases should be closed, despite short-term impacts on local communities, and the Executive Branch's commitment to a fair and impartial selection process. This spirit of inter-branch cooperation pervades the structure and operation of the 1990 Act.

The decision to close Loring and 33 other bases, and to realign 48, was reached only after extensive review, both military and political. In accordance with force-structure plans and with base closure criteria cleared by Congress and after extensive internal analysis, the Secretary of Defense recommended 72 military bases, including Loring, for closure or realignment. An independent blue-ribbon Defense Base Closure and Realignment Commission reviewed this list with input from the General Accounting Office ("GAO"), and formulated its own closure and realignment recommendations for Presidential review. President Bush approved the Commission's recommendations. As is permitted by the Act, the House and Senate Armed Services Committees considered a resolution to disapprove the Commission's recommendations and to halt the closings. Those resolutions were rejected by votes of 45-8 and 17-2, respectively. The full House of Representatives then overwhelmingly defeated the resolution, 364

ple pervades the analysis. As the Supreme Court has made clear, courts do not entertain generalized claims against the conduct of government which are more appropriately addressed by the political branches of government. This is particularly true where, as here, the statute upon which plaintiffs base their claims neither grants them a right to review nor was designed to protect their interests.

For these reasons, this action should be dismissed.

STATUTORY BACKGROUND

1. Earlier Legislative Efforts Dealing With Base Closings.

The closure and realignment of military installations has long been a subject of sharp contention between the Executive and Legislative Branches. During the 1960's and 1970's, Members of Congress frequently complained that the Executive Branch had ordered the closure of military bases in the districts of recalcitrant legislators. Congress attempted to assert some measure of control over base closing decisions by passing bills to require the Department of Defense to submit reports prior to closing bases. Presidents Johnson and Ford vetoed such legislation, consistent with the Executive Branch's view that its authority over national security affairs should generally be free of Congressional interference.

In 1977, Congress passed and President Carter signed legislation that imposed numerous procedural restrictions on the closure of bases. Among other things, the Act required the Secretary to notify the Senate and House Armed Services Commit-

Rep. Packard).

The Act required the Secretary of Defense to close and realign all military installations recommended for closure and realignment by a twelve-person Commission on Base Realignment and Closure established by the Secretary of Defense in May 1988. Pub. L. No. 100-526, §§ 201(1), (2). The Act prohibited the Secretary from closing any bases unless 1) he transmitted a statement to the House and Senate Armed Services Committees that he approved the Commission's recommendations and would carry them out and 2) Congress failed to pass a joint resolution disapproving of the Commission's recommendations. Sections 202(a), 208.

The 1988 Commission recommended that 86 installations be fully closed and that 59 facilities be partially closed or realigned. Implementation of these recommendations was anticipated to save $693.6 million annually. The Secretary of Defense approved these recommendations and Congress did not pass a joint resolution disapproving them. Pursuant to § 201(3), the recommended closures and realignments were allowed to commence between January 1, 1990 and September 30, 1991.

3. Litigation Arising From the 1988 Act.

Not surprisingly, parties disappointed that a particular military base was selected for closure resorted to the courts to block base closures recommended by the impartial Commission and agreed to by the political branches of government. These lawsuits failed to undo the results of unprecedented cooperation between the Congress and Executive Branch in this controversial

standing, grounds.

4. The 1990 Base Closure and Realignment Act.

In January 1990, Secretary of Defense Cheney departed from the 1988 base closure process and independently proposed the closure of an additional 36 military facilities. Many Members of Congress objected to the unilateral announcement, but recognized that further base closures were appropriate in light of rapidly changing world events and the determination that troop levels would decline by 25% over the next five years. See H. R. Rep. 101-665, 101st Cong.,.2d Sess. 341, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3067 ("H.R. Rep. 101-665"). Citing Secretary Cheney's approach as the "wrong way to close bases," id. at 3067-68, and as having "raised suspicions about the integrity of the base closure selection process," H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257 ("H.R. Conf. Rep. 101-923"), Congress passed the Defense Base Closure and Realignment Act of 1990.

Congress insisted on returning to the 1988 base closure procedure, maintaining that "a new base closure process will not be credible unless the 1988 base closure process remains inviolate." H. R. Rep. No. 101-665 at 3068. The Act therefore continues the cooperative relationship between the Executive and Legislative Branches started in 1988, with the help of a new independent Commission, in the often difficult and controversial task of closing unneeded military facilities.

2903(d)(1). The Commission may change any of the Secretary's recommendations only if they "deviate[] substantially" from the force-structure plan and final criteria. Section 2903(d)(2)(B). Unlike the 1988 Act, the 1990 Act requires the Comptroller General, the head of the GAO, to analyze the Secretary's recommendations and selection process and permits the Comptroller, to the extent requested, to assist the Commission in its efforts. Section 2903(d)(5).

The 1990 Act further differs from the 1988 Act by requiring the President to review the Commission's recommendations. Section 2903(e). If the President disapproves of any recommendations, the Commission is required to transmit a revised set of recommended closures and realignments to him. Section 2903(e)(3). If the President does not approve of the revised list of recommendations, the base closing process for that year terminates. Section 2903(e)(5).

Should the President approve the Commission's recommendations, Congress has 45 days from the date of approval or until the adjournment of Congress sine die, whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving of the Commission's recommendations. Sections 2904(b), 2908. If such a resolution is passed, the Secretary of Defense may not close the bases approved for closure by the President. Section 2904(b).

In Specter, a case remarkably similar to this one, several Members of Congress joined with labor unions and the state of

major facilities recommended for closure, including Loring, where they were joined by the Congressional plaintiffs. The Committee's staff reviewed the military services' methodologies and data used to develop their recommendations. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted in obtaining, verifying and reviewing data.

The Commission ultimately recommended that one of the Air Force facilities that the Secretary recommended for closure remain open, but concurred with the Secretary's recommendation that Loring be closed. In total, the Commission recommended to the President that 34 bases be closed and 48 be realigned. The Commission predicted that the closures and realignments will result in net savings of $2.3 billion in fiscal years 1992-1997 after one-time costs of $4.1 billion and that savings will total $1.5 billion annually.

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

On July 30, 1991, the House considered a resolution to disapprove the Commission's recommendations, sponsored by Rep. Olympia Snowe, one of the plaintiffs in this case, and Rep. Thomas Foglietta, one of the plaintiffs in Specter. 137 Cong.

Congress recognized that subjecting the base closure process to judicial review at the behest of every disappointed Member of Congress, municipality or base employee would undermine the entire effort. It therefore expressly precluded judicial review under the 1990 Act, and established instead the joint resolution mechanism. See § 2908. This device allows Congress to review the procedure and substance of the closure process, without permitting the narrow political interests of the minority to cripple those extensive efforts. Plaintiffs' attempt to involve the Judicial Branch in this carefully structured process ignores both the expressed intent of Congress and the structure and objectives of the statutory scheme. The Amended Complaint must therefore be dismissed.

A. Congress Has Specifically Precluded Judicial Review Of The Plaintiffs' Claims

The plaintiffs assert that their right to judicial review arises from the APA, which usually provides for review of federal agency action. See 5 U.S.C. §§ 702, 704, 706. However, the APA contains several exceptions to that general rule, three of which are relevant here. First, the statute provides for review only of "final agency action," 5 U.S.C. § 704. As shown below, Congress specifically declared that the Secretary of Defense and the Commission recommendations challenged here do not constitute final agency action. Second, the APA does not apply at all "to the extent that statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or, third, to action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Before considering the merits of

congressional intent to preclude judicial review under the APA." Id. at 1228. As that court held, the legislative history of the Act conclusively demonstrates that Congress intended to preclude judicial review. The language of the Conference Report could not be more explicit:

> [N]o final agency action occurs in the case of the various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements [of the APA] and would not be subject to judicial review. Specific actions which would not be subject to judicial review include . . . the Secretary of Defense's recommendation of closures and realignments of military installations under section [2903(d), and] the decision of the President under section [2903(e)].

H. R. Conf. Rep. 101-923 at 3258.

This explicit direction followed a number of other indications in the legislative history that Congress intended to facilitate base closures expeditiously without permitting dissatisfied parties to revisit the procedure in court. The conferees explained, for example, that earlier attempts at base closure had failed in part because "closures and realignments under existing law . . . take a considerable period of time and involve numerous opportunities for challenges in court." H. R. Conf. Rep. 101-923 at 3257.[4]

Further, in describing earlier attempts at base closure, the

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[4] See Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 459-60 (1979) (holding that legislative history suggested intent to preclude judicial review because Congress had removed more liberal review provisions, making changes "designed to avoid these disruptive consequences of judicial interference," and concluding that rejection of Congress's intent on the issue "would be giving 'backhanded approval' to these very same consequences") (citation omitted).

under the 1990 Act, it was, of course, free to create an explicit judicial review provision to avoid a repetition of the NFFE decision. It did not. In fact, Congress instead included a new and express intention to preclude judicial review in the October 1990 Conference Report, just a few months after the D.C. Circuit's decision. As the Court in Block also held, intent to preclude review "may also be inferred from contemporaneous judicial construction barring review and Congressional acquiescence in it . . . or from the collective import of legislative and judicial history behind a particular statute." 467 U.S. at 349 (citations omitted). Congress did not merely acquiesce in the NFFE court's conclusion that most base closure decisions are not subject to review, but went even further, banning review altogether, to make clear that the federal courts simply are not the forum in which objections to the closure process are to be resolved.[5] The definitive expression of Congressional intent in the Conference Report here is dispositive, and the plaintiffs' claims simply are not subject to judicial review.

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[5] Other cases have frequently relied on much less explicit legislative history in holding judicial review to be precluded. For example, in Morris v. Gressette, 432 U.S. 491 (1977), plaintiffs challenged the Attorney General's failure to object to South Carolina's amendment of its voting laws under a statutory procedure requiring federal "preclearance" of such amendments. The Court noted that the legislative history did not expressly address the review issue, but nonetheless held that Congress had not intended to permit judicial review because that history indicated that Congress had intended the preclearance process to move speedily. Id. at 503-04; see also Wheaton Industries v. EPA, 781 F.2d 354 (3d Cir. 1986) (holding judicial review precluded where legislative history mentioned only generally that delay could be harmful).

delicate balance. There the court held that the Presidential Records Act, 44 U.S.C. § 2201, et seq. ("PRA"), precluded judicial review of the President's decision to dispose of certain documents. Although the legislative history was unclear, the court explained, the Act represented a careful political compromise between the desire to preserve Presidential records for later public access, and the separation of powers concern with interfering in the President's day-to-day business. Id. at 290.

In a scheme quite similar to the joint resolution of disapproval in the Act, the PRA required the President to notify the Archivist of the United States before destroying documents. The Archivist would then report to Congress, which could enact legislation to protect the specific documents if it chose. The court concluded that "permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." Id. The court therefore held that the PRA impliedly precluded review under 5 U.S.C. § 701(a)(1).

The joint resolution of disapproval mechanism in the Base Closure Act serves the same purpose: it gives Congress the power to review Executive Branch decisions, but balances that power against other important interests. Judicial intervention simply has no role in that statutory scheme. Here, as in Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984),

> [t]he lack of any authorization for . . . review at the behest of members of the public, when viewed in the context

place. And, although the APA often provides a basis for review of executive action, plaintiffs as a practical matter seek a declaratory judgment overturning decisions of both the President and the Legislative Branch.[7] Such sweeping claims of judicial authority to consider these issues founder not only on contrary Congressional intent, but also on the fundamental separation-of-powers principles embodied in the political question doctrine. Baker v. Carr, 369 U.S. 186, 210 (1962); Specter, 777 F. Supp. at 1228-29.

This doctrine recognizes that "a court [must] not immerse itself in a political matter which is principally in the dominion of a political branch of government." McIntyre v. O'Neill, 603 F. Supp. 1053, 1059 (D.D.C. 1985). In Baker, the Court listed six factors that characterize political questions:

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

369 U.S. at 217. The presence of any one of these factors is sufficient to render an issue nonjusticiable. Barkley v.

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[7] Indeed, the APA expressly does not extend so far as to permit review of actions taken by Congress. See 5 U.S.C. § 701(b)(1)(A). The plaintiffs' disregard for Congress's decision effectively seeks judicial review of a legislative determination that the APA expressly forbids.

for that of the [President], the House Committee, and the House of Representatives. This the Court cannot and should not do." Barkley, 624 F. Supp. at 668.

As explained supra, after the President transmitted his approval of the Commission's proposals on July 10, 1991, both the House and Senate Armed Services Committees immediately began hearings on the Commission's procedures, including testimony from three Commissioners. After considering this evidence, the House Subcommittee voted 17-2, and the full Committee voted 45-8, to uphold the President's decision. The Senate Committee also voted 17-3 in favor of the President. Finally, on July 30, 1991, the House voted 364-60 to reject the resolution of disapproval.

Several of those on the losing side of that vote are now before the Court as plaintiffs, demanding that the judiciary do what Congress chose not to do. This case does not present a typical claim that an executive agency has misinterpreted a statute or ignored Congressional intent; here, Congress specifically considered the allegations that the Air Force and the Commission had violated the statute and decided not to overturn those actions. The Court could not possibly accept the plaintiffs' invitation to take a second bite at that apple without questioning the express decision of the political branches of government, to which the Constitution expressly commits the substance and procedure of military organization.

Even if the plaintiffs could successfully characterize their claim as a simple exercise in statutory construction, "a matter

misjudged Loring's "strategic value" based on its "proximity to all potential conflict areas east of the United States." Amended Complaint ¶ 64(g). They also claim that the Air Force considered inaccurate data concerning the cost to upgrade Loring's facilities and miscounted the square footage of available ramp space. See id. ¶ 64. But the assessment of Loring's military value and the relative importance of the other factors plaintiffs cite are precisely the sort of discretionary assessments that the APA commits to the Secretary of Defense. All of the eight criteria established under the Act are overwhelmingly judgmental, and the facts can only be measured against those criteria through the lens of military expertise and practical experience.

Judicial review of such assessments is particularly inappropriate, because they rely on judgments requiring experience and expertise that the courts do not share:

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis omitted). The selection of recommendations for closure was therefore committed to the discretion of the Commission and the Air Force, and is not subject to judicial review.

II. THIS ACTION SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Each plaintiff in this case contends that the Air Force and the Base Closure Commission formulated their recommendations to

well established that Governors and cities[8] have no standing as parens patriae to sue the federal government or a federal instrumentality. Illinois, 726 F. Supp. at 222-23; Baxley v. Rutland, 409 F. Supp. 1249, 1257 (M.D. Ala. 1976) (three judge court). Since the landmark Supreme Court case of Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923), it has been established that, in suits against the federal government over rights and benefits flowing from federal legislation, states may not sue in a parens patriae capacity because it is the federal, not the state, government which is sovereign in the relation of its citizens to the federal government.

This venerable rule has withstood the test of time. The Supreme Court has repeatedly reaffirmed its vitality,[9] and, as recently as 1982, the Court cited Mellon with approval and flatly stated that "[a] State does not have standing as parens patriae to bring an action against the Federal Government." Alfred L. Snapp & Sons v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 610

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[8] Even if the defendants were not federal officials or instrumentalities, cities and towns cannot sue as parens patriae on behalf of their residents because their powers are derivative of the state and not sovereign. See City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1047 (2d Cir. 1976) (Meskill, J., dissenting), cert. denied, 434 U.S. 1034 (1978); In Re Multi-district Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Mfrs. Ass'n., 414 U.S. 1045 (1973); Prince George's County v. Levi, 79 F.R.D. 1, 4 (D. Md. 1977). For the remainder of this discussion, therefore, we discuss only state-initiated parens patriae suits.

[9] See South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 446-47 (1945); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944); Florida v. Mellon, 273 U.S. 12, 18 (1927).

by the federal government, it is the federal rather than the state government which serves as the parens patriae to the beneficiaries. See State of Georgia v. Pennsylvania R. Co., 324 U.S. 437, 446 (1945) ("the United States, not the State, represents the citizens as parens patriae in their relations to the federal government"); Commonwealth of Pennsylvania, 533 F.2d at 676-77; Walters, 660 F. Supp. at 1233. For the states to seek to interfere in that relationship presents serious federalism concerns. This rationale applies with particular force here, as the state and city plaintiffs seek to enjoin implementation of the federal government's determination to close a military facility, a decision indisputably within the exclusive constitutional province of the federal authority over matters of national defense.

2. The State and City Plaintiffs Lack Standing in Their Proprietary Capacities.

The Amended Complaint hints that the Governor and the cities and towns also sue in their proprietary capacities. The plaintiffs claim that the closing of Loring will reduce income and increase unemployment in the area. Amended Complaint ¶ 64(h). Plaintiffs do not allege that the State of Maine, the Governor or the cities themselves will be injured by the closing, but only that their citizens will be. Even if these plaintiffs expressly alleged that the closing would result in lost tax revenue or greater social service spending, they would nevertheless lack standing in their proprietary capacities.

Article III of the Constitution dictates that a plaintiff

First, even assuming that these plaintiffs had claimed that the closing of Loring would cause them financial injury in the form of decreased tax revenues and increased social service spending, any such injury is not one to the state qua state, or city qua city, but to their taxpayers.[11]

In Illinois, the state argued that closure of the bases would result in a loss of state tax revenue, loss of federal funds and increased state spending on social programs. Even if these injuries would occur, the court explained, "[i]t is the citizens and taxpayers of Illinois that will suffer if this comes about, not the state as a state." Illinois, 726 F. Supp. at 225. Following Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985), and Commonwealth of Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976), the Court held both that Illinois had not alleged an injury in fact to itself, thereby failing to satisfy Article III's requirements, and that the state merely asserted

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[11] Any such claim of financial injury would necessarily be conjectural, and be insufficient to establish injury in fact. In Illinois, for example, the state produced a study concluding that the base closure would cost the state nearly $250 million. See Illinois, 726 F. Supp. at 223. Nonetheless, the Court held that "[t]hese are not the types of real and immediate injuries or threats of injuries that will confer standing on a plaintiff. The injuries alleged by Plaintiff are merely conjectural and speculative." Id. at 225. Furthermore, the Court in Illinois noted that the 1988 Base Closing Act provided for economic adjustment assistance to affected communities which would alleviate economic injuries. Id. The 1990 Act similarly provides for such assistance. Section 2905(a)(1)(B). For these reasons, the court in Illinois held that the state failed to satisfy the injury in fact requirement to establish standing. Id. Significantly, the court reached this conclusion before the Supreme Court announced an even more rigorous standard, requiring that a threatened injury be "certainly impending" to constitute injury in fact. Whitmore, 110 S. Ct. at 1724-25 (citation omitted).

The Court further observed that the purpose of the Act was to facilitate the closure or realignment of unneeded military facilities and concluded that the state's interest in keeping home bases open was antithetical to the purpose of the Act. Id.

If anything, the case against the Governor or the cities satisfying the zone of interests test is stronger here than in Illinois. As with the 1988 Act, in enacting the 1990 Act, Congress acknowledged the need to close military bases despite the economic dislocations that might cause. See H.R. Rep. No. 101-665 at 3067. In fact, Congress insisted on recreating the 1988 process for closing bases "in the face of numerous attempts to undermine it." Id. at 3068. Congress recognized that litigation is one approach used to derail the closures chosen by the political branches of government. As a result, unlike in 1988, Congress in 1990 expressly stated its belief that military determinations, such as the Secretary of Defense's closure recommendations, were not subject to judicial review. H. Conf. Rep. No. 101-923 at 3258.

Congress' continuing efforts to craft a method to accomplish the often unpopular closure of military bases, and its express view that the closure determinations be immune from review, reflect its clear judgment that bases found unneeded should be finally closed. The interests of parties, such as the state and city plaintiffs here, to keep their home bases open, despite the President's determination to close them and Congress' acceptance of this military judgment, plainly fall outside the interests

fact, pleading only their names, positions and office and home addresses, Amended Complaint, ¶¶ 1-2, 4, a grossly inadequate demonstration of their entitlement to be heard in federal court.

These congressional plaintiffs could not show a cognizable injury in fact in this context in any event. It is well-established that a congressional plaintiff must not only plead a "specific and cognizable" injury in fact, but also one arising from an interest "positively identified by the Constitution." United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting Moore, 733 F.2d at 951). See also Southern Christian Leadership Conf. v. Kelley, 747 F.2d 777, 780 (D.C. Cir. 1984). Thus, for example, courts have dismissed, for lack of standing, claims by legislators that allegedly unlawful Executive Branch action diminished their legislative effectiveness. Chiles, 865 F.2d at 1205-06; United Presbyterian Church, 738 F.2d at 1381-82; Harrington, 553 F.2d at 211-12. Courts have also rejected claims that the improper execution of laws by the Executive Branch causes legislators injury in fact. See American Federation of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982); Harrington, 553 F.2d at 213-14. "Once a law is passed . . . Congress' interest in its enforcement is no more than that of the average citizen." Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875, 888 (3d Cir. 1986).

Courts have found congressional plaintiffs to have standing only where the claim of injury stems from a "distortion of the process by which a bill becomes a law," Moore, 733 F.2d at 952,

C. The Save Loring Committee and Plaintiff Haines Lack Standing.

The Save Loring Committee describes itself as a collection of individuals and corporations who expect to suffer economically when Loring is closed. See Amended Complaint ¶ 15. Neither the Committee nor its Chairman, Paul D. Haines, has standing to challenge the implementation of a federal statute by the Executive Branch because their claims are merely abstract and generalized grievances felt in common by all citizens concerned about the "conduct of government." Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 218 (1974); see Allen, 468 U.S. at 754; Farsaci v. Bush, 755 F. Supp. 22 (D. Me. 1991). Neither this organization nor its members has any distinct or personal stake in the outcome of this case, and therefore "do not meet the Supreme Court's long-held requirement that Plaintiff's injury be 'peculiar to himself, as distinguished from the great body of his fellow citizens.'" Farsaci, 755 F. Supp. at 24 (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405, 405 (1900)); see also Frissel v. Rizzo, 597 F.2d 840, 844 (3d Cir.), cert. denied, 444 U.S. 841 (1979); Finch v. Mississippi State Medical Ass'n, Inc., 585 F.2d 765, 773-75 (5th Cir. 1978). These plaintiffs also fall outside the zone of interests protected by the Act, as explained in the following section.

D. The Union Plaintiffs Lack Standing to Bring Their Claims.

The union plaintiff, which serves as collective bargaining representative for some of the workers at Loring, and its presi-

Express Statutes to permit private couriers to engage in international remailing. The union's interest was to protect the jobs of their members. The Court held, however, that Congress' purpose in enacting the Private Express Statutes was not to protect jobs, but to ensure sufficient postal income to provide adequate service to the nation. Air Courier, 111 S. Ct. at 919-20. See also National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (union lacks standing to challenge decision to contract out services provided by employees on Army base because employees were not within zone of interests of statutes authorizing OMB to establish cost comparison procedures), cert. denied, 110 S. Ct. 3214 (1990). Thus, plaintiffs' challenge was dismissed for lack of standing.

This case is considerably stronger than Air Courier. Here, protection of union jobs is not simply absent from the list of interests Congress sought to protect in enacting the Act; it is in fact antithetical to these interests. The purpose of the legislation was to create a mechanism to close military bases no longer needed in light of a diminished military threat abroad. See H. Rep. 101-510 at 3067. On the floor of the house, Rep. Foglietta correctly captured the purpose of the Act:

> The bill adopts a logical, fair, and nonpolitical plan for deciding how to close domestic military bases. And, make no mistake about it, we should close domestic military bases.

136 Cong. Rec. H7459 (daily ed. Sept. 12, 1990) (statement of

> Members of Congress were acutely aware of the impact that such closures would have on the economy of communities that surround these bases and the significant job loss that would occur. Plaintiffs' interests are clearly inconsistent with the purposes of the Closure Act. Congress' fundamental objective was to save revenue and to create a more efficient base structure. Plaintiffs can point to nothing in the language of the Act or its legislative history that suggests that Congress contemplated the protection of federal employees or contractors.

NFFE, 727 F. Supp. at 22.

The 1990 Act plainly has the same purpose as the 1988 Act. See H.R. Rep. No. 101-665 ("The committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it."). As in the 1988 Act reviewed in NFFE, the 1990 Act establishes a process for the closure of military bases, notwithstanding the attendant loss of employment. Plaintiffs' desire to keep Loring open, despite the determination of the President and acceptance of that decision by Congress, is inconsistent with the purpose of the 1990 Act. Plaintiffs therefore fail the zone of interests test.

2. The Union Plaintiffs Lack Standing to Bring Any Claim Because Their Asserted Injury Is Not Fairly Traceable to the Actions of Defendants.

As noted, Article III "imposes [the] fairly strict requirement[]" that the plaintiffs demonstrate "a causal connection between the injury and the complained-of acts." Munoz-Mendoza v. Pierce, 711 F.2d 421, 424 (1st Cir. 1983); see Valley Forge, 454 U.S. at 472. Of importance here is the Supreme Court's admonition that plaintiffs must show that the alleged injury is traceable to the defendant, and not caused by "the independent action

Here, the union plaintiffs claim injury from a future loss of employment occasioned by the closure of Loring. As in Simon, however, plaintiffs here cannot argue that actions taken by the defendants directly caused their asserted injuries. The Air Force, Secretary of Defense and Commission are not vested with final base closing authority. Rather, the Act charged the defendants only with recommending closures and realignments. The Act empowered the President to accept or reject these recommendations in whole or in part. Section 2903(e). It was the President's decision to approve the Commission's recommendations and the Congress' acceptance of that determination, not some predecisional suggestions, which will result in the closure of Loring.

The District Court for the District of Columbia recently observed that "[t]he mere possibility that causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied." Coker v. Bowen, 715 F. Supp. 383, 388 (D.D.C. 1989) (emphasis in original). Here, both the President and the Congress stood between the defendants' conduct and plaintiffs' asserted injuries. What effect the defendants' actions challenged here had on the President's and Congress' independent review of the Commission's recommendations is a matter of pure conjecture.

(low income residents lack standing to challenge town's restrictive zoning ordinance because they failed to demonstrate that their inability to find housing in the town was caused by the ordinance rather than economic conditions).

U.S. Department of Justice
901 E Street, N.W., Rm. 918
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

Of Counsel:

Robert J. Moore
General Counsel
Defense Base Closure and
Realignment Commission
1625 K Street. N.W.
Washington, DC

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March 26 92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-0282-B
	)	
DONALD RICE,	)	
Secretary of the Air Force,	)	
et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Severin M. Beliveau, Esq.
Ann R. Robinson, Esq.
Stanley W. Piecuch

PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
Tel: (207) 623-5167
Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

By their motion to dismiss, defendants seek to close Loring Air Force Base ("Loring") by totally immunizing their brazen disregard of procedural statutory mandates from any judicial review whatsoever. In particular, they argue that this court is disabled from even considering the integrity of the base closure process in this instance because judicial review is precluded by (1) the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act" or the "1990 Act") itself, (2) the political question doctrine, and (3) plaintiffs' lack of standing. As the following discussion will indicate, each of defendants' arguments is without merit.

The law is well settled that even in the face of statutory language expressly precluding judicial review -- language that is conspicuously absent from the Base Closure Act -- a federal court has jurisdiction to review claims of procedural irregularities. Defendants' contention that separation-of-powers concerns are implicated in this matter is also demonstrably erroneous because federal courts routinely review agency action to ensure adherence to statutory mandates. Likewise, defendants' attack on plaintiffs' standing is factually insupportable and foreclosed by an abundance of case law.

In short, this court's historical mandate to scrutinize the procedural regularity of the actions of federal administrative

agencies cannot be defeated by defendants' groundless claims of immunity from any judicial review for even the most intentional and flagrant violations of congressionally mandated procedural safeguards. Nothing in the Base Closure Act, its legislative history, or the doctrine of separation-of-powers allows the defendants -- charged with carrying out the express mandates of the Base Closure Act in a fair manner -- to make such a mockery of the process. In a democratic republic historically protected by an independent federal judiciary, any other result is unthinkable.

FACTUAL BACKGROUND

Plaintiffs do not disagree with Congress and the President that military bases must be closed and realigned, and the only judicial review sought by plaintiffs in this case is a scrutiny of defendants' failure to obey the procedural mandates of the Base Closure Act that resulted in the decision to close Loring. It is ironic that the exact procedural deficiencies being charged here not only pervaded prior base closure processes but also provoked enactment of the 1990 Act. The procedural inequities of the earlier base closure process became manifest after a twelve-member Base Closure Commission, acting under authority of the 1988 Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988), summarily concluded that 145 military installations

should be closed or realigned. These recommendations were strongly criticized as unfair by members of Congress and the public primarily because the base closure process had not been sufficiently open to public scrutiny. Congressional critics also charged that faulty data had been used to arrive at the final closure recommendations and that the General Accounting Office ("GAO") should have reviewed the data considered by the 1988 Commission.

Close on the heels of the questionable recommendations of the 1988 Commission, the Department of Defense independently announced a proposal to close thirty-six additional military installations in the United States. Congress recognized that "the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. In November of 1990, to rectify the procedural inequities of the 1988 Act and to nullify the Department of Defense's January list of proposed closures, Congress enacted the Base Closure Act.

The genesis, structure, and objectives of the 1990 Act confirm a congressional commitment to ensure the procedural integrity and fairness of the base closure process. The declared purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment

of military installations inside the United States." Pub. L. No. 101-510, § 2901(b), 104 Stat. 1808, 1808 (1990) (emphasis added). To this end, the 1990 Act provides numerous procedural safeguards that were absent from the 1988 Act, including, among others, the requirements that all meetings be "open to the public" except where classified information is being discussed, id. § 2902(e)(2)(A); that a six-year force structure plan be developed and that "final criteria" for making closure and realignment determinations be developed, published, and even-handedly applied, id. § 2903(b)(2)(A) and (c), 104 Stat. at 1811; that the Secretary of Defense consider all military installations "equally" for closure or realignment, id. § 2903(c)(3); that the Secretary "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments, id. § 2903(c)(4); that the Commission hold public hearings on the recommendations of the Secretary of Defense, id. § 2903(d)(1); and that the Comptroller General and Secretary review and analyze the recommendations and selection process. Id. § 2903(d)(5)(A) and (B), 104 Stat. at 1812.

Defendants admit that these procedures are expressly required by the Base Closure Act. See Defendants' Memorandum at 9-10. They must also admit for purposes of their motion to dismiss pursuant to Fed. R. Civ. P. 12(b) that they

intentionally disregarded them. Nevertheless, defendants maintain that there is no judicial review of their blatant refusal to obey the clear statutory mandates of the Base Closure Act. Contrary to their contentions, in light of the genesis, purpose, and nature of this procedurally oriented statute, this court clearly has jurisdiction to review the integrity of the base closure process.

ARGUMENT

Defendants ask the court to dismiss plaintiffs' amended verified complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and under Rule 12(b)(1) for lack of standing. Because defendants' motion seeks dismissal under Rule 12(b), the grounds for dismissal must be clear on the face of the pleadings alone. Aldahonda-Rivera v. Parke Davis Co., 882 F.2d 590, 592 (1st Cir. 1989). That is not the case here.

Furthermore, in ruling on defendants' motion made pursuant to Rule 12(b)(6), the court must accept plaintiffs' allegations as true and view the facts contained in the complaint in the light most favorable to plaintiffs. See City Cab Co. v. Edwards, 745 F. Supp. 757, 759 (D. Me. 1990). "'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)) (emphasis added). Rather, dismissal under Rule 12(b)(6) is limited to those rare instances where it is certain that no relief could be granted under any set of facts that could be proved. Harper v. Cserr, 544 F.2d 1121, 1122 (1st Cir. 1976). The burden of showing that no claim has been stated is clearly on defendants, and the court's task in this instance is necessarily a limited one, the only issue being whether plaintiffs are entitled to offer evidence in support of their claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Because defendants have failed to carry their burden, the court must deny their motion to dismiss made pursuant to Rule 12(b)(6).

The standard to be applied in the case of defendants' motion made pursuant to Rule 12(b)(1) is not dissimilar. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975); accord Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979). Under this standard, too, defendants' motion is clearly deficient and must be denied.

I. DEFENDANTS' BOLD DISREGARD OF THE PROCEDURAL REQUIREMENTS OF THE BASE CLOSURE ACT ARE SUBJECT TO JUDICIAL REVIEW.

It is axiomatic that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); accord Traynor v. Turnage, 485 U.S. 535, 542 (1988). In recognition of this principle, the Administrative Procedure Act ("APA"), 5 U.S.C.A. §§ 701-706 (West 1977), establishes a strong presumption of reviewability.

The Supreme Court has elaborated on this theme by holding that the APA's "'generous review provisions' must be given a 'hospitable' interpretation" and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. at 141 (citations omitted); accord Traynor v. Turnage, 485 U.S. at 542; Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 671 (1986); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). As the Court explained in Bowen, "[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." Bowen v. Michigan Acad. of Family Physicians, 476 U.S. at 681. The "clear and convincing evidence" standard at

the very least serves as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block v. Community Nutrition Inst., 467 U.S. 340, 350-51 (1984) (emphasis added). For these reasons, defendants bear a heavy burden of demonstrating that their actions are immune from any judicial review whatsoever.

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702. This broad grant of the right to judicial review of agency action is limited only to the extent that the relevant statute precludes such review or the agency action is committed to agency discretion by law. Id. § 701(a). Both of these exceptions are to be read narrowly. Traynor v. Turnage, 485 U.S. at 542; Bowen v. Michigan Acad. of Family Physicians, 476 U.S. at 671; Heckler v. Chaney, 470 U.S. 821, 829 (1984); Abbott Laboratories v. Gardner, 387 U.S. at 140-41; Doe v. Casey, 796 F.2d 1508, 1513-14 (D.C. Cir. 1986), cert. denied, 487 U.S. 1223 (1988) ("In the decades of litigation over the scope of these two grounds for preclusion, the Supreme Court and this court have emphasized in the strongest terms that preclusion is the rare exception and certainly not the norm."); Florida Dep't of Business Regulation v. Department of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

Defendants do not challenge -- nor can they -- that the APA specifically provides for the review of agency action to determine whether the agency has complied with statutory mandates and statutorily prescribed procedures. Section 706 of the APA authorizes the reviewing court to set aside agency action that is

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> . . . .
> (D) without observance of procedure required by law.

5 U.S.C.A. § 706(2) (emphasis added). Because the actions of defendants herein were plainly "not in accordance with law" and "without observance of procedure required by law," the need for and appropriateness of judicial review is manifest.

Moreover, with regard to allegations of procedural deficiencies in agency action of the kind involved in this case, it is well settled that a reviewing court must carefully examine the challenged actions "to determine independently that the [a]gency has not acted unfairly or in disregard of . . . statutorily prescribed procedures." Natural Resources Defense Council, Inc. v. EPA, 790 F.2d 289, 297 (3d Cir. 1986), cert. denied, 479 U.S. 1084 (1987). Just as importantly, this court must invalidate agency actions that, like those at issue here, are inconsistent with a statutory mandate or that frustrate a statutory policy. Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983). In this regard, the Court of

Appeals for the District of Columbia Circuit has recognized a reviewing court's duty to scrutinize closely agency action that is alleged to violate statutorily prescribed procedures:

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

Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (emphasis added) (citations omitted); see also Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1048 (D.C. Cir. 1979) ("Our review of an agency's procedural compliance with statutory norms is an exacting one."). Because the flawed process that resulted in defendants' recommendations to close Loring could hardly have been more unfair or have departed by a wider margin from the procedures prescribed by the Base Closure Act, it manifestly is within the competence of this court to review the integrity of that process and declare its results void insofar as Loring is concerned.

A. The Base Closure Act Does Not Preclude Judicial Review of Defendants' Violations of the Procedures Mandated by It or of Their Own Procedures.

By refusing to understand that plaintiffs do not challenge the substantive merits of any discretionary administrative

decision making, defendants attempt to focus this court's attention on the wrong issue. See Defendants' Memorandum at 13-14. Defendants have failed to cite a single case holding that judicial review of an agency's failure to follow statutory procedures or their own procedures can be precluded under section 701(a) of the APA. In fact, the law is directly to the contrary. The Supreme Court has made clear in respect to preclusion of review under the APA that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." Heckler v. Chaney, 470 U.S. at 833. Rather, "[i]t may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands." Id. at 839 (Brennan, J., concurring); see also Electricities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262, 1267 (4th Cir. 1985) ("For example, an agency decision that violates a statutory or constitutional command . . . is not immune from judicial review even when a lawful exercise of an agency's discretion has that immunity."); East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 534 (9th Cir. 1972) (Where a statute imposes a number of limitations upon the scope of an agency's discretion and the manner in which it is to be exercised, those limitations "may be effectively enforced through judicial review without undue interference with the administrative process.").

Moreover, federal courts have consistently held that judicial review is available for procedural violations by an agency, notwithstanding a statute's express withdrawal of jurisdiction. E.g., First Fed. Sav. & Loan Ass'n v. Casari, 667 F.2d 734, 739-40 (8th Cir. 1982), cert. denied, 458 U.S. 1106 (1982); Hollingsworth v. Harris, 608 F.2d 1026, 1027 (5th Cir. 1979); Graham v. Caston, 568 F.2d 1092, 1097 (5th Cir. 1978). In Graham, for example, the court allowed judicial review of the failure of the Secretary of Housing and Urban Development ("HUD") to adhere to statutorily prescribed procedural requirements despite the fact that the relevant statute provided that the Secretary's decision was "final and conclusive" and "not subject to judicial review." Graham v. Caston, 568 F.2d at 1096. The court held that in spite of this express statutory directive precluding review, the Secretary's departure from statutory authority and HUD's own procedures were nevertheless subject to judicial review: "If an administrative official clearly departs from statutory authority, the administrative action is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable. Likewise, judicial review is available where the administrative agency fails to follow procedures outlined in regulations adopted by that administrative agency." Id. at 1097 (emphasis added) (citations omitted). In the instant case, defendants have not only ignored the procedures expressly required by the

Base Closure Act, but have failed to follow procedures promulgated by the Departments of Defense and Air Force as well.

The court in Hollingsworth also permitted review of the actions of the Secretary of Health and Human Resources to determine whether the Secretary violated the agency's own regulations, notwithstanding that the statute pursuant to which the regulations were promulgated "withdraws federal court jurisdiction to review 'determinations' by the Secretary under that section." Hollingsworth v. Harris, 608 F.2d at 1027. In recognition of this principle that judicial review of procedural regularity cannot be cut off, the court in Casari allowed judicial review of the procedural propriety of a determination made by a designated planning agency ("DPA") under authority delegated by the Secretary of Health, Education and Welfare even though the relevant federal statute expressly provided that "[a] determination by the Secretary . . . shall not be subject to administrative or judicial review." First Fed. Sav. & Loan Ass'n v. Casari, 667 F.2d at 739. Said the court: "We agree with First Federal that DPA determinations are subject to judicial review regarding issues of procedural propriety." Id.

The principle applied by the courts in Graham, Hollingsworth, and Casari applies with even greater force to the instant matter because the Base Closure Act, unlike the statutes involved in those cases, does not expressly preclude judicial review. The three cases demonstrate that even express statutory

provisions precluding review cannot bar judicial review of an agency's failure to follow statutory procedures or its own procedures, or to act in any other respect "without observance of procedure required by law." 5 U.S.C.A. § 706(2)(D). It follows that the Base Closure Act, which does not expressly preclude judicial review, cannot bar such review of plaintiffs' challenge to the procedural integrity of the base closing process.

Furthermore, in the analogous context of purported judicial preclusion under the other APA exception to review, that is, the provision precluding review to the extent that "agency action is committed to agency discretion by law," id. § 701(a)(2), some courts have explicitly adopted the principle applied in Graham, Hollingsworth, and Casari. The Third Circuit, for example, has held that review is always available, notwithstanding this exception, for violations of statutory procedures or the agency's own procedures as alleged, and for present purposes admitted, herein:

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

Kirby v. Department of HUD, 675 F.2d 60, 67 (3d Cir. 1982) (emphasis added) (citation omitted); accord Doe v. Casey, 796 F.2d at 1517.

In addition, in order for the "committed to agency discretion" exception to preclude judicial review altogether, the government must establish that "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. at 830 (emphasis added). This narrow exception applies, in other words, only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)) (emphasis added). Clearly, there is law to apply in the instant case, and defendants' specious claim that judicial review is totally unavailable to remedy their admitted procedural violations of the Base Closure Act must fail.

Defendants go on to cite National Fed'n of Fed. Employees v. United States ("NFFE"), 905 F.2d 400 (D.C. Cir. 1990), in support of their contention that the Base Closure Act itself implicitly precludes judicial review. Specifically, defendants argue that because the court in NFFE found that base closure actions taken pursuant to the 1988 Act were "committed to agency discretion by law" and therefore unreviewable under section 701 of the APA, Congress would have explicitly provided for judicial

review of actions under the Base Closure Act had it intended to permit such review. "Had Congress intended to permit judicial review of decisions under the 1990 Act," defendants argue, "it was, of course, free to create an explicit judicial review provision to avoid a repetition of the NFFE decision. It did not." Defendants' Memorandum at 17-18.

Not surprisingly, defendants distort the NFFE holding and its significance to the present case. The NFFE plaintiffs did not challenge the procedures employed by the Secretary of Defense but the substance and wisdom of the Secretary's choice of bases to be closed. NFFE, 905 F.2d at 405. Indeed, a procedural challenge under the 1988 Act was impossible because the 1988 Act contained none of the procedural safeguards embodied in the 1990 Act, such as the requirements for public hearings, evaluations, and analyses by the Comptroller General, and that all bases receive equal consideration. Given plaintiffs' challenge to the Secretary's decisions as being arbitrary and capricious, the NFFE court necessarily found the controversy to be nonjusticiable:

> It is clear, then, that judicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy. Such decisions are better left to those more expert in issues of defense.

Id. at 406. The relief sought by plaintiffs in this case, by contrast, would clearly not involve this court in such second-guessing, but only in a review of the procedural integrity of the base closure process as created by the 1990 Act.

Accordingly, even if Congress was aware of the holding in NFFE when it passed the Base Closure Act, there was no reason for it to include an express provision granting judicial review for procedural violations because NFFE did not address, let alone foreclose, such challenges. All that may be inferred from the fact that Congress did not create an explicit review provision in the 1990 Act in light of NFFE is that Congress recognized that substantive challenges to decisions made pursuant to statutes containing no procedural safeguards -- like the 1988 Act -- will be barred by the "committed to agency discretion" exception to review under the APA. This point is well settled, and by no means does it suggest that Congress intended in its enactment of the Base Closure Act to foreclose judicial review for agency violations of the procedures implemented therein.

B. Even If the Legislative History of the Base Closure Act Were Relevant, It Does Not Support a Finding of Congressional Intent to Preclude All Judicial Review of Defendants' Procedural Violations.

Given that no provision of the Base Closure Act expressly or implicitly withdraws the right to judicial review, defendants must resort to a tortured reading of the legislative history to

support their argument that the Base Closure Act forbids judicial review. See Defendants' Memorandum at 15-18. However, nothing in the House Conference Report, or any other part of the legislative history of the 1990 Act for that matter, even remotely suggests that the procedural safeguards embodied therein might be disregarded by defendants with impunity. Contrary to defendants' contentions, the portion of the House Conference Report excerpted on page 16 of their memorandum does not even suggest, let alone compel, this anomalous conclusion. At best, that provision only exempts administrative actions undertaken by certain of the defendants from the rulemaking and adjudication provisions of the APA. It clearly does not insulate defendants from judicial review to determine whether they have followed either the procedures embodied in the Base Closure Act or their own procedures.

A brief overview of the structure of the APA is necessary for an understanding of the language of the House Conference Report upon which defendants premise their argument. The APA essentially has two entirely separate functions. Chapter 5 of the APA prescribes specific procedures for a federal agency to follow depending upon whether that agency is engaged in rulemaking or adjudication. Section 553 of the APA requires, for example, that an agency engaged in rulemaking give general notice of the proposed rule in the Federal Register, give interested parties an opportunity to participate in the

rulemaking, and give an interested person the right to petition for the issuance, amendment, or repeal of a rule. 5 U.S.C.A. § 553(b), (c) and (e) (West 1977). Similarly, section 554 of the APA provides that adjudications "required by statute to be determined on the record after opportunity for an agency hearing" must meet certain procedural requirements, including that the agency give notice, an opportunity for all interested parties for "submission and consideration of facts, arguments, offers of settlement or proposals of adjustment," and a hearing conducted in accordance with the numerous procedural requirements of sections 556 and 557 of the APA. Id. § 554(b), (c)(1) and (c)(2).

Chapter 7 of the APA, on the other hand, provides for a second and entirely separate function: "A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Id. § 702 (emphasis added). The provisions of chapter 7 granting the right to judicial review of agency action are separate and distinct from the provisions of chapter 5 containing procedures for rulemaking and adjudication, and do not contain equivalent limitations. Accordingly, although a certain agency action may be exempt on one of several grounds from the special procedural requirements imposed by sections 553 and 554 of the APA upon rulemaking and adjudication, it will nevertheless be subject to

judicial review under chapter 7 of the APA for a determination of whether, for example, the challenged agency action was "not in accordance with law" or "without observance of procedure required by law." Id. § 706(2); see, e.g., Common Cause v. Department of Energy, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983) ("[T]he fact that the 10-year plan is not subject to notice-and-comment rulemaking requirements does not sufficiently indicate a congressional intent to bar judicial review altogether.").

One illustration of the separation between these two sets of provisions is that the rulemaking and adjudication provisions contained in chapter 5 of the APA expressly do not apply to "the conduct of military or foreign affairs functions." 5 U.S.C.A. §§ 553 and 554. Conversely, the right to judicial review found in chapter 7 of the APA is not subject to this exception. A particular agency action may, therefore, be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function -- as defendants' actions in this case certainly are -- but may, nevertheless, be subject to judicial review under section 702 of the APA for adherence to statutory, constitutional, and procedural requirements. See, e.g., International Ass'n of Machinists v. Secretary of Navy, 915 F.2d 727 (D.C. Cir. 1990) (per curiam).

Given this structure of the APA, the section of the House Conference Report selectively quoted by defendants, when read in its entirety, clearly does not suggest an intention on the part

of Congress to withdraw judicial review of defendants' failure to observe the procedural requirements of the Base Closure Act itself:

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

H.R. Conf. Rep. No. 923, supra p.3, at 3258 (emphasis added).

Despite defendants' contentions to the contrary, this passage indicates no more than that the agency action involved in this case would be exempt from the procedural requirements imposed by the rulemaking and adjudication provisions of chapter 5 of the APA and from judicial review for compliance therewith. The passage does not mean that all agency action would be exempt

from judicial review under chapter 7 of the APA to determine, for example, whether defendants' actions were "without observance of procedure required by law," that is, by the Base Closure Act itself. It is for this reason that the House Conference Report does not refer, even once, to the chapter of the APA that confers the right to judicial review, but refers, instead, only to "the military affairs exception to the Administrative Procedures Act." The military affairs exception, however, is not a bar to judicial review under chapter 7 of the APA, but only an exemption to compliance with the special procedures for rulemaking and adjudication found in sections 553 and 554 of the APA. Clearly, this section of the House Conference Report does not indicate a congressional intent to withdraw plaintiffs' right to judicial review as conferred by section 702 of the APA.

It is true that the district court in Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991), held otherwise in an opinion that is neither of precedential value nor, plaintiffs respectfully submit, persuasive. The court concluded that the above quoted passage "expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act." Id. at 1228. Purportedly relying on the Supreme Court's opinion in Block, the court stated that the presumption favoring judicial review of agency action could be overcome by an "appropriate showing of

congressional intent." Id. at 1227 (citing Block v. Community Nutrition Inst., 467 U.S. at 349). According to Block, however, overcoming the presumption in favor of judicial review of administrative action requires "specific language or specific legislative history that is a reliable indicator of congressional intent." Block v. Community Nutrition Inst., 467 U.S. at 349. It can hardly be said that the legislative language or history in this case reliably, or even unreliably, cuts against judicial review.

Furthermore, there is another compelling reason to find that the above-quoted passage was not intended to preclude judicial review in the instant case. The House Conference Report's list of "[s]pecific actions which would not be subject to judicial review" omits any action on the the part of the Base Closure Commission itself in recommending military installations for closure or realignment. The omission is highly significant in that the Commission is obviously the central feature of the Base Closure Act and its deliberations and recommendations are of primary importance in the entire base closure process. Plainly, the omission of the Commission could not have been an oversight. Therefore, even assuming for the sake of argument that Congress intended to foreclose judicial review of certain actions undertaken during the process of base closure and realignment -- an assumption that is, of course, contradicted by the plain language of the House Conference Report -- this court must

conclude that the actions at least of the Commission were intended to be subject to judicial review. Even giving the House Conference Report the erroneous interpretation imposed upon it by defendants, the court must find that the actions of the Commission are nevertheless subject to judicial review under the APA.

C. The Structure and Objectives of the Base Closure Act Evidence the Availability of Judicial Review of Procedural Integrity.

In their memorandum, defendants also argue that the "structure and objectives" of the Base Closure Act demonstrate that Congress intended to preclude any judicial review. Defendants' Memorandum at 19-21. Ironically, defendants' principal contention in this regard is that allowing judicial review for procedural violations of the Base Closure Act would "reduce the carefully crafted statutory mechanism to a meaningless exercise." Defendants' Memorandum at 19. In fact, just the opposite is true. By permitting defendants to flout the important procedural safeguards built into the 1990 Act -- indeed, that are at the very heart of the 1990 Act -- the "carefully crafted statutory mechanism" would most definitely be reduced to a "meaningless exercise" and the Base Closure Act itself rendered a superfluous waste of legislative time and effort.

Defendants' arguments, in any event, are fatally undermined by the indisputable fact that the 1990 Act was created with the

intent to ensure, above all, the integrity of the base closing process. In the same House Conference Report relied upon by defendants, Congress identified as one of the two main reasons for the enactment of the Base Closure Act the need to safeguard that procedural integrity. The House Conference Report in effect stated that the 1990 Act was intended to correct procedural deficiencies under the 1988 Act and eliminate "suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, supra p.3.

Consistent with this underlying purpose, the Base Closure Act expressly provides that its "purpose . . . is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Pub. L. No. 101-510, § 2901(b), 104 Stat. at 1808 (emphasis added). To this end, the 1990 Act provides numerous procedural safeguards that were absent from the 1988 Act, including, among others, the requirements that all meetings be "open to the public" except where classified information is being discussed, id. § 2902(e)(2)(A); that a six-year force structure plan be developed and that "final criteria" for making closure and realignment determinations be developed, published, and even-handedly applied, id. § 2903(b)(2)(A) and (c), 104 Stat. at 1811; that the Secretary of Defense consider all military installations "equally" for closure or realignment, id. § 2903(c)(3); that the Secretary "make available to the Commission

and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments," id. § 2903(c)(4); that the Commission hold public hearings on the recommendations of the Secretary, id. § 2903(d)(1); and that the Comptroller General and Secretary review and analyze the recommendations and selection process. Id. § 2903(d)(5)(A) and (B), 104 Stat. at 1812. Defendants admit that these and other procedures are expressly required by the Base Closure Act. See Defendants' Memorandum at 9-10. They must also admit for purposes of their motion to dismiss that these procedures were almost totally disregarded.

Given the genesis, purpose, and nature of this procedurally oriented statute, it is unfathomable that Congress would have established these procedural safeguards only to have them ignored without any recourse whatsoever to the courts. As previously discussed, even interpreting the House Conference Report in the inaccurate manner urged by defendants, the court may conclude no more than that Congress meant to preclude substantive judicial intervention at certain junctures in the process, that is, before the Commission makes its final recommendations. However, to argue that even the procedural integrity of the Commission's final recommendations are insulated from any judicial examination renders the Base Closure Act a dead letter, which clearly could not have been Congress's intent.

In their memorandum, defendants attempt to obscure the indisputable fact that the structure and objectives of the 1990 Act reveal a congressional commitment to procedural integrity and fairness. Defendants argue that "[t]he joint resolution of disapproval procedure, in particular, was designed to balance Congress's interest in exercising influence over closing decisions against the need to prevent a disappointed minority from overruling the consensus reached by the Executive and Legislative Branches." Defendants' Memorandum at 19. It comes as no surprise that defendants can point to no statutory language or legislative history with which to support their claim, a claim that is, in fact, contradicted by the numerous procedural safeguards having nothing to do with "the need to prevent a disappointed minority" from challenging base closure recommendations. Despite defendants' contentions to the contrary, it is clear that passage of the 1990 Act came about in large measure because procedural inequities under the 1988 Act had "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, supra p.3.

To support their argument that the "structure and objectives" of the Base Closure Act preclude judicial review, defendants principally rely on Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991). Their reliance on Armstrong is misplaced, however, because the statute involved in that case, the Presidential Records Act ("PRA"), truly raised the delicate

constitutional issue of the balance between congressional power and presidential prerogative. The PRA regulates the preservation and disposal of presidential records, requiring the President to preserve records that reflect the performance of his duties while allowing him to dispose of others that are of little historical significance. Id. at 285-86. Under the PRA, the Archivist of the United States may notify Congress of the President's intent to dispose of records, and if the Archivist so notifies Congress, the President must wait sixty days before destroying the records. The Armstrong plaintiffs brought suit to prevent the proposed destruction of records under the PRA.

The circuit court of appeals held that "the PRA is one of the rare statutes that does impliedly preclude judicial review." Id. at 290. The court reached its conclusion on the basis of its determination that the statutory scheme reflected "a congressional intent to balance two competing goals." Id. The court explicitly identified these goals as follows:

> First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. But Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations. Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office.

Id. (emphasis added) (citations omitted).

In stark contrast, the instant case does not involve any competing political or constitutional concerns. Both Congress and the President, and indeed plaintiffs herein, agree that military bases must be closed and realigned. That objective is not in controversy and really does not implicate separation-of-powers concerns or the balance of competing goals as did the PRA in Armstrong. The PRA necessarily struck a balance between the inherent power of the President to control the preservation and disposal of his documents and protect from interference the "day-to-day operations" of his office against the power and duty of Congress to ensure the preservation of presidential documents of value to posterity. There is no such clash in the present case. The only judicial review sought here by plaintiffs arises from defendants' intentional failure to adhere to the procedural requirements of the Base Closure Act, a fact that has nothing to do with balancing the competing interests of Congress and the President. Indeed, both Congress and the President had every right to rely on the integrity of the process that led to the base closure recommendations. Moreover, both branches have a coordinate interest in allowing the federal judiciary to carry out the procedural aspect of the review function as the historical exponents of procedural fairness.

II. PLAINTIFFS' CHALLENGE OF PROCEDURAL INTEGRITY DOES NOT IMPLICATE SEPARATION-OF-POWERS CONCERNS AND IS NOT PRECLUDED BY THE POLITICAL QUESTION DOCTRINE.

Defendants also attempt to shield their disregard of procedural safeguards from any judicial review on the ground that separation-of-powers concerns embodied in the political question doctrine preclude review. See Defendants' Memorandum at 21-25. Citing the Supreme Court's decision in Baker v. Carr, 369 U.S. 186 (1962), defendants first assert that separation-of-powers concerns are implicated in two ways. First, defendants argue that there is a "'textually demonstrable constitutional commitment'" of questions involving foreign and military policy to the political branches. Defendants' Memorandum at 23 (quoting Baker v. Carr, 369 U.S. at 217). Second, Defendants claim that this court's review of their procedural violations of the Base Closure Act would express a "'lack of the respect due coordinate branches of government,'" since the President and Congress have failed to disapprove the Commission's recommendations to close Loring. Defendants' Memorandum at 23 (quoting Baker v. Carr, 369 U.S. at 217). Neither of these arguments has merit.

In fact, federal courts routinely decide a myriad of questions having to do with "military organization," including questions concerning decisions as to military personnel, see, e.g., Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989); Falk v. Secretary of Army, 870 F.2d 941 (2d Cir. 1989);

the award of military contracts, see, e.g., International Ass'n of Machinists v. Secretary of Navy, 915 F.2d 727 (D.C. Cir. 1990); McDonald Welding & Mach. Co. v. Webb, 829 F.2d 593 (6th Cir. 1987); and the construction of military facilities. See, e.g., Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988). To suggest that every agency action taken pursuant to a statute that regulates military organization is nonreviewable is simply wrong and flies in the face of abundant case law.

Moreover, the instant case does not even bear a remote resemblance to the cases cited by defendants in support of their argument that all "questions regarding American foreign and military policy" are unreviewable as a matter of constitutional law. Defendants' Memorandum at 23. For example, the plaintiff in Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1967), was an Army private who sought both a declaratory judgment that the war in Vietnam was unconstitutional and illegal and an injunction against the Secretary of Defense and the Secretary of the Army from sending him there. Id. at 665. Similarly, the plaintiffs in Gilligan v. Morgan, 413 U.S. 1 (1973), who were students at Kent State University when the Ohio National Guard killed and injured several students there during an anti-Vietnam war demonstration, not only sought a "judicial evaluation of the Ohio National Guard" but also demanded that the district court "establish

standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." Id. at 5-6.

The contrast between those cases and this one could hardly be more dramatic. Plaintiffs herein do not seek to involve this court in any military decisions or determinations involving the deployment, training, or use of military personnel, or involving the foreign or military policy of the United States -- matters traditionally barred from review by the political question doctrine. Rather, plaintiffs seek only to establish that the procedures mandated by Congress have been flouted by federal agencies -- a function routinely undertaken by federal courts, deriving as it does "from this country's historical reliance on the courts as the exponents of procedural fairness." Weyerhaeuser Co. v. Costle, 590 F.2d at 1027. The fact that military facilities are being closed, as opposed to customs warehouses, government research facilities, or other federal offices, is irrelevant. It is the integrity of the process that is at issue in this lawsuit.

Defendants' second purported ground for applying the political question doctrine in this case, that an exercise of this court's jurisdiction would show a lack of respect toward Congress and the President, is likewise seriously flawed. Defendants urge this court to abstain from reviewing the challenged actions in this matter because Congress and the

President have already reviewed the Commission's recommendations and failed to disapprove them. Defendants rely for their proposition on Specter, which held that the political question doctrine forecloses judicial intervention into the propriety of the closure of military bases under the Base Closure Act. Specter v. Garrett, 777 F. Supp. at 1229. Plaintiffs respectfully submit, however, that the district court's opinion in Specter is, in addition to being without precedential value, singularly unpersuasive. Citing to no authority for its conclusion, the court decided as it did because it "felt that the . . . case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government." Id. Significantly, the court further admitted that its invocation of the political question doctrine was in reality "no more than a correlative of [its] first conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review." Id. at 1228.

Defendants' argument also proves too much, and would result in the preclusion of judicial review of virtually all agency action. The District of Columbia Circuit Court of Appeals recently rejected this same argument in Armstrong v. Bush, a case relied upon by defendants. The government defendants in Armstrong argued that the Federal Records Act ("FRA"), like the Presidential Records Act, impliedly precluded judicial review.

In particular, the Armstrong defendants, like defendants herein, argued that Congress chose instead to ensure compliance with the FRA through congressional oversight. In language equally applicable to the instant matter, the court squarely rejected defendants' argument and held that judicial review was available under the FRA:

> [T]he fact that Congress retains some direct oversight over agencies' compliance with the FRA does not necessarily indicate an intent to preclude judicial review. Indeed, in American Friends we rejected this argument as overbroad because it "would create an enormous exception to judicial review: Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken."

Id. at 291-92 (quoting American Friends Serv. Comm. v. Webster, 720 F.2d 29, 44 (D.C. Cir. 1983)). As the court indicated, defendants' argument would preclude review of most agency action since Congress may in most instances express its disapproval of agency action through a variety of means, including reductions in funding, passage of specific legislation, or circumscription of the agency's jurisdiction.

Nor is the President's limited role in the base closure process sufficient to distinguish defendants' actions challenged herein from typical agency actions routinely reviewed by the federal courts. Although the President as chief executive maintains an oversight role over all executive agencies, defendants have not cited, and cannot cite, any case that has

held this to be sufficient reason for precluding judicial review of agency actions. Analogously, the President may sign into law legislation that is constitutionally infirm. However, no one would seriously argue that the President's role in enacting that legislation -- not dissimilar to the President's limited role under the Base Closure Act -- immunizes that legislation from review by the federal courts on account of the political question doctrine.

Finally, both Congress and the President had every right to rely on the integrity of the process underlying the Commission's recommendations for base closure and realignment. Under the Base Closure Act, it is not the role of Congress or the President to police the procedural correctness and fairness of defendants' actions, nor is it the role played by the executive or legislative branches of government under the Constitution. Under our Constitution and system of laws, that role most emphatically and appropriately belongs to the federal judiciary.

III. PLAINTIFFS HAVE STANDING TO CHALLENGE DEFENDANTS' FAILURES TO COMPLY WITH THE PROCEDURES MANDATED BY THE BASE CLOSURE ACT.

Defendants finally assert that not one of the plaintiffs has standing to challenge defendants' blatant violations of the Base Closure Act. See Defendants' Memorandum at 26-45. In particular, defendants claim that the plaintiff union and its president lack standing to press their claims, Defendants'

Memorandum at 38-45, even though plaintiffs have alleged that the union is the exclusive bargaining representative for nearly 500 Loring employees who will lose their jobs as a direct result of defendants' disregard of procedural safeguards. Plaintiffs' Amended Verified Complaint ¶ 17. In arguing as they do, defendants obviously disregard the proper standard to be applied by the court in ruling on their motion to dismiss for lack of standing. When ruling on a challenge to standing that is based largely on the pleadings, a federal court must accept as true all material allegations of the complaint and construe the complaint in the light most favorable to the complaining party. Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 109; Warth v. Seldin, 422 U.S. at 501.

A. The Union Plaintiffs Clearly Have Standing Under the Constitution to Challenge Defendants' Wrongful Actions.

Although defendants discuss and rely on NFFE throughout their memorandum, they conspicuously fail to bring to this court's attention one of the most pertinent aspects of that decision, namely, the court of appeals' holding and discussion concerning the standing of the plaintiff union therein. First, the court outlined the requirements for article III standing as announced by the Supreme Court in Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 472 (1982). In Valley Forge, the Court held that article

III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Id. (citations omitted). Like the union plaintiff in NFFE, the union plaintiff here easily meets this standard.

In applying this test to the NFFE plaintiffs, whose members' jobs were also threatened by base closure, the court of appeals found that the union had standing under article III and concluded in words equally applicable to the present case:

> First, there can be no doubt that NFFE's members satisfy the "actual injury" requirement; many of them will lose their jobs if the base closings are carried out. It is also indisputable that the injury NFFE's members will suffer is exclusively traceable to the potential base closings. If the base closures do not take place, NFFE's members will suffer no harm. Finally, it is clear that the harm NFFE's members will suffer as a result of the base closings will be redressed by a decision in favor of NFFE.

NFFE, 905 F.2d at 403 (emphasis added).

Not surprisingly, however, defendants do not come to terms with this holding or even attempt to distinguish it in their memorandum. Instead, they advance the patently frivolous argument that the injuries to the union plaintiffs are not fairly traceable to the actions of defendants, thereby leaving the Valley Forge test for standing unsatisfied. See Defendants' Memorandum at 42-45. Defendants argue that their actions did

not result in harm to the union plaintiffs because "[t]he Air Force, Secretary of Defense and Commission are not vested with final base closing authority. Rather, the [Base Closure] Act charged the defendants only with recommending closures and realignments." Defendants' Memorandum at 44. In this manner, defendants disingenuously characterize their intensive efforts and final recommendations as mere "predecisional suggestions," Defendants' Memorandum at 44, and claim that because the President and Congress had the power to disapprove their recommendations, plaintiffs' injuries cannot fairly be traced to defendants as required for article III standing under Valley Forge.

Despite defendants' attempts to minimize their roles in the base closure process, it can hardly be doubted that the union plaintiffs' injuries are fairly traceable to the challenged actions. Plaintiffs' allegations, which must be accepted as true for purposes of acting on defendants' motion, demonstrate that Loring would not have been slated for closure but for the illegal actions of defendants. Once having slated Loring for closure, defendants, and in particular the Base Closure Commission, created a powerful political momentum leading directly to the injury that plaintiffs seek to have redressed. The mere possibility that Congress or the President theoretically could have broken the causal link is insufficient to defeat standing in this case. See, e.g., NFFE, 905 F.2d at 403.

In addition, defendants' causation analysis is simply wrong, even under the authority relied upon in their memorandum. See Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). As defendants argue, Allen, Simon, and Warth each stand for the proposition that causation will not be found if it is purely speculative that a plaintiff's injury was caused by the challenged action rather than some independent reason unrelated to the challenged action that could as easily have caused the harm. Defendants' Memorandum at 43; see Allen v. Wright, 468 U.S. at 757; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 43; Warth v. Seldin, 422 U.S. at 505-507. Contrary to defendants' contentions, the failure of the President and Congress to disapprove the Commission's recommendations is hardly an "independent reason unrelated" to the Commission's recommendations. It is indisputable that if the Commission had not recommended Loring for closure, Loring's continued existence would not now be threatened. Accordingly, there is but/for causation between the Commission's recommendation that Loring be closed and the imminent harm to the union plaintiffs -- causation that is plainly sufficient to establish article III standing under Allen, Simon, and Warth.

B. The Union Plaintiffs Clearly Fall Within the Zone of Interests Protected by the Base Closure Act.

Defendants also claim that the union plaintiffs lack standing under the APA because they are outside "the zone of interests protected by the [Base Closure] Act." Defendants' Memorandum at 39. This argument is both legally and factually insupportable. As a matter of law, defendants have blatantly misstated the "zone of interest" test as articulated by the Supreme Court for standing under the APA.

In Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987), the Supreme Court repudiated the restrictive approach that some courts had taken to the zone of interest test. The Court emphasized that, "in view of Congress' evident intent to make agency action presumptively reviewable," the zone of interest test should bar the right to judicial review only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id. at 399. The Court expressly held that "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Id. at 399-400 (footnote omitted). The Court also observed that "[i]nsofar as lower court decisions suggest otherwise, they are inconsistent with our understanding of the 'zone of interest' test, as now formulated." Id. at 400

n.15. Therefore, defendants' contention that the union plaintiffs must show that the Base Closure Act was intended to benefit or protect them in order for them to have standing under the APA is an egregious distortion of the law.

In this case, the interests of the union plaintiffs are obviously sharply impacted by, intimately related to, and consistent with the purposes of the Base Closure Act. This is starkly illustrated by the fact that one of the eight criteria approved by Congress governing the base closure and realignment process specifically provides for consideration of "[t]he economic impact [of base closures] on local communities." 56 Fed. Reg. 6374 (1991). Defendants' sole argument in opposition to this fact is that because Congress recognized that some workers would necessarily lose their jobs if their military facility was closed, persons like the union plaintiffs could not have been within the zone of interests protected by the Base Closure Act. Defendants' Memorandum at 42. Once again, defendants' superficial analysis seeks to obscure the fact that the 1990 Act is a procedurally dense statute, the declared purpose of which is "to provide a fair process that will result in the timely closure and realignment of military installations." Pub. L. No. 101-510, 104 Stat. at 1808 (emphasis added). Accordingly, the interests of the union plaintiffs in defendants' adherence to the procedural safeguards of the Base Closure Act is neither "marginally related to [n]or

inconsistent with the purposes implicit in the statute," Clarke v. Securities Indus. Ass'n, 479 U.S. at 399, but rather is consistent with, and a necessary complement to, the declared purpose of the 1990 Act.

The cases cited by defendants are not to the contrary. In Air Courier Conf. of America v. American Postal Workers Union, 111 S. Ct. 913 (1991), a case discussed extensively by defendants, the statute challenged by the plaintiff unions contained no procedural safeguards whatsoever, nor was its purpose, express or implied, to provide a fair process of any kind. The statute challenged in Air Courier was the Private Express Statute ("PES"), which merely codified the postal monopoly in the United States. The particular provision of the PES at issue in Air Courier allowed the Postal Service to "suspend [the PES restrictions] upon any mail route where the public interest requires the suspension." Id. at 914. Pursuant to this provision, the Postal Service had determined that the public interest required lifting the ban on "international remailing," an action that the plaintiff unions argued would eventually reduce employment opportunities for their members. Id. at 916. The Air Courier plaintiffs thus challenged a substantive administrative determination, that is, that lifting the ban on "international remailing" was in the public interest, made pursuant to a statute that provided no procedural protection whatsoever. The contrast between the PES and the

Base Closure Act is glaring. The Base Closure Act was expressly designed to ensure procedural fairness and protect the integrity of the process established by Congress. The PES, on the other hand, contained no equivalent provisions.

Defendants' reliance on the district court's opinion in National Fed'n of Fed. Employees v. United States ("NFFE I"), 727 F. Supp. 17 (D.D.C. 1989), is likewise misplaced. Although the district court did find that the plaintiff union lacked standing under the APA, id. at 22, defendants conspicuously ignore the fact that on appeal of that decision the court of appeals assumed that the union did have standing under the APA and went on to determine the merits of plaintiff's challenge. See NFFE, 905 F.2d at 405. Moreover, the district court's holding in NFFE I has no relevance to the instant matter because the 1988 Base Closure Act challenged there was materially different from the 1990 Act involved here. The 1988 Act did not contain any of the numerous procedural safeguards the violation of which forms the basis of plaintiffs' claims here; nor was the declared purpose of the 1988 Act to provide a "fair process." Indeed, as previously discussed, a primary reason for the passage of the 1990 Act was to address the procedural shortcomings of the 1988 Act. Accordingly, the fact that the district court in NFFE I found that the plaintiff union did not fall within the zone of interests of the 1988 Act -- a holding never affirmed, of course, by the circuit court of appeals -- cannot be determinative of the instant action.

C. Although the Court Need Not Reach the Issue of Other Plaintiffs' Standing, Other Plaintiffs Also Have Standing to Bring This Action.

Given that the union plaintiffs plainly have standing under article III and the APA to challenge defendants' violations of the Base Closure Act, this court need not consider the standing of the other plaintiffs, whose position is identical to that of the union plaintiffs. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 620 n.15 (1988); Bowsher v. Synar, 478 U.S. 714, 721 (1986); Secretary of Interior v. California, 464 U.S. 312, 319 n.3 (1984); Coalition on Sensible Transp., Inc. v. Dole, 642 F. Supp. 573, 583 n.2 (D.D.C. 1986), aff'd, 826 F.2d 60 (D.C. Cir. 1987). To the extent that the court should choose to do so, however, it will find that other of the plaintiffs in this action have also alleged sufficient facts to demonstrate standing.

Contrary to defendants' contentions, the plaintiff county, cities, and towns all have standing in this matter under article III. They have alleged that they will suffer a reduction of $152 million in annual income, a loss of more than 8,000 jobs, and the emigration of up to 14,000 residents as a direct result of the closure of Loring. Plaintiffs' Amended Verified Complaint ¶ 64(h). In and of themselves, these allegations of economic injury suffice to withstand defendants' 12(b)(1) challenge to the standing of the county, cities, and towns under

article III. Furthermore, these allegations can fairly be read as allegations of a reduction in property values, which "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 110-11.

The Save Loring Committee and its chairman also have article III standing to sue in this case. An association may bring suit to vindicate its own concrete interest in performing those activities for which it was formed. Warth v. Seldin, 422 U.S. at 511. In addition, as the Supreme Court has elaborated, an association may have standing solely as the representative of its members even in the absence of injury to itself. Id. If the members of the association would otherwise have standing to sue in their own right, if the interests that the association seeks to protect are germane to the organization's purpose, and if neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit, the association has standing to bring suit on behalf of its members. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). The prerequisites to associational standing are clearly present here, where the members and president of the Save Loring Committee are all residents of the above-mentioned county, cities, and towns and have also alleged that they will suffer direct and substantial harm as a result of Loring's closure. See Plaintiffs' Amended Verified Complaint ¶ 15.

The plaintiff association, county, cities, and towns also have standing to sue in this case under the APA. Like the union and its president, these plaintiffs clearly meet the prudential standing requirements embodied in the "zone of interest" test. Contrary to defendants' contentions, it cannot be said that these plaintiffs are "plaintiffs whose suits are more likely to frustrate than to further statutory objectives," Clarke v. Securities Indus. Ass'n, 479 U.S. at 397 n.12, since the interest of the plaintiff association, county, cities, and towns in defendants' adherence to the procedural safeguards of the Base Closure Act furthers the express statutory objective of providing a fair base closure and realignment process.

It is just as clear that the congressional plaintiffs also have independent standing to seek review of defendants' brazen violations of the procedures mandated by the 1990 Act. Where, as here, there has been interference with the legislative process, or where a congressperson's vote is rendered less effective than it would otherwise be, there is injury sufficient to confer standing. See, e.g., Moore v. United States House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Humphrey v. Baker, 665 F. Supp. 23, 26 (D.D.C. 1987), aff'd, 848 F.2d 211 (D.C. Cir. 1988), cert. denied, 488 U.S. 966 (1988); Pressler v. Simon, 428 F. Supp. 302, 304 (D.D.C. 1976), aff'd sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978). In the unusual and compelling

circumstances of this case, in which the procedural safeguards of the Base Closure Act were literally trampled by defendants, the congressional plaintiffs clearly have independent standing to challenge defendants' intentional wrongdoing. Any other result would threaten the very foundation of our democracy.

Finally, clear legal precedent mandates that the Governor of Maine be allowed to sue on behalf of the state as parens patriae to obtain relief for Maine citizens where federal instrumentalities and their officials, entrusted with decisions that vitally affect the jobs, environment, and lives of persons residing in the state, have markedly deviated from the statutorily prescribed procedures of the Base Closure Act. Defendants' reliance on Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), for the broad proposition that the state has no standing as parens patriae to sue a federal agency or instrumentality is misplaced. For one, the single footnote on which defendants depend for their entire parens patriae argument is mere dictum having nothing to do with the decision in Snapp and, therefore, not binding on this court. See id. at 610 n.16. Second, Snapp simply reaffirms the Supreme Court's landmark decision in Massachusetts v. Mellon, 262 U.S. 447, 485 (1923), holding that a state does not have standing as parens patriae to contest the constitutionality of a federal statute. In fact, case law decided since Snapp has continued to afford a state standing to sue as parens patriae when the state is

contesting the erroneous application or implementation of a federal statute or regulation. See, e.g., Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1153 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975) (holding Mellon doctrine inapplicable where state sought "to vindicate the congressional will by preventing what it asserts to be a violation of a statute by the administrative agency charged with its enforcement"); Maryland Dep't of Human Resources v. Department of Agriculture, 617 F. Supp. 408, 414 (D. Md. 1985); City of New York v. Heckler, 578 F. Supp. 1109, 1123 (E.D.N.Y. 1984), aff'd, 742 F.2d 729 (2d Cir. 1984).

CONCLUSION

In sum, this court must deny defendants' motion to dismiss in favor of exercising its jurisdiction to review claims of their procedural irregularities contrary to the express provisions of the Base Closure Act. As the foregoing discussion demonstrates, the law is well settled that a federal court has authority to review such claims, and neither the Base Closure Act itself nor the political question doctrine forecloses review in this instance. Finally, defendants' challenge to plaintiffs' standing to sue on constitutional and prudential grounds is both factually and legally insupportable. Because defendants have failed to carry their burden under the standards to be applied

by the court in ruling on their motion, their motion must be denied.

Dated at Augusta, Maine, this 26th day of March, 1992.

Respectfully submitted,

Severin M. Beliveau
Bar No. 272

Ann R. Robinson
Bar No. 1286

Stanley W. Piecuch
Bar No. 1372

PRETI, FLAHERTY, BELIVEAU & PACHIOS
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
Tel: (207) 623-5167
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion to Dismiss was mailed this date by first class mail, postage prepaid, to:

Mark W. Batten, Esq.
U.S. Department of Justice
901 E Street, N.W., Room 918
Washington, DC 20530

Ann R. Robinson

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March 26 92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DRAFT

SEN. WILLIAM S. COHEN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 91-0282-B
DONALD RICE, Secretary of the Air Force, et al., Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

STUART M. GERSON
Assistant Attorney General

DAVID J. ANDERSON
VINCENT M. GARVEY
MARK W. BATTEN
JEFFREY S. GUTMAN
Attorneys
U.S. Department of Justice
901 E Street, N.W., Rm. 918
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

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PRELIMINARY STATEMENT

In our opening memorandum, defendants demonstrated that both Congress and the Constitution have precluded judicial review of Presidential base closure decisions. Distilled from its rhetoric, plaintiffs' response is deceptively simple: judicial review of base closure decisions must be available, they contend, because otherwise the Air Force and the Base Closure Commission may freely ignore the detailed requirements of the statute.[1]

The fundamental flaw in plaintiffs' argument is their assumption that only the courts can hold the Executive Branch to the Act's provisions. The issue in this case is not whether the Act must be followed, but who is to consider charges that the Act has been violated. Congress certainly did not intend that the defendants' actions under the Act *go* unreviewed, but just as plainly did not intend for the courts to fulfill that function. Instead, in an effort to cure longstanding political deadlock over base closure, Congress created a specific statutory mechanism that requires base closure decisions to be made by the President and reviewed by Congress itself. Claims like the plaintiffs' that the Act's procedures were ignored are not "immunized" from review, but directed to Congress. Indeed, Congress listened at length to these plaintiffs' charges about the Air Force's decision concerning Loring, and voted overwhelmingly to approve the President's action. Plaintiffs' insistence that the Court should embroil itself in this political conflict

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[1] 1990 Defense Base Closure and Realignment Act, Pub. L. 101-510, Title XXIX (the "Act" or "1990 Act"), codified at 10 U.S.C. § 2687 note.

effectively requests the Court to enjoin the decisions made jointly by the political branches of government in the realm of national defense policy.

The serious separation of powers concerns which pervade this case underlie the alternative theories requiring dismissal of this action. As Congress made clear in both the structure of the Act and in its legislative history, plaintiffs' claims are unreviewable by the courts because Congress intended that the political branches of government resolve the sorts of allegations presented here. For the same reasons, plaintiffs' challenge raises a nonjusticiable political question.

Similarly, separation of powers concerns counsel against the adjudication of claims made by those outside the Act's protective ambit. The plaintiffs lack standing to bring this action because their interest in preserving jobs is flatly contrary to the purpose of the 1990 Act, leaving them outside the zone of interests protected by the Act. For any of these reasons, this action should be dismissed.

ARGUMENT

I. THE BASE CLOSURE ACT DOES NOT PERMIT JUDICIAL REVIEW OF PLAINTIFFS' CLAIMS.

A. Congress Has The Authority To Preclude Judicial Review Of Procedural Claims Under The Act.

Plaintiffs initially devote several pages to the unexceptional principle that administrative actions are generally subject to judicial review, and that Congress usually does not commit decisions to agencies' discretion. See Plaintiffs'

Memorandum of Law In Opposition To Defendants' Motion To Dismiss ("Pls' Opp.") at 7-11. None of the cases cited for these basic concepts, however, involved a statute or legislative history that indicated an intent to preclude judicial review. Although the presumption favoring review provides a useful guide in many cases, it has no application where, as here, Congress requires that a different procedure should govern.

Nor must the Court insist upon "unambiguous proof" to overcome this presumption. Block v. Community Nutrition Institute, 467 U.S. 340, 350 (1984). As the Supreme Court has explained, "[t]he presumption favoring judicial review of administrative action is just that -- a presumption." Id. at 349. And, "like all presumptions used in interpreting statutes," this hornbook rule may always be overcome by specific statutory language or legislative history, by congressional acquiescence in judicial interpretations barring review, or even by drawing inferences from the overall statutory structure -- in short, whenever congressional intent to preclude judicial review is "'fairly discernible in the statutory scheme.'" Id. at 351 (quoting Ass'n of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 157 (1970)); Specter v. Garrett, 777 F. Supp. 1226, 1227 (E.D. Pa. 1991).[2] As described in the defendants' opening

[2] The plaintiffs argue that review should be precluded only on a showing of "clear and convincing evidence" of legislative intent to do so, and that the defendants bear a "heavy burden" to locate such clear proof. Pls' Opp. at 7-8 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). As the Supreme Court explained in Block, however, the Abbott standard is not a "rigid evidentiary test," but is no more than a "useful

brief, Congress's decision to rely on legislative instead of judicial review in the Act is not only "fairly discernible," but "clear and convincing" under any formulation of that standard. Specter, 777 F. Supp. at 1228.

Plaintiffs next attempt to erect a distinction between substance and procedure.[3] They argue that, even if review of "substantive" claims may be limited, consideration of alleged "procedural" violations cannot be cut off, no matter how clearly Congress expresses its intention to do so. Pls' Opp. at 10-14. That view finds no support in the case law.

Plaintiffs principally rely on cases interpreting 42 U.S.C. § 1320a-1(f), a Medicare statute providing that the agency's

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reminder to courts" that the presumption favoring review should control "where substantial doubt about congressional intent exists." Block, 467 U.S. at 351. In this case, the explicit legislative history and the structure of the statute leave no doubt that Congress intended to preclude review, even under the stricter test that the plaintiffs suggest.

[3] The plaintiffs' decision to cast their claims as "procedural" rather than "substantive" is certainly understandable; their memorandum essentially concedes that this Court may not second-guess the Executive Branch's military judgment to close Loring. See National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990). As a practical matter, however, the line between substance and procedure is not so easily drawn. Plaintiffs' insistence that their claims are purely procedural is belied by their Amended Complaint. Plaintiffs contend, for example, that the decision to close Loring should be overturned because they believe Loring offers "a number of military advantages" that enhance the base's "strategic value." Amended Complaint ¶ 64(g). They also differ with the defendants over the significance and appropriate measure of costs to upgrade facilities, id. ¶¶ 64(a), (e), (f), and implicitly contend that Loring should not have been closed because it is "the nation's premiere SAC base," id. ¶ 32, a judgment with which the defendants obviously disagreed. None of these allegations is "procedural"; all seek a substantive reassessment of the defendants' military judgments.

approval of certain state determinations is "not subject to judicial review." First Federal Savings and Loan Ass'n of Lincoln v. Casari, 667 F.2d 734, 739-40 (8th Cir.), cert. denied, 458 U.S. 1106 (1982); Hollingsworth v. Harris, 608 F.2d 1026 (5th Cir. 1979) (per curiam). Neither of these cases has any bearing on the present dispute. In Casari, for example, the Department of Health and Human Services (HHS) was not even a defendant in the suit. Instead, the state agency argued that the preclusion of review of HHS' decisions should extend to its decisions as well, despite the fact that federal regulations specifically assumed that judicial review of state decisions was permitted. The Eighth Circuit's refusal to interpret the statutory preclusion to cover state defendants is hardly relevant to this case. The Fifth Circuit's one-paragraph discussion of the issue in its curt per curiam decision in Hollingsworth also lends little support to the plaintiffs' argument.[4]

No matter how the plaintiffs characterize their claims, the availability of judicial review is purely a question of congres-

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[4] Plaintiffs also rely on Graham v. Caston, 568 F.2d 1092, 1097 (5th Cir. 1978), but that case is also inapposite. There, plaintiffs challenged HUD's refusal to decide their administrative claims. The court held that a statutory provision precluding review of HUD's decisions did not apply because the plaintiffs "were not requesting review of a decision of the Secretary but were attacking his failure to review and decide." Id. Even if this holding were still good law after Heckler v. Cheney, 470 U.S. 821 (1985), it has no relevance to this case; plaintiffs request review of "a decision of the Secretary," not a failure to act. Graham actually reaffirms the basic proposition that the availability of judicial review is solely a question of congressional intent, and "[i]f Congress so chooses, judicial review of administrative decisions may be withheld." Id.

sional intent. Subject only to constitutional limits, Congress has unfettered discretion to permit or withhold judicial review. See, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672-73 (1986).

B. Congress Has Specifically Precluded Review Of Actions Taken By The Air Force And The Commission.

Next, acknowledging that congressional intent is the controlling factor, the plaintiffs attempt to avoid the plain statement of that intent in the Act's legislative history. Plaintiffs insist that the language of the Conference Report reveals no "fairly discernible" intent to preclude review, despite Congress's explicit statement that "the various actions required under the base closure process contained in this bill . . . would not be subject to judicial review." H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257 ("H. R. Conf. Rep. No. 101-923"). They insist that, because Congress exempted base closure actions from the rulemaking and adjudication requirements of Chapter 5 of the APA, see 5 U.S.C. §§ 553-57, it must have intended only to preclude judicial review of claims that the defendants failed to follow those particular requirements. See Pls' Opp. at 17-23. The plaintiffs' argument is contradicted by Congress's unmistakable language precluding any review of base closure actions. Specter, 777 F. Supp. at 1227-28.

Certainly, Congress began by noting that the APA's rulemaking and adjudication requirements, by their own terms, do not extend to "the conduct of military or foreign affairs functions."

H. R. Conf. Rep. 101-923 at 3258. But the Report goes on to state that "no final agency action occurs in the case of various actions required under the base closure process contained in this bill." Id. The term "final agency action" is unrelated to the requirements of Chapter 5 of the APA; that term is drawn from Chapter 7, and defines the limits of judicial review. See 5 U.S.C. § 704. Congress then explained that, because there is no final agency action, base closure actions "would not be subject to judicial review." H. R. Conf. Rep. 101-923 at 3258. Indeed, had Congress intended only to preclude judicial review of a failure to follow procedures under Chapter 5, there would have been no need for the specific list of steps in the base closure process that Congress explicitly exempted from judicial review. See id.[5]

As a last resort, the plaintiffs argue that, even if the legislative history precludes review of the Air Force's actions, the Commission's recommendations must still be subject to review because the Conference Report did not specifically mention the Commission among its examples of "[s]pecific actions which would

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[5] Plaintiffs urge the Court to ignore the decision in Specter, 777 F. Supp. at 1227-28, which rejected plaintiffs' argument and held that the Act precludes judicial review. Conceding that the holding in Specter is relevant and applicable here, plaintiffs argue only that the decision is "unpersuasive" because the court used the phrase "an appropriate showing of congressional intent" rather than the "reliable indicator of congressional intent" language of Block. Pls' Opp. at 22-23; Block, 467 U.S. at 349. In fact, however, the Specter court does quote the "reliable indicator" language, see 777 F. Supp. at 1227, and tracks the standard of Block in finding that Congress's intent to preclude review under the Act is "fairly discernible in the statutory scheme." Id. (quoting Block, 467 U.S. at 351).

not be subject to judicial review." See Pls' Opp. at 23-24. Again, the plaintiffs ignore the clear language of the Report.

First, the Report did not undertake to list every component of the base closure process exempted from judicial review; the Report merely cites a few examples. See H. R. Conf. Rep. 101-923 at 3257 ("Specific actions which would not be subject to judicial review include . . ."). Second, although the Commission's responsibilities are not listed as an example, its recommendations are of exactly the same sort of base closure actions as those that are listed. Moreover, the Report does specifically mention "the decision of the President under section [2903(e)]," id., which is the step in the process subsequent to the Commission's recommendations. Even if Congress's intent were unclear, therefore, the uncontested fact that Congress precluded judicial review of the President's decision would similarly preclude review of the Commission's recommendations to which the President responds. Indeed, in requesting this Court to overturn the Commission's actions, the plaintiffs effectively request the Court to overturn the President's decision, which the Conference Report specifically proscribes.

C. The Structure Of The Statutory Scheme Indicates That Congress Intended To Preclude Review.

Even if Congress had said nothing about judicial review in the Conference Report, moreover, review of the defendants' actions in this case would still be precluded by "inferences of intent drawn from the statutory scheme as a whole." Block, 467 U.S. at 349. In particular, Congress's decision to provide a

specific method to review administrative action often strongly suggests that Congress intended alternatives, including judicial review, to be precluded. See id.; Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (concluding that Congress had not intended to permit judicial review under a statute that contained an "explicit provision of congressional oversight").

Plaintiffs search the statutory scheme in vain for indications that Congress intended the courts to second-guess its and the President's closure decisions. Plaintiffs assert only that Congress surely would not have included the Act's various procedural requirements unless it intended for the courts to enforce them. See Pls' Opp. at 24-29. This argument turns the Act on its head.

Congress certainly did not intend for the Act's provisions to be ignored, and those new procedures may have been designed, in part, to address concerns "about the integrity of the base closure [selection] process," as implemented by Secretary Cheney in January, 1990. Pls' Opp. at 20 (quoting H. R. Conf. Rep. 101-923 at 3257). But the plaintiffs leap from that slender reed to the conclusion that Congress must have charged the courts with policing compliance with those requirements. In fact, the statutory scheme makes clear that the President and Congress itself, not the courts, were designated to review the actions of the Department of Defense and the Commission. The Act's streamlined mechanism permitting Congress quickly to pass a joint resolution disapproving the President's decision establishes

Congress as final reviewer of the base closure process. The Act even provided an explicit role for the Government Accounting Office ("GAO"), an arm of Congress, to assist in the Legislative Branch's review of the base closure process.

Not only was ultimate Congressional review streamlined, but other provisions of the Act put in place extremely tight deadlines that are incompatible with the potential disruptions of judicial review. The Commission has only six weeks to hold public hearings and deliberations on the Secretary's recommendations, conduct any appropriate base visits and other information gathering, and submit its final report to the President. Section 2903(d). The President then has only two weeks to make his final determination, before sending it to Congress for its expedited review. Section 2903(e). In enacting these time limits, Congress simply could not have contemplated the kind of delays inherent in litigation that could have arisen over any or all of the closures. Congress chose a process that was swift and final and that incorporated within it the safeguards thought necessary.

Those provisions plainly do not contemplate that a few disappointed Members of Congress should be able to challenge the action of Congress and the President, after they failed to persuade their colleagues that the alleged procedural errors required disapproval. Nor does the Act suggest that local politicians and labor unions should be permitted to upset these decisions through litigation. Precluding judicial review does not render these procedural requirements "a dead letter," as the

plaintiffs contend, but establishes that the remedy for those alleged defects lies in an appeal to the President and Congress, not the courts.[6] Indeed, it is the plaintiffs' interpretation that threatens to render the Act a "dead letter" because, under their view, Congress's acceptance or rejection of the President's decision is no more than a meaningless preliminary skirmish before litigation begins.[7]

Plaintiffs flatly state, without elaboration or citation, that, "[u]nder the Base Closure Act, it is not the role of Congress or the President to police the procedural correctness and fairness of defendants' actions." Pls' Opp. at 35. In fact, however, that is precisely the role that the Act establishes for

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[6] Plaintiffs' own opposition memorandum clearly demonstrates the danger Congress sought to avoid. Not only are plaintiffs' arguments exactly the same as those rejected in Specter, but much of the language in their brief is drawn verbatim from the plaintiffs' unsuccessful brief in the Pennsylvania case. The prospect of disappointed legislators filing identical briefs around the country, each seeking a ruling on the same issues from their local District Court, threatens the entire structure of the Act and its effort to minimize political wrangling over base closure.

[7] Plaintiffs attempt to distinguish Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991), by arguing that the statute at issue there struck a balance between competing interests of the President and Congress, whereas "the instant case does not involve any competing political or constitutional concerns." Pls' Opp. at 29. It is certainly true that the President and Congress agreed here that Loring should be closed, but this is a meaningless distinction of Armstrong. The decision in that case rested not on the difference in views between the President and Congress, but on the fact that judicial review at the behest of the public would upset "Congress' carefully crafted balance" of various policies and interests. 924 F.2d at 291. Similarly, here, Congress developed a specific statutory mechanism to address objections to the base closure process, which would be effectively nullified by permitting courts to intervene in the dispute.

Congress. It is also the role that Congress fulfilled when it listened at length, in committee proceedings and on the House floor, to the plaintiffs' repeated arguments about both the procedures followed and the specific decision to close Loring, and then voted decisively not to overturn the President's decision. See 137 Cong. Rec. H6006-39 (daily ed. July 31, 1991).

The legislative history could hardly be clearer that Congress envisioned no role for the courts in this process, and the statutory scheme leaves no doubt that, although Congress established certain procedures for base closure, it also intended to assume sole responsibility for their enforcement. Congress's intent to preclude judicial review is not only "fairly discernible" here, but overwhelmingly evident. The plaintiffs' claims must therefore be dismissed.

D. The Plaintiffs' Claims Present A Nonjusticiable Political Question.

Although the plaintiffs consistently attempt to characterize this case as a routine procedural challenge to the actions of a few federal agencies, the relief they seek belies this claim. The inescapable fact that the decision to close Loring was ultimately made by the President, not by any executive agency, and that the President's decision was then carefully considered by Congress under a specific statutorily-prescribed procedure, converts this case from a standard APA claim into a request that the Court upset the considered decision of the other two branches of government. The political question doctrine prevents the Court from reviewing decisions in such circumstances, which would

express a "lack of respect due coordinate branches of government," Baker v. Carr, 369 U.S. 186, 217 (1962), especially in cases involving questions of foreign and military affairs.

The plaintiffs urge that to accept this argument would immunize "virtually all agency action" from judicial review because the President and Congress always exercise some oversight over the activities of federal agencies. See Pls' Opp. at 33.[8] This argument ignores the delicately balanced role that the President and Congress play under the Act, a role specifically crafted by Congress to resolve a longstanding political deadlock between two branches over the closure of military bases.

A political question is presented here not because of Congress's general authority to disapprove administrative action through legislation, but because the Act establishes an explicit mechanism that designates Congress as the final arbiter of the President's decision and the base closure process. Ultimately, the decision to approve or disapprove the proposed closures rests on political, not legal, grounds, and Congress determined that it alone would make that final judgment.

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[8] Plaintiffs again misconstrue Armstrong, quoting dicta in which the court noted that Congress's general oversight authority usually will not preclude review of administrative action. See id. at 34 (quoting Armstrong, 924 F.2d at 291-92). However, Armstrong is not a political question case, and the court there never considered the separation-of-powers issues that underlie that doctrine. Moreover, as explained infra, the political question in this case arises not from Congress's general authority to oversee federal agencies, but from the fact that plaintiffs here request the Court to substitute its judgment on a matter that the Act expressly commits to the Executive and Legislative Branches.

In such circumstances, reconsidering these judgments in this forum "would require this Court, in effect, to substitute its judgment for that of the [President], the House Committee, and the House of Representatives. This the Court cannot and should not do." Barkley v. O'Neill, 624 F. Supp. 664, 668 (S.D. Ind. 1985). As explained in both Barkley and Cranston v. Reagan, 611 F. Supp. 247, 253 (D.D.C. 1985), neither of which the plaintiffs attempt to distinguish, the political question doctrine may apply even where the particular legal issues presented appear appropriate for judicial resolution, if the consequences of the Court's judgment would interfere with judgments primarily committed to the political branches. That is certainly the case here, and the plaintiffs' claims are therefore nonjusticiable.

II. PLAINTIFFS LACK STANDING TO BRING THEIR ADMINISTRATIVE PROCEDURE ACT CLAIMS.

In their opposition brief, plaintiffs make little effort to defend the standing of the lead Congressional plaintiffs to bring this action. Nor do they seriously contest our showing that the state and city plaintiffs lack standing as well.[9] Rather, sug-

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[9] Significantly, the plaintiffs make no effort to distinguish the most relevant case on point, State of Illinois v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989), which expressly held that states lack parens patriae standing to challenge federal base closure decisions. Further, their argument that Massachusetts v. Mellon, 262 U.S. 447 (1923), precludes only parens patriae actions challenging the constitutionality of federal legislation is contradicted by Mellon itself. The Court there explained that:

> While the State, under some circumstances, may sue in that capacity [parens patriae] for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with

gesting that any number of plaintiffs may file a suit so long as one has standing, plaintiffs pin their jurisdictional hopes on the union plaintiffs.[10] Plaintiffs must show, however, that union members employed on a federal military facility, who seek to block a Presidential order, accepted by Congress, to close the facility, fall within the zone of interests of a statute designed to facilitate the closure of military bases. Plaintiffs' brief is conspicuously devoid of any authority which either directly or analogously supports such a position.

A. The Union Plaintiffs Lack Standing to Bring Their APA Claim Because Their Interest in Preserving Jobs Falls Outside the Zone of Interests Protected By the 1990 Act.

The theory underlying application of the zone of interest test is found in the separation of powers doctrine. See Peoples Gas Light & Coke Co. v. U.S. Postal Service, 658 F.2d 1182, 1195

> the Federal Government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Mellon, 262 U.S. at 485-86 (citation omitted and emphasis added). Mellon thus spoke not only to parens patriae suits which challenge federal statutes on constitutional grounds, but also suits, such as this one, which seek to enforce nonconstitutional rights against the federal government.

[10] It is generally true that, as a matter of judicial economy, courts will not adjudicate the standing of all plaintiffs so long as it finds one to have standing. This prudential doctrine, however, does not absolve plaintiffs' counsel of their responsibility to ensure that each plaintiff named properly may invoke the jurisdiction of this Court in accordance with existing law or a good faith argument for the extension, modification or reversal of such law. See Fed. R. Civ. P. 11.

(7th Cir. 1981). Assuming that an agency action is reviewable and that a plaintiff has satisfied the constitutional prerequisites to standing, such as injury in fact,[11] the test inquires whether the judiciary is the proper forum for resolving particular claims:

> To guard against such overreaching, the zone test dictates that parties left unprotected or unregulated by legislation must return to the legislative process if they are dissatisfied with its outcome. Absent some evidence that the interests of these parties are a subject of continuing concern in the statutory scheme, we will not allow them to reopen the legislative inquiry in federal court.

Branch Bank & Trust Co. v. National Credit Union Administration Bd., 786 F.2d 621, 625 (4th Cir. 1986); see also Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 140 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). In short, as the Third Circuit has observed, plaintiff must show that he is the "intended beneficiary of the rule of law he invokes. . ." Bowman v. Wilson, 672 F.2d 1145, 1152 (3d Cir. 1982).

As plaintiffs recognize, where the "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that

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[11] Plaintiffs argue at length that NFFE establishes that plaintiffs have demonstrated "injury in fact," and that the defendants were somehow disingenuous in not addressing the case. See Pls' Opp. at 36-37. In fact, NFFE's holding on this point is entirely irrelevant. Defendants do not contend that plaintiffs have failed to demonstrate injury in fact. But in APA cases, plaintiffs must also satisfy the additional requirement that they fall within the Act's zone of interests. On this point, of course, NFFE expresses no opinion, see 905 F.2d at 405 n.5, and the case does not assist the plaintiffs in satisfying the zone of interests requirement. See also infra p. ⌘.

Congress intended to permit the suit," Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399 (1987), plaintiff fails the zone of interest test. Here, not only are the union plaintiffs' interests flatly inconsistent with the purposes of the Act, but Congress plainly intended that the political branches of government, not the courts, resolve those issues which may arise from the operation of the Act.

Plaintiffs seek to limit application of the zone of interest test by relying on the Court's statement that "there need be no indication of congressional purpose to benefit the would-be plaintiff." Clarke, 479 U.S. at 399-400. Plaintiffs ignore that, four years later, in Air Courier Conference v. American Postal Workers Union, 111 S. Ct. 913, 918 (1991), the Court required the "plaintiff to establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." Having squarely placed the burden of proof of showing statutory protection on the plaintiff, the Court went on to scour, in vain, the language and legislative history of the statute at issue to uncover any congressional intent to protect or benefit the plaintiff union. 111 S. Ct. at 918-20. Plaintiffs cannot shirk -- or satisfy -- their burden of showing that Congress intended the 1990 Act to protect union jobs or to benefit union employees.

Understandably, plaintiffs make no effort to show that the language or legislative history of the 1990 Act even suggests a

purpose to protect jobs.[12] To the contrary, the 1990 Act had a single overriding purpose: to bring about the closure of unnecessary domestic military bases in light of a reduced foreign threat in order to save taxpayer dollars. See H. R. Rep. 101-665, 101st Cong. 2d Sess. 341, reprinted in 1990 U.S. Code Cong. & Admin. News 2937, 3067. The union plaintiffs' interests and legislative purpose behind the 1990 Act are wholly conflicting. Like the union which challenged the closure of bases pursuant to the 1988 Base Closure and Realignment Act, the purpose of which was identical to the 1990 Act, "[p]laintiffs can point to nothing in the language of the Act or its legislative history that suggests that Congress contemplated the protection of federal employees or contractors." National Federation of Federal Employees v. Cheney, 727 F. Supp. 17, 22 (D.D.C. 1989) (federal employees union seeking to block the closure of military bases falls outside the zone of interests of the 1988 Act), aff'd, 905 F.2d 400 (D.C. Cir. 1990).[13]

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[12] The union plaintiffs do suggest that Congress was somehow motivated by the desire to protect union jobs because one of the Secretary of Defense's base closure criteria was "the economic impact on local communities." All other factors being equal, it is possible that economic impact could weigh in favor of closing one particular base instead of another. Even in such a case, however, jobs would be lost. The criteria were designed to determine which bases should be closed, not to justify keeping them open.

[13] Plaintiffs attempt to sidestep the district court's holding in NFFE, which is directly on point, by claiming that, on appeal, the D.C. Circuit assumed the union had standing and proceeded to reject its claims on the merits. Pls' Opp. at 43. Plaintiffs seriously misread the D.C. Circuit's opinion in NFFE. With regard to NFFE's APA claim, the D.C. Circuit did not assume standing, but specifically did not address it because the Court

Unable to show that they fall within the overall purpose of the 1990 Act, the union plaintiffs argue that the Act is "procedurally dense" and suggest that they fall within the zone of interest of these procedures. In essence, plaintiffs contend that because the alleged violation of statutory "procedures" caused their asserted injuries, they necessarily satisfy the zone of interest test. The argument suffers from two logical flaws.

First, plaintiffs confuse the purpose of the statute -- the closure of military bases -- with the means prescribed to achieve that purpose. Second, plaintiffs mistake zone of interest analysis for the injury-in-fact calculus. See Air Courier Conference, 111 S. Ct. at 918. Merely because the alleged violation of statutory "procedures" is asserted to cause one's injury does not mean the prospective plaintiff falls within the zone of interest of the statutory program. See Glass Packing Institute v. Regan, 737 F.2d 1083, 1087-90 (D.C. Cir.) (holding that alleged violation of administrative procedure satisfies injury in fact test, but not zone of interest analysis), cert. denied, 469 U.S. 1035 (1984). Otherwise, the zone of interest test loses all meaning. In addition to showing injury-in-fact, plaintiffs must show that the provisions of the Act alleged to have been violated were intended to protect or benefit them.

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found NFFE's claim to be nonjusticiable. NFFE, 905 F.2d at 405 n.5. Nor did the court reach the merits of the APA claim. Indeed, there would be no reason to "assume" standing because reviewability is logically the threshold inquiry. Even if the D.C. Circuit could be said to have "assumed" standing, it neither specifically found standing nor rejected the lower court's "zone of interest" analysis.

Plaintiffs' implied assertion that the 1990 Act's "fair process" was designed to protect union jobs is meritless. The 1990 Act was a reaction to Secretary of Defense Cheney's unilateral listing in January, 1990 of 36 bases he wished to close. See H. R. Rep. 101-665 at 3067-68; H. R. Conf. Rep. 101-923 at 3257. Democrats charged, as they have historically argued in response to Executive Branch base closing proposals, that most of the bases were located in districts represented by Democrats. A key objective of the 1990 Act was to eliminate party politics from the base closure selection process, "permit[ting] base closures to go forward in prompt and rational manner." H. R. Conf. Rep. at 3257. Even the purpose of the "fair process" upon which the union plaintiffs rest their claims was to facilitate the speedy closure of military bases, not to keep them open to preserve union jobs.

Even more importantly, the separation of powers concerns which underlie the zone of interest test strongly counsel against finding that the union plaintiffs have standing here. The very "procedures" upon which plaintiffs place such great reliance are prima facie proof of Congress' intention that the political branches of government, not the courts at the behest of disappointed workers, have the final word on which bases should be closed. At each step in the carefully crafted base closure process, Congress placed itself, the President or an independent establishment as a check on the work of the entity preceding it in the procedural hierarchy. Congress simply left no room for

the courts in this process.[14]

Selecting military bases for closure is a controversial and complicated enterprise. With any complex human endeavor, there is room for error and dispute. Congress recognized that individuals and localities potentially affected by a local base closure would charge that the decisionmaking process was flawed and that a distant base should have been closed instead. Congress designed the checks and balances in the 1990 Act to allow the Commission and GAO to assess the Secretary's recommendations and so that the President and Congress would ultimately resolve lingering concerns or disputes by accepting or rejecting base closure recommendations.

Congress expressly precluded judicial review, based in part on its conclusion that earlier base closure legislation had "involve[d] numerous opportunities for challenges in court," H.R. Conf. Rep. 101-923 at 3257, to streamline the base closure process and contain resolution of these political disputes in the political branches. Base workers, their political representa-

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[14] National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3214 (1990), presents an example of a case in which federal employees threatened with the loss of employment fell outside the zone of interest of a statute designed to structure and streamline a division of responsibility between the Legislative and Executive Branches. Federal employees on an army base challenged a decision, authorized by two federal budgeting statutes, to contract out duties that the employees had performed. The D.C. Circuit held that the employee's interest in preserving their jobs fell outside the zones of interest of the statutes, which were designed to coordinate executive and legislative branch budgeting procedures in a system of "checks and balances" and to promote efficiency and economy in federal expenditures. 883 F.2d at 1043-50.

tives and their communities across the country fall outside the zone of these interests protected by the Act. See Clarke, 479 U.S. at 397 n.12 ("zone of interest inquiry . . . seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives"). The absence of a role for the courts from Congress' base closure process is, in addition, hardly surprising given the universal recognition that management of our country's defense structure is inherently an enterprise for the political branches of government.

In short, Congress anticipated that disappointed politicians, localities and workers would advance claims such as those presented here. Yet, it determined that they be raised in the course of Commission and GAO analysis and be resolved by the political branches of government in the manner set forth in the Act. For this Court nevertheless to insert itself into this process would jeopardize the separation of powers principles the zone of interest test seeks to preserve.

B. The Union Plaintiffs Lack Standing to Bring Either Their APA or Constitutional Claims Because Their Asserted Injury Is Not Fairly Traceable to the Defendants.

As they recognize, plaintiffs must demonstrate a causal connection between their alleged injury and defendants' conduct. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). When the alleged injury stems from the "independent action" of a nonparty or can only speculatively be linked to defendants, causation has not been satisfied and the plaintiffs lack standing. Simon v.

Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41, 43 (1976).

In our opening memorandum, we demonstrated that the roles of the defendants in the 1990 base closing process were purely recommendatory, because the decision to close any particular military facility rested entirely within the discretion of the President and Congress. Section 2903(e), 2904(b), 2908. The independent role of the President and Congress severed or rendered merely speculative any causal link between the conduct of defendants and plaintiffs' alleged injuries. The union plaintiffs offer two responses.

First, they argue that in NFFE, the case arising from the 1988 Act, the D.C. Circuit found that the plaintiff union had satisfied the traceability requirement. While true, the point is irrelevant because the nature of the challenge reviewed by the D.C. Circuit, at least on that point, was substantively different than that at issue here. In NFFE, the union, inter alia, challenged the entire 1988 Base Closure and Realignment Act on constitutional grounds. NFFE's constitutional claim did not challenge the conduct of any particular actor executing the Act as causing them injury as the union plaintiffs do here. But for the operation of the allegedly unconstitutional 1988 Act, there would be no closings to cause NFFE injury. Because NFFE's injury was traced to the Act, the government conceded NFFE's Article III standing to challenge it. NFFE, 905 F.2d at 403.

Here, the union plaintiffs do not challenge the constitutionality of the 1990 Act or its operation as a whole. In

contrast to NFFE, the union plaintiffs challenge only the alleged acts or omissions of individual defendants and claim that this conduct, not the Act itself, caused them injury. Because the plaintiffs' claims here involve an entirely different causal relationship than the challenge in NFFE, the D.C. Circuit's dicta in that case has no applicability here.

Second, plaintiffs argue that these alleged injuries are "fairly traceable" because the President's and Congress' determinations were not "independent reasons unrelated" to the defendants' challenged conduct. Pls' Opp. at 32. Plaintiffs quote Simon, 426 U.S. at 43, as the source of their proposed "independent reasons unrelated" test. The Supreme Court in Simon, however, never employed such a standard.

Rather, the D.C. Circuit has held that "the presence in the causal chain of . . . 'independent variables,' which depend on the decisions of third parties not before this court, defeats the Unions' standing." National Maritime Union of America, AFL-CIO v. Commander, Military Sealift Command, 824 F.2d 1228, 1236 (D.C. Cir. 1987) (citation omitted). Plaintiffs struggle to characterize defendants as the principal decisionmakers, arguing that the Commission's recommendations generated "powerful political momentum," Pls' Opp. at 38, but they do not seriously dispute that the President and Congress have independent and final decisionmaking roles under the 1990 Act.

Plaintiffs suggest that, but for defendants' challenged conduct, the President would not have approved the closure of

Loring and Congress would not have sustained that approval. What motivated the President's and Congress' determinations, however, is pure speculation. Even if all of the plaintiffs' allegations were true, the President could have as easily decided to approve the closure of Loring despite the alleged procedural violations as because of them. Because the President and Congress are independent actors in the process established by the 1990 Act, plaintiffs cannot establish the causal relationship between the defendants' alleged conduct and their asserted injuries required to invoke the jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be granted and this action dismissed with prejudice.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DAVID J. ANDERSON
VINCENT M. GARVEY

MARK W. BATTEN
JEFFREY S. GUTMAN
Attorneys
U.S. Department of Justice,
Rm. 918
901 E Street, N.W.
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

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July 23 92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-0282-B
	)	
DONALD RICE,	)	
Secretary of the Air Force,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STUART M. GERSON
Assistant Attorney General

DAVID J. ANDERSON
VINCENT M. GARVEY, Bar #1421
MARK W. BATTEN, Bar #1422
JEFFREY S. GUTMAN, Bar # 1423
Attorneys
U.S. Department of Justice,
Rm. 918
901 E Street, N.W.
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

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PRELIMINARY STATEMENT

On May 20, this Court dismissed most of the claims in this case, concluding that the plaintiffs' numerous challenges to the merits of the recommendation to close Loring Air Force Base "are not subject to second guessing by the judiciary."[1] Thus, the factors considered by the Air Force, the Department of Defense and the Defense Base Closure and Realignment Commission (the "Commission") in recommending Loring's closure, and the accuracy of the data on which those recommendations were based, are not subject to judicial review.

The few remaining claims are purportedly "procedural," alleging that the Air Force and the Commission failed to make certain unspecified information available during the process.[2] However, the line between substance and procedure is not so easily drawn. Precluded from arguing that defendants relied upon inaccurate information, plaintiffs now insist that defendants failed to make available "accurate" information to other participants in the base closure process. For the Court to conclude that such "procedural" infractions were anything more than harmless error, however, the Court must assess the probable importance of the allegedly unprovided information to military experts and to the President. Such an assessment would require precisely the sort of judicial "second guessing" this Court

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[1] Slip op. at 11 (quoting Specter v. Garrett, No. 91-1932 (slip op. April 17, 1992), 1992 U.S. Lexis 6969).

[2] See Amended Complaint ¶¶ 64(d), 67 (second sentence), 68(A), 70(a), 70(b); 1990 Defense Base Closure and Realignment Act, Pub. L. 101-510, Title XXIX (the "Act"), codified at 10 U.S.C. § 2687 note.

properly refused to undertake in dismissing plaintiffs' substantive claims.

Thus, dismissal of the remaining claims remains appropriate on purely legal grounds. In fact, in its May 20 opinion, the Court explicitly left open the question of whether or not any violation of the Act that plaintiffs might prove mandates a judicial remedy. See slip op. at 12. As Part I demonstrates, under the unique statutory scheme at issue in this case, the Court could not possibly craft a remedy for any technical errors the plaintiffs might prove without effectively overturning a military decision made by the President and approved by Congress -- a remedy that would ignore not only the Act but constitutional separation-of-powers concerns.

The remaining claims should also be dismissed, without reaching the merits, in light of new authority. As explained in Part II, the Supreme Court has recently decided that there is no "final agency action," and therefore no judicial review, under the Administrative Procedure Act where an agency merely transmits recommendations to the President for decision. Franklin v. Massachusetts, 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992), attached as Exhibit D. The Supreme Court's reasoning squarely applies to the Base Closure Act, and the Court should reconsider its implicit ruling that there is "final agency action" to review.

Should the Court nonetheless wish to address the merits of the remaining claims, the facts relating to these issues are

easily established and not reasonably in dispute. As Parts III and IV demonstrate, both the Air Force and the Commission fully complied with the Act's rather modest procedural requirements.

First, plaintiffs assert that the Air Force failed to furnish all information it used in developing its closure recommendations to the Commission, the General Accounting Office ("GAO"), and Congress. Amended Complaint, ¶¶ 64(d), 67 (second sentence), 68(A). In fact, however, the Air Force cooperated with both the GAO and the Commission throughout the process, providing extensive documentation of its process and permitting GAO access to Air Force officials at all levels across the country. The Air Force also made all of its information available to the Commission, responding to staff inquiries up until the evening of the Commission's final deliberations.

Second, plaintiffs claim that the Commission relied on some unspecified Air Force information not provided to GAO and Congress, and failed to hold public hearings as the Act requires. Amended Complaint, ¶¶ 70(a), (b). However, the Commission provided the public virtually unlimited access to the information it gathered. In the ten weeks available, not only did the Commission hold 28 public hearings across the country and 40 visits to various bases, but Commissioners and Commission staff held almost constant meetings with Members of Congress and representatives of bases recommended for closure, including eleven separate meetings with the plaintiffs in this case. The Commission also considered vast submissions from the plaintiffs

challenging the recommendation to close Loring. All of these procedures were far in excess of what the Act required. As a matter of law and as a matter of fact, plaintiffs' claims are meritless and judgment should now be entered for defendants.

STATEMENT OF FACTS

1. Pertinent Provisions Of The Act

As explained in more detail in defendants' motion to dismiss, the Act established a unique mechanism for arriving at the political consensus that had eluded earlier base closure efforts. After the Department of Defense and the independent, bipartisan Commission develop tentative recommendations for closure, the Act confers on the President discretion to accept, reject or remand the recommendations to the Commission. If the President accepts the proposals, they are forwarded to Congress for additional review. In this case, after receiving the President's decision, both the Senate and the House of Representatives conducted hearings on the decision; the Senate, in particular, held extensive hearings concerning Loring.[3]

Only a few provisions of that Act remain at issue in this case. First, § 2903(c)(4) requires the Air Force to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making

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[3] See Defense Base Closure and Realignment Commission: Hearings Before The Senate Armed Services Committee, 102nd Congress, 1st Session (1991). Excerpts from these hearings are attached as Exhibit E.

its recommendations to the Commission."[4] With respect to the Commission's responsibilities, the Act requires that "the Commission shall conduct public hearings on the recommendations," § 2903(d)(1), and that the Commission shall provide information it used to Members of Congress, upon request, "[a]fter July 1 of each year in which the Commission transmits recommendations to the President." § 2903(d)(4).

2. The Air Force's Process Under The Act

In December, 1990, shortly after the Act was passed, the Secretary of the Air Force appointed a Base Closure Executive Group ("BCEG") to review data, categorize bases, and develop options for closure and realignment of Air Force bases. Declaration of Maj. Gen. Eugene Habiger ("Habiger Decl.") ¶ 2, attached hereto as Exhibit A. The BCEG consisted of five general officers and five senior career civilians with expertise in a wide range of areas. Id. The Secretary also authorized a Base Closure Working Group to collect and verify the accuracy of information, and the BCEG requested the Air Force Audit Agency, an internal Air Force component, to review the BCEG's procedures for accuracy and compliance with both the Act and Department of Defense ("DOD") policy. Id. ¶ 3.

The BCEG began meeting in December 1990, and met frequently in February and March in order to develop the Air Force's recom-

[4] The Act has since been amended to require the Secretary also to make information available "to Congress (including any committee or member of Congress)." Pub. L. No. 102-190, § 2821(e), 105 Stat. 1290, 1545 (December 15, 1991).

mendations, which were to be transmitted to the Secretary of Defense by April 1, 1991. Id. ¶ 4. Detailed minutes of all of these meetings were kept, and were transmitted to the General Accounting Office ("GAO") on April 15, 1991, and later to the Commission. Id. ¶ 5. The BCEG members met with the Secretary throughout the process, keeping him apprised of the BCEG's progress and the issues it was considering. Id. ¶ 6.

To begin its analysis, the BCEG identified and categorized all Air Force bases with more than 300 civilian employees, which were the bases subject to the Act's requirements. See id. ¶ 7; § 2909(c)(2) (incorporating 10 U.S.C. § 2687). Of the 86 active bases identified, 25 were then excluded from consideration because the BCEG determined that there was no "excess capacity" in those categories: that is, that all of these bases were required to support the projected force structure. Habiger Decl. ¶ 8. In addition, the BCEG also excluded 12 bases that were considered essential because of their unique geographic location or military capabilities. Id. ¶ 9.

To select possible closure candidates from the remaining 51 bases, the BCEG developed a detailed questionnaire, which rated bases on roughly 80 separate elements. Id. ¶ 10. The questionnaires were answered by the major commands, with copies sent to individual bases for verification of the data. The major commands reviewed the bases' suggested changes. All information used by the BCEG was that available at Headquarters or supplied by the major commands (including the one relevant to this case,

the Strategic Air Command ("SAC")). Id. ¶ 11.

SAC, among other commands, viewed "quality of life" as one important measure of an installation's military value. Accordingly, the BCEG made several attempts to measure that factor and include it in the analysis. However, these attempts were unsuccessful, and the BCEG ultimately concluded that "quality of life" had to be excluded from the analysis. Id. ¶ 12; Exhibit A-1.

Each member of the BCEG then assigned a color-coded ranking (red, yellow, or green) to each of the sub-elements for each of the bases. Habiger Decl. ¶ 13. A "red" ranking meant that a base fell below established Air Force standards on a particular data element; a "yellow" meant that the base minimally satisfied the requirement; and a "green" ranking indicated that the base met or exceeded the standard. Id. The BCEG then, by consensus or vote, agreed on a color code for each base on each of the elements.

Next, the BCEG ranked the strategic bases against each other, using six different models. See id. ¶ 14; Exhibit A-2 at 20. All six models emphasized military value, but some models also stressed or downplayed other factors, such as cost, readiness and training, future needs, and wartime needs. Following discussions among the BCEG, the Secretary of the Air Force, and the Air Force Chief of Staff, the Secretary decided to use the model called "Option 5," which was the most inclusive, emphasizing readiness and training, future needs, and cost. Habiger Decl. ¶ 15; see Exhibit A-2 at 20.

The BCEG's capacity analysis at the beginning of the process had determined that the Air Force could close six strategic bases and still support the projected force structure. The six lowest-ranking bases under Option 5 included Loring and Plattsburgh Air Force Base. Habiger Decl. ¶ 16. However, the BCEG had determined that Loring and Plattsburgh could not both be closed. The Secretary therefore recommended closure of Loring, concluding that its long-term military value was limited, that the cost to close the base was low, and that savings from its closure would be the highest of any of the 21 strategic bases. Id. ¶ 17. These recommendations were transmitted to the Secretary of Defense, and information used in developing them was sent to the GAO and the Commission. Id. ¶¶ 17, 19, 22, 24.

3. The Role of the General Accounting Office

The Act provides for participation in the base closure process by the GAO in two ways. First, the GAO was required to assist the Commission in the Commission's review and analysis of the Secretary's recommendations "to the extent requested" by the Commission. Section 2903(d)(5)(A). Second, the GAO was required to submit to Congress and to the Commission, by May 15, 1991, a report containing a "detailed analysis" of the Secretary's recommendations and selection process. Section 2903(d)(5)(B).[5]

GAO officials began coordinating their review of the Air

[5] "Military Bases: Observations On The Analyses Supporting Proposed Closures and Realignments" (GAO, May 15, 1991) ("GAO Report"). Excerpts from the GAO Report relevant to GAO's consideration of the Air Force's process are provided as an attachment to Exhibit C, the Declaration of Robert L. Meyer ("Meyer Decl.").

Force's process almost immediately after the Act was passed, and before the Air Force had even established the procedures it would follow. Habiger Decl. ¶ 18. Between January 14, 1991 and May 5, 1991, as the BCEG was developing its rankings, GAO was permitted to work in the Air Force's headquarters offices, and visited several major commands (including SAC, headquartered in Nebraska). Id. ¶ 20. GAO was permitted to discuss both the process and specific data with Air Force officials at all levels in the decisionmaking chain. Id. ¶ 21; Meyer Decl. ¶ 4; GAO Report at 64. The Air Force also provided GAO extensive documentation of its process, opening all of its data and files, both classified and unclassified, to GAO scrutiny. Habiger Decl. ¶ 22. Members of the Working Group also had numerous meetings with GAO officials to describe the Air Force's procedures. As part of this policy of openness, GAO was also aware both of the Air Force's effort to include "quality of life" in its analysis, and the BCEG's ultimate conclusion that that factor had to be excluded because it could not be measured accurately. Id. ¶ 23; Meyer Decl. ¶ 9.

On May 15, 1991, GAO submitted its Report. Meyer Decl. ¶ 5. As explained in more detail below, the GAO was fully satisfied both that it had been permitted access to all information used by the Air Force in developing its recommendations, id. ¶ 3, and that the Air Force had adequately documented its reasoning and reached reasonable conclusions. See, e.g., id. ¶¶ 2-4; GAO Report at 4, 42-43, 64.

4. The Formulation of the Commission's Recommendations

Following receipt of the Secretary of Defense's recommendations on April 15, 1991, the Commission proceeded with its analysis. In just two and a half months, the Commission conducted twenty-eight public hearings, including one in Boston, at which Loring was discussed extensively, and one in which testimony from the congressional plaintiffs was heard. See Declaration of Jim Courter ("Courter Decl.") ¶¶ 3-4, attached hereto as Exhibit B. All the unclassified information that the Commission received from any source was available to the public, including Members of Congress. Id. ¶¶ 7-9. The public was freely permitted to provide the Commission information, analysis and argument throughout the Commission's review; the Commissioners even considered information passed to them on handwritten notes during the final weekend of deliberations. Id. ¶¶ 11-13.

With the assistance of detailed employees of the GAO and a private consultant, the Commission's staff analyzed all the information received by the Commission. Commission staff telephoned and met with Air Force officials throughout the process, checking information and responding to questions or disputed data submitted by Members of Congress and the public. Id. ¶ 15. Like the GAO, the Commission was permitted full access to all of the information used by the Air Force. Id. Commissioners and Commission staff also met repeatedly with the plaintiffs and others who opposed Loring's closure, and considered voluminous information they submitted disputing the Air Force's conclusions

concerning Loring. See Courter Decl. ¶¶ 14(a)-(n), 15. After considering all of this information, the Commission voted 5-2 to uphold the Secretary of Defense's recommendation to close Loring.

5. The President's Decision And Congress's Approval

The President subsequently approved this recommendation, ordering that Loring and 18 other Air Force Bases be closed or realigned. Resolutions to overturn President Bush's decision were introduced in both Houses of Congress. The House disapproval resolution was defeated 364-60. 137 Cong. Rec. H6006-39 (daily ed. July 31, 1991). The Senate Armed Services Committee reported unfavorably on a similar resolution, and also held several hearings at which issues related to Loring were discussed in great detail. However, because the House had already voted down a resolution on which both chambers would have had to agree, the Senate resolution was never voted upon by the full Senate.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THIS COURT CANNOT AFFORD MEANINGFUL RELIEF FOR ANY VIOLATIONS OF THE ACT THAT PLAINTIFFS MIGHT PROVE

Unlike remedies at law, the courts have "broad discretionary power" to grant or withhold injunctive or declaratory relief: "equitable remedies are a special blend of what is necessary, what is fair, and what is workable."[6] The Third Circuit's decision in Specter reaffirmed this principle. Although opining that

[6] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); see also id. at 201 ("[i]n equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests").

sharply limited review of base closure decisions is permitted, the court pointedly expressed doubt that the courts could or should take any action to correct a violation of the Act: "such a finding, if and when made, will not necessarily mandate judicial relief." Slip op. at 32.[7] Instead, "[w]hether or not a violation receives a remedy is something that a court must determine through an exercise of discretion." Id. at 32. This Court explicitly adopted the same caveat in its May 20, 1992 opinion. See slip op. at 12.

The Court's hesitation was fully justified. The remedy plaintiffs seek completely ignores the statutory scheme. Moreover, it would permit plaintiffs to do indirectly what they concededly cannot do directly: overturn a complex, discretionary military decision expressly made by the President and Congress, with the advice of a Commission that, in practice, no longer exists. This Court should therefore decide the issue that both Specter and this Court left open, and conclude that no judicial remedy is available for any "technical defalcations" that the plaintiffs might eventually prove.[8]

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[7] See also id. at 32-33 ("judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from step one"); id. at 40 ("we do not decide that the Act [was violated] or that a remedy is available under the circumstances of this case even if it [was]").

[8] Yet another difficulty in awarding plaintiffs any relief is that no court has determined the relevant standard: are the plaintiffs entitled to a judicial reversal of the President's decision if they demonstrate that any information "used by the Air Force," no matter how technical or irrelevant, was not provided to GAO or the Commission? Or are they required to

A. Plaintiffs' Proposed Remedy Would Fatally Undermine The Statutory Scheme

Plaintiffs primarily request that the Court vacate the President's and Congress's decision and remand the Loring closure issue to the Commission. Struggling to reconcile this proposal with the statutory scheme, plaintiffs argued in an earlier memorandum that the Commission "continues to be a legally existing administrative entity," despite the fact that all of the members of that Commission have returned to private life.[9] Plaintiffs circumvent the fact that there are currently no Commissioners to review the Loring recommendation by suggesting that the Court simply wait, and eventually require the new members of the 1993 Commission, when they are appointed, to take up the issue.[10]

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demonstrate, under a "harmless error" analysis, that GAO would have withheld its approval and the Commission would have voted to recommend keeping Loring open had these agencies known of the missing information? There is simply no source from which the Court might determine what level of "technical defalcation" warrants judicial relief.

[9] Plaintiffs' [Second] Supplemental Memorandum In Opposition To Defendants' Motion To Dismiss ("Pls' Mem.") at 3. The current Chairman of the Commission, Jim Courter, alone continues to serve as Chairman until his successor is appointed, but even he no longer has authority to take any action concerning the closure of bases. See § 2902(d)(2).

[10] Plaintiffs argue that such a procedure must be permissible, because they cannot locate a case requiring that the same agency officials who made a decision participate in reconsideration. See Pls' Mem. at 5. Of course, plaintiffs also cannot locate a case in which the governing statute requires that every agency official be replaced each time the agency makes a recommendation. As defendants have argued, Congress purposely established a unique procedure for base closure because standard administrative mechanisms had consistently failed. Plaintiffs' attempt to shoehorn the peculiar statutory provisions here into

Plaintiffs' novel proposal is inconsistent with numerous provisions of the Act. First, despite plaintiffs' insistence that the Commission technically exists continuously until 1995, as a practical matter, there are three separate Commissions, permitted to meet only in calendar years 1991, 1993, and 1995, each composed of entirely different members (except the Chairman, who serves "until the confirmation of a successor"). See Courter Decl. ¶ 2; §§ 2902(c)(1)(B), (d), (e)(1). Plaintiffs thus seek remand to an entirely different Commission than the one that recommended Loring for closure in 1991. Successive Commissions are not empowered to reconsider a Presidential decision from earlier years, but only to review the recommendations submitted by the Secretary of Defense for the year that Commission sits, using the force structure plan and selection criteria applicable for that year. See § 2903(d).

Second, the Act specifically forbids the closure of bases except under the carefully structured procedures set out in the Act for each of the three base closure rounds, see § 2909(a), and for good reasons. Plaintiffs' proposal to remand one base on the list for further consideration greatly complicates the base closure process for future years, because the Department of Defense cannot possibly develop recommendations for the 1993 Commission if the President's 1991 decision remains in doubt.

More fundamentally, a remedy in this case ignores the

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the traditional administrative mold is plainly at odds with Congress's intent.

statutory requirement that the President and Congress consider the Commission's final list of recommendations as a whole, rather than debate the merits of closing an individual base. See §§ 2903(e), 2908. Such a result not only undermines the political objective of developing consensus on a list of bases to close, but threatens the military assumptions underlying the decision. The Commission does not select each base for closure in a vacuum, but develops a single package of recommended closures based on a unified view of the national force structure. Thus, the decision to close or keep open other bases may have depended in part on the decision to close Loring, and a judicial reversal of that determination could upset the assumptions underlying any number of decisions on other bases.

In short, nothing in the statute suggests that Congress intended any link between the three separate rounds of base closure, or that the Act was designed to allow for overlap in the work of the three Commissions. To the contrary, every provision governing the Commission's composition and duties, as well as consideration by the President and Congress, mandates a strict separation between the three sessions. Plaintiffs' proposed remedy is fundamentally at odds with the scheme established by Congress for base closure, and the Court should therefore hold that judicial relief is unavailable.

B. Plaintiffs' Proposed Remedy Violates Separation Of Powers Principles

More fundamentally, plaintiffs' suggestion that an injunction in this case requires no more than a simple remand to the

agency ignores the practical effect of the relief they request. In the usual case, remand of an administrative decision does no more than invalidate the agency's work, and requires that agency to correct its own mistakes. In contrast, requiring a new Commission to reconsider Loring's closure, and presumably to submit that new recommendation to the President and Congress for review, effectively invalidates the President's and Congress's considered 1991 decision that Loring should be closed. Thus, despite their protestations that they challenge only the Commission's actions, plaintiffs do not simply ask that the Commission be required to correct its alleged mistakes; they effectively demand that the President and Congress revisit their decisions.[11]

Granting plaintiffs the remedy they request therefore presents serious separation-of-powers issues, even though the Court has determined that judicial review itself, in some limited circumstances, does not. Had the plaintiffs directly named the President and Congress as defendants, this Court undoubtedly would not have entertained their challenge; yet granting the relief plaintiffs request just as surely "would require this Court, in effect, to substitute its judgment for that of the [President], the House Committee, and the House of Representa-

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[11] At most, plaintiffs' complaint amounts to an insistence that the President and Congress received flawed advice in making decisions that rest entirely within their discretion. In any event, as the exhaustive detail of the Senate's hearings reveals, Congress approved the President's decision with full knowledge of all the alleged flaws in the defendants' consideration of Loring. See generally Exhibit E.

tives. This the Court cannot and should not do." Barkley v. O'Neill, 624 F. Supp. 664, 668 (S.D. Ind. 1985).

This challenge to the President's and Congress's decision is even plainer in the second portion of plaintiffs' memorandum, in which they urge the Court "to reverse the decision of the Commission without remanding the matter."[12] Again, no decision was made by the Commission; the decision plaintiffs request the Court to discard is the President's. Even the Third Circuit did not imply that this extreme relief would be justified, holding that "any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act." Slip op. at 33. Any remedy that would address plaintiffs' claims would necessarily require the Court to confront directly the decision made by coordinate branches of government, and the Court therefore should hold that no remedy is available.

C. The Court Should Exercise Its Remedial Discretion To Deny An Equitable Remedy

Finally, the Supreme Court has repeatedly held that, because equitable remedies are committed to the court's discretion, courts may withhold injunctive relief where its award would upset settled expectations and would be contrary to the broad public interest. See, e.g., Heckler v. Matthews, 465 U.S. 728, 745 (1984); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam); Felton v. Secretary, United States Dept. of Education, 787 F.2d

[12] Pls' Mem. at 5. Plaintiffs later express some apparent hesitation at the breadth of their request: "the exigencies of the case at bar warrant that the decision of the Commission be reversed [?]." Id. at 7.

35 (2d Cir. 1986); Franklin Savings Assn. v. Director, Office of Thrift Supervision, 740 F. Supp. 1535, 1542 (D. Kan. 1990), aff'd, 934 F.2d 1127, 1150 (10th Cir. 1991). That doctrine is plainly applicable here, where the plaintiffs' invitation to invalidate Presidential decisions threatens to undermine delicate political compromises in the sensitive area of national defense policy.

II. THE COURT SHOULD RECONSIDER ITS RULING ON THE MOTION TO DISMISS IN LIGHT OF RECENT AUTHORITY FROM THE SUPREME COURT

Under the Act, the Air Force, the Department of Defense, and the Commission have no authority to order the closure of any base. Instead, each merely compiles a list of recommendations. The President has the ultimate authority to accept or reject the Commission's recommendations, for any reason. § 2903(e). Because only the President makes a final base closure decision, defendants argued in their motion to dismiss that the recommendations of the Air Force and the Commission are not reviewable under the Administrative Procedure Act, because there is no "final agency action" to review. 5 U.S.C. § 704.[13] The only decision that had any impact on the plaintiffs was the President's, and that decision is not reviewable. Specter, slip op. at 23-24.

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[13] See also H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("no final agency action occurs in the case of the various actions required under the base closure process contained in this bill"); Specter, slip op. at 19 ("The actions challenged here are not 'agency actions' as usually encountered under the APA.").

The Court did not specifically address this argument in its May 20, 1992 opinion, but adopted the Third Circuit's reasoning in Specter that the Court could conduct a limited review of the defendants' actions even though the President's decision is not reviewable. However, the Supreme Court has now held, in a decision issued after the Third Circuit's Specter ruling and in indistinguishable circumstances, that, when an administrative agency simply makes recommendations to the President, who then makes the actual decision and transmits it to Congress, there is no "final agency action" to review. Franklin v. Massachusetts, 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992), attached as Exhibit D. Therefore, this Court should reconsider its decision and conclude that there is no "final agency action" subject to judicial review in this case.

In Franklin, the State of Massachusetts challenged the method used by the Secretary of Commerce for including in the census federal employees serving overseas. The Secretary decided to count these employees as residents of their "home of record," which altered state populations enough to shift a Representative from Massachusetts to the state of Washington. See 60 U.S.L.W. at 4782-83.

The Secretary of Commerce conducts the census and transmits the figures to the President. See 13 U.S.C. § 141(b). The President then sends them to Congress, along with the number of Representatives to which each state is entitled, which is derived from a mathematical formula dictated by statute. See 2 U.S.C.

§ 2a(a). Although the President's role is largely "ministerial," 60 U.S.L.W. at 4784, no statute prohibits the President from rejecting the Secretary's report. Similarly, under the Base Closure Act, the President receives the Commission's recommendations and makes a decision; in fact, the statute expressly authorizes him to accept the list of recommendations, return the list to the Commission for revision, or do neither. See §§ 2903(e)(3)-(5).

In Franklin, the Supreme Court held that there is no "final agency action" subject to APA review in these circumstances, because the agency's report to the President "serves more like a tentative recommendation than a final and binding determination." 60 U.S.L.W. at 4784. The Court explained that the existence of reviewable agency action turns on whether the agency has completed its process and "whether the result of that process is one that will directly affect the parties." Id. The Court held that the President's statement to Congress, not the Secretary's report, changed the apportionment of Representatives. The intermediate report from the Secretary "is, like 'the ruling of a subordinate official,' . . . not final and therefore not subject to review." Id. (citations omitted). The Court went on to hold that the President is not subject to the APA, and that the method of allocating overseas federal employees therefore was not subject to judicial review at all under that statute. Id. at 4785.

This case is even stronger than Franklin, for two reasons.

First, in Franklin, there was no statute that authorized the President to reject the Secretary's census figures; the Court simply noted that Congress had not prohibited the President from exercising his discretion. Here, the President's authority is clear and explicit: the Act specifically permits the President to accept some, all, or none of the Commission's recommendations. In Franklin, the President was not free to declare that the census shall not be taken, but the Base Closure Act authorizes him to decide that no military bases will be closed.

Second, this case is stronger than Franklin because in base closure decisions the President does not act merely pursuant to statutory powers delegated by Congress, as in Franklin, but under his constitutional authority as Commander-In-Chief. As the Supreme Court explained: "it is clear that Congress thought it important to involve a constitutional officer . . . . That the final act is that of the President is important to the integrity of the process and bolsters our conclusion that his duties are not merely ceremonial or ministerial." Id. at 4784-85.

The Franklin decision is squarely applicable in this case. The defendants' "tentative recommendations" are unreviewable under the APA because they are not "final agency action," and the President's final decision, which plaintiffs actually challenge, is not subject to review. In light of Franklin, therefore, the Court should reconsider its May 20, 1992 decision, and dismiss all counts of the Amended Complaint.

III. THE AIR FORCE MADE AVAILABLE TO THE GAO AND THE COMMISSION ALL INFORMATION ON WHICH IT RELIED IN RECOMMENDING

BASES FOR CLOSURE

Plaintiffs' remaining claim against the Air Force is that the Air Force failed to provide Congress, GAO, and the Commission all information the Air Force used in developing its closure and realignment recommendations. See Amended Complaint ¶¶ 67, 68(A); § 2903(c)(4).

A. The Air Force Was Not Required To Make Any Information Available To Congress

Plaintiffs contend that the President's decision to close Loring must be overturned because the Secretary of the Air Force did not "supply" all information used in formulating its recommendations to Congress, and insist that this failure also violated § 2903(c)(4). See Amended Complaint ¶¶ 67, 68(A). Even if plaintiffs could substantiate this claim, however, there is no provision in the Act that requires the Air Force to provide any information concerning its recommendations to Congress. Section 2903(c)(4) obligates the Air Force only to provide information to the Commission and to GAO.

In fact, Congress was apparently aware that the Act imposed no such requirement. In recent amendments to the Act, Congress added several provisions that specifically require the Department of Defense to supply information to Congress, as well as GAO and the Commission. See Pub. L. No. 102-190, §§ 2821(c), (e), (i), 105 Stat. 1290, 1545 (December 5, 1991).

B. The Air Force Provided All Information Used In Making Its Recommendations To The GAO

Ever since publishing its report analyzing the military

services' base closure processes, the GAO has consistently maintained that the Air Force fully cooperated in making information available and responding to issues GAO raised. Contacts between the Air Force and GAO began shortly after the Act became law on November 5, 1990, and continued throughout the process. Habiger Decl. ¶¶ 18-23. The GAO's report is replete with approval for both the Air Force's base closure recommendation procedures and the open communications between the two agencies. The report finds that the Air Force's conclusions are well documented, GAO Report at 3, 4; that the procedures the Air Force adopted were reasonable, id. at 35; and that the Air Force's decisions treated all bases equally and were based upon the relevant criteria, id. at 42. In its conclusion, GAO summarized its satisfaction with the Air Force's process and cooperation with GAO's inquiries:

> The extent to which we could track and assess the process followed by the services was highly dependent on (1) the documentation made available to us, (2) the extent to which the materials used in the process had been checked and verified, (3) the access we had to the process and the officials who participated in the process, and (4) the time available. For example, the Army and the Air Force made extensive materials on their decision process available to us and used their internal audit agencies in implementing their processes. We were also able to discuss the process as it was being conducted and after it was finished with numerous officials involved at all levels of the Army and Air Force decision-making chain, which facilitated our evaluation.

Id. at 64.

In the year since the report was published, GAO's view has not wavered. GAO maintains that the Air Force provided all of the information it requested in a complete and timely manner, and

that GAO was fully able to fulfill its statutory role of reviewing and evaluating the Air Force's process. See Declaration of Robert L. Meyer ¶¶ 2-4. The GAO official who was responsible for the GAO's analysis of the base closure recommendations is unaware of any information that the Air Force used in developing its recommendations that it failed to make available to GAO. Id. ¶ 2.

C. The Air Force Made All Information Available To The Commission

The Commission was also satisfied that the Air Force made available all information on which the Air Force recommendations were based. See Courter Decl. ¶¶ 15-16. Throughout the process, as the Commission staff responded to questions from the Commissioners, or received new information from Congress and the public, Commission staff repeatedly contacted the Air Force for additional information. All of those requests were answered in a timely and complete manner. See id. ¶ 15.

IV. THE COMMISSION FULLY COMPLIED WITH THE REQUIREMENTS OF THE ACT

A. All Information On Which The Commission Relied Was Made Available To The Public

Plaintiffs next contend that the Commission considered information not "made available to the GAO or to Congress." Amended Complaint ¶ 70(a). Presumably, plaintiffs charge that the Commission considered information that it had failed to make

available to GAO and Congress.[14] There is no legal basis for such a claim.

There is simply no legal requirement that the Commission make available to GAO and Congress all information on which it relies. The Secretary of Defense, not the Commission, is required to provide information to GAO. § 2903(c)(4). The Act does not mention GAO at all as a recipient of information from the Commission; GAO's process concludes on May 15, when it submits its report.

In addition, aside from a few selected Committee Chairpersons, ranking minority members, and their designees, see § 2902(e)(2)(b), the Act does not provide that Members of Congress generally may review the Commission's information during the process. The statute requires only that the Commission make information available to Congress, upon request, after the

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[14] The Amended Complaint could also be read to claim that the Commission violated the Act by considering information that the Air Force had failed to make available to GAO and Congress. That claim has already been refuted supra in Part III. The Air Force supplied to GAO and the Commission all information used in making its recommendations. See Meyer Decl. ¶ 2; Courter Decl. ¶ 16. Even if it had not done so, however, it would not violate the Act for the Commission to accept information that the Air Force had failed to provide to GAO. Indeed, because GAO's report was due on May 15, 1991, and the Commission's recommendations were not due until July 1, 1991, the Act specifically contemplated that the Commission might consider information that GAO had not received. A crucial part of GAO's role was to provide the Commission an analysis of the Air Force's process, as a starting point from which the Commission could conduct further proceedings and gather more information to understand and evaluate the Air Force's recommendations. Similarly, the Act does not forbid the Commission from considering information the Air Force failed to provide to Congress; the Act does not require the Air Force to provide any information, at any time, to Members of Congress, but only to GAO and the Commission. See § 2903(c)(4).

Commission makes its final recommendations to the President on June 30. § 2903(d)(4).[15] Nonetheless, the Commission opened its files and accepted information and comments from all interested parties throughout its process. Courter Decl. ¶¶ 4-12. Paragraph 70(a) of the Amended Complaint must be dismissed.

B. The Act Does Not Prohibit The Commission From Receiving Information After The Close Of Public Hearings

The Act assigned the Commission an enormous task: to develop independent recommendations for closure and realignment of Army, Navy, and Air Force bases across the country, based on a comprehensive review of all available information, from all interested parties, in just ten weeks. The Act imposes no limitations on the means the Commission may use to gather and analyze data and opinions given the short time allotted to the Commission. Instead, Congress vested the Commission with broad discretion to structure its procedures in any manner it saw fit to develop the most informed recommendations possible.

The only provision in the Act concerning public hearings simply provides that "the Commission shall conduct public hearings on the [Secretary of Defense's] recommendations" after receiving them. Section 2903(d)(1). The Act does not specify how many hearings must be held, what subjects must be considered, or when the hearings must occur during the process. Nor does the

[15] The National Defense Authorization Act for fiscal years 1992 and 1993, Pub. L. No. 102-190, enacted in December, 1991, amends the Act to require the Commission to make information provided by the military services available to Congress. § 2821(e)(6).

Act require that all information received by the Commission must, at some point, be reviewed in a public hearing.[16]

Rather than approaching the public hearing requirement halfheartedly, the Commission conducted twenty-eight public hearings in nine weeks, both in Washington, D.C. and at regional sites throughout the nation, to obtain information and opinions from citizens, their elected representatives, the military, the GAO and countless other persons and organizations. See Courter Decl. ¶¶ 3-4. Plaintiffs can hardly contend that the Commission's punishing schedule of conducting public hearings across the country on the average of every three days somehow violated the Act.

Rather, the plaintiffs complain that the Commission, or its staff, obtained some unspecified information from the Air Force after the final regional hearing. See Amended Complaint ¶ 70(b). The point is legally irrelevant. There is simply no requirement in the Act that the Commission discontinue its efforts to obtain, or refuse to receive, information from any military service, or from any citizen, or their elected representatives, after the final public hearing. Under the constricted timetable estab-

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[16] The Act does require that each meeting of the Commission, other than those in which classified information is discussed, be open to the public and noticed in the Federal Register. See § 2903(e)(2)(A). The Commission scrupulously followed this requirement; indeed, all but one of the meetings of the seven-person Commission were shown on C-SPAN. See Courter Decl. ¶ 4. The Act did not require meetings of Commission staff to be open to the public. Nonetheless, consistent with its policy of openness, the Commission unanimously determined that Members of Congress or their staffs could attend the meetings if they requested to do so. None did. Courter Decl. ¶ 5.

lished by the Act, Congress could not have intended the Commission to call a hearing every time an additional fact or argument relating to a military installation was presented to the Commission. Nor does any provision in the Act guarantee the public an opportunity to comment on every piece of information the Commission considers.

Instead, Congress gave the Commission broad discretion in structuring its information gathering and analysis efforts. The Commission used a wide range of both formal and informal procedures to accomplish that task. In addition to formally receiving information in public hearings and from the military services, the Commission extended an open invitation to the public and its political representatives to provide information in face-to-face meetings, through correspondence, or even by telephone calls to Commissioners and their staff. In fact, each of the Commissioners either met personally with members of the Maine delegation at least once or visited Loring, when Sens. Cohen and Mitchell, Rep. Snowe and Gov. McKernan were present. See Courter Decl. ¶ 14.

Although the Act did not require it, the Commission also permitted the public free access to the Commission's offices to review and comment upon any of its unclassified information at any time until the Commission's final deliberations were completed on June 30, 1991.[17] Indeed, the Commissioners even accepted

[17] Prior to July 1, 1991, when the Commission submits its recommendations to the President, the Commission's only statutory obligation to make its information available is upon request by certain designated Members of Congress. See § 2902(e)(2)(B).

and considered notes passed to them during the final deliberations. See Courter Decl. ¶ 12.[18]

Thus, if plaintiffs claim that the Commission was unaware of their views, or that they were barred from commenting on material received by the Commission from the Air Force after the close of public hearings, they are simply mistaken. Of course, there is no requirement in the Act that the public have access to any information provided to the Commission, either before or after the final public hearing, much less an opportunity to comment upon it. Nonetheless, the Commission far exceeded the literal requirements of the statute and permitted the plaintiffs, and anyone else, to review and copy unclassified documents in the Commission's files, received from the Air Force or any other source, at any time, both before and after the final public hearing. Courter Decl. ¶¶ 7-9. Plaintiffs frequently commented on Commission materials and offered responsive information to individual Commissioners and Commission staff, Courter Decl. ¶ 14, and could have done so until the final deliberations concluded.

In short, the Commission and its staff did obtain additional information from the Air Force after the last public hearing. The Commission would have been derelict in its responsibility to provide the best possible recommendations to the President if it

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[18] The public took full advantage of this opportunity. Overall, the Commission received over 143,000 letters and more than 100 phone calls per day in the ten weeks in which it conducted its review. Courter Decl. ¶ 13.

refused to accept relevant information from any source at any time. Not only could the Commission consider this information, but its remarkable and voluntary policy of openness permitted anyone else to review and comment on it as well. The Commission's tireless efforts to gather relevant data violated no provision of the Act.

C. The Commission Did Not Consider A "New" COBRA Model At Its Final Meeting

Plaintiffs' only specific allegation is that, at the Commission's final meeting on June 30, 1991, the Air Force furnished and the Commission considered "new data pertaining to potential cost savings based upon a new COBRA model" that had not previously been made available to Congress or other interested parties. See Amended Complaint ¶ 64(d) (emphasis in original). As demonstrated supra, the Act required neither the Air Force nor the Commission to make information available to Congress generally or local communities. In any event, this contention is simply incorrect as a matter of fact and, even if true, could not possibly have injured the plaintiffs.

One of the factors considered by the Air Force and the Commission was potential cost savings, which included consideration of the cost to close the base, the annual savings that would result from closure, and the time it would take to recover the costs of closure (the "payback period"). GAO Report at 65. The estimated savings for each base were based on a computer model known as "COBRA," an acronym for "Cost of Base Realignment Actions."

Near the end of the June 30 meeting, as the Commission turned to consideration of strategic Air Force bases, Commission staff pointed out to the Commissioners a discrepancy in some of the data concerning cost savings. See Exhibit F. One set of figures was based on the Air Force's original model, an early version of COBRA that was based on the generic assumption that, when a base was closed, all of its forces had to be moved to some other fictitious base located 1500 miles away. The Air Force used that general model because, at the time it was developing closure options, the Air Force did not know precisely which bases would close or where forces from those bases would move, but wanted to include potential savings as a factor. Using this model, the Air Force estimated that closure of Loring would result in annual savings of $66.6 million, and that the "payback period" would be one year. See id. at 420.

A second COBRA model, used by the Department of Defense, was more specific, basing its cost calculations on the actual movement of forces that would be necessary when particular bases were closed. In the case of Loring, the DOD model based its figures on the fact that closure of Loring would require relocation of its B-52 bombers to K.I. Sawyer Air Force Base, in Michigan, and dispersal of Loring's KC-135 tankers to other bases. This more accurate model still projected a one-year payback period for Loring, but estimated that the annual savings would be $61.8 million. See id. at 416, 421.

Plaintiffs suggest that the "new" estimate, based on the

more accurate DOD model, suddenly appeared for the first time in the Commission's final meeting, and complain that they were not permitted an opportunity to comment on its accuracy. In fact, however, the DOD model and its $61.8 million estimated annual savings for Loring, on which the Commission relied, had long been a matter of public record. It was the figure reported in the Secretary of Defense's original recommendations, published months earlier, at the very beginning of the Commission's process. See 56 Fed. Reg. 15184, 15252 (April 15, 1991). Indeed, the Commission's Chairman is unaware of any COBRA model or data based upon a COBRA model that was presented to the Commission for the first time on June 30, 1991. See Courter Decl. ¶ 8. The COBRA models and all data generated using those models were available for public inspection and comment at the Commission's offices at any time. See id. Plaintiffs thus had a full opportunity to comment on the accuracy of the savings estimate, notwithstanding the fact that another, less accurate model also appeared and was rejected in the final deliberations.

Furthermore, even if the DOD model had not been subject to public scrutiny, and that violated some provision of the Act, there would be no basis for overturning the Commission's recommendation concerning Loring. The DOD model to which the plaintiffs object actually projected smaller savings than the Air Force model, by some $480,000 per year. If anything, therefore, the "new" data weighed against Loring's closure, and plaintiffs were hardly prejudiced by the Commission's adoption of a more

conservative estimate.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment should be granted.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

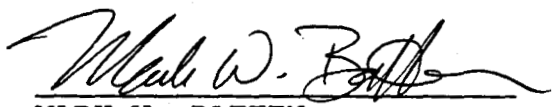
Vincent M. Garvey/MWB
DAVID J. ANDERSON
VINCENT M. GARVEY, Bar #1421

Mark W. Batten
MARK W. BATTEN, Bar #1422
JEFFREY S. GUTMAN, Bar # 1423
Attorneys
U.S. Department of Justice,
Rm. 918
901 E Street, N.W.
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support of Defendants' Motion For Summary Judgment was mailed this 23rd day of July, 1992, by Federal Express, postage prepaid, to:

Severin M. Beliveau
Ann R. Robinson
Preti, Flaherty, Beliveau & Pachios
45 Memorial Circle
Augusta, Maine 04332-1058



MARK W. BATTEN

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DATE: August 24, 1992

Matt —

TO: Matt Behrmann

FAX NUMBER: 653-1028

FROM: Robert Moore Bob

NUMBER OF PAGES BEING SENT INCLUDING COVER: 30

REMARKS:

The trial is still on for September 21. As of yet, DOJ has no details on the logistics of the trip, but they should know by next week. I'll let you know as soon as I hear from them so you can make your travel arrangements. Attached is a reply memo DOJ sent me today. Please have your crew review the document and fax any recommended changes to my office by COB Wednesday (the 26th). I am to inform DOJ of our opinion by Thursday morning. Thanks. Hope all is well.

DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 91-0282-B
DONALD RICE, Secretary of the Air Force, et al., Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

STATEMENT

Plaintiffs' response to defendants' legal arguments continues their failure to acknowledge that the relief they seek in this case is not the simple remand of an administrative decision, but the reversal of the President's military and political determination that Loring Air Force Base, among others, be closed. Plaintiffs' insistence that they have no quarrel with the President's decision, but only the process by which recommendations to the President were developed, ignores the inescapable fact that they cannot obtain meaningful relief unless Loring is not closed as the President has ordered. As we explain below in Parts I and II, to provide that relief on the ground that the advice the President received was developed improperly is contrary to separation of powers principles, the Act itself and recent Supreme Court precedent.

As extraordinary as the relief plaintiffs seek is the paucity of support they have marshalled to warrant such a remedy.

Plaintiffs begin with the mistaken assumption that, on summary judgment, defendants are required to disprove their contentions, and then offer only unsupported claims of the most incidental infractions of the Act, largely failing to respond to the arguments and evidence advanced in our motion. As we show below in Parts III and IV, plaintiffs have simply failed to present sufficient evidence on these technical issues to avoid summary judgment.

Even if they could prove their assertions, plaintiffs have not even claimed any significant error. They ask this Court to overturn a Presidential decision based on the Air Force's failure to furnish a handful of documents among boxloads, and the passing remarks of one Commissioner among reams of transcripts recording the views of seven. Even if this case warranted a trial, plaintiffs' list of minor alleged infractions offers the Court no basis for exercising its equitable discretion to nullify the President's determination that Loring should be closed.

STANDARD OF REVIEW

Plaintiffs mischaracterize the defendants' burden on summary judgment as requiring that we establish the absence of evidence to support plaintiffs' case. See Plaintiff's [sic] Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pls' Opp.") at 2. No such showing is required. To the contrary, there is no burden "on the party moving for summary judgment to provide evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which

the nonmoving party bears the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Indeed, in response to a motion for summary judgment, it is plaintiffs' obligation to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.[1] Summary judgment for defendants is warranted, and "there is no issue for trial[,] unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986); see also Caputo v. Boston Edison Co., 924 F.2d 11, 13 (1st Cir. 1991); Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989).

As demonstrated infra in Parts III and IV, plaintiffs have failed to carry that burden, and in fact have offered no admissible evidence on several of their claims. On the remaining issues, plaintiffs have, at most, created factual disputes that are legally irrelevant or unnecessary, and as a result "will not be counted." Anderson, 477 U.S. at 248. Plaintiffs cannot prevail at trial on the record presented here, and summary judgment for the defendants is therefore appropriate.

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[1] See, e.g., Caputo, 911 F.2d at 13; Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) ("On issues where the nonmovants bear the burden of proof, however, they must reliably demonstrate that specific facts sufficient to create an authentic dispute exist."); Ismert & Assoc., Inc., v. New England Mutual Life Ins. Co., 801 F.2d 536, 537 (1st Cir. 1986).

ARGUMENT

I. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE THE COURT CANNOT AWARD MEANINGFUL RELIEF

In our opening memorandum, we demonstrated that the remedy plaintiffs demand -- reconsideration of Loring by the 1993 Commission -- would ignore both constitutional limits and the structure of the Act, and that the Court should therefore exercise its discretion to withhold injunctive relief. Memorandum In Support Of Defendants' Motion For Summary Judgment ("Defs' Mem.") at 11-18. In response, plaintiffs essentially argue that the question is premature, urging the Court not to decide whether a remedy exists until after this case has been tried. See Pls' Opp. at 4-6, 9-10. It hardly makes sense, however, to try this case without first ensuring that some meaningful judicial relief awaits the plaintiffs if they prevail.

In support of their argument that the Court postpone consideration of the issue, plaintiffs argue that the discretionary decision whether to award relief for a violation must be based "on the character of the violation and all of the surrounding circumstances," an assessment that plaintiffs insist cannot be made until after trial. See id. at 4 (quoting Specter v. Garrett, No. 91-1932 at 12 (slip op. Apr. 17, 1992), 1992 U.S. Lexis 6969). However, the "character" of plaintiffs' remaining allegations is now quite clear, and explained in detail in their opposition memorandum and attached affidavits. In assessing the availability of a remedy, the Court may assume the truth of all of these allegations, and there is no need to await whatever

minimal clarification trial might provide.

More fundamentally, the unavailability of a remedy here turns not on the nature of the alleged violations, but on basic limitations on the Court's authority to overturn explicit decisions of the President and Congress. Plaintiffs again insist that they are uninterested in reversing the President's decision, and seek only to require the Commission to repeat its review; they dismiss defendants' argument that the President's decision would be vacated as "jump[ing] the gun," because the effect on that decision "cannot be determined until after the Commission has reconsidered its actions." Pls' Opp. at 9-10.

This assertion is disingenuous. The order plaintiffs seek has an immediate and irreparable impact on the President's 1991 decision to close Loring as part of a package of other bases to be closed. The order plaintiffs seek would vacate that decision now, regardless of what a future Commission may recommend. To remand one selected base from that package to a body serving as the President's advisors, with instructions reconsider what the President has already decided, ventures into dubious and uncharted constitutional waters. Plaintiffs cannot avoid the reality that they seek the overturn of a Presidential decision simply by naming the Commission as a defendant instead of the President himself.

Plaintiffs repeatedly cite Specter and this Court's May 20, 1992 decision, suggesting that these opinions somehow have already resolved the remedial issue. See, e.g., Pls' Opp. at 7

("This Court's adoption of Specter should have settled the question."). In fact, of course, both the Third Circuit and this Court expressly left the issue unresolved so that relevant facts might be developed. Those facts have now been fully detailed in plaintiffs' submissions, and there is no justification for postponing this issue any longer. The Court should decide the issue that it and Specter left open, and conclude that no meaningful relief is available.

II. RECENT AUTHORITY DEMONSTRATES THAT THERE IS NO "FINAL AGENCY ACTION" TO REVIEW IN THIS CASE

The Administrative Procedure Act ("APA") limits judicial review to "final agency action." 5 U.S.C. § 704. Where an agency's action does not itself have a concrete effect, but is only an intermediate step in a larger process, it simply is not subject to judicial review. The Supreme Court, in an indistinguishable analysis of that provision, has held that when a defendant agency makes only a tentative recommendation that the President is free to accept or reject, it takes no "final agency action" to review. Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). The APA therefore precludes review of defendants' actions in this case.

Plaintiffs attempt to slip out of Franklin's shadow by arguing that it precludes only substantive challenges to agency action, not claims that an agency has followed improper procedures. Thus, they argue, that this Court (and the Third Circuit in Specter) have already accounted for the Franklin principles by dismissing challenges to the substantive basis for the decision

to close bases. See, e.g., Pls' Opp. at 11-13, 15. Put another way, plaintiffs contend that the remaining purely procedural claims are not actions of the President, but distinct, reviewable and "final" actions of the Air Force and the Commission. E.g., id. at 14-15.

Franklin is not so easily dismissed. The reasoning of the Supreme Court's decision has nothing to do with the difference between substantive and procedural claims. The pertinent question is whether the action challenged is "final," that is, whether it will "directly affect the parties," or is instead merely "tentative" or "the ruling of a subordinate official." Franklin, 112 S. Ct. at 2773 (citations omitted). Here, the process by which the Air Force and the Commission developed their recommendations is removed even further from their ultimate substantive advice, which Franklin teaches is itself not final agency action. Plaintiffs' observation that the alleged procedural errors at issue here were committed by the defendants and not by the President, see Pls' Opp. at 15, serves only to highlight the applicability of Franklin, not to distinguish it. The plaintiffs in Franklin did not challenge Presidential action either, but the Secretary of Commerce's census report.[2]

Simply put, the finality of an agency's action does not turn on the nature of the challenge to it: the action cannot be

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[2] In fact, plaintiffs' memorandum never even mentions 5 U.S.C. § 704 or the term "final agency action," which were at the heart of the reasoning in Franklin. Nor do they even offer an argument that the Air Force's and the Commission's intermediate actions fall within the scope of that term.

"final" for some purposes, but only "tentative" for others. Either an agency's role in a statutory process has a "direct effect on . . . day-to-day business," or it does not. 112 S. Ct. at 2773 (citation omitted). In this case, as in Franklin, the administrative agencies are charged merely to develop recommendations, which the President may or may not adopt in making the sole "final and binding determination." Id. The only final action under both statutory schemes is the President's, and permitting judicial review of an intermediate step in the process, even on purely procedural grounds, is inconsistent with Franklin and ignores the limitation imposed by 5 U.S.C. § 704.

Plaintiffs also attempt to distinguish the statutory scheme at issue in Franklin from the Act, arguing that the Act imposes greater restrictions on the President's discretion. See Pls' Opp. at 16-19. For example, they point out that the President cannot select individual bases to close or retain, and that the Commission conducts much of its process in public. See id. In fact, however, the Act gives the President greater authority than do the statutes in Franklin. The President could not simply refuse to take a census, but the Act specifically authorizes him to declare that no bases will be closed or return particular recommendations to the Commission. § 2903(e). Furthermore, as explained in greater detail in our opening memorandum, in considering bases for closure the President acts not only pursuant to statutory authority, as in Franklin, but also in his constitutional role as Commander-in-Chief.

Nor does public involvement in the Commission's process somehow convert its recommendations into "final" agency action; the statute reserves the ultimate base closure decision exclusively to the President. The public attention and submissions that the Commission's review receives may give its recommendations some political momentum, just as the Commerce Department's elaborate efforts to conduct the census may arguably dissuade the President from ordering that it be taken over again. But, in both cases the recommendations of these subordinate agencies are still nonbinding and subject entirely to the President's discretion.

As a statutory matter, therefore, the Air Force's, Secretary of Defense's and Commission's recommendations are not the final word on base closure, and are therefore not within the scope of the APA. Indeed, Congress specifically acknowledged as much in the Act's legislative history. See H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("no final agency action occurs in the case of the various actions required under the base closure process contained in this bill"). Franklin is indistinguishable, and the Amended Complaint must be dismissed.

III. THE AIR FORCE FULLY COMPLIED WITH THE ACT IN MAKING INFORMATION AVAILABLE

A. The Act Does Not Require The Air Force To Make Information Available To Congress

Before detailing all of the occasions on which the Maine Delegation allegedly had difficulty obtaining information from

the Air Force, plaintiffs make a brief and unsuccessful attempt to locate some provision of the Act that requires such access. The Act itself contains no provision requiring the Department of Defense to make any supporting information available either to Congress or to the public. Indeed, Congress has only subsequently amended the Act to require that the Department of Defense supply information to Congress. See Pub. L. No. 102-190, §§ 2821(e), 105 Stat. 1290, 1545 (Dec. 5, 1991).

Faced with this complete lack of statutory support, plaintiffs propose only that such a requirement would be "consistent" with the "fair process" alluded to in the Act. See § 2901(b). They also divine from the Act a "legislative intent" to impose a "good faith obligation" on the Air Force to provide "documents and information" to Congress "within a reasonable time." Pls' Opp. at 20-21. This undeclared intent does not appear in the legislative history or anywhere else, and plaintiffs offer no citation to support such a requirement.[3]

The statute's actual provisions are quite clear: the Secretary of Defense is to make available to the GAO and the Commission all information used in developing recommendations for closure and realignment. § 2903(c)(4). The Secretary's only

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[3] Plaintiffs also suggest that an explicit provision guaranteeing Congressional access would be unnecessary, because information must already be provided pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Pls' Opp. at 21. Such an assertion leaves Congress' subsequent amendment to the Act an apparent nullity. Even assuming that FOIA would have required the sort of access plaintiffs demand, however, any failure of the Air Force to comply with that statute would not state a claim for violation of the Act.

obligation to Congress, the public, or anyone else, is to publish in the Federal Register and transmit to Congress the recommendations and a summary of the process and a justification for each recommendation. §§ 2903(c)(1)-(2). Those requirements concededly were met, see 56 Fed. Reg. 15184 (Apr. 15, 1991), and the Act mandated nothing more. The Court therefore should dismiss plaintiffs' claims that the Air Force violated the Act by failing to make information available to Congress.

B. The Air Force Made Available To GAO All Information Used In Developing Its Base Closure Recommendations.

Plaintiffs allege that the Air Force failed to provide to GAO information on three topics: the condition of facilities at Loring, see Pls' Opp. at 26 & n.7; notes taken in meetings of the Base Closure Executive Group ("BCEG") with the Secretary of the Air Force, see id. at 26-27; and the Cost of Base Realignment Actions ("COBRA") model referred to in the Commission's final meeting on June 30, 1991, see id. at 27. None of these purported failures precludes summary judgment against the plaintiffs.[4]

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[4] Plaintiffs also contend that the defendants have not established that the Air Force provided all information to GAO. They object to defendants' reliance on GAO's declaration, in which the official who directed GAO's review process affirms that he is unaware of any unprovided information, because there may be information not provided that GAO never discovered. See Declaration of Robert Meyer ¶¶ 2-4, Defs' Exh. C. First, defendants relied not only on Mr. Meyer's declaration, but on the sworn statement of the BCEG Chairman that all information of which he is aware was made available to GAO. See Declaration of Maj. Gen. Eugene Habiger ¶ 19, Defs' Exh. A. Second, if plaintiffs contend that there is other information of which GAO was not aware, they have failed to identify it. Indeed, Mr. Meyer specifically states that he was aware of the facilities information plaintiffs now claim the Air Force failed to provide, see Meyer Decl. ¶ 6,

1. Plaintiffs Have Failed To Raise A Genuine Issue Of Material Fact Concerning Information About The Condition of Loring's Facilities.

Plaintiffs rely exclusively on two Air Force memoranda, dated May 15 and 17, 1991, submitted with their memorandum as Exhibits C and D. The first outlines the opinion of Loring Air Force Base officials concerning the condition of facilities at the base and the cost to upgrade those facilities, which was substantially lower than the estimate provided by Strategic Air Command ("SAC") Headquarters. The second, authored by SAC Headquarters, explains the difference between the base's figures and SAC's. Plaintiffs have decided that the base had the more appropriate figures on these elements, and contend that the Air Force failed to bring the "correct" data to GAO's attention.

Of course, the substantive claim that the Air Force relied on inaccurate information in reaching its base closure recommendations has been dismissed. Amended Complaint, ¶¶ 64(a), (b), (f). Plaintiffs cannot prevail on their remaining claim unless they can demonstrate that the Air Force denied GAO access to information the Air Force actually used, whether erroneous or not.

On this narrower point, there can be no dispute. The statute requires the Air Force to make available to GAO only the information "used by the Department in making its recommendations to the Commission." § 2903(c)(4). As plaintiffs must concede,

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and plaintiffs have presented no evidence that the Air Force failed to provide any relevant notes or the COBRA model to the GAO. See infra Sections III.B.2 - 3.

the Air Force's recommendations concerning Loring relied only on "off-the-shelf" information provided by SAC, not the figures now offered by the plaintiffs. See, e.g., Habiger Decl. ¶ 11. The Air Force fully complied with the statutory requirement, making available to GAO all of the information it used in developing its recommendations.

In any event, the record is undisputed that GAO was aware of the differing estimates of various bases' facilities. Meyer Decl. ¶¶ 6-7; see also Pls' Declaration of Andrew Marek, Att. 2. Plaintiffs have failed to raise a genuine dispute as to whether the information in the May 15 and 17 memoranda was provided to GAO. They cite only the affidavit of Dale Gerry, Sen. Cohen's legislative assistant, who says it "appeared" to him that GAO had not received the information from the Air Force. See Gerry Affidavit ¶ 31. This speculative statement does not preclude summary judgment: "[a]lthough [plaintiffs] are entitled to all favorable reasonable inferences in their favor, their own unsupported assessment of the situation is insufficient to raise a genuine issue of material fact." Texaco Puerto Rico, Inc. v. Medina, 834 F.2d 242, 247 (1st Cir. 1987) (emphasis in original). Plaintiffs' claim that the Air Force failed to make available to GAO facilities information that it used is thus both legally and factually unsupported.

2. Plaintiffs Have Failed To Raise A Genuine Issue Of Material Fact Concerning Notes Of Meetings With The Secretary Of The Air Force.

Plaintiffs also claim that the Air Force failed to make

available to GAO notes taken by individual BCEG members in meetings with the Secretary of the Air Force during the first few months of 1991. See Pls' Opp. at 26-27. Plaintiffs have failed to present any evidence to support such a claim.

Most importantly, it is not even clear that any such notes existed after April 15 for the GAO to review. Deputy Assistant Secretary of the Air Force James F. Boatright testified before Congress that some BCEG members took notes, strictly for their own use, during meetings with the Secretary, but that no official use was ever made of these personal notes, and that the members themselves used them only as "memory refreshers." See Defense Base Closure and Realignment Commission: Hearings Before The Senate Armed Services Committee, 102nd Cong., 1st Sess. at 492 (1991) ("Hearings"), Defs' Exh. G. Mr. Boatright did not testify that BCEG members kept these personal jottings after April 15, when the Air Force's recommendations were announced.

Mr. Carolla's affidavit, which is the only authority plaintiffs cite on this point, adds nothing more. He merely testifies that he does not believe the notes were ever provided. See Carolla Affidavit ¶ 24. Just as with Mr. Gerry's speculations, see supra, Mr. Carolla's unsupported opinions do not create an issue for trial: "[a] genuine issue of material fact does not spring into being simply because a litigant claims that one exists." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). There is no evidence in the record that these notes exist, that BCEG members retained them after April 15, 1991, or

that they contained any relevant information. See Deposition of Dale F. Gerry at 50-51, Defs' Exh. H; Deposition of Robert J. Carolla at 66-68, Defs' Exh. I.

3. Plaintiffs Have Failed To Raise A Genuine Issue Of Material Fact Concerning the COBRA Model.

Finally, plaintiffs claim that the Air Force failed to make available to GAO the COBRA model mentioned at the June 30, 1991 meeting of the Commission. See Pls' Opp. at 27. However, plaintiffs do not cite a single fact to support this claim. They argue that the Air Force used the COBRA model "at the eleventh hour," but present no evidence whatsoever that this information had not been provided to GAO earlier. In fact, as explained in defendants' opening memorandum, the figures generated by the COBRA model for Loring and used at the Commission's June 30, 1991 meeting had been a matter of public record since April 15, 1991, when they were published in the Federal Register. Defs' Mem. at 30-33. Plaintiffs have presented no evidence to support this claim, and it should therefore be dismissed.

C. The Air Force Made Available To The Commission All Information Used In Developing Its Recommendations For Closure.

Plaintiffs' claims that the Air Force failed to make available to the Commission all information used by the Air Force are quite similar to their claims concerning the Air Force's cooperation with GAO. Although they offer no evidence contradicting his statement, plaintiffs resist acceptance of Commission Chairman Courter's statement that he was not "aware of any information

that the Air Force used in developing its list of recommended bases for closure or realignment that it failed to make available to the Commission." Courter Decl. ¶ 16, Defs' Exh. B; Pls' Opp. at 27-28. Incorrectly asserting that we rely only on Chairman Courter's sworn statement on this point, plaintiffs ignore General Habiger's statement that he, too, is "not aware of any information used by the Air Force in making recommendations that was not accessible to the Commission. Habiger Decl. ¶ 25.

First, plaintiffs argue that the Air Force failed to make available information contained in the May 15 and 17, 1991 memoranda concerning the condition of facilities at Loring. As explained supra, however, this information was not used by the Air Force in developing its recommendations, and therefore need not have been provided. In any event, the Commission was unquestionably aware of the discrepancies between the base-level information and the information used by the BCEG. In fact, Commission staff examined both sets of figures and developed its own assessment. See Hearings at 47, attached to Defs' Mem. as Exhibit E.

Second, plaintiffs repeat their claim that the Commission was not provided copies of notes that may have been taken by individual BCEG members in meetings with the Secretary of the Air Force. See Pls' Opp. at 29. Again, as explained supra, plaintiffs have failed to carry their burden of proof on this issue. They cannot demonstrate that any such notes exist, or that they contained any relevant information. Nor have they offered

anything more than Robert Carolla's speculation that any relevant notes that did exist were not provided to the Commission. See Carolla Affidavit ¶ 24.

Finally, plaintiffs argue that the Air Force failed to make available to the Commission "a method of evaluating quality of life at Loring and Plattsburgh Air Force Base." Pls' Opp. at 29. Although they attempt to create an issue of fact concerning whether or not the Air Force in fact considered "quality of life" in its analysis, that issue is irrelevant. Even assuming that the Air Force did consider "quality of life" in recommending Loring's closure, plaintiffs have failed to present any evidence that the Air Force withheld information on the issue from the Commission. Plaintiffs cite no document nor even any particular information that they believe the Air Force used in its supposed consideration of the issue, much less any information used but not provided to the Commission.

Indeed, their real complaint appears to be that they were not permitted to attend the meeting in which the Air Force did provide information to the Commission. See Pls' Opp. at 30.[5] Obviously, even if plaintiffs were denied access to the meeting or a transcript of the meeting, that fact does not demonstrate that the Air Force withheld any information on "quality of life" from the Commission.

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[5] Even during that briefing, however, Col. Heflebower reportedly said only that SAC, not the Secretary of the Air Force, felt strongly about the quality of life issue. Pls' Opp. at 30.

All information that was actually -- or even possibly -- used by the Air Force in developing its base closure recommendations was made available to the GAO and the Commission. The Air Force also made information available to the plaintiffs, although it had no statutory obligation to do so. Plaintiffs have raised no genuine issue of material fact, and the Air Force is entitled to judgment as a matter of law.

IV. PLAINTIFFS HAVE FAILED TO CARRY THEIR BURDEN OF SHOWING THAT THE COMMISSION VIOLATED THE ACT.

Following this Court's May 20, 1992 Order, only two claims remained against the Commission, both arising from the same factual allegations. Plaintiffs contend that the Commission improperly considered a purportedly new COBRA model and the "quality of life" at Loring on the final day of its deliberations, June 30, 1991, Pls' Opp. at 31-39, and various Commissioners told them not to present information on the latter issue as it would not be considered. Plaintiffs argue that the Commission's consideration of them was unlawful for two reasons: 1) the information was not previously made available to the GAO or Congress, Amended Complaint, ¶ 70(a); Pls' Opp. at 31-35[6] and 2)

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[6] In our opening memorandum, we noted that plaintiffs had not made clear whether they claim that the Commission should not consider information that it had not provided to Congress or the GAO, or information that the Air Force had not furnished to them. Defs' Memo. at 24-26 & n.14. Plaintiffs' opposition does not resolve this confusion. If it is the latter, our showing that the Air Force complied with the Act's requirement to provide the information it used in making its recommendations, and that it had no obligation to provide any material to Congress moots the parallel claim as to the Commission. In any event, we demonstrate, infra, that both claims are meritless.

the Commission failed to hold public hearings on these issues because they were allegedly considered after the final public hearing on Loring. Amended Complaint, ¶ 70(b); Pls' Opp. at 35-39. These claims fail as matter of law and of fact.

A. Assuming the Commission Considered a New COBRA Model and "Quality of Life" at the June 30 Hearing, It Violated No Provision of the Act.

Assuming arguendo that plaintiffs' factual assertions are correct, and we show infra that they are not, plaintiffs' legal theory apparently is that the Commission may not consider information not previously provided to the GAO and Congress, or matters raised after the Commission's final public hearing. The Act does not support that theory. There is nothing in the Act which prevents the Commission from considering information received or matters raised at any time during the process by which it develops its recommendations. Nor does the structure or purpose of the Act suggest any limitations on the information the Commission may consider in its effort to present the President with the best possible base closure and realignment recommendations.

1. The Act Neither Requires the Commission to Make Information It Considers Available to the GAO or Congress, Nor Bars It From Considering Information Not Provided by the Air Force to Them.

No provision of the Act requires the Commission to provide information generally to Congress prior to July 1 or to the GAO

at any time,[7] and plaintiffs cite neither the Act nor its legislative history to support their claim. Indeed, § 2903(d)(4) of the Act only required the Commission to provide, after July 1, 1991, the information it used in making its recommendations to any Member of Congress requesting it.[8]

Nor does the Act prevent the Commission from considering any information which the Air Force did not earlier provide GAO or the Congress. In fact, the structure of the Act shows precisely the opposite: GAO's role in the process is to flag areas on which it believes the Commission might require more information. Furthermore, as we have shown, the Act does not require the Air Force to provide all base closure information in the Air Force's possession to the GAO, but, rather, only information it used in making its recommendations. And, the Act does not require the Air Force to provide any material to Congress. To suggest that the Commission may not consider information that the Air Force did not furnish the GAO or Congress is not only to compound one misreading of the Act with another, but also to hamstring the ability of the Commission to produce sound advice to the President.

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[7] The duty to provide information used by the Secretary of Defense in making his recommendations to the GAO rests with the Secretary, not the Commission. See § 2903(c)(4).

[8] § 2902(e)(2)(B) opens the proceedings, information and deliberations of the Commission any time, upon request, to selected ranking members of Congress. Plaintiffs do not allege that the Commission has violated this provision.

2. The Act's Public Hearing Requirement Does Not Bar the Commission From Considering Information and Matters Raised After the Final Public Hearing.

Plaintiffs claim that the Commission considered a purportedly new COBRA model and the "quality of life" issue in violation of the public hearing requirement in § 2903(d)(1). According to plaintiffs, § 2903(d)(1) bars the Commission from considering any new information concerning Loring after the final public hearing on that base, which occurred in late May, 1991. Pls' Opp. at 35. Nevertheless, plaintiffs themselves admittedly had at least fourteen written or personal contacts with Commissioners or Commission staff after that public hearing. Plaintiffs' Responses to Interrogatories Propounded by Defendants, No. 10. Surely plaintiffs do not argue that the Act's public hearing requirement prevented the Commission from considering the information plaintiffs provided to it.

The Act merely requires that the Commission "shall conduct public hearings on the [Secretary of Defense's] recommendations" after receiving them. § 2903(d)(1). The Act neither dictates when such hearings are to occur nor forbids the Commission from considering information, from any source, after the last public hearing. All that is required is that the Commission conduct public hearings; plaintiffs cannot contend that the Commission's 29 regional and Washington, D.C. meetings and forty base visits, Courter Decl. ¶ 3, in a two and a half month period deprived them

or anyone the opportunity to offer the Commission their views.[9]

The Act's requirement that the Commission develop base closure recommendations for the President in just ten weeks, §§ 2903(c)(1), 2903(d)(2)(A), yields certain practical realities. First, the public importance and impact of the Commission's work resulted in a massive outpouring of information from interested delegations like the plaintiffs to the Commission. Courter Decl. ¶ 13. Second, as the Commission proceeded to consider the enormous quantities of information provided by the military services and the public and conducted hearings, the Commission sought additional information from the services, which, in turn, engendered a cycle of responsive public information and requests for more information from the military. Courter Decl. ¶ 15. By necessity, much information was provided by the services and the public in the final weeks and days of the Commission's work. Courter Decl. ¶¶ 3, 9.

For the Commission and its staff to return to their offices to digest and analyze this information, it must, as a practical matter, conduct its last regional or public hearing some time prior to its final deliberations. At the same time, because of

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[9] The crux of plaintiffs' "public hearing" claim is that the Commission told the Maine delegation that it would not be considering the "quality of life" issue, but then allegedly did so. Pls' Opp. at 31-33. In essence, the claim is not that the Commission failed to hold public hearings, but that it should be estopped from considering an issue it allegedly reported that it would not assess. The Supreme Court, however, has cautioned that prevailing on a claim of equitable estoppel against the government is next to impossible. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

the complexity of the subject matter and time constraints, it recognized that helpful and relevant information from delegations such as plaintiffs would necessarily arrive shortly before or during its deliberations. To suggest that the Commission could consider no information after the last public hearing would either require the Commission to ignore important information or to schedule numerous public hearings nationwide at the very end of June, immediately prior to its final deliberations. Neither the Act nor common sense require such a result, and plaintiffs' frequent -- and entirely lawful and welcome -- contacts with the Commission through the end of its process belie their claim.[10]

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[10] The two cases relied on by plaintiffs are easily distinguishable. In United States Lines v. Federal Maritime Comm., 584 F.2d 519 (D.C. Cir. 1978), a determination of the Federal Maritime Commission was remanded because it was based on information received ex parte to which the petitioner had no access during the public hearing. In National Wildlife Federation v. Marsh, 568 F. Supp. 985 (D.D.C. 1983), the Army failed to include "perhaps the most important document influencing the Secretary's decision," id. at 995, in the administrative record for public comment.

Unlike the statutes at issue in United States Lines and National Wildlife Federation, the Act, as shown, contemplated the submission and consideration of information, even ex parte oral communications such as those made by plaintiffs, until and even during the Commission's final deliberations. Also unlike the plaintiffs in United States Lines and National Wildlife Federation, plaintiffs here point to no pertinent documentary information that was before the Commission, but to which they had no access. To the contrary, plaintiffs assert only that a Commissioner raised an issue sua sponte at the final deliberations, not that information relating to that issue was unavailable for comment during the process. Finally, as we show below, the "quality of life" issue was neither "pivotal," nor served as the rationale for the Commission's recommendation, prerequisites to the National Wildlife Federation court's finding that the public hearing requirement at issue there was violated. [cite]. See Sierra Club v. Costle, 657 F.2d 298, 398-99 (D.C. Cir. 1981) (rejecting similar claim on the ground that plaintiff "itself has

B. Plaintiffs' Factual Assertions About the Commission's Alleged Consideration of a New COBRA Model and the "Quality of Life" Issue Are Unsupported.

We have demonstrated that plaintiffs' allegations about the Commission's consideration of a COBRA model and the "quality of life" issue are irrelevant because, even if true, they do not establish that the Commission violated the Act. As a factual matter, however, plaintiffs have offered no response to our showing that the Commission did not consider a new COBRA model on June 30, 1991. See Defs' Mem. at 30-33. Nor does plaintiffs' claim that the Commission's recommendation to close Loring turned on the "quality of life" issue have any support in the record.

1. The Commission Did Not Consider a New COBRA Model During Its June 30, 1991 Deliberations.

As we explained in our opening memorandum, the Commission did not review a new or revised COBRA model on June 30. Defs' Mem. at 30-33. Previously, the Commission had been working with figures derived from an Air Force COBRA model. See Defs' Memo. Exh. F at 416-20. On June 30, the Commission considered savings figures from a Department of Defense ("DOD") model regarded as more accurate and which projected figures more favorable to the retention of Loring. See Defs' Memo. Exh. F at 416-20. The DOD model and its results were long a matter of public record; indeed, the savings figure for Loring derived from the DOD model was published in the Federal Register months before the Commis-

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failed to show us any particular document or documents to which it lacked on opportunity to respond, and which also were vital to EPA's support for the rule." (emphasis added)).

sion's final meeting. 56 Fed. Reg. 15184, 15252 (Apr. 15, 1991). Furthermore, the Chairman of the Commission stated, without any evidentiary contradiction from plaintiffs, that he was "unaware of any COBRA model, or any data based upon any COBRA model, that was presented to the Commission for the first time at the final meeting of the Commission on June 30, 1991." Courter Decl. ¶ 8.

To this argument and evidence, plaintiffs argue only that they provided input to the Commission on the Air Force rather than the DOD model used by the Commission. Pls' Opp. at 34. That plaintiffs chose to comment on one model rather than both is plainly no refutation of our factual showing that both COBRA models were publicly available and subject to comment. Furthermore, plaintiffs rely on the Declaration of Robert Carolla, ¶ 11, which states only that he asked the Air Force for the Air Force COBRA model, a model he admittedly received from GAO. Carolla Depo. at 34.[11] Mr. Carolla nowhere contends that the DOD model was not available to him for review. No questions of law or material issues of disputed fact therefore prevent entry of summary judgment in defendants' favor on the allegation that the Commission unlawfully considered a new COBRA model.

2. There Is No Factual Basis for Plaintiffs' Claim that "Quality of Life" Was the Decisive Issue in the Commission's Recommendation to Close Loring.

As we have shown, had the Commission considered "quality of

[11] Indeed, Mr. Carolla admitted that he did not look at the COBRA model closely and made no attempt to obtain other COBRA models or data runs from such models. Carolla Depo. at 34-35.

life" in their final deliberations, it would have violated no procedural requirement set forth in the Act. And, of course, plaintiffs' claim that neither the Air Force nor the Commission should have considered this issue as a substantive matter has been dismissed from this case. Amended Complaint, ¶ 65; slip op. at 9, 11-12. Apart from having no legal basis, plaintiffs' "quality of life" claim is meritless as a matter of fact as well.

Plaintiffs do not cite the final Commission Report as evidence that the Commission's decision to close Loring turned on the "quality of life" issue or that it considered it all. That report cites a number of other reasons for the Commission's recommendation. Commission Report, attached as Def's Exh. --, at --. Plaintiffs offer no evidence that the issue weighed in the minds of each of the seven Commissioners. Nor do plaintiffs offer a single document relating to "quality of life" which they believe the Commission improperly considered. Rather, the only evidence plaintiffs supply to support their claim is a brief excerpt from the remarks of Commissioner Cassidy recorded in the final Commission hearing transcript. Pls' Opp. at 33.[12]

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[12] The basis of plaintiffs' legal claim regarding "quality of life," that it should have been presented to GAO or Congress and subject to a public hearing, founders on a substantial practical problem. At the very most, the record suggests that "quality of life" was an issue that one Commissioner considered, based entirely on his own experiences and opinions, and not the product of written briefing or documentation. How are the mental impressions of one Commissioner to be furnished to the GAO and to Congress and be subject to a public hearing before he or she considers them? Plaintiffs' "quality of life" argument boils down to a claim that Commissioner Cassidy should not have considered the issue because it was not one of the eight selection criteria. That claim has been dismissed, and plaintiffs' effort

Plaintiffs offer no evidence from the hearing transcript that any other Commissioner joined Commissioner Cassidy in considering "quality of life." Indeed, the rest of the long discussion concerning Loring and Plattsburgh considered a number of other factors: the amount of usable ramp space and the significance of the different ramp configurations at Loring and Plattsburgh; the possibility of closing both bases; the relative distance of each from primary tanker routes, and the significance of those factors. cite.

In fact, there is specific evidence that a number of Commissioners did not consider "quality of life." Commissioner Ball, who voted to recommend retaining Loring, stated during the deliberations that he believed the two bases to be closely ranked on several measures, but that he valued Loring's strategic location. See transcript at 454, 461-62, 474. Both Chairman Courter, who voted to recommend keeping Loring open, and Commissioner Levitt, who voted to recommend closure of the base, later testified at a hearing of the Senate Armed Services Committee that "quality of life" had played no role at all in their decision.[13] Indeed, Chairman Courter characterized Commissioner

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to relitigate this substantive issue in the guise of a procedural challenge should be rejected.

[13] See Exhibit E at 95 (statement of Commissioner Levitt) ("[Quality of life] had nothing to do with my decision. Nor do I think it had very much to do with the decision of a number of other commissioners who voted as I did. . . . [T]he arguments made in terms of the military importance of retaining Loring were not persuasive."); id. at 96 (statement of Chairman Courter) (voted to "keep Loring from closure, not on quality of life at all, but based on the argument that . . . there was substantial

Cassidy's remark as "a gratuitous statement by a [C]ommissioner that indicated how he felt about it," and flatly stated that "we did not discuss quality of life." Exhibit E at 188.

In short, even accepting plaintiffs' interpretation of Commissioner Cassidy's remarks, they have offered no evidence that the "quality of life" issue was decisive for the Commission as a whole. On this critical point, they refer the Court only to "human dynamics," Pls' Opp. at 34, whatever that may mean, and invite the Court to speculate on the effect of Commissioner Cassidy's comments by watching a videotape of the meeting. Id. No substantiated notions of "human dynamics" amount to a genuine issue of material fact.[14]

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be granted.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DAVID J. ANDERSON

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deviation in some of the stated criteria"); id. at 189 (the other Commissioners "have independent minds and they made their own independent judgments, and I do not think they were swayed by one statement of one Commissioner on one facility").

[14] At the conclusion of their brief, plaintiffs raise a new claim not advanced in their Amended Complaint. Plaintiffs assert that the Commission's consideration of "quality of life" violates procedural due process. Our discussion above should dispense with this tardy claim. In any event, plaintiffs have not and cannot articulate a protectible property right to which they have been deprived. See Specter, slip op. at 23-24.

VINCENT M. GARVEY, Bar #1421

MARK W. BATTEN, Bar #1422
JEFFREY S. GUTMAN, Bar # 1423
Attorneys
U.S. Department of Justice,
Rm. 918
901 E Street, N.W.
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

Document Separator

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 92-2427

SENATOR WILLIAM S. COHEN, et al.,

Plaintiffs-Appellants,

v.

DONALD RICE, SECRETARY OF THE AIR FORCE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRIEF FOR THE APPELLEES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

1. The plaintiffs' claims arise under the Defense Base Closure and Realignment Act of 1990 ("Base Closure Act", "1990 Act", or "Act"). The plaintiffs invoked the jurisdiction of the district court under 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1346, and 1361.

2. The judgment under appeal is a final decision of the district court and is within this Court's appellate jurisdiction under 28 U.S.C. § 1291. The notice of appeal was filed within the time allowed by FRAP 4(a)(5).

STATEMENT OF ISSUES

1. Whether the actions of the Department of Defense and the Defense Base Closure and Realignment Commission in preparing non-binding recommendations for the President under the Base Closure Act are "final agency action" for purposes of judicial review under the Administrative Procedure Act.

2. Whether judicial review of claims based on the Base Closure Act is precluded by the Act itself.

STATEMENT OF THE CASE

This is an action to prohibit the Department of Defense from carrying out a decision of the President, acting with the concurrence of Congress under the Base Closure Act, to close Loring Air Force Base. The plaintiffs filed suit in December 1991, seeking to enjoin the Department of Defense "from taking any action upon the closure recommendation specifically with respect to Loring" and "from taking any action that interferes with Loring Air Force Base's ability to operate as if the Base were not on the closure list." App. 21, 23. The suit was based on allegations that the Department of Defense and the Defense Base Closure and Realignment Commission ("Base Closure Commission") violated the substantive and procedural requirements of the Base Closure Act in the course of preparing recommendations concerning base closures.

The district court dismissed most of the plaintiffs' claims in May 1992, on the ground that the Base Closure Act precludes judicial review of substantive challenges to base closure decisions. The district court entered summary judgment against the plaintiffs on the remaining claims in September 1992, on the basis of the

Supreme Court's intervening decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). This appeal followed.

STATEMENT OF FACTS

I. Statutory Background

Before turning to the facts of this case, we first describe the recent history of domestic base closures and the structure and policies of the Base Closure Act, which are critical to an understanding of the legal issues in this appeal.

A. Procedural Obstacles to Base Closures Prior to 1988

Beginning in the early 1960s and continuing into the 1970s, successive Administrations attempted to reduce military expenditures by closing or realigning unnecessary domestic bases. Those efforts were met with considerable opposition among members of Congress, who feared the social and economic impact on their communities. Congressional opponents also contended that the Executive Branch's choice of bases was influenced by improper political considerations. See generally Defense Base Closure and Realignment Commission, Report to the President (1991) ("Commission Report"), p. 1-1.

In 1977, Congress enacted legislation that imposed major restrictions on the use of appropriated funds for major base closures and realignments. See 10 U.S.C. § 2687 (Supp. I 1977) (codifying Pub. L. No. 95-82, § 612, 91 Stat. 358, 379-80 (1977)). The 1977 legislation remained in force without significant changes for more than a decade, and it formed the legal background against which Congress designed the Act at issue in this case.

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

The 1977 legislation refrained from imposing substantive restrictions on the authority of the Executive Branch to close or realign domestic military installations. However, the procedural requirements of the legislation -- in particular, the requirement that the Department of Defense comply with NEPA, and the concomitant threat of protracted NEPA litigation -- made it effectively impossible to carry out significant base closures or realignments without further enabling legislation by Congress. See Commission Report, p. 1-1; see also H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) ("1988 Conference Report"), reprinted in 1988 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N.") 3403.

B. The 1988 Act

Congress first broke the stalemate over domestic military base closures by enacting the Base Closure and Realignment Act of 1988 ("1988 Act"). See Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623,

2627-34 (1988). The 1988 Act is the immediate predecessor to the Act at issue in this case, and many of the basic features of the current Act are taken directly from the 1988 Act.

The 1988 Act assigned the task of identifying unnecessary military bases to an independent commission. 1988 Act §§ 201(1), 203(b)(1)-(2). The commission's recommendations were presented to the Secretary of Defense for his approval or disapproval. Id. §§ 201(1), 202. If the Secretary approved the commission's recommendations, Congress was empowered to override his decision by passing a joint resolution of disapproval within a 45-day period. Id. §§ 202(b), 208.

The 1988 Act's provision for direct Congressional review of the Secretary's decision was conceived as an alternative to the procedural barriers of the 1977 legislation (see p. 4, supra), and those barriers were eliminated by the 1988 Act. In particular, the 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA, thus removing the threat of disabling NEPA litigation. Id. § 204(c)(1).[1] The House and Senate conferees endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts," but restricted NEPA's applicability out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base

[1]In 1985, in the course of revising the 1977 legislation, Congress had omitted the 1977 legislation's NEPA provision. See Pub. L. No. 145, § 1202(a), 99 Stat. 716 (amending 10 U.S.C. § 2687). However, NEPA continued to apply to the base closure process of its own force, thus requiring further Congressional action to free base closures from NEPA review.

closures * * * ." 1988 Conference Report at 23, 1988 U.S.C.C.A.N. 3403.

The 1988 Act led to the closure or realignment of 145 domestic military installations. Predictably, dissatisfied parties brought suit to block several base closures. The suits were dismissed on the grounds that the plaintiffs lacked standing and that the base closure decisions were committed to agency discretion by law. See National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990); People ex rel. Hartigan v. Cheney, 726 F. Supp. 219 (C.D. Ill. 1989).

C. The 1990 Act

1. The 1988 Act was not a permanent mechanism for closing and realigning military installations, but rather a one-time exception to the restrictions of the 1977 legislation. In 1990, Congress established a longer-term program for closing unneeded bases by enacting the Defense Base Closure and Realignment Act of 1990, the Act at issue in this case. Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808-19. In framing the 1990 Act, Congress insisted on preserving the basic structure of the 1988 Act, stating that "a new base closure process will not be credible unless the 1988 base closure process remains inviolate." H. R. Rep. 665, 101st Cong., 2d Sess. 342 (1990) ("1990 House Report"), reprinted in 1990 U.S.C.C.A.N. 2931, 3068. The Act therefore continues the cooperative relationship between the executive and legislative branches undertaken in 1988, and once again suspends the procedural barriers to base closures put in place before 1988.

The 1990 Act is intended to govern three rounds of base closures in 1991, 1993, and 1995. The Act establishes an independent Defense Base Closure and Realignment Commission to meet in each of these years. Act § 2902(a), (e). The Act requires the Secretary of Defense to provide the Commission with a six-year force structure plan that assesses national security threats and the force structure needed to meet them. Id. § 2903(a)(1), (2). The Act also requires the Secretary to formulate criteria to be used in identifying bases for closure or realignment. The Secretary is required to publish the criteria in the Federal Register for notice and comment, and present them to Congress for legislative review. Id. § 2903(b); see 56 Fed. Reg. 6374 (Feb. 15, 1991) (final criteria).

For the 1991 round of base closures, the Act required the Secretary to prepare recommendations regarding base closures and realignments, based on the force structure plan and final criteria, and to present the recommendations to the Commission by April 15, 1991. Act § 2903(c)(1). The Act then charged the Commission with reviewing the Secretary's recommendations and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. Id. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations. Id. § 2903(d)(1). The Act authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force-structure plan and final criteria. Id. § 2903(d)(2)(B). The Act also requires the Comptroller General,

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

The Commission's recommendations have no independent legal effect under the Act. Instead, the Act provides for the Commission's recommendations to be presented to the President for his review. Act § 2903(e). The President may approve or disapprove the Commission's recommendations and must transmit his decision to the Commission and Congress. Id. § 2903(e)(2), (3). If the President disapproves the recommendations, the Commission is required to prepare a revised set of recommendations. Id. § 2903(e)(3). If the President does not approve the revised recommendations, the base closing process for that year terminates. Id. § 2903(e)(5).

If the President approves the Commission's original or revised recommendations, Congress has 45 legislative days to pass a joint resolution disapproving the Commission's recommendations. Act § 2904(b), 2908. If such a resolution is enacted, following presentment to the President, the Secretary of Defense may not close the bases approved for closure by the President. Id. § 2904(b).

Under the 1990 Act, as under the 1988 Act, direct Congressional oversight replaces the procedural requirements imposed by pre-1988 base closure legislation (see p. 4, supra). The 1990 Act thus authorizes the Secretary of Defense to close or realign military installations "without regard to" the 1977 base closure

statute and related legislation. Act § 2905(d). And like the 1988 Act, the 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in carrying out [the Act]." Id. § 2905(c)(1). The Act authorizes a narrowly limited class of NEPA suits involving post-decisional steps taken to implement the base closure decisions, but it prohibits such suits from contesting the closure decisions themselves, and it subjects the suits to a strict 60-day statute of limitations. Id. § 2905(c)(2)-(3).

II. The Present Litigation

A. The Decision to Close Loring

In April 1991, as required by the Act, the Secretary of Defense issued his list of recommended domestic base closures and realignments. See 56 Fed. Reg. 15184 (April 15, 1991). In all, the Secretary recommended the closure or realignment of 72 military installations, including 20 Air Force bases. See id. at 15240-70. Among the Air Force bases recommended for closure was Loring. See id. at 15252.

The Commission reviewed the Secretary's recommendations. The Commission conducted public hearings in which it heard testimony from Department of Defense officials, legislators, and other experts. App. 13; see Commission Report at 4-1, G-1 to G-2. The Commissioners visited the major facilities recommended for closure, including Loring. Id. at 4-1, H-1. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. The GAO forwarded a report on

the Secretary's recommendations to the Commission and assisted the Commission in obtaining, verifying, and reviewing data. Id. at 3-1 to 3-2.

With one exception, the Commission concluded that the Secretary's recommendations regarding Air Force facilities satisfied the standards set by the Base Closure Act. Id. at 5-31 to 5-45. The Commission specifically concurred with the Secretary's recommendation that Loring be closed. Id. at 5-37. In all, the Commission recommended to the President that 34 installations be closed and 48 be realigned. Id. at vii-viii.

On July 10, 1991, the President approved all of the recommendations of the Commission, including the recommended closure of Loring. 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's decision, the House and Senate Armed Services Committees held hearings on the recommendations. Three Commissioners testified at the hearings, as did Air Force officials and interested parties from the affected communities.

On July 30, 1991, the House entertained a proposed resolution to disapprove the Commission's recommendations. 137 Cong. Rec. H6006 (daily ed. July 30, 1991). The resolution was co-sponsored by one of the current plaintiffs, Representative Snowe of Maine. During the course of the ensuing floor debate, Representative Snowe presented a variety of alleged errors in the process by which Loring was chosen for closure, and she urged the House to block the closure of Loring on those grounds. See id. at H6012-H6020. Nonetheless, the House rejected the proposed resolution of disapproval

by a vote of 364 to 60, thereby requiring the Secretary of Defense to proceed with the closures and realignments. See id. at H6039.

B. The Present Suit and the District Court's Rulings

1. The present suit was filed in December 1991, almost five months after the House of Representatives rejected the proposed resolution of disapproval. The plaintiffs alleged that the Secretary of Defense, the Secretary of the Air Force, and the Commission violated "the procedural and substantive safeguards and requirements set forth the Base Closure Act" in a number of respects. App. 19, 22 (¶¶ 68, 70).

In Count I of the complaint, the plaintiffs claimed that the Air Force failed to adhere to the force-structure plan and "deviated substantially from the base closure criteria"; failed to apply the selection criteria "equally, fairly and objectively"; acted "arbitrarily and capriciously" in applying the selection criteria to Loring and a rival facility (Plattsburgh AFB); improperly considered an unapproved selection criterion; and failed to supply relevant information to the GAO and Congress. Id. at 14-20 (¶¶ 61-68). In Count II, the plaintiffs alleged that the Commission committed many of the same asserted errors and also failed to comply with the Act's public-hearing requirement. Id. at 22 (¶ 70). Based on these allegations, the plaintiffs asked the district court to enjoin the Secretary of Defense and the Secretary of the Air Force from carrying out their statutory obligation under the Act to close Loring. App. 21, 23. The plaintiffs' claims were based solely on the statutory requirements imposed by the Base Closure Act; although the plaintiffs make several references in

their present brief to due process concerns, the plaintiffs did not present any constitutional, as opposed to statutory, claims below.

2. In February 1992, the government moved to dismiss the suit on the ground, inter alia, that judicial review of the plaintiffs' claims is implicitly precluded by the Act itself. In May 1992, the district court granted the motion to dismiss with respect to most of the claims in the complaint, allowing the plaintiffs to proceed with only "a small category of claims." App. 43.

With one exception, the court dismissed all the claims against the Secretary of Defense and the Secretary of the Air Force (Count I). App. 40-41. The court allowed the plaintiffs to proceed only on the allegation that the Secretary of Defense failed to provide the GAO, Congress, and the Commission with all of the information used in preparing the Department's recommendations. Id. at 41-42. The court determined that all of the other claims against the Secretary of Defense and the Secretary of the Air Force were unreviewable because those claims would require the court to "reevaluate the basis for the Secretaries' decision to close Loring and the relative importance of such data." Id. at 40. The district court also dismissed most of the plaintiffs' claims against the Commission (Count II) for the same reasons. App. 42. The court allowed the plaintiffs to proceed only on the claim that the Commission had not complied with the Act's public-hearing requirement. Id. at 43.

3. The following month, the Supreme Court issued its decision in Franklin. Franklin is central to this appeal, and we describe it in detail below. For present purposes, it is sufficient to note

two holdings in Franklin that bear on this case. First, the Supreme Court held that the President is not an "agency" for purposes of the Administrative Procedure Act and hence is not subject to judicial review under the APA on any grounds other than constitutional claims. 112 S. Ct. at 2775-76. Second, the Supreme Court held that the actions of the Secretary of Commerce in preparing a recommendation for the President on the allocation of House seats under the 1990 census did not constitute "final agency action," and hence were not subject to judicial review under the APA, because the Secretary's recommendations had no effect until and unless they were approved by the President. Id. at 2773-75.

Following the Supreme Court's decision in Franklin, the government moved for summary judgment in this case. The government argued that Franklin forecloses judicial review of the plaintiffs' remaining claims in this case. The government also argued that even if judicial review were not otherwise barred, the plaintiffs' remaining claims are legally and factually without merit.

In September 1992, the district court granted the government's summary judgment motion on the basis of Franklin and dismissed the remainder of the plaintiffs' suit. App. 47-60. The district court first noted that "substantive decisions made under the Base Closure Act are not subject to judicial review under the APA because such decisions are made by the President and, therefore, are not agency action" under Franklin. App. 48. Then, turning to the actions of the Department of Defense and the Commission preceding the President's decisions, the court explained (App. 58):

> Under the Base Closure Act, the President is not required to submit the Commission's recommendations to Congress. In fact, under the Base Closure Act, the President has even greater discretion than in the case of the census in Franklin. Under the Constitution, the President cannot halt the taking of the census whereas, under the Base Closure Act, the President has the power to terminate the base closure process by not transmitting an approved list of recommendations to Congress. Because the President is not required to transmit the Commission's recommendations to Congress, the recommendations carry no direct consequences for base closure and, therefore, are not final agency action.

The plaintiffs argued, inter alia, that "Franklin precludes only substantive challenges to agency action and not claims that an agency followed improper procedures." App. 59. The district court explained that "[t]his distinction is flawed because under Franklin, the finality of an agency's action does not turn on the nature of the challenge to it." Id. The court pointed out that the action of the President is the only final action under the Base Closure Act, and "[p]ermitting judicial review of an intermediate step in the process, even on purely procedural grounds, would be inconsistent with Franklin and would ignore the limitation imposed by the APA." Id.

III. The Specter Litigation

At the same time that this case has been proceeding in this Circuit, a similar legal challenge involving the closure of the Philadelphia Naval Shipyard has been proceeding in the Third Circuit in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992). Because the Specter litigation is relevant to the legal issues in this case, and because the district court here relied on Specter in its initial, pre-Franklin ruling, we briefly summarize the course of that litigation.

The plaintiffs in Specter brought suit in July 1991, making broadly similar allegations and seeking similar injunctive relief with respect to the planned closure of the Philadelphia Naval Shipyard. The district court dismissed the suit in its entirety, on the grounds that judicial review is precluded by the Base Closure Act and the political question doctrine. On appeal, a divided panel of the Third Circuit affirmed the dismissal in part and reversed it in part. A majority of the panel held that substantive challenges to base closure decisions could not be entertained, but that strictly procedural challenges based on non-compliance with the Act's procedural requirements were subject to judicial review. 971 F.2d at 945-53. In dissent, Judge Alito took the position that the Act implicitly forecloses judicial review of all claims arising under the Act, procedural as well as substantive. 971 F.2d at 956-61.

Two months after the Third Circuit issued its decision in Specter, the Supreme Court decided Franklin. The government petitioned for certiorari in Specter, asking the Supreme Court to vacate the Third Circuit's judgment and remand for further consideration in light of Franklin. The Supreme Court granted the government's petition in November 1992 and remanded the case to the Third Circuit, which has set the case for reargument on February 24, 1993.

SUMMARY OF ARGUMENT

1. The district court correctly concluded that this suit is barred under the Supreme Court's recent decision in Franklin. Franklin makes clear that the Department of Defense and the Base Closure Commission are not engaging in "final agency action," and hence are not subject to review under the APA, because they are merely preparing recommendations for the President to accept or reject in his discretion. The only arguably "final" action in this case is the action of the President, and under Franklin, the President's actions are not subject to APA review because the President is not an "agency" under the APA. Although the plaintiffs make a number of attempts to distinguish Franklin, they never attempt to square their position with the actual terms of Franklin's finality test, nor can they. Their purported distinctions are either illusory or irrelevant, and none of the pre-Franklin or post-Franklin lower court decisions that they cite casts any doubt on the correctness of the district court's decision here.

2. If this Court should conclude that the suit is not barred under Franklin, the judgment below should nonetheless be affirmed on the alternative ground that the Base Closure Act itself implicitly precludes judicial review of the plaintiffs' claims. Under the governing Supreme Court precedents, the general presumption in favor of judicial review of agency actions is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984). Here, the structure,

policies, and legislative history of the Base Closure Act all demonstrate that judicial review of the base closure process would disserve Congress's overriding goals. The procedural character of the plaintiffs' claims, far from undermining this conclusion, actually reinforces it, for one of the primary goals of the Base Closure Act is to eliminate the procedural obstacles and threat of procedural litigation that frustrated previous attempts to close obsolete bases. The case for preclusion of judicial review is further strengthened by the insoluble remedial problems that would arise if courts attempted to intervene in the base closure process, as the plaintiffs demand, to "correct" procedural errors after the President and Congress have made their final decisions about which bases to close.

ARGUMENT

I. The Contested Actions of the Department of Defense and the Base Closure Commission under the Base Closure Act Are Not "Final Agency Action" under Franklin

Absent specific statutory authorization, only "final agency action for which there is no other adequate remedy in a court" is subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 704. This requirement of "final agency action" comprises two distinct, subsidiary requirements: the action in question must be "final," and it must be the action of an "agency."

The Supreme Court's decision in Franklin addresses both of these subsidiary requirements in ways that are critical to this case. First, Franklin addresses whether actions by an agency involving non-binding recommendations to the President are "final." Second, Franklin addresses whether the President is an "agency."

For the reasons set forth below, the resolution of these issues in Franklin requires the affirmance of the dismissal in this case.

Although the plaintiffs argue at length that Franklin does not control this case, they spend remarkably little time explaining what Franklin actually holds, and what little they do have to say is seriously inadequate. We therefore begin our response with a detailed analysis of the Supreme Court's reasoning and decision in Franklin (pp. 18-20, infra). We then explain why Franklin is controlling and why the plaintiffs' efforts to distinguish this case from Franklin are unavailing (pp. 20-30, infra).

A. The Supreme Court's Decision in Franklin

Franklin involved a challenge to the reapportionment of the House of Representatives under the 1990 decennial census. By statute, the Secretary of Commerce is directed to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). The Secretary is thereafter directed to provide the President with the tabulation of total population by States, as required for reapportionment. Id. § 141(b). After receiving the Secretary's report, the President "shall transmit to the Congress a statement showing the whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under a specified formula. 2 U.S.C. § 2a(a). By statute, each state is entitled to the number of Representatives shown in the President's statement. Id. § 2a(b). See generally Franklin, 112 S. Ct. at 2771 (discussing apportionment statutes).

In Franklin, the state of Massachusetts brought suit to challenge the allocation of overseas federal employees under the 1990 census. 112 S. Ct. at 2773. Massachusetts sued the Secretary of Commerce and the President, among others, asserting that the method used to allocate overseas employees was arbitrary and capricious under the APA and was unconstitutional under Article I. Id. at 2770, 2773. The Supreme Court entertained the constitutional challenge, but held that the APA challenge could not be entertained because none of the actions at issue constituted "final agency action" for purposes of 5 U.S.C. § 704. Id. at 2773-76. The Court held that the actions of the Secretary were not "final" agency actions, while the actions of the President were not subject to review under the APA because the President is not an "agency." Id.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. In Franklin, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. Id. at 2773-74. "Because the Secretary's report to the President carries no direct consequences," the Court concluded that "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." Id. at 2774 (citations omitted).

The Court then declined to extend the APA's definition of "agency" to the President, "[o]ut of respect for the separation of powers and the unique constitutional position of the President." 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." Id. at 2775-76. The Court acknowledged that "the President's actions may still be reviewed for constitutionality," but held that his actions nonetheless are not subject to judicial review "under the [standards of the] APA." Id.

B. The Impact of Franklin on this Case

The single most striking thing about the plaintiffs' discussion of Franklin (at 13-25) is their reluctance to deal with Franklin's holding regarding the finality of agency action under the APA. According to the plaintiffs (at 25), "[t]he fundamental holding of the Franklin case [is] that the decisions of the President are not reviewable under the APA." The plaintiffs virtually ignore Franklin's other holding, regarding whether agency action is "final" under the APA. Nowhere in their brief do they bother to set forth Franklin's standards for determining finality, much less apply those standards directly to this case. This reluctance to come to terms with Franklin's finality holding is understandable, because, when that holding is kept clearly in mind, the correctness of the district court's decision here is readily apparent.

1. As noted above, the "core question" in deciding whether an agency action is "final" under Franklin is "whether the agency has completed its decisionmaking process, and whether the result of

that process is one that will directly affect the parties." 112 S. Ct. at 2773 (emphasis added). The base closure recommendations of the Commission, like the census report of the Secretary in Franklin, are not binding on the President and do not have any "direct consequences" (Franklin, 112 S. Ct. at 2774), since they take effect only if the President exercises his discretion to accept them. If the President determines that the Commission's recommendations are unacceptable to him, either in whole or in part, he has complete liberty to reject the recommendations and return them to the Commission for further consideration. Act § 2903(e)(2). And in the unlikely event that the Commission fails to take adequate account of his concerns when it prepares a revised set of recommendations, he is free to reject the recommendations again and terminate the base closure process. Id. §§ 2903(e)(3), 2903(e)(5). Accordingly, the Commission's report, and the steps taken by the Commission leading up to the report, do not constitute "final" agency action under Franklin.

The same conclusion applies a fortiori to the actions of the Department of Defense. The recommendations of the Secretary of Defense to the Commission, and the prior recommendations of the Air Force and the other branches of the armed services to the Secretary, play an even more preliminary and non-final role in the base closure process than the recommendations of the Commission (see pp. 7-8, supra). Indeed, the plaintiffs themselves make virtually no effort to characterize the actions of the Department of Defense as "final" under Franklin, devoting their efforts almost exclusively to the actions of the Commission instead.

2. While the plaintiffs shy away from acknowledging the terms of Franklin's finality test or applying it to this statute, they do make a series of attempts to distinguish the statutory scheme in Franklin from the one at issue in this case. As we now show, these efforts are uniformly unsuccessful.

First, the plaintiffs suggest (at 18-19) that Franklin is distinguishable because the statute in Franklin imposed only substantive requirements on the Secretary of Commerce and the Secretary's actions were not being challenged on procedural grounds, while the Base Closure Act imposes specific procedural requirements on the Department of Defense and the Commission and the plaintiffs are now making only procedural challenges. Unfortunately for the plaintiffs, this "distinction" between substantive and procedural challenges is irrelevant to the reasoning in Franklin, as the district court correctly pointed out (App. 59). The Court's analysis in Franklin turns on whether the agency action at issue has a "sufficiently direct and immediate" impact, 112 S. Ct. at 2773 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967)), not on whether a plaintiff's challenge to the action can be characterized as "procedural" rather than "substantive." Whether the agency action is final and why the action is being challenged are two entirely distinct questions, and the answer to one does not depend on the answer to the other, as the district court recognized.

Under the plaintiffs' reasoning, if an agency action were challenged on both substantive and procedural grounds, it could simultaneously be "non-final" (as to the substantive claim) and

"final" (as to the procedural claim). The illogic of such a result is self-evident. Under Franklin and 5 U.S.C. § 704, an agency action is either final or non-final. It cannot be both at the same time.

Second, the plaintiffs attempt to contrast the relationship between the Secretary of Commerce and the President in Franklin, on the one hand, with the relationship between the Commission and the President under the Base Closure Act, on the other. The plaintiffs argue (at 19-20) that the Commission is "independent" of the President and that the President has less authority over the Commission than he has over the Secretary of Commerce in Franklin. In particular, the plaintiffs argue that President's discretion is limited because he cannot close a base unless the Commission recommends the closure.

This line of argument fundamentally misconstrues the relationship between the President and the Commission under the Act. As we have already explained, while the President cannot directly revise or amend the Commission's recommendations, the Base Closure Act expressly authorizes him to reject them altogether if he disapproves of them in whole or in part, and if the Commission does not take adequate account of his views in preparing a revised list of recommendations, the Act further authorizes him to reject the list a second time and thereby terminate the base closure process altogether. Act § 2903(e)(2), (3), (5). Thus, both legally and practically speaking, the Act vests the President with considerable power over the ultimate selection of bases for closure and realignment -- far more explicit power, it should be noted, than in

Franklin, where the most that the Supreme Court could say was that the census statute did not "expressly require[] [the President] to adhere to the policy decisions reflected in the Secretary's report." 112 S. Ct. at 2775. The critical point is that here, just as in Franklin, the agency's recommendations must be approved by the President before they have any effect on the parties.[2]

Third, the plaintiffs argue (at 20-21) that the Base Closure Act, in supposed contrast to the census statute in Franklin, "does not leave solely to the President what advice and data he can consider and use." But while the Act clearly is designed to provide the President with the data relied on by the Commission, nothing in the Act limits the President from relying on other sources of information and advice as well when he reviews the recommendations presented by the Commission. The President is free under the Act to consult his defense and domestic policy advisors, other federal agencies, and members of Congress, among others, in evaluating the Commission's recommendations and deciding whether to accept them. Whether he chooses to engage in these kinds of consultation is, of course, for him alone to decide. But the fact is that nothing in the Act restricts the President, as the plaintiffs imply, to the information and views placed before him by the Commission itself.

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[2]In Franklin, the Supreme Court noted that "Congress thought it was important to involve a constitutional officer [the President] in the apportionment process," and that this reinforced the conclusion that the President played more than a "ministerial" role under the census statute. 112 S. Ct. at 2775. Here, given the President's constitutional role under Article II as Commander-in-Chief, Congress obviously had a far greater need to involve the President in the base closure process, and hence the argument is even stronger here than in Franklin that the President's statutory role is more than "ministerial."

Fourth, the plaintiffs argue (at 21-22) that the census figures in Franklin were subject to change until the President finally approved them, and hence "there was no substantive decision which could be reviewed until the President transmitted the apportionment to Congress." But precisely the same thing is true here. The list of bases to be closed or realigned is subject to change until the President finally approves the list, and hence there is no final action until the President transmits to Congress his notification of approval. Indeed, even then the action is not necessarily final, since the Base Closure Act (in contrast to the census statute in Franklin) provides a special procedural mechanism for Congress to override the President's decision and prevent the closures and realignments from taking place.

Fifth, the plaintiffs argue (at 22-23) that while the report of the Secretary of Commerce in Franklin was characterized by the Supreme Court as an "unusual candidate" for "agency action" under the APA, the report of the Commission under the Base Closure Act bears more of the traditional indicia of agency action. As the district court pointed out, however (App. 58-59), this argument confuses the question of "agency action" (which is not at issue here) with the question of "final agency action" (which is). Franklin rejected judicial review of the actions of the Secretary of Commerce not because those actions did not constitute "agency action," but because they were not "final agency action." So too, here, the actions of the Commission are not subject to APA review because, while they undoubtedly are "agency action," they simply are not final. Whether the actions of the Commission look more

like conventional "agency actions" than those of the Secretary of Commerce in Franklin is simply irrelevant.

Finally, the plaintiffs point to two post-Franklin district court decisions that are said to demonstrate why Franklin does not affect this case. The first case, County of Seneca v. Cheney, 806 F. Supp. 387 (W.D.N.Y. 1992), appeal pending, No. 92-6296 (2d Cir.), also involves the closing of a domestic military base. But the plaintiffs omit a critical difference between Seneca and this case: the base closure in Seneca was not carried out under the Base Closure Act and therefore did not involve the presentation of Defense Department recommendations to the Commission or Commission recommendations to the President. See 806 F. Supp. at 392, 394. As a result, the government had no basis in Seneca for the kind of finality argument that is being presented here, and nowhere in the opinion in Seneca does the district court address the issue of finality or Franklin.

The other district court decision cited by the plaintiffs in this regard is Colorado Environmental Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992). The government respectfully disagrees with the decision in Colorado, which has not yet been the subject of appellate review. But Colorado does not assist the plaintiffs' finality arguments here in any event, because the statutory scheme at issue in Colorado (as interpreted by the district court there) gave more finality to the agency recommendation than the Base Closure Act gives to the recommendations of the Commission. According to the district court in Colorado, "[o]nce the [Secretary of the Interior's] recommendations are sent

to the President * * * , there will be no opportunity for any other recommendations by the Secretary," and "[t]herefore * * * the challenged agency action is final." 803 F. Supp. at 369 (emphasis added). Here, in contrast, there is an "opportunity for * * * other recommendations," because the President is free to reject the Commission's initial recommendations and require the Commission to prepare revised ones. Thus, even under the reasoning of Colorado, the recommendations of the Commission would not constitute final agency action.

3. After completing their efforts to distinguish Franklin, the plaintiffs go on to argue (at 26-32) that the district court's application of Franklin conflicts with "well-established precedent" involving judicial review of administrative action under other federal statutes. But with one exception, the "well-established precedents" invoked by the plaintiffs do not involve the issue of "final agency action" under the APA.[3]

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[3]For example, the plaintiffs claim (at 26-27) that the decision below conflicts with this Court's NEPA decision in Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983). But the finality of agency action in Watt was never at issue, as even a casual review of the opinion shows. The passages from Watt cited by the plaintiffs involve an entirely different legal issue -- whether the plaintiffs in Watt were faced with the kind of immediate, irreparable injury that would support a preliminary injunction. See 716 F.2d at 951-52.

Even less relevant is Maple Leaf Fish Co. v. United States, 762 F.2d 86 (Fed. Cir. 1985), which the plaintiffs cite (at 27-29) to establish a conflict between the decision below and the law governing judicial review of "escape clause" controversies under Section 201 of the Trade Act of 1974. Not only did Maple Leaf Fish not address whether the agency actions at issue there constituted "final agency action" under the APA, but it actually held that it lacked jurisdiction (for different reasons) to review the Section 201 claim before it. See 762 F.2d at 90.

The only cases cited by the plaintiffs that do involve finality under the APA are those (at 29-30) reviewing EPA designations of "nonattainment areas" under the Clean Air Act. Unfortunately for the plaintiffs, those decisions all turn on the fact that the EPA's designation of nonattainment areas has, in the Ninth Circuit's words, "immediate and substantial consequences" for regulated businesses. Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 808 (9th Cir. 1980); accord, Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1306 (7th Cir. 1983) (nonattainment designation "triggers definite and grave consequences"); United States Steel Corp. v. EPA, 595 F.2d 207, 212 (5th Cir.), modified, 598 F.2d 915 (1979) (relying on fact that designation "necessarily bring[s] [the EPA's] Offset Ruling [requiring 'offsets' for new emissions] into play"); PPG Industries, Inc. v. Costle, 630 F.2d 462, 467 (6th Cir. 1980) (same). Here, in contrast, the recommendations of the Commission do not have "immediate and substantial consequences" for anyone. To the contrary, they have no effect whatsoever until and unless the President exercises his unqualified discretion to accept them. The Base Closure Act thus differs fundamentally from the provisions of the Clean Air Act invoked by the plaintiffs.

4. Moving further afield, the plaintiffs invoke what they call (at 13) the APA's "strong presumption of reviewability" as a basis for resolving the finality issue in this case. More specifically, the plaintiffs invoke the general rule that "judicial review of a final agency action * * * will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbott Laboratories, 387 U.S. at 140.

For reasons explained below, it is doubtful whether this presumption is applicable to the Base Closure Act (see pp. 31-32, infra). But even if it is applicable, it is irrelevant to the specific issue here -- namely, whether the agency actions in question are "final" for purposes of the APA. By its own terms, Abbott Laboratories' presumption in favor of "judicial review of a final agency action" only comes into play once it is determined that the actions are in fact final. Invoking the presumption before the issue of finality has been resolved merely begs the question.

5. The plaintiffs devote a considerable amount of effort toward demonstrating that the actions at issue in this case are those of the Department of Defense and the Commission, rather than those of the President. As the plaintiffs themselves concede, Franklin squarely precludes judicial review of Presidential actions under the APA on all but constitutional grounds (see p. 20, supra). It would thus be fatal to the plaintiffs' cause if their claims were regarded as challenges to the actions of the President.

The plaintiffs' argument that they are not contesting Presidential action does them no good in the end, since if the suit is regarded instead solely as one against the Department of Defense and the Commission, it is barred on finality grounds under Franklin for the reasons given above. But as the Third Circuit pointed out in Specter, to characterize a suit like this one as nothing more than a suit against the Department of Defense and the Commission is to ignore the true dimensions of the litigation and the impact of

the suit on the President's closure decision. See Specter, 971 F.2d at 945.

The plaintiffs claim (at 15) that "the Specter court implicitly found that * * * it was not the actions of the President which were to be subject to judicial review" (emphasis added). This reading of Specter's "implicit" reasoning is curious, to say the least, because it is explicitly refuted by the majority opinion:

> While the statutory * * * violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense * * *, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief[.] [I]t is the implementation of the President's decision that we have been asked to enjoin. Thus, in at least one sense, we are here asked to review a presidential decision. [971 F.2d at 945 (emphasis added).]

Thus, to the extent that the plaintiffs effectively are seeking relief from Presidential actions under the APA, they are barred by Franklin's holding that the President is not an "agency" under the APA.[4]

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[4]In Specter, the Third Circuit held that even if the President were not subject to suit under the APA, he could be subjected to suit on the basis of "common law" principles of judicial review. See 971 F.2d at 944-45. The plaintiffs here make no effort to rely on this "common law" theory, and rightly so, for Franklin makes clear that there is no general "common law" basis for challenging the President's exercise of his statutory authority. The only kind of non-APA judicial review recognized in Franklin is a suit challenging the constitutionality of Presidential actions (see 112 S. Ct. at 2776), and the constitutionality of the government's conduct is not at issue in this case. Franklin's concerns for "the separation of powers and the unique constitutional position of the President," 112 S. Ct. at 2775, would be rendered meaningless if plaintiffs could perform an end run around the APA simply by characterizing their suit as an action for "common law" judicial review.

II. Alternatively, Judicial Review Is Precluded by the Base Closure Act Itself

If this Court agrees with us that the challenged actions of the Department of Defense and the Commission in this case are not "final agency action" under Franklin, the Court need go no further. However, if the Court does not agree that Franklin controls this case, the judgment below should be affirmed on an alternative ground -- namely, that the Base Closure Act itself precludes judicial review. The APA expressly withholds jurisdiction to review agency action "to the extent that * * * [other] statutes preclude judicial review." 5 U.S.C. § 701(a)(1). As we now show, the structure, policies, and legislative history of the Base Closure Act are fundamentally inconsistent with judicial intervention in the base closing process, and the Base Closure Act therefore should be held to preclude judicial review.

A. Standards for Preclusion of Review under the APA

As noted above, the plaintiffs repeatedly invoke the presumption that final agency actions are subject to judicial review. At the outset, we seriously question whether that presumption has any applicability in the present setting, for the presumption "runs aground when it encounters concerns of national security * * * ." Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1988). Here, concerns of national security are directly implicated, for the plaintiffs are seeking to prevent the Secretary of Defense from carrying out a Presidential decision regarding America's military base structure. Moreover, unlike cases like Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), this case involves a statute that does not directly regulate individuals and

does not purport to grant or withdraw individual rights and benefits. Thus, there are good reasons to dispense with the presumption altogether, if not to start from an opposite presumption.

In any event, "[t]he presumption favoring judicial review of administrative action is just that -- a presumption." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). While the Supreme Court has said on various occasions that the presumption may be overcome only by "a showing of 'clear and convincing evidence'" (Abbott Laboratories, 387 U.S. at 141), the Court "has * * * never applied the 'clear and convincing evidence' standard in the strict evidentiary sense * * * ." Block, 467 U.S. at 350. In particular, the Court has never required the existence of an explicit statutory limitation of judicial review. Instead, "the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 351 (citation omitted). And this "fairly discernible" Congressional intent may be found in a variety of sources.

First, the presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block, 467 U.S. at 349. Second, congressional intent "may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." Id. (citations omitted). Finally, the presumption of reviewability

"may be overcome by inferences of intent drawn from the statutory scheme as a whole." Id. As long as "the congressional intent to preclude judicial review is 'fairly discernible'" from any of these sources (Block, 467 U.S. at 351), judicial review is foreclosed. When measured against these standards, it is manifest that the Base Closure Act precludes judicial review of the base closing process.

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

1. The Base Closure Act strikes a delicate balance between the Executive Branch and Congress, a balance designed to produce a package of base closures that is militarily and politically acceptable to both branches. The Act vests the President with a substantial measure of control over the ultimate selection of bases for closure and realignment. At the same time, the Act provides for direct Congressional involvement and oversight, a process that begins with consultations over the membership of the Commission (Act § 2902(c)(2)), continues through the deliberations preceding the President's decision (e.g., id. § 2902(e)(2)(B)), and culminates in the consideration of a joint resolution of disapproval. As an integral part of this balance between the Executive Branch and Congress, the Act mandates the creation of a single, indivisible "package" of base closures that stand or fall together. See Specter, 971 F.2d at 959 (Alito, J.). The decisionmaking process carried out by the President and Congress under the Act is political in a way that ordinary administrative decisionmaking is not, and it touches on basic issues concerning the makeup of the Nation's defense establishment.

Allowing litigants to contest individual base closures after the President and Congress have jointly agreed on a package of bases to be closed would strike at the heart of this machinery. Two aspects of the Act in particular would be jeopardized by the exercise of judicial review. The first is the Act's elaborate and carefully balanced mechanisms for reconciling the interests of the Executive Branch and Congress, mechanisms that leave no room for judicial involvement. The second is the Act's rigorous insistence on expediting, rather than delaying, the closure of unnecessary bases.

a. The 1990 Act, like its 1988 predecessor, breaks the pre-1988 impasse over domestic base closures through a comprehensive and carefully structured statutory compromise. The Act balances the interests of the Executive Branch and Congress by vesting the Secretary of Defense and the President with substantial authority over the selection of bases for closure and realignment, while creating elaborate mechanisms for Congressional oversight and involvement. See pp. 7-9, supra. This balancing process culminates in the Act's provision for a joint Congressional resolution of disapproval. See Act §§ 2904(b), 2908. By subjecting the President's base closure decision to Congressional approval or disapproval in its entirety, the joint resolution mechanism allows Congress to pass judgment on the base closure process as a whole while preventing a disappointed minority of legislators from defeating a consensus between the two branches.

Allowing private parties to bring judicial challenges to the base closing process would interfere with this carefully structured

mechanism in two basic ways. First, judicial intervention would disrupt the Act's careful balance between the Executive Branch and Congress. And second, permitting recourse to the courts would undermine the statutory role of Congress as arbiter of the base closure process.

The D.C. Circuit addressed judicial review under a statute involving a similarly delicate balance between the Executive Branch and Congress in Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991). In Armstrong, the court held that the Presidential Records Act, 44 U.S.C. §§ 2201 et seq. ("PRA"), precluded judicial review of the President's decision to dispose of certain documents. In a scheme quite similar to the joint resolution of disapproval in the present Act, the PRA required the President to notify the Archivist of the United States before destroying documents. The Archivist would then report to Congress, which could enact legislation to protect the specific documents if it chose.

Although the legislative history of the PRA was unclear, the D.C. Circuit explained that the Act represented a careful political compromise between the desire to preserve Presidential records for later public access, and the separation of powers concern with interfering in the President's day-to-day business. 924 F.2d at 290. The court concluded that "permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." Id. The court therefore held that the PRA impliedly precluded review under 5 U.S.C. § 701(a)(1).

The joint resolution mechanism in the 1990 Act serves the same basic purpose: it gives Congress a specific review mechanism over Executive Branch decisions, but balances that power against other important interests. There is simply no room for judicial intervention in this statutory scheme. Here, as in Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984),

> [t]he lack of any authorization for * * * review at the behest of members of the public, when viewed in the context of * * * the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.

The Act plainly does not contemplate that a few legislators, whose efforts to keep a particular base open have been overwhelmingly defeated in Congress, can request federal courts to dictate a different result to the President and Congress. Instead, the Act provides a political and legislative remedy, designed to serve as the exclusive basis for reviewing the Department of Defense's actions and the Commission's recommendations.

In addition, the Act is designed to create a single "package" of base closures and realignments, to be approved or disapproved by Congress in its entirety. See Specter, 971 F.2d at 959 (Alito, J.). If litigants can break up this package by contesting individual closures in the courts, one of the basic legal and political premises of the Act will be defeated.

b. In addition to reflecting a careful balance of executive and legislative interests, the Act reflects Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work." 1990 House Report at 384, reprinted in 1990 U.S.C.C.A.N. at 3077 (emphasis added). Congress thus framed the

Act to "considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 707 (1990) ("1990 Conference Report"), reprinted in 1990 U.S.C.C.A.N. 3110, 3259 (emphasis added). In particular, Congress established a rigid series of deadlines and time limits to expedite the base closure process.

Under the Act, the Secretary of Defense was required to submit his closure recommendations to the Commission by April 15, 1991. Act § 2903(c). The Commission was then required to hold public meetings and deliberations, conduct necessary base visits and other information gathering, and submit its final report to the President by July 1, 1991, ten weeks later. Id. § 2903(d). The President, in turn, was required to make his decision within two weeks, by July 15, 1991. Id. § 2903. Finally, the Act allowed Congress 45 days in which to disapprove the President's decision, under streamlined procedures designed to eliminate ordinary legislative delays, after which time the decision would take effect automatically. Id. § 2904(b), 2908.

Allowing private parties to drag the base closure process through a series of judicial challenges, with the protracted delays inherent in such litigation, would be directly antithetical to this expedited process. Indeed, the legislative history of the Act specifically recognizes the role of private litigation in the delays that had undermined pre-1988 base closure efforts. Among the reasons given by the Conference Report for "a new base closure process" was the fact that "under existing law," "closures and

realignments take a considerable period of time and involve numerous opportunities for challenges in court." Conference Report at 705, reprinted in 1990 U.S.C.C.A.N. at 3257. Judicial review has been held to be precluded under other statutes where the statutory scheme placed a premium on speed. See, e.g., Morris v. Gressette, 432 U.S. 491, 503-504 (1977); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985); Wheaton Industries v. EPA, 781 F.2d 354, 356-57 (3d Cir. 1986).

One provision of the Base Closure Act, in particular, confirms the critical importance of expedition and demonstrates Congress's general intent to preclude judicial review. As noted above (see p. 9, supra), the Act expressly authorizes a very narrow class of NEPA suits directed at the implementation of base closures, rather than at the selection of bases for closing, but it imposes a strict 60-day time limit on the filing of such suits. Act § 2905(c)(2)-(3). Given this provision, it is striking that the Act contains no time limit for the kind of suit brought by the plaintiffs in this case, a suit that goes directly to the heart of the base closure process. Why would Congress impose an exceptionally short time limit on a class of suits that are not directed at the underlying selection of bases for closure, while imposing no time limit whatsoever on suits like this one that place the entire selection process in jeopardy? The answer is obvious: Congress never contemplated that the courts would entertain the kind of suit brought by the plaintiffs, and therefore had no need to impose a time limit on such suits. See Specter, 971 F.2d at 960 n.16

(Alito, J.) ("This seems a clear indication that no such suits were contemplated.").

The majority in Specter acknowledged the Act's interest in speed and finality, and it further admitted that judicial intervention before Congress acted on the President's recommendation would fatally compromise this interest. See 971 F.2d at 945-46. But the majority assumed that this interest lapses once Congress has acted. See id. at 948. Nothing could be further from the truth.

Even after Congress has acted, the Act places a continuing premium on expedition and finality -- as shown, for example, by the 60-day time limit just discussed above. Moreover, the Act provides for three successive biennial rounds of base closures (see p. 7, supra), and the finality of each round's decisions is vital to planning for the following round. The delay caused by litigation over the first round will necessarily interfere with subsequent rounds by creating uncertainty for the Department of Defense and the Commission over future base structure and capacity. It will also interfere with the steps necessary to carry out the first round itself, for those steps must be commenced long before closures are finally effected. Finally, as a practical matter, the armed services make countless budgetary, scheduling, and personnel decisions in reliance on the finality of the base closures approved by the President and Congress, and post hoc judicial intervention that reopens the political branches' decisions will directly upset these decisions. In short, judicial review, regardless of when it is conducted, simply cannot be undertaken without jeopardizing the vital interest in speed and finality.

2. The inferences drawn from the structure and policies of the Act are reinforced by the Act's legislative history. The Conference Report on the Act addresses the issue of judicial review in the following terms:

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

1990 Conference Report at 706, reprinted in 1990 U.S.C.C.A.N. at 3258.

The intent to renounce judicial review of the base closing process is manifest in this statement. See Specter, 971 F.2d at 957 (Alito, J.) ("The passage does state quite clearly that there would be no APA review of key decisions in the base closing and realignment process * * * ."). And as a joint declaration of the House and Senate conferees responsible for the final terms of the Act, this statement "carr[ies] greater weight" than other forms of legislative history and "is entitled to great weight in analyzing Congressional intent," especially since the report itself was approved by both Houses. American Jewish Congress v. Kreps, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978); San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268, 1270 (9th Cir. 1986).

The Specter majority concluded that "[a] fair reading" of the Committee Report merely revealed an intent to bar judicial review

"to the extent that there is not yet 'final agency action' to review." 971 F.2d at 949. It is certainly true that lack of finality was one of the concerns underlying the quoted passage, and to that extent, the legislative history reinforces our finality arguments in Part I, supra. But lack of finality cannot have been Congress's only concern. As the Third Circuit itself admitted, the Conference Report proclaims the nonreviewability of actions that "concededly do not fit" within the scope of finality concerns, such as the President's approval or disapproval of the Commission's recommendation and the Secretary of Defense's actions to carry out the President's decision. Specter, 971 F.2d at 949. The Conference Report therefore cannot be written off as merely a pronouncement on finality.

Moreover, Congress subsequently reaffirmed the language of the 1990 Conference Report regarding the unavailability of judicial review when, in November 1991, it enacted the National Defense Authorization Act for FY 1992-1993. See Pub. L. No. 102-190, 105 Stat. 1290 (1991). The National Defense Authorization Act amended the 1990 Act in a variety of respects. See id. § 2821, 105 Stat. 1544-46. However, it did not amend the 1990 Act to authorize judicial review of suits relating to the Act. To the contrary, the conference report stated that "[i]n recommending these amendments to the Base Closure and Realignment Act of 1990, the conferees reaffirm the view, expressed in the [Conference Report] accompanying the [1990 Act], that actions taken under the Act 'would not be subject to the rulemaking and adjudication requirements [of the Administrative Procedure Act] and would not be subject to judicial

review.'" H.R. Conf. Rep. No. 311, 102d Cong., 1st Sess. 638 (1991), reprinted in 1991 U.S.C.C.A.N. 1185 (emphasis added).

The National Defense Authorization Act was passed three weeks after the district court in Specter had dismissed that suit on non-reviewability grounds (see p. 15, supra), and the plaintiffs in Specter had made Congress fully aware of the district court's decision in the interim. See, e.g., 137 Cong. Rec. S17153-70 (daily ed. Nov. 20, 1991) (Sen. Specter). The fact that Congress amended the 1990 Act in other respects following the district court's decision in Specter, but did not make any amendments relating to reviewability, is further confirmation that the 1990 Act precludes judicial review of the present claims. See Block, 467 U.S. at 349; cf. CFTC v. Schor, 478 U.S. 833, 846 (1986).

C. The Procedural Nature of the Plaintiffs' Claims Reinforces the Case for Preclusion of Review

The district court in this case, following the lead of the panel majority in Specter, concluded that the Base Closure Act implicitly precludes judicial review of substantive challenges to base closure decisions, but does not preclude judicial review of procedural challenges arising from the Act's own procedural requirements. See App. 34-36, 40-43. But as we now show, the fact that the plaintiffs are pursuing "procedural" claims does not justify the exercise of judicial review under the Act. To the contrary, the procedural character of the plaintiffs' claims actually reinforces, rather than undercuts, the case for preclusion of review.

1. At the outset, we note that the language of the Conference Report discussing the unavailability of judicial review does not

draw any distinction between substantive and procedural challenges. As already noted, the report says that the actions involved in the base closure process "would not be subject to judicial review" -- period. More fundamentally, the attempted distinction between substantive and procedural litigation ignores the procedural nature of the obstacles to base closures prior to 1988 and the explicit steps taken by the 1988 and 1990 Acts to eliminate such procedural barriers.

As explained above (see pp. 3-4, supra), the primary barriers to the closing of unneeded domestic military installations prior to 1988 were procedural, not substantive. For present purposes, the most important of these barriers was the National Environmental Policy Act, which Congress explicitly made applicable to base closures in 1977. See 10 U.S.C. § 2687(b)(2) (Supp. I 1977). As the Supreme Court has stressed, the obligations imposed on federal agencies by NEPA "are 'essentially procedural'" ones. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)). "NEPA itself does not mandate particular results, but simply prescribes the necessary process" to be followed in considering the environmental impact of agency actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

If Congress were concerned only with precluding substantive challenges to base closure decisions, it would have had no occasion to restrict NEPA actions, since NEPA suits address only the procedures followed by an agency rather than the substantive validity of the agency's decision. But as pointed out above, the 1988 and

1990 Acts do restrict NEPA actions, and indeed foreclose them altogether, by explicitly exempting closure and realignment decisions from the requirements of NEPA. See pp. 5, 9, supra.

The 1988 and 1990 Acts do not restrict the availability of NEPA actions out of a lack of concern for NEPA policies. To the contrary, the 1988 House and Senate conferees specifically endorsed "the NEPA goals of public disclosure and clear identification of potential adverse environmental impacts." 1988 Conference Report at 23, 1988 U.S.C.C.A.N. at 3403. Rather, NEPA actions were restricted out of a "recogni[tion] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures * * * ." Id. In short, Congress recognized that procedural challenges under NEPA could have the substantive effect of impeding or defeating base closures altogether, and Congress acted to foreclose this threat.

Precisely the same kind of threat is presented by the plaintiffs' procedural claims in this case. Even if litigants challenge the decision to close a military installation solely on procedural grounds under the Act, the lesson drawn by Congress from NEPA is that procedural litigation can be as effective as substantive litigation in obstructing the base closure process. If the plaintiffs can maintain the present suit simply by casting their objections in procedural terms, they can accomplish precisely what the 1990 Act and its 1988 predecessor were intended to prevent -- the perpetuation of the base closure impasse through the erection of procedural barriers. Thus, the procedural character of the plaintiffs' claims

in no way diminishes the correctness of the district court's decision.

The majority opinion in Specter dismissed the Base Closure Act's treatment of NEPA claims as ambiguous, on the theory that the Act's explicit disallowance of NEPA suits might just as easily imply Congressional acceptance, rather than disapproval, of other types of procedural claims under the Act. 971 F.2d at 948. This reasoning ignores the special role of NEPA suits in the pre-Act stalemate over base closures. As explained above, NEPA suits were the primary litigation tool for impeding base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977 (see p. 4, supra). It therefore was incumbent on Congress to deal explicitly with NEPA claims when it enacted the Act. Congress faced no similar history of non-NEPA litigation over base closures, and hence had no need to be similarly explicit about such litigation. Indeed, non-NEPA suits based on the Base Closure Act's immediate predecessor, the 1988 Act, had already been held to be nonreviewable (see p. 6, supra), so Congress had good reason to believe that an explicit prohibition on judicial review of non-NEPA claims arising under the Base Closure Act was unnecessary.

2. In an effort to justify its substantive/procedural distinction, the Specter majority emphasized the procedural requirements contained in the Base Closure Act. The majority started from the premise that Congress meant to ensure the procedural integrity of the base closure process, and inferred that judicial review must be available to vindicate that goal. The premise is correct, but the inference is a non sequitur.

It is unquestionably true that when Congress framed the terms of the 1990 Act, one of its major concerns was to ensure the use of fair and unbiased procedures in identifying unneeded domestic military bases. But it simply does not follow that Congress meant for private parties to be able to resort to judicial proceedings to enforce these procedures. This is not a conventional case in which judicial review is the only possible mechanism for overseeing the procedural integrity of agency action. Instead, relief is available from Congress, which is empowered under the Act to disapprove the President's decision for any reasons, including procedural ones. The structure of the Act makes manifest that recourse for errors by the Executive Branch, including procedural errors, lies with Congress rather than with the courts.

It can hardly be claimed that Congress lacks the institutional capacity to review and act on procedural objections. The Act allows Congress 45 legislative days to deliberate over the President's closure decision, during which time both Houses of Congress can -- and in this case, did -- hold hearings, take testimony, and examine witnesses. There is no reason why Congress could not address procedural issues during these hearings and the ensuing floor debates. Indeed, during the deliberations over the proposed joint resolution of disapproval in July 1991, Representative Snowe took to the floor of the House to air procedural and other objections to the selection of Loring (see pp. 10-11, supra). One can only assume that she did so because she thought that the House was capable of acting on those objections.

D. Judicial Remedies for the Plaintiffs' Procedural Challenges Would Fatally Compromise the Act's Policies

The Specter majority, in a portion of its decision adopted by the district court in this case, declined to resolve questions about the appropriate remedy for procedural violations of the Act:

> [A] finding [that the Act has been violated] * * * will not necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all of the surrounding circumstances. Thus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one. * * * Accordingly, it is unwise to speculate about the appropriate form of a remedy without knowing the character of and circumstances surrounding the violation. [971 F.2d at 950 & n.13.]

It will not do, however, to wave aside the remedial issues in this fashion. For a variety of reasons, the procedural claims now being pursued by the plaintiffs cannot be meaningfully redressed without fatally compromising the underlying policies of the Act. The remedial problems that will arise if judicial review is allowed to go forward offer further support for the conclusion that judicial review is precluded by the Act itself.

The Specter majority reasoned that "any remedy * * * would be limited to requiring further process in accordance with the provisions of the Act." 971 F.2d at 950 n.13. In practical terms, there are only two forms that this "further process" could take. First, the court might direct the Secretary of Defense and the Commission to reconsider the recommendation to close Loring, employing "proper" procedures, without reconsidering any of their other recommendations. Second, the court might direct the Secretary and

the Commission to reconsider the entire package of base closure and realignment recommendations, including but not limited to Loring.

The first of these two options (reconsidering Loring on a freestanding basis) is fundamentally inconsistent with the Act's policy of creating a unified package of base closures and realignments, to be accepted or rejected in toto. Act §§ 2903(e), 2908; see p. 36, supra. Such a result not only undermines the political objective of developing consensus on a unified list of bases to close, but also threatens the military assumptions underlying the decision. The Commission does not select each base for closure in a vacuum, but develops a single package of recommended closures based on a unified view of the national force structure. Thus, the decision to close or keep open other bases may have depended in part on the decision to close Loring, and a judicial rescission of that determination could upset the assumptions underlying any number of decisions on other bases.

The second option (ordering the reconsideration of the entire package of recommendations) would be equally antithetical to the Act's policies, albeit for different reasons. The Act's insistence on expedition (see pp. 36-38, supra) could not possibly survive if the entire process of selecting bases had to be repeated months or years after it originally was brought to a conclusion. The damage would be particularly grave if the court sought to enjoin the carrying out of the President's original base closure decision during the pendency of the reconsideration process.

The idea of "remanding" Loring to the Commission, either by itself or in conjunction with the other bases, also ignores the

unique provisions governing the operation of the Commission. The Commission does not sit in continuous session over the life of the Base Closure Act, but instead convenes only during the three years (1991, 1993, and 1995) in which the Secretary of Defense prepares his base closure recommendations. Act § 2902(e)(1). During the intervening years, the Commission effectively goes out of existence. The terms of the Commissioners (other than the chairman) expire at the end of the legislative session in which they were appointed. Id. § 2902(d)(1).

As a practical matter, therefore, there are extended periods (a year or more) when there essentially is no Commission to which base closure recommendations can be remanded. And each time the Commission reconvenes, it effectively constitutes a new Commission, with a new and strictly limited statutory mandate -- to consider the recommendations of the Secretary of Defense for the current round of base closures, not to reconsider recommendations from a prior round. There is simply no room in this statutory scheme for the kind of conventional administrative remand apparently contemplated by the Third Circuit in Specter and by the plaintiffs in this case.

The gravest remedial problem, however, does not involve the deliberations of the Commission, but what happens after those deliberations. It is critical to remember that the Commission does not itself decide which bases to close and realign; it merely forwards recommendations to the President, whose decision is then subject to further consideration by Congress. Thus, a "remand" to the Commission would be meaningless unless the court also undertook

to compel the President and Congress to repeat their previous deliberations on the basis of the Commission's new report.

For obvious reasons, such a "remedy" cannot be made available. Elementary separation-of-powers principles, as well as the APA's limitation of judicial review to the acts of "agencies," would preclude a court from compelling the President and Congress to reconsider their previous decisions concerning Loring and the other bases selected for closure and realignment. If the plaintiffs had named the President and Congress as defendants, and sought this kind of relief directly against them, it is inconceivable that a court would have entertained such a demand. Yet the plaintiffs effectively are asking for the same relief, albeit in a more indirect fashion, in this case. The Base Closure Act cannot possibly be interpreted to allow such a result.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART M. GERSON
Acting Attorney General

RICHARD S. COHEN
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

February 12, 1993

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 1993, I have served the foregoing BRIEF FOR THE APPELLEES by delivering copies by overnight mail service to:

Severin M. Beliveau
Ann R. Robinson
Joseph G. Donahue
Preti, Flaherty, Beliveau & Pachios
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058

Michael S. Raab
Michael S. Raab

Document Separator

Inited States Court of Appeals
'or the First Circuit
Io. 92-2427
VILLIAM S. COHEN, ET AL., Plaintiffs, Appellants,

)ONALD RICE, SECRETARY OF THE AIR FORCE, ET AL., Defendants, Appellees.

.PPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Hon. Morton A. Brody, U.S. District Judge)

Before: Boudin, Circuit Judge; Campbell, Senior Circuit Judge; and Stahl, Circuit Judge.

Severin M. Beliveau, with whom Ann R. Robinson, Joseph G. Donahue, and Preti, Flaherty, Beliveau & Pachios, were on brief for appellants.

Jacob M. Lewis, with whom Stuart M. Gerson, Acting Attorney General, Richard S. Cohen, United States Attorney, Douglas N. Letter, United States Attorney and Scott R. McIntosh, United States Attorney, were on brief or appellee.

May 3, 1993

STAHL, Circuit Judge. This is an action to enjoin the Department of Defense from carrying out the President's decision to close Loring Air Force Base ("Loring") in Limestone, Maine. Plaintiffs,1 seeking relief under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 et seq., allege that defendants Secretary of Defense, Secretary of the Air Force, and Base Closure and Realignment Commission ("the Commission") violated procedural and substantive requirements of the Defense Base Closure and Realignment Act of 1990 ("the 1990 Act"). Pub. L. No. 101-510, 2901-11, 104 Stat. 1808- 19 (codified at 10 U.S.C. 2687). In dismissing many of the plaintiffs' claims in May 1992, the district court ruled that the 1990 Act precludes judicial review of substantive challenges to base closure decisions. See Cohen v. Rice, 800 F. Supp. 999 (D. Me. 1992) ("Cohen I"). In September of 1992, the district court granted defendants' motion for summary judgment on the remaining claims on the basis of the Supreme Court's intervening decision in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). See Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992) ("Cohen II"). Plaintiffs' timely appeal focuses on the district court's application of Franklin to this case. After careful review of the decision below, the 1990 Act, and the Court's pronouncements in Franklin, we affirm the judgment of the district court. As this case is apparently the first at the appellate level to mesh the 1990 Act with the recent dictates of Franklin,2 we begin with an overview of the 1990 Act and its predecessors, and then focus on the specifics of the matter at hand.

The 1990 Act

The 1990 Act is the latest attempt by Congress to regulate the process by which domestic military bases are closed or realigned. Throughout the 1960s and 1970s, the Executive Branch attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, ("Commission Report") at 1-1 (1991). Often, however, these attempts were opposed by members of Congress, who feared the economic impact on their constituents, and who suspected the influence of political motivation in the Executive's decisions. Id.

In 1977, Congress passed legislation granting the Secretary of Defense the power to unilaterally close particular bases, but only after (1) notifying the Armed Services Committees of the Senate and House of Representatives of the selected bases; (2) submitting to the committees his evaluation of the economic, environmental, budgetary and strategic consequences of the closings; and (3) deferring action for at least 60 days, during which time Congress could legislate a halt to the closures. See 10 U.S.C. 2687(b) (Supp. IV 1980). In addition, the proposed closures had to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). Id. While the 1977 legislation imposed few substantive restrictions on the Executive Branch's authority to close bases, the procedural requirements--most notably the mandate to comply with NEPA-- made such action difficult. See Commission Report at 1-1; see also H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403 ("(t)he conferees recognize that (NEPA) has been used in some cases to delay and ultimately frustrate base closures . . . .").

Congress next tackled the base closure issue in 1988 by enacting the Defense Authorization Amendments and Base Closure and Realignment Act ("the 1988 Act"). Pub. L. No. 100-526, 201-209, 102 Stat. 2623, 2627-34 1988). The 1988 Act replaced the Secretary of Defense's decision-making power with that of an independent ommission, which was granted the power to recommend bases for closure or realignment. 1988 Act 201, 203(b)(1)-2), 102 Stat. at 2627-28. The commission presented its recommendations to the Secretary, who had the power to pprove or disapprove the entire group of recommendations. Id. 201(1)-(2), 202(a), 102 Stat. 2627. If the Secretary pproved the commission's recommendations, Congress was given 45 days to override the Secretary by passing a oint resolution. Id. 202(b), 208, 102 Stat. 2627, 2632-34. Finally, in response to the prior difficulties, the 1988 Act xplicitly exempted the Secretary and commission's base closure decisions from the requirements of NEPA. Id. 04(c)(1), 102 Stat. 2630.

Although the newer processes of the 1988 Act led to closure or realignment of 145 domestic military bases, it vas not enacted as a permanent mechanism, but was instead a one- time exception to the procedures set forth in the 977 legislation. See Specter, 971 F.2d at 939. Thus, the Defense Secretary's January 1990 base closure proposals vere governed by the 1977 rules. Id. Members of Congress expressed concern over the "considerable period of time nd . . . numerous opportunities for challenges in court()" presented by the 1977 procedures, and noted that the ecretary's list of bases for study "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2nd Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257.

Congress, in enacting the 1990 Act, attempted to incorporate the procedures of the 1988 Act, without the bstacles of prior legislation. See H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990), reprinted in 1990 J.S.C.C.A.N. 2931, 3068 ("a new base closure process will not be credible unless the 1988 base closure process emains inviolate"). The 1990 Act envisioned three rounds of base closures, in 1991, 1993, and 1995, and provided or the establishment of an independent Commission to meet in each of those years. 1990 Act 2902(a), (e), 104 Stat. 808 (1990). The Act required the Secretary of Defense to provide Congress and the Commission with a six-year orce structure plan that assessed national security threats and the force structure necessary to meet such threats. Id. 2903(a)(1)-(3), 104 Stat. 1810 (1990). The Secretary was also required to formulate criteria for use in identifying ases for closure or realignment. The criteria had to be published in the Federal Register for public notice and omment, and submitted to Congress which had the power to evaluate and disapprove them. Id. 2903(b), 104 Stat. 1810-11.3

For the 1991 cycle, the Act required the Secretary to recommend base closures and realignments to the Commission by April 15, 1991, based on the force structure plan and final criteria. Id. 2903(c)(1), 104 Stat. 1811. The Act charges the Commission with reviewing the Secretary's recommendations, holding public hearings, and preparing a report for the President containing its assessment of the Secretary's proposals and its own ecommendations. Id. 2903(d)(1)-(2)(A), 104 Stat. 1811. The Act allows the Commission to change any of the Secretary's recommendations if they "deviate() substantially" from the force structure plan and final criteria. Id. 2903(d)(2)(B), 104 Stat. 1811-12. However, in its report to the President, the Commission must explain any leparture from the Secretary's recommendations. Id. 2903(d)(3), 104 Stat. 1812. The Secretary must make available o the Comptroller General all information used in making the initial recommendations. The Comptroller General nust report on the Secretary's recommendations and selection process to the Commission and Congress, and may, o the extent requested, assist the Commission. Id. 2903(c)(4), (d)(5), 104 Stat. 1811-12.

Once the Commission completes its report, the Act requires that it be transmitted to the President, who may pprove or disapprove the Commission's recommendations, and then must relate his decision to the Commission nd Congress. Id. 2903(e)(1)-(3), 104 Stat. 1812. If the President disapproves the Commission's recommendations, n whole or in part, he returns them to the Commission, which must then reconsider its prior recommendations and ubmit a revised list to the President. Id. 2903(e)(3), 104 Stat. 1812. If the President does not approve the revision, nd thereby does not submit any recommendations to Congress, the base closure process for that year is terminated. d. 2903(e)(5). If, however, the President approves the Commission's recommendations, or its revised version, Congress has 45 days to pass a joint resolution disapproving the Commission's recommendations in their entirety. d. 2908, 104 Stat. 1816-18. If a disapproval resolution is enacted, the Secretary may not close the bases approved or closure by the President. Id. 2904(b), 104 Stat. 1813. If Congress does not pass such a resolution, the Act calls or the Secretary to close or realign all bases so recommended by the Commission and approved by the President. d. 2904(a), 104 Stat. 1812-13.

The Loring Decision

In April 1991, the Secretary issued his list of recommended domestic base closures and realignments. See 56 Fed. Reg. 15184 (April 15, 1991). Among the 72 military installations on the list were 20 Air Force bases. Loring

was scheduled for closure. Id. at 15252. Pursuant to the Act, the Commission then conducted its analysis and review of the Secretary's recommendations. The Commission conducted public hearings at which it heard testimony from Department of Defense officials, legislators, and other experts. Commission Report at 4-1, (G-1)-(G-2). Commissioners also visited many of the affected bases, including Loring. Id. at 4-1, H-1. The Commission's staff reviewed the military services' methodologies and data used to develop their recommendations. Id. In addition, the General Accounting Office ("GAO") issued a report on the Secretary's recommendation and forwarded it to the Commission, while also assisting the Commission in obtaining, verifying and reviewing data. Id. at (3-1)-(3-2). In the end, the Commission recommended that one of the Air Force bases targeted for closure by the Secretary remain open, but the Commission concurred in the recommendation that Loring be closed. Id. at (5-31)-(5-45).

On July 10, 1991, President Bush approved the recommendations of the Commission, including the closure of Loring. See Cohen I, 800 F. Supp. at 1002; Cohen II, 800 F. Supp. at 1008. On July 30, 1991, pursuant to section 2908 of the 1990 Act, the House considered a resolution, proposed by plaintiff Rep. Snowe, to disapprove the Commission's recommendations. Id. Three Commissioners, Air Force officials, and members of the affected communities testified at the hearings. 137 Cong. Rec. H6006 (daily ed. July 31, 1991). During the course of debate, Representative Snowe urged the House to block Loring's closure, alleging a variety of procedural errors on the part of the Commission. Id. at H6012-H6020. The House rejected the proposed disapproval resolution by a vote of 364 to 60, thus requiring the Secretary to proceed with the 1991 closures and realignments. Id. at H6039.

Prior Proceedings

Plaintiffs filed the instant suit in December 1991, alleging in Count I that the Air Force failed to adhere to the force structure plan and "deviated substantially" from the published base closure criteria; failed to fairly apply the selection criteria; improperly considered an unapproved selection criterion; acted "arbitrarily and capriciously" in applying the selection criteria to Loring and a rival base; and failed to supply all relevant information to the GAO and Congress. Count II made many of the same allegations against the Commission, and also alleged a failure to comply with the 1990 Act's public hearing requirement.

In February 1992, the defendants moved to dismiss the suit, essentially on the ground that the 1990 Act implicitly precluded judicial review. Cohen I, 800 F. Supp. at 1005. With respect to Count I, the district court dismissed all claims against the Air Force and Secretary, except those containing allegations that the Secretary failed to transmit to the GAO, Congress and the Commission all of the information used in preparing his recommendations, as the 1990 Act requires. Id. The court ruled that the remainder of plaintiffs' challenges were not judicially reviewable because they would require the court to "reevaluate the basis for the Secretaries' decision to close Loring. . . ." Relying on Specter, the court held that such review was precluded by the Act, which "decided to put these questions to rest and guaranty the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission and the GAO." Id. at 1005 (quoting Specter, 971 F.2d at 951). The district court also dismissed most of the claims against the Commission made in Count II, for essentially the same reasons. Id. at 1006. Only the charge that the Commission failed to hold public hearings, in violation of section 2903(d)(1) of the 1990 Act, was left standing. Id.

Subsequent to Cohen I, the Supreme Court, in Franklin, expressed its interpretation of reviewable agency action under the APA. The district court, relying on Franklin, granted defendants' motion for summary judgment on the remaining aspects of the case. See Cohen II. This appeal followed. Before delving into Franklin and its applicability herein, we briefly outline the strictures of the APA.

The Administrative Procedure Act

The APA sets forth the procedures by which federal agencies are held accountable to the public and their actions made subject to judicial review. Franklin, 112 S. Ct. at 2773. Pursuant to the APA, a court may set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or contrary to applicable legal or procedural requirement. 5 U.S.C. 706(2). Such review, however, is only available "'to the extent that . . . statutes (do not) preclude judicial review' and the agency action 'is (not) committed to agency discretion by law.' " Cohen II, 800 F. Supp. at 1009 (quoting 5 U.S.C. 701(a)). Finally, and perhaps most importantly, the APA authorizes judicial review only of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704 (emphasis added). At the heart of the instant dispute is whether the actions complained of are "final actions" within the meaning of the APA. In Franklin, the Court addressed this critical issue. We turn now to the Court's opinion.

Franklin v. Massachusetts

Franklin involved a challenge to the reapportionment of the House of Representatives following the 1990 census. Article I, 2, cl. 3, of the Constitution provides that Representatives "shall be apportioned among the several States . . according to their respective Numbers . . . ." Section 2 of the Fourteenth Amendment mandates counting the 'whole number of persons in each state." Such counting is to be done through "actual Enumeration," conducted every 10 years, "in such Manner as (Congress) shall by Law direct." U.S. Const., art I, 2, cl. 3. Pursuant to statutory authority, the Secretary of Commerce is directed to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). The Secretary then must provide the President with the state-by-state population, necessary for reapportionment. Id. 141(b). The President then sends Congress a statement, based on the Secretary's report, showing the population of each state, and the number of Representatives to which each state is entitled, according to a specified formula. 2 U.S.C. 2a(a). Each state is entitled to the number of Representatives shown in the President's statement to Congress. Id. 2a(b). See generally Franklin, 112 S. Ct. at 2771 (outlining historical bases of apportionment and census statutes).

The Commonwealth of Massachusetts challenged the Secretary of Commerce's inclusion of military personnel serving overseas in state population counts for census purposes. The resulting tabulation shifted a Representative from Massachusetts to Washington. Id. Massachusetts claimed that the allocation of overseas personnel was arbitrary and capricious under the APA. A three-judge district court panel agreed. Commonwealth v. Mosbacher, 785 F. Supp. 230 (D. Mass. 1992). The Supreme Court reversed, holding that the action of the Secretary, in reporting the population tabulations, was not "final," within the meaning of the APA, while the actions of the President were not subject to APA review because the President is not an "agency" within the APA. Franklin, 112 S. Ct. at 2773-76.

In assessing the finality of the Commerce Secretary's actions,4 the Court first looked to Abbott Lab. v. Gardner, 387 U.S. 136 (1967). There, the Court stated that the finality of agency action depends on whether its impact "'is sufficiently direct and immediate' and has a 'direct effect on . . . day-to-day business.' " Franklin, 112 S. Ct. at 2773 (quoting Abbott, 387 U.S. at 152). "An agency action is not final if it is only 'the ruling of a subordinate official' or tentative.' " Id. (quoting Abbott, 387 U.S. at 151). "The core question is whether the agency has completed its decisionmaking (sic) process, and whether the result of that process is one that will directly affect the parties." Id. In answering this "core question," the

Court first reasoned that the census statute, unlike others, does not explicitly require the President to transmit the agency's report to Congress. Id. The Court stated:

"After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." 2 U.S.C. 2a. Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the "decennial census." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. Id. at 2774."

Therefore, according to the Court, the census itself still presents a "moving target" after the Secretary reports to the President, especially since there exists no statutory bar to the President instructing the Secretary to reform the census, even after the President receives the Secretary's report. Id. "It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by 2a to a particular number of Representatives." Id. Thus, the Court concluded: "Because the Secretary's report to the President carries no direct consequences for the reapportionment . . . serv(ing) more like a tentative recommendation than a final and binding determination(,) (i)t is, like 'the ruling of a subordinate official,' not final and therefore not subject to review." Id. (quoting Abbott, 387 U.S. at 151).

We agree with the district court's conclusion that "(t)he holding and reasoning of Franklin are directly applicable to the facts of the present controversy." Cohen II, 800 F. Supp. at 1011. In arriving at its decision, the Franklin Court explicitly distinguished statutory schemes whereby the President is required to transmit an agency's report directly to Congress from those in which the President is not so required, holding that the former represent final agency action, under the APA, but that the latter do not.

Under the 1990 Act, the President is not required to submit the Commission's report to Congress. In addition, the 1990 Act gives the President the power to order the Commission to revise its report, and, in the final analysis, the President has the power to terminate a base closure cycle altogether via a second rejection of a Commission report. In our view, the agency action involved here bears even less indicia of finality than that in Franklin, where the majority referred to the President's role in reapportionment as "admittedly ministerial," id. at 2775, yet still found the President's action to be the "final action." Id.

Plaintiffs seek to avoid Franklin's restrictions by arguing that this case involves a challenge to the Commission's faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO,

whereas Franklin, according to plaintiffs, proscribes only challenges to an agency's substantive decisions. As an initial matter, we note that Franklin makes no such distinction. In any event, we view it as a distinction without legal difference. As previously noted, Franklin's finality determination explored whether an agency action has a "sufficiently direct and immediate" impact. Here, if the Commission's report to the President is not a "final action," then the techniques used by the Commission to create the report, which are even more preliminary to the final decision, cannot themselves be "final agency actions." In sum, whether the complaints are styled as procedural or substantive, our answer to the "core question" of finality remains the same. The judgment of the district court is therefore affirmed.5

Footnote 1. Plaintiffs are: United States Senators William S. Cohen and George J. Mitchell; Maine Governor John R. McKernan, Jr.; United States Representative Olympia J. Snowe; the towns of Limestone, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden and Van Buren, and the cities of Caribou, and Presque Isle, all of which are municipalities of the State of Maine; Aroostook County, a political subdivision of the State of Maine; Save Loring Committee, an organization of individual and corporate citizens residing in the plaintiff towns and cities, and Committee Chairman Paul D. Haines; and American Federation of Government Employees ("AFGE") Local Union Chapter #2943, the exclusive bargaining representative for approximately 492 Loring employees and Chapter President Alan Mulherin.

Footnote 2. One other appellate court has addressed the issue we face today, deciding, at least partially, in favor of judicial review. See Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992). The district court, in fact, relied on Specter in ruling on defendants' motion to dismiss. Subsequently, however, following the issuance of Franklin, the Court granted the government's petition for certiorari in Specter, vacated the judgment herein, and remanded the case to the Third Circuit for reconsideration in light of Franklin. See O'Keefe v. Specter, 113 S. Ct. 455 (1992).

Footnote 3. On February 15, 1991, the Department of Defense published eight proposed final criteria governing base closure and realignment. 56 Fed. Reg. 6374. The criteria were subject to Congressional review until March 15, 1991, and became final on that date. 1990 Act 2903(b)(2). The criteria are reported as follows: In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

Military Value

1. The current and future mission requirements and impact on operational readiness of the Department of Defense's total force.

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

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

4. The cost and manpower implications.

Return on Investment

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

Impacts

6. The economic impact on communities.

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

8. The environmental impact. 56 Fed. Reg. 6374-02 (Feb. 15, 1991).

Footnote 4. Here, plaintiffs have expressly conceded that they are not attacking the actions of the President. Thus, we focus our discussion on Franklin's assessment of the Secretary of Commerce's actions.

Footnote 5. Because we have based our decision on Franklin's finality analysis, we need not address whether the 1990 Act, by its own terms, precludes judicial review.

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1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

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02 JUL 1991

June 29, 1991

The Honorable George Mitchell
United States Senate
Washington, D.C. 20510

Dear Senator Mitchell:

As I stated in my June 25, 1991, letter, I forwarded the information you provided to the Commission's Department of Research and Analysis. Your concerns about the information used by the Commission staff at the June 13, 1991 hearings are fully noted. During our previous hearings, the information provided by the staff reflected what they had been able to develop up to that time. In several instances, the data was interim. The staff has and will continue to evaluate the Department of Defense (DOD) data until the final decisions are made. The attachment is provided in response to your specific concerns.

Once again I thank you for your interest and assistance in assuring that the information used for making decisions about the bases is adequate, accurate, and fully evaluated.

Sincerely yours,

JIM COURTER
Chairman

ATTACHMENT ATTACHMENT

RESEARCH AND ANALYSIS

RESPONSE TO MAINE DELEGATION

CAPACITIES

Runways

The primary sources of data used by the Air Force during its deliberations was the Air Force Base Closure Report Back-Up Data, Flying Category/Strategic Subcategory (Back-up) which contains responses to the facilities questionnaire and the Strategic Air Command's addendum to the Backup. In the Back-up book, Loring officials stated that it had a unique feature--two PLS runways. Plattsburgh did not list this as a unique feature. However, eight bases have PLS runways in addition to their operational runway. Two have received funding to upgrade their parallel taxiways to PLS runways--Griffiss and Loring. Six bases, Carswell, Fairchild, Grand Forks, Minot, Plattsburgh, and K.I. Sawyer AFBs already had the capability to use their parallel taxiway as a PLS runway.

Ramp space

Air Force backup documentation records contain two amounts for square yards of ramp space. The amounts were taken from the Back-Up Data Report and the addendum. The addendum states that there are 1,185,996 square yards of ramp space which was taken from the September 30, 1989 Annual Real Property Report. In that report the base submitted the ramp space for two facilities in square **feet**, but the computer read the data as square **yards**. In the September 30, 1990 report, the Air Force corrected this error. The correct number is 331,477 square yards. In addition, the Commission staff made a rough calculation of the ramp space at Loring and found that it was about 350,000 square yards.

Weapons storage

The Air Force's Civil Engineering Programs Office provided data that verified that the property records should show that Loring Air Force Base should have 12,580,338 NEW. Whether the ammunition storage facility has this capacity or the 10,247,882 NEW, the capacity far exceeds current or projected requirements.

Fuel storage

In our presentation on June 13, the staff stated that Loring had 9.2 million gallons of on-base fuel storage while Plattsburgh had 3.6 million gallons. However, both Loring and Plattsburgh have

off-base storage. Loring's is 43.5 million gallons located at Searsport, Maine, about 200 miles away. Plattsburgh's off-base storage is 31.5 million gallons at leased space about 18 miles away. In either case, both bases have more than enough capacity to meet current and future missions.

Mobilization facility

Although Plattsburgh AFB did not state that they had a mobilization facility, real property records show and base officials confirm that the base does have a mobilization facility.

COST TO UPGRADE FACILITIES

At the June 13 hearings, the staff presented data on the cost to upgrade facilities. This data has been further revised as shown in the table below. Aviation maintenance upgrade costs were increased from $9.73 to $43 million because the Air Force overlooked a page of data on some space that needed to be upgraded. The costs for base housing was reduced because the community information correctly highlighted an error in the Air Force data, specifically 3 or 4 dorm buildings should not have been included. The cost for roads and grounds was reduced when the Air Force gave the base credit for paving some of the main roads. However, the base did not include costs of paving the parking lots and installing curbing and drainage systems. Figures provided by the base represented only operation and maintenance funds, no military construction.

In the revised cost we gave Loring credit for military construction projects underway and gave them full credit for disputed Condition Code 1 facilities. However, even with these revisions, Loring's base facilities cost rating is still Red. We did not make this analysis or adjust the cost estimates for the other bases.

		Air Force Data		
Category	Community	Original	Revised	R & A
Communications	$ .28	$ .46	$ 2.16	$ 2.16
Aviation Main	9.73	12.16	43.00	43.00
POL Storage	.59	16.00	16.00	13.00
Ammo Storage	.18	6.83	6.83	3.72
Administration	2.11	10.62	8.18	7.38
Troop Hou/Dining	.86	18.10	16.34	2.34
Utilities	11.18	21.00	21.00	19.65
Roads and Grounds	1.08	34.00	31.30	31.30
Total	$26.01	$119.17	$144.81	$122.55

COST TO UPGRADE MEDICAL FACILITIES

In your letter you questioned the difference between the base's answers to the questionnaire and the data submitted to the Base Closure Executive Group for costs to upgrade medical facilities. The data you provided recognized that Loring had received a Green rating for the Medical Facilities Sub-subelement, but you questioned why six other bases had the data for the cost of upgrading medical facilities changed when it was submitted to the Base Closure Executive Group.

According to Air Force Civil Engineering officials, the base figures were reduced for the six bases because the original base estimates included the adding of capabilities to the medical facilities rather than what the cost would be for bringing them up to Condition Code 1.

Base	Project	Base estimate	BCEG
Barksdale	Upgrade and add to	$14.7	$ .15
Beale	Upgrade and add to	15.0	.27
Dyess	Upgrade, add to and alter (asbestos)	25.0	7.34
Ellsworth	Upgrade	3.1	.07
F.E.Warren	Add/alter	5.5*	.00
Plattsburgh	Upgrade/add	40.5	.26

QUIET HOURS

Plattsburgh voluntarily observes quiet hours for engine maintenance run-up from 10 pm to 6 am. There are no quiet hours restrictions concerning flight operations.

ECONOMIC IMPACT

We agree that the initial economic impact at Loring will be devastating, as it will be at most bases including Plattsburgh. However, we also agree that while Plattsburgh has the potential to recover, it will be very difficult for the Loring community to recover. We will include this distinction in all future information.

AIRSPACE

Plattsburgh was given a rating lower than Loring for airspace because it will be difficult for Plattsburgh to get changes to routes leaving/arriving the airfield.

STRATEGIC LOCATION

As agreed with your representatives, the staff has made a comparison of the effects the relative locations of the two bases would have on various missions. The staff examined three potential bomber mission scenarios (simplified) flown from each base and compared the difference in distance, time, and mission effectiveness. The potential missions include B-52 conventional strike, B-52 sea control and F-15 air defense. We also assessed the Tanker mission.

The simplified B-52 conventional strike mission was planned with the following factors:

Target:	Baghdad
Overflight:	No in-route overflight permitted
Routing:	Great circle to Gibraltar, central Med to Israel, direct Baghdad, Persian Gulf to Hormuz, over water to Diego Garcia
Tankers:	From launch base (west Atlantic), from European TTF (Med), from Pacific TTF (Diego Garcia)
Profile:	All high altitude
Recovery:	Diego Garcia

Launch Base	Sortie distance	Sortie Time	Notes
Loring	8,900	19.8 hrs	
Plattsburgh	9,175	20.4 hrs	+ 3%

NOTE: Above analysis is also representative of a strategic bomber mission comparison.

The importance of this 3 percent needs to be tempered by the fact that only the first mission is likely to be affected. Historically, conventional bombing has always been done from a forward location. In truth, the Loring/Plattsburgh comparison for this mission can be reduced to a "36 minute delay on the first mission only."

The simplified B-52 sea control mission involves two B-52s striking a Surface Action Group (SAG) with Harpoon missiles. The target selected represents a worst case scenario for this comparison--the target is northeast of both bases, exaggerating

the geographic difference. The mission was planned with the following factors:

Target:	SAG at 65'N 00'W (Norwegian Sea, between Greenland and Norway)
Overflight:	No in-route overflight permitted
Routing:	International airspace, most direct to SAG, NO LOITER, return to launch base
Tankers:	Pre-strike only, all return to base
Profile:	High/Low/High, NO LOITER
Recovery:	Launch base

Launch Base	Sortie distance	Sortie Time	Notes
Loring	5,341	12.3	
Plattsburgh	5,608	12.9	+ 5%

The simplified air defense mission compares a worst case scenario of an air defense alert launch of two F-15s from either Loring (current air defense alert detachment location) or Bangor (the location the F-15s will fly from if Loring closes). As in the sea control mission, target location drives the sortie distance and time comparison. In all real cases, a tanker aircraft is able to launch to allow extended search, trail and loiter time which makes the Loring/Plattsburgh comparison irrelevant. However, in the worst case scenario of an unidentified target "popping up" at the furthest northeast sector with no warning the round robin sortie launched from Bangor would be approximately 15 percent longer.

Looking at the tanker mission offers the following observations. The advantages of either base for this mission is more difficult to quantify. It is a fact that 70 percent of the DESERT STORM Atlantic deployment/re-deployment air refueling missions were flown from Plattsburgh AFB. This is primarily because the air refueling was conducted within the North Atlantic Track System (NATS) airspace. For these missions, Plattsburgh is 125 nautical miles closer to the air refueling track than is Loring. This same advantage would be true for most peacetime European deployments.

From a tanker recovery perspective, the weather and ramp space at Plattsburgh give it an advantage.

In conclusion, Loring has a slight advantage for bombers and Plattsburgh has a slight advantage for tankers but in neither case does it alone provide a compelling rationale for a closure decision.

Document Separator

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

22 AUG 1991 002452

OFFICE OF THE ASSISTANT SECRETARY

AUG 14 1991

The Honorable Sam Nunn
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510-0001

Dear Mr. Chairman:

This letter responds to issues raised by Senator Cohen during the July 23, 1991, Senate Armed Services Committee hearing on the 1991 Defense Base Closure and Realignment Commission recommendations. Specifically, he expressed concern with the responsiveness of the Air Force to certain Congressional inquiries, the processing of a Freedom of Information Act (FOIA) request, the openness of communications with Loring AFB officials, and the appropriateness of cost data comparisons. The Acting Chairman, Senator Dixon, requested that we provide a response to these issues for the hearing record.

Regarding the Air Force's responsiveness to inquiries from the Maine Congressional Delegation, the response times to the Delegation's written requests for information from the Air Force were as follows: the Air Force responded to an April 22, 1991, letter on April 26; to an April 22 inquiry on May 1; to a May 9 letter on May 17 and May 28; to May 13 and 16 inquiries on May 17; to a May 20 letter on June 17; to a June 24 letter on June 26; and to a June 27 letter on June 28. A June 26 letter regarding FOIA processing is being answered separately, but we understand that a reply is imminent. Considering that the information sought was not always available at Air Staff level, we believe that the Air Force was responsive.

We have compared the Maine Delegation's requests with our replies and found that, in addition to being timely, Air Force officials provided what they understood was requested. We now realize that there may have been "disconnects." For example, the Air Force provided aggregated data that the Air Force Base Closure Executive Group reviewed. In fact, we now understand the Delegation actually wanted raw base-level data. We regret that such miscommunications occurred, but believe that the Air Force officials acted in good faith in responding. From April 15, 1991, to June 30, 1991, the Air Force responded to over 750 requests for information from Congressional delegations, the Base Closure Commission, state delegations, local communities, and individuals. In every case our standard policy was one of openness, accuracy, and timeliness.

It was suggested that Members of Congress had to resort to the FOIA to obtain information on the Loring closure recommendation, and that Air Force processing of the FOIA request was inadequate. We regret that any Member of the Maine Delegation believes the only recourse was to use the FOIA. At the same time, we are, again, convinced that Air Force officials acted in good faith to respond to the FOIA request. The Save Loring Committee made the FOIA request on May 21, 1991. The Freedom of Information Act involves strict response times at every level; provisions are made for extensions when good reasons exist, such as additional time needed to research records. Loring AFB received the Save Loring Committee FOIA request on May 22, and forwarded the information and its recommendations to Headquarters Strategic Air Command (HQ SAC) on May 31, 1991. HQ SAC forwarded its recommendations and the package to HQ USAF on June 13, 1991. Due to a regrettable administrative error on our part, the package was not logged in until June 18, 1991. The information was reviewed and a recommendation started through coordination on June 26, 1991. On July 2, 1991, the HQ USAF FOIA manager notified the Save Loring Committee that ten additional working days would be required. On July 3, the first package of documents was shipped via Federal Express to the Save Loring Committee. On July 5, the second and final package of documents was shipped to the Committee by Federal Express. At this point, a total of 32 working days, for three levels of command, had elapsed. Given the magnitude of this FOIA request, we believe that our processing complied with FOIA guidelines. Nonetheless, with the benefit of hindsight, we could have expedited the process by being more sensitive to the timing of the Delegation's presentation to the Base Closure and Realignment Commission. For example, we could have used overnight mail in every case, and we might have combined the two headquarters reviews.

It was additionally suggested that officials at Loring AFB were under a "gag rule." We have tried to determine what was said to Loring officials that might leave such an impression. Our understanding is that HQ SAC instructed Air Force officials at all Command bases recommended for closure or realignment to support the recommendations of the Secretary of Defense. HQ SAC directed all base officials to notify the headquarters if they received a Congressional inquiry concerning the recommended closure or realignments. In addition, during meetings in the Pentagon at Headquarters USAF just prior to announcement of the DoD recommendations, Headquarters personnel instructed officials from bases being recommended for closure or realignment to support the recommendations. We do not consider these actions, either individually or collectively, to constitute a "gag rule." We routinely expect our personnel to support official Air Force/DoD policy, whatever their personal opinions may be, and to avoid taking affirmative steps to undercut it. In the exceptionally emotional circumstances surrounding base closures, we view this as necessary and prudent management, consistent with the way DoD wanted the process handled.

Regarding requests for factual information, the normal Congressional inquiry process allows officials at each level of authority the option of referring the reply to higher headquarters for review and validation. This is often done in cases where there is a possibility that higher headquarters may have additional information bearing on the material the base has been asked to furnish. This process is followed in the interest of consistency and accuracy. As noted above, that process was changed slightly for base closures and realignments in that HQ SAC was to be notified of all Congressional requests for information in order to review proposed responses. In the case of Loring, base officials forwarded information they gathered to HQ SAC. HQ SAC in turn forwarded the information to HQ USAF, which transmitted the information to the requester through the Secretary of the Air Force's Legislative Liaison office. This standard policy was applied to all bases which responded to Congressional inquiries.

We are aware of a situation that arose at Loring AFB during the visit of Commission Members and Members of the Maine Delegation that would explain the Delegation's perception of a "gag rule." The Base Commander was specifically instructed by HQ USAF to give any information he had to Members of the Commission, but he was not given any additional specific guidance regarding what to give to Members of Congress who were also there. When asked by both groups to give them the same information, he hesitated to give documents to the Congressional Delegation before higher headquarters review. Within minutes, Commissioner Ball gave a copy of the documents to Delegation Members. The Base Commander followed the guidance he had been given which, frankly, had not anticipated face-to-face requests from Members of Congress. Clearly, the HQ USAF answer, had the question been asked, would have been to hand the documents to the Maine Delegation, with advice that it was base-level-only (raw) data, not fully coordinated HQ USAF information. We regret any awkwardness that arose, but are satisfied that the information requested was, in fact, provided.

A final issue raised revolves around the May 17 and 28 Air Force responses to the May 9 letter the Maine Congressional Delegation sent to the Loring Base Commander requesting information on the condition of several categories of facilities and the cost to upgrade them to code 1, or "adequate," status. The HQ USAF response reflected a careful review of the data submitted by both the base and HQ SAC. The Maine Delegation contended that figures generated at base level were more accurate than those used by the Base Closure Executive Group (BCEG). An example cited by the Delegation was the cost to upgrade the hospital at Plattsburgh AFB, New York. HQ SAC replied to a January 1991 Air Staff questionnaire requesting condition and cost to upgrade base facilities. The HQ SAC Command Surgeon's staff had responded to the questionnaire with a cost for <u>replacing</u> the Plattsburgh hospital (beyond the year 2000) with a new state-of-the-art facility at an estimated cost of $40 million. The estimated cost to <u>upgrade</u> the existing hospital to condition code 1, using real

property records, is $260,000. HQ SAC Civil Engineering staff scrubbed the data before submitting it to HQ USAF and consistently used the upgrade figures on a Command-wide basis for accurate comparison among bases. This same methodology was also used in the review of military construction (MILCON) requirements for other SAC hospitals such as Beale AFB, California, and Barksdale AFB, Louisiana. Another example cited was the cost to upgrade the roads at Loring to condition code 1. HQ SAC officials compared all bases objectively using cost estimates derived from the real property records as of September 30, 1990. This was deemed to be the most accurate method for comparing all bases. All roads reflected in the real property records in a condition code 2 or 3 status were given a cost estimate to upgrade by contract to condition code 1. This resulted in the cost figure of $31.3 million for Loring AFB. Using a current snapshot of road condition versus a September 30, 1990, baseline, Loring officials estimated they could upgrade the roads at a much lower cost through use of on-site equipment. The base estimate of $855,000 for upgrade of the roads only included a limited number of projects and did not take into account all of the roads in a condition code 2 or 3. In addition, the base's cost figures did not include required repairs to sidewalks and parking lots. Those pavements were included in the HQ SAC cost estimate. Although the HQ SAC projections were significantly higher in this example, the Air Force employed a consistent methodology across the board to ensure a "level playing field" for all bases evaluated. These cost figures only provided a generic view of overall base facilities conditions at all 21 SAC bases. They were not part of the economic analysis used in the base closure process.

We very much regret if any member of the Maine Delegation perceives that the Air Force acted improperly over the recommended closure of Loring AFB. Loring AFB was treated equally with the other 20 Strategic Air Command bases. Each was systematically measured against 80 subelements that were developed to evaluate bases using the eight DoD base closure selection criteria. We were required to make painful choices. But we are convinced that base, major command and headquarters officials performed their duties in good faith. The GAO and the Commission also validated the Air Force process. As discussed earlier, we regret any actions that diminished the Maine Delegation's confidence in our procedures. We hope that the foregoing information will put any misunderstandings behind us.

Due to the concern of the entire Maine Delegation, we have forwarded copies of this letter to Senator Mitchell, Senator Cohen, Representative Snowe, Representative Andrews, and Governor McKernan, as well as to Senator Warner as the ranking Republican of the Committee.

Sincerely,

James F. Boatright
Deputy Assistant Secretary of the Air Force
(Installations)

Document Separator

SECRETARY OF THE AIR FORCE
WASHINGTON

AUG 15 1991

The Honorable William S. Cohen
United States Senate
Washington, D.C. 20510-0001

Dear Senator Cohen:

I would like to share a personal concern with each Member of the Maine Delegation.

The base closure/realignment process is enormously complex and difficult. I have read the recent letter of Mr. Jim Boatright, Air Force Deputy Assistant Secretary for Installations, to Chairman Sam Nunn (a copy of which went to the Members of the Delegation). I understand why Maine Members may perceive that the Air Force was insufficiently responsive to your requests for information about Loring AFB and the Air Force decision process. We have learned from this experience that we must improve the guidance we give to our people. However, the Air Force people involved, at the base, at SAC and at Headquarters, were making good faith attempts to ensure that you received accurate and reliable information.

The people of Maine can be justifiably proud of the role Loring Air Force Base and its personnel have played in the defense of our country. Changing world conditions and budgetary constraints, however, compelled us to make difficult decisions in recommending for closure bases that our changing force structure could no longer justify. I hope that the closure decision itself can be put behind us and that we can move constructively ahead. The Air Force stands ready to assist you with Loring Air Force Base's transition, and I look forward to working with you personally in the future.

Sincerely,

Donald B. Rice

SECRETARY OF THE AIR FORCE
WASHINGTON

AUG 15 1991

The Honorable Thomas H. Andrews
House of Representatives
Washington, D.C. 20515-0001

Dear Mr. Andrews:

I would like to share a personal concern with each Member of the Maine Delegation.

The base closure/realignment process is enormously complex and difficult. I have read the recent letter of Mr. Jim Boatright, Air Force Deputy Assistant Secretary for Installations, to Chairman Sam Nunn (a copy of which went to the Members of the Delegation). I understand why Maine Members may perceive that the Air Force was insufficiently responsive to your requests for information about Loring AFB and the Air Force decision process. We have learned from this experience that we must improve the guidance we give to our people. However, the Air Force people involved, at the base, at SAC and at Headquarters, were making good faith attempts to ensure that you received accurate and reliable information.

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Sincerely,

Donald B. Rice

SECRETARY OF THE AIR FORCE
WASHINGTON

AUG 15 1991

The Honorable Olympia J. Snowe
House of Representatives
Washington, D.C. 20515-0001

Dear Mrs. Snowe:

I would like to share a personal concern with each Member of the Maine Delegation.

The base closure/realignment process is enormously complex and difficult. I have read the recent letter of Mr. Jim Boatright, Air Force Deputy Assistant Secretary for Installations, to Chairman Sam Nunn (a copy of which went to the Members of the Delegation). I understand why Maine Members may perceive that the Air Force was insufficiently responsive to your requests for information about Loring AFB and the Air Force decision process. We have learned from this experience that we must improve the guidance we give to our people. However, the Air Force people involved, at the base, at SAC and at Headquarters, were making good faith attempts to ensure that you received accurate and reliable information.

The people of Maine can be justifiably proud of the role Loring Air Force Base and its personnel have played in the defense of our country. Changing world conditions and budgetary constraints, however, compelled us to make difficult decisions in recommending for closure bases that our changing force structure could no longer justify. I hope that the closure decision itself can be put behind us and that we can move constructively ahead. The Air Force stands ready to assist you with Loring Air Force Base's transition, and I look forward to working with you personally in the future.

Sincerely,

Donald B. Rice

SECRETARY OF THE AIR FORCE
WASHINGTON

AUG 15 1991

The Honorable George J. Mitchell
United States Senate
Washington, D.C. 20510-0001

Dear Senator Mitchell:

I would like to share a personal concern with each Member of the Maine Delegation.

The base closure/realignment process is enormously complex and difficult. I have read the recent letter of Mr. Jim Boatright, Air Force Deputy Assistant Secretary for Installations, to Chairman Sam Nunn (a copy of which went to the Members of the Delegation). I understand why Maine Members may perceive that the Air Force was insufficiently responsive to your requests for information about Loring AFB and the Air Force decision process. We have learned from this experience that we must improve the guidance we give to our people. However, the Air Force people involved, at the base, at SAC and at Headquarters, were making good faith attempts to ensure that you received accurate and reliable information.

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Sincerely,

Donald B. Rice

SECRETARY OF THE AIR FORCE
WASHINGTON

AUG 15 1991

The Honorable Joseph R. McKernan, Jr.
Governor
State of Maine
State House, Station 1
Augusta, Maine 04333

Dear Governor McKernan:

I would like to share a personal concern with you as Governor and with each Member of the Maine Delegation.

The base closure/realignment process is enormously complex and difficult. I have read the recent letter of Mr. Jim Boatright, Air Force Deputy Assistant Secretary for Installations, to Chairman Sam Nunn (a copy of which went to the Members of the Delegation). I understand why Maine Members perceive that the Air Force was insufficiently responsive to your requests for information about Loring AFB and the Air Force decision process. We have learned from this experience that we must improve the guidance we give to our people. However, the Air Force people involved, at the base, at SAC and at Headquarters, were making good faith attempts to ensure that you received accurate and reliable information.

The people of Maine can be justifiably proud of the role Loring Air Force Base and its people have played in the defense of our country. Changing world conditions and budgetary constraints, however, compelled us to make difficult decisions in recommending for closure bases that our changing force structure could no longer justify. I hope that the closure decision itself can be put behind us and that we can move constructively ahead. The Air Force stands ready to assist you with Loring Air Force Base's transition, and I look forward to working with you personally in the future.

Sincerely,

Donald B. Rice

Donald B. Rice

Document Separator

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

AUG 16 1991

OFFICE OF THE SECRETARY

The Honorable William S. Cohen
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

This is in response to your August 12, 1991, letter requesting information about Air Force base closure/realignment deliberations and about Air Force interactions with the Defense Base Closure and Realignment Commission.

The Air Force internal control plan based on the Assistant Secretary of Defense for Production and Logistics memorandum dated February 13, 1991 is at attachment 1.

The Base Closure Executive Group (BCEG) meeting minutes you requested are classified SECRET. We are preparing an unclassified version for delivery to you by August 20. Our Senate Liaison Office, SR-182, Russell SOB, has been provided a copy of the classified version which you or properly cleared members of your staff may review in the interim.

No minutes were made of BCEG briefing to the Secretary of the Air Force.

There was no Air Force briefing to the Defense Base Closure and Realignment Commission (DBC&RC) on June 6, 1991. However, the DBC&RC did hold a classified question and answer session with an Air Force representative on June 6, 1991. This question and answer session (which essentially focused on tactical aircraft basing in the Southeast and on strategic aircraft basing at three Northeastern SAC bases) was debriefed to members of the Loring Delegation on the afternoon of June 7, 1991. There is no unclassified transcript of the June 6, 1991 session. Because the DBC&RC classified the transcript, it retains sole authority to declassify. I recommend that you redirect your request for this document to the DBC&RC. (We have notified the DBC&RC that a request might be forthcoming.)

Videotapes of Base Closure Commission visits to six SAC bases are available and are enroute to us. We will reproduce these videotapes upon receipt and provide you with copies.

Although you did not request it, the Secretary thought you would find it informative to have a copy of his briefing to the Defense Base Closure and Realignment Commission on April 12, 1991 (Attachment 2).

Sincerely,

BUSTER C. GLOSSON
Major General, USAF
Director, Legislative Liaison

2 Attchments
1. Air Force Internal Control Plan
2. Base Closure and Realignment Briefing

Document Separator

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

AUG 20 1991

The Honorable William S. Cohen
United States Senate
Washington, D.C. 20510

Dear Senator Cohen:

Although the processing of the Freedom of Information Act (FOIA) request discussed in your letter of June 26, 1991, to Secretary Rice was completed with the release of all requested documents on July 5, I wanted to personally write each Member of the Delegation and explain the processing of the request.

As outlined in the attached chronology, the request was received at Loring Air Force Base (AFB) on May 22, 1991. It was logged for completion pursuant to Department of Defense (DoD) and Air Force guidelines by June 6, ten working days after receipt. The package was forwarded to the base civil engineering squadron to conduct a search of available records and make a recommendation as to their releasability. A base-level search had been completed and a release recommendation prepared by the 30th of May.

The request sought the release of all records of transmissions between Loring AFB, Headquarters Strategic Air Command (HQ SAC), the Department of the Air Force, and the DoD concerning the condition of facilities at Loring AFB from May 7 to 21, 1991. Such a request requires a search of records at all locations mentioned in the request, not just those at base level.

Additionally, in response to our experience with FOIA requests concerning the base closure list approved in 1988, the Air Force established a policy in early 1989 directing that all FOIA requests for information concerning base closure issues be forwarded through the relevant Major Command with recommendations on release to Headquarters USAF (SAF/AAIS) for final resolution. This policy has remained in effect since 1989 and throughout the base closure recommendation process this year.

Thus, the Save Loring Committee FOIA request was forwarded through HQ SAC to SAF/AAIS for further searches of records at those levels, recommendations, and final disposition of the request. This is why the Base Commander at Loring AFB told the Committee he had been directed to forward their request to higher headquarters. Base officials wrote the Committee to tell them the request was being forwarded to HQ SAC on May 31, and that HQ SAC would advise them of its determination by June 20.

Although the FOIA itself provides little guidance on processing requests, the courts have established a due diligence standard for the review of agency actions. DoD and the Air Force have promulgated procedures to be followed in FOIA processing. These procedures envision that many requests will have to be forwarded to additional locations or higher authorities for resolution. In such cases, an internal ten working-day suspense is established at each location which receives a referral request.

Officials at Loring AFB completed their search of records and prepared their recommendation within ten working days. They referred the request to HQ SAC on Friday, May 31, and it was received there on Tuesday, June 4. With hindsight, the use of overnight delivery could have begun processing at HQ SAC one day earlier. HQ SAC was also able to conduct its records search and refer the request to Headquarters USAF within ten working days. They forwarded the request by overnight delivery on June 12. It was received in the Pentagon on June 13. HQ SAC wrote the Committee to inform them of this referral on June 12.

The Headquarters FOIA office received the request on June 13 but, due to administrative error, did not log it in and begin processing until June 18, a delay of three work days. This oversight did delay the final response and we regret that error. Based on the June 18 log entry, a ten-workday deadline of July 2 was mistakenly established. As processing in Washington continued, it became clear that all required records searches, reviews and coordinations would not be completed by July 2. On July 2, the same day the Committee brought suit to compel the release of the documents, SAF/AAIS wrote the Committee to advise of the need for an extension.

Coordination was completed at Headquarters USAF on July 3. All documents sought in the request were delivered in two installments shipped by Federal Express to the Committee on July 3 and 5.

The processing of FOIA requests involves careful, line-by-line analysis of relevant documents and requires multiple levels of review. The Air Force is fully committed to maximum disclosure under the FOIA and to expeditious processing. With hindsight, this request could have been processed more quickly if personnel at all levels had given it even higher priority, had proper log-in been accomplished in the Pentagon, and had we used overnight delivery at every level. I want to assure you our actions do not reflect any intent to frustrate your efforts on behalf of Loring AFB. As to the suggestion of using FOIA procedures to suppress release of evidence of inaccurate or incomplete information, I can only reiterate what Secretary Rice stated in his letter to the Delegation on August 15: Air Force personnel at all levels were making good faith attempts to ensure that you received accurate and reliable information.

I hope this clears the air as to how we processed the FOIA request. If you or your staff have any questions, please call me so that we can put this behind us.

Sincerely,

James F. Boatright
Deputy Assistant Secretary of the Air Force
(Installations)

Attachment

PROCESSING OF REQUEST

21 May 91	Save Loring Committee (Committee) sends Freedom of Information Act (FOIA) request to Loring AFB.
22 May 91	Loring FOIA Office receives the request. Ten working days deadline = 6 Jun. Request is forwarded to Civil Engineering for staffing.
23 - 30 May	Civil Engineering personnel conduct a search for responsive records and have records reviewed by the FOIA Office and Base Legal Office. A recommendation for denial is prepared and signed by the Base Commander.
31 May 91	Loring FOIA Office refers the request to Strategic Air Command Headquarters (SAC) for a search of records at that Headquarters and a review of the recommendation on release. The Loring FOIA Office also sends a letter to the Committee attorney advising the request has been referred to SAC and stating an answer should be provided by June 20, 1991.
3 June 91	The attorney for the Committee writes to the Loring FOIA Office stating that he believes the response is due by the June 6 deadline.
4 June 91	Referral package is received at SAC FOIA Office. Ten working days deadline = 18 Jun.
5 June 91	SAC FOIA Office forwards the package to the Office of the Deputy Chief of Staff for Plans for a review of the records forwarded from Loring, a search for any additional responsive records at SAC, and a recommendation on release.
10 June 91	Loring FOIA Manager writes the Committee attorney in response to his June 3 letter and cites "Unusual circumstances" provision in the applicable regulations which permits additional processing time and notes the package has been referred to SAC.
11 June 91	Referral package is returned to the SAC FOIA Office with additional records located at SAC, a legal review, and recommendations.
12 June 91	SAC refers the request package to the FOIA Manager at Headquarters United States Air Force (SAF/AAIS) for a further search of records there and a decision on release. SAC FOIA Manager sends a letter to the Committee attorney advising the request has been referred to SAF/AAIS and that SAF/AAIS will advise the Committee of their determination.

13 June 91 — Package is delivered to the Pentagon; receipt shows accepted at 2:40 p.m., June 13. For unknown reasons, the package is not logged into SAF/AAIS until June 18.

18 June 91 — Referral package is logged into SAF/AAIS and processing begins. ten working days deadline = believed to be July 2, based upon logged receipt on June 18.

19 June 91 — Package is forwarded to the Office of the Assistant Chief of Staff for Programs and Evaluation for a further search for responsive records and a decision on release.

20 June 91 — Package is received in the Installation Management Division for action.
Review of package begins.

25 June 91 — Review continues with study of the Freedom of Information Act, legal recommendation is obtained.

26 June 91 — Staff Summary Sheet and draft response letter are finalized in the Installation Management Division. Coordinations are sought from the General Law Division, Office of The Judge Advocate General; the Office of the Civil Engineer; the General Counsel; the Deputy Assistant Secretary of the Air Force for Installations; and the FOIA Manager (SAF/AAIS).

28 June 91 — Coordination is obtained from General Law Division and Office of the Civil Engineer.

2 July 91 — FOIA Manager (SAF/AAIS) writes the Committee attorney reporting that a ten working-day extension is required to consult with other Air Force activities to determine if the records are releasable.

Committee sues to compel release of information.

3 July 91 — Hearing is held in US District Court on Committee's suit. Air Force is ordered to release information sought by July 5, 1991, further hearing is set for July 8 to review any Air Force claims of exemption from release.

Coordination on release is obtained from General Counsel and the Deputy Assistant Secretary for Installations.

First package of documents is shipped to the Committee by Federal Express.

5 July 91 — Second and final package of documents is datafaxed and shipped to the Committee by Federal Express.

8 July 91 — No hearing is held in US District Court; Air Force withheld none of the records sought in the request.

By letter, the Committee claims not all documents requested have been released; cites additional items sought.

10 July 91 — Government answers Committee claim with affidavits establishing no other documents exist.

No further court action, case open, but Committee has made no further claims.

Document Separator

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

AUG 20 1991

The Honorable George J. Mitchell
United States Senate
Washington, D.C. 20510

Dear Senator Mitchell:

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Additionally, in response to our experience with FOIA requests concerning the base closure list approved in 1988, the Air Force established a policy in early 1989 directing that all FOIA requests for information concerning base closure issues be forwarded through the relevant Major Command with recommendations on release to Headquarters USAF (SAF/AAIS) for final resolution. This policy has remained in effect since 1989 and throughout the base closure recommendation process this year.

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Deputy Assistant Secretary of the Air Force
(Installations)

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Document Separator

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

AUG 20 1991

The Honorable Olympia J. Snowe
House of Representatives
Washington, D.C. 20515

Dear Mrs. Snowe:

Although the processing of the Freedom of Information Act (FOIA) request discussed in your letter of June 26, 1991, to Secretary Rice was completed with the release of all requested documents on July 5, I wanted to personally write each Member of the Delegation and explain the processing of the request.

As outlined in the attached chronology, the request was received at Loring Air Force Base (AFB) on May 22, 1991. It was logged for completion pursuant to Department of Defense (DoD) and Air Force guidelines by June 6, ten working days after receipt. The package was forwarded to the base civil engineering squadron to conduct a search of available records and make a recommendation as to their releasability. A base-level search had been completed and a release recommendation prepared by the 30th of May.

The request sought the release of all records of transmissions between Loring AFB, Headquarters Strategic Air Command (HQ SAC), the Department of the Air Force, and the DoD concerning the condition of facilities at Loring AFB from May 7 to 21, 1991. Such a request requires a search of records at all locations mentioned in the request, not just those at base level.

Additionally, in response to our experience with FOIA requests concerning the base closure list approved in 1988, the Air Force established a policy in early 1989 directing that all FOIA requests for information concerning base closure issues be forwarded through the relevant Major Command with recommendations on release to Headquarters USAF (SAF/AAIS) for final resolution. This policy has remained in effect since 1989 and throughout the base closure recommendation process this year.

Thus, the Save Loring Committee FOIA request was forwarded through HQ SAC to SAF/AAIS for further searches of records at those levels, recommendations, and final disposition of the request. This is why the Base Commander at Loring AFB told the Committee he had been directed to forward their request to higher headquarters. Base officials wrote the Committee to tell them the request was being forwarded to HQ SAC on May 31, and that HQ SAC would advise them of its determination by June 20.

Although the FOIA itself provides little guidance on processing requests, the courts have established a due diligence standard for the review of agency actions. DoD and the Air Force have promulgated procedures to be followed in FOIA processing. These procedures envision that many requests will have to be forwarded to additional locations or higher authorities for resolution. In such cases, an internal ten working-day suspense is established at each location which receives a referral request.

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James F. Boatright
Deputy Assistant Secretary of the Air Force
(Installations)

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DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

AUG 20 1991

The Honorable Thomas H. Andrews
House of Representatives
Washington, D.C. 20515

Dear Mr. Andrews:

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DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

JIM COURTER, CHAIRMAN

COMMISSIONERS:
WILLIAM L. BALL, III
HOWARD H. CALLAWAY
GEN. DUANE H. CASSIDY, USAF (RET)
ARTHUR LEVITT, JR.
JAMES SMITH II, P.E.
ROBERT D. STUART, JR.
ALEXANDER B. TROWBRIDGE

June 2, 1991

The Honorable Susan Livingstone
Assistant Secretary of the Army
for Installations
The Pentagon
Washington, D.C. 20310-0101

Dear Mrs. Livingstone:

The Defense Base Closure and Realignment Commission is continuing its review of the various proposals. There are pieces of some of the Army's proposals that need further justification.

Realignment of DESCOM to Rock Island - The formation of an Industrial Operations Command appears valid. However, there is an option of forming that command and splitting its missions and staff between Rock Island and Letterkenny. The realization is the personnel savings will be reduced, but so would the one-time costs. We request an analysis of this option. The option should be added to our May 24, 1991 request. Additionally, identify any additional realignments desired with your original proposal.

Realignment of SIMA-East to Rock Island - The relocation of SIMA-E does not appear to have any savings or operational advantages, since SIMA-E has a variety of customers and is not a part of DESCOM or Industrial Operations Command. This portion of your proposal only generates one-time costs. We request the operational rationale, by proposed workload, for this proposal. This option should be added to our May 24, 1991 request.

Combat Material Research Lab - The realignment of the Electronics Technology and Devices Lab to Harry Diamond Lab - Adelphi has large one-time costs, primarily for the construction of the new lab. There is no apparent operational synergism since this function appears to be an unique operation. We request the operational rationale and cost considerations for this proposal. This option should be added to our May 24, 1991 request.

Realign Artillery and Tactical Vehicle Rebuild and Tactical Missile Maintenance - This realignment is noted in your recommendations for the Industrial Depot Category. We request the specifics, in terms of costs and personnel, be broken-out of your costs analysis. This should be added to our May 24, 1919 request.

The Commission is rapidly approaching the decision phase of its effort. The above information is required no later than June 4, 1991. The original request of May 24, 1991 may be extended to that date.

Thank you in advance for your cooperation and timely response.

Sincerely,

JIM COURTER
Chairman

cc: The Honorable Colin McMillan

Document Separator

17 JUN 1991 00[illegible]5

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, DC 20310-0200

REPLY TO
ATTENTION OF

11 June 1991

Mr. Jim Courter
Chairman, Defense Base Closure
and Realignment Commission
1625 K Street, N.W., Suite 400
Washington, D.C. 20006-1604

Dear Mr. Courter,

Thank you for your letter of May 22, 1991, to Mrs Livingstone requesting the Army to review the independent proposal for retaining the Land Combat Missile Systems maintenance mission at Anniston Army Depot.

Attached is a copy of the comments prepared by Headquarters, AMC in response to what appears to be the same proposal submitted by the Alabama delegation on behalf of Anniston Army Depot. The last page of the attachment is the requested COBRA summary.

The economic challenges made in the proposal overstate the equipment that would actually be moved to Letterkenny Army Depot and fail to consider the savings in overhead identified in the DDMC study. The environmental concerns are totally unfounded and the evidence shows that environmental compliance will improve at both Anniston and Letterkenny Army Depots.

If we can be of further assistance, please feel free to contact me personally or Lieutenant Colonel Chip Larouche at (703) 693-7556.

Sincerely,

John B. Nerger
Acting Director, Total
Army Basing Study

Attachment

cc: The Honorable Colin McMillan
The Honorable Susan Livingstone

EXECUTIVE SUMMARY

After reviewing the information provided by the delegation from Alabama on behalf of Anniston Army Depot, we find that none of the considerations provided warranted incorporation or approval into the Tactical Missiles Study.

Combat Readiness will not be detrimentally impacted by the consolidation of all DoD missiles at Letterkenny Army Depot.

Environmental Compliance will not only be met, but will be exceeded, due mostly to the change in workload mix at Letterkenny.

The Tactical Missiles Study report issued in January 1991 projected total cost savings of $87.194 million from the movement of all Services' workload to Letterkenny, less a total cost for facilities renovation to accept the additional equipment plus the cost to move equipment of $29.200 million for a net savings associated with the consolidation of $57.994 million.

Of the total $87.194 to be saved, $23.4 (Table 1) is applicable to the workload to be moved from Anniston Army Depot. Military construction avoidance at Anniston is $7.25 million for the ATACMS and Inertial Guide projects. Increased travel cost for personnel from MICOM to Letterkenny vs. Anniston is $368,445. Cost to move the equipment unique to the Land Combat Missile Systems is $102,232. Although personnel costs were not calculated at the time of the original study those costs applicable to the move of ANAD workload are projected to be about 1/3 of the total $5.4 million for all Army workload change -- $1.8 million. This results in a net savings projected to be $28.3 million. ($23.4 mil + $7.25 mil - $368K - $102 K - $1.8 mil = $28.3 mil)

This projected savings of $28.3 million is contrary to the Alabama projection. Their projection was a cost of $38,508,919.78 plus $7,283,325.21 per year for 5 years ($36,416,626) or a total cost of approximately $75 million.

The Tactical Missiles Study offers a cost savings projection to DoD by consolidating workload at LEAD. The material provided by Alabama offered no savings to keep the workload at ANAD.

The consolidation of Tactical Missiles from ANAD to LEAD is consistent with the policy of Army Deputy Chief of Staff for Logistics (DCSLOG) and is consistent with the Joint Service Business Plan endorsed by Department of the Army, Department of the Navy, and Department of the Air Force dated Feb. 28, 1991, to Assistant Secretary of Defense (Production and Logistics).

The following is an excerpt from the Army's Business Plan relative to the Tactical Missiles Study that also supports our position.

3.8.Ø. LETTERKENNY ARMY DEPOT (LEAD) - STRATEGY. LEAD will be postured as the DoD missile and missile support equipment CTX (Center for Technical Excellence) and integrated depot-level maintenance facility. This consolidates guidance and control section repair for all current and future air, ground, and surface launched missiles. The missile support equipment includes Army-only launchers, radars, associated ancillary equipment, and subsystem repair of missile platforms mounted on track or wheeled vehicles for which system integrity is not impacted by their removal and repair at LEAD. All artillery workload will be consolidated at RRAD consistent with DDMC study recommendations. The short-term savings plan consolidated the automotive workload at TEAD.

REVIEW OF LEAD VS. ANAD PERFORMING LAND COMBAT MISSILE SYSTEMS WORKLOAD

We have addressed the issues in the same order as the material provided by the delegation from Alabama. Our position was not to refute the position taken by Alabama, but rather to effectively deal strictly with the facts associated with the movement of the workload from ANAD to LEAD. Listed below is the projection made by the Tactical Missiles Study Team.

In the areas addressed below, some of the projections address the total Services' workload change when it was too intermeshed with the Alabama workload to differentiate.

A. COMBAT READINESS -

Impact to readiness is a most important consideration in the decision making process to relocate a Source of Repair (SOR). To minimize the impact to a change in SOR a detailed implementation plan is required. The implementation plan includes phasing of workload, facilities requirements, equipment requirements, people (skill levels, training, relocation, learning curve, availability, etc.), and inventory availability.

With the decline in world hostilities and the low probability of a global land based war scenario, less demand is being placed on existing inventory and turn-around-time.

With the utmost concern for combat readiness, there is negligible impact to our ability to support the existing force structure and to readily dispatch the operating forces to meet any emergent demand during the transition of SORs. The orderly transition of the Tactical Missiles took into consideration the weapons requirements of the present force structures and conflict scenarios as major factors. The responsibility for this transition process has been directed by Commander Depot Systems Command to each depot, to be executed as the priority of the Business Offices. Transition plans will be patterned to the specific missile systems. Where duplication of support equipment exists, equipment will be moved and a dual capability will be established allowing for the timely transition while maintaining readiness.

As an example, the Airborne TOW equipment has been reviewed and it has been determined that dual capability exists within the depot system. This duplicate capability is presently housed in Mainz Army Depot. Based on the recommendations from the DDMC study concerning Mainz, the TOW mission would be transferred to LEAD in FY93. This dual capability allows for the timely equipment transfer from Mainz prior to the movement of Anniston's

support equipment. Thus allowing for no maintenance downtime for TOW and making it one of the systems providing the best transition options with the lowest risk factor to impact readiness.

B. ENVIRONMENTAL CONSIDERATIONS -

Environmental compliance was considered in the Defense Depot Maintenance Council (DDMC) study. It is acknowledged that environmental regulations are not consistently restrictive across the country. However, as stewards of our national resources it is incumbent upon the Department of Defense to reduce environmental pollutants from its industrial operations rather than seeking means to circumvent the words and spirit of these regulations. The Clean Air Act of 1990 will likely redefine pollutant categories and monitoring requirements such that engineering controls will be required to reduce emissions from all large industrial facilities within DESCOM. The LEAD is involved in advanced planning to install control equipment for Volatile Organic Compound (VOC) emissions which will maintain compliance during expanded mission workload in support of unplanned surge events such as Desert Storm. This technology is also under analysis to maximize its application under the new Clean Air Act of 1990 requirements.

The DDMC study proposal regarding missile consolidation will ease the LEAD compliance posture with regard to VOC emissions specifically, and all environmental media generally. Consolidation of tactical missiles at LEAD coupled with the planned movement of artillery and truck workload from LEAD will significantly reduce the emissions of VOC and improve the LEAD compliance posture in this regard. Annually, an estimated reduction of 75-80% of VOC emissions from LEAD may result from implementation of the study recommendations. The influx of new missile systems will replace the current VOC-intensive workload with a much cleaner type of work. The eleven missile systems recommended to be transferred to LEAD will be electronic missile component work requiring minimal painting.

Environmental impacts and compliance are issues which receive significant consideration in every level of DoD planning. However, consolidation of tactical missile workload at LEAD and the transfer of artillery and trucks will result in decreased levels of VOC output in relation to present output. Compliance will be achieved and maintained in accordance with statute and policy.

C. ECONOMIC CONSIDERATIONS -

1. RELATIVE LOCATION OF ANNISTON AND LETTERKENNY TO THE ARMY MISSILE COMMAND (MICOM) AND ASSOCIATED IMPACTS ON OPERATING COSTS

We accept the position offered on behalf of Anniston. We expect travel costs to increase when workload is moved from Anniston to Letterkenny. We offer no opposing position.

2. COSTS OF DOING BUSINESS, ANNISTON VS. LETTERKENNY

No attempt was made to differentiate the costs per commodity other than the savings calculations made in the original Tactical Missiles Study. Therefore, bid rates do not serve as a comparison until all workload changes stabilize.

3. COSTS OF FACILITIZATION

Land Combat Missile Systems relocated from ANAD to LEAD require similar facilities which are used for maintenance support that exist throughout the DoD Tactical Missile community. Existing clean rooms within DoD are of a higher quality modular design than the ones located at ANAD and will be relocated to provide the necessary capacity/capability at the LEAD Consolidated Tactical Missile Facility.

A major objective of the Tactical Missiles Study was to optimize an existing facility's use through consolidation with no Military Construction expenditures. LEAD was determined to be the only site that could be dedicated as a Tactical Missile Facility for the following reasons: (a) the current mission as CTX for HAWK/PATRIOT air defense missile systems; (b) concurrent DDMC studies on trucks, and towed/self propelled Howitzers recommended the consolidation of these systems at other activities thus availing an additional 317,000 square feet facility to be renovated with no Military Construction costs at LEAD; and additionally, (c) LEAD has other facilities which contain physical and electronic surveillance security for service systems identified in the study. These facilities include tri-level security systems with ample security/safety/ammunition operations and conforming earth covered storage space.

4. RELOCATION OF EQUIPMENT FROM ANNISTON TO LETTERKENNY

This analysis included the following:

Only those cost centers involving direct missile support were analyzed;

Support activities such as machine shops, paint facilities, and cleaning operations were not considered because they already exist at LEAD;

Equipment required to support relocated workload was taken from the Capability/Capacity Engineering Data Reporting System (CEDRS). The CEDRS file only lists equipment over $1,000.00. Only major test consoles in the missile cost centers, which are uniquely dedicated, transfer with the mission. The weight of a typical major test console is estimated at 2,000 lbs.

Estimated workhours for labor and the cost per workhour were derived from a similar study performed in 1990.

For the purpose of this analysis, it is expected that current prices at ANAD are within plus or minus 10 percent of the 1990 figures.

Based on the CEDRS file, the equipment listed for direct missile support cost centers equals 182 items at a total cost of $20,577,000.00. Only 47 of the 182 items listed represent test consoles. The remainder are mostly peripheral support equipment such as oscilloscopes, multimeters, power supply generators, fixtures, etc. A cost breakdown for disassembly, crating, shipping, uncrating, and reassembly at LEAD is as follows:

	Est Workhours per unit	Est cost per work hr	Est crating cost per unit	Number of units	cost
Disassemble and move to shipping area	8	$42.50	na	47	$15,980
Crating	na	na	$300	47	$14,100
Uncrate	na	na	$ 50	47	$2,350
Move to new location and reinstall	8	$42.50	na	47	$15,980
			Sub total		$48,410
Estimated transportation cost for 47 consoles at 2,000 lbs each					$3,822
(Disassemble, crate, uncrate, reinstall) est cost to move remaining equipment					$50,000
Estimated cost to move all direct support missile equipment from ANAD to LEAD					$102,232

Consideration was given to the vast quantities of support equipment existing within the Tactical Missile arena. Through consolidation, specialized support equipment will be moved to the selected location and the common support equipment will be screened for application across all services, thereby reducing overall common support equipment transitioned to the selected site.

REALIGNMENT SUMMARY (COBRA Ver 1.20)

ption NPV20	($K) :	-64801	Losing Base	:	ANAD
l One-Time Cost	($K) :	7184	Group	:	AMC
s to Break Even	:	1	Service	:	US Army
OI Years	:	0	Option Package	:	ANAD-LEAD

Net Cost ($K) Constant Dollars

	Year1 1992	Year2 1993	Year3 1994	Year4 1995	Year5 1996	Year6 1997	Beyond
ission	0	0	0	0	0	0	0
ersonnel	0	0	0	0	0	0	0
verhead	0	-4672	-9355	-9355	-9355	-9355	-9355
onstruct	323	0	2081	2254	0	0	0
oving	0	2135	0	0	0	0	0
ther	0	391	0	0	0	0	0
ET	323	-2146	-7274	-7101	-9355	-9355	-9355
ff Elim	0	0	0	0	0	0	
nl Elim	0	0	0	0	0	0	
iv Elim	0	0	0	0	0	0	
OT ELIM	0	0	0	0	0	0	

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

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May 22, 1991

The Honorable Susan Livingstone
Assistant Secretary of the Army
for Installations
The Pentagon
Washington, D.C. 20301

Dear Mrs. Livingstone:

The Defense Base Closure and Realignment Commission has received an independent proposal for retaining the Land Combat Missile Systems maintenance mission at Anniston Army Depot. The proposal challenges the economics of the Army proposal, identifies a potential environmental problem (handling VOC's), and proposes an alternative.

We request that you review the attached proposal and provide comments no later than June 3, 1991. The comments should include a short information paper and COBRA analysis of the proposal.

Thank you in advance for your cooperation and timely response.

Sincerely,

Jim Courter
Chairman

jc:tgm
enc

cc: The Honorable Colin McMillan

Document Separator

DAEN-ZCI

20 NOV 1991

MEMORANDUM FOR RECORD

SUBJECT: REALIGNMENT OF MAINTENANCE WORKLOAD - LETTERKENNY ARMY DEPOT

PURPOSE: Define the Defense Base Realignment and Closure Commissions consideration of the Army initiative to realign maintenance activity among various Army Depots.

DISCUSSION: The Department of Defense Base Realignment and Closure Proposal submitted to the Commission contained a sentence in the Letterkenny Army Depot recommendation section regarding maintenance activity transfer (pg 47). The sentence read " Losses in personnel at Letterkenny Army Depot are partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT, and Red River Army Depots, TX respectively."

The justification for the Letterkenny Army Depot submission contained cost data for the realignment of activities to Rock Island Arsenal and Redstone Arsenal. No reference or cost data for the workload transfer proposal was included in the DoD submission.

Subsequent actions requested the Army submit Migration Diagrams and COBRA (cost) Analysis for all of their proposals (and alternatives). The Army did submit Migration Diagrams for the maintenance workload; however, no COBRA (cost) Analysis was provided.

Telephonic coordination with the Army Total Army Basing Study indicated that the Letterkenny maintenance workload realignment was "workload" only and did not involve personnel and was within Army authority to approve. The Army included it because of OSD guidance to include cumulative actions which triggered the threshold that warranted submission to the Commission.

DAEN-ZCI
SUBJECT: REALIGNMENT OF MAINTENANCE WORKLOAD - LETTERKENNY ARMY DEPOT

The undersigned addressed the issue with Commission counsel and Director of Review and Analysis, recommending the Commission not consider the initiative. The recommendation was accepted and the Commission did not address the initiative.

DAVID A. LENTZER
Analyst
Defense Base Realignment and
Closure Commission

Document Separator

To: Matt
From: Jackie
re.: The Land Combat Missile Systems Maintenance at Anniston

11.22.91

Per numerous conversations among staff, below is a precursory list of pros and cons:

- The realignment of the Tactical Missile Maintenance workload from several locations, Anniston included, is a **MAJOR** initiative from AMC -- in accordance to the AMC 2000 vision. Thus, it should have been highlighted clearer by OSD in its original submission.

- The Army rationalized that the realignment was **WORKLOAD**-oriented, and did not involve personnel, thus fell within Army authority. True, however, it does not **EXCLUDE** the Commission from taking a position on the move, if we so choose. At the same time, if it were completely in the Army's purview to decide, then why even mention the realignment in the recommendation?

- The Commission chose not to comment on the move. Though, since we also did **NOT** explicitly disapprove of the consolidation of the Missile Systems Maintenance, the Army is interpreting that we approved the Anniston move as part of the Letterkenny realignment.

- The question that needs to be answered is: Should the realignment of the Tactical Missile Maintenance be a separate package than the Letterkenny realignment?

- A COBRA Summary Report, a single page, and a migration diagram were submitted by the Army for the Commission to review. These items were provided in response to our 6.2.91 inquiry, and not as part of the original submission.

- Also included in our record as an attachment to the Army June 11th response is a memo detailing the Army's rationale for the realignment of Artillery & Tactical Vehicle Rebuild and Tactical Missile Maintenance.

- Also included in our files is a letter from the Mayor of Anniston stating his opposition to moving the Tactical Missile Maintenance workload to Letterkenny. The Mayor also testified at a regional hearing in Jacksonville, Fla held on 5.23.91

- According to Dave Yentzer, there were no reference or cost data for the workload transfer proposal included in the DoD submission. (I think he meant in the <u>original</u> submission)

- The AAA commented that there was no clear decision-trail to support the Return-on-Investment of the Anniston realignment. Staffs also cannot verify the costs and potential savings for this movement.

- There is enough documentation to prove that staffs had a chance to review the move. Further, the Alambama delegation (represented by the Anniston Mayor) testified and corresponded with the Commission, thus, "had his day in court."

There was no seperate discussion by both staffs and commissioners during our public deliberations.

Document Separator

SUBJECT: TACTICAL MISSILE MAINTENANCE WORKLOAD

Reference: DoD Base Closure and Realignment Report, April 1991
* See Page 47 - Letterkenny Army Depot (LEAD)

o Contained within the Letterkenny recommendation to move functions to Rock Island, Illinois, is the statement that "Losses in personnel at Letterkenny Army Depot are partially offset by a concurrent action to move the missile maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT, and Red River Army Depots, TX, respectively" (Atch 1).

- The justification paragraphs for the Letterkenny to Rock Island move make no mention of the below threshold moves to LEAD from Anniston, Red River, Sacramento, Tobyhanna and several unnamed Navy and Air Force industrial facilities. Also, the move from Letterkenny to Tooele and Red River Depots is not mentioned a[illegible] justification information c[illegible] ith the major realignment fi[illegible]

- T[illegible] naintenance moves refers tc[illegible] ort submission, there was ar[illegible] ot Maintenance Council (I[illegible] onsolidations. Also, the cc[illegible] nsistent with established pc[illegible] for Logistics (DCSLOG) an[illegible] ess Plan endorsed by the Se[illegible] ction and Logistics dated Fe[illegible]

Th[illegible] oad and not movement of pe[illegible] dealt with this category of[illegible] rmy staff if the move inv[illegible] ne action did not involve the[illegible], that has changed and doe[illegible] Letterkenny (Atch 2).

- Appendix G of the DoD Report contains personnel gains and losses for installations impacted by closures and realignments. For Anniston and Tobyhanna, the table shows only a gain of personnel and no losses. Red River Army Depot does not even appear in the table and the other industrial facilities are not named anywhere in the report (Atch 3).

    - Conversely, Letterkenny does show a gain in personnel as well as the loss (LEAD to Rock Island)

- No COBRA analyses or specific details on the missile maintenance moves to LEAD or from LEAD to Red River and Tooele were provided as part of the DoD Report or detail documentation.

- Early in the process, the Commission Review and Analysis staff queried the Army on the reference to the missile maintenance functions relocating to LEAD (see page 47 of DoD Report). The Army response was that the realignment was **workload** and not **workforce oriented**. Additionally, the DoD Report does not mention which Navy and Air Force industrial facilities are to be realigned, only that there are Navy and Air Force facilities involved.

    - The base closure statute mandates that the DoD must submit to the Commission closures and realignments that break the threshold, but does not preclude the Commission from looking at below-threshold installations.

- On closer examination of the DoD Report, all recommendations by the Army regardless of the length, are contained in one paragraph with the exception of Letterkenny Depot (Atch 4).

    - The Review and Analysis staff considered the second paragraph as a parenthetical statement by the Army to "soften the blow" of the movement of significant numbers of personnel from Letterkenny to Rock Island.

    - This question was asked by the R&A staff analyst (Mr. Yentzer) of the Commission Counsel. Counsel did agree at that time that the statements contained in the second paragraph of the DoD Report appeared to be explanatory and not part of the recommendation by the Army (Atch 2).

- The Department of the Army's contention is that the missile maintenance movements to LEAD are part of the Letterkenny DoD recommendations. Since the Commission did not find any substantial deviation to that proposal (in fact, the Commission was totally silent on missile maintenance movements in deliberation hearings and the Final Report) it is their position that the Commission gave approval to the realignment.

    - The Army plans to request MILCON funds in their FY 1995 budget request which is forwarded to Congress in January 1994. Therefore, the Army has sufficient time to prepare an environmental assessment and request funds under the normal process rather than seek the expedited track that the base closure law permits.

- The Commission requested that the Army provide information on the missile maintenance realignments by letter dated June 2, 1991 (Atch 5). This request asks the Army to provide "the specifics, in terms of costs and personnel" for the realignment of the tactical missile maintenance function.

    - We have no record of the Army ever providing any information in response to our request of June 2, 1991 relative to missile maintenance realignments. This response would have been quite extensive since there were moves involving six military installations.

- The movement of missile maintenance activities, including Anniston, AL, is part of a major Department of the Army initiative called AMC 2000. If the Army was looking for the Commission's agreement to proceed, a prudent person would think that the Department would have highlighted their proposal much more clearly as evidenced by their actions relative to the Tri-Service Reliance and Lab 21 Realignments (see pages 49 & 51 of the DoD Report). Both of these realignment proposals contained moves that were below the reporting requirement thresholds.

    - The Commission received an independent proposal for retaining the maintenance function at Anniston. As was the case with proposals received from outside sources, we forwarded the proposal to the Army for comment by letter dated May 22, 1991 (Atch 6).

    - The Army's response to our May 22, 1991 request is dated June 11, 1991 and is signed by Mr. John Nerger, Acting Director - Total Army Basing Study, (Atch 7). The response was received by ExecSec on June 17, 1991.

- Additionally, the only other time the movement of missile maintenance functions became a topic of discussion occurred when the Mayor of Anniston testified on May 22, 1991 in Jacksonville, Florida, at the southeast Regional Hearing. Mayor Robison provided the Commission information by letter (Atch 8). That information had already been forwarded to the Army for a response (atch 6).

CONCLUSION:

Neither DoD nor the Army were seeking the Commission's approval to realign the missile maintenance function when they placed in the DoD Report the information contained in paragraph two of the recommendation for Letterkenny. The Army's only purpose for including this information was to soften the loss of personnel and workload at Letterkenny by telling the reader (the Commission and the public) that the Army, through a concurrent action, was moving a number of missile maintenance functions to Letterkenny from at least six other locations.

ATTACHMENTS:

1. DoD Report, Letterkenny Depot
2. R&A Staff Analyst - Memo For Record
3. DoD Report - Personnel Impacts
4. DoD Report - Army Recommendations
5. Commission Letter dated June 2, 1991
6. Commission Letter dated May 22, 1991
7. Dept of Army Ltr dated June 11, 1991
8. City of Anniston Ltr dated May 23, 1991

Letterkenny Army Depot, Pennsylvania

Recommendation: Realign the Headquarters, Depot Systems Command (DESCOM) (including the Systems Integration and Management Activity) from Letterkenny Army Depot to Rock Island Arsenal and merge it with the Armament, Munitions and Chemical Command (AMCCOM) to form the Industrial Operations Command (IOC). Relocate the Material Readiness Support Activity (MRSA) from Lexington-Bluegrass Army Depot to Redstone Arsenal, AL, along with the relocation of the Logistics Control Activity (LCA) from the Presidio of San Francisco, CA, to Redstone Arsenal, AL. This proposal is a revision to the recommendations of the 1988 Base Closure Commission, which directed MRSA to relocate from Lexington-Bluegrass Army Depot, KY, to Letterkenny Army Depot, PA. The merger of these two activities will form the Logistics Support Activity (LOGSA).

Losses in personnel at Letterkenny Army Depot are partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT, and Red River Army Depots, TX, respectively.

Justification: To improve efficiency of the Army logistics, the Army's implementation of the Defense Management Report includes the consolidation of Inventory Control Points. Sixteen million dollars ($16M) have already been programed for building a facility for MRSA and LCA at Letterkenny Army Depot to implement a the 1988 Base Closure Commission recommendation. The Material Readiness Support Activity (MRSA) move to Letterkenny was specified by the 1988 Base Closure Commission. There are no additional costs to the changed destination of MRSA. Leaving MRSA at Letterkenny Army Depot would not be as operationally efficient as the proposed change.

In order to streamline management functions for industrial operations, DESCOM and AMCCOM are being merged into the IOC at Rock Island. Merging them at Letterkenny was also considered but was determined to be more costly.

ATCH 1

Implementing this recommendation will cost $3M. Annual savings after implementation are expected to be $2M. Changes in the force structure have indirect effects on industrial operations. The actual changes in workloads and required capacity will be affected by decisions on equipment policies that have not been made yet. When reviewing the military value matrix calculations, Letterkenny Army Depot rates 5 of 10 depot facilities. Moving DESCOM to Rock Island Arsenal provides an immediate return on investment. This action will have no effect on remedial environmental actions currently ongoing at any installation and the environmental impact the losing and gaining installations is expected to be minimal. These realignment actions may result in a potential employment change of -2.2% at Letterkenny.

Rock Island Arsenal, Illinois

Recommendation: Realign Armament, Munitions, and Chemical Command (AMCCOM) from Rock Island Arsenal, IL, to Redstone Arsenal, AL, as part of the Inventory Control Point (ICP) consolidations under a Defense Management Report decision.

Justification: To improve efficiency of Army logistics, the Army's implementation of the Defense Management Report includes the consolidation of Inventory Control Points. Moving the armament portion of AMCCOM to Redstone Arsenal permits the Army to consolidate the missile and armament functions into one ICP. Changes in the force structure only have indirect effects on industrial operations. This recommendation is a business oriented decision to improve supply distribution efficiency.

Moving the AMCCOM Inventory Control Point to Redstone Arsenal provides an immediate return on investment. Implementing this recommendation (including the consolidation of the missile and armament functions into one ICP at Redstone Arsenal, AL, as well as formation of the Industrial Operations Command (IOC) at Rock Island, IL) will save $2M. Annual savings after implementation are expected to be $66M. This action will have no effect on remedial environmental actions ongoing at any installation and the environmental impacts are expected to be minimal.

These realignment actions may result in a potential employment change of +2.6% at Redstone Arsenal and -1.1% at Rock Island Arsenal. Losses in personnel at Rock Island Arsenal are partially offset by a concurrent action to move the Headquarters, Depot Systems Command (DESCOM) from Letterkenny Army Depot, PA, to Rock Island Arsenal, merging AMCCOM and DESCOM to form the Industrial Operations Command (IOC).

Realign Army Laboratories (LAB 21 Study)

Recommendation: The LAB 21 study establishes the Combat Materiel Research Laboratory (CMRL), at Adelphi, MD. The Army also recommends that the Army Material Technology Laboratory (AMTL), Watertown, MA, not be split up and sent to Detroit Arsenal, Picatinny Arsenal and Fort Belvoir but instead that the AMTL be sent to Aberdeen Proving Ground (APG), MD, less the Structures Element that should be collocated at the NASA-Langley Research Center, Hampton, VA. This proposal is a revision to the recommendations of the 1988 Base Closure Commission.

Justification: The decision to form the CMRL was driven by the LAB 21 Study and a Defense Management Report decision to consolidate Army laboratories to create a world class laboratory and achieve savings through a more efficient laboratory system. The military value of CMRL lies with the exploration of technology to be used in both the improvement of current of military systems and the development of future systems. The establishment of the CMRL will provide a return on investment in 3 years. Implementing this recommendation will cost $92M. Annual savings after implementation are expected to be $51M. The establishment of CMRL will have minimum environmental impact. The establishment of CMRL may result in a potential employment change of +0.1% in the Adelphi, Maryland area. Specific realignments for the CMRL follow:

o Move the Army Research Institute (ARI) MANPRINT function from Alexandria, VA, to Aberdeen Proving Ground (APG), MD.

o Move the 6.1 and 6.2 materials elements from the Belvoir Research and Development Center, VA, to APG, MD.

DAEN-ZCI

20 NOV 1991

MEMORANDUM FOR RECORD

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ATCH 2

DAEN-ZCI
SUBJECT: REALIGNMENT OF MAINTENANCE WORKLOAD - LETTERKENNY ARMY DEPOT

The undersigned addressed the issue with Commission counsel and Director of Review and Analysis, recommending the Commission not consider the initiative. The recommendation was accepted and the Commission did not address the initiative.

DAVID A. [illegible]
Analyst
Defense Base Realignment and
Closure Commission

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
ALABAMA					
Anniston Army Depot	Receive	0	0	0	366
Fort McClellan	Close	6,107	1,026	0	0
Redstone Arsenal	Receive	0	0	0	1,884
	Total	6,107	1,026	0	2,250
ARIZONA					
Fort Huachuca	Receive	0	0	9	47
Davis-Monthan AFB	Receive	0	0	355	41
Luke AFB	Receive	0	0	1,623	112
Williams AFB	Close	1,567	781	0	15
	Total	1,567	781	1,987	215
ARKANSAS					
Fort Chaffee	Close	2,617	671	0	0
Eaker AFB	Close	2,712	792	0	15
	Total	5,329	1,463	0	15
CALIFORNIA					
Sacramento Army Depot	Close	334	3,164	0	0
Fort Ord	Close	13,619	2,835	0	0
Castle AFB	Close	5,239	1,164	0	15
Beale AFB	Receive	0	0	588	193
Edwards AFB	Receive	0	0	766	336
MCAS Tustin	Close	4,105	348	0	0
Hunters Point Annex	Close	5	63	0	0
ICSTF San Diego	Close	276	41	0	0
MCB Camp Pendleton	Receive	0	0	137	78
MCAGCC 29 Palms	Receive	0	0	4,194	227
NAVCOMSTA Stockton	Receive	0	0	0	3
NAVMEDCOM NW Region	Receive	0	0	114	46
NAVSTA Long Beach	Close	9,519	833	0	0
NAVSTA San Diego	Receive	0	0	4,380	115
NAS Alameda	Receive	0	0	215	19
NAS Lemoore	Receive	0	0	5,945	231
NAS Moffet Field	Close	3,359	633	0	0
NAVHOSP Camp Pendleton	Receive	0	0	137	78
NCBC Point Hueneme	Receive	0	0	18	74
NOSC San Diego	Receive	0	0	0	1,140
NSC Oakland	Receive	0	0	874	1
NSSA Los Angeles	Close	0	29	0	0
NWC China Lake	Realign	0	160	0	29
NESEC Vallejo	Close	8	314	0	0
NESEC San Diego	Close	0	619	0	0
PMTC Point Mugu	Realign	0	190	2	33
	Total	36,464	10,393	17,370	2,618
COLORADO					
Lowry AFB	Close	4,052	2,290	0	15
Fort Carson	Receive	0	0	1,026	56
	Total	4,052	2,290	1,026	71

* Does not include workload adjustments.

ATCH 3

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
CONNECTICUT					
NUSCD New London	Realign	27	884	0	0
	Total	27	884	0	0
DISTRICT OF COLUMBIA					
Air Force Audit Agency	Receive	0	0	0	45
NAVMEDCOM-NCR	Receive	0	0	45	15
NESSEC Washington	Close	41	162	0	0
	Total	41	162	45	60
FLORIDA					
Eglin AFB	Receive	0	0	559	22
MacDill AFB	Realign	2,773	231	0	0
NAS Jacksonville	Receive	0	0	583	44
NAVHOSP Pensacola	Receive	0	0	92	26
NTC Orlando	Close	15,736	1,148	0	0
NCSC Panama City	Realign	4	284	0	0
	Total	18,513	1,663	1,234	92
GEORGIA					
Moody AFB	Close	3,098	728	0	15
	Total	3,098	728	0	15
HAWAII					
NAS Barbers Point	Receive	0	0	978	36
NAS Pearl Harbor	Receive	4	0	432	0
NOSCD Kaneohe	Close	9	190	0	0
NSY Pearl Harbor	Receive	0	0	0	14
	Total	13	190	1,410	50
IDAHO					
Mountain Home AFB	Receive	1,200	0	To Be Determined	
	Total	1,200	0		
ILLINOIS					
Rock Island Arsenal	Realign	0	1,434	0	738
NTC Great Lakes	Receive	0	0	14,463	342
	Total	0	1,434	14,463	1,080
INDIANA					
Fort Benjamin Harrison	Close	3,437	1,103	0	0
Grissom AFB	Close	2,497	807	0	15
NAC Indianapolis	Realign	0	120	0	0
NAVWPNSPTCTR Crane	Realign	0	150	0	75
	Total	5,934	2,180	0	90
KENTUCKY					
NOS Louisville	Realign	2	235	0	0
Fort Knox	Receive	0	0	622	428
	Total	2	235	622	428

* Does not include workload adjustments.

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
LOUISIANA					
Fort Polk	Realign	12,672	1,132	8,885	793
England AFB	Close	3,042	697	0	15
Barksdale AFB	Receive	0	0	2,171	116
	Total	15,714	1,829	11,056	924
MAINE					
Loring AFB	Close	2,875	1,326	0	15
NAS Brunswick	Receive	0	0	425	20
	Total	2,875	1,326	425	35
MARYLAND					
Aberdeen Proving Ground	Receive	5	104	20	279
H. Diamond Lab, Adelphi	Realign	21	562	14	452
Fort Detrick	Realign	9	30	0	0
Fort Ritchie	Receive	0	0	24	155
NMRI Bethesda	Receive	0	0	17	16
NATC Patuxent River	Receive	0	0	143	1,813
NSWCD White Oak	Realign	5	1,701	0	0
NESEA St. Ingoes	Close	37	1,018	0	0
DTRC Carderock	Realign	0	0	0	363
DTRCD Annapolis	Realign	5	548	0	0
NOS Indian Head	Realign	2	30	0	0
	Total	84	3,993	218	3,078
MASSACHUSETTS					
Natick R & D Center	Receive	0	0	2	62
Fort Devens	Closed	1,662	2,178	0	0
	Total	1,662	2,178	2	62
MICHIGAN					
K.I. Sawyer AFB	Receive	0	0	2,022	116
Wurtsmith AFB	Close	2,903	705	0	15
	Total	2,903	705	2,022	131
MISSISSIPPI					
Keesler AFB	Receive	0	0	466	120
NAS Meridian	Receive	0	0	198	9
NCBC Gulfport	Receive	0	0	5	20
	Total	0	0	669	149
MISSOURI					
AVSCOM-TROSCOM	Realign	0	500	0	0
Richards-Gebaur ARS	Close	199	569	0	15
Fort Leonard Wood	Receive	0	0	5,238	764
	Total	199	1,069	5,238	779
MONTANA					
Malmstrom AFB	Receive	0	0	175	6
	Total	0	0	175	6

* Does not include workload adjustments.

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
NEBRASKA					
Offutt AFB	Receive	0	0	233	7
	Total	0	0	233	7
NEW JERSEY					
Fort Dix	Close	309	500	0	0
Fort Monmouth	Realign	1	223	0	0
Picatinny Arsenal	Realign	0	0	0	30
NAEC Lakehurst	Realign	8	86	10	89
NAPC Trenton	Realign	0	260	0	0
	Total	318	1,069	10	119
NEW MEXICO					
White Sands Missile Range	Realign	1	127	0	0
Cannon AFB	Receive	0	0	1,650	450
NWEF Albuquerque	Close	109	108	0	0
	Total	110	235	1,650	450
NEW YORK					
NAVSTA Staten Island	Receive	0	0	1,092	24
	Total	0	0	1,092	24
NORTH CAROLINA					
Pope AFB	Receive	0	0	575	22
NAVHOSP Camp LeJeune	Receive	0	0	86	20
	Total	0	0	661	42
OHIO					
Rickenbacker AGB	Close	600	1,129	0	15
Wright-Patterson AFB	Receive	0	0	189	959
	Total	600	1,129	189	974
PENNSYLVANIA					
Letterkenny Army Depot	Realign	0	738	0	600
NADC Warminster	Realign	237	2,030	0	0
NASO Philadelphia	Receive	0	0	5	135
NSPCC Mechanicsburg	Receive	0	0	2	63
NSY Philadelphia	Close	89	7,644	0	0
NAVSTA Philadelphia	Close	2,151	1,304	0	0
Tobyhanna Army Depot	Receive	0	0	0	445
	Total	2,477	11,716	7	1,243
RHODE ISLAND					
CBC Center Davisville	Close	5	133	0	0
TCCSMA Newport	Realign	18	20	0	0
NUSC Newport	Receive	0	0	25	1,024
	Total	23	153	25	1,024

* Does not include workload adjustments.

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
SOUTH CAROLINA					
Fort Jackson	Receive	0	0	2,993	589
Myrtle Beach AFB	Close	3,193	799	0	15
Shaw AFB	Receive	0	0	722	27
Charleston AFB	Receive	0	0	253	37
NAVHOSP Beaufort	Receive	0	0	44	15
NESEC Charleston	Close	4	363	0	0
	Total	3,197	1,162	4,012	683
TENNESSEE					
NAVHOSP Millington	Receive	0	0	69	18
	Total	0	0	69	18
TEXAS					
Fort Sam Houston	Receive	0	0	29	8
Fort Hood	Receive	0	0	12,672	868
Bergstrom AFB	Close	3,940	942	0	15
Brooks AFB	Receive	0	0	11	30
Carswell AFB	Close	4,659	884	3	15
Dyess AFB	Receive	0	0	168	14
Lackland AFB	Receive	0	0	416	104
Laughlin AFB	Receive	0	0	79	46
Randolph AFB	Receive	0	0	288	178
Sheppard AFB	Receive	0	0	663	207
NAS Chase Field	Close	733	914	0	0
NAS Kingsville	Receive	0	0	327	34
	Total	9,332	2,740	14,656	1,519
VIRGINIA					
ARI, Alexandria	Realign	3	54	0	0
H. Diamond Lab, Woodbridge	Close	0	90	0	0
Fort Belvoir	Realign	17	147	0	0
NAB Little Creek	Realign	5	0	10	376
NAVHOSP Portsmouth	Receive	0	0	119	40
NAVSTA Norfolk	Receive	0	0	660	0
NMWEC Yorktown	Close	12	206	0	0
NSCSES Norfolk	Receive	12	280	49	856
NSWC Dahlgren	Receive	0	0	4	1,002
	Total	49	777	842	2,274
WASHINGTON					
Fairchild AFB	Receive	0	0	1,401	122
McChord AFB	Receive	0	0	658	28
Fort Lewis	Receive	3,903	234	12,177	885
NAS Whidbey Island	Close	7,152	1,220	0	0
Naval Sub Base Bangor	Receive	0	0	94	15
NAVSTA Sand Pt. (Puget Snd)	Close	557	423	0	0
NAVHOSP Bremerton	Receive	0	0	96	36
NUWES Keyport	Realign	0	10	0	0
	Total	11,612	1,887	14,426	1,086

* Does not include workload adjustments.

* NO RED RIVER FIGURES OR[176] TOOELE, UTAH

Closure and Realignment Impacts* by Installation and State

State / Installation	Action	Out Mil	Out Civ	In Mil	In Civ
MIDWAY ISLAND					
Naval Air Facility Midway	Realign	0	230	0	0
	Total	0	230	0	0

* Does not include workload adjustments.

Department of the Army

(EXCERPT FROM DoD REPORT)

ATCH 4

Summary of Selection Process

Introduction

The Army is reducing its force structure and tailoring its base structure in light of changes in the world situation and the reduction in resources devoted to national defense. By 1995, the Army will have 12 active divisions, 6 fewer than in 1990. The end strength of the Army will decline by almost 30 percent, with the majority of that decline overseas.

In projecting future force reductions, the Army has focused on maintaining sufficient forces in the Active Component to satisfy crisis and contingency response, and forward presence requirements, and on a structure for domestically based reinforcing forces that relies primarily on the Reserve Components.

The Selection Process

The Army has performed a detailed study of its installations to determine which, based on the final criteria and the force structure plan established under Title XXIX of Public Law 101-510, should be closed or realigned. In making its choices, the Army determined which bases would serve well into the next century.

The Army began its Total Army Basing Study by determining the military value of its bases, as defined by the first four and the seventh of the final criteria. After grouping its installations for comparative purposes, the Army produced a baseline from which to formulate and gauge reasonable realignment/closure alternatives. The Army categorized bases according to like missions, capabilities, and attributes, without regard to whether the base was previously considered for closure or realignment.

In determining military value, the Army evaluated bases that historically performed the same types of missions and determined their military value relative to the entire Army. Each installation within a particular category was measured against a set of uniform

attributes relative to the category's mission. Installations were judged on their relative overall value in a category, rather than by capacity for current mission needs. The Army weighed the attributes to assess a starting point in the evaluation of the base structure. The ranking alone does not produce a decision, but represents a logical basis for judging possible opportunities for closure and realignment.

Next, the Army began the process of selecting bases for realignment and closure. The Army screened installations to determine whether any should be excluded from active consideration during this process. To do this, the Army considered the force structure plan, assessments of military value; and visions of the future to identify reasonable candidates for more detailed study. Then the study focused on whether the cost of the closure or realignment package would provide a return on investment. After considering the potential impacts on the environment and local economies, recommendations were presented to senior Army leaders. As this study progressed, those alternatives considered not feasible were eliminated. The Army routinely met with the Air Force and the Navy representatives to discuss the potential for interservice asset sharing.

The Army established internal controls to ensure that data was collected and assessed in a consistent and equitable manner. Standard attributes to quantify and measure the operational efficiencies, expandability, and quality of life for a base were established. The Army Audit Agency: tracked the data used to quantify each attribute; performed random testing of data at Major Commands; verified the calculations; and evaluated the reasonableness of the procedures used.

The Secretary of the Army, with the advice of the Chief of Staff of the Army, nominated bases to the Secretary of Defense for closure and realignment based on the force structure plan and final criteria established under Public Law 101-510. The Secretary of Defense recommends the following Army bases for closure or realignment pursuant to Public Law 101-510:

Recommendations and Justifications

Fort Benjamin Harrison, Indiana

Recommendation: Close Fort Benjamin Harrison, retain the Department of Defense Finance and Accounting Service, Indianapolis Center. This proposal is a revision to the recommendations of the 1988 Base Closure Commission; the U.S. Army Recruiting Command (USAREC) will now relocate from Fort Sheridan to Fort Knox, KY, rather than to Fort Benjamin Harrison. Realign the Soldier Support Center (U.S. Army Adjutant General and Finance Schools) from Fort Benjamin Harrison, IN, to Fort Jackson, SC, to initiate the Soldier Support Warfighting Center.

Justification: The Army is creating a "vision of the future" for the Training and Doctrine Command (TRADOC) which incorporates the need for reduced training loads as the force structure decreases and also recommends management initiatives that will reduce expenditures. Part of this TRADOC "vision" calls for the creation of a Soldier Support Warfighting Center which will eventually collocate the Adjutant General, Finance, Staff Judge Advocate General and Chaplain schools. The collocation of these branches enhances their synergistic effect by training as a team similar to the manner in which they are employed. Although force structure reductions do not dictate specific base structure changes in the training installation category, they do suggest that adjustments are possible through operational and management changes. Fort Benjamin Harrison has a small TRADOC mission. The training functions are important but require less unique, special, or extensive facilities or acreage than other training schools. Expansion external to the property line is limited and would be expensive.

Retaining the DOD Finance and Accounting Service, Indianapolis Center in Building 1, the second largest administrative building in the DOD inventory, will allow continued operations without engaging in costly leases or incurring moving costs at this time. Diverting the realignment of USAREC to Fort Knox, KY, places USAREC on an

active duty installation with its own airfield, hospital, family housing and other Army community services once Fort Benjamin Harrison is closed. This action can occur in a time frame consistent with the closure of Fort Sheridan. USAREC's realignment costs to Fort Knox are less than to Fort Benjamin Harrison.

Closure of Fort Benjamin Harrison has an immediate return on investment. Implementing this recommendation will save $59M, including $104M in land value. Annual savings after implementation are expected to be $36M. One building at Fort Benjamin Harrison is on the National Register of Historic sites; additional buildings are potentially eligible. Ground water and asbestos remedial actions are required and other cleanup costs are likely. The current environmental restoration cost estimate is $4 million. Closure may results in a potential employment change of -1% in the Indianapolis area, +2% at Fort Jackson, and +3% at Fort Knox. Future reuse of facilities after disposal may mitigate this impact. Reserve components require a small enclave carved out to house current USAR activities.

Fort Chaffee, Arkansas

Recommendation: Close Fort Chaffee, retaining the facilities and training area to support Reserve Component (RC). The permanent stationing of the current Active Component tenant, the Joint Readiness Training Center (JRTC) at Fort Polk, LA, is outlined in another paper (Fort Polk).

Justification: All the installations in the major training area category have similar military value, except for Fort Irwin, CA, which ranked first by a wide margin. Study of the installations in this category, including Fort Chaffee, was driven by the desire to reduce overall manpower and costs while increasing the training opportunities for their primary users, the Army National Guard and Army Reserve.

When Fort Chaffee was designated the temporary location of the JRTC, Army National Guard and US Army Reserve training was constrained by active component requirements for training areas and facilities. This realignment will eliminate constraints to training and better support RC units in the geographic area. While Reserve Component end strength will decline by FY 95, changes in force structure by geographic region have not been determined. In fact,

while a given area may lose force structure, other units requiring training in that area may make it impossible to close an installation. Further analysis of RC force structure and training requirements remains to be done. The transfer of Fort Chaffee to the Reserve Component, coupled with the realignment of the 5th ID (MX) from Fort Polk to Fort Hood and the permanent stationing of the JRTC at Fort Polk, provides a return on investment four years after the completion of the realignment.

Implementing this recommendation (including the transfer of JRTC from Fort Chaffee to Fort Polk, the 5th ID (MX) from Fort Polk to Fort Hood and the 199th SMB from Fort Lewis to Fort Polk) will cost $256M. Annual savings after implementation are expected to be $23M. The environmental impact will be positive at Fort Chaffee. Action may result in a potential loss of 6.1 percent of jobs in the local community. Oil and gas drilling activities on the installation may mitigate that impact. Since training tempo will decline in the near future, land use may be reduced. However, drilling associated with oil and gas leases managed by the Bureau of Land Management will continue.

Fort Devens, Massachusetts

Recommendation: Close Fort Devens, retaining only facilities to support Reserve Component training requirements. This proposal is a revision to the recommendations of the 1988 Base Closure Commission that directed the relocation of HQ, Information Systems Command (ISC), and supporting elements to Fort Devens from Forts Huachuca, AZ, Monmouth, NJ, and Belvoir, VA, and leased space in the National Capital Region. It is more cost effective to leave HQ, ISC, where it is currently located. This recommendation would: create a small reserve enclave on Fort Devens main post and retain approximately 3,000 acres for use as a regional training center; dispose of the remainder of the post; retain HQ, Information Systems Command (ISC) and supporting elements at Fort Huachuca, AZ, and Fort Monmouth, NJ; relocate 10th Special Forces Group (SFG) (Airborne) from Fort Devens, MA, to Fort Carson, CO; relocate selected ISC elements from Fort Belvoir, VA, to Fort Ritchie, MD, or another location within the National Capital Region. Essential facilities and training areas will be retained; excess facilities and land will be sold.

Justification: The decision to transfer Fort Devens to the Reserve Components was driven by the need to reduce the number of command and control installations. A review of the Army's requirements in this category revealed that all missions located on post or scheduled to be realigned to the post could be accommodated at other installations within the current structure with little or no effect on the readiness of active units. Retaining a reserve enclave and training facility was necessitated by the desire to maintain the readiness of the numerous reserve component units from the New England area that currently depend on the facilities at Fort Devens for training. The relocation of the 10th SFG has been under study by the Army for quite some time because of the inadequate training land available at Fort Devens.

The Army will need fewer command and control installations in the future. Of the Army's Command and Control installations, Fort Devens was ranked 9 out of 11 in military value. It is not critical to either the mid-term management of the Army's build-down or the long-term strategic requirements of the Army's command and control installation structure. The closure of Fort Devens and the transfer to the Reserve Components has an immediate return on investment upon completion.

Implementing this recommendation will save $143M, including $112M in land value. Annual savings after implementation are expected to be $55M. Environmental mitigation will be required. Asbestos abatement and other remedial actions are likely. The recommendation may result in a potential employment change of -3.5% in the Fort Devens area. There is great potential for reuse of facilities which can be expected to mitigate impact. The Reserve Components would retain a small enclave on main post and run the training area. This will incur a small annual cost for personnel and maintenance of the facilities and training area.

Fort Dix, New Jersey

Recommendation: Close Fort Dix, retaining only facilities to support Reserve Component (RC) training requirements. This recommendation, which is a change to the recommendation of the 1988 Base Closure Commission, relocates active organizations without a direct RC support mission except those which cannot be accommodated elsewhere. Essential facilities and training areas will be retained; excess facilities and land will be sold.

Justification: This proposal retains facilities and training areas essential to support ARNG and USAR units in the Mid-Atlantic states. However, it reduces base operations and real property maintenance costs considerably by eliminating excess facilities and relocating non-RC support tenants. While Reserve Component end strength will decline by FY 95, changes in force structure by geographic region have not been determined. In fact, while a given area may lose force structure, other units requiring training in that area may make it impossible to close an installation. Further analysis of RC force structure and training requirements remains to be done. All the installations in the major training area category have similar military value, except for Fort Irwin, CA, which ranked first by a wide margin. Study of the installations in this category, including Fort Dix, was driven by the desire to reduce overall manpower and costs while increasing the training opportunities for their primary users, the Army National Guard and Army Reserve.

The Fort Dix recommendation has an immediate return on investment. Implementing this recommendation will save $116M, including $83M in land value. Annual savings after implementation are expected to be $34M. Overall environmental impact will be minimal, because training will continue. There is a sanitary landfill which is on the National Priority List (NPL). A Remedial Investigation/Feasibility Study (RI/FS) of the installation is ongoing. The planned waste water treatment facility will be funded in FY 94, at the 4.6 million gallons per day rate to ensure compliance with New Jersey State clean water regulations when facilities are excessed. This proposed realignment may result in a potential loss of 0.9 percent of jobs in the community, a reduction additive to losses predicted (1.8 percent) as a result of the change to "semi-active" status under the 1988 Base Closure Commission. Future reuse of facilities after

disposal may be expected to mitigate some of the impact to the local economy. By relocating active tenants and excessing property and facilities no longer required for RC training, substantive reductions to operating costs can be achieved without any degradation of that training. The Air Force is interested in assuming some of the family housing units on Fort Dix; the number will be determined after a study of the requirement.

Fort McClellan, Alabama

Recommendation: Close Fort McClellan. Realign the U.S. Army Chemical and Military Police schools to Fort Leonard Wood, MO; realign the Department of Defense Polygraph School to Fort Huachuca, AZ; retain Pelham Range, the Special Operations Test Site (SOTS) and a reserve enclave; place in caretaker status, the Chemical Decontamination Training Facility (CDTF). Create the Maneuver Support Warfighting Center at Fort Leonard Wood.

Justification. The Army is creating a "vision of the future" for the Training and Doctrine Command (TRADOC) which incorporates the need for reduced training loads as the force structure decreases and also recommends intelligent management initiatives that will reduce expenditures. Part of this vision calls for the creation of a Maneuver Support Warfighting Center which collocates the Army Engineer, Chemical and Military Police schools. The collocation of these branches enhances the synergistic effect of chemical, military police and engineer units by training as a team similar to the manner in which they would be tactically employed. Although force structure reductions do not dictate specific base structure changes in the training installation category, they do suggest that adjustments are possible through operational and management changes. Fort McClellan is the home of the smallest Army Training Center. The skills produced there represent about 5% of the Total Force and the respective schools can be reestablished on another installation which otherwise will be operating at less than current capacity with the smaller force. Return on investment is 2 years. Proceeds from the sale of excess land are projected but some areas will require environmental restoration prior to disposal.

Implementing this recommendation will result in a net cost of $28M, including $49M in land value. Annual savings after implementation

are expected to be $26M. Fort McClellan is currently undergoing investigation to generate data necessary to score the site under the Environmental Protection Agency's Hazard Ranking System. An Enhanced Preliminary Assessment has been completed. Ground water and asbestos remedial actions are required and other cleanup costs are likely. Closure may results in a potential employment change of -18% in the Fort McClellan area, +16% at Fort Leonard Wood, and +0.3% at Fort Huachuca (economic impact for all recommended actions at Fort Huachuca is +8% employment change). Future reuse of facilities after disposal may mitigate impact. Army reserve components will require a small enclave carved out for use. Additionally, this proposal recommends licensing Pelham Range and carving out selected facilities for use by the Alabama Army National Guard. Under a separate 1988 Base Closure Commission action, part of the ground communications maintenance workload currently at Sacramento Army Depot (SAAD), CA, will transfer from SAAD to Anniston Army Depot, AL. Additionally, tactical missile maintenance workload will move from Anniston Army Depot, AL, to Letterkenny Army Depot, PA.

Fort Ord, California

Recommendation: Close Fort Ord and relocate 7th Infantry Division (Light) to Fort Lewis, WA.

Justification: The decision to close Fort Ord is based upon required force structure reductions by 1995 and the Army's reduced requirement to house divisions in the United States. Force structure and budget reductions require the Army to close several installations while maximizing use of those remaining installations with the highest military value. By 1995, the Army will have 12 Active divisions. It currently has the capacity to house 13 divisions in the U.S. Based on force structure decisions already made, the Army has excess capacity to station at least one division. Fort Ord was selected for closure because it ranks relatively low among the Army's fighting bases in military value. The closure of Fort Ord and relocation of the 7th ID (L) to Fort Lewis is the best way to reduce excess capacity, maintain flexibility, and capitalize on the superior deployability and operational security attributes of Fort Lewis. Because of the downsizing of the 9th ID in FY 90 to the 199th Separate Motorized Brigade, Fort Lewis

has excess capacity and can easily absorb the 7th ID (L). The 199th Separate Motorized Brigade, will relocate to Fort Polk, LA.

Fort Ord requires the use of a civilian airport, since the military airfield is not fully capable of handling C-141 aircraft. Those war fighting installations ranking below Fort Ord were not recommended for closure due to strategic location or because final disposition decisions for major units have not been made. Closing Fort Ord provides an immediate return on investment. Proceeds from the sale of excess land are projected. Implementing this recommendation will save $362M, including $400M in land value. Annual savings after implementation are expected to be $70M. Environmental impacts will be positive because air and noise pollution sources will be eliminated. The estimated socio-economic impact of the closure of Fort Ord is a potential loss of 17.5 percent of jobs in the local community. Future reuse of facilities after disposal may be expected to mitigate this impact. A Reserve Component enclave will be established to accommodate missions which cannot be relocated. The Navy is interested in assuming some of the family housing units on Fort Ord; the number will be determined after a study of the requirement.

Sacramento Army Depot, California

Recommendation: Close Sacramento Army Depot. Transfer the ground communication electronic maintenance workload from Sacramento Army Depot, CA, to Tobyhanna Army Depot, PA, Anniston Army Depot, AL, Red River Army Depot, TX, Letterkenny Army Depot, PA, and Corpus Christi Army Depot, TX. Retain 50 acres for Reserve Component (RC) use.

Justification: The decision to close Sacramento was driven by the need to consolidate functions in a time of decreasing resources. Based upon commodity studies done by the Services, the Defense Depot Maintenance Council (DDMC) evaluated DoD depot capacity in 21 separate studies and concluded that the Sacramento workload could be more economically and efficiently accommodated at other depots. Sacramento Army Depot is rated 7 out of 10 in the military value matrix. The three depots rated lower than Sacramento have critical ammunition missions that would preclude closure. Sacramento Army Depot is one of two "electronic repair" depots. High labor rates are a key reason the DDMC recommended shifting workload to other

depots with idle capacity. Closure of Sacramento provides an immediate return on investment. Land value of zero was used in the analysis. The depot real estate (less 50 acres for the RC) is programmed for disposal after cleanup. Implementing this recommendation will save $31M excluding any land value. Annual savings after implementation are expected to be $56M. Sacramento Army Depot is a National Priority List site. The Enhanced Preliminary Assessment is finished. Ground water and asbestos remedial actions are required and other cleanup costs are likely. Closure of the depot and redistribution of workload results in an employment change of -0.8% at Sacramento. Future reuse of Sacramento facilities after disposal may be expected to mitigate impact. Reserve components would retain 50 acres to house current USAR activities and to collocate activities in the region currently in leased space. Information Systems Command tenant will be relocated to Fort Lewis, WA. DLA supply activities would likely be moved to one of the facilities of Defense Depot West at Tracy or Sharpe Depots, both in California.

Aviation Systems Command And Troop Support Command
Saint Louis, Missouri

Recommendation: Merge Aviation Systems Command and Troop Support Command (AVSCOM/TROSCOM), St. Louis, MO, as part of the Inventory Control Point (ICP) consolidation under a Defense Management Report decision.

Justification: To improve efficiency of Army logistics, the Army's implementation of the Defense Management Report includes the consolidation of Inventory Control Points. The merging of AVSCOM and TROSCOM into one organization accomplishes part of the Defense Management Report by consolidating these organization in place. Military value in the form of management and costs efficiency was the driving factor for this recommendation. Of all the commodity oriented installations, the Price Support Center and the Saint Louis Federal Center which house the elements of AVSCOM and TROSCOM are rated 10 and 15 of 15, respectively. Neither facility will close under this recommendation. Merging AVSCOM and TROSCOM in place provides an immediate return on investment. Implementing this recommendation will save $31M. Annual savings after implementation are expected to be $23M. There are no

foreseen environmental impacts as a result of this proposal. Realignment results in a potential employment change of -0.1% in the Saint Louis, MO area due to personnel reductions which will be achieved by the merger of the two organizations.

Fort Polk, Louisiana

Recommendation: Realign 5th Infantry Division (Mechanized) to Fort Hood, TX, from Fort Polk, LA; the Joint Readiness Training Center (JRTC) from Fort Chaffee, AR, to Fort Polk; in addition, realign 199th Separate Motorized Brigade (SMB) from Fort Lewis, WA, to Fort Polk. The transfer of Fort Chaffee, AR, to the Reserve Component is discussed in another paper (Fort Chaffee).

Justification: Realigning the 5th ID (MX) to Fort Hood allows the Army to fully utilize its finest fighting installation (Fort Hood) and to station the JRTC at the installation best suited to its requirements (Fort Polk). Fort Hood is the only installation which can house two divisions; fully utilizing the installation optimizes base operations. Fort Hood also ranks first in military value among fighting installations. Its ranges and training areas are outstanding as is its ability to support deployment. Realigning the 199th SMB operating force from Fort Lewis to Fort Polk enhances the training capability at JRTC as well as frees space at Fort Lewis for the 7th Infantry Division (Light). Fort Polk's military value is average relative to other similar installations; however, it has excellent permanent facilities and training areas ideally suited to light fighters.

The realignment of 5th ID (MX) and the 199th SMB, coupled with the transfer of Fort Chaffee to the Reserve Component (current temporary site of JRTC), provides a return on investment four years after the completion of the realignment. Implementing this recommendation (including the transfer of JRTC from Fort Chaffee to Fort Polk, the 5th ID (MX) from Fort Polk to Fort Hood and the 199th SMB from Fort Lewis to Fort Polk) will cost $256M. Annual savings after implementation are expected to be $23M. Increases in population or in training tempo at Forts Hood and Polk could have minor adverse impact on the environment, principally in the areas of air pollution and land use. The proposed decrease in population at Fort Polk may result in a potential loss of approximately 25 percent of jobs in the area. Even with the JRTC and the 199th SMB, Fort Polk affords the Army with expansion capability in the future. Employment in the Fort Hood area will increase.

Letterkenny Army Depot, Pennsylvania

Recommendation: Realign the Headquarters, Depot Systems Command (DESCOM) (including the Systems Integration and Management Activity) from Letterkenny Army Depot to Rock Island Arsenal and merge it with the Armament, Munitions and Chemical Command (AMCCOM) to form the Industrial Operations Command (IOC). Relocate the Material Readiness Support Activity (MRSA) from Lexington-Bluegrass Army Depot to Redstone Arsenal, AL, along with the relocation of the Logistics Control Activity (LCA) from the Presidio of San Francisco, CA, to Redstone Arsenal, AL. This proposal is a revision to the recommendations of the 1988 Base Closure Commission, which directed MRSA to relocate from Lexington-Bluegrass Army Depot, KY, to Letterkenny Army Depot, PA. The merger of these two activities will form the Logistics Support Activity (LOGSA).

Losses in personnel at Letterkenny Army Depot are partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT, and Red River Army Depots, TX, respectively.

Justification: To improve efficiency of the Army logistics, the Army's implementation of the Defense Management Report includes the consolidation of Inventory Control Points. Sixteen million dollars ($16M) have already been programed for building a facility for MRSA and LCA at Letterkenny Army Depot to implement a the 1988 Base Closure Commission recommendation. The Material Readiness Support Activity (MRSA) move to Letterkenny was specified by the 1988 Base Closure Commission. There are no additional costs to the changed destination of MRSA. Leaving MRSA at Letterkenny Army Depot would not be as operationally efficient as the proposed change.

In order to streamline management functions for industrial operations, DESCOM and AMCCOM are being merged into the IOC at Rock Island. Merging them at Letterkenny was also considered but was determined to be more costly.

Implementing this recommendation will cost $3M. Annual savings after implementation are expected to be $2M. Changes in the force structure have indirect effects on industrial operations. The actual changes in workloads and required capacity will be affected by decisions on equipment policies that have not been made yet. When reviewing the military value matrix calculations, Letterkenny Army Depot rates 5 of 10 depot facilities. Moving DESCOM to Rock Island Arsenal provides an immediate return on investment. This action will have no effect on remedial environmental actions currently ongoing at any installation and the environmental impact the losing and gaining installations is expected to be minimal. These realignment actions may result in a potential employment change of -2.2% at Letterkenny.

Rock Island Arsenal, Illinois

Recommendation: Realign Armament, Munitions, and Chemical Command (AMCCOM) from Rock Island Arsenal, IL, to Redstone Arsenal, AL, as part of the Inventory Control Point (ICP) consolidations under a Defense Management Report decision.

Justification: To improve efficiency of Army logistics, the Army's implementation of the Defense Management Report includes the consolidation of Inventory Control Points. Moving the armament portion of AMCCOM to Redstone Arsenal permits the Army to consolidate the missile and armament functions into one ICP. Changes in the force structure only have indirect effects on industrial operations. This recommendation is a business oriented decision to improve supply distribution efficiency.

Moving the AMCCOM Inventory Control Point to Redstone Arsenal provides an immediate return on investment. Implementing this recommendation (including the consolidation of the missile and armament functions into one ICP at Redstone Arsenal, AL, as well as formation of the Industrial Operations Command (IOC) at Rock Island, IL) will save $2M. Annual savings after implementation are expected to be $66M. This action will have no effect on remedial environmental actions ongoing at any installation and the environmental impacts are expected to be minimal.

These realignment actions may result in a potential employment change of +2.6% at Redstone Arsenal and -1.1% at Rock Island Arsenal. Losses in personnel at Rock Island Arsenal are partially offset by a concurrent action to move the Headquarters, Depot Systems Command (DESCOM) from Letterkenny Army Depot, PA, to Rock Island Arsenal, merging AMCCOM and DESCOM to form the Industrial Operations Command (IOC).

Realign Army Laboratories (LAB 21 Study)

Recommendation: The LAB 21 study establishes the Combat Materiel Research Laboratory (CMRL), at Adelphi, MD. The Army also recommends that the Army Material Technology Laboratory (AMTL), Watertown, MA, not be split up and sent to Detroit Arsenal, Picatinny Arsenal and Fort Belvoir but instead that the AMTL be sent to Aberdeen Proving Ground (APG), MD, less the Structures Element that should be collocated at the NASA-Langley Research Center, Hampton, VA. This proposal is a revision to the recommendations of the 1988 Base Closure Commission.

Justification: The decision to form the CMRL was driven by the LAB 21 Study and a Defense Management Report decision to consolidate Army laboratories to create a world class laboratory and achieve savings through a more efficient laboratory system. The military value of CMRL lies with the exploration of technology to be used in both the improvement of current of military systems and the development of future systems. The establishment of the CMRL will provide a return on investment in 3 years. Implementing this recommendation will cost $92M. Annual savings after implementation are expected to be $51M. The establishment of CMRL will have minimum environmental impact. The establishment of CMRL may result in a potential employment change of +0.1% in the Adelphi, Maryland area. Specific realignments for the CMRL follow:

o Move the Army Research Institute (ARI) MANPRINT function from Alexandria, VA, to Aberdeen Proving Ground (APG), MD.

o Move the 6.1 and 6.2 materials elements from the Belvoir Research and Development Center, VA, to APG, MD.

o Move the Army Materials Technology Laboratory (AMTL) (less Structures element) from Watertown, MA, to APG (Change to the recommendations of the 1988 Base Closure Commission).

o Move the AMTL Structures element to the Army Aviation Aerostructures Directorate collocated at NASA-Langley Research Center at Hampton, VA, and expand the mission at that site to form an Army Structures Directorate. (Change to the recommendations of the 1988 Base Closure Commission).

o Move the Directed Energy & Sensors Basic and Applied Research element of the Center for Night Vision and Electro-Optics at Fort Belvoir, VA, to Adelphi, MD.

o Move the Electronic Technology Device Laboratory from Fort Monmouth, NJ, to Adelphi, MD.

o Move the Battlefield Environment Effects element of the Atmospheric Science Laboratory at White Sands Missile Range, NM, to Adelphi, MD.

o Move Ground Vehicle Propulsion Basic and Applied Research from Warren, MI, to the Army Aviation Propulsion Directorate collocated at the NASA-Lewis Research Center in Cleveland, OH, to form the Army Propulsion Directorate.

o Move the Harry Diamond Laboratories Woodbridge Research Facility element to CMRL, Adelphi, MD and close/dispose of the Woodbridge, VA, facility.

o Move the Fuze Development and Production Mission (Armament related) from Harry Diamond Laboratories, Adelphi, MD, to Picatinny Arsenal (ARDEC), NJ.

o Move the Fuse Development and Production Mission (Missile related) from Harry Diamond Laboratories, Adelphi, MD, to Redstone Arsenal (MRDEC), AL.

Tri-Service Project Reliance Study

Recommendation: Execute the Tri-Service Project Reliance medical research aspects of a Defense Management Report decision by reducing the number of Army medical research labs from 9 to 6. This action includes disestablishing the Letterman Army Institute of Research (LAIR), Presidio of San Francisco, CA (change to the 1988 Base Closure Commission recommendation); disestablishing the U.S. Army Institute of Dental Research (USAIDR), Washington, DC, and disestablishing U.S. Army Biomedical Research Development Laboratory (USABRDL), Fort Detrick, MD. The proposal recommends consolidating the Army's trauma research and medical materiel development with existing Army medical Research Development, Test, and Evaluation (RDT&E) facilities. The proposal also recommends the collocation of seven Tri-Service medical research programs at existing Army, Navy and Air Force medical laboratories as follows: the Army blood research with the Navy; the Army combat dentistry with the Navy; Army directed energy (laser and microwave) bioeffects with the Air Force; elements of the Army and Navy biodynamics with the Air Force; Navy and Army toxicology (environmental quality and occupational health) with the Air Force; Navy infectious disease research and Air Force environmental medicine (heat physiology) with the Army.

Justification: Realigning medical research laboratories and programs achieves efficiencies through inter-department consolidations, transfers and reliance in technology. Medical research activities are relatively unaffected by changes in force structure. Military value in the form of mission requirements and the technological capabilities of existing staff expertise and facilities were the driving factors in this recommendation. Implementation of Project Reliance medical realignments results in steady state savings to the Army from elimination of civilian authorizations. This proposal changes the recommendation of the 1988 Base Closure Commission that previously identified LAIR for movement to Fort Detrick, MD. Under this proposal, LAIR is disestablished and the construction of a new laboratory at Fort Detrick is eliminated. Implementing the LAIR portion of this recommendation will save $56M. Annual savings after implementation are expected to be $7M. Environmental and community impacts are expected to be minimal. Closure of LAIR, USABRDL and USAIDR and other realignments may result in potential employment impacts of 0.8% at Fort Detrick, MD, and less than .1% at other installations. Specific realignments are:

o Disestablish the Letterman Army Institute of Research (LAIR) as part of the closure of the Presidio of San Francisco, cancel the design and construction of the replacement laboratory at Fort Detrick, MD, and realign LAIRs research programs in the following manner (Change to recommendations of the 1988 Base Closure Commission):

-- Move trauma research to the U.S. Army Institute of Surgical Research, Fort Sam Houston, TX.

-- Move blood research and collocate with the Naval Medical Research Institute (NMRI), Bethesda, MD.

-- Move laser bioeffects research and collocate with the U.S. Air Force School of Aerospace Medicine (USAFSAM), Brooks Air Force Base, TX.

o Disestablish U.S. Army Biomedical Research Development Laboratory at Fort Detrick, MD, and transfer medical materiel research to the U.S. Army Medical Materiel and Development Activity at Fort Detrick and collocate environmental and occupational toxicology research with the Armstrong Aerospace Medical Research Laboratory (AAMRL) at Wright-Patterson Air Force Base, OH.

o Disestablish the U.S. Army Institute of Dental Research, Washington, DC, and collocate combat dentistry research with the Naval Dental Research Institute at Great Lakes Naval Base, IL.

o Move microwave bioeffects research from Walter Reed Army Institute of Research (WRAIR), Washington, DC, and collocate with USAFSAM.

o Move infectious disease research from NMRI and collocate with WRAIR.

o Move biodynamics research from U.S. Army Aeromedical Research Laboratory, Fort Rucker, AL, and collocate with AAMRL.

o Move heat physiology research from USAFSAM and collocate with U.S. Army Research Institute of Environmental Medicine (USARIEM), Natick, MA.

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

June 2, 1991

The Honorable Susan Livingstone
Assistant Secretary of the Army
for Installations
The Pentagon
Washington, D.C. 20310-0101

Dear Mrs. Livingstone:

The Defense Base Closure and Realignment Commission is continuing its review of the various proposals. There are pieces of some of the Army's proposals that need further justification.

Realignment of DESCOM to Rock Island - The formation of an Industrial Operations Command appears valid. However, there is an option of forming that command and splitting its missions and staff between Rock Island and Letterkenny. The realization is the personnel savings will be reduced, but so would the one-time costs. We request an analysis of this option. The option should be added to our May 24, 1991 request. Additionally, identify any additional realignments desired with your original proposal.

Realignment of SIMA-East to Rock Island - The relocation of SIMA-E does not appear to have any savings or operational advantages, since SIMA-E has a variety of customers and is not a part of DESCOM or Industrial Operations Command. This portion of your proposal only generates one-time costs. We request the operational rationale, by proposed workload, for this proposal. This option should be added to our May 24, 1991 request.

Combat Material Research Lab - The realignment of the Electronics Technology and Devices Lab to Harry Diamond Lab - Adelphi has large one-time costs, primarily for the construction of the new lab. There is no apparent operational synergism since this function appears to be an unique operation. We request the operational rationale and cost considerations for this proposal. This option should be added to our May 24, 1991 request.

Realign Artillery and Tactical Vehicle Rebuild and Tactical Missile Maintenance - This realignment is noted in your recommendations for the Industrial Depot Category. We request the specifics, in terms of costs and personnel, be broken-out of your costs analysis. This should be added to our May 24, 1919 request.

The Commission is rapidly approaching the decision phase of its effort. The above information is required no later than June 4, 1991. The original request of May 24, 1991 may be extended to that date.

Thank you in advance for your cooperation and timely response.

Sincerely,

JIM COURTER
Chairman

cc: The Honorable Colin McMillan

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1625 K STREET, N.W. SUITE 400
WASHINGTON, D. C. 20006-1604
202-653-0823

May 22, 1991

The Honorable Susan Livingstone
Assistant Secretary of the Army
for Installations
The Pentagon
Washington, D.C. 20301

Dear Mrs. Livingstone:

The Defense Base Closure and Realignment Commission has received an independent proposal for retaining the Land Combat Missile Systems maintenance mission at Anniston Army Depot. The proposal challenges the economics of the Army proposal, identifies a potential environmental problem (handling VOC's), and proposes an alternative.

We request that you review the attached proposal and provide comments no later than June 3, 1991. The comments should include a short information paper and COBRA analysis of the proposal.

Thank you in advance for your cooperation and timely response.

Sincerely,

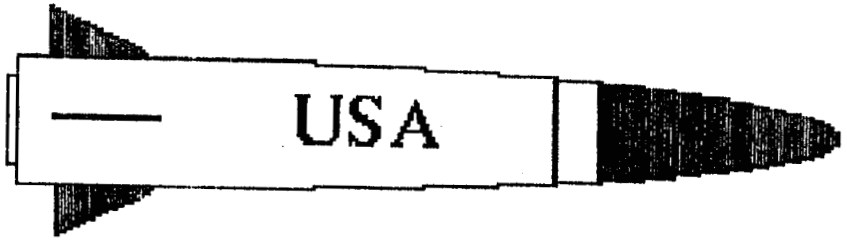
Jim Courter
Chairman

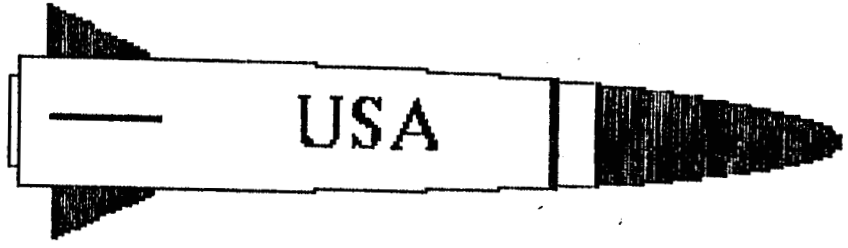
jc:tgm
enc

cc: The Honorable Colin McMillan

ATCH 6

ANALYSIS OF DDMC RECOMMENDATION
LAND COMBAT MISSILE SYSTEMS
ANNISTON ARMY DEPOT





REASONS

LAND COMBAT MISSILES

SHOULD REMAIN AT

ANNISTON ARMY DEPOT

- COMBAT READINESS
- ENVIRONMENTAL
- ECONOMICS

COMBAT

READINESS

READINESS

- MISSION AND OPERATIONAL READINESS SEVERELY DEGRADED
  - -4—6 MO. TO PHYSICALLY RELOCATE
    - DISMANTLE EQUIP. CRATE/SHIP
    - UNCRATE SETUP/REPAIR/CALIBRATE
  - -LEAD RECRUIT AND TRAIN TECH.
  - -LEARNING CURVE
  - -SPARES INVENTORY WILL NOT SUPPORT MORE THAN 30 DAYS LOSS
- 3 YRS TO ATTAIN ACCEPTABLE LEVEL OF SUPPORT

ENVIRONMENT

ENVIRONMENTAL RESTRICTIONS

- LETTERKENNY IS LIMITED TO 50 T/YR VOCs FOR ENTIRE INSTALLATION

- ANNISTON IS ALLOWED 100 T/YR VOCs FOR EACH SOURCE

  -ANNISTON USED 2.5 TONS OF VOCs LAST YEAR IN MISSILE OPERATION

  -CAN THIS BE ADDED TO ALL USAF USN & OTHER MISSILE MAINT. AT LETTERKENNY ARMY DEPOT

ECONOMICS

COST OF ANNISTON'S MISSILE WORKLOAD AT LEAD VS ANAD

	ANNISTON	LETTERKENNY
TRAVEL	$38,465	$416,103
VACATED BLDGS.	$169,512	$0
COST OF BUSINESS	$30,632,400	$37,707,600
TOTAL RECURRING COST	$30,840,377	$38,123,703
ANNUAL DIFFERENCE	$7,283,326	
NON-RECURRING COST	$0	$38,508,919

RECOMMENDATION

AMEND

DDMC STUDY TO

EXCLUDE ANAD

LAND COMBAT MISSILES

TABLE OF CONTENTS

Review Results of Defense Depot
Maintenance Council Missile Study

I. INTRODUCTION

Results of a missile study recently endorsed by the Defens Depot Maintenance Council (DDMC) recommends that all tactical missile systems maintenance within the Air Force , Navy, and Arr be consolidated at Letterkenny Army Depot (LEAD) in Chambersburg Pennsylvania. The focus of the study is commendable - to identif similar missile work being accomplished at various locations ar consolidate the work, saving dollars by increased efficiencies and economies of scale.

Although the results of the study may be applicable to the majority of the defense installations and agencies effected, for the reasons presented herein, the recommendations should be amended to leave Land Combat Missile System (LCMS) maintenance and support located at Anniston Army Depot (ANAD).

An intense review has been conducted to determine the impact on defense readiness and the economics associated with moving Land Combat Missile System work from Anniston to Letterkenny. The review has shown that the move will cause a significant negative impact on the readiness of Army missile systems and a disservice to the tax paying American public. Th attached economic analysis (see Tab A), which is based on sound assumptions and documented facts, demonstrates that the move wi have an initial cost of $38,508,919.78 and an additional $7,283,325.21 per year over current costs and will never pay for itself!

The information contained herein is presented for your consideration. It plainly demonstrates our soldiers are more effectively and economically served by adjusting the recommendation of the stated report to allow Land Combat Missile Systems repair and maintenance to remain at Anniston Army Depot

II. RATIONAL FOR AMENDING THE MISSILE STUDY TO RECOMMEND LAND COMBAT MISSILE SYSTEM MAINTENANCE AND SUPPORT TO REMAIN AT ANNISTON ARMY DEPOT

An in-depth review of the stated missile study revealed tha certain facts, difficult to discern by the visiting DDMC study team, have been overlooked. Once considered, these facts lead a person to see that leaving Land Combat Missile System maintenanc and support at Anniston Army Depot to supplement the consolidation of tactical missile maintenance workload at Letterkenny Army Depot is advantageous not only to defense readiness, but to the American taxpayers as well.

A. COMBAT READINESS -

Combat readiness of the missile systems currently maintaine at Anniston can expect to be negatively impacted by the move to Letterkenny.

It must be realized that missile systems are supported and maintained using a complex arrangement of sophisticated equipment. At Anniston, 946 pieces of equipment directly suppor Land Combat Missile Systems maintenance. Assuming that adequate facilities were completed at Letterkenny prior to the move (a significant accomplishment in itself), a phased move of the equipment would have to be accomplished. To limit the impact on operations, equipment supporting respective weapon systems woul be moved as each weapon system was moved. The time required to disconnect, package, transport, uncrate, reinstall, repair, and calibrate the equipment, even under an expedited schedule, woul be a minimum of 120 to 180 days per weapon system. Recent conversations with project manager offices within the Army Missile Command (MICOM) have determined that a lapse of support of more than 30 days would be detrimental to the readiness of various missile weapon systems. This was especially true for t Airborne TOW components (Telescopic Sight Unit, Stabilization Control Amplifier, and Missile Control Amplifier) that do not have sufficient spares in inventory to accommodate the producti lost during the transition period. Production lost during transition would have a direct and significant impact on the readiness of these systems in support of our soldiers and national defense.

B. ENVIRONMENTAL CONSIDERATIONS -

Environmentally related standards and restrictions should a primary consideration for ANY industry relocating from Alabam to Pennsylvania. Generally speaking, environmental restrictions

are normally tighter in the industrialized Northeastern states than the lesser populated Southern states. A noteworthy exampl of this is the allowable emission rates of Volatile Organic Compounds(VOC's) - a chemist's name for the fumes produced fr the evaporation of substances such as paint thinners, solvents,etc. At Anniston, 100 tons of VOC's are allowed from EACH source per year, while at Letterkenny, the annual VOC emissions from the ENTIRE installation (all sources) are limit to 50 tons. Based on FY91 requisition records, Anniston's miss operations are expected to produce 2.5 tons of VOC's this year During Desert Storm Letterkenny exceeded VOC emission limits s by the Pennsylvania Department of Environmental Resources. The added emissions associated with consolidating Air Force, Navy Army tactical missile maintenance operations at Letterkenny co push emissions above allowable limits.

The New Clean Air Act of 1990 is expected to lead to progressive reduction programs for VOC's. In areas of the coun where ozone concentrations are of particular concern (which includes Letterkenny), more stringent compliance regulations a emission limits can be expected. This will require industries these areas to reduce the amounts of VOC producing materials consumed or buy and install costly emission scrubbing equipme

Anniston Army Depot continues to stay within all applicab air, water, and solid waste emission/discharge limits. Current, and even additional, missile maintenance operations at Annisto offer absolutely no threat to the environment or the State of Alabama pollution discharge limits.

C. ECONOMIC CONSIDERATIONS -

1. RELATIVE LOCATION OF ANNISTON AND LETTERKENNY TO THE ARMY MISSILE COMMAND (MICOM) AND ASSOCIATED IMPACTS ON OPERATI COSTS

Supporting the Land Combat Missile Systems requires freque interface between the Army Missile Command and the supporting installation. During FY 90, 112 Anniston Army Depot employees visited the Army Missile Command, and conversely, 308 Missile Command employees visited Anniston. Since Anniston is located only 112 miles south of the Army Missile Command Headquarters (Huntsville Al.), these trips were often accomplished on one da trips with the only associated travel costs being mileage reimbursement. Regardless of the length of the trip, a traveler between the Missile Command and Letterkenny would have two mo travel days (one on each end of the trip) and the cost of air fare over a traveler from Anniston. Records of FY90 travel sh that 420 MICOM/ANAD employees made the trip between Huntsville and Anniston. If these same trips were made between Letterkenny Army Depot (Chambersburg,Pa.) and MICOM, additional costs woul translate to 3 days per diem at $75/day, 420 commercial plane

trips at $463/ticket, and 3 days of rental cars totaling $36.50/day for a total added travel cost of $334,950. Since the two additional travel days per trip would not be time on the job, the cost of associated non-productive time would be:

112trips/yr X 2 days/trip X 8hrs/day X $17.73/hr =$31,772/yr

It can be CONSERVATIVELY estimated that the relocation of operations and associated changes and transition would escalate travel by 10% to total:

$334,950/yr X 10% = $33,495/yr

Combining the extra costs in travel and the cost of non-productive time, a grand total of $368,445 would be spent annually to travel between Letterkenny Army Depot and Huntsville, Al.

2. COSTS OF DOING BUSINESS, ANNISTON VS. LETTERKENNY

The HQ DESCOM published FY 91 bid rate for Anniston is $45.72/hr and for Letterkenny is $56.28 (washing out parts costs from both rates to compensate for differences in commodities worked). The net difference of having work performed at Anniston vs. Letterkenny is $10.56/hr. This difference multiplied by Anniston's projected FY91 missile workload yields:

$10.56/hr X 670,000 hrs/yr = $7,075,000/yr savings.

Or, based on FY91 workload figures, a year's missile work accomplished at Anniston would cost $7,075,000 less than the same work performed at Letterkenny.

3. COSTS OF FACILITIZATION OF LETTERKENNY TO ACCEPT ANNISTON WORKLOAD

As acknowledged in the DDMC study (see Tab B), proper facilities will not be available at Letterkenny to receive consolidated Air Force, Navy, and Army tactical missile maintenance operations.

Assuming facilities exist at Letterkenny that can be renovated to house missile maintenance operations, the cost of reproducing the facilities located at Anniston will be significant. Anniston recently conducted studies to determine the costs of renovating facilities needed to receive BRACII workload. Using this study as a basis, the cost of renovating facilities at Leterkenny to provide environmentally controlled space to accept Anniston's missile work is estimated to be $50/sf. The cost to construct or install clean rooms is $116/sf for 10,000 class and $100/sf for 100,000 class. At Anniston, 75,000sf of shop space,

7,500sf of clean rooms, and 2 Automated Storage and Retrieval Systems (ASRS) are used to house and support missile maintenance operations. Using this data to calculate the cost of duplicating Anniston's missile maintenance space at Letterkenny:

$50/sf X 75,000sf = $3,750,000 for renovated space

$116/sf X3,000sf = $348,000 for 10,000 class clean rooms

$100/sf X 4,500sf = $450,000 for 100,000 class clean rooms

2 ea. ASRS's X $55,000/ea = $110,000

Or, the cost of facilitizing Letterkenny to accept Anniston's missile workload will be approximately $4,658,000.

This total does not reflect costs associated with upgrading existing facilities to meet governing physical and electronic surveillance security measures. It should be noted that at Anniston, missile guidance system operations are located in buildings that have 12 inch lace-bricked walls, two layers of intrusion detection, and surveillance cameras, while the facilities housing assembled missile maintenance operations have explosion relief walls, and are protected with two layers of intrusion detection and surveillance cameras. If not existing, to add these levels of securities at Letterkenny would be extremely expensive. A possibility exists that DOD regulations would require new security hardened facilities to be constructed, which would lead to astronomical construction costs.

In addition, Anniston has dedicated 50,000 total sf (25 each @ 25' X 80') of security/ safety/ ammunition operation conforming earth covered storage space in direct support of missile storage. If this space is not available at Letterkenny, $4,385,000 ($87.70/sf X 50,000) would be required to construct the new facilities.

4. RELOCATION OF EQUIPMENT FROM ANNISTON TO LETTERKENNY

At Anniston, the number of pieces of equipment directly supporting missile operations total 946, which occupy 19,000 cubic feet of space and weigh more than 100,000 tons. The cost to disconnect, package, transport, uncrate, install, repair, and calibrate the equipment is estimated to be $801,432.20.

Since all missile maintenance operations are to be out of operation for approximately five months for the relocation to Letterkenny, production will have to be accelerated at Letterkenny until the inventory in the supply system is equalized again. Anniston cannot overproduce prior to and in anticipation of the move because sufficient assets will not be available. The lost production will have to be regained once operations resume

in Letterkenny. This can only be accomplished by working accelerated schedules, which translates directly into overtime. Calculating five months production (based on FY91 workload projections) using overtime schedules:

670,000 hrs/yr X 5/12 yr X $56.28/hr

X 1.5 overtime = $23,567,250

5. MOVING, HIRING, AND TRAINING PERSONNEL NEEDED TO PERFORM OPERATIONS RELOCATED FROM ANNISTON TO LETTERKENNY

Currently 414 direct and indirect labor employees are neede to perform the missile maintenance operations recommended for relocation to Letterkenny.

Because of the higher costs of living in the Letterkenny area, and the traditionally strong roots of Anniston employees, realistic number of Anniston employees that could be expected tc relocate to Letterkenny would be 25% or 104 personnel. It is assumed a transfer of function and associated personnel relocation entitlements will be involved in the move of operations from Anniston to Letterkenny.

The cost of relocating an employee from Anniston to Letterkenny is estimated to be $ 31,521.30. This figure includes the costs of transportation, a house hunting trip, shipping of household goods to the new station, and the government's cost associated with buying and reselling the home of the departing employee. To relocate the 104 displaced employees from Anniston to Letterkenny, a total moving cost shown below would be incurred:

104 employees X $ 31,521.30/employee = $ 3,278,215.20

With only 25% of Anniston employees expected to make the move to Pennsylvania, the remaining 75% or 310 employees must be released from government employment at Anniston and replacements hired and trained at Letterkenny. It is estimated that the co of releasing a missile related employee is $8,510.40, the cost processing-in an employee is $58.72/employee, and the cost of interviewing an employee is $17.73/employee. The cost of releasing the 310 employees that chose not to relocate from Anniston and hiring their replacements at Letterkenny would be:

$8,510.40/employee X 310 employees = $2,638,224 for Releas

$58.72/employee X 414employees = $24,310.08 for Processing-In

$17.73/employee X 310employees = $5,496.30 for Interviewin

It should be noted at this point that employees can only be hirec if qualified candidates are available. The rural areas of Pennsylvania are similar to those of Alabama - qualified electronic technicians are not readily available. This would mear that Letterkenny would have to teach basic electronics to many of the new hires, lengthening the time needed to bring missile maintenance production levels back to normal after the relocation.

Records show that the missile maintenance technicians at Anniston Army Depot have taken 80,400 hours of specialized missile system training to become proficient in their jobs. This type of training is normally obtained through a commercial contractor. For the purpose of this study it is conservatively assumed the training will be taught on-sight at Letterkenny (much of this type training is accomplished in a TDY status). It will be optimistically assumed that training is still available (many of the older missile systems no longer have contractor supplied training available). Calculating the costs associated with the required training:

$43.98/employee per hr X 80,400 hours = $3,535,992

Totaling the costs for moving, releasing, hiring, and training the government employees necessary to move missile operations from Anniston to Letterkenny:

Moving Costs = $3,278,215.20
Releasing Costs = $2,638,224
Hiring Costs = $29,806.38
Training Costs = $3,535,992

Grand Total = $9,482,237.58

III. OTHER CONSIDERATIONS

A. ANNISTON'S UNIQUE CAPABILITIES

Anniston Army Depot missile maintenance capabilities are unique in that unlike Air Force, Navy, and other Army missile systems, Anniston specializes in Land Combat Missile Systems.

Work at Anniston is performed by the Directorate of Ammunition Operations (DAO) on assembled missiles such as the LANCE, ATACM, TOW, DRAGON, and SHILLELAGH systems, while the Directorate of Maintenance (DM) maintains the launcher and guidance systems of not only these systems, but systems such as the AIRBORNE TOW, TOW II, and Land Combat Support System (LCSS) as well.

Maintenance of these missile guidance systems requires interrelating capabilities in the areas of electro-optic maintenance. Electro-optics are an integral and essential component of the missile guidance systems. Anniston Army Depot currently has electro-optic repair and maintenance capabilities necessary to support assigned missile systems. Upon the closure of Sacramento Army Depot, additional electro-optic workload, facilities, and equipment are scheduled for Anniston. With this close interrelationship between electro-optics and missile guidance system maintenance, a strong justification exists to leave both electro-optic AND supported missile guidance maintenance operations at Anniston rather than splitting operations between Anniston and Letterkenny and incurring additional shipping costs and operational inefficiencies.

B. APPLYING BASE CLOSURE AND REALIGNMENT METHODOLOGY TO THE RELOCATION OF MISSILE MAINTENANCE WORK FROM ANNISTON TO LETTERKENNY

It is fully recognized and supported that for DOD to operate within reduced budgets of the future, both the size of the armed forces and the infrastructure that supports them must be reduced. It is further recognized that one of the most efficient methods of enacting the necessary reductions is the consolidation of operations and the closure of the vacated installations.

Applying this rational to the planned consolidation of missile work to Letterkenny, however , is difficult to follow. Anniston Army Depot is not scheduled for closure. Should missile maintenance operations be relocated from Anniston to Letterkenny, Anniston will still remain open, and no associated savings in operational costs realized.

Even if some of the missile guidance system maintenance operations were relocated from Anniston, it is widely recogniz movement of the LANCE and ATACM systems is not feasible. Annis will achieve depot capability of maintaining the ATACMS missi system on 1 Oct 91. The ATACMS Project Manager's Office and t Deputy Chief of Staff for Logistics have recognized the wisdom leaving ATACMS maintenance operations at Anniston and have pla their positions in writing. Another reason for ATACMS maintena remaining at Anniston is the Army's policy on performing surveillance and stockpile reliability testing of munitions at the point of storage. Anniston has been selected as the point storage for the ATACMS. To split separate storage and maintena operations between Anniston and Letterkenny would only create operating inefficiencies and additional costs.

Another missile system that would be inappropriate to relocate from Anniston is the SHILLELAGH. Designed to be launc from the M551 battle tank, the SHILLELAGH missile guidance sys is separated from the tank as Anniston enters the M551 into th overhaul process. The missile system is repaired, tested, and certified as the tank is being refurbished. As the tank emerge from the overhaul process, the missile system is reinstalled a the combat ready tank is prepared for shipment. The Land Comba Support System (LCSS) is the only equipment available to test, repair, and certify the SHILLELAGH missile system. Based on th interdependencies stated above, operational efficiencies and costs dictate leaving maintenance of the SHILLELAGH and the La Combat Support System (LCSS) at Anniston, the same depot responsible for refurbishing the M551 battle tank.

The specially designed and unique facilities at Anniston used to unload, regenerate, and reload the liquid propellants used in the LANCE missiles could not be feasibly duplicated at Letterkenny without significant construction expenses. The replacement cost of Anniston's LANCE Fueling Facility is estimated to be $5,341,579.06. For this reason, and also becau the vehicle used to launch the missile is overhauled at Annist it is logical the LANCE system will remain at Anniston.

Since Anniston Army Depot is going to remain open after t proposed consolidation of work at Letterkenny, and if Anniston going to remain in the missile maintenance business with the ATACMS, LANCE, LCSS, and SHILLELAGH, strong justification exis for the remaining missile related workload to stay at Anniston and avoid the disadvantages of relocation - relocation that is fully expected to reduce combat readiness of the systems invol and cost exorbitant dollars for no increased benefits.

IV. CONCLUSION

CONCLUSION - It should be noted that the DDMC missile stuc was conducted within a compressed schedule that did not allow the study team or reviewers sufficient time at the involved installations/agencies to resolve the inaccuracies (see Tab B f detail comments on study inaccuracies) previously identified. I should be further noted that the information presented in this package was limited solely to relocation of Anniston workload, and should not be applied to the remainder of the study recommendations without further review.

The previously presented information clearly indicates tha the decision to consolidate all tactical missile workload to Letterkenny Army Depot should be revisited. The Anniston move will not save, but will actually cost additional defense dollar to provide a lower state of combat readiness for our Land Comba Missile Systems. The attached economic analysis (see Tab A), supports in detail that the relocation of Land Combat Missile Systems from Anniston to Letterkenny will have an initial cost $38,508,919.78 and an additional $7,283,325.21 per year over current operations and will never pay for itself!

The old adage "If it's not broken, don't fix it." Applies the relocation of missile maintenance operations from Anniston Letterkenny. The existing facilities, equipment, and employee dedication at Anniston contribute to the 99.6% defect free workmanship of Anniston missile electronic technicians. Anniston's missile maintenance customer, the Army Missile Command, is pleased with the work produced at Anniston as demonstrated by numerous citations and letters of appreciation received from MICOM.

Anniston Army Depot, with in-place facilities, equipment a a ready, trained workforce, is proud of the missile maintenance work it accomplishes for the Army and our nation and stands rea to continue successfully performing this critical mission.

V. RECOMMENDATION

AMEND THE DDMC MISSILE STUDY, AND SUBSEQUENTLY THE BASE CLOSURE AND REALIGNMENT ACT, TO EXCLUDE ANNISTON ARMY DEPOT MAINTENANCE OF LAND COMBAT MISSILE SYSTEMS FROM THE CONSOLIDATIOI OF TACTICAL MISSILE MAINTENANCE AT LETTERKENNY ARMY DEPOT.

A. PROJECT TITLE: Defense Depot Maintenance Council Missile Study

B. DEPOT: Anniston Army Depot

C. PREPARING ORGANIZATION: Anniston Army Depot

D. DATE OF PREPARATION: May 91

E. PROJECT OBJECTIVE:
To show the cost effectiveness of amending the DDMC Study to allow Land Com
Missile Systems maintenance and support to remain at ANAD.

F. BACKGROUND:
In January 1991 the DOD Tactical Missile Study was prepared by the Defense I
Maintenance Council. The results of the study recommended that related mis:
work at ANAD should be consolidated at LEAD. In contrast to these results,
Economic Analysis shows that the Land Combat Missile Systems maintenance anc
can be performed more cost effectively at ANAD.

PROJECT PARAMETERS
DESCOM-P 11-1

Source Doc #:

ASSUMPTIONS AND CONSTRAINTS:

1. Assumptions:

a. Factors used for calculation purposes are correct (See Addendum Sheets).
b. Workload will remain relatively constant or will increase throughout the life of the project.
c. No additional equipment will have to be purchased or replaced at LEAD.
d. No equipment will be damaged during transportation to LEAD.
e. Labor Rates at LEAD are comparable to the ANAD rates used herein.
f. LEAD will require the same type and size of facilities presently at ANAD. (This includes clean rooms and sensitive item security requirements).
g. The buildings vacated at ANAD will not be used for any purpose. (This is a requirement since 'physical facility costs' are shown as a savings in the DDMC Study).
h. LEAD has sufficient storage for all missile parts, components, and completed assemblies for ALL systems involved in the consolidation.
i. Required utilities are in-place and ready for equipment installation. (Installation costs reflected in this EA refer to 'un-plug/plug-in' costs ONLY).

2. Constraints:

ALTERNATIVES:

ALTERNATIVE 1 -Leave Land Combat Missile Systems at ANAD

ALTERNATIVE 2 -Relocate Land Combat Missile Systems to LEAD

COST ESTIMATE WORKSHEET
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study

DATE: May 91

2. ALTERNATIVE : 1
Leave Land Combat Missile Systems at ANAD

3. ECONOMIC LIFE:

2. NON-RECURRING COST ESTIMATES:*

		PY	COST	DISCOUNT FACTOR	DISCOUNT CC
A.	RESEARCH AND	0	0.00	0	$0.
	DEVELOPMENT *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
B.	LAND *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
C.	BUILDINGS *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
D.	EQUIPMENT *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
E.	INSTALL/SHIP/	0	0.00	0	$0.
	HANDLE *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
F.	OTHER *	0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
		0	0.00	0	$0.
G.	TOTALS *		$0.00		$0.

* NOTE: All costs which occur past the minimum econ. life between Alt 1 or 2 are n

CES:

Automated version of SDS Form 1026-5-R

COST ESTIMATES
DESCOM-P 11-1

A. FORMATS INCLUDED:

		Quantity
	(A)	
X	(A-1)	1
X	(B)	1
X	(SENSITIVITY ANALYSIS)	1

B. RANKING/RECOMMENDATION OF ALTERNATIVES:

ALTERNATIVE	Undiscounted Total Savings	Undiscounted Benefit to Investment Ratio (BIR)	Undiscounte Amortization
Alt 2: Relocate Land Combat Missile Systems to LEAD	($182,083,130.25)	-4.728	NA
Alt 1: Leave Land Combat Missile Systems at ANAD	NA	NA	NA

RECOMMENDATION:

The benefits derived from the leaving Land Combat Missile Systems at ANAD are sufficient to pursue Alternative 2. The benefits which were analyzed show the alternative 2 is cost effective. The readiness of Land Combat Missile Systems provides the Army an increased fighting capability which directly improves the mission of the soldier in the field.

Recommend Alternative 1 - Leave Land Combat Missile Systems at ANAD

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study

DATE: May 91

2. ALTERNATIVE: 1

Leave Land Combat Missile Systems at ANAD

3. ECONOMIC LIFE:

2. RECURRING COST ESTIMATES:

A. OPERATIONS:

(A) HQ DESCOM'S MAINTENANCE BID RATES FY-91:

D.L. & DIR. OTHER	$21.38
OVERHEAD & BOCIE	$21.47
GAE & SSM (MEMO)	$2.87
TOTAL HOURLY RATE	$45.72

(B) WORKLOAD SOURCE:

PY	WORKLOAD	UTIL FACTOR	LABOR RATE	COST
1	670000	1	$45.72	$30,632,400.00
2	670000	1	$45.72	$30,632,400.00
3	670000	1	$45.72	$30,632,400.00
4	670000	1	$45.72	$30,632,400.00
5	670000	1	$45.72	$30,632,400.00
6	670000	1	$45.72	$30,632,400.00
7	670000	1	$45.72	$30,632,400.00
8	670000	1	$45.72	$30,632,400.00
9	670000	1	$45.72	$30,632,400.00
10	670000	1	$45.72	$30,632,400.00
11	670000	1	$45.72	$30,632,400.00
12	670000	1	$45.72	$30,632,400.00
13	670000	1	$45.72	$30,632,400.00
14	670000	1	$45.72	$30,632,400.00
15	670000	1	$45.72	$30,632,400.00
16	670000	1	$45.72	$30,632,400.00
17	670000	1	$45.72	$30,632,400.00
18	670000	1	$45.72	$30,632,400.00
19	670000	1	$45.72	$30,632,400.00
20	670000	1	$45.72	$30,632,400.00
21	670000	1	$45.72	$30,632,400.00
22	670000	1	$45.72	$30,632,400.00
23	670000	1	$45.72	$30,632,400.00
24	670000	1	$45.72	$30,632,400.00
25	670000	1	$45.72	$30,632,400.00

AT AS NECESSARY

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study
DATE: May 91

2. ALTERNATIVE: 1
Leave Land Combat Missile Systems at ANAD
3. ECONOMIC LIFE: 2

PY	B: MATERIAL COST:	C. UTILITIES COST:	D. FUEL COST:	E. OTHER COST:
1	$0.00	$169,512.75	$0.00	$38,465.2
2	$0.00	$169,512.75	$0.00	$38,465.2
3	$0.00	$169,512.75	$0.00	$38,465.2
4	$0.00	$169,512.75	$0.00	$38,465.2
5	$0.00	$169,512.75	$0.00	$38,465.2
6	$0.00	$169,512.75	$0.00	$38,465.2
7	$0.00	$169,512.75	$0.00	$38,465.2
8	$0.00	$169,512.75	$0.00	$38,465.2
9	$0.00	$169,512.75	$0.00	$38,465.2
10	$0.00	$169,512.75	$0.00	$38,465.2
11	$0.00	$169,512.75	$0.00	$38,465.2
12	$0.00	$169,512.75	$0.00	$38,465.2
13	$0.00	$169,512.75	$0.00	$38,465.2
14	$0.00	$169,512.75	$0.00	$38,465.2
15	$0.00	$169,512.75	$0.00	$38,465.2
16	$0.00	$169,512.75	$0.00	$38,465.2
17	$0.00	$169,512.75	$0.00	$38,465.2
18	$0.00	$169,512.75	$0.00	$38,465.2
19	$0.00	$169,512.75	$0.00	$38,465.2
20	$0.00	$169,512.75	$0.00	$38,465.2
21	$0.00	$169,512.75	$0.00	$38,465.2
22	$0.00	$169,512.75	$0.00	$38,465.2
23	$0.00	$169,512.75	$0.00	$38,465.2
24	$0.00	$169,512.75	$0.00	$38,465.2
25	$0.00	$169,512.75	$0.00	$38,465.2

B (cont.). MATERIAL COST: SOURCE
METHOD OF CALCULATION:

C (cont.). UTILITIES COST: SOURCE
METHOD OF CALCULATION: SEE ADDENDUM SHEETS

D (cont.). FUEL COST: SOURCE
METHOD OF CALCULATION:

(cont.). OTHER COST: SOURCE
METHOD OF CALCULATION: SEE ADDENDUM SHEETS (Costs Associated with Trips betwe ANAD and MICOM)

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

1 ROJECT TITLE: DATE: May 91
Defense Depot Maintenance Council Missile Study

2. ALTERNATIVE: 1 3. ECONOMIC LIFE: 25
Leave Land Combat Missile Systems at ANAD

PY	F. MAINTENANCE COST	G. TOTAL RECURRING COSTS BY PROJECT YEAR
1	$0.00	$30,840,378.03
2	$0.00	$30,840,378.03
3	$0.00	$30,840,378.03
4	$0.00	$30,840,378.03
5	$0.00	$30,840,378.03
6	$0.00	$30,840,378.03
7	$0.00	$30,840,378.03
8	$0.00	$30,840,378.03
9	$0.00	$30,840,378.03
10	$0.00	$30,840,378.03
11	$0.00	$30,840,378.03
12	$0.00	$30,840,378.03
13	$0.00	$30,840,378.03
14	$0.00	$30,840,378.03
15	$0.00	$30,840,378.03
16	$0.00	$30,840,378.03
17	$0.00	$30,840,378.03
18	$0.00	$30,840,378.03
19	$0.00	$30,840,378.03
20	$0.00	$30,840,378.03
21	$0.00	$30,840,378.03
22	$0.00	$30,840,378.03
23	$0.00	$30,840,378.03
24	$0.00	$30,840,378.03
25	$0.00	$30,840,378.03

F (cont.). MAINTENANCE COST: SOURCE
METHOD OF CALCULATION:

COST ESTIMATE WORKSHEET
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study

DATE: May 91

2. ALTERNATIVE : 2
Relocate Land Combat Missile Systems to LEAD

3. ECONOMIC LIFE:

2. NON-RECURRING COST ESTIMATES:*

		PY	COST	DISCOUNT FACTOR	DISCOUNTED COST
A.	RESEARCH AND	0	0.00	0	$0.00
	DEVELOPMENT *	0	0.00	0	$0.00
		0	0.00	0	$0.00
		0	0.00	0	$0.00
		0	0.00	0	$0.00
B.	LAND *	0	0.00	0	$0.00
		0	0.00	0	$0.00
		0	0.00	0	$0.00
		0	0.00	0	$0.00
		0	0.00	0	$0.00
C.	BUILDINGS *	0	0.00	0	$0.00
	0	1	4,658,000.00	0.954	$4,443,732.00
	0	0	0.00	0	$0.00
	0	0	0.00	0	$0.00
	0	0	0.00	0	$0.00
D.	EQUIPMENT *	0	0.00	0	$0.00
	0	0	0.00	0	$0.00
	0	0	0.00	0	$0.00
	0	0	0.00	0	$0.00
		0	0.00	0	$0.00
E.	INSTALL/SHIP/	0	0.00	0	$0.00
	HANDLE *	0	0.00	0	$0.00
	Installation	1	36,060.20	0.954	$34,401.43
	Shipping	1	15,372.00	0.954	$14,664.89
	Packaging	1	750,000.00	0.954	$715,500.00
F.	OTHER *	0	0.00	0	$0.00
	Hire/Fire	1	2,668,030.38	0.954	$2,545,300.98
	Training	1	3,535,992.00	0.954	$3,373,336.37
	Relocate People	1	3,278,215.20	0.954	$3,127,417.30
	OT rqd to 'catch-up'	1	23,567,250.00	0.954	$22,483,156.50
G.	TOTALS *		$38,508,919.78		$36,737,509.47

* NOTE: All costs which occur past the minimum econ. life between Alt 1 or 2 are not

SOURCES:

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study

DATE: May 91

2. ALTERNATIVE : 2
Relocate Land Combat Missile Systems to LEAD

3. ECONOMIC LIFE:

2. RECURRING COST ESTIMATES:

A. OPERATIONS:

(A) HQ DESCOM'S MAINTENANCE BID RATES FY-91:

D.L. & DIR. OTHER	$24.36
OVERHEAD & BOCIE	$25.97
GAE & SSM (MEMO)	$5.95
TOTAL HOURLY RATE	$56.28

(B) WORKLOAD SOURCE:

PY	WORKLOAD	UTIL FACTOR	LABOR RATE	COST
1	670000	1	$56.28	$37,707,600.00
2	670000	1	$56.28	$37,707,600.00
3	670000	1	$56.28	$37,707,600.00
4	670000	1	$56.28	$37,707,600.00
5	670000	1	$56.28	$37,707,600.00
6	670000	1	$56.28	$37,707,600.00
7	670000	1	$56.28	$37,707,600.00
8	670000	1	$56.28	$37,707,600.00
9	670000	1	$56.28	$37,707,600.00
10	670000	1	$56.28	$37,707,600.00
11	670000	1	$56.28	$37,707,600.00
12	670000	1	$56.28	$37,707,600.00
13	670000	1	$56.28	$37,707,600.00
14	670000	1	$56.28	$37,707,600.00
15	670000	1	$56.28	$37,707,600.00
16	670000	1	$56.28	$37,707,600.00
17	670000	1	$56.28	$37,707,600.00
18	670000	1	$56.28	$37,707,600.00
19	670000	1	$56.28	$37,707,600.00
20	670000	1	$56.28	$37,707,600.00
21	670000	1	$56.28	$37,707,600.00
22	670000	1	$56.28	$37,707,600.00
23	670000	1	$56.28	$37,707,600.00
24	670000	1	$56.28	$37,707,600.00
25	670000	1	$56.28	$37,707,600.00

\T AS NECESSARY

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

PROJECT TITLE: Defense Depot Maintenance Council Missile Study
DATE: May 91

2. ALTERNATIVE: 2
Relocate Land Combat Missile Systems to LEAD
3. ECONOMIC LIFE: 25

PY	B: MATERIAL COST:	C. UTILITIES COST:	D. FUEL COST:	E. OTHER COST:
1	$0.00	$0.00	$0.00	$416,103.24
2	$0.00	$0.00	$0.00	$416,103.24
3	$0.00	$0.00	$0.00	$416,103.24
4	$0.00	$0.00	$0.00	$416,103.24
5	$0.00	$0.00	$0.00	$416,103.24
6	$0.00	$0.00	$0.00	$416,103.24
7	$0.00	$0.00	$0.00	$416,103.24
8	$0.00	$0.00	$0.00	$416,103.24
9	$0.00	$0.00	$0.00	$416,103.24
10	$0.00	$0.00	$0.00	$416,103.24
11	$0.00	$0.00	$0.00	$416,103.24
12	$0.00	$0.00	$0.00	$416,103.24
13	$0.00	$0.00	$0.00	$416,103.24
14	$0.00	$0.00	$0.00	$416,103.24
15	$0.00	$0.00	$0.00	$416,103.24
16	$0.00	$0.00	$0.00	$416,103.24
17	$0.00	$0.00	$0.00	$416,103.24
18	$0.00	$0.00	$0.00	$416,103.24
19	$0.00	$0.00	$0.00	$416,103.24
20	$0.00	$0.00	$0.00	$416,103.24
21	$0.00	$0.00	$0.00	$416,103.24
22	$0.00	$0.00	$0.00	$416,103.24
23	$0.00	$0.00	$0.00	$416,103.24
24	$0.00	$0.00	$0.00	$416,103.24
25	$0.00	$0.00	$0.00	$416,103.24

B (cont.). MATERIAL COST: SOURCE
METHOD OF CALCULATION:

C (cont.). UTILITIES COST: SOURCE
METHOD OF CALCULATION:

D (cont.). FUEL COST: SOURCE
METHOD OF CALCULATION:

E (cont.). OTHER COST: SOURCE
METHOD OF CALCULATION: SEE ADDENDUM SHEETS (Costs Associated with Trips between LEAD and MICOM)

COST ESTIMATE WORKSHEET (CONTINUED)
DESCOM-P 11-1

1. PROJECT TITLE: Defense Depot Maintenance Council Missile Study — DATE: May 91

2. ALTERNATIVE: 2 — Relocate Land Combat Missile Systems to LEAD

3. ECONOMIC LIFE: 25

PY	F. MAINTENANCE COST	G. TOTAL RECURRING COSTS BY PROJECT YEAR
1	$0.00	$38,123,703.24
2	$0.00	$38,123,703.24
3	$0.00	$38,123,703.24
4	$0.00	$38,123,703.24
5	$0.00	$38,123,703.24
6	$0.00	$38,123,703.24
7	$0.00	$38,123,703.24
8	$0.00	$38,123,703.24
9	$0.00	$38,123,703.24
10	$0.00	$38,123,703.24
11	$0.00	$38,123,703.24
12	$0.00	$38,123,703.24
13	$0.00	$38,123,703.24
14	$0.00	$38,123,703.24
15	$0.00	$38,123,703.24
16	$0.00	$38,123,703.24
17	$0.00	$38,123,703.24
18	$0.00	$38,123,703.24
19	$0.00	$38,123,703.24
20	$0.00	$38,123,703.24
21	$0.00	$38,123,703.24
22	$0.00	$38,123,703.24
23	$0.00	$38,123,703.24
24	$0.00	$38,123,703.24
25	$0.00	$38,123,703.24

F (cont.). MAINTENANCE COST: SOURCE
METHOD OF CALCULATION:

COST SUMMARY

FORMAT A-1
DESCOM-P 11-1

Project Title:	Defense Depot Maintenance Council MDATE:	May 91
Alternative 1:	Leave Land Combat Missile Systems at ANAD	Economic Lif
Alternative 2:	Relocate Land Combat Missile Systems to LEAD	Economic Lif

Col 4	Col 5	Col 6	Col 7	Col 8	Col 9
Project Year	Recurring Costs (Alt 1)	Recurring Costs (Alt 2)	Undiscounted Differential Costs (col 5 - 6)	Discount Factor	P. V. Differenti Costs (col 7
0	0.00	0.00	0.00	1.000	(
1	30,840,378.03	38,123,703.24	(7,283,325.21)	0.954	(6,948,29
2	30,840,378.03	38,123,703.24	(7,283,325.21)	0.867	(6,314,64
3	30,840,378.03	38,123,703.24	(7,283,325.21)	0.788	(5,739,26
4	30,840,378.03	38,123,703.24	(7,283,325.21)	0.717	(5,222,14
5	30,840,378.03	38,123,703.24	(7,283,325.21)	0.652	(4,748,72
6	30,840,378.03	38,123,703.24	(7,283,325.21)	0.592	(4,311,72
7	30,840,378.03	38,123,703.24	(7,283,325.21)	0.538	(3,918,42
8	30,840,378.03	38,123,703.24	(7,283,325.21)	0.489	(3,561,54
9	30,840,378.03	38,123,703.24	(7,283,325.21)	0.445	(3,241,07
10	30,840,378.03	38,123,703.24	(7,283,325.21)	0.405	(2,949,74
11	30,840,378.03	38,123,703.24	(7,283,325.21)	0.368	(2,680,26
12	30,840,378.03	38,123,703.24	(7,283,325.21)	0.334	(2,432,63
13	30,840,378.03	38,123,703.24	(7,283,325.21)	0.304	(2,214,13
14	30,840,378.03	38,123,703.24	(7,283,325.21)	0.276	(2,010,19
15	30,840,378.03	38,123,703.24	(7,283,325.21)	0.251	(1,828,11
16	30,840,378.03	38,123,703.24	(7,283,325.21)	0.228	(1,660,59
17	30,840,378.03	38,123,703.24	(7,283,325.21)	0.208	(1,514,93
18	30,840,378.03	38,123,703.24	(7,283,325.21)	0.189	(1,376,54
19	30,840,378.03	38,123,703.24	(7,283,325.21)	0.172	(1,252,73
20	30,840,378.03	38,123,703.24	(7,283,325.21)	0.156	(1,136,19
21	30,840,378.03	38,123,703.24	(7,283,325.21)	0.142	(1,034,23
22	30,840,378.03	38,123,703.24	(7,283,325.21)	0.129	(939,54
23	30,840,378.03	38,123,703.24	(7,283,325.21)	0.117	(852,14
24	30,840,378.03	38,123,703.24	(7,283,325.21)	0.107	(779,31
25	30,840,378.03	38,123,703.24	(7,283,325.21)	0.097	(706,48
	0.00	0.00	0.00	0	
	0.00	0.00	0.00	0	
	0.00	0.00	0.00	0	
	0.00	0.00	0.00	0	
	0.00	0.00	0.00	0	
TOTALS	$771,009,450.75	$953,092,581.00	($182,083,130.25)	10.525	($69,373,67

AMORTIZATION

FORMAT A-1
DESCOM-P 11-1

Project Title:	Defense Depot Maintenance Council Missile Study
Alternative 2:	Relocate Land Combat Missile Systems to LEAD
Economic Life:	25 DATE: May 91

1. UNDISCOUNTED DOLLARS	
A. GROSS INVESTMENT (Alt 2)	$38,508,919.7
B. VALUE OF ADDITIONAL EXISTING ASSETS EMPLOYED (ALT 2) (Existing assets that would not be employed in Alt 1)	$0.0
C. VALUE OF EXISTING ASSETS REPLACED (Assets From Alt 1 not used by Alt 2)	$0.0
D. TERMINAL VALUE (Alt 2)	$0.0
E. NET INVESTMENT (Lines A + B - Lines C & D)	$38,508,919.7
F. TOTAL UNDISCOUNTED DIFFERENTIAL COST (Cost Summary Sheet, Col. 7)	($182,083,130.2
G. MODIFICATION/REFURBISHMENT ELIMINATED (Alt 1) (Required by Alt 1, thus eliminated by Alt 2)	$0.0
H. TOTAL SAVINGS (Line F + Line G)	($182,083,130.2
I. PARTIAL SAVINGS (Sum of Col. 7 Until the Addition of One More Year Would Exceed Line E)	($182,083,130.2
J. NUMBER OF YEARS SUMMED IN LINE I	3
K. FRACTIONAL AMORTIZATION (Lines E-I) / (Value in Col 7, Project Yr Line J+1)	1
L. AMORTIZATION (Lines J + K)	1
M. BENEFIT/INVESTMENT RATIO (Line H, Total Savings / Line E, Net Investment)	-4.7

2. DISCOUNTED DOLLARS (To Present Value)	
A. GROSS INVESTMENT (Alt 2)	$36,737,509.4
B. VALUE OF ADDITIONAL EXISTING ASSETS EMPLOYED (ALT 2) (Existing assets that would not be employed in Alt 1)	$0.0
C. VALUE OF EXISTING ASSETS REPLACED (Assets From Alt 1 not used by Alt 2)	$0.0
D. TERMINAL VALUE (Alt 2)	$0.0
E. NET INVESTMENT (Lines A + B - Lines C & D)	$36,737,509.4
F. TOTAL DISCOUNTED DIFFERENTIAL COST (Cost Summary Sheet, Col. 9)	($69,373,672.0
G. MODIFICATION/REFURBISHMENT ELIMINATED (Alt 1) (Required by Alt 1, thus eliminated by Alt 2)	$0.0
H. TOTAL SAVINGS (Line F + Line G)	($69,373,672.0
I. PARTIAL SAVINGS (Sum of Col. 9 Until the Addition of One More Year Would Exceed Line E)	($69,373,672.0
J. NUMBER OF YEARS SUMMED IN LINE I	
K. FRACTIONAL AMORTIZATION (Lines E-I) / (Value in Col 9, Project Yr Line J+1)	
L. AMORTIZATION (Lines J + K)	
M. BENEFIT/INVESTMENT RATIO (Line H, Total Savings / Line E, Net Investment)	-1.8

** NOTE: All above column references are to columns on the Format A-1, Cost Summary

COST ESTIMATE SUMMARY (FORMAT B)

PROJECT TITLE: Defense Depot Maintenance Council Missile Study

ALTERNATIVE . Leave Land Combat Missile Systems at ANAD

ECONOMIC LIFE: 25 DATE: May 91

OUTPUTS:

1. Quantifiable Benefits

   a. The 'one time' cost associated with hiring/firing/moving/tra personnel displaced from ANAD to LEAD will not be incurred.

   b. Trips between ANAD and MICOM are significantly cheaper than same amount of trips between LEAD and MICOM.

   c. The amount of Overtime that will be required to 'catch up' s work that will be interrupted during the move will not be ir

   d. HQ DESCOM published Bid Rates of ANAD are cheaper than rates resulting in a significantly lower cost of doing business at

   e. The cost of packaging, shipping, installing, and calibrating pieces of sensitive equipment will not be incurred.

   f. The cost associated with facilitizing LEAD to accept the ANA will not be incurred.

2. Non-quantifiable Benefits

   a. 99.6% defect-free Land Combat Missile Systems maintenance ar will continue at ANAD.

   b. Combat Readiness will NOT be jeopardized.

   c. Environmental Regulations will be met.

ADDENDUM SHEET(S)
DESCOM-P 11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Costs Associated with Hiring and Terminating Personnel

COST TO PROCESS- N AND INTERVIEW PERSONNEL:

ASSUMPTION: It takes at least one day to process-in and employee.
Personnel Analysts (GS 03) process-in new employees.
(Other costs such as rating panels, testing, routing paperwork, etc. are incurred, but are not included in this EA)
All personnel affected will have to be processed-in at LEAD.
75% of affected personnel will be 'new hires' at LEAD and will be interviewed by at least 1 supervisor for at least 1 hour.

A GS 03 Step 05 makes		$7.34 /hour	(From Labor Rate Chart dated Jan 91)	
Total personnel affected		414 personnel	(From DDMC Missile Study)	
$7.34 /hour	X	8 hour/day	=	$58.72 /day-person
$58.72 /day-person	X	414.00 personnel	=	$24,310.08 to process-in

A WS 18 Step 05 makes		$25.00 /hour	(From Labor Rate Chart dated Jan 91)	
414 personnel	X	75.00%	=	310 'new hires' a
$17.73 /hour	X	1 hour/person	=	$17.73 /person
$17.73 /person	X	310.00 personnel	=	$5,496.30 to interview

COST TO TERMINATE PERSONNEL:

ASSUMPTION: Severance pay is granted to displaced employees at a rate of 1 pay period's pay for each year of service.

Average length of employment at ANAD:	6 years/person
Average Labor Rate of affected employee:	$17.73 /hour
Pay period at ANAD:	80 hours

1 pay-pd/year	X	6 years/person	=	6 pay-periods/p
80 hours/pay-pd	X	6 pay-pd/person	=	480 hours/person
$17.73 /hour	X	480 hours/person	=	$8,510.40 /person
310 people hired	X	$8,510.40 /person	=	$2,638,224.00 severance pa

ADDENDUM SHEET(S)
DESCOM-P 11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Costs Associated with Specialized Training

COST TO OBTAIN SPECIALIZED TRAINING FOR LEAD PERSONNEL:

ANAD hours of specialized training: 79,000.00 hours for DM
1,400.00 hours for DAO
80,400.00 hours total

McDonnel-Douglas training charge: $399,840.00 (18 weeks 12 student
Hughes Aircraft training charge: $50,000.00 (2 weeks 15 students

18 weeks X 40.00 hours/week = 720 hours

$399,840.00 / 720 = $555.33 /hour

$555.33 /hour / 12 student = $46.28 /hour-student

2 weeks X 40.00 hours/week = 80 hours

$50,000.00 / 80 = $625.00 /hour

$625.00 /hour / 15 student = $41.67 /hour-student

$46.28 /hour-student + $41.67 /hour-student = $87.95 /hour-student

$87.95 /hour-student / 2 = $43.98 /hour-student (avera

$43.98 /hour X 80,400.00 hours trng = $3,535,992.00 specialized training

ADDENDUM SHEET(S)
DESCOM-P 11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Cost Associated with Moving Employees to LEAD

COST TO MOVE EMPLOYEES TO LEAD:

Relocation (to COE for house buy/sell)	$22,648.00 /employee disp
HHG Transportation	6,300.00 /employee disp
Mileage	147.80 /employee disp
House Hunting Trip (NTE 10 Days)	1,980.00 /employee disp
Per Diem (2.25 Days)	445.50 /employee disp
	$31,521.30 /employee disp

Total personnel affected 414 personnel (From DDMC Missile Study)
25% of affected personnel are expected to relocate.

414 personnel X 25.00% = 104 personnel to r

104 personnel X $31,521.30 /person = $3,278,215.20 to relocate pe

ADDENDUM SHEET(S)
DESCOM P-11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Costs Associated with Trips made between ANAD and M

COST OF TRIPS BETWEEN ANAD AND MICOM:

Trips from ANAD to MICOM:	112 /year (average)
Trips from MICOM to ANAD:	308 /year (average)
Reimbursable Mileage Rate:	$0.24 /mile
Mileage from ANAD to MICOM:	224 miles (Round Trip)
Airfare from MICOM to LEAD:	$463.00 /ticket
Per Dium Rate:	$75.00 /day
Rental Car Rate:	$36.50 /day
Length of Trip LEAD to MICOM:	3 days
Labor Rate (Average):	$17.73 /hour

Cost of ANAD/MICOM trips (Assuming one person/car):

112	trip/year+	308	trips/year	=	420 total trips ANAD & MI
420.00	trip/yearX	224	miles/trip	=	94,080.00 miles/year
94,080	mile/yearX	$0.24	$/mile	=	$22,579.20 /year (total travel c

Cost of non-productive time at ANAD due to travel:

112	trip/yearX	1	day/trip	=	112 days/year
112	days/yearX	8	hours/day	=	896 hours/year
896	hour/yearX	$17.73	/hour	=	$15,886.08 /year non-productive

Cost of LEAD/MICOM trips (Assuming same average number of trips is required):

$75.00	/day +	$36.50	/day	=	$111.50 /day (per dium/rental
420.00	trip/yearX	3	days/trip	=	1,260.00 days/year (days per d
1,260.00	days/yearX	$111.50	/day	=	$140,490.00 /year(per dium/rental
420	trip/yearX	$463.00	/ticket-trip	=	$194,460.00 /year (ticket costs)
$140,490	/year +	$194,460	/year	=	$334,950.00 /year (total travel c

Travel costs will escalate by a conservative 10% due to relocation of operations.

$334,950	/year X	10.00%	=	$33,495.00
				$368,445.00 /year (total travel c

Cost of non-productive time at LEAD due to travel:

					days/year
					hours/year
112	trip/yearX	3	day/trip	=	336 /year non-productive t
336	days/yearX	8	hours/day	=	2688
2688	hour/yearX	$17.73	/hour	=	$47,658.24

ADDENDUM SHEET(S)
DESCOM P-11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Costs Associated with Overtime Required to 'Cat after Systems are Relocated

COST OF OVERTIME REQUIRED BY LEAD AFTER SET-UP IS ACHIEVED:

ANAD's Projected FY 91 workload:				670,000.00	hours	
Time to relocate equipment to LEAD:				5	months (minimum)	
Bid Rate at LEAD:				$56.28	/hour	
Over Time Rate at LEAD:				$84.42	/hour (Time and 1/2)	
5	months	/	12	month/year	=	0.417 year downtime
0.417	years	X	$84.42	/hour	=	$35.18 /hour
$35.18	/hour	X	670,000.00	hours	=	$23,567,250 Overtime to 'cat

ADDENDUM SHEET(S)
DESCOM P-11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Costs Associated with Relocating Equipment

COST OF RELOCATING EQUIPMENT TO LEAD:

Equipment at ANAD:	100,000.00	tons
	19,000.00	cubic feet
Shipping Cost for ANAD Equipment*:	$15,372.00	(Transportation Division Figure)
Packaging Cost for ANAD Equipment:	$750,000.00	(Transportation Division Figure)
Time Required to Install Equipment:	2,035.00	hours (Un-plug/Plug-in)
		(Assuming all Utilities are Prese:
Labor Rate for Equipment Installers:	$17.72	/hour (Assuming same rate as ANAD

2,035 hours X $17.72 /hour = $36,060.20 Un-plug/Plug-in Cos

*Shipping Cost:

14 trucks X $1,098.00 /truck = $15,372.00 Shipping Cost

ADDENDUM SHEET(S)
DESCOM P-11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Facilitization Cost Estimate

COST TO FACILITIZE LEAD:

	SF	$/SF	COST (SF X $/SF)
Environmentally Controlled Shop Space:	75,000	50	$3,750,000.00
10,000 Class Clean Room Space:	3,000	116	348,000.00
100,000 Class Clean Room Space:	4,500	100	450,000.00
TOTAL			$4,548,000.00
ASRS Required (2 @ $55,000):			$110,000.00
			$4,658,000.00

ADDENDUM SHEET(S)
DESCOM P-11-1

A. ADDITION TO PAGE:

B. RIP TITLE: Defense Depot Maintenance Council Missile Study

C. ITEM: Savings Associated with Vacating Buildings at ANAD

Reference "DOD Tactical Missile Study" prepared for Defense Depot Maintenance Counil, page "35% of the cost is related to the physical facilities cost where the workload is located (this cost would not transfer)."

FACILITIES COST AT ANAD THAT WOULD BE AVOIDED WITH RELOCATION TO LEAD:

All Utility Costs used were obtained from "Facilty Engineering & Housing Annual Summary of Operation", FY 89

Total Building SF at ANAD (Depot-wide): 8,645,000 SF
Total Building SF at ANAD (Affected in Relocation): 75,000 SF

Type of Service	A Total Cost at ANAD	B Cost/SF at ANAD (A / 8,645,000)	Cost Status Quo (75,000 X B)
Water	218,682	0.0253	$1,897.50
Sewage	873,663	0.1011	7,582.50
Electrical	3,225,140	0.3731	27,982.50
Maint. Real Prop.	6,190,865	0.7161	53,707.50
Custodial	310,598	0.0359	2,692.50
Boiler Plnt & Heat	1,841,100	0.2130	15,975.00
AC/Refrigeration	191,020	0.0221	1,657.50
Pest Control	53,739	0.0062	465.00
Engineering Support	4,857,889	0.5619	42,142.50
SUB TOTAL			$154,102.50
(Assume 10% increase in Cost for FY 91)		10%	15,410.25
TOTAL			$169,512.75

INACCURACIES OF DDMC MISSILE STUDY "QUESTIONS AND COMMENTS"

1. Where did the 35% savings factor come from? If associated only with physical facility cost, this cost is minimal when compared with total operational costs. (Page 1, Paragraph 5 of Executive Summary)

2. Savings calculations are erroneous. If the calculations are based on the total business base, 35-40% is repair parts. Repair parts cost will remain constant at Anniston or Letterkenny and should not be a part of savings calculations. (Page 1, Paragraph 5 of Executive Summary)

3. All personnel direct and indirect would have to be afforded an opportunity to transfer with mission. (Page 1, Paragraph 5 of Executive Summary)

4. If a new way of doing business is required for LEAD to operate as the Tactical Missile Depot, why couldn't the same philosophy and any associated improvements of operations apply to ANAD and other depots? (Page 2, Paragraph 2 of Executive Summary)

5. Would LEAD be totally transparent to the owning service? (Page 2, Paragraph 4 of Executive Summary)

6. Personnel's moving expenses and termination costs would be substantial. Why were they not included as part of the study? (Page 2, Item 10 of Study)

7. There would be an enormous increase in MICOM's travel expenditures as a result of moving missile work from ANAD. This is a very meaningful figure and should not be overlooked.

8. Skills required for this consolidation will not be available in LEAD's recruiting area, especially in the numbers that they will need. Look at the total consolidation workload and subtract projected transfers of 25%. Where will needed personnel possessing those skills come from? (Page 2, Item 11 of Study)

9. Even if skills are available, there is much system training which will be required, some of which is no longer available. This cost also, was not included in the study. (Page 2, Item 11 of Study)

10. The Army's readiness will be significantly impacted by moving ANAD's missile workload to LEAD. This should not be assumed otherwise as stated DDMC study. It will take 3-5 years for Letterkenny to reach the level of support that ANAD is currently providing. (Page 2, Item 1 of Study)

11. MILCON savings need to be re-looked - $22.2M included in the tactical missile study was also a part of the Communications & Electronic Study. This amount should be subtracted from the total, reducing MILCON savings from $63.64 to $41.44. The cost of the Inertial Guidance Unit (IGU) Facility at ANAD should also be removed from consideration as savings. The IGU Facility will be needed at Anniston for support of the newer configuration of M1 Abrams tank. The Air Force has expressed intentions of not providing IGU support. (Page 12, Paragraph 1 of Study)

12. Part of the electro optic workload (112 manyears) that ANAD will gain as a result of the Sacramento Army Depot (SAAD) closure is also included in the DDMC study and slated to go to LEAD. (Appendix A - Night Sights)

13. Cost comparability and facility utilization are basic to a consolidation study. Where are these portions of the DDMC study?

14. Recommend this study (as it effects ANAD) be properly audited and evaluated by the Government Accounting Office.

17 JUN 1991

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, DC 20310-0200

REPLY TO
ATTENTION OF

11 June 1991

Mr. Jim Courter
Chairman, Defense Base Closure
and Realignment Commission
1625 K Street, N.W., Suite 400
Washington, D.C. 20006-1604

Dear Mr. Courter,

Thank you for your letter of May 22, 1991, to Mrs Livingstone requesting the Army to review the independent proposal for retaining the Land Combat Missile Systems maintenance mission at Anniston Army Depot.

Attached is a copy of the comments prepared by Headquarters, AMC in response to what appears to be the same proposal submitted by the Alabama delegation on behalf of Anniston Army Depot. The last page of the attachment is the requested COBRA summary.

The economic challenges made in the proposal overstate the equipment that would actually be moved to Letterkenny Army Depot and fail to consider the savings in overhead identified in the DDMC study. The environmental concerns are totally unfounded and the evidence shows that environmental compliance will improve at both Anniston and Letterkenny Army Depots.

If we can be of further assistance, please feel free to contact me personally or Lieutenant Colonel Chip Larouche at (703) 693-7556.

Sincerely,

John B. Nerger
Acting Director, Total
Army Basing Study

Attachment

cc: The Honorable Colin McMillan
The Honorable Susan Livingstone

EXECUTIVE SUMMARY

After reviewing the information provided by the delegation from Alabama on behalf of Anniston Army Depot, we find that none of the considerations provided warranted incorporation or approval into the Tactical Missiles Study.

Combat Readiness will not be detrimentally impacted by the consolidation of all DoD missiles at Letterkenny Army Depot.

Environmental Compliance will not only be met, but will be exceeded, due mostly to the change in workload mix at Letterkenny.

The Tactical Missiles Study report issued in January 1991 projected total cost savings of $87.194 million from the movement of all Services' workload to Letterkenny, less a total cost for facilities renovation to accept the additional equipment plus the cost to move equipment of $29.200 million for a net savings associated with the consolidation of $57.994 million.

Of the total $87.194 to be saved, $23.4 (Table 1) is applicable to the workload to be moved from Anniston Army Depot. Military construction avoidance at Anniston is $7.25 million for the ATACMS and Inertial Guide projects. Increased travel cost for personnel from MICOM to Letterkenny vs. Anniston is $368,445. Cost to move the equipment unique to the Land Combat Missile Systems is $102,232. Although personnel costs were not calculated at the time of the original study those costs applicable to the move of ANAD workload are projected to be about 1/3 of the total $5.4 million for all Army workload change -- $1.8 million. This results in a net savings projected to be $28.3 million. ($23.4 mil + $7.25 mil - $368K - $102 K - $1.8 mil = $28.3 mil)

This projected savings of $28.3 million is contrary to the Alabama projection. Their projection was a cost of $38,508,919.78 plus $7,283,325.21 per year for 5 years ($36,416,626) or a total cost of approximately $75 million.

The Tactical Missiles Study offers a cost savings projection to DoD by consolidating workload at LEAD. The material provided by Alabama offered no savings to keep the workload at ANAD.

The consolidation of Tactical Missiles from ANAD to LEAD is consistent with the policy of Army Deputy Chief of Staff for Logistics (DCSLOG) and is consistent with the Joint Service Business Plan endorsed by Department of the Army, Department of the Navy, and Department of the Air Force dated Feb. 28, 1991, to Assistant Secretary of Defense (Production and Logistics).

The following is an excerpt from the Army's Business Plan relative to the Tactical Missiles Study that also supports our position.

3.8.Ø. LETTERKENNY ARMY DEPOT (LEAD) - STRATEGY. LEAD will be postured as the DoD missile and missile support equipment CTX (Center for Technical Excellence) and integrated depot-level maintenance facility. This consolidates guidance and control section repair for all current and future air, ground, and surface launched missiles. The missile support equipment includes Army-only launchers, radars, associated ancillary equipment, and subsystem repair of missile platforms mounted on track or wheeled vehicles for which system integrity is not impacted by their removal and repair at LEAD. All artillery workload will be consolidated at RRAD consistent with DDMC study recommendations. The short-term savings plan consolidated the automotive workload at TEAD.

REVIEW OF LEAD VS. ANAD PERFORMING LAND COMBAT MISSILE SYSTEMS WORKLOAD

We have addressed the issues in the same order as the material provided by the delegation from Alabama. Our position was not to refute the position taken by Alabama, but rather to effectively deal strictly with the facts associated with the movement of the workload from ANAD to LEAD. Listed below is the projection made by the Tactical Missiles Study Team.

In the areas addressed below, some of the projections address the total Services' workload change when it was too intermeshed with the Alabama workload to differentiate.

A. COMBAT READINESS -

Impact to readiness is a most important consideration in the decision making process to relocate a Source of Repair (SOR). To minimize the impact to a change in SOR a detailed implementation plan is required. The implementation plan includes phasing of workload, facilities requirements, equipment requirements, people (skill levels, training, relocation, learning curve, availability, etc.), and inventory availability.

With the decline in world hostilities and the low probability of a global land based war scenario, less demand is being placed on existing inventory and turn-around-time.

With the utmost concern for combat readiness, there is negligible impact to our ability to support the existing force structure and to readily dispatch the operating forces to meet any emergent demand during the transition of SORs. The orderly transition of the Tactical Missiles took into consideration the weapons requirements of the present force structures and conflict scenarios as major factors. The responsibility for this transition process has been directed by Commander Depot Systems Command to each depot, to be executed as the priority of the Business Offices. Transition plans will be patterned to the specific missile systems. Where duplication of support equipment exists, equipment will be moved and a dual capability will be established allowing for the timely transition while maintaining readiness.

As an example, the Airborne TOW equipment has been reviewed and it has been determined that dual capability exists within the depot system. This duplicate capability is presently housed in Mainz Army Depot. Based on the recommendations from the DDMC study concerning Mainz, the TOW mission would be transferred to LEAD in FY93. This dual capability allows for the timely equipment transfer from Mainz prior to the movement of Anniston's

support equipment. Thus allowing for no maintenance downtime for TOW and making it one of the systems providing the best transition options with the lowest risk factor to impact readiness.

B. ENVIRONMENTAL CONSIDERATIONS -

Environmental compliance was considered in the Defense Depot Maintenance Council (DDMC) study. It is acknowledged that environmental regulations are not consistently restrictive across the country. However, as stewards of our national resources it is incumbent upon the Department of Defense to reduce environmental pollutants from its industrial operations rather than seeking means to circumvent the words and spirit of these regulations. The Clean Air Act of 1990 will likely redefine pollutant categories and monitoring requirements such that engineering controls will be required to reduce emissions from all large industrial facilities within DESCOM. The LEAD is involved in advanced planning to install control equipment for Volatile Organic Compound (VOC) emissions which will maintain compliance during expanded mission workload in support of unplanned surge events such as Desert Storm. This technology is also under analysis to maximize its application under the new Clean Air Act of 1990 requirements.

The DDMC study proposal regarding missile consolidation will ease the LEAD compliance posture with regard to VOC emissions specifically, and all environmental media generally. Consolidation of tactical missiles at LEAD coupled with the planned movement of artillery and truck workload from LEAD will significantly reduce the emissions of VOC and improve the LEAD compliance posture in this regard. Annually, an estimated reduction of 75-80% of VOC emissions from LEAD may result from implementation of the study recommendations. The influx of new missile systems will replace the current VOC-intensive workload with a much cleaner type of work. The eleven missile systems recommended to be transferred to LEAD will be electronic missile component work requiring minimal painting.

Environmental impacts and compliance are issues which receive significant consideration in every level of DoD planning. However, consolidation of tactical missile workload at LEAD and the transfer of artillery and trucks will result in decreased levels of VOC output in relation to present output. Compliance will be achieved and maintained in accordance with statute and policy.

C. ECONOMIC CONSIDERATIONS -

1. RELATIVE LOCATION OF ANNISTON AND LETTERKENNY TO THE ARMY MISSILE COMMAND (MICOM) AND ASSOCIATED IMPACTS ON OPERATING COSTS

We accept the position offered on behalf of Anniston. We expect travel costs to increase when workload is moved from Anniston to Letterkenny. We offer no opposing position.

2. COSTS OF DOING BUSINESS, ANNISTON VS. LETTERKENNY

No attempt was made to differentiate the costs per commodity other than the savings calculations made in the original Tactical Missiles Study. Therefore, bid rates do not serve as a comparison until all workload changes stabilize.

3. COSTS OF FACILITIZATION

Land Combat Missile Systems relocated from ANAD to LEAD require similar facilities which are used for maintenance support that exist throughout the DoD Tactical Missile community. Existing clean rooms within DoD are of a higher quality modular design than the ones located at ANAD and will be relocated to provide the necessary capacity/capability at the LEAD Consolidated Tactical Missile Facility.

A major objective of the Tactical Missiles Study was to optimize an existing facility's use through consolidation with no Military Construction expenditures. LEAD was determined to be the only site that could be dedicated as a Tactical Missile Facility for the following reasons: (a) the current mission as CTX for HAWK/PATRIOT air defense missile systems; (b) concurrent DDMC studies on trucks, and towed/self propelled Howitzers recommended the consolidation of these systems at other activities thus availing an additional 317,000 square feet facility to be renovated with no Military Construction costs at LEAD; and additionally, (c) LEAD has other facilities which contain physical and electronic surveillance security for service systems identified in the study. These facilities include tri-level security systems with ample security/safety/ammunition operations and conforming earth covered storage space.

4. RELOCATION OF EQUIPMENT FROM ANNISTON TO LETTERKENNY

This analysis included the following:

Only those cost centers involving direct missile support were analyzed;

Support activities such as machine shops, paint facilities, and cleaning operations were not considered because they already exist at LEAD;

Equipment required to support relocated workload was taken from the Capability/Capacity Engineering Data Reporting System (CEDRS). The CEDRS file only lists equipment over $1,000.00. Only major test consoles in the missile cost centers, which are uniquely dedicated, transfer with the mission. The weight of a typical major test console is estimated at 2,000 lbs.

Estimated workhours for labor and the cost per workhour were derived from a similar study performed in 1990.

For the purpose of this analysis, it is expected that current prices at ANAD are within plus or minus 10 percent of the 1990 figures.

Based on the CEDRS file, the equipment listed for direct missile support cost centers equals 182 items at a total cost of $20,577,000.00. Only 47 of the 182 items listed represent test consoles. The remainder are mostly peripheral support equipment such as oscilloscopes, multimeters, power supply generators, fixtures, etc. A cost breakdown for disassembly, crating, shipping, uncrating, and reassembly at LEAD is as follows:

	Est Workhours per unit	Est cost per work hr	Est crating cost per unit	Number of units	cost
Disassemble and move to shipping area	8	$42.50	na	47	$15,980
Crating	na	na	$300	47	$14,100
Uncrate	na	na	$ 50	47	$2,350
Move to new location and reinstall	8	$42.50	na	47	$15,980
			Sub total		$48,410
Estimated transportation cost for 47 consoles at 2,000 lbs each					$3,822
(Disassemble, crate, uncrate, reinstall) est cost to move remaining equipment					$50,000
Estimated cost to move all direct support missile equipment from ANAD to LEAD					$102,232

Consideration was given to the vast quantities of support equipment existing within the Tactical Missile arena. Through consolidation, specialized support equipment will be moved to the selected location and the common support equipment will be screened for application across all services, thereby reducing overall common support equipment transitioned to the selected site.

REALIGNMENT SUMMARY (COBRA Ver 1.20)

n+ion NPV20	($K) :	-64801	Losing Base	:	ANAD
One-Time Cost	($K) :	7184	Group	:	AMC
to Break Even	:	1	Service	:	US Army
01 Years	:	0	Option Package	:	ANAD-LEAD

Net Cost ($K) Constant Dollars

	Year1 1992	Year2 1993	Year3 1994	Year4 1995	Year5 1996	Year6 1997	Beyond
ission	0	0	0	0	0	0	0
ersonnel	0	0	0	0	0	0	0
verhead	0	-4672	-9355	-9355	-9355	-9355	-9355
onstruct	323	0	2081	2254	0	0	0
oving	0	2135	0	0	0	0	0
ther	0	391	0	0	0	0	0
ET	323	-2146	-7274	-7101	-9355	-9355	-9355
ff Elim	0	0	0	0	0	0	
nl Elim	0	0	0	0	0	0	
iv Elim	0	0	0	0	0	0	
OT ELIM	0	0	0	0	0	0	

CITY OF
ANNISTON, ALABAMA

P. O. BOX 670 • 36202
205-236-3422

May 23, 1991

Honorable James Courter
Chairman
Defense Base Closure and Realignment Commission
1625 K Street, N.W. Suite 400
Washington, D.C. 20005-1604

Dear Mr. Chairman:

As I stated during my remarks before the commission on May 23, 1991, I hearby respectfully submit the enclosed document concerning the proposed transfer of Tactical Missile Maintenance work from the Anniston Army Depot, AL. to Letterkenny Army Depot, PA. This information clearly establishes that economic, environmental, and readiness issues make the relocation of this work not in the best interests of the Department of Defense or our nation. We ask that this recommendation by the Department of Defense be overturned.

Thank you for your consideration of this information.

Sincerely,

William A. Robison

William A. Robison
Mayor

WAR:sls

ATCH 8

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DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Suite 1425
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TELECOPIER (703) 893-8029

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SUITE 1530
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601 PENNSYLVANIA AVENUE, N.W.
SUITE 900
WASHINGTON, D.C. 20004
(202) 462-4607
TELECOPIER (703) 893-8029

FRANKFURT OFFICE:
PROF. W. HEIERMANN & PARTNER*
D-6000 FRANKFURT / MAIN
FEDERAL REPUBLIC OF GERMANY
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DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, DC 20310-0104

July 27, 1993

MEMORANDUM FOR THE ACTING ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS, LOGISTICS, AND ENVIRONMENT)

SUBJECT: BRAC '93 Recommendation for Consolidation of Tactical Missile Maintenance at Letterkenny Army Depot

The purpose of this memorandum is to draw your attention to an issue arising from the 1993 Defense Base Closure and Realignment Commission's recommendation regarding Letterkenny Army Depot (LEAD) that may require immediate legislative action. As you are aware, the Commission resurrected the consolidation of tactical missile maintenance at LEAD by including the consolidation as a recommendation in its report to the President.[1] The consolidation had been halted by the Principal Deputy Assistant Secretary of Defense (Production and Logistics) on December 30, 1992, following a district court order enjoining the Army from transferring tactical missile maintenance work from Anniston Army Depot (ANAD) to LEAD as part of the consolidation.

Despite the apparent rejuvenation of the consolidation by the 1993 BRAC Commission's recommendation, the statutory basis of the district court injunction at ANAD remains; section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 prohibits the Secretary of Defense from taking action to effect the consolidation without conducting a competition among all depots to select the consolidation site. This statutory provision and the district court injunction based upon it remain in effect and the BRAC Commission's recommendation may not be sufficient to guarantee that the present injunction will not be continued.

Clearly, the injunction at ANAD must be lifted before the consolidation at LEAD can be completed.

---

[1] This memorandum assumes that Congress will not act to nullify the 1993 BRAC Commission's recommendations transmitted by the President.

Although it may be possible to fashion arguments designed to demonstrate that the Army has taken action which amounts to the competition required by section 351(a), the factual basis for such arguments has not yet been set forth, and such arguments may well appear strained to the district court. It also may be possible to fashion arguments that the BRAC Commission's recommendation regarding the consolidation effectively supersedes the competition requirement of section 351(a). We have substantial concerns, however, that such arguments may not prevail in court.

We therefore recommend that the Department of Defense consider seeking repeal of section 351(a). Repealing section 351(a) will erase any doubt regarding the consolidation of tactical missile maintenance at LEAD. We further recommend that you seek the assistance of the Chief of Legislative Liaison in accomplishing the necessary coordination to pursue this action.

Please call me or Mr. Joe Chontos at X33024 if you have any questions regarding this matter.

Earl H. Stockdale
Deputy General Counsel
(Civil Works and Environment)

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LEGAL MEMORANDUM **DRAFT**

FACTS

In 1991, the Secretary of Defense recommended to the BRAC Commission that the Tactical Missile Maintenance Mission be consolidated at Letterkenny Army Depot ("LEAD") in Pennsylvania. The recommendation by the Department of Defense was not included in the Report of the BRAC Commission to the President and, thus, did not receive Presidential and Congressional consideration in that year.

In 1991, the Department of Defense Maintenance Depot Council had proposed a Joint Service Business Plan and Defense Maintenance Council Corporate Business Plan which proposed that the Secretary of Defense consolidate the tactical missile maintenance mission to LEAD. The consolidation of the tactical missile maintenance mission was not incorporated into the final BRAC 91 recommendation. Eventually, the consolidation of the tactical missile maintenance mission was enjoined by the United States District Court for the Northern District of Alabama in December, 1992 based on two conflicting provisions in the Defense Authorization and Defense Appropriations Acts of 1993.

Specifically, on December 21, 1992 the United States District Court for the Northern District of Alabama issued an injunction preventing the movement of the tactical missile maintenance mission based on Section 351(a) of the National Defense Authorization Act for fiscal year 1993 which required

that consolidation of the tactical missile maintenance must be performed through the use of competitive procedures. Accordingly, the court enjoined the Department of Defense, its agents and employees from transferring any portion of the Anniston tactical missile maintenance work to LEAD. Consequently, DOD suspended all tactical missile maintenance mission consolidation.

As part of the BRAC 1993 recommendations, the BRAC Commission may consider including in its report to the President a recommendation that DOD's tactical missile maintenance work be consolidated at LEAD. Some concern has been voiced regarding the ability of the Commission to recommend the movement of the tactical missile maintenance mission to LEAD due to the injunction issued by the United States District Court for the Northern District of Alabama and its interpretation of the Defense Authorization and Appropriation Acts for fiscal year 1993.

Question Presented:

Whether the injunction issued by the United States District Court for the Northern District of Alabama in American Federation of Government Employees v Cheney, or Section 351(a) of the National Defense Authorization Act of 1993 prevents the BRAC Commission from including in its report to the President a recommendation that the Tactical Missile Maintenance work be transferred from Anniston Army Depot and other DOD facilities to LEAD in Pennsylvania?

Short Answer:

The BRAC Commission's authority to recommend the consolidation of the tactical missile maintenance system from both Anniston Army Depot and other DOD facilities to LEAD has not been limited by Section 351(a) or the injunction issued by the United States District Court for the Northern District of Alabama. The language and policy behind the BRAC Act mandate that the BRAC procedures must be maintained as the exclusive procedures for closing and realigning military installations. Accordingly, Section 351(a) does not repeal, amend or modify the BRAC procedures.

Further, the United States Court of Appeals for the First Circuit Court of Appeals has foreclosed the ability to challenge the BRAC Commission's procedural and substantive decisions in its Report to the President. Accordingly, any challenge to the Commission's Report, either under the APA or under the Fifth Amendment Due Process Clause, will not be reviewed by any court and will be summarily dismissed.

But cf. 3rd Cir.

Discussion:

I. The BRAC Commission's Recommendations Regarding LEAD are Authorized by Law

The first line of inquiry of any action taken by an administrative agency or independent commission is whether the action itself is authorized by law. The BRAC Act of 1990 conferred authority upon the BRAC commission to transmit a report regarding base closures and realignments to the President. Base Closure and Realignment Act, Pub. L. No. 101-150, §2903(d), 104

Stat. 1815 (codified at 10 U.S.C. §2687, note (Supp. 1993)), (hereinafter referred to as "BRAC Act"). The legislative history of the BRAC Act confirms that the formulation and transmittal of the BRAC Commission's Report is pursuant to a proper delegation of authority.[1]

---

1 The legislative history of the BRAC Act provides that:

> the base closure process contained in this bill clearly avoids the constitutional pitfall of excessive delegation of legislative authority. First, Congress is not really delegating its authority. Both the content of the criteria by which bases will be selected for closure in realignment in the final list of closures and realignments are subject to congressional review. Second, while Congress obviously has a major role in the opening and closing of military installations, the decision to close a base is not so clearly a legislative power as to make Congress' determination to seek the help and advice of the Department of Defense and an independent commission a delegation of legislative authority. Third, by providing considerable congressional involvement in the development of the governing criteria, and ensuring a clear power to disapprove, the conferees intend that Congress establish an intelligible principle for the Department and the Commission to use in making their decisions.

H.R. Conf. Rep. No. 101-923, 101st Cong. 2d. Sess. 703, reprinted in 1990 U.S. Code Cong. & Admin. News §255, 3257.

II. The BRAC Commission's Authority to Recommend to the President the Consolidation of the Tactical Missile Maintenance Mission is Not Affected by Section 351(a)

The legislative history of the Base Closure and Realignment Act, the language of the Base Closure and Realignment Act and the rules of statutory construction lead to one conclusion: the BRAC Commission's authority is not affected either by the provisions of Section 351(a) of the National Defense Authorization Act of 1993 or the terms of the injunction issued by the United States District Court for the Northern District of Alabama in American Federation of Government Employees v. Cheney; CV92-PT-2453E (Dec. 21, 1992).

A. Background of the Tactical Missile Maintenance Mission and the Injunction Issued by the Northern District of Alabama

Section 351(a) and Section 9252 of the Defense Authorization and Appropriations Act for fiscal year 1993 are examples of the types of political power struggles which Congress intended to foreclose by the passage of the Base Closure and Realignment Act of 1990. Section 351 of the Defense Authorization Act for fiscal year 1993 provides:

> "(a) competitive bidding - if the Secretary of Defense takes action to consolidate at a single location, the performance of depot .level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this act shall be eligible to compete for such selection."

P.L. 102-484 (Oct. 23., 1992). Importantly, on its face, Section 351(a) of the National Defense Authorization Act does not apply to action taken by the BRAC Commission; the section only applies to actions taken by the Secretary of Defense to consolidate the tactical missile maintenance mission.

The Authorization Act was signed into law by President Bush on October 23, 1992. However, the Defense Appropriations Act for fiscal year 1993 contained the following provision in Section 9252:

> Notwithstanding the provisions of Section 351(a) of the National Defense Authorization Act for fiscal year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition, no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance. For purposes of this section, this act shall be treated as having been enacted after the National Defense Authorization Act for fiscal year 1993. (Regardless of the actual dates of enactment).

In American Federation of Government Employees v. Cheney, CV92-PT-2453-E (December 21, 1992), the United States District Court for the Northern District of Alabama enjoined the transfer of the tactical missile maintenance mission from Anniston Army Depot to LEAD based on the language of Section 351(a) of the National Defense Authorization Act, notwithstanding the contradictory language of Section 9252 of the National Defense Appropriations Act of 1993. The case was not considered under

the BRAC statute, as the defendants conceded that the proposed transfer to LEAD and the action in the United States District Court for the Northern District of Alabama were not governed by the Defense Base Closure and Realignment Act.

The injunction issued by the United States District Court for the Northern District of Alabama also does not apply to the actions of the BRAC Commission. The terms of the injunction provide:

> 1. The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot to Letterkenny Army Depot (the court addresses only such subject matter which is before this court) is subject to all the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993, which said provisions are now and have been since the date of the President's signing in full force and effect.
>
> 2. The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile maintenance work or facilities, and jobs and equipment related thereto, located at Anniston Army Depot, to Letterkenny Army Depot or any other depot, base or facility for the purpose of or with the intent of consolidating said tactical missile maintenance work of the Department of the Army, unless and until competitive procedures as provided for in said § 351(a) are implemented and selection made and action taken accordingly.
>
> 3. It is not intended to enjoin any action except that which must be in compliance with the provisions of said § 351(a).

American Federation of Government Employees, at 33 (emphasis Added). Accordingly, actions which do not have to comply with Section 351(a) are not subject to the injunction. Further, the court addressed only the subject matter before it and did not address the issue of the interplay between BRAC and Section 351(a).

In American Federation of Government Employees, the court resolved the conflict between Section 351(a) and Section 9252 by concluding that the requirement for competitive bidding was not nullified or repealed by Section 9252 of the Appropriations Act; however, Section 9252 prohibited the appropriation of funds for use during Fiscal Year 1993 for such competitive procedures. Accordingly, the court reconciled the statutes by upholding the requirement of competitive procedures to consolidate the tactical missile maintenance mission, but precluding the appropriation of funds for such procedures during Fiscal Year 1993 due to the prohibition in Section 9252.

B. Legislative History of the BRAC Act

The legislative history of the Base Closure and Realignment Act reveals congressional intent to insure that the BRAC Act is the exclusive means of carrying out base closures and realignments, in order to avoid the political pitfalls which existed under the prior law. The House Conference Report noted that there were two principal failures with the old system of base closures and realignments, stating:

> [t]he conferees prescribe a new base closure process because closures and realignments under existing law have two

> failings. First, closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. Second, the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raise suspicions about the integrity of the base closure selection process. A new process involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner.

H.R. Conf. No. 923, 101st Cong., 2d Sess 705, reprinted in 1990 U.S. Code Cong. & Admin. News at 2931, 3257.

The policy behind the BRAC Act was to create an exclusive means of closing and realigning military bases in order to create a fair and non-political system of base closure and realignment. In the legislative history of the 1990 BRAC Act, the House Report explained the need to protect the base closure procedures instituted in the 1988 base closure process, stating:

> [t]he [Armed Services] Committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it. Some of those attempts have come in Congress from those interested in keeping open a base recommended for closure. Other attempts have come from the Department of Defense. A new base closure process will not be credible unless the 1988 base closure process remains inviolate.

H.R. Rep. No. 101-665, 101st Cong., 2d Sess. 342, reprinted in 1990 U.S. Code Cong. & Admin. News 3068.

B. The Language of the BRAC Act

The purpose of the BRAC statute is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." BRAC

§2901(b)." Further, §2909 of the BRAC Act entitled "Restriction on Other Base Closures Authority," provides:

> (a) In general - except as provided in subsection (c), during the period beginning on the date of the enactment of this act [Nov. 5, 1990] and ending on December 31, 1995, this part [amending the section and enacting this note] shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.
>
> (b) Restriction - except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a) -
>
> (1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned, or as an installation under consideration for closure or realignment; or
>
> (2) to carry out any closure or realignment of a military installation inside the United States.

10 U.S.C. § 2687 note.

Section 2906 of the BRAC Act also provides that:

> [t]he Secretary of Defense may close or realign military installations under this part without regard to -
>
> (1) any provision of law restricting the use of funds for closing or realigning military installations included in any appropriations or authorization act;

10 U.S.C. § 2687 note.

Accordingly, the legislature clearly intended to ensure that the exclusive processes of the BRAC Act would remain

inviolate from the political process, except to the extent that Congress retained the power to nullify the final base closure and realignment selection through a joint resolution. Judicial interpretation of the BRAC Act supports the exclusivity of the BRAC Act procedures in closure and realignment of military installations.

The United States Court of Appeals for the Third Circuit has commented on the legislature's intent to establish an exclusive method of base closure. Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992), vacated and remanded, O'Keefe v. Specter, 113 S. Ct. 455 (vacating decision due to the Supreme Court's recent decision in Franklin v. Massachusetts, 112 S.Ct. 2767 (1992) on issue of judicial review). The court in Specter stated:

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

Specter, 971 F.2d 936, 947.

Thus, Congress created a statutory scheme which stripped the Secretary of Defense of his unilateral authority to recommend military installations for closure and stripped Congress of its ability to block individual closures and realignments through the political process. County of Seneca v. Cheney, 806 F. Supp. 387 (W.D.N.Y. 1992), vacated by, County of Seneca v. Cheney, No. 92-6296 (2d Cir. March 9, 1993). By establishing BRAC as the exclusive means of closing and realigning military bases, Congress foreclosed the type of political infighting that resulted in congressional attempts to block individual closures and realignments, such as Section 351(a) and Section 9252.

C. Statutory Construction

According to the rules of statutory construction, it is plain that the BRAC Act and the exclusivity of its mandated procedures for closing and realigning bases was not amended, repealed or modified by Section 351(a) of the Defense Authorization Act of 1993. Any statutory analysis must begin with the language of the Act itself. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988). There is no language in Section 351(a) that overtly amends, repeals or modifies the BRAC Act of 1990.[2] Further, Section 351(a) does not apply to actions taken by the BRAC Commission; its application is limited to the Secretary of Defense.

---

2 The Base Closure and Realignment Act was amended by the National Defense Authorization Act of 1993 at Public Law 102-484 Section 2821; however, Section 351(a) of the National Defense Authorization Act was not a part of the amendment.

There are two cardinal rules of statutory construction which provide the proper framework and resolution of the present statutory interpretation problem. First, amendments or repeals by implication are disfavored; only when Congress' intent to repeal or amend is clear and manifest will the courts conclude that a later act implicitly repeals or amends an earlier one. See e.g. Rodriguez v. United States, 107 S. Ct. 1391 (1987); Radzanower v. Touche Ross & Co., 96 S.Ct. 1989 (1976); Posadas v. National City Bank, 56 S. Ct. 349 (1936); Patel v. Quality Inn South, 346 F.2d 700 (11th Cir. 1988), cert. den., 109 S.Ct. 1120. The second cardinal rule of statutory construction provides that a repeal by implication will only be found when the earlier and the later statutes are irreconcilable. Morton v. Mancari, 94 S. Ct. 2474 (1974).

It is not "manifestly clear" that Congress intended, in Section 351(a), to amend or repeal the exclusivity section of the BRAC Act and adopt different procedures for the realignment of the missile maintenance mission through the use of competitive procedures. Further, the legislative branch envisioned a base closure process, initiated in 1988, that would be safeguarded from the political process, particularly the process exemplified by the passage of Sections 351(a) and 9252. Any interpretation of Section 351(a) which would repeal or amend the exclusive procedures set forth in the BRAC Act of 1990 would contravene the principles of statutory interpretation and the policy of the BRAC

mandate. Accordingly, Section 351(a) cannot be interpreted to amend or repeal the BRAC Act.

Further, making Section 351(a) applicable to the actions of the BRAC Commission would result in a repeal of Section 2905(d) of the BRAC Act which provides that the Secretary of Defense may close or realign bases without regard to "any provision of law restricting the use of funds...included in any Authorizations or Appropriations Act." 10 U.S.C. § 2687 note. The argument can be made that this provision applies only to existing authorizations or appropriations acts at the time of the passage of the BRAC Act.

However, the language of the Section 2905(d), when contrasted with the language of a previous version of this section, indicates that this provision waives restrictions on funds which are included in future authorizations and appropriations acts, also. In House Resolution 461, an earlier version of this section stated:

> "(g) INAPPLICABILITY OF OTHER LAW.-The Secretary of Defense may close or realign military installations pursuant to the procedures set forth in this section without regard to-
> (1) any provision of law restricting the use of funds for closing or realigning military installations .<u>included in any appropriations or Defense Authorization Act enacted before the date of the enactment of the National Defense Authorization Act for Fiscal Year 1991</u>;

H.R. Rep. 101-693, 101st Congress, 2d Session, Sept. 11, 1990 (emphasis added).

Accordingly, Section 2905(d) reflects a rejection of the earlier version of the amendment which would have restricted the waiver on the use of funds to previously enacted authorization and appropriations acts. The statute, as enacted, waives restrictions in any authorization and appropriations act. This is also in accordance with the doctrine that repeals by implication are especially disfavored when the claimed repeal rests solely in an appropriations act. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). Although Section 351(a) does not clearly restrict the use of funds, it is apparent that consolidation action through competitive procedures would require funding.[3]

Also, the BRAC Act provides that Congress, after transmittal of the Report from the President, does not have the ability to block individual bases which appear on the Commission's report from closure or realignment. BRAC §2908. Obviously, the intent of this restriction would be nullified if Section 351(a) was interpreted to restrict the BRAC Commission's authority.

III. The BRAC Commission's Report to the President is Not Final Agency Action and Thus Not Subject to Judicial Review Under the APA

The Administrative Procedure Act is the vehicle through which federal agencies are accountable to the public. Under the

3 In American Federation of Government Employees v. Cheney, the court recognized that competitive procedures would require funding and that consolidation action could not be taken through competitive procedures during FY 93 unless and until such funds were available.

APA, final agency actions, with some exceptions, are subject to the process of judicial review by the court system. On May 3, 1993, the United States Court of Appeals for the First Circuit Court of Appeals held that the BRAC Commission's Report to the President is not final agency action and; therefore, is not subject to judicial review under the Administrative Procedure Act. Cohen v. Rice, 1993 WL 131914 (1st Cir. May 3, 1993). The decision in Cohen v. Rice precludes the judiciary from reviewing both the Commission's procedures in formulating the Report and the Commission's final Report to the President.

The availability of judicial review of the BRAC Commission's actions and the presumption in favor of review was previously addressed in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), vacated and remanded, O'Keefe v. Specter, 113 S.Ct. 455). In Specter, the United States Court of Appeals for the Third Circuit Court of Appeals determined that the merits of the Commission's recommendations were not subject to second guessing by the judiciary which is "ill-equipped to conduct reviews of the nation's military policy." Id. at 951. However, the court in Specter held that whether the Commission followed statutory procedures in formulating its report presented justiciable issues. The Supreme Court recently vacated and remanded the Specter decision to the Third Circuit in light of Franklin v. Massachusetts, 112 S.Ct. 2767 (1992); O'Keefe v. Specter, 113 S.Ct. 455 (1992).

Cohen v. Rice arose in the United States District Court for the District of Maine as an action to enjoin the Secretary of the Air Force from carrying out the decision to close the Loring Air Force Base. Cohen v. Rice, 800 F.Supp. 999 (D.Me. 1992) (hereinafter "Cohen I") In Cohen I, the plaintiffs charged that a variety of substantive and procedural defects had been made by the Air Force and the BRAC Commission in their decision to close the base. In Cohen I, the district court dismissed the substantive challenges to the base closure decision, ruling that the BRAC Act precluded judicial review of such claims. After Cohen I, the only remaining claim against the BRAC Commission was the allegation that it had failed to hold public hearings as required by the Act.

After the decision in Cohen I, the Supreme Court decided Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), expressing its interpretation of reviewable agency action under the Administrative Procedure Act. Based on this intervening Supreme Court decision, the district court then granted summary judgment for the defendants on the remainder of the claims against the BRAC Commission. Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992)(hereinafter "Cohen II").

In Franklin v. Massachusetts, the Supreme Court addressed a challenge to the propriety of the Secretary of Commerce's census report. The Secretary's census report is transmitted to the President for purposes of apportionment and calculation of the number of Representatives to which each state is entitled.

The President sends Congress a statement, based on the Secretary's report, which delineates the number of Representatives for each state. The Supreme Court held that the action of the Secretary, in reporting the census to the President, was not "final agency action" within the meaning of the APA and thus not reviewable by the judiciary.

In Franklin, the Supreme Court stated that the finality of agency action depends on whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on . . .day-to-day business.' Id. at 2773 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967)). In making this determination, the Court stated that the principal inquiry is "whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." Id.

In the case of the census report, the Court found that "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." Id. The Supreme Court distinguished statutory schemes which required the President to transmit an agency's report directly to Congress from statutes which provide that the President is not required to transmit such reports, finding that required transmission denotes final agency action while the latter does not represent final agency action.

In light of the Franklin reasoning, the court of appeals in Cohen, examined the BRAC Commission's report and found that the Report itself would not have a direct effect on the parties. Further, in Cohen, the court of appeals noted that the statutory scheme under the BRAC Act involved even less indicia of final agency action as the President has the authority to terminate a base closure cycle altogether by a second rejection of the Commission's report. In Franklin, the role played by the President in reapportionment was "admittedly ministerial." Cohen, at 6.

Finally, the plaintiffs in Cohen argued that their case was distinguishable from Franklin, as it involved a challenge to the BRAC Commission's faulty procedures, e.g. failure to hold public hearings and failure to provide information to Congress and the GAO, rather than a challenge to the Commission's substantive decisions. The court of appeals noted that the Franklin Court did not make any distinction between substantive and procedural challenges, but went on to state that the distinction had no legal significance, stating:

> [a]s previously noted, Franklin's finality determination explored whether an agency action has a 'sufficiently direct and immediate' impact. Here, if the Commission's report to the President is not a 'final' action,' then the techniques used by the Commission to create the report, which are even more preliminary to the final decision, cannot themselves be 'final agency actions.' In sum, whether the complaints are styled as procedural or substantive, our answer to the 'core question' of finality remains the same.

Cohen, at 7.

The court of appeals, in Cohen, has precluded judicial review of the BRAC Commission's report under the Administrative Procedure Act. Accordingly, the Commission's actions, both substantive and procedural, can no longer be challenged in court under the APA.

A constitutional challenge under the Fifth Amendment Due Process Clause, which would provide an alternative avenue of judicial review, has also been considered and rejected by the courts in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), vacated and remanded, O'Keefe v. Specter, 113 S.Ct. 455. In Specter, the shipyard employees and their unions made a Fifth Amendment Due Process claim, in addition to their APA claim, alleging that they possessed a property interest in the continued operation of the Shipyard until it was properly determined to be closed, pursuant to the mandates of the BRAC Act. Specter, 971 F.2d at 955. However, the court held that the employee and union plaintiffs did not possess a protectable property interest in the continued operation of the shipyard.

The court found that the dispositive question in determining whether a statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of shipyard workers. Id. at 955. The court found that the statute did not place any substantive limits on the official decision makers in the base closure and realignment process, stating:

> [w]hile the Act establishes a specific process for closing military installations, it places no substantive limits on any of the decisionmakers. The Secretary is allowed to develop and publish criteria and a force structure plan, without specific guidance from the statue, and has broad discretion in applying those standards to current domestic deployment of military resources. The Commission also is accorded broad discretion in applying those standards and may accept the Secretary's recommendations even if they deviate substantially from the final criteria and force structure plan. See § 2903(d)(2)(B). Finally, the President and Congress, of course, may reject the Commission's recommendations for any reason at all. See §§ 2903(e), 2904(b).
>
> In sum, the Act specifies a particular process but does not guarantee a particular outcome. As a result, the unions and the Shipyard employees can identify no legitimate claim of entitlement under the Act and Count II fails to state a due process claim upon which relief could be granted.

Id. at 955-56 (emphasis added).

The Supreme Court has vacated and remanded the Specter decision to the Third Circuit Court of Appeals for reconsideration in light of the Franklin v. Massachusetts decision. Presumably, the Third Circuit will reach the same result regarding the finality of the agency action involved in the BRAC Commission's Report as the First Circuit court held in Cohen v. Rice. The Third Circuit will probably not revisit the Fifth Amendment due process issue; thus, foreclosing both the constitutional due process challenge to the BRAC Commission's actions and the availability of judicial review of such actions under the Administrative Procedure Act.

IV. Conclusion

The BRAC Commission's authority to recommend the consolidation of the tactical missile maintenance mission from both Anniston Army Depot and other DOD facilities to LEAD has not been limited by Section 351(a) or the injunction issued by the United States District Court for the Northern District of Alabama. Neither the terms of Section 351(a) nor the injunction apply to the action of the BRAC Commission. Further, the language and policy behind the BRAC Act mandate that the BRAC procedures must be maintained as the exclusive procedures for closing and realigning military installations. Accordingly, Section 351(a) does not repeal, amend or modify the BRAC procedures.

Further, the United States Court of Appeals for the First Circuit Court of Appeals has foreclosed the ability to challenge the BRAC Commission's procedural and substantive decisions in its Report to the President. Consequently, any challenge to the Commission's Report, either under the APA or under the Fifth Amendment Due Process Clause, will not be reviewed by any court and will be summarily dismissed.

Accordingly, the Commission has complete and absolute authority to recommend the consolidation of tactical missile maintenance to LEAD.

< CONFIRMATION REPORT >

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				23	0°11'17"		

Privileged and Confidential
Draft - June 10, 1993

To:

From: Sheila C. Cheston, General Counsel

Some misc. thoughts

Re: Consolidation of Tactical Missile Maintenance Mission (from Anniston et al.) at Letterkenny Army Depot

---

A. Background Facts

1. 1991 BRAC Process

-- DoD recommendation: DoD recommended various missions be realigned from Letterkenny. DoD noted that the losses resulting from these realignments would be partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston, Red River, Sacramento, Tobyhanna and several other facilities to Letterkenny. DoD did not explicitly recommend that concurrent action for Commission consideration.

-- 1991 BRAC Report does not discuss tactical missile work; it says only that DoD recommended the realignment of other missions from Letterkenny and the Commission agrees with those recommendations.

-- Letterkenny claims that in DoD's view, the movement of the tactical missile mission from Anniston to Letterkenny is part of the final 91 BRAC recommendations. Letterkenny cites and has provided copies of correspondence that suggests that DoD interprets the Commission's silence (with respect to the noted concurrent move of the tactical missile mission) as implicit approval of that move, concluding that at least where, as here, the Commission finds no substantial deviation with the DoD recommendation, the Commission should be deemed to have agreed with the entire recommendation, even those portions of it that the Commission did not restate.

-- The correspondence does not discuss the facts that (1) DoD did not present the tactical missile mission move as a recommendation for Commission consideration; and (2) neither the President nor Congress appeared to have considered it.

-- Barry Rhoades argues that DoD recommended the consolidation of the Tactical Missile Maintenance Mission (from Anniston et al.) at Letterkenny Army Depot, but the Commission did not adopt the recommendation.

2. Legislation

-- Section 351(a) of the National Defense Authorization Act for FY 1993 (PL 102-484): provides that if SecDef takes action to consolidate tactical missile maintenance work, SecDef shall select the depot through competitive procedures.

-- Section 9252 of the Defense Appropriations Act for FY 1993: provides that notwithstanding section 351(a) or any other provision of law, no funds appropriated to DoD shall be made available to prevent or delay the transfer of tactical missile work to Letterkenny, and no funds shall be made available for depot selection competition.

-- HR 5504-41, Sec 9062 (passed as part of the FY 1992 and 1993 Defense Appropriation Acts, PL 102-172 (sec 8064) and PL 102-396 (sec 9062)): provides that SecDef shall ensure that at least 50% of the missile mission is in place at Letterkenny by the time Systems Integration Management Activity and Depot Systems Command are scheduled to relocate to Rock Island (part of 91 Commission recommendations).

-- Sec. 9062 requires the SecDef to have moved 50% of the missile mission to Letterkenny "by the time" SIMA and DSC are scheduled to relocate. On its face, it does not appear to limit the relocation of SIMA and DSC (it does not say, for example, the missile mission shall be there "before" SIMA and SC move, or they may not move "until" the missile mission does). It appears simply to impose a separate requirement on the SecDef to have moved 50% of the missile mission by a specified time.

-- FY 93 Auth. Act Conf. Rpt. states that there is an amendment to the House version of section 351 (requiring SecDef to use competitive measures if SecDef decides to consolidate tactical missile maintenance) which will require the SecDef to ensure that the SIMA and DSC are relocated to Rock Arsenal in accordance with the 1991 recommendation of the Commission. Letterkenny says also states "not the intention of the conferees to impede the realignment of SIMA and HGDESCOM, but to ensure" missile mission consolidated at Letterkenny. (cite?)

-- [Check legislative history.]

-- However, in a letter dated March 23, 1992 to Rep. Shuster (Ref. Doc. 1, Letterkenny presentation), U.S. Army General Jimmy D. Ross writes: SIMA and DSC "will not move until 50% of the joint service missile mission is at Letterkenny as required by Pubic Law 102-172." [Check whether official DoD legal view.]

-- 2905(d) BRAC Act: SecDef may close/realign without regard to any provision restricting use of funds for closure/realignment in any appropriations or authorization bill or 10 USC 2662 or 2687.

-- 2909 BRAC Act: "except as provided in subsection (c), . . . this part shall be the exclusive authority for selecting for closure or realignment or for carrying out any closure or realignment of a military installation inside the U.S." (Subsection (c) refers to PL 100-526, and 10 USC 2687 (threshold).)

-- Check whether this is below threshold.

3. Court Decision

-- D.Ct (ND AL 12/92) found that the two provisions (sections 351(a) and 9252) were not in conflict; simply that section 9252 precluded implementing section 351(a) during FY 93.

-- Court enjoined DoD from transferring tactical missile mission from Anniston to Letterkenny unless and until it followed the competitive procedures required by section 351(a).

-- neither party contended that the move was governed by BRAC.

4. 1993 BRAC

-- Secretary recommends realign Letterkenny Army Depot, revising somewhat the 91 recommendations. Secretary notes that the missile maintenance workload will not consolidate at Letterkenny as originally planned.

-- Commission added Red River Army Depot, Anniston Army Depot, and Tobyhanna Army Depot to list of possible

closures/ realignments.

7. Rhoades argument:

-- The Commission can recommend consolidation of the missile maintenance work at Letterkenny; neither the court's injunction nor section 351(a) prevent it.

-- BRAC is the exclusive procedure for closure/realignment; section 351 doesn't change it.

-- Check whether the missile mission is below threshold?

-- County of Seneca v. Cheney, 806 F. Supp. 387 (WDNY 1992), vacated County of Seneca v. Cheney, No. 92-6296 (2d Cir. 3./9/93).

-- Section 351 and 9252 are examples of the congressional squabbles and stalemating that BRAC was intended to remedy. [It is also counter to congressional intent to permit congressional/political piecemeal changes to BRAC decisions.]

-- On its face, section 351 does not apply to the Commission or the BRAC process. Provides that "if the Secretary takes action to consolidate . . . the Secretary shall select the depot . . . through the use of the competitive process." And, section 351 did not amend or repeal exclusivity of BRAC Act.

-- [Presumes selection by Secretary; but Secretary does implement BRAC closures/ realignments.]

-- Court's injunction does not apply to the Commission or actions pursuant to BRAC process -- Commission not a party; Commission not named in injunction; scope of injunction limited:

-- Order enjoins "the proposed consolidation . . . under the direction of the defendants . . . . (the court addresses only such subject matter which is before this court) . . . . The defendants are enjoined from transferring any portion of the tactical missile maintenance work or facilities . . at Anniston Army Depot to Letterkenny Army Depot .

> . . for the purpose of consolidating . . . unless and until competitive procedures . . . . It is not intended to enjoin any action except that which must be in compliance with the provisions of said section 351(a)."
>
> -- [But, DoD is enjoined from transferring (only at own directive?) and DoD must implement BRAC closure. Could conclude move not enjoined if pursuant to BRAC, decision no longer valid, law changed, or seek clarification of order.]

-- in general, last law in time can supersede especially if express.

Document Separator

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, PATRICIA S. WHITE AND DARRELL D. DEMPSEY,	)	
Plaintiffs,	)	
vs.	)	CASE NO. CV-92-PT-2453-E
RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY	)	
Defendants.	)	

PETITION TO DESIGNATE THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION AS A PARTY DEFENDANT AND FOR OTHER RELIEF

COME NOW, the Plaintiffs, and petition this Honorable Court to designate the Defense Base Closure and Realignment Commission ("BRAC") as party defendant in the above styled action and as grounds therefore states as follows:

1. By law BRAC is an agent of the Secretary of Defense, Secretary of the Army and Department of Defense.

2. By proceeding with the realignment of missile maintenance work from the Anniston Army Depot ("ANAD"), to Letterkenny Army Depot ("LEAD"), BRAC is attempting to evade a final order of this Court issued on or about December 21, 1992, which was not appealed by any party defendant to the above styled action, and the requirements of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993 ("Authorization Act"). (See BRAC Report for 1993 attached as Exhibit "A" hereto.)

3. Said final order (attached as Exhibit "B" hereto) states in pertinent part as follows:

> The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot... is subject to all the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993...
>
> The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile maintenance work or facilities, and jobs and equipment related thereto, located at Anniston Army Depot, to Letterkenny Army Depot or any other depot, base or facility for the purpose of consolidating said tactical missile maintenance work of the Department of the Army, unless and until competitive procedures as provided for in said § 351(a) are implemented and selection made and action taken accordingly. (emphasis added).

4. Any realignment of missile maintenance work from ANAD to LEAD without implementation of competitive bidding procedures, as proposed in the BRAC-1993 Report, would violate this Court's order and § 351(a) of the Authorization Act.

5. The Department of Defense had stopped said realignment from ANAD to LEAD pursuant to the Court's order.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request this Court to enter an order designating BRAC as a party defendant in the above referenced action, to reissue its order enjoining the defendants, including BRAC, from proceeding with the realignment from ANAD to LEAD without the implementation of competitive bidding procedures as required by § 351(a) of the Authorization Act, to expedite any ruling on this petition, and to tax costs of this

proceeding against said defendants.

Respectfully submitted,

Charlie D. Waldrep

Thomas L. Stewart

Graham L. Sisson, Jr.

Donald E. Blankenship

Attorneys for Plaintiff, American Federation of Government Employees

OF COUNSEL:
GORHAM & WALDREP, P.C.
2101 Sixth Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon the following, by placing same in the United States Mail, properly addressed and postage prepaid, this the 21 day of July, 1993.

Jennifer R. Rivera
David J. Anderson
Vincent M. Garvey
Susan L. Korytkowski
Pamela Moreau
Gregory D. Page
United States Department of Justice
Civil Division - Room 1042
901 E. Street N.W.
Washington, D.C. 20530

Of Counsel

< CONFIRMATION REPORT >

08-17-1993(TUE) 15:39

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U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 8/27/93

TO: Sheila Cheston

FAX NUMBER: 703-696-0550

FROM: Pamela Moreau (phone 202-616-8263)
Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF____ PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE Plaintiffs, vs. RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY, Defendants.	)	CASE NO. CV92-PT-2453-E

BRIEF IN SUPPORT
OF PLAINTIFF'S PETITION TO DESIGNATE
THE DEFENSE BASE CLOSURE AND
REALIGNMENT COMMISSION AS A PARTY DEFENDANT
AND FOR OTHER RELIEF

STATEMENT OF FACTS

On or about October 20, 1992, the Plaintiffs, The American Federation of Government Employees, Local 1945 ("AFGE"), and Patricia S. White, filed their complaint against the above named Defendants in the United States District Court for the Northern District of Alabama seeking injunctive relief from the Army's proposed movement or transfer of missile maintenance work from Anniston Army Depot, ("ANAD"), to Letterkenny Army Depot ("LEAD"). This Honorable Court heard the above stated cause at a bench trial on December 15, 1992.

On December 21, 1992, this Court entered a final judgment which enjoined the above named Defendants, their agents and employees, from transferring any portion of the tactical missile

maintenance work or facilities, and related jobs and equipment, located at Anniston Army Depot to Letterkenny Army Depot or any other depot, base or facility for consolidation purposes unless and until competitive procedures as provided for in Section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 are implemented and selection made and action taken accordingly. Final Judgment, at pp. 1-2.

Recently, the Secretary of Defense issued his recommendations on base closures and realignments to the Defense Base Closure and Realignments Commission ("BRAC Commission"). The BRAC Commission subsequently issued its report to the President recommending realignment of missile work from Anniston Army Depot to Letterkenny Army Depot without implementation of the competitive bidding procedures required under Section 351(a) of the Authorization Act. The President submitted his report to Congress on July 13, 1993.

On or about July 21, 1993, the Plaintiffs filed their petition to designate the BRAC Commission as a party defendant and for other relief.

ARGUMENT

I. **PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 65(d), THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION FALLS UNDER THE SCOPE OF THIS COURT'S ORDER ENJOINING THE TRANSFER OF TACTICAL MISSILE MAINTENANCE WORK AT ANNISTON ARMY DEPOT UNLESS SUCH TRANSFER COMPLIES WITH SECTION 351 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993.**

Federal Rule of Civil Procedure 65(d) provides as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other

> document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. (Emphasis added).

One of the purposes of Rule 65(d) is to prevent a defendant under an injunction from nullifying the injunction by carrying out prohibited acts through "aiders and abettors" even though the aiders and abettors were not parties to the original proceeding. Regal Knitwear Co. v. N.L.R.B., 65 S. Ct. 478 (1945). Whether or not a non-party may be bound by the terms of an injunction depends on the facts of each case. Vuitton et Fils S.A. v. Carousal Handbags, 592 F.2d 126 (2d. Cir. 1979); Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317 (8th Cir. 1966).

A. **THE BRAC COMMISSION RECEIVED ACTUAL NOTICE OF THIS COURT'S ORDER ENJOINING THE TRANSFER OF TACTICAL MISSILE MAINTENANCE WORK AT ANNISTON ARMY DEPOT UNLESS SUCH TRANSFER COMPLIES WITH SECTION 351 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993.**

Knowledge or notice by a non-party of an injunction may be established by circumstantial evidence. Hill v. United States, 33 F.2d 489 (8th Cir. 1929). Moreover, it is not necessary that a non-party be served with an actual copy of the injunction, as long as they appear to have had actual notice. Hill, 33 F.2d at 490-91; see also Vuitton et Fils, 592 F.2d at 129.

In the instant case, an article in the "Public Opinion" (attached hereto as Exhibit "A") dated Thursday, April 22, 1993, sets out the text of Congressman Bud Shuster's testimony before the BRAC Commission regarding the Letterkenny Army Depot. In his

testimony before the Commission, Congressman Shuster expressly referred to this Court's order enjoining the transfer of missile maintenance work to Letterkenny. "Public Opinion", April 22, 1993, at 6(A). Based on the case law, the BRAC Commission received actual notice of this Court's order enjoining the transfer of any missile maintenance work from Anniston Army Depot, unless such transfer complied with Section 351 of the Authorization Act, through Congressman Shuster's testimony in front of the Commission.

B. THE BRAC COMMISSION IS IN ACTIVE CONCERT OR PARTICIPATION WITH THE SECRETARY OF DEFENSE AND THE SECRETARY OF THE ARMY.

In addition to its knowledge of this Court's injunction, the BRAC Commission also acted in concert or participation with the Secretary of Defense and the Secretary of the Army in that the BRAC Commission has aided and abetted the Secretary of Defense and the Secretary of the Army in preparing and attempting to evade this court's injunction. Therefore, the BRAC Commission falls under the scope of Rule 65(d).

In determining whether a non-party has acted in concert or participation with a party under an injunction, courts have stated that the "active concert or participation" provision of Rule 65(d) is analogous to the concept of privity. Royal News Co. v. Schultz, 230 F. Supp. 641 (E.D. Mich. 1964), quoting Regal Knitwear Co. v. N.L.R.B., 65 S. Ct. 478 (1945); see also Baltz v. The Falx, 170 F. Supp. 691 (N.D. Ill. 1959). Moreover, the concept of privity under Rule 65(d) has been defined as "such an identification of interest of one person with another as to represent the same legal right."

Peterson v. Fee Int'l. Ltd., 435 F. Supp. 938 (W.D. Okla. 1975). A showing that a non-party is in active concert or participation with a defendant under an injunction requires proof that the non-party either aided and abetted the defendants in evading the injunction or was identified in interest with them. O & I Assoc. v. Del Conte, 601 F. Supp. 1463 (S.D.N.Y. 1985); see Reich v. United States, 239 F.2d 134 (1st Cir. 1956). Courts have further held that where a non-party is in active concert or participation with a party under an injunction, and the party under the injunction seeks to evade the injunction through the activities of the non-party, then the non-party is brought within the scope of the injunction. N.L.R.B. v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953).

The Defense Base Closure and Realignment Act of 1990, (BRAC), sets out the responsibilities and powers of the Secretary of Defense and the BRAC Commission. Pub. L. No. 101-510, §§ 2901 et seq., 104 Stat. 1808, (codified at 10 U.S.C. § 2687, note (Supp. 1993)). BRAC requires the Secretary of Defense to provide Congress and the BRAC Commission with a six (6) year "force structure plan" which critiques national security threats and the force structure that is necessary to meet such threats. Id. at § 2903(a)(1)-(3), 104 Stat. 1810 (1990). The Secretary is also required to develop criteria to use in identifying bases for closure or realignment. Finally, based on the force structure plan and criteria, the Secretary must recommend base closures and realignments to the BRAC Commission. Id. at § 2903(c)(1), 104 Stat. 1811.

Next, the BRAC Commission reviews the Secretary's recommendations, holds public hearings, and prepares a report for the President containing its assessment of the Secretary's recommendations along with its own recommendations. Id. at § 2903(d)(1)-(2)(A), 104 Stat. 1811. BRAC only allows the BRAC Commission to change the Secretary's recommendations if they "deviate substantially" from the force structure plan and criteria. Id. at § 2903(d)(2)(B), 104 Stat. 1811-12. Moreover, in its report to the President, the BRAC Commission must explain why it made any changes to the Secretary's recommendations. Id. at § 2903(d)(3), 104 Stat. 1812.

The BRAC process outlined above demonstrates the close, if not identical, interest of the Secretary of Defense and the BRAC Commission. Both the Secretary and the Commission work toward the same goal of determining base closures and realignments. This identification of interests between the Secretary of Defense and the BRAC Commission evidences the fact that the two entities are in privity with each other. Moreover, the issuance of the Secretary of Defense's recommendations to the BRAC Commission and the BRAC Commission's subsequent recommendation that the Anniston Army Depot's missile maintenance work be realigned to Letterkenny Army Depot without any mention of the competitive bidding procedures required by the Authorization Act, violates this court's order enjoining any transfer of the missile maintenance work at Anniston Army Depot unless such competitive bidding procedures are followed.

These actions on the part of the Secretary of Defense and the

BRAC Commission demonstrate that the BRAC Commission is aiding and abetting the Secretary of Defense and is violating this court's injunction. Furthermore, the Secretary of Defense is using the BRAC Commission as a device to evade this court's injunction, and therefore, the BRAC Commission should fall under the scope of this court's injunction. The above stated facts show that the BRAC Commission is in "active concert or participation" with the Secretary of Defense in that they are identified in interest and/or that the BRAC Commission has aided and abetted the Secretary of Defense. Since the President has already approved the BRAC Commission's recommendations, it is imperative that this court clarify its injunction to make it clear that the BRAC Commission is included within the scope of the injunction.

C. **IN THE ALTERNATIVE, THE BRAC COMMISSION SHOULD BE SUBJECT TO THIS COURT'S INJUNCTION IN ORDER TO PROTECT THIS COURT'S ABILITY TO RENDER A BINDING JUDGMENT.**

In United States v. Hall, 472 F.2d 261 (5th Cir. 1972), the Fifth Circuit held that a non-party who violated a court order restricting access to a high school campus, and who did not have any relationship to the party under the order, could be held to be bound by the order. The court further held that Rule 65(d) does not restrict the inherent power of courts to protect their ability to render binding judgments. Hall, 474 F.2d at 267; see also Vuitton, 592 F.2d at 129. The court reasoned that Rule 65(d) "was intended to embody rather than to limit' the courts' common law powers. Hall, 474 F.2d at 267.

Moreover, the Fifth Circuit in Hall distinguished those cases

in which the activities of a non-party, although harmful to the Plaintiff's interest, would not disturb the adjudication of rights and obligations between the original plaintiff and defendant. Id. at 265 citing Chase Nat'l. Bank v. City of Norwalk, 291 U.S. 431 (1934); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930). In particular, the court noted that in cases such as those cited above, the activities of a non-party would not upset or interfere with the defendant's duty to refrain from engaging in the enjoined activity, nor would such activities upset or interfere with the plaintiffs' rights under the injunction. Hall, 472 F.2d at 265. However, the court held that in the case before it, the activities of the non-party "threatened both the plaintiff's right and the defendant's duty" under the court's previous order. Id.

Likewise, in the present case the activities of the BRAC Commission in recommending realignment of the missile work at Anniston Army Depot interfere with and upset AFGE's rights under this court's order enjoining such alignment unless competitive bidding procedures are followed. Further, the BRAC Commission's activities in recommending realignment of the missile work at Anniston Army Depot interfere with and upset the Secretary of the Army's and the Secretary of Defense's duty under this court's order to refrain from transferring any missile maintenance work at Anniston Army Depot unless competitive bidding procedures are followed. Therefore, based on the case law, the BRAC Commission should fall under the scope of this court's previous injunction.

II. THE BRAC COMMISSION IS AN AGENT OF THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE ARMY.

The Defense Base Closure and Realignment Commission is statutorily authorized under Pub. L. No. 101 - 510, §§ 2901, et seq., 104 Stat. 1808, (codified at 10 U.S.C. § 2687, note (Supp. 1993)). The stated purpose of BRAC is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Id. at § 2901(b). As commander in chief of the Armed Forces, the President is authorized under the aforementioned statute to appoint members to the BRAC Commission. Id. at § 2902(c). Under Section 2902(c)(2), the President must consult with the Speaker of the House of Representatives, the majority leader of the Senate, the minority leader of the House of Representatives, and the minority leader of the Senate in appointing members. The President also designates the Chairman of the Commission. Id. at § 2902(c)(3). This statute further directs the BRAC Commission to meet only during the calendar years 1991, 1993 and 1995. Id. at § 2902(e). Except when a BRAC meeting involves the discussion of classified information, it is mandated that all meetings be open to the public. Id. at § 2902(e)(2)(A).

As a general rule, an agency is a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it. 3 Am.Jur.2d Agency, § 1, at seq. In an agency

relationship, the party for whom another acts and from whom he derives authority to act is known and referred to as a "principal", while the one who acts for and represents the principal and acquires his authority from such principal is known and referred to as an "agent." Id. The agent is a substitute or deputy appointed by the principal with power to do certain things which the principal may or can do. Id. Pursuant to the grant of authority invested in him by the principal, the agent is a representative of the principal and acts for, in the place of, and instead of, the principal. Id. If these basic tenets of agency law are applied to the case at bar, then the BRAC Commission is an agent of the Department of Defense.

Under Section 2901, et seq., of the statute that sets up the BRAC Commission, the very purpose for establishing the BRAC Commission was to set up an independent commission to insure that the process of closing and realigning military installations within the United States would be fair, non-partisan and open to public scrutiny. Therefore, BRAC can at least be characterized as an independent contractor and also an agent of the Department of Defense. Arguably, while not all agents are independent contractors, all independent contractors are agents. Even if a principal and agent contract to establish the agent as an independent contractor, that characterization contained in the contract alone is not controlling on the question of agency. See generally Northern v. McGraw-Edison Company, 542 F.2d 1336 (8th Cir. 1976).

In Northern, a franchisor and franchisee contracted to set up the franchisee as an independent contractor. Northern, 542 F.2d at 1339-41. The court stated "if the surrounding facts evidence an agency relationship, however, artfully disguised, parties cannot negate its existence by representing that it is something other than an agency relationship. Id. at 1343, n. 7. In assessing whether an individual occupies the status of an agent, it is necessary to review the facts and circumstances surrounding that individual's activities to determine whether the purported principal exerts the requisite control over the individual so as to create an agency relationship. Id. at 1336 quoting Aetna Insurance Co. v. Glenn Falls Insurance Co., 453 F.2d 687 (5th Cir. 1972). In Northern, the court quoted Board of Trade v. Hammond Elevator Company, 198 U.S. 424 (1905), wherein it was established that characterization of a relationship is not the controlling factor, but rather the conduct of the parties and the facts surrounding the particular relationship. Northern, 542 F. 2d at 1343.

In the case at bar, the Department of Defense set up the BRAC Commission to act in its behalf. The only reason that the BRAC Commission was set up was to take the "partisan" aura away from the closing of bases. The Defense Department did not fully divorce itself from base closures, but rather gave the BRAC Commission the authority to do what the Department of Defense could have done on its own. This clearly satisfies the basic elements of agency that point to the principal giving authority to the agent to act "on his behalf." A perusal of the BRAC statute will show that the BRAC

Commission is paid by the Department of Defense, receives travel expenses from that Department, and is paid in an amount equivalent to the amounts set out by the United States Code for Government Employees.

Further, the funding of the BRAC Commission can be provided for by the Secretary of Defense in the event that Congress does not appropriate money to the Commission for fiscal year 1991. See, S 2902(k)(2). This is not only an indicia of control, but also shows that the Commission is acting in a capacity in which the Department of Defense could act if it so desired.

Based on the foregoing, it is clear that the BRAC Commission is an agent of the Secretary of Defense. Even though the Secretary of Defense does not completely control BRAC Commission actions, because the BRAC Commission was set up to be an independent body, we must look to the reasoning set out in Northern in that the mere characterization of one party as an independent contractor is not controlling on the question of agency.

III. THE BRAC STATUTE DOES NOT "TRUMP" SECTION 351(a) OF THE AUTHORIZATION ACT, AND THIS COURT'S PRIOR INJUNCTION IS EFFECTIVE AGAINST THE BRAC COMMISSION.

If the BRAC Commission were joined as a party defendant, this Court's prior injunction would be valid as to the BRAC Commission. Section 2905 of the BRAC statute would not be applicable to the instant case. Specifically, that section provides in pertinent part as follows:

> Secretary of Defense may close or realign military installations under this part without regard to --

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

The Authorization Act for 1993 does not restrict the actual use of BRAC funds. It only sets a requirement which must be met before such funds are used. Consequently, Section 2905 would not "trump" Section 351(a) of the Authorization Act.

Likewise, the argument that BRAC "trumps" the Authorization Act is meaningless. The Authorization Act simply requires the implementation of competitive procedures prior to any realignment or transfer under BRAC. Stated differently, the Authorization Act would not prevent a transfer or realignment under BRAC if competitive procedures were utilized pursuant to Section 351(a) of the Authorization Act. Consequently, any contention by defendants that BRAC "trumps" Section 351(a) would not prevent application of this Court's injunction against the BRAC Commission.

CONCLUSION

The recommendation on the part of the BRAC Commission to realign the missile work at Anniston Army Depot without implementation of competitive bidding procedures required under the Authorization Act violates this Court's injunction. As stated previously, the BRAC Commission is an agent of the Secretary of Defense and therefore falls under the scope of this Court's injunction.

In addition, the BRAC Commission has acted in concert or participation with the Secretary of Defense and the Secretary of the Army in recommending the transfer of such missile work without

implementing competitive bidding procedures. The close identification in interest between the BRAC Commission and the Secretary of Defense is exemplified in both the activities on the part of the BRAC Commission and the base closure/realignment process set out in the BRAC statute. The requirements of the BRAC statute do not "trump" the requirements under the Authorization Act or this Court's injunction which requires competitive bidding. Further, if the BRAC Commission is not brought within the scope of this Court's injunction, then the Commission's recommendations will disturb this Court's adjudication of rights and obligations between the original parties to the injunction and will upset this Court's ability to render a binding judgment.

Based on the above stated case law, statutes and arguments, the BRAC Commisison should fall within the scope of this Court's injunction thereby rendering any issues regarding "ripeness" moot. This Honorable Court should clarify the scope of its previous order enjoining the transfer of missile work at Anniston Army Depot unless competitive bidding procedures are implemented, to include the BRAC Commission within its scope.

Respectfully submitted,

Charlie D. Waldrep

Thomas L. Stewart

Graham L. Sisson, Jr.

Donald E. Blankenship

Attorneys for Plaintiff, American Federation of Government Employees

OF COUNSEL:
GORHAM & WALDREP, P.C.
2101 Sixth Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon the following, by placing same in the United States Mail, properly addressed and postage prepaid, this the 27th day of August, 1993.

Jennifer R. Rivera
David J. Anderson
Vincent M. Garvey
Susan L. Korytkowski
Pamela Moreau
Gregory D. Page
United States Department of Justice
Civil Division - Room 1042
901 E. Street N.W.
Washington, D.C. 20530

Of Counsel

Document Separator

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Suite 1425
1700 North Moore Street
Arlington, Virginia 22209

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, PATRICIA S. WHITE & DARRELL D. DEMPSEY, Plaintiffs, v. UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE; UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, Defendants.	Civil Action No. CV-92-PT-2453-E

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PETITION TO DESIGNATE THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION AS A DEFENDANT

INTRODUCTION

In an extraordinary move, plaintiffs seek to name the Base Closure and Realignment Commission ("Commission") as a party defendant for the purpose of having this Court's December 21, 1992, Order ("Order") modified and applied to it, despite the fact that the Commission's presence presents ~~new~~ legal and factual issues entirely ~~that~~ different from those ~~were not~~ addressed by this Court last December. Plaintiffs fail to appreciate that a separate ~~new~~ legislative scheme, the 1990 Defense Base Closure and Realignment Act, Pub. L. No. 101-510, 104 Stat. 1808 (1990), as amended by Pub. L. No. 102-910, § 2821, 105 Stat. 1290, 1545 (1991) ("the "Act" or "~~BRAC~~") (copy attached),[1] gives the "Base Closure Act" (Avoid use of this term.)

[1] The Act is codified in a note to 10 U.S.C. § 2687. For ease of reference, citations to the Act will be by section number only.

the Commission independent authority to act. Ignoring this factor altogether, plaintiffs ~~stretch~~ legal principles to link the Commission to defendants. They claim, for example, that a "fiduciary relationship" exists between the ~~two entities~~ or, barring that, that they ~~somehow two entities~~ entered into a collusive agreement to evade this Court's Order. For the reasons that follow, the Court should not and, in any event, could not issue the relief requested by plaintiffs. Accordingly, defendants request that the Court deny plaintiffs' petition.

BACKGROUND

On October 20, 1992, plaintiffs filed this action, challenging ~~the manner in which~~ defendants ~~were implementing the realignment of~~ tactical missile maintenance work performed at Anniston Army Depot ("ANAD") in Alabama to Letterkenny Army Depot ("LEAD") in Chambersburg, Pennsylvania. ~~Demanding~~ emergency injunctive relief, plaintiffs claimed that ~~the~~ movement of the tactical missile maintenance mission to LEAD violated Section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 ("Authorization Act"). Section 351(a) provides that ~~before any missiles could be moved from ANAD, the Secretary of Defense had to first choose~~ the recipient military installation through a competitve bidding process.[2]

---

[2] Section 351(a) provides that

> if the Secretary of Defense takes action to consolidate at a single location, the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-

(continued...)

In opposing plaintiffs' Motion for a Preliminary Injunction, defendants had argued that section 9252 of the Defense Appropriations Act for Fiscal Year 1993 ("Appropriations Act") nullified section 351(a). That provision expressly prohibits the use of those funds appropriated or available to defendants in fiscal year 1993 to delay or prevent the planned consolidation at LEAD.[3]

In a narrowly drawn order[4] issued on December 21, 1992, the Court ~~ruled for plaintiffs and~~ issued an injunction ~~preventing the movement of tactical missile maintenance during fiscal year 1993~~. See AFGE v. Cheney, No. CV-92-PT-2453-E, slip op. (N.D.

enjoining the Secretary of Defense from directing the consolidation of tactical missile maintenance work at ~~Letterkenny~~ LEAD ~~ordered~~ until the Secretary complied with section 351(a).

---

[2](...continued)
level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this act shall be eligible to compete for such selection.

P.L. 102-484 (Oct. 23, 1992).

[3] Section 9152 provides that

Notwithstanding the provisions of section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot and, in addition, no funds shall be made available for a depot selection competition to assess depot level tactical missile maintenance.

Pub. L. No. 102-396, § 9152.

[4] In issuing its opinion, the Court specifically stated that it would "address[] only such subject matter which is before the court . . . ." Final Judgment ¶ 1. In addition, the Court stated that "[i]t is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)." Id. ¶ 3.

Ala. Dec. 21, 1992) (hereinafter "slip opinion") -- **do we have a f. supp. cite?.** The Court held that the two statutory provisions were not in conflict, and accordingly gave effect to section 351(a). The Court reconciled the two statutory provisions by upholding the requirement that the Secretary implement of competitive procedures ~~to~~ before he selects to consolidate the tactical missile maintenance mission, but precluding the appropriation of funds for such procedures during fiscal year 1993 due to the prohibition in section 9252. As plaintiffs concede, the Department of Defense ~~has~~ stopped its proposed realignment from ANAD to LEAD pursuant to the Court's order. See Petition ¶ 5. Add brief discussion -- neither 351(a) nor Order apply to Comm'n or ~~other~~ closures/realigns. pursuant to Base Clos. process

¶ Moreover, since the Order, ~~however~~, the Commission has acted pursuant to ~~BRAC~~ the Base Closure Act, and the President. This changes the factual and legal landscape, and raises numerous issues that were not before the Court or considered by ~~the Court~~ it when it issued its December 21, 1992 Order. Specifically, in issuing its opinion, the Court considered only the interplay between section 351(a) and section 9252, and did not determine what effect BRAC would have on the result it reached.

the exclusive mech. for closures & realigns.

Insert fn 4 into text to

In an attempt to thwart the Commission's performance of its statutorily authorized functions, plaintiffs have filed a Petition to Designate the Commission as a party defendant and ask this Court to reissue its order enjoining the Commission "from proceeding with the realignment from ANAD to LEAD without the implementation of competitive bidding procedures as required by § 351(a) of the Authorization Act . . . ." Petition at 2.

comm. has already performed its functions - submitted recs. - comm. doesn't implement - what relief looking for??

STATUTORY BACKGROUND

=, in a necessarily ~~subject to change~~ altered form, =

Insert D

At best, plaintiffs misconstrue the nature and role of the Base Closure Commission -- an independent, outside commission established by Congress for the purpose of providing the President with a fair and impartial set of recommendations for base closures and realignments. As explained more fully below, the Commission held public hearings, gathered information and ultimately submitted to the President recommendations for 130 base closures and 45 realignments, including the realignment of tactical missile maintenance work to Letterkenny. On July 2, the President approved the Commission's recommendations. If Congress

does not pass a joint resolution of disapproval within the statutorily prescribed 45-day period, the President's decision to realign Tactical missile maintenance work at Letterkenny will become law. Nothing in this Court's Order of December can or should be construed as precluding or even touching upon that result, the Commission or any part of the base closure and realignment process. See Order at ___ (add quote of portion of Order saying doesn't address base closure act).

21, 1992, interpreting sections 351(a) and 9252 of the 1993 Appropriations and Authorizations acts,

The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990), is the most recent legislative attempt to regulate the process by which domestic military bases are closed and realigned. See Specter v. Garrett, 971 F.2d 936, 939 (3d Cir. 1992). The 1990 Act, ~~like a similar statute enacted in 1988,~~ was designed to break years of deadlock over the closure of unneeded military bases. For years, Congress, desiring to keep local bases open for the benefit of individual members, effectively blocked efforts to close these facilities. Many in Congress viewed Executive Branch base closure proposals with skepticism, believing them motivated by the desire to punish political opponents rather than to save taxpayer dollars. See Cohen v. Rice, 992 F.2d 376, 378 (1st Cir. 1993). During this impasse, while foreign threats diminished and budget deficits soared, no U.S. bases were closed.

The ~~1988 and~~ 1990 Acts ~~were~~ were a political compromises. ~~They~~ reflect Congress' recognition that unneeded military bases should be closed, despite ~~short term~~ economic impacts on local communities, and the Executive Branch's commitment to a fair and impartial selection process. This spirit of inter-branch cooperation pervades the structure and operation of the 1990 Act, which has the avowed purpose of providing "a fair process that will result in the timely closure and realignment of military installation inside the United States." § 2901(b).

---

[5] See Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988).

Insert here discussion — appointed by Pres w/advice/consent Senate ...

1. The 1990 Base Closure and Realignment Act, As Amended

BRAC established an independent entity called the Defense Base Closure and Realignment Commission ("Commission") to meet in 1991, 1993, and 1995. §§ 2902(a), (e). It required the Secretary of Defense to develop a six-year force structure plan, which assesses national security threats and the force structure needed to meet them. §§ 2903(a)(1), (2). The Secretary was to provide the plan to the Commission. § 2903(a). The 1990 Act also required the Secretary to publish in the Federal Register for notice and comment the criteria he proposed to use to recommend bases for closure or realignment. § 2903(b). Pursuant to section 2903(b)(2)(A), the Secretary established such final criteria on February 15, 1991, see 56 Fed. Reg. 6374 (Feb. 15, 1991), and Congress did not disapprove of these criteria by joint resolution by March 15, 1991 (as would have been permitted by the Act). See § 2903(b)(2)(B).

For the first of three rounds of base closures to conclude in 1995, the Act required the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and selection criteria. § 2903(c)(1). For the second and third rounds, the 1991 amendments to the Act changed the due date for the Secretary's recommendations to March 15. Id. The Act directs the Secretary to summarize in the Federal Register the process by which each base was recommended for closure or realignment and to provide a justification of each recommendation. § 2903(c)(2). The Act requires the Comptroller

Shorten — simply say Act set up exclusive process for closure/realignment, Sec. Def submits recs. (Talk only in terms of '93 round.)

General, the head of the General Accounting Office (GAO), to analyze and report to Congress on the Secretary's recommendations and selection process by April 15. § 2903(d)(5). Congress charged the Commission with reviewing the Secretary's recommendations, and with preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. § 2903(d)(2). The Comptroller General, to the extent requested, must assist the Commission in its review. § 2903(d)(5). The Act requires the Commission to hold public hearings on the Secretary's recommendations. § 2903(d)(1). The Commission may reject or change ~~any of~~ the Secretary's recommendations if they "deviate[] substantially" from the force structure plan and final criteria. § 2903(d)(2)(B). If the Commission proposes to change the Secretary's recommendations by adding military installations to the list, it must publish the proposed changes in the Federal Register thirty days prior to submitting its recommendations to the President and hold public hearings on the proposed changes. § 2903(d)(2)(C).

The Commission must report its recommendations to the President by July 1. § 2903(d)(2)(A). The President then has two weeks in which to approve or disapprove the Commission's recommendations ~~in whole or in part and must transmit this determination to the Commission and Congress.~~ § 2903(e). If the President disapproves of any recommendations, the Commission has until August 15 to submit a revised list of recommended closures

and realignments to him. § 2903(e)(3). If the President does not approve ~~of~~ the revised list of recommendations by September 1, the base closure process for that year terminates. § 2903(e)(5).

If ~~Should~~ the President approves the Commission's recommendations, Congress has forty-five days from the date of approval or until the adjournment of Congress sine die, whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving ~~of~~ the Commission's recommendations. §§ 2904(b), 2908. If such a resolution is passed, the Secretary of Defense may not carry out the closures and realignments approved by the President. § 2904(b). If a joint resolution of disapproval is not passed, the President's decisions become law.

2. The 1993 Base Closure Process

For the 1993 round of base closures and realignments, the Secretary of Defense transmitted his recommendations for base closure and realignment on March 12, 1993. 165 bases were on the list, which included 31 major bases recommended for closure, 12 major bases recommended for realignment, and 122 smaller base or activity reductions. Department of Defense, Base Closure and Realignment Report (March 1993) (hereinafter "DOD Report") at 23-34. The Secretary of Defense did not recommend that ANAD be closed or realigned, or that tactical missile maintenance work be consolidated at LEAD. Id. To the contrary, ~~Pursuant to its statutory authority,~~ the Commission held public hearings to discuss the recommendations. Defense Base Closure and Realignment Commission, 1993 Report to the President (hereinafter "Commission Report") at vii. ~~Before the Commission~~ the Secretary recommended that LEAD be realigned and that various functions previously performed at LEAD be transferred elsewhere. Id.

Id. at 1-6 ("missile maintenance workload will not consolidated at Letterkenny") (emphasis added).

As required by statute,

~~could change any of the Secretary's recommendations, BRAC required it to find substantial deviation from the Secretary's force structure plan and the final criteria approved by Congress.~~

already said above

The Commission engaged in an extensive ~~process of review.~~ It held independent review of the Secretary's recommendations.

> "investigative hearings, conducted over 125 fact-finding visits to activities at each major candidate installation, held 17 regional hearings nationwide to hear from affected communities, listened to hundreds of Members of Congress and responded to hundreds of thousands of letters from concerned citizens from across the country."

no evident

Id.

Based on the Commission's review and analysis, it voted to add a total of 73 installations for further consideration as alternatives and additions to the 165 bases recommended for closure or realignment by the Secretary of Defense. See 58 Fed. Reg. 31192 (June 1, 1993). The Commission then held public hearings on these additions, and ultimately recommended to the President that 130 bases be closed and 45 bases be realigned.[6] Commission Report at viii-xiii. ~~The Commission's 1993 Report to the President contains findings for each base on the list. Id. at 1-1 to 1-103. Where applicable, substantial deviations from the application of the force structure plan and final criteria are identified. Id.~~

~~On July 13, 1993,~~ President Clinton approved the recommendations of the Commission. See xx Weekly Comp. Pres. Doc. , .

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[6] The Commission estimated that these actions will result in net savings of approximately $3.8 billion over fiscal years 1994-1999. Commission Report at viii.

The Commission explicitly rejected the Secretary's recommendation to downsize LEAD, and instead ~~[illegible]~~ recommended to the President that tactical missile maintenance work be consolidated there.

If it does not do so, the commission's recommendations, approved by the President and not disapproved by Congress, will become law.

Congress has forty-five days ~~from the date of approval~~ or until the adjournment of Congress sine die, whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving of the Commission's recommendations. §§ 2904(b), 2908.

ARGUMENT

I. THE COURT'S INJUNCTION COULD NOT BE APPLIED TO THE COMMISSION

Central to plaintiffs' contention is their erroneous characterization of the Commission as either an agent of the Department of Defense ("DOD") or as having acted in "active concert" with DOD to enable DOD to evade this Court's Order. In order to make their argument, plaintiffs rewrite ~~legislative~~ history and ~~mislead this Court about~~ grossly mischaracterize the relationship between the Commission and DOD. As explained below, the Commission is an entity entirely independent and separate from defendants, which operates under its own grant of authority from Congress.

-- and by law is required to be --

A. The Commission is not an Agent of Defendants

Contrary to plaintiffs' assertion, see Petition ¶ 1, the Commission is not "an agent of the Secretary of Defense, Secretary of the Army and Department of Defense." As the Base Closure Act ~~Law~~ makes explicitly clear, ~~that~~ the Commission, composed of eight members appointed by the President, by and with the advise and consent of the Senate, is an "independent commission." BRAC, § 2902. Indeed, the independence of the Commission is a ~~core~~ fundamental element of the ~~BRAC~~ base closure process. Many in Congress viewed Executive Branch base closure proposals with skepticism, believing them largely motivated by the desire to punish

Prior to enactment of the Base Closure Act, and creation of the Commission,

political opponents rather than to save taxpayer dollars. They believed that the Secretary of Defense's decisionmaking "raised suspicions about the integrity of the base closure selection process." See H.R.Conf.Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257. Congress thus sought to create "an independent, outside commission" to direct the base closure selection process. Id. See also Specter v. Garrett, 971 F.2d 936, 940 (3d Cir. 1992); Cohen v. Rice, 992 F.2d 376, 377-78 (1st Cir. 1993). ~~The effect is to create a Commission that is shielded from political whim, thus creating an~~ impartial process to downsize the nation's military establishment.

In the face of the plain statutory language and legislative history ~~supporting~~ the independence of the Commission, plaintiffs resort to principles of agency law to bind the Commission. Unbelievably, plaintiffs claim that the ~~two entities~~ are in "a fiduciary relationship" and that "the Department of Defense set up the BRAC Commission to act in its behalf." Mem. at 11.

This assertion is an absolute distortion of reality. Congress, not DOD, established the ~~BRAC~~ process ~~to separate~~ as the exclusive means for closing or realigning military bases. Indeed, under ~~BRAC~~, DOD no longer has authority to implement the ~~closure or~~ realignment of military installations "involving a reduction by more than 1,000, or by more than 50 percent in the number of civilian personnel authorized to be employed at such military installation . . . ." See 10 U.S.C. § 2687. DOD did

not "give" any authority to the Commission, and DOD does not exert any control over the Commission. The Commission, therefore, cannot be and is not an agent of DOD.

B. The Commission Has Not Acted In "Active Concert" With DOD

Plaintiffs' next argument relies on the view that the Commission served as a smokescreen behind which the defendants could operate to avoid complying with this Court's command. This theory clearly implies that the various entities had some collusive agreement to avoid the Court's Order. ~~But, as the case law points out, a simple~~ commonality of interest is insufficient to establish collusion. At the very least, before aider abettor law could enmesh the Commission in the web of the injunction, plaintiffs would have to show that the Commission acted "in active concert" with DOD. See Fed. R. Civ. P. 65(d).

Generally, "[o]ne who is not a party to the action in which the injunction was issued cannot be bound by it because he has not had his day in court with respect to the validity of the injunction." 7 Moore's Federal Practice ¶ 65.13 (1992). The exception is where a nonparty has actually aided and abetted the defendant in avoiding the injunction. ~~A court's order would be meaningless if~~ parties cannot substitute a nonparty to carry out the enjoined activity. See, e.g., Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

Cases establishing aider and abettor liability, however, bear no resemblance to the situation here, where the Commission has simply acted within its statutory mandate. Often, aider and

Insert (2)

As noted above, the Secretary of Defense did not recommend that ANAD be closed or realigned, or that tactical missile maintenance work be moved from ANAD to LEAD. To the contrary, the Secretary recommended that LEAD be downsized. Id. After an exhaustive review (including site visits and public hearings), the Commission explicitly rejected the Secretary's recommendations relating to ANAD and LEAD, and instead recommended to the President ~~and~~ and Congress that tactical missile maintenance work be realigned to LEAD. Not only did the Commission and defendants not act collusively, they didn't

abettor liability is found in trademark infringement cases, where an enjoined defendant colludes with another to continue selling infringing goods. See, e.g., Vuitton v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979). Importantly, a mere commonality of interest is insufficient to establish collusion. Vuitton, at 130. Rather, courts require actual evidence of evasive behavior before imposing an injunction on a nonparty. Id.

Of significance to the case at bar is the omission of ANAD from the Secretary of Defense's recommendations, see DOD's Report at 23-34, a fact plaintiffs fail to mention because it would eviscerate their whole argument. insert (2) ~~The Commission determined that the Secretary's recommendations deviated substantially from the force structure plan, and then prepared its own list, which scheduled ANAD for realignment.~~ See Commission Report at 1-6. ~~The Commission and DOD, therefore, did not~~ even agree on ~~whether ANAD should be included on the list presented~~ the substance of the recommendations to the President.

Plaintiffs' "evidence" that the Commission and DOD acted "in active concert" consists of statutory provisions, establishing the ~~BRAC~~ base closures process, which require the Secretary of Defense to create a force structure plan and to submit recommendations for base closures and realignments to the Commission. Mem. at 5-6. ~~Merely because~~ The single fact that both the Commission and DOD have a role in the closure and realignment of military installations does not ~~prove~~ establish liability under "aider or abettor" theory.

C. The Court Specifically Declined To Address Issues That Were Not Before It

An additional reason the Court should not add the Commission as a defendant is that, in making its ruling, the Court specifically declined to address matters which were not before the Court. Order ¶ 1. Specifically, in issuing its Order, the Court assumed, correctly, that defendants were not proceeding under ~~BRAC~~ the Base Closure Act. See slip op. at 3 n.5. It thus did not consider the interplay between ~~BRAC~~ the Base Closure Act and section 351(a). Since that time, the Commission has acted pursuant to the statute and recommended to the President ~~BRAC to place ANAD on its list of the Secretary's recommendations for closures and realignments.~~ that ANAD be realigned and that tactical missile maintenance work be moved to LEAD. The President has approved the recommendation and Congress is now considering it. The Commission's appearance clearly presents new factual and legal issues which were not considered by the Court in issuing its Order.

II. EVEN IF THE COMMISSION WERE JOINED AS A PARTY DEFENDANT, THE COURT ~~CANNOT~~ could ISSUE THE RELIEF THAT PLAINTIFFS SEEK.

Assuming, arguendo, that the Commission ~~was~~ is joined as a party defendant, the Court ~~is~~ will be limited in the type of relief it ~~could~~ can provide in at least three very significant respects. First, this Court would not have jurisdiction because the action is not ripe. Second, § 351(a), requiring competitive procedures, applies only to the Secretary of Defense, and not to the Commission. Finally, ~~BRAC~~ the Base Closure Act is the exclusive means of closing domestic military bases, and the statute expressly provides that certain appropriation and authorization act provisions cannot divest the Secretary of Defense of his authority to ~~close or realign military bases~~ implement base closures and recommendations approved by the President and Congress, NO exceptions that have the force of law.

A. The Controversy is Not Ripe

The addition of the Commission as a party defendant would not afford plaintiffs any relief at this time because there has

been no final agency action and the controversy is in any event not ripe for judicial review. ~~In~~ Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), vacated and remanded, 113 S. Ct. 455 (1992), aff'd on remand, No. 91-1932 (3d Cir. May 18, 1993), petition for reh'g filed and pending. ~~the court specifically held that~~ Even if the Commission's recommendations were subject to judicial review, no judicial review of the base closure process ~~may occur~~ before the President's decision regarding closures and realignments becomes final. Id. at 941 n.4, 945-46, 948. ~~Similarly,~~ As the court held in Cohen v. Rice, 992 F.2d 376, 381-82 (1st Cir. 1993), ~~the court determined that~~ the Commission's ~~Report~~ recommendations to the President ~~is~~ are not final agency action and, therefore, not subject to judicial review under the Administrative Procedure Act. See also Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) (Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census was not "final agency action" subject to judicial review under the APA; actions taken by the President are not subject to APA review). Accordingly, even if the Commission was added as a defendant, plaintiffs could not challenge the 1993 base closure process at this time.

Judicial review would come, if at all, only after the ~~BRAC~~ Act's process has run its course. In this case, in accordance with the procedures outlined in ~~BRAC~~ the Act, the Commission submitted its report to the President on July 1, 1993, ~~and the President was to submit his report to Congress by July 15, 1993~~. The President approved the recommendations and then transmitted them to Congress, which accepted them. BRAC, § 2903(e). ~~The President's report was in fact submitted~~ on July 13, 1993. Congress has 45

days'[7] ~~from the report's submission date~~ in which to pass a joint resolution disapproving the recommendations ~~of the Commission~~. BRAC, § 2904(b). To date, there has been no definitive congressional action on the proposed recommendations. ~~Thus~~, any challenges ~~to the actions of the Commission~~ recommendations could be brought only if at all, after the President's recommendations for base closures and realignments have become effective.

B. Section 351(a) Does Not Apply to the Commission

Second, by its express terms, § 351(a) of the Authorization Act applies to the Secretary of Defense and not to the Commission. The Court's narrowly drawn Order provides that "[i]t is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)." Order ¶ 3. Thus, even if the Commission were made a party defendant, § 351(a) would not control the Commission's actions. Addition of the Commission, therefore, would be a futile act.

C. BRAC Is The Exclusive Means Of Closing Military Bases

[i need to develop this argument] (1) Even if 351 did apply, would no longer prevail. Pres + Cong can change -- and if Cong approves rec - will have effect of law + supersede. Surely Ct didn't intend for Order to say Cong can't even change.

Third, BRAC expressly trumps certain statutes that might be deemed to ~~divest~~ hamper the Secretary of Defense's ability to implement ~~of his authority to~~ the President's base closure or realignment ~~military bases~~ recs. Section 2905 provides that

> The Secretary of Defense may close or realign military installations under this part without regard to --
> (1) any provision of law restricting the use of funds for closing or realigning military

---

[7] BRAC provides that "the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period." BRAC, § 2904(b)(2).

(2) Base clos. exclusive, intended to do away w/ piecemeal squabbles.

(3) Indeed, express by provides

> installations included in any appropriations or authorization Act . . . .

any leg history on § 2905? Clearly, the intent of Congress in placing this provision in BRAC was to prevent the political infighting and inconsistent legislation that would inhibit the inevitable downsizing of the nation's military establishment. See, e.g., H.R. Conf. No. 923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News at 2931, 3257. Indeed, with limited exception not applicable here, Congress intended BRAC to be the exclusive means of carrying out base closures and realignments. BRAC, § 2909(a).

Section 351(a) falls within the prohibition of § 2905 because it limits the Secretary of Defense's ability to use appropriated funds to realign tactical missile maintenance missions. develop

Don't even need to get to this since even if there inconsistent, new rec trumps as later enacted law, Also - urgent Act desired to ensure in toto adoption rec's.

CONCLUSION

For these reasons, the Court should deny plaintiffs' petition to designate the Commission as a party defendant.

Respectfully submitted,

Add § or fn or ft no relief available from Comm. which has finished its work -- making rec's

FRANK W. HUNGER
Assistant Attorney General

JACK W. SELDEN
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY

JENNIFER R. RIVERA
PAMELA A. MOREAU
United States Department of Justice
Civil Division - Room 935
901 E Street, N.W.
Washington, D.C. 20530
(202) 616-3263

Attorneys For Defendants

DATED:

Of counsel
Major J. Mackey Ives
Joseph Chontos

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, PATRICIA S. WHITE & DARRELL D. DEMPSEY, Plaintiffs, v. UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE; UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, Defendants.	Civil Action No. CV-92-PT-2453-E

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PETITION TO DESIGNATE THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION AS A DEFENDANT

INTRODUCTION

In an extraordinary move, plaintiffs seek to have this Court apply its December 21, 1992, Order ("Order") to the Base Closure and Realignment Commission ("Commission"), despite the fact that the Commission's presence presents legal and factual issues entirely different from those addressed by this Court last December.[1] Plaintiffs fail to appreciate that a separate legislative scheme, the 1990 Defense Base Closure and Realignment Act, Pub. L. No. 101-510, 104 Stat. 1808 (1990), as amended by Pub. L. No. 102-910, § 2821, 105 Stat. 1290, 1545 (1991) (the "Act" or the "Base Closure Act")[2] gives the Commission independent authority to act. Ignoring this factor altogether, plaintiffs distort legal principles in an unsuccessful effort to link the Commission to defendants, where no link can or does exist.

[1] Although plaintiffs style their pleading as one to add the Commission as a party defendant, the relief that plaintiffs actually seek -- the application of injunctive relief against a nonparty -- is centered on Fed. R. Civ. P. 65(d). Nowhere in their pleadings do plaintiffs discuss a basis on which this Court could add the Commission as a party nearly nine months after it rendered a final judgment in this case. In addition, plaintiffs have failed to serve the Commission or to plead this Court's purported jurisdiction over the Commission. Accordingly, we do not treat this as a Petition to Add the Commission as a Party Defendant; rather, we treat it as a Motion to Apply Injunctive Relief to a Nonparty.

Plaintiffs misconstrue the nature and role of the Base Closure Commission -- an independent, outside commission established by Congress for the purpose of providing the President with a fair and impartial set of recommendations for base closures and realignments. As explained more fully below, the Commission held public hearings, gathered information and ultimately submitted to the President recommendations for 130 base closures and 45 realignments, including the realignment of tactical missile maintenance work to Letterkenny Army Depot ("LEAD") in Chambersburg, Pennsylvania. On July 2, the President approved the Commission's recommendations. If Congress does not pass a joint resolution of disapproval within the statutorily prescribed 45-day period,[3] the President's decision to realign tactical missile maintenance work at LEAD will become law.

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[2] The Act is codified in a note to 10 U.S.C. § 2687. For ease of reference, citations to the Act will be by section number only.

[3] The Base Closure Act provides that "the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period." § 2904(b)(2).

Defense Appropriations Act for Fiscal Year 1993 ("section 9152"), can or should be construed as precluding or even touching upon that result.

Reissuing the Order against the Commission, moreover, would not afford plaintiffs any relief. The Commission has already performed its statutorily authorized functions and no longer has a role in the closure or realignment of military installations. In addition, the Court specifically stated that its Order "is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)," Order ¶ 3, and § 351(a) is directed at the Secretary of Defense only, not at the Commission. In the event there exists some conflict between the Secretary's obligation under the Base Closure Act and under this Court's Order, defendants may move to clarify or modify this Court's Order, at which time the Court can address the effect of the Base Closure Act process on its previous findings. The Commission's involvement at this time, however, is unwarranted.

For the reasons that follow, the Court should not and, in any event, could not issue the relief requested by plaintiffs. Accordingly, defendants request that the Court deny plaintiffs' petition.

On October 20, 1992, plaintiffs filed this action, challenging defendants' plan to move tactical missile maintenance work performed at Anniston Army Depot ("ANAD") in Alabama to LEAD. Requesting emergency injunctive relief, plaintiffs claimed that defendants' proposed movement of the tactical missile maintenance mission to LEAD violated Section 351(a).[4] Section 351(a) provides that if the Secretary of Defense decides to consolidate tactical missile maintenance, he must select the recipient military installation through a competitive bidding process.[5]

In opposing plaintiffs' Motion for a Preliminary Injunction, defendants had argued that section 9152 nullified section 351(a). That provision expressly prohibits the use of those funds

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[4] Plaintiffs also argued that DOD's decision violates the Base Closure Act. Defendants, however, explained that DOD's action was not governed by the Base Closure Act and that no such funds were to be used to implement the LEAD consolidation.

[5] Section 351(a) provides that

> if the Secretary of Defense takes action to consolidate at a single location, the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this act shall be eligible to compete for such selection.

P.L. 102-484, 106 Stat. 2315, 2377 (Oct. 23, 1992).

appropriated or available to defendants in fiscal year 1993 to delay or prevent the planned consolidation at LEAD.[6]

In a narrowly drawn order issued on December 21, 1992, the Court enjoined the Secretary of Defense from directing the consolidation of tactical missile maintenance work at LEAD until the Secretary had complied with section 351(a). See AFGE v. Cheney, No. CV-92-PT-2453-E, slip op. (N.D. Ala. Dec. 21, 1992) (hereinafter "slip opinion"). The Court held that the two statutory provisions were not in conflict, and accordingly gave effect to both. The Court reconciled the two statutory provisions by upholding the requirement that the Secretary implement competitive procedures before he elects to consolidate the tactical missile maintenance mission, but precluding the use of funds for such procedures during fiscal year 1993 due to the prohibition in section 9152. See Slip op. 13-15. As plaintiffs concede, the Department of Defense stopped the proposed realignment from ANAD to LEAD pursuant to the Court's order. See Petition ¶ 5.

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[6] Section 9152 provides that

> Notwithstanding the provisions of section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot and, in addition, no funds shall be made available for a depot selection competition to assess depot level tactical missile maintenance.

Pub. L. No. 102-396, 106 Stat. 1876, 1943 (Oct. 6, 1992).

Since the Order, however, the Commission has issued its list of installations recommended for closure or realignment pursuant to the Base Closure Act. With respect to ANAD, the Commission recommended the consolidation of tactical missile maintenance at LEAD. See Defense Base Closure and Realignment Commission, 1993 Report to the President (hereinafter "Commission Report") at 1-6 to 1-7 (attached as Exhibit A). This changes the factual and legal landscape, and raises numerous issues that were not before the Court or considered by it when it issued its December 21, 1992, Order. Specifically, in issuing its opinion, the Court considered only the interplay between section 351(a) and section 9152, and did not determine what effect the Base Closure Act would have on the result it reached.

STATUTORY BACKGROUND

The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990), is the most recent legislative attempt to regulate the process by which domestic military bases are closed and realigned. See Specter v. Garrett, 971 F.2d 936, 939 (3d Cir. 1992). The 1990 Act was designed to break years of deadlock over the closure of unneeded military bases. For years, Congress, desiring to keep local bases open for the benefit of individual members, effectively blocked efforts to close these facilities. Many in Congress viewed Executive Branch base closure proposals with skepticism, believing them motivated by the desire to punish political opponents rather than to save taxpayer dollars. See Cohen v.

Rice, 992 F.2d 376, 378 (1st Cir. 1993). During this impasse, while foreign threats diminished and budget deficits soared, no domestic bases were closed.

The Base Closure Act was a political compromise. It reflects Congress' recognition that unneeded military bases should be closed, despite short-term impacts on local communities, and the Executive Branch's commitment to a fair and impartial selection process. This spirit of inter-branch cooperation pervades the structure and operation of the Act, which has the avowed purpose of providing "a fair process that will result in the timely closure and realignment of military installation inside the United States." § 2901(b).

1. The 1990 Base Closure and Realignment Act, As Amended

The Base Closure Act established an independent entity called the Defense Base Closure and Realignment Commission ("Commission") to meet in 1991, 1993, and 1995. §§ 2902(a), (e). It required the Secretary of Defense to develop a six-year force structure plan, which assesses national security threats and the force structure needed to meet them, §§ 2903(a)(1), (2), and to develop criteria he proposed to use to recommend bases for closure or realignment. § 2903(b).

For the 1993 round of base closures, the Act required the Secretary to publish in the Federal Register and transmit to Congress and the Commission by March 15, 1991, a list of military installations recommended for base closure or realignment based on the six-year force structure plan and selection criteria.

§ 2903(c)(1). The Act directs the Secretary to summarize in the Federal Register the process by which each base was recommended for closure or realignment and to provide a justification of each recommendation. § 2903(c)(2).

Congress charged the Commission with reviewing the Secretary's recommendations, and with preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for domestic military base closures. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations. § 2903(d)(1). The Commission may reject or change any of the Secretary's recommendations if they "deviate[] substantially" from the force structure plan and final criteria. § 2903(d)(2)(B). If the Commission proposes to change the Secretary's recommendations by adding military installations to the list, it must publish the proposed changes in the Federal Register thirty days prior to submitting its recommendations to the President and hold public hearings on the proposed changes. § 2903(d)(2)(C).

The Commission must report its recommendations to the President by July 1. § 2903(d)(2)(A). The President then has two weeks in which to approve or disapprove the Commission's recommendations. If the President disapproves of any recommendations, the Commission has until August 15 to submit a revised list of recommended closures and realignments to him. § 2903(e)(3). If the President does not approve the revised list

of recommendations by September 1, the base closure process for that year terminates. § 2903(e)(5).

Should the President approve the Commission's recommendations, Congress has forty-five days from the date of approval or until the adjournment of Congress sine die, whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving the Commission's recommendations. §§ 2904(b), 2908. If such a resolution is passed, the Secretary of Defense may not carry out the closures and realignments approved by the President. § 2904(b). If Congress does not pass a joint resolution of disapproval, the Secretary shall implement the recommendations of the Commission. § 2904(a).

2. The 1993 Base Closure Process

For the 1993 round of base closures and realignments, the Secretary of Defense transmitted his recommendations for base closure and realignment to the Commission on March 12, 1993. The Secretary's report included 165 bases on the list: 31 major bases recommended for closure, 12 major bases recommended for realignment, and 122 smaller base or activity reductions. Department of Defense, Base Closure and Realignment Report (March 1993) (hereinafter "DOD Report") at 23-34 (attached as Exhibit B). The Secretary of Defense did not recommend that ANAD be closed or realigned. Id.

Pursuant to its statutory authority, the Commission held public hearings to discuss the recommendations. See Commission Report at vii. Before the Commission could change any of the

Secretary's recommendations, the Base Closure Act required it to find substantial deviation from the Secretary's force structure plan and the final criteria approved by Congress. The Commission engaged in an extensive process of review. It held

> investigative hearings, conducted over 125 fact-finding visits to activities at each major candidate installation, held 17 regional hearings nationwide to hear from affected communities, listened to hundreds of Members of Congress and responded to hundreds of thousands of letters from concerned citizens from across the country.

Commission Report at vii.

Based on the Commission's review and analysis, it voted to add a total of 73 installations for further consideration as alternatives and additions to the 165 bases recommended for closure or realignment by the Secretary of Defense. See 58 Fed. Reg. 31192 (June 1, 1993). The Commission then held public hearings on these additions, and ultimately recommended to the President that 130 bases be closed and 45 bases be realigned.[7] Commission Report at viii-xiii. The Commission's 1993 Report to the President contains findings for each base on the list. Id. at 1-1 to 1-103. Where applicable, substantial deviations from the application of the force structure plan and final criteria are identified. Id.

On July 13, 1993, President Clinton approved the recommendations of the Commission. Congress has forty-five days from the date of approval or until the adjournment of Congress sine die,

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[7] The Commission estimated that these actions will result in net savings of approximately $3.8 billion over fiscal years 1994-1999. Commission Report at viii.

whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving of the Commission's recommendations. §§ 2904(b), 2908.

ARGUMENT

I. THE COURT'S INJUNCTION COULD NOT BE APPLIED TO THE COMMISSION BECAUSE IT IS NEITHER AN AGENT OF, NOR ACTED IN CONCERT WITH, THE DEFENDANTS

Central to plaintiffs' contention is their erroneous characterization of the Commission as either an agent of the Department of Defense ("DOD") or as having acted in "active concert" with DOD to enable DOD to evade this Court's Order. In order to make their argument, plaintiffs rewrite history, ignore the express language of the Base Closure Act, and mischaracterize the relationship between the Commission and DOD. As explained below, the Commission is -- and by law is required to be -- an entity entirely independent and separate from defendants, which operates under its own grant of authority from Congress.

A. The Commission Is Not An Agent Of Defendants

Contrary to plaintiffs' assertion, see Petition ¶ 1, therefore, the Commission is not "an agent of the Secretary of Defense, Secretary of the Army and Department of Defense." Rather, the independence of the Commission is the core element of the Base Closure Act process. The Base Closure Act makes explicitly clear that the Commission, composed of eight members appointed by the President, by and with the advise and consent of the Senate, is an "independent commission." § 2902. Prior to

enactment of the Base Closure Act, and creation of the Commission, many in Congress viewed Executive Branch base closure proposals with skepticism, believing them largely motivated by the desire to punish political opponents rather than to save taxpayer dollars. They believed that the Secretary of Defense's decisionmaking "raised suspicions about the integrity of the base closure selection process." See H.R.Conf.Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257. Congress thus sought to create "an independent, outside commission" to direct the base closure selection process.[8] Id. See also Specter v. Garrett, 971 F.2d 936, 940 (3d Cir. 1992); Cohen v. Rice, 992 F.2d 376, 377-78 (1st Cir. 1993). The effect was to create a Commission shielded from political whim, thus creating an impartial process to downsize the nation's military establishment.

The Base Closure Act is replete with provisions that serve to safeguard the Commission's independence. Although the Commission is encouraged to borrow employees from other federal agencies (because of the brief tenure of the Commission), Congress specifically provided that it may hire only a limited number of detailees from the DOD and they may perform only certain functions. § 2902. Specifically, not more than a third of the Commission's staff may be detailed from DOD, and no more than a fifth of its professional analysts may be DOD detailees. § 2902(i)(3)(A)-(B).

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[8]

In addition, the Act contains many provisions to guard against conflict of interest. For example, the Commission's Director of Staff may not have served on active duty in the Armed Forces or as a DOD civilian employee during the year preceding the appointment. § 2902(h). No DOD officer or employee, moreover, may be detailed to the Commission if, within twelve months before the detail is to begin, that person participated personally and substantially in any matter within DOD concerning the preparation of recommendations for closures and realignments. § 2902(i)(3)(C).

In the face of the plain statutory language and legislative history supporting the independence of the Commission, plaintiffs resort in vain to principles of agency law in an effort to bind the Commission. Without any support whatsoever, plaintiffs claim that the Commission and defendants are in "a fiduciary relationship" and that "the Department of Defense set up the BRAC Commission to act in its behalf." Plaintiffs' Mem. at 11.

This assertion is directly rebutted by the express language and deliberate scheme of the Base Closure Act. Congress, not DOD, created and empowered the Commission and established the Base Closure Act process to operate as the exclusive means for closing or realigning military bases. § 2909(a). DOD did not "give" any authority to the Commission, and DOD does not exert any control over the Commission. The Commission, therefore, cannot be, and is not, an agent of DOD.

B. The Commission Has Not Acted In "Active Concert" With DOD

Plaintiffs' next argument relies on the view that the Commission served as a smokescreen behind which the defendants could operate to avoid complying with this Court's command. This theory clearly implies that the various entities had some collusive agreement to avoid the Court's Order, but plaintiffs cite no evidence to support this allegation and there is none. Plaintiffs note simply that the Commission and defendants have some common interest vis-a-vis base closures. That is clearly insufficient to establish collusion.

Generally, "[o]ne who is not a party to the action in which the injunction was issued cannot be bound by it because he has not had his day in court with respect to the validity of the injunction." 7 Moore's Federal Practice ¶ 65.13 (1992). See also Peterson v. Fee Int'l, Ltd., 435 F. Supp. 938, 943 (W.D. Okla. 1975). The exception is where a nonparty has actually aided and abetted the defendant in avoiding the injunction. A court's order would be meaningless if parties could substitute a nonparty to carry out the enjoined activity. See, e.g., Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

Cases establishing aider and abettor liability, however, bear no resemblance to the situation here, where the Commission has simply acted within its statutory mandate. Often, aider and abettor liability is found in trademark infringement cases, where an enjoined defendant colludes with another to continue selling infringing goods. See, e.g., Vuitton v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979); Peterson, supra. Importantly, a mere

commonality of interest is insufficient to establish collusion. Vuitton, at 130; Peterson, at 943. Rather, courts require evidence that the defendant and the nonparty are "so identified in interest as to represent the same legal right." Peterson, at 943. See also Vuitton, at 130.

Of significance to the case at bar is the omission of ANAD from the Secretary of Defense's recommendations, see DOD's Report at 23-34, a fact plaintiffs fail to mention because it would eviscerate their whole argument. As noted above, the Secretary of Defense did not recommend that ANAD be closed or realigned, or that tactical missile maintenance work be moved from ANAD to LEAD. To the contrary, the Secretary recommended that LEAD be downsized. DOD Report at 41-42. After an exhaustive review (including site visits and public hearings), the Commission explicitly rejected the Secretary's recommendations relating to ANAD and LEAD, and instead recommended to the President and Congress that tactical missile maintenance work be realigned to LEAD. Commission Report at 1-6 to 1-7. Not only did the Commission and defendants not act collusively, they did not even agree on whether ANAD should be included on the list presented to the President.

Plaintiffs' "evidence" that the Commission and DOD acted "in active concert" consists of statutory provisions, establishing the Base Closure Act process, which require the Secretary of Defense to create a force structure plan and to submit recommendations for base closures and realignments to the

Commission. Plaintiffs' Mem. at 5-6. The simple fact that both the Commission and DOD have a role in the closure and realignment of military installations does not establish liability under "aider or abettor" theory.

C. The Court Specifically Declined To Address Issues That Were Not Before It

An additional reason the Court should not add the Commission as a defendant is that, in making its ruling, the Court specifically declined to address matters which were not before the Court. Order ¶ 1. Specifically, in issuing its Order, the Court assumed, correctly, that defendants were not proceeding under the Base Closure Act. See slip op. at 3 n.5. It thus did not consider the interplay between the Act and section 351(a). Since that time, the Commission has acted pursuant to the Act and recommended to the President that ANAD be realigned and that tactical missile maintenance work be moved to LEAD. The President has approved the recommendation and Congress is now considering it. The Commission's appearance clearly presents new factual and legal issues which were not considered by the Court in issuing its Order.

II. SUBJECTING THE COMMISSION TO THE INJUNCTION WOULD NOT ADD TO PLAINTIFFS' ABILITY TO OBTAIN RELIEF

Issuing an injunction against the Commission would not be efficacious for at least three very significant reasons. First, an injunction at this time would be premature because the President's recommendations to Congress have not become final. Plaintiffs' ability to seek relief would come, if at all, only

after the Base Closure Act process has run its course. In this case, in accordance with the procedures outlined in the Base Closure Act, see Base Closure Act, § 2903(e), the Commission submitted its report to the President on July 1, 1993, the President approved the recommendations and then transmitted them to Congress, which accepted them on July 13, 1993. Congress has 45 days in which to pass a joint resolution disapproving the recommendations. See Base Closure Act § 2904(b). To date, there has been no definitive congressional action on the proposed recommendations. Thus, any challenges could be brought, if at all, only after the President's recommendations for base closures and realignments have become effective.[9]

Second, the Commission no longer has a role in the base closure process and has no authority to implement its recommendations. The Commission's function ended when it transmitted to the President, on July 2, 1993, its findings and recommendations with regard to base closures and realignments. There is, therefore, no action which the Base Closure Commission has taken, or is empowered to take, that could violate the Court's injunction or that would interfere with plaintiffs' rights under the Order.

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[9] In a similar vein, courts have held that there can be no judicial review of the base closure process before the President's decision regarding closures and realignments becomes final. See Specter v. Garrett, 971 F.2d 936, 941 n.4, 945-46, 948 (3d Cir. 1992), vacated and remanded, 113 S. Ct. 455 (1992), aff'd on remand, No. 91-1932 (3d Cir. May 18, 1993), petition for reh'g filed and pending, Id. at 941 n.4, 945-46; Cohen v. Rice, 992 F.2d 376, 381-82 (1st Cir. 1993).

Third, by its express terms, § 351(a) of the Authorization Act applies to the Secretary of Defense and not to the Commission. Section 351(a) specifically provides that "if the Secretary of Defense takes action to consolidate . . . the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures." (Emphasis added). The Court's narrowly drawn Order provides that "[i]t is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)." Order ¶ 3. Thus, even if the Commission could be enjoined, § 351(a) would not control the Commission's actions. Addition of the Commission, therefore, would be a futile act.

The Secretary of Defense may ultimately be required to take action under the Base Closure Act with respect to ANAD and LEAD. In the event there exists some conflict between the Secretary's obligation under the Base Closure Act and under this Court's Order, defendants may move to clarify or modify this Court's Order, at which time the Court can address the effect of the Base Closure Act process on its previous findings. The Commission's involvement at this time, however, is unwarranted.

CONCLUSION

For these reasons, the Court should deny plaintiffs' petition to designate the Commission as a party defendant.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

Document Separator

DISTRICT COURT
TRICT OF ALABAMA
VISION

Please refer to this number
when responding 930926-L

Civil Action No.
CV-92-PT-2453-E

OPPOSITION TO PLAINTIFFS'
DEFENSE BASE CLOSURE AND
EFENDANT AND FOR OTHER RELIEF[1]

UCTION

ocess draws to a close,

rt apply its December 21, 1992,

ase Closure and Realignment

upon the erroneous conclusion

that this is necessary to preserve the integrity of the Court's

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[1] Although plaintiffs style their petition as one to add the Commission as a party defendant, the relief that plaintiffs actually seek -- the application of injunctive relief against a nonparty -- is centered on Fed. R. Civ. P. 65(d). Nowhere in their papers do plaintiffs discuss a basis on which this Court could add the Commission as a party nearly nine months after it rendered a final judgment in this case. In addition, plaintiffs have failed to serve the Commission or to plead this Court's purported jurisdiction over the Commission. Accordingly, plaintiffs' Petition to add the Commission as a party defendant requires no further discussion and must be denied. The remainder of this opposition will treat plaintiffs' petition as a motion to apply injunctive relief to a nonparty under Fed. R. Civ. P. 65(d).

injunction. Revising the Court's injunction to apply to the Commission, a non-party, is neither necessary nor appropriate. The Court's injunction runs against the Secretary of Defense and, in the event that the Secretary may in the future be required to take action under the 1990 Defense Base Closure and Realignment Act[2] (the "Act" or the "Base Closure Act"), the need to clarify or modify this Court's Order, if any, can be addressed when the Secretary's obligations ripen at the completion of the Base Closure Act process. It would be meaningless to apply the injunction to the Commission. The Commission has already fully performed its statutory role in the 1993 round of closures and realignments of military installations; it will not play a role in implementing the 1993 recommendations, if and when they become effective.

In addition to being unnecessary, no legal basis exists to make the Court's injunction applicable to the Commission. Contrary to plaintiffs' assertions, the Commission is not an agent of the Secretary of Defense and its injection into this lawsuit would present legal and factual issues entirely different than those addressed by the Court last December. Plaintiffs' efforts to show otherwise are based on a misconstruction of the independent nature and role of the Commission under the Base Closure Act. Plaintiffs also misconstrue the limited nature of

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[2] See Pub. L. No. 101-510, 104 Stat. 1808 (1990), as amended by Pub. L. No. 102-910, § 2821, 105 Stat. 1290, 1545 (1991). The Act is codified in a note to 10 U.S.C. § 2687. For ease of reference, citations to the Act will be by section number only.

the Court's Order, which was "not intended to enjoin any action except that which must be in compliance with the provision of section 351(a)." Section 351(a) governs only certain actions taken by the Secretary of Defense and is not directed at the Commission.

As further demonstrated below, the Court should deny plaintiffs' request that this Court apply its injunctive relief against the Commission, a non-party.

BACKGROUND

On December 21, 1992, this Court issued a narrowly drawn Order enjoining the Department of Defense ("DOD") and the Department of the Army ("Army") from directing the consolidation of tactical missile maintenance work performed at Anniston Army Depot ("ANAD") in Alabama to Letterkenny Army Depot ("LEAD") unless and until the Secretary of Defense complied with § 351(a) of the National Defense Authorization Act for Fiscal Year 1993.[3] See AFGE v. Cheney, No. CV-92-PT-2453-E, slip op. (N.D. Ala. Dec.

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[3] Section 351(a) provides, in pertinent part:

> if the Secretary of Defense takes action to consolidate at a single location, the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this act shall be eligible to compete for such selection.

P.L. 102-484, 106 Stat. 2315, 2377 (Oct. 23, 1992).

21, 1992) (hereinafter "slip opinion").[4] As plaintiffs concede, DOD has stopped its proposed movement of missile maintenance work from ANAD to LEAD pursuant to the Court's Order. See Petition ¶ 5.

Since the Order, the 1993 round of base closures and realignments has been initiated. The Base Closure Act established an independent entity called the Defense Base Closure and Realignment Commission ("Commission") to meet in 1991, 1993, and 1995, §§ 2902(a), (e), for the purpose of recommending to the President a list of military installations for closure and realignment. The Secretary of Defense initiated the 1993 process by transmitting to Congress and to the Commission, on March 12, 1993, his proposed list of military installations recommended for base closure or realignment. § 2903(c)(1).[5] The Secretary's report, which was required to be submitted by March 15, 1993, id., included 165 bases on the list, but did not recommend that ANAD be closed or realigned. See Department of Defense, Base Closure and Realignment Report (March 1993) (hereinafter "DOD Report") at 23-34 (attached as Exhibit A).

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[4] In opposing plaintiffs' Motion for a Preliminary Injunction, defendants had argued that section 9152 of the Defense Appropriations Act for Fiscal Year 1993 nullified section 351(a). That provision expressly prohibits the use of those funds appropriated or available to defendants in fiscal year 1993 to delay or prevent the planned consolidation at LEAD. See Pub. L. No. 102-396, 106 Stat. 1876, 1943 (Oct. 6, 1992).

[5] The Act directs the Secretary to summarize in the Federal Register the process by which each base was recommended for closure or realignment and to provide a justification of each recommendation. § 2903(c)(2).

Pursuant to the Act, see § 2903(d)(2), the Commission reviewed the Secretary's recommendations.[6] See Defense Base Closure and Realignment Commission, 1993 Report to the President (hereinafter "Commission Report") (attached as Exhibit B). Upon finding that certain of the Secretary's recommendations "deviated substantially" from the force structure plan and selection criteria, § 2903(d)(2)(B), the Commission made findings, prepared its own recommendations and presented them to the President. See Commission Report. With respect to ANAD, the Commission recommended that tactical missile maintenance be realigned at LEAD. Commission Report at 1-6 to 1-7.

President Clinton approved the Commission's recommendations and transmitted them to Congress. Congress has forty-five days[7] from the date on which the President transmitted his report or until the adjournment of Congress sine die, whichever is earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving of the Commission's recommendations. See §§ 2904(b), 2908. If Congress does not pass a joint resolution of disapproval, the President's recommendations become

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[6] The Commission held "investigative hearings, conducted over 125 fact-finding visits to activities at each major candidate installation, held 17 regional hearings nationwide to hear from affected communities, listened to hundreds of Members of Congress and responded to hundreds of thousands of letters from concerned citizens from across the country." See Commission Report at vii.

[7] The Base Closure Act provides that "the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period." § 2904(b)(2).

law and the Secretary of Defense, not the Commission, shall implement the President's decisions. § 2904(a).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY NEED FOR THE EXTRAORDINARY RELIEF THEY SEEK

Issuing an injunction applicable to the Commission would not be efficacious for at least three very significant reasons. First, and foremost, the Commission cannot do anything proscribed by the Court's injunction. Under the Base Closure Act, the Commission's role is limited; its function is to recommend to the President those military installations that it determines should be closed or realigned. It has absolutely no authority to implement the recommendations, and indeed its role in the 1993 process has essentially ended. As noted above, the Commission simply makes recommendations. It is the President and Congress that determine whether the recommendations become final, and then it is the Secretary of Defense that implements the President's decisions. § 2904. There is, therefore, no action that the Commission has taken, or is empowered to take, that could violate the Court's injunction or that could interfere with plaintiffs' rights under the Order.

Second, by its express terms, § 351(a) of the Authorization Act applies to the Secretary of Defense and not to the Commission. Section 351(a) specifically provides that "if the Secretary of Defense takes action to consolidate . . . the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures."

(Emphasis added). The Court's narrowly drawn Order provides that "[i]t is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)." Order ¶ 3. Thus, even if the Commission could be enjoined, § 351(a) does not control the Commission's actions and, thus, the Court's injunction would not apply to the Commission.

Third, consideration of any modification of the Court's injunction at this time would be premature because the President's base closure decisions are not yet final. Plaintiffs' ability to seek relief, or any requirement to seek modification of the injunction, would come, if at all, only after the Base Closure Act process has run its course. In this case, in accordance with the procedures outlined in the Base Closure Act, see § 2903(e), the Commission submitted its report to the President on July 1, 1993. The President approved the recommendations and then transmitted them to Congress, which accepted them on July 13, 1993. Congress has a 45 day period in which to pass a joint resolution disapproving that decision. See § 2904(b). To date, there has been no definitive congressional action and the 45 day period has not yet expired. Thus, any challenges could be brought, if at all, only after the President's base closure and realignment decisions have become effective.[8]

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[8] In a similar vein, courts have held that, at a minimum, there can be no judicial review of the base closure process before the President's decisions regarding closures and realignments becomes final. See Specter v. Garrett, 971 F.2d (continued...)

In sum, the Secretary of Defense may ultimately be required to take action under the Base Closure Act with respect to ANAD and LEAD. In the event there exists some conflict between the Secretary's obligation under the Base Closure Act and under this Court's Order, either plaintiffs or defendants may move to clarify or modify this Court's Order, at which time the Court can address the effect of the Base Closure Act process on its previous findings. The Commission's involvement, however, is unwarranted.

II. IN ANY EVENT, NO LEGAL BASIS EXISTS TO APPLY THE COURT'S INJUNCTION AGAINST THE COMMISSION BECAUSE IT IS NEITHER AN AGENT OF, NOR ACTED IN CONCERT WITH, THE DEFENDANTS

Central to plaintiffs' petition is their erroneous characterization of the Commission as either an agent of DOD or as having acted in "active concert" with DOD to enable it to evade this Court's Order. In order to make their argument, plaintiffs rewrite history, ignore the express language of the Base Closure Act, and mischaracterize the relationship between the Commission and DOD. As explained below, the Commission is -- and by law is required to be -- an entity entirely independent and separate from defendants, which operates under its own grant of authority from Congress.

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[8](...continued)
936, 941 n.4, 945-46, 948 (3d Cir. 1992), vacated and remanded, 113 S. Ct. 455 (1992), aff'd on remand, No. 91-1932 (3d Cir. May 18, 1993), petition for reh'g filed and pending, Id. at 941 n.4, 945-46; Cohen v. Rice, 992 F.2d 376, 381-82 (1st Cir. 1993). In Cohen, the Court further held that the base closure process is not subject to judicial review under the APA.

A. The Commission Is Not An Agent Of Defendants

Contrary to plaintiffs' assertion, see Petition ¶ 1, the Commission is not "an agent of the Secretary of Defense, Secretary of the Army and Department of Defense." Rather, the independence of the Commission is the core element of the Base Closure Act process. The Base Closure Act makes explicitly clear that the Commission, composed of eight members appointed by the President, by and with the advise and consent of the Senate, is an "independent commission." § 2902. Prior to enactment of the Base Closure Act, and creation of the Commission, many in Congress viewed Executive Branch base closure proposals with skepticism, believing them largely motivated by the desire to punish political opponents rather than to save taxpayer dollars. They believed that the Secretary of Defense's decisionmaking "raised suspicions about the integrity of the base closure selection process." See H.R.Conf.Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3257. Congress thus sought to create "an independent, outside commission" to direct and ensure an impartial process to downsize the nation's military establishment. Id. See also Specter v. Garrett, 971 F.2d 936, 940 (3d Cir. 1992); Cohen v. Rice, 992 F.2d 376, 377-78 (1st Cir. 1993).

The Base Closure Act is replete with provisions that serve to safeguard the Commission's independence. Although the Commission is encouraged to borrow employees from other federal agencies (because of the brief tenure of the Commission),

Congress specifically provided that it may hire only a limited number of detailees from DOD and they may perform only certain functions. § 2902. For example, no more than a fifth of its professional analysts may be DOD detailees. § 2902(i)(3)(B). No DOD officer or employee may be detailed to the Commission if, within twelve months before the detail is to begin, that person participated personally and substantially in any matter within DOD concerning the preparation of recommendations for closures and realignments. § 2902(i)(3)(C). In addition, the Commission's Director of Staff may not have served on active duty in the Armed Forces or as a DOD civilian employee during the year preceding the appointment. § 2902(h).

In the face of the plain statutory language and legislative history supporting the independence of the Commission, plaintiffs resort in vain to principles of agency law in an effort to bind the Commission. Without any support whatsoever, plaintiffs claim that the Commission and defendants are in "a fiduciary relationship" and that "the Department of Defense set up the BRAC Commission to act in its behalf." Plaintiffs' Mem. in Support of Plaintiffs' Petition to Designate the Defense Base Closure and Realignment Commission as a Defendant (hereinafter Pls.' Mem.) at 11.

As the express language and deliberate scheme of the Base Closure Act show, however, Congress, not DOD, created and empowered the Commission and established the Base Closure Act process. DOD did not "give" any authority to the Commission, and

DOD does not exert any control over the Commission. The Commission, therefore, cannot be, and is not, an agent of DOD.

B. The Commission Has Not Acted In "Active Concert" With DOD

Plaintiffs' next argument relies on the contention that the Commission served as a smokescreen behind which the defendants could operate to avoid complying with this Court's command. This theory clearly implies that the various entities had some collusive agreement to avoid the Court's Order, but plaintiffs cite no evidence to support this allegation and there is none. Plaintiffs note simply that the Commission and defendants have some common interest vis-a-vis base closures. That is clearly insufficient to establish collusion.

Generally, "[o]ne who is not a party to the action in which the injunction was issued cannot be bound by it because he has not had his day in court with respect to the validity of the injunction." 7 Moore's Federal Practice ¶ 65.13 (1992). See also Peterson v. Fee Int'l, Ltd., 435 F. Supp. 938, 943 (W.D. Okla. 1975). The exception is where a nonparty has actually aided and abetted the defendant in avoiding the injunction. Parties cannot simply substitute a nonparty to carry out the enjoined activity. See, e.g., Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

Cases establishing aider and abettor liability, however, bear no resemblance to the situation here, where the Commission has simply acted within its statutory mandate. Often, aider and abettor liability is found in trademark infringement cases, where

an enjoined defendant colludes with another to continue selling infringing goods. See, e.g., Vuitton v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979); Peterson, supra. Importantly, a mere commonality of interest is insufficient to establish collusion. Vuitton, at 130; Peterson, at 943. Rather, courts require evidence that the defendant and the nonparty are "so identified in interest as to represent the same legal right." Peterson, at 943. See also Vuitton, at 130.

Of significance to the case at bar is the omission of ANAD from the Secretary of Defense's recommendations, see DOD's Report at 23-34, a fact plaintiffs do not mention because it undermines their whole argument. As noted above, the Secretary of Defense did not recommend that ANAD be closed or realigned, or that tactical missile maintenance work be realigned from ANAD to LEAD. To the contrary, the Secretary recommended that LEAD be downsized. DOD Report at 41-42. After an exhaustive review (including site visits and public hearings), the Commission explicitly rejected the Secretary's recommendations relating to ANAD and LEAD, and instead recommended to the President and Congress that tactical missile maintenance work be realigned to LEAD. Commission Report at 1-6 to 1-7. This shows that the Commission and defendants did not act collusively, and, indeed, did not even agree on whether ANAD should be included on the list presented to the President.

Plaintiffs' "evidence" that the Commission and DOD acted "in active concert" consists of statutory provisions, establishing

the Base Closure Act process, which require the Secretary of Defense to create a force structure plan and to submit recommendations for base closures and realignments to the Commission. Pls.' Mem. at 5-6. The simple fact that both the Commission and DOD have a role in the closure and realignment of military installations does not establish liability under an "aider or abettor" theory.

C. The Court Specifically Declined To Address Issues That Were Not Before It

The Court's injunction was not originally intended to apply to the Commission. Indeed, in making its ruling, the Court expressly declined to address matters that were not before it, Order ¶ 1, and assumed, correctly, that defendants were not proceeding under the Base Closure Act. See slip op. at 3 n.5. It thus did not consider the interplay between the Base Closure Act and section 351(a), nor the effect of any future recommendations enacted pursuant to the Act. Since the Court issued its Order, the Commission has acted pursuant to the Base Closure Act and recommended to the President that tactical missile maintenance work be realigned to LEAD. The President has approved the recommendation and Congress is now considering the President's action. The Commission's appearance clearly presents new factual and legal issues which were not considered by the Court in issuing its Order.[9] This alone would be a sufficient

[9] Nor should these issues be considered now. See supra at 7-8.

basis to refuse to extend the injunction to apply to the Commission.

CONCLUSION

For these reasons, the Court should deny plaintiffs' petition to designate the Commission as a party defendant and/or to extend the injunction to apply to the Commission.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

JACK W. SELDEN
United States Attorney

David J. Anderson/pam
DAVID J. ANDERSON

Vincent M. Garvey /pam
VINCENT M. GARVEY

Pamela A. Moreau
JENNIFER R. RIVERA
PAMELA A. MOREAU
United States Department of Justice
Civil Division - Room 935
901 E Street, N.W.
Washington, D.C. 20530
(202) 616-8263

Attorneys For Defendants

Of counsel
Major J. Mackey Ives
Joseph E. Chontos

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 1993, I served by federal express a copy of the Defendant's Memorandum in Opposition to Plaintiffs' Petition to Designate the Defense Base Closure and Realignment Commission as a Defendant and for Other Relief on:

Graham L. Sisson
Gorham & Waldrep
Suite 700
2101 6th Avenue North
Birmingham, Alabama 35203

Pamela A. Moreau

Pamela A. Moreau

Document Separator

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,

Plaintiffs,

vs.

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

Defendants.

Please refer to this number when responding 930921-3

CASE NO. CV-92-PT-2453-E

PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' PETITION TO DESIGNATE THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION AS A DEFENDANT AND FOR OTHER RELIEF

I.

EXTENDING THE SCOPE OF THIS COURT'S PRIOR INJUNCTION TO INCLUDE THE BRAC COMMISSION DOES NOT PRESENT NEW FACTUAL AND LEGAL ISSUES TO THIS COURT.

The issue presented to this court at present is the same issue presented to and decided by this court in its previous order enjoining the Secretary of Defense from taking any action to realign the missile maintenance work from the Anniston Army Depot ("ANAD") to the Letterkenny Army Depot, ("LEAD") without implementation of competitive bidding procedures set out in the Authorization Act. The issue presented to this court is whether the BRAC Commission's recommendation that the missile maintenance work at ANAD be realigned to LEAD violates the requirements of Section 351(a) of the Authorization Act which requires the implementation of competitive bidding procedures. This court addressed this same issue previously in its "Findings of Fact and

Conclusions of Law" entered on December 21, 1992. This Court framed the issue as "[i]s the realignment of missile maintenance work from ANAD to LEAD in violation of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993 signed by the President on October 23, 1992." See American Federation of Government Employees, Local 1945, and Patricia S. White v. Cheney, No. CV-92-PT-2453-E, slip op. at 4 (N.D. Ala. Dec. 21, 1990).

The Defendants argue that this Court did not address the Base Closure Act (BRAC) in its previous ruling and therefore including the BRAC Commission within the scope of this Court's injunction would present new issues which were not considered by this Court. The Defendants, however, are mistaken in their interpretation of the issues previously addressed by this Court and in their interpretation of the issue presented in the instant circumstances. As set out above, the issue in this instant action is the precise issue presented to this Court under the previous action. The BRAC Commission has recommended the same actions previously recommended by the Secretary of Defense and enjoined by this Court. As in the previous action, it is not necessary for this Court to specifically address the BRAC statute since the outcome of this Court's decision does not rest upon the BRAC statute, but rests instead upon § 351(a) of the Authorization Act. Therefore, this Court should extend the scope of its previous order enjoining the transfer of any missile maintenance work from ANAD to LEAD unless such transfer complies with § 351(a) of the Authorization Act, to include the BRAC Commission.

II.

SECTION 351(A) OF THE AUTHORIZATION ACT APPLIES TO THE BRAC COMMISSION.

Section 351(a) of the Authorization Act provides in part as follows:

> If the Secretary of Defense takes action to consolidate at a single location, the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures.

The Defendants argue that the language of this section restricts its application to only include the Secretary of Defense. However, this argument is erroneous in that it fails to take into account the relationship between the Secretary of Defense and the BRAC Commission.

In its Findings of Fact and Conclusions of Law, this Court held that "the clear intent of Congress in Act 351(a) is to require competitive procedures if there is to be a consolidation action." Slip op. at 25. The Secretary of Defense is clearly subject to the provisions of the Authorization Act. Under the process set out in the Defense Base Closure and Realignment Act of 1990 (BRAC), the Secretary of Defense acts to close or realign military bases pursuant to the recommendations of the BRAC Commission. Since the Secretary of Defense is required by § 351(a) to implement competitive bidding procedures prior to consolidation or realignment, the Secretary of Defense cannot follow the BRAC Commission's recommendations without implementation of such

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competitive bidding procedures. See Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2904 et.seq., 104 Stat. 1808, (codified at 10 U.S.C. § 2687, note (Supp. 1993)). Therefore, the BRAC Commission may not recommend that the Secretary of Defense take actions in violation of the Authorization Act and as a result, the BRAC Commission is ultimately subject to the competitive bidding provision in Section 351(a) of the Authorization Act.

The Defendants' interpretation of Section 351(a) of the Authorization Act would allow the BRAC Commission to circumvent the requirements of said section and would place conflicting obligations on the Secretary of Defense. Specifically, the BRAC Commission's recommendation to realign the missile work from ANAD to LEAD without implementation of competitive bidding procedures will either require the Secretary of Defense to follow such recommendation thereby violating this Court's injunction and § 351(a), or to refuse to follow such recommendations; however, the Secretary cannot do both. Such an interpretation of Section 351(a) is therefore not reasonable, and thus this Court should find that the BRAC Commission is subject to the requirements of Section 351(a) of the Authorization Act which requires competitive bidding procedures to be implemented in conjunction with any base closure or realignment.

III.

EXTENDING THE SCOPE OF THIS COURT'S PREVIOUS INJUNCTION TO INCLUDE THE BRAC COMMISSION WOULD NOT BE PREMATURE.

The Defendants rely on several cases for their assertions that

extending the scope of this Court's injunction to include the BRAC Commission at this time, would be premature. See Defendants' Reply Memorandum at 7-8 citing Spector v. Garrett, 971 F.2d 936 (3rd Cir. 1992), vacated and remanded, 113 S.Ct. 455 (1992), aff'd. on remand, 995 F.2d 404 (3rd Cir. 1993); Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993). However, the Defendants' reliance on these cases is misplaced and their interpretation of such cases is erroneous.

The Defendants erroneously cite Cohen v. Rice for the proposition that the base closure process is not subject to judicial review under the Administrative Procedure Act. See Defendants' Reply Memorandum at 8. The court in Cohen did not render such a holding. In contrast, the court stated that the actions of the President were not subject to judicial review under the Administrative Procedure Act because the President is not an "agency" within the meaning of the Administrative Procedure Act. Cohen, 992 F.2d at 381, citing Franklin v. Massachusetts, 112 S.Ct. 2767 (1992). The Plaintiffs in the instant action are not challenging the decision of the President. Moreover, on remand from the Supreme Court, the Third Circuit in Spector v. Garrett, held that the President's decision to close a military base under BRAC was subject to judicial review based on the separation of powers doctrine. Spector, 995 F.2d at 408-09.

In both Cohen and Spector, the plaintiffs brought suit to enjoin the closure of military bases under BRAC. In both cases, the plaintiff's basis for relief was that the Secretary of Defense and the BRAC Commission did not comply with the procedural and

substantive requirements of BRAC in recommending the closure of the bases. See Spector, 971 F. 2d at 942; Cohen, 992 F. 2d at 380. In contrast, in the instant action, the Plaintiffs do not allege that either the Secretary of Defense or the BRAC Commission has failed to comply with the requirements of BRAC. Instead, the Plaintiffs argue that the BRAC Commission violated the requirements of Section 351(a) of the Authorization Act by recommending the realignment of missile maintenance work from ANAD to LEAD without competitive bidding procedures. Therefore, the cases on which the Defendants rely are inapplicable since the analysis in such cases was based on the Court's construction of BRAC and not on Section 351(a).

IV.

THE BRAC COMMISSION IS AN AGENT OF, AND/OR ACTED IN CONCERT WITH, THE DEFENDANTS AND THEREFORE FALLS UNDER THE SCOPE OF THIS COURT'S ORDER ENJOINING THE TRANSFER OF TACTICAL MISSILE MAINTENANCE WORK FROM ANAD TO LEAD UNLESS SUCH TRANSFER COMPLIES WITH SECTION 351(a) OF THE AUTHORIZATION ACT.

The recommendation on the part of the BRAC Commission to realign the missile work from ANAD to LEAD without implementation of competitive bidding procedures required under the Authorization Act violates this Court's injunction. The BRAC statute indicates that the Department of Defense set up the BRAC Commission to act in its behalf. See 10 U.S.C. § 2687, note, §§ 2901, et.seq., (Supp. 1993). The Department of Defense did not fully divorce itself from base closures, but rather gave the BRAC Commission the authority to do what the Department of Defense could have done on its own. Id. This clearly satisfies the basic elements of agency wherein a principal gives authority to his agent to act on his behalf.

The close identification in interest between the BRAC Commission and the Sectary of Defense is exemplified in both the activities on the part of the BRAC Commission and in the base closure/realignment process set out in the BRAC statute. This "identification in interest" shows that the BRAC Commission is in "active concert or participation" with the Secretary of Defense. See Peterson v. Fee Int'l. Ltd., 435 F. Supp. 938 (W.D. Okla. 1975); Royal News Co. v. Shultz, 230 F. Supp. 641 (E.D. Mich. 1964).

The Defendants allege that the BRAC Commission "cannot do anything proscribed by the Court's injunction." Defendants' Reply Memorandum at 6. However, such an allegation is erroneous. If the BRAC Commission is not brought within the scope of this Court's injunction, then the Commission's recommendations that the missile maintenance work at ANAD be realigned to LEAD without implementation of competitive bidding procedures will disturb this Court's adjudication of the rights and obligations between the original parties to this Court's injunction and will upset this Court's ability to render a binding judgment. See United States v. Hall, 472 F.2d 261 (5th Cir. 1972). Therefore, the BRAC Commission should be brought under the scope of this Court's previous injunction.

CONCLUSION

Based on the foregoing, this Court should grant the Plaintiffs' Petition and extend the scope of this Court's previous

injunction to apply to the BRAC Commission.

Respectfully submitted,

Charlie D. Waldrep

Thomas L. Stewart

Graham L. Sisson, Jr.

Donald E. Blankenship

Attorneys for Plaintiff, American Federation of Government Employees

OF COUNSEL:

GORHAM & WALDREP, P.C.
2101 Sixth Avenue North
Suite 700
Birmingham, Alabama 35203
(205) 254-3216

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon the following, by placing same in the United States Mail, properly addressed and postage prepaid, this the 17 day of September, 1993.

Jennifer R. Rivera
David J. Anderson
Vincent M. Garvey
Susan L. Korytkowski
Pamela Moreau
Gregory D. Page
United States Department of Justice
Civil Division - Room 1042
901 E. Street N.W.
Washington, D.C. 20530

Of Counsel

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,

PLAINTIFFS,

v.

CV92-PT-2453-E

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

DEFENDANTS.

ENTERED
DEC. 21 1992

FINAL JUDGMENT

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, the court orders, adjudges, declares and decrees as follows:

1. The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot to Letterkenny Army Depot (the court addresses only such subject matter which is before this court) is subject to all the provisions of §351(a) of the National Defense Authorization Act for Fiscal Year 1993, which said provisions are now and have been since the date of the President's signing in full force and effect.

2. The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile

maintenance work or facilities, and jobs and equipment related thereto, located at Anniston Army Depot, to Letterkenny Army Depot or any other depot, base or facility for the purpose of or with the intent of consolidating said tactical missile maintenance work of the Department of the Army, unless and until competitive procedures as provided for in said § 351 (a) are implemented and selection made and action taken accordingly.

3. It is not intended to enjoin any action except that which must be in compliance with the provisions of said § 351(a).

Costs are assessed against the defendants.

The court is amenable, of course, to a consideration of appropriate amendments to this judgment which may be suggested.

DONE and ORDERED this 21 day of December, 1992.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

Document Separator

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

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U.S. DIST. CT.
N.D. OF ALA.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,

PLAINTIFFS,

v.

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

DEFENDANTS.

(CV92-PT-2453-E)

ENTERED

DEC 21 1992

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Facts[2]

This cause came on to be heard on December 15, 1992 at a bench trial and concerns the Army's proposed movement or transfer of missile maintenance work from Anniston Army Depot (ANAD) to Letterkenny Army Depot (LEAD). ANAD is one of a number of depots throughout the United States, each of which is involved in maintaining and supporting various weapons systems of the United States Army. ANAD's mission includes missile systems maintenance

[1]The parties agreed to a consolidation of hearing with trial on merits pursuant to the Fed. R. of Civ. P. 65. The court has expedited its consideration of the case because of the imminence of the proposed consolidation and transfer.

[2]The court will state a brief summary of the facts. The parties have stipulated to certain facts which will not be repeated but are hereby incorporated herein. The parties signed a "Stipulation of Facts" designated as Joint Exhibit 1. To the extent that any facts stated by the court here are in conflict with the stipulated facts, the stipulated facts will govern. Only one witness testified. A number of exhibits have been admitted without objection. The parties have been helpful in narrowing, defining and refining the issues.

work. Other depots performing missile maintenance work include the Red River Army Depot (RRAD), Sacramento Army Depot (SAAD), Letterkenny Army Depot (LEAD) and the Tobyhanna Army Depot (TOAD).

The Department of Defense created a counsel known as the Defense Depot Maintenance Counsel, which on January 18, 1991 prepared a study entitled "DOD Tactical Missile Study". This study recommended that certain missile repair work being performed at the Army Depots referred to above, including a substantial amount of work being conducted at ANAD, be consolidated at LEAD in the State of Pennsylvania. If this report is implemented, any tactical missile maintenance presently being conducted at ANAD would move to LEAD, thereby affecting at least two hundred forty eight civilian jobs presently located at ANAD.[3] The recommendation of the Defense Maintenance Depot Counsel has been proposed to be implemented by the Secretary of Defense by a virtue of a Joint Service Business Plan, dated February 1991, and the Defense Maintenance Counsel Corporate Business Plan, dated May 1991.

The implementation of the consolidation to LEAD was to begin as of October 1, 1992 with the realignment of eleven positions from ANAD to LEAD effective on that date. When the present

[3]The ANAD Environmental Assessment with reference to the purported transfer estimated that two hundred ninety three civilian positions would be affected by the consolidation. Plaintiffs have suggested, but have offered no evidence to support it, that four hundred positions may be affected. In this court's view it is immaterial whether the number is two hundred forty eight or four hundred.

lawsuit was filed, plaintiffs' counsel was contacted by the Justice Department on behalf of the Army and, by letter dated October 22, 1992, plaintiffs were advised that, "the Army has advised us that it will take no actions, other than planning, through the end of this month to implement the transfer of Anniston's missile maintenance mission for consolidation." On October 27, 1992, however, Major General Dennis L. Benchoff sent a Memorandum to ANAD which stated "We are moving ahead with the transition of missile systems into LEAD." He further directed that two pieces of equipment be moved during the week of November 2, 1992. ANAD employees were directed to prepare these two pieces of equipment to be moved to LEAD. They did so on October 28 and/or 29, 1992. The two pieces of equipment were shipped during the week of November 2, 1992.[4]

Conclusions of Law

The issues to be decided by this court are the following:[5]

1. Does the court have the authority to review defendants' actions?

2. Do plaintiffs have standing to maintain their claims?

3. Is the realignment of missile maintenance work from ANAD to LEAD in violation of Section 351(a) of the National

[4]The plaintiffs asked for extraordinary relief and consideration at various stages. Because of agreements between the parties, hearings of these applications were rendered unnecessary. The moving of the two pieces of equipment was not deemed to be critical.

[5]Defendants no longer maintain that either the proposed transfer to LEAD or this action is governed by the Defense Base Closure and Realignment Act of 1990 ("BRAC").

Defense Authorization Act for Fiscal Year 1993 signed by the President on October 23, 1992. This issue involves a determination of whether said § 351(a) was effectively repealed or nullified by Section 9252 of the Defense Appropriations Act for Fiscal Year 1993, signed by the President on October 7, 1992.

4. Have defendants complied with the provisions of the National Environmental Policy Act (NEPA)?[6]

There are some preliminary issues which must be addressed prior to the court's reaching the merits of the plaintiffs' claim(s). These issues have been previously well addressed in County of Seneca v. Cheney, ____ F. Supp.____ (W.D. of NY 1992). ← OPT This court will comment on but not repeat various conclusions of Judge Larimer. Page references are to the original opinion.[7]

1. Justiciability and Authority To Review

Although the defendants now concede that BRAC does not apply to this case, this court generally agrees with and adopts Judge Larimer's "Justiciability" conclusions at pages 18-23. The court

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[6]Plaintiffs now acknowledge that their NEPA claim is limited to asserting that the defendants have not complied with the procedural requirements of NEPA. This position eliminates the necessity for the court to consider an earlier argument of plaintiffs that defendants have not properly considered the socio-economic impact of the move.

[7]The court has been provided with a copy of Judge Larimer's opinion and has been advised that it will be published. The parties have a copy of the opinion. While the issue of whether BRAC applies has been removed from this case, the court calls attention to Judge Larimer's "History of the Base Closure and Realignment Act" at pages 13-17. Also see Specter v. Garrett, 971 F.2d 936, 939-41 (3rd Cir. 1992). The court has been advised by defendants that Specter was vacated on November 9, 1992 and remanded for further consideration in light of Franklin v. Massachusetts, 112 S.Ct. 2767 (1992).

fully agrees with the essence of these conclusions, that is, "when the issues presented by an action involve interpreting legislation and protecting rights believed to have been infringed by an administrative agency's failure to comply with that legislation, the Judiciary is empowered to review the controversy. See 5 U.S.C. § 702." This court also agrees with and adopts Judge Larimer's conclusions with reference to "Judicial Review Under the APA" at pages 24-35.[4]

The thrust of the vacated *Specter* holding is that, while judicial review is prohibited with regard to many military and BRAC Commission discretionary type decisions, it is not prohibited when the allegation is that the defendants failed to follow statutory procedural requirements. Specifically, the court held that district courts can review a claim that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations." *Id.*, at 952. The distinction the court makes is succinctly stated in the

[4]The "Justiciability" and "Judicial Review Under the APA" issues appear to overlap. *See also Specter*, *supra*, at 971 F.2d 942-55. This case does not involve an attempt by plaintiffs to review "the decision making process of the Secretary of Defense." *Id.*, 971 F.2d at 950-52. This action is distinguishable from *Franklin v. Massachusetts*, *supra*. Here there is a final determination by the defendants. It is not merely a recommendation. While this court is well aware of the deference which should and must be shown by courts in reviewing military decisions, such deference does not extend to allowing the Military to interpret statutes as it desires and either complying or not complying with statutes depending upon its own interpretations. This court has previously addressed deference to military decisions in another context in *Steenson v. Marsh*, 609 F. Supp. 800 (N.D.Ala. 1985).

following:

> We admit to some confusion, however, as to whether the plaintiffs are complaining about the failure to transmit the data, or the adequacy of the data to support the recommendations. Based on the foregoing analysis, the former is reviewable by a court, the latter is not. Similar ambiguity can be found in several other of the claims here. For example, plaintiffs charge the Secretary with having failed to publish in the Federal Register as required by the Act "a summary of the selection process" and "a justification for each recommendation." Complaint at 48. If the point here is that there was no publication and the Act required it, this is clearly a reviewable claim. If the point is that the Act requires individual justification and there were none, this again is reviewable. On the other hand, if the point is that the justifications were unpersuasive or inadequately detailed, this is not a judicially reviewable allegation.

Id., at 952.

2. Standing

For reasons stated in both *Specter* and *County of Seneca*, *supra*, the court concludes that the union plaintiff, at least, has standing to bring this action.[5]

3. Authorization Act or Appropriations Act?

On October 23, 1992, President Bush signed into law the "National Defense Authorization Act For Fiscal Year 1993." P.L. 102-484 (Authorization Act). Section 351(a) of that Act provides

[5]Defendants acknowledged at trial that plaintiffs have standing in some areas. The court has not obtained a transcript to determine exactly what the concession is. This court does not view this as a case of broad taxpayer disgruntlement. The plaintiffs clearly have a special interest. Defendants' reference to the holding in *Warth v. Seldin*, 422 U.S. 490, 499 (1975) that "Claims based on a generalized grievance shared in substantially equal measure by all or a large class of citizens are thus nonjusticiable," is inapposite. Plaintiffs do not, as is suggested by defendants, base their claims on "taxpayer status" or expenditure of funds.

as follows:

> (a) COMPETITIVE BIDDING - If the Secretary of Defense takes action to consolidate at a single location the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this Act shall be eligible to compete for such selection.

The defendants have not complied with said section and maintain that it "has no force or effect during fiscal year 1993, as a result of the superseding language in the Appropriations Act." (Emphasis added).

Prior to the signing of the Authorization Act on October 23, 1992, President Bush signed into law the Defense Appropriations Act (Appropriations Act) on or about October 7, 1992. This Act contains language which is arguably in conflict with the Authorization Act. Section 9252 of the Appropriations Act provides in pertinent part as follows:

> Notwithstanding the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition, no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance. For purposes of this Section, this Act shall be treated as having been enacted after the National Defense Authorization Act for Fiscal Year 1993. (Regardless of the actual dates of enactment).

As usual, this court has been dealt the difficult hand which results when Congress does not get its "Act[s]" together. Defendants argue that "The Appropriation Act effectively repeals the corresponding (sic) provision of the Authorization Act. . . . While defendants cite *Morton v. Mancari*, 417 U.S. 535, 551 (1974) for the proposition that, "where two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective", and *Georgia v. Penn. Ry. Co.*, 324 U.S. 439, 456 (1945) for the proposition that "only a clear repugnancy between the old . . . and the new will justify a finding that repeal has occurred", they argue that, here, "the two statutes clearly conflict with each other," and that "the two statutes are not capable of coexistence." Plaintiffs, on the other hand, argue that "the Authorization Act would be controlling, whether or not the Appropriations Act and the Authorization Act are reconcilable or irreconcilable . . . ." All parties acknowledge that they have been unable to find any cases which address an issue exactly like that presented here. Therefore, this court is required to adorn itself with its oracle robe and decide an issue which, realistically, can only be fully decided at the places where finality engenders infallibility.

The court's analysis must begin, of course, with the language of the two statutes. Section 351(a) clearly provides that "If the Secretary of the Defense takes action to consolidate at a single location the performance of depot level tactical

missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures." (Emphasis added). There is no dispute that ANAD was "engaged in tactical missile maintenance on the date of enactment" of § 351(a) and was then and is now "eligible to compete for such selection." There is further no dispute that the "Secretary has tak[en] action to consolidate at a single location [LEAD] the performance of depot level tactical missile maintenance by employees of the Department of Defense." Further, there is no dispute that the "Secretary...[has not]" select[ed] the depot to perform the tactical missile maintenance through the use of competitive procedures."

If it were not for a consideration of the Appropriations Act, it would be absolutely clear that the proposed action of the defendants is not authorized by law and should be enjoined. Obviously, § 9252 of the Appropriations Act must also be considered.[10] That Act states:

> Notwithstanding the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993...no funds appropriated or available to the Department of the Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition no funds shall be made available for depot selection competition to

[10]While the evidence may be unclear as to the actual dates of enrollment of the two Acts in Congress or the actual dates of signing by the President, it is undisputed that the Authorization Act was enrolled in Congress after the Appropriations Act was enrolled in Congress and was signed by the President.

> assess depot level tactical missile maintenance. For purposes of this section, this Act shall be treated as having been enacted after the National Defense Authorization Act for Fiscal Year 1993. (Regardless of the actual dates of enactment).

(Emphasis added).

Obviously, § 351(a) was intended to prohibit the consolidation and transfer unless it was preceded by competitive procedures. Obviously, § 9252 was intended, by at least one Representative, to "trump" § 351(a) to some extent. Interested Congressional Representatives from the ANAD and LRAD areas were obviously attempting to obtain or protect employment in their own areas. One was attempting to require competition, the other to avoid it. The motivation of individual Representatives in seeking enactment of the legislation is, however, not the total issue. The situation does suggest, however, that there was no real "intent" of Congress, only the intent of the individual Representatives.[11] If there had been true intent of Congress, this problem likely would not have arisen. In any event, the court has only the language of the statutes and general, but not clearly applicable, law to consider.

An initial inquiry must be whether the Acts are irreconcilable. If they are not, the court should give effect to both acts if possible. Posadas v. National City Bank, 296 U.S. 497, 503-506 (1936); Sutherland Statutory Construction (4th Ed.), §23:17; Cf. Uniform Law Commissions' Model Statutory Act, 1965 Act, § 17. *Posadas* states:

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[11]The parties have not cited any legislative history.

The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. It will be enough to direct attention to a few of these decisions out of a very large number. In *United States v. Tynen*, 11 Wall. 88, 92, Mr. Justice Field, speaking for the court, after stating the general rule, said that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." It was not meant by this statement to say, as a casual reading of it might suggest, that the mere fact that the latter act covers the whole subject and embraces new provisions demonstrates an intention completely to substitute the latter act for the first. This is made apparent by the decision in *Henderson's Tobacco*, at the same term, 11 Wall. 652, 657, where, in an opinion delivered by Mr. Justice Strong, it is said, "But it must be observed that the doctrine [of the *Tynen* case] asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

> These two cases, with others, are briefly reviewed by this Court in *Red Rock v. Henry*, 106 U.S. 596, 601, by Justice Woods, and the court's conclusion stated as follows:
>
> > The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.
>
> The implication of which the cases speak must be a necessary implication. *Wood v. United States*, 16 Pet. 342, 362-363. It is not sufficient, as was said by Mr. Justice Story in that case, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." The question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention.
>
> . . . .

(Emphasis added in part). *Id.*, at 603-04.

Another way of saying the same thing is that it is assumed that Congress intended to enact an effective law. See Uniform Statutory Construction Act § 13(2). Congress is not to be presumed to have done a vain thing in enacting the statute. *See Imperial Production Corp v. Sweetwater*, 210 F.2d 917, 920 (5th Cir. 1954). *See also U.S.A. v. Jordan*, 915 F.2d 622 (11th Cir. 1990). Interpretation and construction which would defeat, nullify, destroy, repeal, emasculate or render statutory provisions insignificant, meaningless, inoperative, or nugatory should be avoided. *Armstrong Paint and Varnish Works v. Nu-*

Enamel Corp, 305 U.S. 315 (1938); *Crowell v. Benson*, 285 U.S. 22 (1932); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *U.S. v. Powers*, 307 U.S. 214 (1939). When separate statutes are involved, they should be construed, if possible, to give full force and effect to each and all. *U.S. v. Borden Co.*, 308 U.S. 188 (1939). In the absence of clearly expressed Congressional intention to the contrary, courts should regard each statute as effective. *Andrus v. Glover Const. Co.* 446 U.S. 608 (1980). Constructions should be avoided which frustrate or thwart the purposes of statutes. *Helvering v. Fammel*, 311 U.S. 504 (1941).

The defendants' construction would clearly and totally nullify or thwart § 351(a). Competitive procedures would not, of necessity, "prevent" a transfer to Letterkenny. Whether they would delay it is a matter of degree. There is no evidence that prior to this time, such procedures could not have already been implemented with no more delay than there has been. The purpose of § 9252's "prevent and delay" provision could have perhaps been preserved even in the face of § 351(a). If the intent of § 9252 is to preclude funds for competitive procedures, the consolidation action arguably cannot take place in FY 93. That does not mean that the requirement of competitive procedures, if and when consolidation does occur, is nullified.

In this court's view, the Acts are not irreconcilable. § 351(a) merely provides that "If the Secretary of Defense takes action to consolidate...." (Emphasis added). It does not mandate

that such action be taken.[12] It clearly provides that if the action is taken, The selection must be through the use of competitive procedures.

Neither does § 9252 either mandate nor prohibit such consolidation action. It says that "no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance." (Emphasis added). Considering only the immediately foregoing language of § 9252, the Acts are not irreconcilable. The circumstance would be no different than in a myriad of other situations in which an action has been authorized, with or without condition, but no funds are available during a particular fiscal year to implement the authorized act and/or condition.[13] Defendants stated in briefs that their position is that "the Authorization Act has no force or effect during the fiscal year 1993 as a result of the superseding language of the Appropriation Act." (Emphasis added). This suggests that § 351(a) is not nullified or repealed or meaningless, only that its condition cannot be implamented during FY 93. [14]

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[12]It does, by implication, authorize the action if the condition is met.

[13]The situation is analogous to an Authorization Act's authorization of a post office and an Appropriation Act's saying "not this year". The authorization does not go away.

[14]If the transfer to LEAD takes place without competitive procedures, § 351(a) will be effectively nullified, not by Congress, but by the Executive. While the Executive Department has considerable authority, through the President as Commander in Chief, it is clear that Congress has the final legislative authority. Thus, BRAC 90 itself

It is not clear what was intended by directing no funds be available to "prevent or delay the transfer." It would not actually take funds to "prevent or delay" the consolidation because the consolidation has not been required or mandated by any statute. If the defendants simply failed to carry out such a consolidation it would "prevent or delay" it, but their doing so would not conflict with any statute that requires such a consolidation. If any provision should be deemed a nullity, it is the "prevent and delay" provision. It is basically meaningless. § 351(a) is totally clear. In order of meaningfulness, the court ranks § 351(a) first, the funds available for "depot selection competition" clause second, and the "delay or prevent" clause last, if meaningful at all. Consolidation action is not required or mandated by any statute. If such action is taken, selection must be through competitive procedures. The court does not decide if funds are available for such procedures.

After making reference to non-availability of funds to prevent or delay, § 9252 continues with "and in addition, no funds shall be made available...." (Emphasis added). The Act does not say "including" funds for depot selection competition. The depot selection competition provision in § 9252 is in addition to the prevent and delay provision. No evidence has been offered, or suggestion made otherwise, as to how funds could be made available or used to prevent or delay a transfer.

There is no evidence that, if promptly undertaken, any competitive bid procedures would have delayed or prevented any transfer to Letterkenny. Construed reasonably in order to avoid the absurdity that § 351(a) was null ab initio, the two acts read together would provide, in paraphrased summary, that "no tactical missile maintenance consolidation will take place at a single depot unless and until the depot is selected through competitive procedures. If Letterkenny is or has been thus selected, no funds will be made available to prevent or delay the transfer. For FY 93 no funds will be made available to conduct any such competitive procedures, thus no consolidation action can be taken during FY 93 unless and until such funds are available. This view is not as absurd as assuming that § 351(a) was stillborn when it was enacted last, with Congress having knowledge of § 9252.

Section 9252 does not state that the transfer will not be prevented or delayed. It does not purport to either repeal or amend, by anticipation or otherwise, § 351(a). The anticipatory language in § 9252 has no effect if the statutes are not deemed to be in irreconcilable conflict. If they are so deemed, the court has been cited no authority with respect to a similar situation. § 9252 merely provides that funds will not be made available for the purposes designated. The court considers that the two Acts are not irreconcilable and can be reasonably construed so as to give effect to each, albeit perhaps creating at least a temporary stalemate with regard to defendants'

intentions, not those of Congress. Arguably, funds to conduct the competitive procedures could be available in FY 93 if the Appropriations Act is amended.[15]

The only clear expression is in § 351(a). It is clear in that section that Congress does not intend such a consolidation to take place unless and until competitive bid procedures are followed. Defendants themselves argued that:

> Where Congress' intent is plain on the face of the statute, no further inquiry is needed. The first canon of statutory construction is that 'courts must presume that a legislature says what it means in a statute what it says there.'" *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992); ... When, as here, the words of the statute are unambiguous, 'this first canon is also the last: 'judicial inquiry is complete.

What could be clearer than a statement that "if the Secretary takes action to consolidate..., the Secretary shall select the depot...through the use of competitive procedures." (Emphasis added). If that expression is not given significance, § 351(a) is a total nullity. If the consolidation takes place in FY 93 without competitive procedures, the clearest expression of Congress would be thwarted. § 9252 does not make it clear, certainly not manifestly so, that § 351(a) is to be totally nullified, repealed, or thwarted. It totally relates to the

[15]Defendants have suggested that if this court concludes that the Authorization Act has not been superseded, it can proceed with the competitive procedures. (P.8 of Dx 23). Defendants also argue that a conclusion of this court that the Authorization Act controls "would require a finding (sic) that the Authorization Act repealed the Appropriations Act provision." This court has not been called upon to decide those issues and does not reach them.

availability of funds during FY 93. It is arguable that § 9252 is in conflict with itself by presently denying funds for competitive procedures and purportedly, at the same time, prohibiting delay. It does not repeal § 351(a), it says notwithstanding § 351(a). The use of the term "notwithstanding" connotes continued viability. The expression that "if" this is done certain action will be taken is certainly clearer than the expression that "...no funds will be made available."

This court cannot attribute to Congress the absurdity of saying, we are enacting § 351(a), but, immediately upon passage it is a nullity and has no force and effect. § 9252 itself contemplated the later (chronologically) passage of § 351(a). It would be absurd to say that a contemplated Act would be enacted with no intended effect whatsoever.

If an absurdity is to be avoided, it must be assumed that if Congress had intended § 351(a) to have no effect, it would have either not enacted it or stated clearly in § 9252 that it would be null and void upon enactment. The court cannot conclude, as was suggested by defendants at the trial, that Congress simply didn't know What it was doing and enacted a senseless expression of no effect. The more reasonable construction is that Congress intended a delay in funding. In *Graham & Foster v. Goodcell*, 282 U.S. 409, 425-26 (1931), the Court stated:

> The familiar principle that repeal will not be implied unless there is a positive repugnance between the provisions of the new law and those of the old, has most appropriate application, as stated by Mr. Justice Story, to the interpretation of laws for the collection of revenue..., and the presumption against such an

> intention to repeal is strongest when the two acts are passed not only in the same session but on the same day... In the present instance there is not irreconcilable conflict between the two provisions. Section 611 established a special rule for a particular situation in order to embody a policy deliberately adopted by the Congress, and there is no ground for concluding that contemporaneously with that enactment the policy was abandoned and the enactment repealed. (Emphasis added).

While this court primarily bases its decision on a conclusion that each Act can be given effect, if the Acts are deemed to be irreconcilable, it would appear that general law still favors the plaintiffs. A similar issue in a situation in which there appeared to be an irreconcilable conflict between an appropriations act and an authorization act was addressed in a letter from the Comptroller General to the Secretary of Defense Cheney dated March 2, 1992.

Interestingly, the two acts which the Comptroller General was considering were Department of Defense 1992 Appropriations Act and the National Defense Authorization Act for Fiscal Years 1992 and 1993. The same type political in-fighting was apparently implicated. It would appear that two competing contractors each had their own respective Congressional advocate.

The Appropriations Act provided:

> None of the funds in this Act may be used to execute a contract for the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Reform Initiative that exceeds the total fiscal year 1987 costs for CHAMPUS care provided in California and Hawaii, plus normal and reasonable adjustments for price and program growth: Provided, That notwithstanding any other provision of law, the CHAMPUS Reform Initiative contract for California and Hawaii shall be extended until February 1, 1994, within the limits and rates specified in the contract. . . ." (Emphasis added).

The Authorization Act provided:

> (a) AUTHORITY. -- Upon the termination (for any reason) of the contract of the Department of this Act under the CHAMPUS reform initiative established under section 702 of the National Defense Authorization Act for Fiscal Year 1987 (10 U.S.C. 1073 note), the Secretary of Defense may enter into a replacement or successor contract with the same or a different contractor and for such amount as may be determined in accordance with applicable procurement laws and regulations and without regard to any limitation (enacted before, on, or after the date of the enactment of this Act) on the availability of funds for that purpose. (Emphasis added).
>
> (b) TREATMENT OF LIMITATION ON FUNDS FOR PROGRAM. -- No provision of law stated as a limitation on the availability of funds may be treated as constituting the extension of, or as requiring the extension of, any contract under the CHAMPUS reform initiative that would otherwise expire in accordance with its terms.

The Comptroller General recognized the conflict, saying:

> However, the provisions are not easily reconciled. The Appropriations Act directs the Department to extend the existing contract through January 1994, while the Authorization Act would prohibit the Department from giving effect to that direction.

He further recognized that ploy, not intent, was at work, saying:

> The legislative history indicates that, in fact, reconciliation of the two provisions was not the intention of the drafters. The appropriations bill was an apparent effort to counteract the effect of the authorization bill, just as the authorization bill appears to have been directed at overcoming the original version of the appropriation.
>
> * * *
>
> Statements in the legislative history of the two bills make explicit what this sequence of events suggests, that the object of the provision in each bill was to counter the effect of the provision in the other bill. As one of the sponsors of the Authorization Act provision, speaking of the final versions of the provisions, said, "The two provisions are directly at odds. In essence, it is the intent of each provision to repeal the other and substitute its own direction to

> the Secretary. . . ." 137 Cong. Rec. S18, 555 (daily ed. Nov. 26, 1991) (statement of Sen. McCain). *See also* 137 Cong. Rec. S17, 635 (daily ed. Nov. 22, 1991).

Even though the final Congressional action was taken on the Appropriations Act first,[16] the Comptroller General, whose views of federal statutory construction should be considered persuasive, stated that the "Department should consider the Authorization Act provision as controlling" because the President signed it last." (Emphasis added).

The Comptroller General based his conclusion on the following:

> Final congressional action on the Authorization Act took place first, one day before final action on the Appropriations Act. The President acted in the opposite order, signing the Appropriations Act on November 26 and the Authorization Act 9 days later on December 5, 1991.
>
> . . .
>
> If two statutes are irreconcilable, the general rule is that, to the extent of the conflict, the more recent statute controls. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1939). This rule is ordinarily applied on the basis of the sequence in which the two provisions become law, typically upon approval by the President. *Gardner v. Barney*, 6 Wall. 499, 504; 18 L.Ed. 890, 891 (1868) ("The date of the President's approval of the bill is undoubtedly the date at which it became a law. . . ."); *Louisville v. Savings Bank*, 104 U.S. 469, 479 (1881)("We look to the final act of approval by the executive to find when the statute took effect. . . .")
>
> We considered whether the order of congressional action on the two bills, which was the opposite of the sequence of presidential signatures, could affect the outcome. However, bills, before they become law, can have no legal effect on each other. It is only when

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[16]It is in Congress that whatever intent there was would presumably lie.

> they are approved by the President that they have legal force and effect, and therefore only then that one can be said to supersede the other. Moreover, in this case, the order of congressional action does not appear to be a reliable guide to congressional intent. These bills were passed within a day of each other, as part of a hurried effort to provide funding for most of the government for the remainder of the fiscal year and to end the congressional session, with no indication that the order of passage was anything but accidental.
>
> It is therefore our view that the Department should consider the Authorization Act provision as controlling. Under this view, the Department can proceed with the competition for the CRI contract which Department representatives told us they would prefer.

While the view of the Comptroller General may be somewhat mechanical, it comports with general law. In Sutherland Statutory Construction, § 23.17, it is stated:

> In the absence of an irreconcilable conflict between two acts of the same session, each will be construed to operate within the limits of its own terms in a manner not to conflict with the other.
>
> However, when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms.
>
> Because the latest expression of the legislative will prevails, the statute last passed will prevail over a statute passed prior to it, irrespective of the time of taking effect. Where two acts of the same session take effect at the same time, the latest passed will prevail. Where two acts are enacted on the same day, but take effect on different days, it is the date of the enactment that controls.[17]

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[17]Sutherland also states:
Other courts have eschewed a mechanical approach to the problem of resolving conflict between statutes enacted by the same legislative authority, and have sought to give effect to the legislative intent irrespective of the chronology of different enactments.
Id. at 23.17.

Most cases which consider implied repeal of other statutes, are considering circumstances in which the last enacted statute is said to have impliedly repealed an earlier statute. This court has not been cited nor found a case which involves a consideration of an earlier enacted statute purportedly repealing provisions of a later enacted statute.

While the appropriate decision may be less clear if the Acts are considered to be irreconcilable, this court would still hold that § 351(a) remains effective even after such a determination. *Cf.* Uniform Laws Annotated, Statutory Construction, § 18. ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.") In *New York Airways, Inc. v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966), the court stated:

> As a general proposition Congress has the power to amend substantive legislation for a particular year by an appropriation act, although such procedure is considered undesirable legislative form and subject to a point of order. An amendment will not readily be inferred. The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest. The application of the limitation in the appropriation provision to a single year suggests that no change in substantive law was intended. *NLRB v. Thompson Products*, 141 F.2d 794 (C.A. 9, 1944). "Repeals by implication are not favored", it is ruled in United States v. Langston, 118 U.S. 389, 393, 6 S.Ct. 1185, 1187, 30 L.Ed. 164 (1886), where our Minister to Haiti was found entitled to his statutory salary despite the terms of an appropriation act providing funds for a lower salary and declaring that "all acts, or parts of acts, inconsistent or in conflict therewith, or which allow a larger salary to any officer or employee herein named, shall be, and are hereby, repealed." *Id.* at 391, 6 S.Ct. at 1186. The intention to repeal substantive law was more manifest in the *Langston* case than in the provision of the appropriation act quoted above placing a purported

> ceiling on helicopter subsidies for the fiscal year 1965, yet it was held not sufficient to accomplish a repeal.

There is perhaps even more reason to apply the more objective standards of "last enacted prevails" and/or the requirement of a "clear manifestation of intent to repeal" when the legislation is more significantly influenced by individual Congressmen than by the "intent" of Congress. This court should give greater consideration to whether there are conflicts in the statutes than to whether there are conflicts between Congressmen.

There is general law to the effect that specific statutes are not considered nullified by general statutes, regardless of priority of enactment, absent clear intention otherwise. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). Here there is no indication that the pertinent provisions of either Act are general. At the time § 351(a) was enacted there was only one pertinent missile maintenance program which could have been consolidated. It is not less specific to refer to the tallest monument in Washington, D.C., than it is to refer to the Washington Monument. Although § 9252 specifically refers to Letterkenny and § 351(a) does not, one would have to be blind not to see that § 351(a) relates to a specific circumstance. They both specifically deal with the same subject matter. Section 351(a) specifically requires competitive procedures, while § 9252 specifically forbids the availability of funds in the same specific area.

Section 9252 does not specifically repeal the competitive procedure requirement and such repeal should not be implied. *Rembold v. Pacific First Federal Sav. Bank*, 798 F.2d 1307 (9th Cir. 1986) and *U.S. v. Joya-Martinez*, 947 F.2d 1141 (4th Cir. 1991). In any event, the proposition that a specific statute controls a general statute applies only when the statutes are irreconcilable. *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528 (2d Cir. 1991); *Int. Ass'n of Mach. & Aerospace Wkrs. Lodge 751 v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987). It is reasonably arguable that § 351(a)'s provisions that "if the Secretary of Defense takes action . . . ., the Secretary shall select the depot . . . " are the more specific of the provisions in the two statutes. The provisions of § 9252 are perhaps not clear enough to be specific.

This court primarily concludes that there is no irreconcilable conflict between the pertinent provisions of the two Acts. Thus the court is required to give effect to both Acts. This effect is that the clear intent of Congress in Act 351(a) is to require competitive procedures if there is to be a consolidation action. At best, the intent in § 9252 is to not provide funds for such competitive procedures. If this creates a present stalemate, so be it.[11]

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[11]The court has read the cases cited by defendants on pages 10-11 of Def. Ex. 23 and concludes that only a strained consideration of those cases and these claims could result in the application of those cases here.

This court is very reluctant to interfere with a military decision which could possibly save this country substantial funds. It is not this court which has made that decision. Congress made the decision in enacting § 351(a). It is not the role of this court to determine the wisdom of that legislation. It would be putting the cart before the horse for this court to reach a conclusion which merely accommodates defendants' plans. Plaintiffs are entitled to an injunction with reference to their claim pursuant to said § 351(a).[19]

4. NEPA

The National Environmental Policy Act (NEPA) was signed into law in 1970. The purpose of the NEPA, as enunciated in § 2 of the Act itself, was to provide a central clearinghouse and central watchdog to handle environmental concerns that initiated or evolved into national problems and to oversee the protection of the natural environment. Specifically, § 2 of the Act reads,

> (t)he purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation. . . .

Under Section 103 of the NEPA, all agencies of the federal government are required to review their present statutory authority, administrative regulations, and current policies and

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[19]It is clear that the consolidation action will proceed in the absence of an injunction.

procedures with the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act. NEPA, therefore, specifically mandates that all Federal and State agencies abide by its guidelines. Being all inclusive, the U. S. Department of Defense, and therefore, the Army is under the auspices of the NEPA.[20]

32 CFR § 214 and 32 CFR § 651 *et seq.* detail the environmental requirements of U.S. Army actions. One of the stated policies of the Department of Defense is to "insure . . . that, in carrying out its mission of providing for the national defense, it does so in a manner consistent with national environmental policies . . . ." § 214.3. Those policies are fully detailed in the National Environmental Policy Act. Thus, the Army, in one of several stated policies, submits itself to NEPA authority. Since this is not a BRAC-91 decision, all NEPA guidelines must be met.

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[20]At § 2906 part C, BRAC-91 states "[t]he provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in Paragraph 2, the Department of Defense in carrying out this part. . . ." Therefore, except for certain provisions concerning property disposal and the relocation of functions, NEPA does not apply to BRAC. BRAC, of course, is not applicable here.

Plaintiffs have made little significant effort to prove their NEPA claims. No 37 of the Stipulation of Facts (Joint Ex.1) refers only to "the human environment." "Human environment" is defined at 40 CFR 1508.14. Plaintiffs have not offered any evidence by stipulation of fact or otherwise, except as may be reflected in exhibits, of any purported effect on the "human environment."

Unlike with the Authorization Act claim, the court has a significant doubt about the standing of the plaintiffs. The thrust of plaintiffs' NEPA claim, as alleged in their complaint, is that defendants were required to prepare an environmental impact statement (EIS) as opposed to an Environmental Assessment (EA). The plaintiffs have offered no evidence which rebuts the contents of the EA's which were prepared and acknowledge that their claims are based on procedural, not substantive defects. At trial they ultimately acknowledge that their claims are based solely on the argument that in either EA('s) or EIS('s), the defendants should have addressed the cumulative effects of the total consolidation, including, presumably, environmental effects at all depots which could be affected by the proposed consolidation.[21] The court finds no authority to support such a claim.

Plaintiffs have offered no evidence that the proposed action "significantly affect[s] the quality of the human environment." 42 U.S. 4332(C). Plaintiffs have offered no evidence to rebut

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[21]Of course, separate EA's were prepared for ANAD and LEAD.

the findings and conclusions in the EA's which have been prepared. This court does not construe the "cumulative impact" provision at 40 CFR § 1508.7 in the fashion suggested by plaintiffs. There is nothing in that provision to suggest that it addresses a number of geographic "environment[s]." This court sees no need to fully recite all the applicable provisions, but merely calls attention to 40 C.F.R. 1508.1 through 1508.14 to support its conclusion that plaintiffs have not met their burden with reference to a NEPA claim.

There is no evidence of significant physical effects or environmental consequences at ANAD, LEAD or any other pertinent depot or depots in combination. Plaintiffs have not suggested any harm or possible harm to the individual plaintiff or to the union members.[2] While it is not necessary that the court reach the NEPA issue, it has done so and has concluded that plaintiffs cannot recover on that claim. The plaintiffs have not well-developed the claim and the court has responded in like fashion.[3]

A separate judgment granting plaintiffs' request for an injunction based on their Authorization Act claim will be entered.

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[2]One individual plaintiff requested dismissal of his claim(s).

[3]Plaintiffs have relied upon 40 C.F.R. 1508.7 and 40 C.F.R. 1508 27(b). This court finds no support in said provisions under the evidence in this case.

This 21 day of December, 1992.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

Document Separator

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

92 DEC 21 PM 3:39
U.S. DISTRICT COURT
N.D. OF ALABAMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1946, and PATRICIA S. WHITE,

PLAINTIFFS,

v.

CV92-PT-2453-E

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

DEFENDANTS.

ENTERED
DEC. 21 1992

FINAL JUDGMENT

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, the court orders, adjudges, declares and decrees as follows:

1. The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot to Letterkenny Army Depot (the court addresses only such subject matter which is before this court) is subject to all the provisions of §351(a) of the National Defense Authorization Act for Fiscal Year 1993, which said provisions are now and have been since the date of the President's signing in full force and effect.

2. The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile

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ENTERED

DEC 21 1992

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Facts[2]

This cause came on to be heard on December 15, 1992 at a bench trial and concerns the Army's proposed movement or transfer of missile maintenance work from Anniston Army Depot (ANAD) to Letterkenny Army Depot (LEAD). ANAD is one of a number of depots throughout the United States, each of which is involved in maintaining and supporting various weapons systems of the United States Army. ANAD's mission includes missile systems maintenance

[1]The parties agreed to a consolidation of hearing with trial on merits pursuant to the Fed. R. of Civ. P. 65. The court has expedited its consideration of the case because of the imminence of the proposed consolidation and transfer.

[2]The court will state a brief summary of the facts. The parties have stipulated to certain facts which will not be repeated but are hereby incorporated herein. The parties signed a "Stipulation of Facts" designated as Joint Exhibit 1. To the extent that any facts stated by the court here are in conflict with the stipulated facts, the stipulated facts will govern. Only one witness testified. A number of exhibits have been admitted without objection. The parties have been helpful in narrowing, defining and refining the issues.

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lawsuit was filed, plaintiffs' counsel was contacted by the Justice Department on behalf of the Army and, by letter dated October 22, 1992, plaintiffs were advised that, "the Army has advised us that it will take no actions, other than planning, through the end of this month to implement the transfer of Anniston's missile maintenance mission for consolidation." On October 27, 1992, however, Major General Dennis L. Benchoff sent a Memorandum to ANAD which stated "We are moving ahead with the transition of missile systems into LEAD." He further directed that two pieces of equipment be moved during the week of November 2, 1992. ANAD employees were directed to prepare these two pieces of equipment to be moved to LEAD. They did so on October 28 and/or 29, 1992. The two pieces of equipment were shipped during the week of November 2, 1992.[4]

Conclusions of Law

The issues to be decided by this court are the following:[5]

1. Does the court have the authority to review defendants' actions?

2. Do plaintiffs have standing to maintain their claims?

3. Is the realignment of missile maintenance work from ANAD to LEAD in violation of Section 351(a) of the National

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[4]The plaintiffs asked for extraordinary relief and consideration at various stages. Because of agreements between the parties, hearings of these applications were rendered unnecessary. The moving of the two pieces of equipment was not deemed to be critical.

[5]Defendants no longer maintain that either the proposed transfer to LEAD or this action is governed by the Defense Base Closure and Realignment Act of 1990 ("BRAC").

fully agrees with the essence of these conclusions, that is, "when the issues presented by an action involve interpreting legislation and protecting rights believed to have been infringed by an administrative agency's failure to comply with that legislation, the Judiciary is empowered to review the controversy. See 5 U.S.C. § 702." This court also agrees with and adopts Judge Larimer's conclusions with reference to "Judicial Review Under the APA" at pages 24-35.[4]

The thrust of the *Specter* holding is that, while judicial review is prohibited with regard to many military and BRAC Commission discretionary type decisions, it is not prohibited when the allegation is that the defendants failed to follow statutory procedural requirements. Specifically, the court held that district courts can review a claim that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations." *Id.*, at 952. The distinction the court makes is succinctly stated in the

[4]The "Justiciability" and "Judicial Review Under the APA" issues appear to overlap. *See also Specter, supra*, at 971 F.2d 942-55. This case does not involve an attempt by plaintiffs to review "the decision making process of the Secretary of Defense." *Id.*, 971 F.2d at 950-52. This action is distinguishable from *Franklin v. Massachusetts, supra*. Here there is a final determination by the defendants. It is not merely a recommendation. While this court is well aware of the deference which should and must be shown by courts in reviewing military decisions, such deference does not extend to allowing the Military to interpret statutes as it desires and either complying or not complying with statutes depending upon its own interpretations. This court has previously addressed deference to military decisions in another context in *Steenson v. Marsh*, 609 F. Supp. 800 (N.D.Ala. 1985).

as follows:

> (a) COMPETITIVE BIDDING - If the Secretary of Defense takes action to consolidate at a single location the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this Act shall be eligible to compete for such selection.

The defendants have not complied with said section and maintain that it "has no force or effect during fiscal year 1993, as a result of the superseding language in the Appropriations Act." (Emphasis added). Δ5

Prior to the signing of the Authorization Act on October 23, 1992, President Bush signed into law the Defense Appropriations Act (Appropriations Act) on or about October 7, 1992. This Act contains language which is arguably in conflict with the Authorization Act. Section 9252 of the Appropriations Act provides in pertinent part as follows:

> Notwithstanding the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition, no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance. For purposes of this Section, this Act shall be treated as having been enacted after the National Defense Authorization Act for Fiscal Year 1993. (Regardless of the actual dates of enactment).

missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures." (Emphasis added). There is no dispute that ANAD was "engaged in tactical missile maintenance on the date of enactment" of § 351(a) and was then and is now "eligible to compete for such selection." There is further no dispute that the "Secretary has tak[en] action to consolidate at a single location [LEAD] the performance of depot level tactical missile maintenance by employees of the Department of Defense." Further, there is no dispute that the "Secretary...[has not] select[ed] the depot to perform the tactical missile maintenance through the use of competitive procedures."

No compet procedure —

If it were not for a consideration of the Appropriations Act, it would be absolutely clear that the proposed action of the defendants is not authorized by law and should be enjoined. Obviously, § 9252 of the Appropriations Act must also be considered.[10] That Act states:

> Notwithstanding the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993...no funds appropriated or available to the Department of the Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition no funds shall be made available for depot selection competition to

[10]While the evidence may be unclear as to the actual dates of enrollment of the two Acts in Congress or the actual dates of signing by the President, it is undisputed that the Authorization Act was enrolled in Congress after the Appropriations Act was enrolled in Congress and was signed by the President after the Appropriations Act was signed by the President.

The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

intention to repeal must be clea

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. It will be enough to direct attention to a few of these decisions out of a very large number. In *United States v. Tynen*, 11 Wall. 88, 92, Mr. Justice Field, speaking for the court, after stating the general rule, said that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." It was not meant by this statement to say, as a casual reading of it might suggest, that the mere fact that the latter act covers the whole subject and embraces new provisions demonstrates an intention completely to substitute the latter act for the first. This is made apparent by the decision in *Henderson's Tobacco*, at the same term, 11 Wall. 652, 657, where, in an opinion delivered by Mr. Justice Strong, it is said, "But it must be observed that the doctrine [of the *Tynen* case] asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

Enamel Corp, 305 U.S. 315 (1938); Crowell v. Benson, 285 U.S. 22 (1932); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); U.S. v. Powers, 307 U.S. 214 (1939). When separate statutes are involved, they should be construed, if possible, to give full force and effect to each and all. U.S. v. Borden Co., 308 U.S. 188 (1939). In the absence of clearly expressed Congressional intention to the contrary, courts should regard each statute as effective. Andrus v. Glover Const. Co. 446 U.S. 608 (1980). Constructions should be avoided which frustrate or thwart the purposes of statutes. Helvering v. Hammel, 311 U.S. 504 (1941).

The defendants' construction would clearly and totally nullify or thwart § 351(a). Competitive procedures would not, of necessity, "prevent" a transfer to Letterkenny. Whether they would delay it is a matter of degree. There is no evidence that prior to this time, such procedures could not have already been implemented with no more delay than there has been. The purpose of § 9252's "prevent and delay" provision could have perhaps been preserved even in the face of § 351(a). If the intent of § 9252 is to preclude funds for competitive procedures, the consolidation action arguably cannot take place in FY 93. That does not mean that the requirement of competitive procedures, if and when consolidation does occur, is nullified.

In this court's view, the Acts are not irreconcilable. § 351(a) merely provides that "If the Secretary of Defense takes action to consolidate...." (Emphasis added). It does not mandate

It is not clear what was intended by directing no funds be available to "prevent or delay the transfer." It would not actually take funds to "prevent or delay" the consolidation because the consolidation has not been required or mandated by any statute. If the defendants simply failed to carry out such a consolidation it would "prevent or delay" it, but their doing so would not conflict with any statute that requires such a consolidation. If any provision should be deemed a nullity, it is the "prevent and delay" provision. It is basically meaningless. § 351(a) is totally clear. In order of meaningfulness, the court ranks § 351(a) first, the funds available for "depot selection competition" clause second, and the "delay or prevent" clause last, if meaningful at all. Consolidation action is not required or mandated by any statute. If such action is taken, selection must be through competitive procedures. The court does not decide if funds are available for such procedures.

After making reference to non-availability of funds to prevent or delay, § 9252 continues with "and in addition, no funds shall be made available...." (Emphasis added). The Act does not say "including" funds for depot selection competition. The depot selection competition provision in § 9252 is in addition to the prevent and delay provision. No evidence has been offered, or suggestion made otherwise, as to how funds could be made available or used to prevent or delay a transfer.

intentions, not those of Congress. Arguably, funds to conduct the competitive procedures could be available in FY 93 if the Appropriations Act is amended.[15]

The only clear expression is in § 351(a). It is clear in that section that Congress does not intend such a consolidation to take place unless and until competitive bid procedures are followed. Defendants themselves argued that:

> Where Congress' intent is plain on the face of the statute, no further inquiry is needed. The first canon of statutory construction is that 'courts must presume that a legislature says what it means in a statute what it says there.'" *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992); ... When, as here, the words of the statute are unambiguous, 'this first canon is also the last: 'judicial inquiry is complete.

D51

What could be clearer than a statement that "if the Secretary takes action to consolidate..., the Secretary shall select the depot...through the use of competitive procedures." (Emphasis added). If that expression is not given significance, § 351(a) is a total nullity. If the consolidation takes place in FY 93 without competitive procedures, the clearest expression of Congress would be thwarted. § 9252 does not make it clear, certainly not manifestly so, that § 351(a) is to be totally nullified, repealed, or thwarted. It totally relates to the

[15]Defendants have suggested that if this court concludes that the Authorization Act has not been superseded, it can proceed with the competitive procedures. (P.8 of Dx 23). Defendants also argue that a conclusion of this court that the Authorization Act controls "would require a finding (sic) that the Authorization Act repealed the Appropriations Act provision." This court has not been called upon to decide those issues and does not reach them.

> intention to repeal is strongest when the two acts are passed not only in the same session but on the same day... In the present instance there is not irreconcilable conflict between the two provisions. Section 611 established a special rule for a particular situation in order to embody a policy deliberately adopted by the Congress, and there is no ground for concluding that contemporaneously with that enactment the policy was abandoned and the enactment repealed. (Emphasis added).

While this court primarily bases its decision on a conclusion that each Act can be given effect, if the Acts are deemed to be irreconcilable, it would appear that general law still favors the plaintiffs. A similar issue in a situation in which there appeared to be an irreconcilable conflict between an appropriations act and an authorization act was addressed in a letter from the Comptroller General to the Secretary of Defense Cheney dated March 2, 1992.

Interestingly, the two acts which the Comptroller General was considering were Department of Defense 1992 Appropriations Act and the National Defense Authorization Act for Fiscal Years 1992 and 1993. The same type political in-fighting was apparently implicated. It would appear that two competing contractors each had their own respective Congressional advocate.

The Appropriations Act provided:

> None of the funds in this Act may be used to execute a contract for the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Reform Initiative that exceeds the total fiscal year 1987 costs for CHAMPUS care provided in California and Hawaii, plus normal and reasonable adjustments for price and program growth: Provided, That notwithstanding any other provision of law, the CHAMPUS Reform Initiative contract for California and Hawaii shall be extended until February 1, 1994, within the limits and rates specified in the contract. . . ." (Emphasis added).

the Secretary. . . ." 137 Cong. Rec. S18, 555 (daily ed. Nov. 26, 1991) (statement of Sen. McCain). *See also* 137 Cong. Rec. S17, 635 (daily ed. Nov. 22, 1991).

Even though the final Congressional action was taken on the Appropriations Act first,[16] the Comptroller General, whose views of federal statutory construction should be considered persuasive, stated that the "Department should consider the Authorization Act provision as controlling" because the President signed it last." (Emphasis added).

The Comptroller General based his conclusion on the following:

> Final congressional action on the Authorization Act took place first, one day before final action on the Appropriations Act. The President acted in the opposite order, signing the Appropriations Act on November 26 and the Authorization Act 9 days later on December 5, 1991.
>
> . . .
>
> If two statutes are irreconcilable, the general rule is that, to the extent of the conflict, the more recent statute controls. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1939). This rule is ordinarily applied on the basis of the sequence in which the two provisions become law, typically upon approval by the President. *Gardner v. Barney*, 6 Wall. 499, 504; 18 L.Ed. 890, 891 (1868) ("The date of the President's approval of the bill is undoubtedly the date at which it became a law. . . ."); *Louisville v. Savings Bank*, 104 U.S. 469, 479 (1881)("We look to the final act of approval by the executive to find when the statute took effect. . . .")
>
> We considered whether the order of congressional action on the two bills, which was the opposite of the sequence of presidential signatures, could affect the outcome. However, bills, before they become law, can have no legal effect on each other. It is only when

[16]It is in Congress that whatever intent there was would presumably lie.

Most cases which consider implied repeal of other statutes, are considering circumstances in which the last enacted statute is said to have impliedly repealed an earlier statute. This court has not been cited nor found a case which involves a consideration of an earlier enacted statute purportedly repealing provisions of a later enacted statute.

While the appropriate decision may be less clear if the Acts are considered to be irreconcilable, this court would still hold that § 351(a) remains effective even after such a determination. *Cf.* Uniform Laws Annotated, Statutory Construction, § 18. ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.") In *New York Airways, Inc. v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966), the court stated:

> As a general proposition Congress has the power to amend substantive legislation for a particular year by an appropriation act, although such procedure is considered undesirable legislative form and subject to a point of order. An amendment will not readily be inferred. The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest. The application of the limitation in the appropriation provision to a single year suggests that no change in substantive law was intended. *NLRB v. Thompson Products*, 141 F.2d 794 (C.A. 9, 1944). "Repeals by implication are not favored", it is ruled in United States v. Langston, 118 U.S. 389, 393, 6 S.Ct. 1185, 1187, 30 L.Ed. 164 (1886), where our Minister to Haiti was found entitled to his statutory salary despite the terms of an appropriation act providing funds for a lower salary and declaring that "all acts, or parts of acts, inconsistent or in conflict therewith, or which allow a larger salary to any officer or employee herein named, shall be, and are hereby, repealed." *Id.* at 391, 6 S.Ct. at 1186. The intention to repeal substantive law was more manifest in the *Langston* case than in the provision of the appropriation act quoted above placing a purported

Section 9252 does not specifically repeal the competitive procedure requirement and such repeal should not be implied. *Rembold v. Pacific First Federal Sav. Bank*, 798 F.2d 1307 (9th Cir. 1986) and *U.S. v. Joya-Martines*, 947 F.2d 1141 (4th Cir. 1991). In any event, the proposition that a specific statute controls a general statute applies only when the statutes are irreconcilable. *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528 (2d Cir. 1991); *Int. Ass'n of Mach. & Aerospace Wkrs. Lodge 751 v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987). It is reasonably arguable that § 351(a)'s provisions that "if the Secretary of Defense takes action . . . ., the Secretary shall select the depot . . . " are the more specific of the provisions in the two statutes. The provisions of § 9252 are perhaps not clear enough to be specific.

This court primarily concludes that there is no irreconcilable conflict between the pertinent provisions of the two Acts. Thus the court is required to give effect to both Acts. This effect is that the clear intent of Congress in Act 351(a) is to require competitive procedures if there is to be a consolidation action. At best, the intent in § 9252 is to not provide funds for such competitive procedures. If this creates a present stalemate, so be it.[11]

Conclusion

[11]The court has read the cases cited by defendants on pages 10-11 of Def. Ex. 23 and concludes that only a strained consideration of those cases and these claims could result in the application of those cases here.

procedures with the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act. NEPA, therefore, specifically mandates that all Federal and State agencies abide by its guidelines. Being all inclusive, the U. S. Department of Defense, and therefore, the Army is under the auspices of the NEPA.[20]

32 CFR § 214 and 32 CFR § 651 et seq. detail the environmental requirements of U.S. Army actions. One of the stated policies of the Department of Defense is to "insure . . . that, in carrying out its mission of providing for the national defense, it does so in a manner consistent with national environmental policies . . . ." § 214.3. Those policies are fully detailed in the National Environmental Policy Act. Thus, the Army, in one of several stated policies, submits itself to NEPA authority. Since this is not a BRAC-91 decision, all NEPA guidelines must be met.

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[20]At § 2906 part C, BRAC-91 states "[t]he provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in Paragraph 2, the Department of Defense in carrying out this part. . . ." Therefore, except for certain provisions concerning property disposal and the relocation of functions, NEPA does not apply to BRAC. BRAC, of course, is not applicable here.

the findings and conclusions in the EA's which have been prepared. This court does not construe the "cumulative impact" provision at 40 CFR § 1508.7 in the fashion suggested by plaintiffs. There is nothing in that provision to suggest that it addresses a number of geographic "environment[s]." This court sees no need to fully recite all the applicable provisions, but merely calls attention to 40 C.F.R. 1508.1 through 1508.14 to support its conclusion that plaintiffs have not met their burden with reference to a NEPA claim.

There is no evidence of significant physical effects or environmental consequences at ANAD, LEAD or any other pertinent depot or depots in combination. Plaintiffs have not suggested any harm or possible harm to the individual plaintiff or to the union members.[22] While it is not necessary that the court reach the NEPA issue, it has done so and has concluded that plaintiffs cannot recover on that claim. The plaintiffs have not well-developed the claim and the court has responded in like fashion.[23]

A separate judgment granting plaintiffs' request for an injunction based on their Authorization Act claim will be entered.

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[22]One individual plaintiff requested dismissal of his claim(s).

[23]Plaintiffs have relied upon 40 C.F.R. 1508.7 and 40 C.F.R. 1508 27(b). This court finds no support in said provisions under the evidence in this case.

PHONE NUMBER: 717-267-8474

FROM: MAJOR J. MACKEY IVES DATE: 22 Dec. 92

COMMENTS: Court's Judgment & Memorandum.

* This is being sent in 2 parts: pg 2-17
pg 18-33

NO. OF PAGES 34 (including header sheet)

TELEPHONE: (703) 696-1630 FAX: (703) 696-1587
DSN 226-1630

MAILING ADDRESS: Army Litigation Division
901 N. Stuart St. Suite 400
Arlington, VA 22203-1837

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COMMUNICATION RESULT REPORT

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January 21, 1994

General Litigation Branch
Litigation Division

Pamela Moreau, Esq.
Department of Justice
Civil Division, Federal Programs
901 E. St., NW
Washington, D.C. 20530

SUBJECT: AFGE, et al. v. United States, No. CV-92-PT-2453-E (N.D. Ala.) - Comments to Draft #2 Reply Brief (20 Jan 94)

Dear Pamela:

I have reviewed all pages to the second draft of the Reply Brief. You indicate that after conferring with Joe Chontos, David Anderson, and Vince Garvey you rewrote portions of the first draft.

On 19 January 1994, I datafaxed two pages of typewritten comments to you concerning the first draft of the Reply Brief. Additionally, I made several marginal notes on the first draft of the Reply Brief and sent them to you by datafax. After reviewing the second draft of the Reply Brief, I note that none of my comments or suggestions have been incorporated.

More importantly, I am very concerned that the second draft of the Reply Brief downplays the significance of the Base Closure Act and the 1993 recommendations of the Defense Base Closure and Realignment Commission. The most significant difference between the circumstances that existed in December, 1992, and January, 1994, is that the Defense Base Closure and Realignment Commission adopted the April, 1992 Tactical Missile Maintenance Consolidation Plan for Letterkenny Army Depot, making the ANAD transfer of tactical missile maintenance a "BRAC action," mandated by the Commission and Congress. Section 351(a) by its express terms only applies to actions by the Secretary of Defense (SECDEF) to consolidate tactical missile maintenance (TMM) at a single location. The current proposal to transfer (TMM) from ANAD to LEAD is not a SECDEF action at all, but a mandate by the BRAC Commission and Congress. Accordingly, section 351(a), by its express terms, does not apply.

Although I agree that § 8112 and the BCA together impliedly repeal section 351(a), I do not think we should concede that the Base Closure Act and the Commission's recommendations are irrelevant with respect to section 351(a). See Def. Reply Brief, pp. 6 - 7. This argument largely undercuts the argument in the

Defendant's Motion to Vacate This Court's Injunction that the BCA and § 8112 supersede section 351(a). As I indicated in my earlier comments, the BCA is continuing legislation which provides for three separate Base Closure Commissions. The 1993 Commission's recommendations took effect on September 20, 1993, mandating that the SECDEF implement the Commission's recommendations. See Act, § 2904(a)(2). Accordingly, I strongly recommend the following changes to the second draft of the Reply Brief:

a. Rewrite the second paragraph on page 6 and lines 4 - 7 on page 7 to eliminate any reference that the BCA is irrelevant with respect to the effect of section 351(a). I think our position should be consistent throughout, i.e., that the BCA and § 8112 together supersede section 351(a). See Motion to Vacate This Court's Injunction.

b. Substitute the following for the last sentence of footnote 6: "Since Congress did not disapprove the 1993 recommendations, the recommendations of the 1993 Commission became effective on September 20, 1993, subsequent to the enactment of § 351(a), mandating that the Secretary of Defense implement the recommendations, notwithstanding § 351(a). See § 2904(a)."

agreed

Please call me at (703) 696-1617 if you have any questions.

Sincerely,

J. Mackey Ives
Major, U.S. Army
Litigation Attorney

DRAFT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, PATRICIA S. WHITE & DARRELL D. DEMPSEY, Plaintiffs, v. UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE; UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, Defendants.	Civil Action No. CV-92-PT-2453-E

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO VACATE THIS COURT'S INJUNCTION

STATEMENT

Defendants filed their motion to vacate the Court's injunction because they are statutorily required, by the Base Closure Act and by § 8112 of the Defense Appropriations Act for Fiscal Year 1994 ("§ 8112"), to transfer missile maintenance functions from Anniston Army Depot ("ANAD") in Alabama to Letterkenny Army Depot ("LEAD") in Pennsylvania. Defendants now find themselves under mandates by two different authorities directing them to take two different actions. Congress has directed defendants to realign missile functions to LEAD, while this Court's order prevents such action, unless the Secretary first conducts a competition to determine the recipient installation (which, by definition, could be an installation other than LEAD).

— when passed?

twice — via 8112 & BCA

Plaintiffs' opposition to this motion consists of little more than a series of string cites on the subject of statutory construction. In a conclusory fashion, without any explanation or support, plaintiffs insist that § 351(a) can be reconciled with both the Base Closure Act and § 8112. They do not frontally address the undeniable conflict that exists. Instead, plaintiffs' approach is an adherence to abstract principles of statutory construction that do not support their case. Enforcing § 351(a) would, purely and simply, be contrary to the express intent of Congress in the Base Closure Act and § 8112 and would lead to senseless results.

Because of this direct conflict and because Congress clearly expressed its intent that the realignment should take place, "notwithstanding any other provision of law," this Court should vacate its injunction.

ARGUMENT

Section 8112 and Section 351(a) are in Direct Conflict and Congress Expressed its Clear Intent that Section 8112 Should Prevail

Section 8112 provides that "[n]otwithstanding any other provision of law," the Secretary of Defense shall implement the Base Closure Act Commission's recommendation to consolidate tactical missile maintenance at LEAD.[1] This unmistakably

[1] Section 8112 provides as follows:

> Notwithstanding any other provision of law, and in accordance with Section 2905 of the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, the Department of Defense shall proceed with the

(continued...)

requires a result that is directly contrary to § 351(a)'s competition requirement. Section 351(a) presumes that the Secretary of Defense should select the installation to receive tactical missile maintenance through a competition, but the Commission and Congress have made plain that LEAD has been selected as the recipient installation. Rather than explaining how the two provisions could be reconciled, plaintiffs instead latch on to the "notwithstanding" clause of § 8112 in an attempt to salvage their case. They argue that, because Congress used the phrase "notwithstanding any other provision of law" at the beginning of § 8112, Congress expected § 351(a) to have "continued viability." Pls.' Opp. at 7 (citing slip op. at 18).

Plaintiffs' argument runs afoul of every decision that has considered the meaning of similar "notwithstanding" clauses. Recently, the Supreme Court ruled that a contract containing such a clause "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." Cisneros v. Alpine Ridge Group, 113 S.Ct. 1898, 1903 (1993) (emphasis supplied). The same rule applies in the statutory context. In Bank of New England Old Colony, N.A. v. Clark, 986 F.2d 600 (1st Cir. 1993), the court determined that a "notwithstanding" clause "manifests a

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[1](...continued)
implementation of the 1993 Defense Base Closure and Realignment Commission recommendation concerning the consolidation of tactical missile maintenance at Letterkenny Army Depot.

Pub. L. No. 103-139, 107 Stat. 1418 (Nov. 11, 1993).

clear intent to override any conflicting statutes in existence." Id. at 604.[2] Thus, the "notwithstanding" clause in this case means that, for purposes of construing § 8112, all other conflicting provisions of law, including § 351(a), must ~~yield~~ be overridden. Otherwise, § 8112 would be rendered meaningless, and, as plaintiffs admit, Congress would not have enacted a hollow mandate. See Pls.' Opp. at 6.[3]

Plaintiffs next take issue with the clarity of Congress' command in § 8112. See Pls.' Opp. at 8-9. But, in drafting § 8112, Congress could not have been clearer in conveying its intent that the missile maintenance functions be consolidated at LEAD. Its language is precise and direct, and needs no further explanation to glean congressional intent.

In a further attempt to undercut § 8112, plaintiffs argue that this Court should not give it the force of law because the provision is contained in an Appropriations Act. Pls.' Opp. at

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[2] There is ample support for this position. See Dean v. Veterans Admin. Regional Office, 943 F.2d 667, 670 (6th Cir. 1991), vacated and remanded on other grounds, 503 U.S. ___, 112 S.Ct. 1255 (1992); Liberty Maritime Corp. v. United States, 928 F.2d 413, 416 (D.C. Cir. 1991) In re FCX, Inc., 853 F.2d 1149, 1154 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989); Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525 (D.C. Cir.), cert. denied, 469 U.S. 1017 (1984); New Jersey Air National Guard v. FLRA, 677 F.2d 276, 283 (3d Cir.), cert. denied, 459 U.S. 988 (1982).

[3] This Court previously found that § 351(a) had "continuing viability" when considered against § 9152 of the Defense Appropriations Act for Fiscal Year 1993 ("§ 9152"). See AFGE v. United States, No. CV-92-PT-2453-E, slip op. at 18 (N.D. Ala. Dec. 21, 1992). But there, the Court determined that the two provisions were reconcilable. The "notwithstanding" clause operates to override only conflicting statutes, as presented in this case.

7-8. But, it is well-recognized that "Congress can amend substantive legislation through a provision in an appropriations act." Republic Airlines, Inc. v. United States Dept. of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988). See also United States v. Will, 449 U.S. 200, 223 (1980); American Fed. of Gov. Emp., AFL-CIO v. Campbell, 659 F.2d 157 (D.C. Cir. 1980). Indeed, "[a]ppropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject." Republic Airlines, 849 F.2d at 1320 (citation omitted). See also United States v. Dickerson, 310 U.S. 554, 555 (1940) ("There can be no doubt that Congress could suspend or repeal [its own acts]; and it could accomplish its purpose by an amendment to an appropriations bill, or otherwise.").[4]

As plaintiffs concede, "where provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." Posadas v. National City Bank, 296 U.S. 497, 503-04 (1936) (quoted in Pls.' Opp. at 4). Section § 8112, enacted more than a year after § 351(a),[5] directs the Secretary to implement the

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[4] Plaintiffs attempt to distinguish this case law by relying on decisions refusing to allow an "indefinite congressional expression" in an appropriations act to override "plain statutory language." See Pls.' Opp. at 8 (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981)). But that is not this case because, as described above, § 8112 is not "indefinite;" rather, it is a clear and precise command.

[5] Section 351(a) was enacted on October 23, 1992, see Pub. L. No. 102-484, 106 Stat. 2315, 2377, while § 8112 was enacted on November 11, 1993. See Pub. L. No. 103-139, 107 Stat. 1418.

Commission's recommendation with respect to LEAD. In addition, the "notwithstanding" clause manifests a clear intent that § 8112 should override any conflicting statutes in existence, including § 351(a). Because the two provisions are in direct conflict, § 8112, the later enacted law, must prevail.

Whether § 351(a) survives the Base Closure Act and the Commission's 1993 recommendations made pursuant to the Act, see Pls.' Opp. at 3-7, is ~~irrelevant~~ because § 8112 clearly controls this case. However, consideration of the Base Closure Act is important in interpreting § 8112 because, inter alia, it explains the legislative mandate under which LEAD was chosen as the recipient installation for tactical missile maintenance.[6]

The Base Closure Act is ~~also~~ important because Congress specifically required § 8112 to be construed "in accordance with Section 2905 of the Defense Base Closure and Realignment Act of 1990." Congress thereby incorporated by reference § 2905, entitled "Implementation," into this new piece of legislation. Section 2905 contains the "Waiver" provision, which permits the Secretary of Defense to realign military installations notwithstanding "any provision of law restricting the use of funds for closing or realigning military installations included

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[6] In making this statement, defendants do not intend to downplay the Base Closure Act's significance in governing defendants' conduct. The Base Closure Act created a framework under which the Commission would make recommendations for closures and realignments in 1991, 1993 and 1995, which Congress could then disapprove. § 2904(b). Since Congress did not disapprove the 1993 recommendations, defendants are bound to implement them, as required by the Base Closure Act, see § 2904(a), notwithstanding § 351(a).

in any appropriations or authorization Act." § 2905(d). Section 351(a) restricts the use of funds by limiting the Secretary's ability to spend Base Closure Act funds to conduct the realignment. See § 2902(k). Thus, because § 8112 is determinative of the issues before this Court, whether or not the earlier enacted § 351(a) conflicts with the Base Closure Act and the Commission's recommendations made pursuant to the Act is irrelevant.

In sum, Congress clearly expressed its intent, in both § 8112 and the Base Closure Act, that the Secretary must implement the Commission's recommendation with regard to consolidating tactical missile maintenance at LEAD, notwithstanding any other provision of law. This recommendation directly conflicts with § 351(a)'s competition requirement. To permit the Secretary of Defense to carry out the will of Congress, this Court should vacate its Order of December 21, 1992.[7]

CONCLUSION

For these reasons, the Court should grant defendant's Motion to Vacate the Injunction.

Respectfully submitted,

FRANK W. HUNGER

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[7] Plaintiffs' attempt to distract the Court with newspaper articles and an unattributed internal memorandum discussing possible closures in 1995 is without merit. See Pls.' Opp. Exh. A. These items contain nothing more than speculation and do not affect the legal issues that are present in this case. It is absurd to argue, furthermore, that media speculation regarding future base closures (much of which, indeed, post-dates enactment of § 8112) could possibly be relevant in determining Congress' intent in enacting § 8112.

Assistant Attorney General

CLAUDE HARRIS
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY

PAMELA A. MOREAU
United States Department of Justice
Civil Division - Room 935
901 E Street, N.W.
Washington, D.C. 20530
(202) 616-8263

Attorneys For Defendants

Of counsel
Major J. Mackey Ives
Joseph E. Chontos

Document Separator

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,)

PLAINTIFFS,)

v.) CV-92-PT-2453-E

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P.W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,)

DEFENDANTS.)

ENTERED

FEB 1. 1994.

ORDER

In accordance with the Memorandum Opinion filed contemporaneously herewith, this court's December 21, 1992 order is VACATED and the injunction ordered therein is DISSOLVED. Said vacation and dissolution are STAYED for 14 days to allow plaintiffs to seek further stay.

DONE and ORDERED this 1st day of February, 1994.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,)

PLAINTIFFS,)

v.) CV-92-PT-2453-E

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P.W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,)

DEFENDANTS.)

ENTERED

FEB 1 1994

MEMORANDUM OPINION

This cause comes on to be heard on Defendants' Motion to Vacate this Court's Injunction filed on December 20, 1993.[1]

I. PROCEDURAL AND FACTUAL BACKGROUND

In October of 1992, plaintiffs filed a complaint against the above named defendants seeking to enjoin the Army's proposed movement or transfer of missile maintenance work from Anniston Army Depot (ANAD) to Letterkenny Army Depot (LEAD).[2] In their

[1]In its December 20, 1993 order, this court stated that "if any party wishes to request an evidentiary hearing, that party may do so." Neither party has made such a request.

[2]Acting pursuant to the Department of Defense's ("DOD") general authority to "provide more effective, efficient, and economical administration and operation" in the Armed Forces, see 10 U.S.C. § 125, defendants proposed the transfer of tactical missile maintenance functions from ANAD for consolidation with similar functions at LEAD. The names of the appropriate defendants may have changed from time to time. That is of no substantive significance.

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complaint, plaintiffs argued that, because of § 351(a) of the Defense Authorization Act[3], the Secretary of Defense ("Secretary") could not transfer the tactical missile maintenance work without first conducting a competition to select the receiving installation. In opposition, defendants argued that § 9252 of the Defense Appropriations Act for Fiscal Year 1993[4] effectively nullified § 351(a). This court conducted a bench trial on December 15, 1992, and concluded that

> [T]here is not irreconcilable conflict between the pertinent provisions of the two Acts. Thus the court is required to give effect to both Acts. This effect is that the clear intent of Congress in Act 351(a) is to require competitive procedures if there is to be a consolidation action. At best, the intent of § 9252 is to not provide funds for such competitive procedures. If this creates a present stalemate, so be it.

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[3] § 351(a) provides in pertinent part:

> [I]f the Secretary of Defense takes action to consolidate at a single location, the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures.

Pub. L. No. 102-484, 106 Stat. 2315, 2377 (Oct. 23, 1992).

[4] § 9252 provides that:

> Notwithstanding the provision of section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot and, in addition, no funds shall be made available for a depot selection competition to assess depot level tactical missile maintenance.

Pub. L. No. 102-936, 106 Stat. 1876, 1943 (Oct. 6, 1992).

See AFGE v. Cheney, No. CV-92-PT-2453-E, (N.D. Ala. Dec. 21, 1992) at page 26 (hereinafter "Slip op."). Pursuant to this conclusion, this court entered a final judgment enjoining the

> defendants and their agents from transferring any portion of the tactical missile maintenance work or facilities, and jobs and equipment related thereto, located at Anniston Army Depot, to Letterkenny Army Depot or any other depot, base or facility for the purpose of or with the intent of consolidating said tactical missile maintenance work of the Department of the Army, unless and until competitive procedures as provided for in said § 351(a) are implemented and selection made and action taken accordingly. . .It is not intended to enjoin any action except that which must be in compliance with the provisions of said § 351(a).

In March of 1993, pursuant to the Base Closure and Realignment Act ("BRAC"), the Defense Base Closure and Realignment Commission ("Commission") issued its report and recommendations to President Clinton, including a recommendation of a realignment of missile maintenance work from ANAD to LEAD. See Defense Base Closure and Realignment Commission, 1993 Report to the President. President Clinton approved the Commission's recommendations and Congress did not disapprove them. Consequently, the recommendations of the Commission now have the force of law. See Department of Defense Base Closure and Realignment Report of 1993.

In July of 1993, plaintiffs filed a Petition to Designate the Defense Base Closure and Realignment Commission as a Party Defendant and For Other Relief. Plaintiffs argued that the

Commission was the defendants' agent,[5] and was, by proceeding with the realignment, attempting to evade this court's injunction. Accordingly, plaintiffs requested that this court (1) designate the Commission as a party defendant, or (2) reissue its order enjoining the defendants, including the Commission, from proceeding with the realignment without the implementation of competitive procedures as required by § 351(a). The court conducted a phone conference in this matter, during which defendants represented that:

> (1) they did not consider the Commission a necessary party to this proceeding;
>
> (2) they will not take any action to effect the subject Commission recommendation as accepted by the President and Congress unless and until the issue has been presented to this court for resolution.

See Order filed September 21, 1993. Based on these representations, this court denied plaintiffs' petition without prejudice.

In November of 1993, Congress enacted the Defense Appropriations Act for Fiscal Year 1994. See Pub. L. No. 103-139, § 8112 (Nov. 11, 1993). Section 8112[6] of said Act purports

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[5]Plaintiffs' argument that the BRAC Commission is an "agent" of the Department of Defense appears to have no foundation.

[6]§ 8112 provides that:

> Notwithstanding any other provision of law, and in accordance with Section 2905 of the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, the Department of Defense shall proceed with the implementation of the 1993 Defense Base Closure and Realignment Commission recommendation concerning the consolidation of tactical missile maintenance at Letterkenny Army Depot.

to direct the Secretary of Defense to comply with the Commission's recommendation regarding realignment of missile maintenance work to LEAD, notwithstanding any other law. Defendants, pursuant to Fed. R. Civ. P. 60(b), filed a Motion to Vacate this Court's Injunction, alleging that the injunction is inconsistent with the Secretary's now affirmative obligation under both BRAC and § 8112 to go forward with realignment to LEAD.

II. DEFENDANTS' CONTENTIONS:

Defendants argue that both BRAC and § 8112 direct the Secretary to implement the Commission's recommendation to realign tactical missile maintenance from ANAD to LEAD. This direction, according to the defendants, clearly supersedes § 351(a)'s requirement for competitive bidding procedures. Defendants argue that "Fed. R. Civ. P. 60(b)(5) authorizes, and indeed requires, this court to modify its orders when faced with changes in circumstances." According to defendants, Rule 60(b)(5) authorizes the court to modify or vacate its orders when "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). Defendants cite case law suggesting that changed circumstances, such as changes in law or fact, are a basis for modifying an injunction. See United States v. Swift, 286 U.S. 106 (1932); Miller v. Securities and Exchange Commission, 998 F.2d 62 (2d Cir.), cert. denied, 114 S.Ct. 634 (1993); Williams v. Atkins, 786 F.2d 457 (1st Cir.

Pub. L. No. 103-139 (Nov. 11, 1993).

1986).

Defendants assert that circumstances have changed significantly since this court's order of December 1992. For example, the Commission has made its recommendation concerning tactical missile realignment, and has chosen LEAD as the receiving installation.[7] The President has approved the recommendation, and it has not been disapproved by Congress. Defendants also argue that the Secretary of Defense is now "statutorily required to implement these decisions" by both BRAC and § 8112. Defendants rely on two sections of BRAC in making this argument. Section 2904(a)(2) of BRAC provides that the Secretary shall "realign all military installations recommended for realignment by such Commission in each such report." In addition, § 2909(a) of BRAC provides that "[e]xcept as provided in subsection (c), during the period beginning on the date of the enactment of this Act and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States." Defendants also assert that Congress passed § 8112 "to ensure that the recommendation with respect to LEAD would remain intact."[8]

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[7]BRAC provides for "realignment," which is defined, in § 2910(5) as "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

[8]Defendants concede that § 8112 is an "appropriations bill." Defendants maintain, however, that this characterization does not alter the conclusion that § 8112 impliedly repeals § 351(a).

Defendants characterize § 8112 as "an unequivocal and specific directive from Congress that the Secretary of Defense must implement the Commission's recommendation to consolidate tactical missile maintenance functions to LEAD." Defendants assert that "the commands of the Base Closure Act [BRAC] and § 8112 supersede § 351(a)'s competition requirement."

Defendants concede that the initial inquiry must be whether the three acts are irreconcilable. If they are, the later act, to the extent of the conflict, defendants argue, constitutes an implied repeal of the earlier one(s). Section 8112 was signed by the President on November 11, 1993, more than one year after § 351(a) was enacted. In addition, § 8112 specifically states that the Secretary must act "in accordance with Section 2905 of the Defense Base Closure and Realignment Act of 1990." Defendants contend that, by including a reference to § 2905 (the "Implementation" provision) of BRAC in § 8112, Congress clearly manifested its intent that the Secretary go forward with the Commission's recommendation with regard to missile maintenance realignment at LEAD, notwithstanding any other provision of law.[9] Defendants contend that BRAC, coupled with § 8112, leaves the Secretary "no discretion to ignore these legislative judgments, and he cannot now conduct a competition to select a different

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Defendants note that other courts have recognized that "Congress can amend and substitute legislation through a provision in an appropriations act." Citing, Republic Airlines, Inc. v. United States Dept. of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988).

[9]Or, presumably, this court's injunction.

and he cannot now conduct a competition to select a different installation."

With regard to § 351(a) and its competitive procedure requirement, defendants argue that there can be "no legitimate argument that § 351(a) survives the Base Closure Act and § 8112." Defendants assert that the two requirements, (1) ordering consolidation to LEAD, and (2) ordering a competition to choose a depot for consolidation, cannot now stand together. In attempting to reconcile the arguably conflicting commands, defendants conclude that "Congress' clear intent to realign LEAD, as expressed in the Base Closure Act and § 8112, renders superfluous § 351(a)'s competition-driven selection requirement."

Defendants note that this court's December 1992 conclusions recognized that "[c]onsolidation action is not required or mandated by any statute" and thus that the two sections could then be reconciled. Now, defendants contend, both BRAC and § 8112 mandate consolidation to LEAD, and thus neither provision can co-exist with § 351(a). Defendants contend that "the plain language of the Base Closure Act and § 8112 repeal § 351(a) and reflect Congressional intent that the consolidation proceed without delay," and that "the explicit mandate of [the provisions] should be given effect."

III. PLAINTIFFS' CONTENTIONS

Plaintiffs' primary argument in opposition to defendants' motion is that "the Base Closure Act does not supersede or impliedly repeal section 351(a)." Citing the general rules of

statutory construction (repeals by implication are highly disfavored; where two statutes cover the same subject, courts should give effect to both, if possible), plaintiffs contend that the court must first determine whether the acts are irreconcilable. Plaintiffs also note that in its earlier opinion, this court recognized that:

> "[t]here are two well-settled categories of repeals by implication. . . (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the Legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment."

Because § 351(a) was enacted after BRAC, plaintiffs contend that BRAC cannot impliedly repeal that section or its competitive bidding requirement and that, according to the rules of statutory construction, § 351(a), as the later act, should prevail to the extent of any inconsistency. The plaintiffs add that, in any event, the two acts can be reconciled such that each is given effect. Section 2905(d) of BRAC provides that "[t]he Secretary of Defense may close or realign military installations under this part without regard to (1) any provision of law restricting the use of funds for closing or realigning military installations

included in any appropriations or authorization Act. . ."[10] According to plaintiffs, § 351(a) is not a "provision of law restricting the use of funds," and therefore § 2905(d) does not render § 351(a) inapplicable. Plaintiffs also address § 2909(a) of BRAC, which provides that BRAC shall be the "exclusive authority" for base closure or realignment. Plaintiffs contend that, because § 351(a) was enacted after BRAC, that § 2909(a) does not supersede § 351(a). Plaintiffs remind this court of its earlier holding that it could not "attribute to Congress the absurdity of saying, we are enacting Section 351(a), but, immediately upon passage it is a nullity and has no force or effect."[11] Thus, plaintiffs conclude that BRAC does not supersede § 351(a) and that § 351(a) must be given effect.

Plaintiffs' second argument is that "Section 8112 of the Defense Appropriations Act for Fiscal Year 1994 does not supersede or impliedly repeal Section 351(a)." Section 8112 provides that "[n]otwithstanding any other provision of law, and in accordance with Section 2905 of the Defense Base Closure and Realignment Act," the Secretary shall proceed with closure and realignment according to the recommendation of the Commission. Plaintiffs disagree with defendants' argument that § 8112 and § 351(a) are irreconcilable, and that § 8112 impliedly repeals §

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[10]This court notes the broad effect of such a provision and the intent that BRAC exclusively control such decisions.

[11]At the time of the earlier decision to transfer the mission and at the time this court so stated, there had been no BRAC Commission recommendation on the proposed transfer.

351(a). Plaintiffs base this argument on the "notwithstanding" language in § 8112. Referring again to this court's language in its earlier opinion, plaintiffs contend that the use of the term "notwithstanding" in an act "connotes continued viability" of the other provisions of law referred to, including § 351(a).
In their reply brief, defendants argue that, although this court did state in its earlier opinion that "notwithstanding" connotes continued viability, this rule applies only when the two acts are reconcilable. Defendants argue that the use of "notwithstanding" clauses in contracts "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." Citing, Cisneros v. Alpine Ridge Group, 113 S.Ct. 1898, 1903 (1993). Defendants contend that this rule is also applicable in the statutory context, citing cases that suggest that "notwithstanding" clauses "manifest[] a clear intent to override any conflicting statutes in existence." Citing, Bank of New England Old Colony, N.A. v. Clark, 986 F.2d 600 (1st Cir. 1993)).[12]

Defendants maintain that the "notwithstanding" clause in § 8112 means that § 351(a) must yield because it conflicts with § 8112.

Plaintiffs note that implied repeals by appropriations acts, although possible, are "highly disfavored." Citing, Robertson v. Seattle Audubon Soc'y, 112 S.Ct. 1407 (1992)). Plaintiffs contend that "the congressional intent to do so must be clearly

[12]Defendants have cited numerous cases suggesting that "notwithstanding" clauses manifest a drafter's intent that conflicting provisions yield.

expressed." [13] Plaintiffs argue that since there is no clear expression to repeal § 351(a), the two acts can be reconciled, and that § 8112 should be construed as a continuation of, and not a substitute for, § 351(a).[14]

DISCUSSION

I. HISTORY OF BASE CLOSURE

The history of base closure and realignment has been stated in "The Department of Defense Base and Closure Realignment Report, March 1993," the "Defense Base Closure and Realignment Commission, 1993 Report to the President," and other documents:

> Many military installations were closed to reduce military overhead in the early 1960's, and hundreds were closed after the end of the Vietnam War. Members of Congress, eager to protect the interests of their constituents, enacted Section 2687 of Title 10, United States Code. This statute required the Department of Defense to notify Congress if an installation became a closure or realignment candidate. This law also subjected proposed closure actions to time-consuming environmental evaluations which effectively halted base closures. (Defense Base Closure and Realignment

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[13]In their reply brief, defendants list several cases which recognize that "Congress can amend substantive legislation through a provision in an appropriation act." See Republic Airlines, Inc. v. United States Dept. of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988); United States v. Will, 449 U.S. 200, 223 (1980); American Fed. of Gov. Emp., AFL-CIO v. Campbell, 659 F.2d 157, 160 (D.C. .Cir. 1980), cert. denied, 454 U.S. 820 (1981); United States v. Dickerson, 310 U.S. 554, 555 (1940)).

[14]Plaintiffs also add that LEAD is "reportedly being considered for closure in 1995. . . Arguably, such fact coupled with the fact that Section 8112 does not contain a clear expression of intent to repeal Section 351(a), supports the construction that Congress intended Section 351(a)'s provision regarding competitive bidding procedures to remain viable." This court, however, cannot consider such speculations. It may likewise be arguable that, if LEAD is to be closed, the intention is to transfer the function so that the consolidated functions can be terminated. Any such reasoning is speculative.

Commission, 1993 Report to the President, at page 3-1)(emphasis added).

For the next decade after the passage of Section 2687, all attempts at closing major installations met with failure, and even proposed movements of small military units were frustrated. (Department of Defense Base Closure and Realignment Report, March, 1993, at page 230)(emphasis added).

As a result, in the late 1980's, as the forcestructure steadily declined, the base structure became bloated. Readiness was threatened as the Services struggled to pay the operating costs of unneeded bases. The Secretary of Defense, in close cooperation with Congress, proposed a base closure law to close obsolete military bases and bring the base structure in line with the declining force structure.

Public Law 100-526, enacted in October 1988, created the Secretary of Defense's Commission on Base Realignment and Closure. The law charged the Commission with recommending installations for closure or realignment based on an independent study of the domestic military structure. The 1988 Commission recommended the closure of 86 military and the realignment of 59 others. . .

Despite the accomplishments of the 1988 DoD Commission, additional base closures were necessary with the declining force-structure brought on by the end of the Cold War. Since the 1988 Commission charter expired by this time, the Executive Branch attempted to propose further reductions on its own. In 1990, Secretary of Defense Cheney announced additional base closures and realignments. Congress protested the Secretary's proposals were politically influenced. To overcome the potential stalemate and to ensure a fair process, Congress enacted an independent five-year Defense Base Closure and Realignment Commission with the passage of Public Law 101-510 under Title XXIX.

Congress created the Defense Base Closure and Realignment Commission "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Lawmakers intended this Commission to be a model of open government. . .

Procedurally, the 1988 DoD Commission and the Defense Base Closure and Realignment Commission differ substantially. The 1988 Commission, working for the

> Secretary of Defense, generated its own list of recommended closures and realignments. Under the new law, the Defense Base Closure and Realignment Commission independently reviews and analyzes the Secretary of Defense's recommendations and submits its findings directly to the President. To insure an independent process, the law requires the General Accounting Office (GAO) to provide a detailed analysis of the Secretary of Defense's recommendations and selection process to the Commission. . . (Report to the President, at page 3-1)(emphasis added).
>
> The conferees prescribe a new base closure process because closures and realignments under existing laws have two failings. First, closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. Second, the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raised suspicions about the integrity of the base closure process. A new process involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner. (136 Congr. Rec. H11935-18, H12223)(emphasis added).

It is clear that past attempts at base closure and realignment were hindered by delays resulting from political in-fighting, executive-legislative stalemates, and time consuming litigation. The base closure and realignment process contemplated by the Defense Base Closure and Realignment Act (BRAC) was designed to eliminate such delays by removing the "partisan aura" from base closure and realignment decisions, thereby insuring fair and expedient methods of downsizing military operations.

> Public Law 101-510 requires the Secretary of Defense to submit a list of proposed military base closures and realignments to the Commission by March 15, 1993. . .
>
> The law requires the Commission to hold public hearings on the Secretary of Defense's . . . recommendations and on any changes proposed by the Commission to those

> recommendations. The Commission must report its findings to the President by July 1, 1993, based on its review and analysis of the Secretary of Defense's recommendations. To change any of the Secretary's recommendations, the Commission must find that the Secretary deviated substantially from the force-structure plan and final selection criteria.
>
> Once the President receives the Commission's final report, he has until July 15 to approve or disapprove the recommendations. If approved, the report is sent to Congress which then has 45 legislative days to reject the report by a joint resolution of disapproval or the report becomes law.

Defense Base Closure and Realignment Commission, 1993 Report to the President at pages 3-2 to 3-3. If Congress does not pass a joint resolution of disapproval, the Commission's recommendations become law.[15]

In 1992, when this court considered the petition to enjoin the defendants from proceeding with the transfer of the missile maintenance work from ANAD to LEAD without first complying with § 351(a)'s competitive bidding requirement, there was some early question as to whether BRAC was implicated. Defendants initially maintained that BRAC did govern that proposed transfer to LEAD. Defendants, however, later abandoned this position. The issue before this court at that time was the effect of § 351(a) and § 9252 on the proposed transfer of missile maintenance work from ANAD to LEAD. BRAC was not implicated in that action, and the issue of how BRAC might affect such a transfer was not decided by this court. Since the 1992 order was issued, however, the 1993 round of base closures and realignments pursuant to the BRAC

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[15]For further discussion of BRAC and its history and purposes, see cases cited in earlier opinions of this court.

process has been completed. The Secretary's report included 165 bases, but did not recommend that ANAD be closed or realigned. Department of Defense, Base Closure and Realignment Report, March 1993 at pages 23-24. Pursuant to BRAC, the Commission reviewed the Secretary's recommendations. Upon finding that certain of the Secretary's recommendations "deviated substantially" from the force structure plan and selection criteria, the Commission made findings and prepared its own recommendations and presented them to the President. With respect to ANAD, the Commission recommended that tactical missile maintenance be realigned to LEAD.[16] Commission Report at pages 1-6 to 1-7. President Clinton approved the Commission's recommendations and transmitted them to Congress. On September 20, 1993, the House did not pass Senate Joint Resolution 114, a joint resolution disapproving the recommendations of the Commission. 139 Cong. Rec. S12003-01. Accordingly, the Commission's recommendations now have the force of law, and are thus implicated in the motion now before this court.[17]

According to § 2904(a)(2) of BRAC, the Secretary shall "realign all military installations recommended for realignment by such Commission in each such report." Congress' use of the

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[16]Other than arguing that the recommendation conflicts with § 351(a) and this court's prior order, plaintiffs have not argued that the BRAC recommendation was contrary to procedural or substantive law. Cf. Specter v. Garrett, 995 F.2d 404 (3d Cir. 1993).

[17]In this fashion the force of law post-dates the passage of § 351(a).

word "shall" leaves the Secretary with no discretion. Once the Commission's recommendations become law, the Secretary must close or realign the selected military bases as recommended. In addition, § 2909(a) of BRAC provides that

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

This presents a situation quite different from the one before this court in 1992. This court stated "[n]either does § 9252 either mandate nor prohibit such consolidation action. It says that 'no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance.'"[18] The mandate has now come.

In its earlier opinion, this court discussed rules concerning the effect of later passed enactments. This court concluded that § 351(a) and § 9252 were not irreconcilable, and could both be given effect. Thus, the court did not totally base its decision on which statute was most recently adopted. As stated earlier, BRAC was not implicated in that action, and its effective date was not at issue. Now, however, BRAC is implicated, and the parties disagree as to the "effective date" of BRAC. BRAC itself was enacted prior to both § 351(a)

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[18]§ 351(a) reads "[i]f the Secretary takes action to consolidate . . ." Here the action was taken pursuant to BRAC. There is a difference between saying "if the Secretary takes action. . ." and in saying "if the realignment is mandated by the BRAC Commission and subsequent Congressional legislation."

(effective date October 23, 1992) and § 9252 (effective date October 7, 1992). Plaintiffs argue that § 351(a), as the most recently adopted statute of the three, controls. This court disagrees. Although the Base Closure and Realignment Act became law prior to the passage of § 351(a), the recommendations of the Commission did not attain the force of law until 1993. As such, the recommendation is the most "recent" law. Section 351(a)'s competitive bidding requirement is in direct conflict with the Commission's recommendation that the Secretary realign tactical missile maintenance from ANAD to LEAD. Applying the general rule, the most recent law, the Commission's recommendation, governs.[19]

II. § 8112

The mandate of the Commission recommendation is supplemented by yet another, even more recent, statute. As stated above, § 8112 of the Defense Appropriations Act for Fiscal Year 1994 provides that

> Notwithstanding any other provision of law, and in accordance with Section 2905 of the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, the Department of Defense shall proceed with the implementation of the 1993 Defense Base Closure and Realignment Commission recommendation concerning the consolidation of tactical missile maintenance at Letterkenny Army Depot.

Pub. L. No. 103-139 (Nov. 11, 1993)(emphasis added). The President signed the 1994 Appropriations Act on November 11, 1993, at which time it became law. As such, it is the most

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[19]Apparently, § 351(a) has not been re-adopted after the action of the BRAC Commission and the passage of § 8112.

recent statute of those applicable in deciding the motion now before this court. It is important to note the underlined portions of § 8112.[20]

First, the section specifically mentions § 2905 of BRAC. § 2905, entitled "Implementation," instructs the Secretary of Defense on how to proceed with realigning and closing military bases in accordance with the Commission's recommendations. This specific reference to BRAC in § 8112 manifests Congress' clear intent that the BRAC closures and realignments proceed unimpeded. Compare this "Congressional" intent with the motivation behind §§ 351(a) and 9252. In this court's earlier opinion, it stated the following with regard to those sections:

> Interested Congressional Representatives from the ANAD and LEAD areas were obviously attempting to obtain or protect employment in their own areas. One was attempting to require competition, the other to avoid it. The motivation of the individual Representatives in seeking enactment of the legislation is, however, not the total issue. The situation does suggest, however, that there was not real "intent" of Congress, only the intent of the individual Representatives.

Congress' specific mandate with regard to base closure and realignment expressed in BRAC was clearly designed to avoid such individualized political decisions.[21]

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[20]As stated in this court's earlier opinion, "it is assumed that Congress intended to enact an effective law. Congress is not to be presumed to have done a vain thing in enacting the statute."

[21]The broad, general and exclusive effect of BRAC is further evidenced by § 2906 part C, which provides that "[t]he provision of the National Environmental Policy Act of 1969 (42 U.S.C. 4231 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in Paragraph 2, the Department of Defense in carrying out this part. . ."

Second, the section contains the language "notwithstanding any other provision of law. . ." As plaintiffs correctly note, "this Court previously stated that the use of the term 'notwithstanding' in an act 'connotes continued viability.'" There is, however, more to the story than that emphasized by the plaintiffs. In its 1992 opinion, this court concluded that § 351(a) and § 9252 were not irreconcilable. In the situation now before this court, § 8112 and BRAC are irreconcilable with § 351(a) and its competitive bidding requirement. As noted by defendants, in this situation a "notwithstanding" clause "manifests a clear intent to override any conflicting statutes in existance." Bank of New England Old Colony, N.A. v. Clark, 986 F.2d 600 (1st Cir. 1993).[22] Accordingly, the "notwithstanding" clause in § 8112 manifests an intent by Congress to override the compatitive bidding requirement of § 351(a).

Plaintiffs also argue that § 8112 should not be read to supersede or impliedly repeal § 351(a) because is it an "appropriations" act. In support of this contention, plaintiffs cite case law suggesting that "repeals by implication in such contexts are 'especially disfavored,' and the congressional intent to do so must clearly be expressed." The latter part of

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[22]See also Dean v. Veterans Admin. Regional Office, 943 F.2d 667, 670 (6th Cir. 1991, vacated and remanded on other grounds, 112 S.Ct. 1255 (1992); Liberty Maritime Corp. v. United States, 928 F.2d 413, 416 (D.C. Cir. 1991); In re FCX, Inc., 853 F.2d 1149, 1154 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989); MultiState Communications, Inc. v. FCC, 728 F.2d 1519, 1525 (D.C. Cir), cert. denied, 469 U.S. 1017 (1984); New Jersey Air National Guard v. FLRA, 677 F.2d 276, 283 (3d Cir.), cert. denied, 459 U.S. 988 (1982).

plaintiffs' contention has already been addressed by this court. As stated earlier in this opinion, Congress clearly expressed its intent in § 8112 that the Commission's recommendations be implemented in accordance with § 2905 of BRAC without further delay. In addition, defendants cite cases suggesting that:

> Congress can amend substantive legislation through a provision in an appropriations bill. . .Republic Airlines, Inc. v. United States Dept. of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988).
>
> Appropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. American Fed. of Gov. Emp., AFL-CIO v. Campbell,. 659 F.2d 157 (D.C. Cir. 1980), cert. denied, 454 U.S. 820 (1981).

Thus, plaintiffs' labelling of § 8112 as an "appropriations" bill does not undercut this court's conclusion that § 8112, coupled with BRAC, manifests Congress' clear intent to mandate expedient implementation of this round of base closures and realignments.

Based on the foregoing, it is clear that BRAC and § 8112 necessarily override § 351(a). The Commission has made its recommendations, and these recommendations now have the force of law. As such, the Secretary is mandated to consolidate the tactical missile maintenance work from ANAD to LEAD. This mandate is strengthened by specific reference to BRAC in § 8112. Consequently, § 351(a), which is in direct conflict with this mandate, can no longer prevail.

IV. FEDERAL RULE OF CIVIL PROCEDURE 60(b)

In their brief, defendants state that they move "pursuant to Fed. R. Civ. P. 60(b), to vacate this Court's December 21, 1992 Order. . . because subsequent legislation has changed the legal

framework and defendants are now under a congressional mandate inconsistant with that Order." Rule 60(b)(5) authorizes this court to modify or vacate its orders when "it is no longer equitable that the judgment should have prospective application." Defendants cite the following authority in support of their contention that this court should modify its December order:

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . [A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. United States v. Swift & Co., 286 U.S. 106, 114-15 (1932).
>
> While recognizing that the reasoning in Swift that a change in law or fact is the clearest basis for modifying an injunction, we also recognized that sometimes the power of equity may serve to modify an injunction if "in light of experience. . . [it becomes clear] that the decree is not properly adapted to accomplishing its purposes." Miller v. SEC, 998 F.2d 62 (2d Cir. 1993).
>
> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. System Federation No. 91 Railway Employees' Dept., AFL-CIO v. Wright, 364 U.S. 642, 647 (1961).
>
> We believe that this court no only has equitable discretion to respond to changing circumstances but has a responsibility to take corrective action when its prior orders threatens to foster rather than forestall irreparable harm. Consolidated Edison Co. v. FPC, 511 F.2d 372, 378 (D.C. Cir. 1974)(emphasis added).[23]

As noted by defendants, circumstances have changed since this

[23]In its opposition brief, plaintiffs do not provide this court with case law to the contrary.

LEAD. First, BRAC is now implicated. Second, the BRAC process is complete, and the Commission's recommendation that such work be transferred to LEAD has the force of law. Third, § 8112 has been passed, further strengthening the mandate that realignment to LEAD proceed without delay. As stated above, BRAC § 2904(a)(2) leaves the Secretary no discretion--he must "realign all military installations recommended for realignment by such Commission in each such report." Sections 2905 and 2909 also serve to reinforce the realignment mandate. Thus, the circumstances, both legal and factual, obtaining at the time of issuance of this court's December injunction have changed, and new circumstances have arisen. As such, this court has a responsibility to modify the terms of its decree to accommodate the changed circumstances.

In a footnote to its 1992 opinion, this court noted its awareness of the deference which should and must be shown by courts in reviewing military decisions. At that time, this court stated that "such deference does not extend to allowing the Military to interpret statutes as it desires and either complying or not complying with statutes depending upon its own interpretations." Likewise, this court cannot avoid the clearly expressed intent of Congress. This court cannot defy Congress' mandate that base closure and realignment proceed, without further delay, as contemplated by BRAC and § 8112. Earlier, the voice of Congress was muddled. Now, it is loud and clear. This court's order of December 21, 1992, enjoining defendants from transferring any portion of the tactical missile maintenance work

voice of Congress was muddled. Now, it is loud and clear. This court's order of December 21, 1992, enjoining defendants from transferring any portion of the tactical missile maintenance work from ANAD to LEAD will be vacated and the injunction ordered therein dissolved. The court will stay said vacation and dissolution for 14 days, to allow plaintiffs to seek a stay from the appellate court.

This 1st day of February, 1994.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

CITY OF
ANNISTON, ALABAMA
P. O. BOX 670 • 36202
205-236-3422

May 23, 1991

Honorable James Courter
Chairman
Defense Base Closure and Realignment Commission
1625 K Street, N.W. Suite 400
Washington, D.C. 20005-1604

Dear Mr. Chairman:

As I stated during my remarks before the commission on May 23, 1991, I hearby respectfully submit the enclosed document concerning the proposed transfer of Tactical Missile Maintenance work from the Anniston Army Depot, AL. to Letterkenny Army Depot, PA. This information clearly establishes that economic, environmental, and readiness issues make the relocation of this work not in the best interests of the Department of Defense or our nation. We ask that this recommendation by the Department of Defense be overturned.

Thank you for your consideration of this information.

Sincerely,

William A. Robison

William A. Robison
Mayor

WAR:sls

Document Separator

MATT – FYI

RE: LETTERKENNY/ANNISTON et.al.

DAEN-ZCI

20 NOV 1991

MEMORANDUM FOR RECORD

SUBJECT: REALIGNMENT OF MAINTENANCE WORKLOAD - LETTERKENNY ARMY DEPOT

PURPOSE: Define the Defense Base Realignment and Closure Commissions consideration of the Army initiative to realign maintenance activity among various Army Depots.

DISCUSSION: The Department of Defense Base Realignment and Closure Proposal submitted to the Commission contained a sentence in the Letterkenny Army Depot recommendation section regarding maintenance activity transfer (pg 47). The sentence read " Losses in personnel at Letterkenny Army Depot are partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT, and Red River Army Depots, TX respectively."

The justification for the Letterkenny Army Depot submission contained cost data for the realignment of activities to Rock Island Arsenal and Redstone Arsenal. No reference or cost data for the workload transfer proposal was included in the DoD submission.

Subsequent actions requested the Army submit Migration Diagrams and COBRA (cost) Analysis for all of their proposals (and alternatives). The Army did submit Migration Diagrams for the maintenance workload; however, no COBRA (cost) Analysis was provided.

Telephonic coordination with the Army Total Army Basing Study indicated that the Letterkenny maintenance workload realignment was "workload" only and did not involve personnel and was within Army authority to approve. The Army included it because of OSD guidance to include cumulative actions which triggered the threshold that warranted submission to the Commission.

DAEN-ZCI
SUBJECT: REALIGNMENT OF MAINTENANCE WORKLOAD - LETTERKENNY ARMY DEPOT

The undersigned addressed the issue with Commission counsel and Director of Review and Analysis, recommending the Commission not consider the initiative. The recommendation was accepted and the Commission did not address the initiative.

DAVID A. [illegible]
Analyst
Defense Base Realignment and
Closure Commission

Document Separator

December 17, 1991

The Honorable Glen Browder
U.S. House of Representatives
1221 Longworth House Office Building
Washington, D.C. 20515-3261

Dear Congressman Browder:

Thank you for you recent letter concerning the consolidation of the Department of Defense's tactical missile maintenance function. I recognize your interest and that of Senators Heflin and Shelby in this matter, and the potential impacts on your state.

The statutory change of this Commission is to review and analyze the closure and realignment of recommendations of the Secretary of Defense to ensure that his recommendations did not substantially deviate from the provisions of Public Law 101-510, Title XXIX. If substantial deviation were found then the Commission was to make ~~recommended~~ changes to the Secretary's list. As you are ~~well~~ aware ~~there were~~ several ~~changes~~ to the Secretary's recommendations.

You have inquired as to whether the workload adjustments mentioned in paragraph 2, page 47, DoD Base Closure and Realignment Report, was approved by the Commission in it's July 1 Report to the President. The Department's "concurrent" workload adjustments stated in paragraph 2 were neither approved nor disapproved. As a workload adjustment alone, this proposed action does not fall under the purview of the Commission.

The Secretary of Defense retains the managerial discretion to carry out workload adjustments or to terminate same. In addition, the Secretary retains the authority to carry out closures, or realignments which both reduces and relocates functions and civilian personnel positions, so long as they do not exceed the thresholds as stated in 10 U.S.C. 2687.[Reduction of 1,000 or 50 percent in the number of authorized civilian personnel]

The Secretary also has the prerogative to recommend workload adjustments coupled with civilian personnel reductions and relocations of any size to the Commission by March 15, 1993.

I have forwarded a copy of this letter to Assistant Secretary McMillen. Please feel free to call on me at any time.

Sincerely,

JIM COURTER
Chairman

JAC/bb

Document Separator

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U.S. House of Representatives
1221 Longworth House Office Building
Washington, D.C. 20515-3261

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The objective of this Commission was to review and analyze the closure and realignment recommendations of the Secretary of Defense to ensure that his recommendations did not substantially deviate from the provisions of Public Law 101-510, Title XXIX. If substantial deviations were found then the Commission was to make recommended changes to the Secretary's list. As you are well aware there were several changes to the Secretary's recommended list.

With regard to Letterkenny Army Depot, the Commission determined that the DoD recommendation did not deviate substantially from the force structure plan and the final selection criteria and, therefore agreed with the Secretary's recommendation. However, the movement of tactical missile maintenance workload to Letterkenny from a number of other locations including the Anniston Depot was viewed as a concurrent action within the purview of the Department of Defense and annotated to show that there would be an offset to the loss of personnel at Letterkenny Depot.

The Commission staff researched this area with the Department of the Army during the review and analysis process and determined that there was a concurrent action that would mitigate to some degree the loss of personnel from Letterkenny Depot. Additionally, staff was informed that the concurrent action involved the movement of workload and not workforce.

The movement of the tactical missile maintenance and tactical vehicle and artillery maintenance workloads are within the authority of the Secretary of Defense and he can proceed within the limits of existing law. However, these movements could be brought before the 1993 Commission if the Secretary was so inclined.

I have forwarded a copy of this letter to Assistant Secretary McMillan. Please feel free to call on me at any time.

Matt/Bob

Should ~~be~~ this paragraph be included in our letters to Senators Shelby + Heflin and Rep. Browder?

Paul

The Secretary also has the prerogative to recommend workload adjustments coupled with civilian personnel reductions and relocations of any size to the Commission by March 15, 1993.

I have forwarded a copy of this letter to Assistant Secretary McMillen. Please feel free to call on me at any time.

Sincerely,

JIM COURTER
Chairman

JAC/bb

* Howell T. Heflin
U.S. Senate
728 Hart Senate Office Building
Washington, D.C 20510-0101
* Dear Senator Heflin
Senator Shelby & Congressman Browder

* Richard C. Shelby
U.S. - -
313 Hart - -
U.D.C 20510-0103
* Dear Senator Shelby
* Senator Heflin & Congressman Browder

December 17, 1991

* The Honorable Glen Browder
U.S. House of Representatives
1221 Longworth House Office Building
Washington, D.C. 20515-3261

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You have inquired as to whether the workload adjustments mentioned in paragraph 2, page 47, DoD Base Closure and Realignment Report, ~~was~~ were approved by the Commission in it's July 1 Report to the President. The Department's "concurrent" workload adjustments stated in paragraph 2 were neither approved nor disapproved. As a workload adjustment alone, this proposed action ~~does~~ did not fall under the purview of the Commission.

The Secretary of Defense retains the managerial discretion to carry out workload adjustments or to terminate same. In addition, the Secretary retains the authority to carry out closures, or realignments which both reduces and relocates functions and civilian personnel positions, so long as they do not exceed the thresholds as stated in 10 U.S.C. 2687.[Reduction of 1,000 or 50 percent in the number of authorized civilian personnel]

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1991 Commission

COMMISSION FINDINGS

The Commission found that excess capacity will exist at Fort Polk after completion of the recommended realignment. However, it also found that the Army will likely use this excess capacity to house forces that may return from overseas or to station other Army or DoD activities. Additionally, the Commission finds that Fort Polk does not have enough training facilities or maneuver acreage to support both a division and the JRTC at Fort Polk. The Commission estimates that the unemployment impact will be severe.

RECOMMENDATIONS

The Commission finds that the DoD's recommendation did not deviate substantially from the force-structure plan and the selection criteria. The Commission, therefore, recommends the realignment of the 5th Infantry Division (Mechanized) from Fort Polk to Fort Hood, the JRTC from Fort Chaffee to Fort Polk, and the 199th SMB from Fort Lewis to Fort Polk.

Letterkenny Army Depot, Pennsylvania

Category: Industrial Depot
Mission: Depot Maintenance
Costs to Realign: $36.4 million
Savings: 1992-97: $27.0 million;
Annual: $17.7 million
Payback: Immediate

DEPARTMENT OF DEFENSE RECOMMENDATIONS

Realign the Headquarters, Depot Systems Command, including the Systems Integration Management Activity (SIMA), from Letterkenny Army Depot, Pennsylvania, to Rock Island Arsenal, Illinois, and merge it with the Armaments, Munitions and Chemical Command to form the Industrial Operations Command. Realign the Materiel Readiness Support Activity from Lexington-Blue Grass Army Depot, Kentucky, and the Logistics Control Activity from the Presidio of San Francisco, California, to Redstone Arsenal, Alabama. The latter proposal is a revision to the recommendations of the 1988 Base Realignment and Closure Commission, which relocated the Materiel Readiness Support Activity to Letterkenny Army Depot.

COMMUNITY CONCERNS

The community argued that the Depot Systems Command need not be relocated in order to form the Industrial Operations Command. The new command could operate effectively in a split configuration. Additionally, the community believed that the SIMA was a separate entity that supported a variety of customers. Relocating that activity would result in an unwarranted up-front cost and an additional operational cost to support the entire customer base. The community was also concerned that the realignments would degrade the mission because experienced personnel would not move.

COMMISSION FINDINGS

The Commission found that the depots were treated equally. The formation of the Industrial Operations Command and resultant reduction of the number of subordinate commands were rational approaches to management efficiencies.

The Commission did consider alternative ways to form the Industrial Operations Command and to realign each of the activities designated for relocation. The Commission determined that the formation of the Industrial Operations Command in a single location was operationally more effective. The realignments of Depot Systems Command, the Materiel Readiness Support Activity, and the Logistics Control Agency were also determined to be economical. The relocation of SIMA was operationally expedient in the long term and beneficial to the economy at the receiving location (Rock Island Arsenal), which is losing a large number of employees because of other base realignment and closure actions.

RECOMMENDATIONS

The Commission finds the DoD recommendations did not deviate substantially from the force-structure plan and final selection criteria. Therefore, the Commission recommends that DoD realign Depot Systems Command with the Systems Integration Management Activity to Rock Island and form the Industrial Operations Command. Additionally, it recommends that the Materiel Readiness Support Activity and the Logistics Control Agency be realigned at Redstone Arsenal as proposed. This proposal is a revision to the recommendations of the 1988 Base Closure Commission, which directed the Materiel Readiness Support Activity to relocate from Lexington-Blue Grass Army Depot to Letterkenny.

Realign Army Laboratories (Lab 21 Study), Adelphi and Aberdeen, Maryland

Category: Industrial-Commodity Oriented Installations
Mission: Research, Development and Testing
Cost to Realign: $281.8 million
Savings: 1992-97: –$106.0 million; Annual: $44.7 million
Payback: 4 years

DEPARTMENT OF DEFENSE RECOMMENDATION

Establish the Combat Materiel Research Laboratory (CMRL) at Adelphi, Maryland. The Army Materiel Technology Laboratory (AMTL), now in Watertown, Massachusetts, should not be split among Detroit Arsenal, Michigan; Picatinny Arsenal, New Jersey; and Fort Belvoir, Virginia. Instead, realign the AMTL to Aberdeen Proving Ground (APG), Maryland. Collocate the Structures Element at NASA-Langley Research Center, Hampton, Virginia. This proposal is a revision to the recommendations of the 1988 Base Realignment and Closure Commission.

COMMUNITY CONCERNS

The community argued the Base Closure and Realignment Commission should wait for the recommendations on laboratory realignments from the Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories. The latter Commission is an advisory group established by law to provide recommendations to the Secretary of Defense on how to effectively reorganize the research and development structure. The community also argued portions of the realignment were not cost-effective and would adversely impact readiness.

COMMISSION FINDINGS

The Commission found the industrial-commodity oriented installations were treated equally. The Commission found that the DoD studies and Defense Management Report Decision regarding laboratory realignments were credible and rational. The Army reviewed ten scenarios for the realignment of the laboratories and this proposal was cost-effective. The realignment of the Army Materiel Technology Laboratory functions to a single site was determined to have operational and cost advantages over the triple-site option recommended by the 1988 Base Realignment and Closure Commission.

RECOMMENDATIONS

The Commission finds DoD's recommendations did not deviate substantially from the force-structure plan and the criteria. The Commission recommends the closure of Harry Diamond Laboratory in Woodbridge, Virginia, and realignment of the laboratories to establish the Combat Materiel Technology

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Army Depots

Letterkenny Army Depot, Pennsylvania

Category: Depots
Mission: Depot Maintenance
*One-time Cost: $ 23.1 million**
*Savings: 1994-99: $ 42.8 million**
Annual: $ 13.1 million
Payback: 7 years
**These numbers reflect SIMA-E redirect savings*

SECRETARY OF DEFENSE RECOMMENDATION

Realign Letterkenny Army Depot (LEAD) by reducing it to a depot activity and placing it under the command and control of Tobyhanna Army Depot, PA. Relocate the maintenance functions and associated workload to other depot-maintenance activities, including the private sector. Retain the conventional ammunition storage mission and the regional Test Measurement and Diagnostic Equipment (TMDE) mission. Change the recommendation of the 1991 Commission regarding Letterkenny as follows: instead of sending Systems Integration Management Activity East (SIMA-E) to Rock Island Arsenal, Illinois, as recommended by the 1991 Commission, retain this activity in place. Retain the SIMA-E and the Information Processing Center at Letterkenny until the Defense Information Systems Agency (DISA) completes its review of activities relocated under Defense Management Review Decision (DMRD) 918. The activities of the depot not associated with the remaining mission will be inactivated, transferred or otherwise eliminated. Missile maintenance workload will not consolidate at Letterkenny, as originally planned. However, Depot Systems Command will relocate to Rock Island Arsenal, where it will consolidate under the Industrial Operations Command there, as approved by the 1991 Commission.

SECRETARY OF DEFENSE JUSTIFICATION

The decision to realign LEAD was driven by the results of the Chairman, Joint Chiefs of Staff triennial review of roles and missions in the Department of Defense. As part of this review, the Chairman chartered the Depot Maintenance Consolidation Study. The study identified a significant amount of excess depot capacity and duplication among the Services.

The Army has concluded the projected ground systems and equipment depot maintenance workload for fiscal year 1999 is not sufficient to maintain all of the ground systems and equipment depots.

In drawing the conclusion to downsize LEAD, the Army considered the following factors: relative military value of the depots, the future heavy force mix, reduced budget, workforce skills, excess capacity, ability of the depots to accommodate new workload levels, the proximity of the depots to the heavy forces in the U.S., and the resulting savings.

SIMA-E, which performs computer systems design and data management functions for a variety of activities, is transferring to the Defense Information Systems Agency (DISA) in 1993. Retention keeps this activity focused regionally upon the customer. SIMA-West is located in St. Louis and supports functions in the western portion of the U.S. DISA advised the Army there were no advantages or savings from a relocation to Rock Island Arsenal, IL. Less than 25% of the work performed by SIMA-E is associated with the Industrial Operations Command at Rock Island Arsenal.

COMMUNITY CONCERNS

The community argued the consolidation of the Joint Missile Maintenance mission at Letterkenny Army Depot, as originally recommended by Defense Management Review Decision (DMRD) 918, remains the most sensible and economical option available for the interservicing of missile workload. The community maintained realigning the missile-maintenance workload to other depots would not take advantage of the efficiencies gained by interservicing at a single site. Also, the community argued existing artillery workload should not be transferred to another Army depot as originally planned. The community cited various factors including a partnership arrangement with private industry for assembling the Paladin weapon system. Additionally, the community believed Depot Systems Command (DESCOM) should not relocate to Rock Island Arsenal, IL, as recommended by the 1991 Commission, but should remain in place at LEAD and form the Industrial Operations Command (IOC) from existing DESCOM assets thereby saving the cost of

personnel relocations. The community agreed with the Army recommendation SIMA-E should remain in place at LEAD until DISA determined the best alternative for its future.

COMMISSION FINDINGS:

The Commission found the Army treated all its depots equally. The Commission also found the Army's process for isolating and eliminating excess capacity was a consistent and prudent approach toward decreasing the excess capacity that existed in the Army's depot system.

The Commission carefully considered interservicing of tactical-missile maintenance and found the eight defense depots identified by the Department of Defense as interservicing candidates in the *Tactical Missile Maintenance Consolidation Plan for Letterkenny Army Depot*, 31 January 1992 (revised 30 April 1992) were performing similar work on tactical-missile guidance and control sections and in some instances related ground control systems. In addition to Letterkenny Army Depot, these eight included Anniston Army Depot, AL; Red River Army Depot, TX; Tobyhanna Army Depot, PA; Naval Weapons Station Seal Beach, CA; Naval Aviation Depot Alameda, CA; Naval Aviation Depot Norfolk, VA; and Ogden Air Logistics Center, Hill AFB, UT.

The Commission also found the workload originally planned for consolidation at Letterkenny had decreased. Some missile systems—the Shillelagh, Land Combat Support System, Chaparral, and the ANTSQ-73—were no longer considered viable candidates for transfer because they would soon be retired, and a substantial portion of the remaining work for potential transfer to Letterkenny was being performed by private contractors. Despite all of these interservicing efficiency-reducing factors, a recent study by the Army Audit Agency concluded the annual recurring savings to be realized from tactical-missile consolidation at Letterkenny would still be equivalent to savings achieved from the proposed Letterkenny realignment, if all missile maintenance workload, including that which is currently assigned to the private sector, transitions to Letterkenny.

While the Letterkenny facilities might possibly be under-utilized if the tactical-missile workload was consolidated at the depot, retention of the current artillery workload could help alleviate the problem. Although not included with DOD's original consolidation plan, the transfer of Hawk ground control system maintenance from the Marine Corps Logistics Base, Barstow, could further reduce costs and improve Letterkenny facility utilization rates.

The Commission found the consolidation of tactical-missile maintenance at a single depot was a valid plan worthy of implementation in order to create efficiencies and reduce costs.

COMMISSION RECOMMENDATION

The Commission finds the Secretary of Defense deviated substantially from final criteria 1 and 4. Therefore, the Commission rejects the Secretary's recommendation on Letterkenny Army Depot, PA, and instead, adopts the following recommendation: Letterkenny Army Depot will remain open. Consolidate tactical-missile maintenance at the depot as originally planned by the Department of Defense in the *Tactical Missile Maintenance Consolidation Plan for Letterkenny Army Depot*, 31 January 1992 (revised 30 April 1992). Add tactical-missile maintenance workload currently being accomplished by the Marine Corps Logistics Base Barstow, California, to the consolidation plan. Retain artillery workload at Letterkenny. Retain the Systems Integration Management Activity-East (SIMA-E) at Letterkenny Army Depot (change to the 1991 Commission recommendation) until the Defense Information Systems Agency completes its review of activities relocated under DMRD 918. Relocate Depot Systems Command to Rock Island Arsenal, IL, and consolidate with the Armament, Munitions, and Chemical Command into the Industrial Operations Command, as approved by the 1991 Commission. The Commission finds this recommendation is consistent with the force-structure plan and final criteria.

Tooele Army Depot, Utah

Category: Depots
Mission: Depot Maintenance
One-time Cost: $ 73.7 million
Savings: 1994-99: $ 107.2 million
Annual: $ 51.0 million
Payback: Immediate

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zero opposed, and the motion passes.

CHAIRMAN COURTER: Thank you very much, and we'll proceed. Mr. Behrmann.

MR. BEHRMANN: Mr. Chairman, I believe we're ready to move on to interservicing. Bob Cook will introduce the team that's going to brief tactical missile maintenance.

MR. COOK: Good morning. This is the first of a series of presentations with deal with interservicing issues. Today, we'll address Letterkenny Army Depot and the potential for consolidating the tactical missile workload at that location, and Tooele Army Depot with the potential for consolidating wheeled vehicle mission at that depot.

The DOD recommendation was to transfer these depot workloads to other Army Depots, so the decision before the Commission is to accept that recommendation or to invoke some form of consolidation.

To offer the discussion for the Commissioners, MAJ Gary Evans is an Army detailee from DOD and will cover a very brief overview of the Army Depot System and he'll be followed by Mr. Glenn Knoepfle, who is the analyst that did the specific analysis for both of the bases.

MAJ EVANS: Good morning. If we could go to Tab 3,

I've been relegated to the back and we'll start there. This overview will stand for both Letterkenny and Tooele. If you look at the map, the main depots of the Depot System Command consists of Tooele, Red River, Anniston, Letterkenny and Tobyhanna.

When the Army did their study on the closure process, they determined that there were two depots over excess capacity, so when they did their iterations of how to close depots, they took them in pairs. They determined through their work that Tooele and Letterkenny would be the two depots that they should realign into depot activities, and the reason they realigned is because their maintaining the ammunition storage capability at both places.

Given if both Letterkenny and Tooele close, the chart on the left shows how the commodities would fall out between the other three depots. Now, if you notice on the bottom, undecided is missiles, and that was originally in a Defense Management Review decision.

They decided that missiles would be consolidated at Letterkenny about two years ago. Unfortunately, that hasn't happened yet and during the DOD recommendation this time around, they determined that it would not take place, as

originally planned.

COMMISSIONER McPHERSON: Is there litigation about that?

MR. BEHRMANN: Yes, sir. It was turned off originally due to a recommendation in '91 that there was mention of a concurrent workload moving into Letterkenny out of Anniston, and we asked a number of questions about that in 1991 of the Department of the Army, and they viewed it as a non-BRAC action.

We asked a lot of questions about it, so we did not include it in our report. We weren't given costed data on it. It was viewed by us as something that they could do on their own and the only reason they mentioned it in the report to us was as a mitigator for moving things out of Letterkenny, to let that community know there is going to be workload coming in to backfill.

We don't know how much. We don't know the full impact, so we just want to kind of give you notice about that. There was a suit filed that says that the movement of that workload into Letterkenny was not blessed by BRAC; therefore, it could not go on, you know, with all of the BRAC safeguards. It happened on a fast track.

The court held on that and I believe it's in appeal, Counsel.

MS. CHESTON: I think the short answer to your question, Commissioner McPherson, is that the litigation does not prohibit the Commission from adopting any of these recommendations.

COMMISSIONER STUART: But on the other hand, hasn't it been a factor in the Army's change of position?

MS. CHESTON: Yes.

MR. BEHRMANN: Yes, sir, it has been, and that's why they didn't originally make the recommendation but if we went ahead and mandated it as part of BRAC, it's completely acceptable to do so.

COMMISSIONER STUART: The effect of this, in a way, invites many other communities to use legal action to do the same thing.

MR. BEHRMANN: Yes, sir.

COMMISSIONER STUART: That troubles me.

MR. BEHRMANN: That troubles me, sir, because I've been deposed in a couple of those actions and I'd rather not have to do it again.

COMMISSIONER STUART: Right.

COMMISSIONER BYRON: Matt, was there somewhere in the discussion a quote by a judge who stated that had the Commission specifically spelled out the missile mission?

MS. CHESTON: In the Letterkenny litigation, are you referring to?

COMMISSIONER BYRON: Yes.

MS. CHESTON: The Letterkenny litigation did not address specifically the BRAC process. Indeed, it said, "This is not a BRAC action and we are not considering the issue of what would happen if it were a BRAC action." They just put that whole issue aside and they treated it as a non-BRAC action.

COMMISSIONER COX: But it is clear, Sheila, that should we decide to consolidate the missile mission at Letterkenny, that is not prohibited by the lawsuit?

MS. CHESTON: Yes.

MR. BEHRMANN: This may be a long answer to a short question, and I apologize.

COMMISSIONER McPHERSON: I also think Commissioner Stuart's comment is very apt, that if this is permitted to set a precedent for intervening and blocking these moves that reduce the nation's excess capacity and make the Defense

Department more efficient, then it's to be resisted. Excuse me. Go ahead.

MAJ EVANS: Our next chart, please. This depot summary shows the '99 projected workload. What it outlines is the capacity at each of the five depots, the projected workload, and breaks it down into percent of utilization. If you notice, we --

COMMISSIONER BYRON: Do you have a different numbering on your chart?

COMMISSIONER McPHERSON: We don't have these in our charts. Ours is 33.

CHAIRMAN COURTER: That's okay.

COMMISSIONER McPHERSON: We're okay.

MAJ EVANS: You'll notice there was 8.1 million labor hours in excess capacity within the five depots, and that's what the Department of the Army was trying to reduce. Closing Letterkenny and Tooele increases the utilization of the depots to 77 percent and decreases the excess capacity to 23 percent.

Not closing either or both maintains an excess capacity. That, in turn, when you spread out the overhead, could product higher labor rates at the existing depots in

might as well begin here. That's my feeling. I'll entertain a motion.

COMMISSIONER COX: Mr. Chairman, I move that the Commission find the Secretary of Defense deviated substantially from final criteria 1 and 4. Therefore, the Commission rejects the Secretary's recommendation on Letterkenny Army Depot, Pennsylvania, and instead adopts the following recommendation:

Letterkenny Army Depot will remain open. Consolidate tactical missile maintenance at the depot as originally planned by DoD in 1995. Add tactical missile maintenance workload currently being accomplished by the Marine Corps Logistics Base in Barstow, California, to the consolidation plan.

Retain current artillery workload at Letterkenny. Retain the Systems Integration Management Activity East at Letterkenny Depot Activity until the Defense Information System Agency completes its review of activities relocated under the DMRD 918. Relocate Depot Systems Command to Rock Island Arsenal, Illinois, and consolidate with the Armament, Munitions and Chemical Compound Command into the Industrial Operations Command, as approved by the 1991 Commission.

The Commission finds this recommendation is consistent with the force structure plan and final criteria.

CHAIRMAN COURTER: Do I hear a second to the motion?

COMMISSIONER STUART: Second.

CHAIRMAN COURTER: Seconded by Commissioner Stuart. The motion was by Commissioner Cox. Any discussion on the motion?

COMMISSIONER COX: I think you said it very well, Mr. Chairman.

CHAIRMAN COURTER: Any discussion on the motion? Any amendments to the motion or substitutes to the motion?

(No response.)

CHAIRMAN COURTER: Hearing none, the Commission will vote. We'll start with Commissioner McPherson.

COMMISSIONER McPHERSON: Aye.

MS. CHESTON: Commissioner McPherson votes "aye."

CHAIRMAN COURTER: The Chair votes aye.

MS. CHESTON: Commissioner Courter votes "aye."

CHAIRMAN COURTER: Commissioner Stuart.

COMMISSIONER STUART: Aye.

MS. CHESTON: Commissioner Stuart votes "aye."

Document Separator

17 February 1993

MEMORANDUM FOR MATT BEHRMANN

FROM ED BROWN

SUBJECT: Final Judgement, Anniston Army Depot, AL

In its April 1991 report to the Defense Base Closure and Realignment Commission, the Army recommended that Headquarters, Depot Systems Command be realigned from Letterkenny Army Depot, PA to Rock Island Arsenal, IL. The DoD report mentioned that losses in personnel at Letterkenny would be:

> "...partially offset by a concurrent action to move the tactical missile maintenance workload from Anniston Army Depot, AL; Red River Army Depot, TX; Sacramento Army Depot, CA; Tobyhanna Army Depot, PA; and several Navy and Air Force industrial facilities into Letterkenny Army Depot and to realign the tactical vehicle and artillery maintenance workload from Letterkenny to Tooele, UT and Red River Army Depots, TX, respectively."

The 1991 Defense Base Closure and Realignment Commission did not include the relocations noted as "concurrent action" and I believe it is not important at this time to pursue the reasons for this omission.

By its final judgement of December 21, 1992, the U.S. District Court for the Northern District of Alabama, Eastern Division, enjoined the Department of Defense from transferring any portion of the tactical missile maintenance mission from Anniston to Letterkenny unless and until the competitive procedures provided for in §351(a) of the National Defense Authorization Act for FY 1993 are implemented. That section provides:

> COMPETITIVE BIDDING - If the Secretary of Defense takes action to consolidate at a single location the performance of depot level tactical missile maintenance by employees of the Department of Defense, the Secretary shall select the depot to perform the tactical missile maintenance through the use of competitive procedures. Any depot-level activity of the Department of Defense that is engaged in tactical missile maintenance on the date of enactment of this Act (October, 23, 1992) shall be eligible to compete for such selection.

Prior to signing the Authorization Act, the President signed into law the Defense Appropriations Act on October 7, 1992. Section 9252 of this Act provides:

> Notwithstanding the provisions of §351(a) of the National Defense Authorization Act for Fiscal Year 1993 or any other provision of law, no funds appropriated or available to the Department of Defense shall be made available to prevent or delay the transfer and execution of the tactical missile maintenance consolidation to Letterkenny Army Depot, and in addition, no funds shall be made available for depot selection competition to assess depot level tactical missile maintenance. For purposes of this section, this Act shall be treated as having been enacted after the National Defense Authorization Act for Fiscal Year 1993. (Regardless of the actual dates of enactment.)

Even though the provisions of the Authorization Act and the Appropriations Act are arguably in conflict, the court concluded that there is no "irreconcilable" conflict. Therefore, the Department of Defense is required to implement both provisions and the Army cannot take any action during FY 1993 to consolidate tactical missile maintenance at any location.

cc: Paul, Mary Ann

is to require competitive procedures

clear intent of Congress - if there

is to be consolidation -

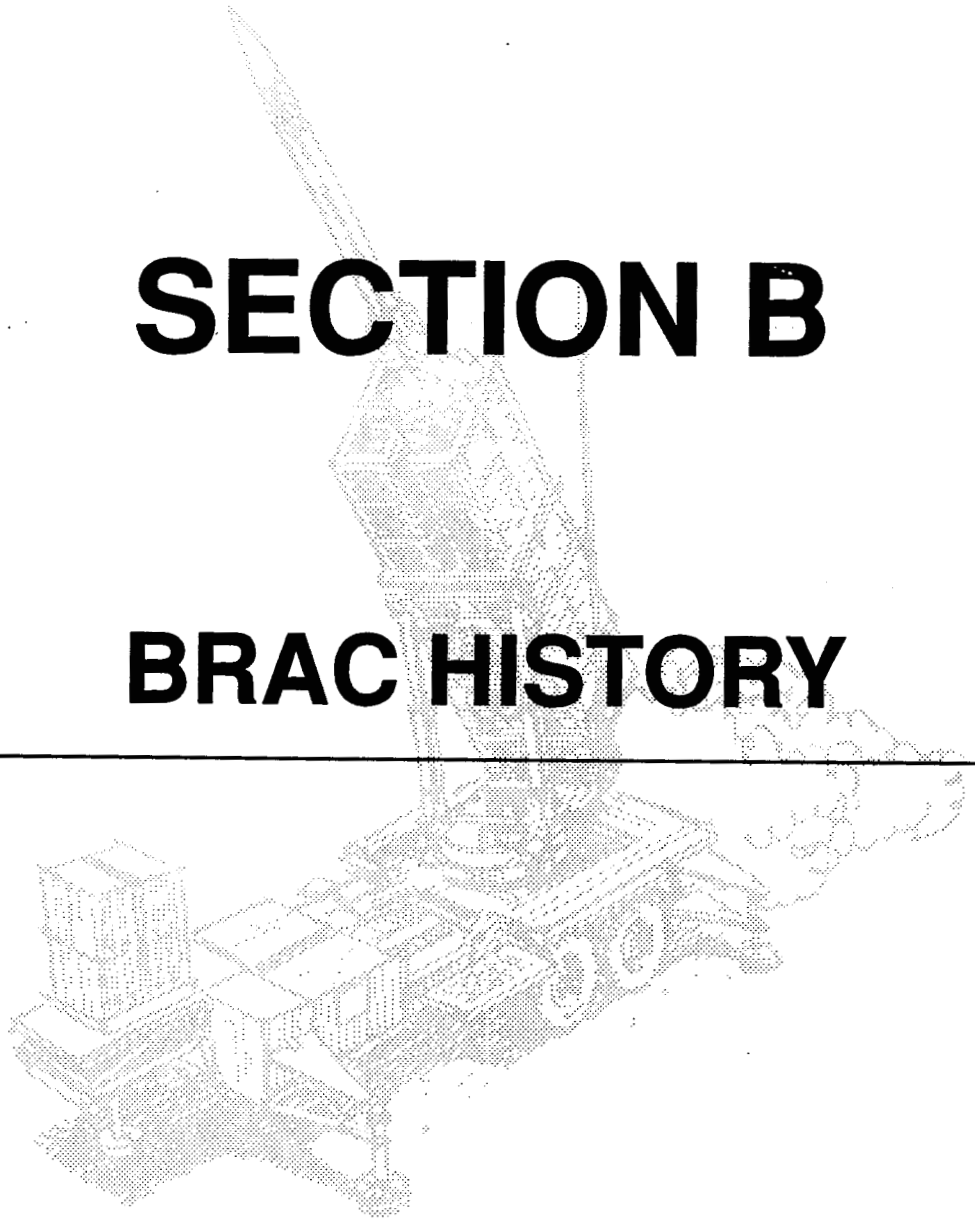
TRO granted injunction

Document Separator

4/21/93
Pa submission

SECTION B

BRAC HISTORY



BRAC 91

Commission Recommendations

DoD Recommendation to BRAC

- Consolidate the Tactical Missile Maintenance workload from Anniston Army Depot, AL, Red River Army Depot, TX, Sacramento Army Depot, CA, Tobyhanna Army Depot, PA, and several Navy and Air Force industrial facilities into **Letterkenny Army Depot.**

BRAC Action

- Silent

Result

It was and is the belief of the DoD and the Army Materiel Command that the consolidation of the Tactical Missile Mission at Letterkenny was part of the final BRAC recommendations.

On March 23, 1992 AMC CG Jimmy D. Ross confirmed this in a letter to me in which he stated "The office of the Secretary of Defense (OSD) General Counsel recently reviewed the tactical missile maintenace consolidation and reaffirmed the OSD position that this action falls under the 1991 Base Realignment and Closure decision." (Reference Doc.#1)

On April 28, 1992, DOD General Counsel reconfirmed the BRAC oversight. That the Tactical Missile consolidation to Letterkenny "was both in fact and in law part of the Base Closure and Realignment Act of 1990.(Reference Doc. #1B)

BRAC 93

Service Recommendations

- **The Tactical Missile Maintenance workload should not be consolidated at Letterkenny Army Depot as originally recommended.**

- **No alternate SINGLE site for consolidation of Tactical Missile Maintenance workload recommended.**

Letterkenny Army Depot
Base Realignment and Closure History
State of Flux

1988 - Logistics Control Agency into LEAD
Material Readiness Support Activity into LEAD

1991 - Material Readiness Support Activity to Huntsville, Alabama

Logistics Control Agency to Huntsville

Systems Integration Management Activity to Rock Island, Illinois

Depot Systems Command to Rock Island, Illinois

Artillery Workload to Red River, Texas

Missile Workload into LEAD

1993 - Systems Integration Management Activity to stay at LEAD
All Maintenance out of LEAD
Defense Distribution Depot (DLA) out of LEAD

Letterkenny Army Depot

Playing by the Rules

- **Acted in Good Faith to BRAC and DDMC Dictates**
  - Moved Generator workload
  - Moved Truck Workload
  - Prepared to Move Artillery
  - Prepared to Receive Missile Workload
  - Prepared to Move SIMA
  - Prepared to Move DESCOM
  - NO COURT CHALLENGES
- **Adversely affected by following dictates**
  - Did not compete for workload that the depot is qualified to conduct in order to save floor space for Missile Mission.
    - Electro optics workload from Sacramento
    - Truck Maintenance Workload
    - Generator Workload
    - Electronic and Mechanical Services
    - M88-A2 Full Track Recovery Vehicles: 1500-2000 vehicles

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

92 DEC 21 PM 3:39

U.S. DISTRICT COURT
N.D. OF ALABAMA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1945, and PATRICIA S. WHITE,

PLAINTIFFS,

v.

CV92-PT-2453-E

RICHARD CHENEY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE and MICHAEL P. W. STONE IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

DEFENDANTS.

ENTERED

DEC. 21 1992

FINAL JUDGMENT

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, the court orders, adjudges, declares and decrees as follows:

1. The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot to Letterkenny Army Depot (the court addresses only such subject matter which is before this court) is subject to all the provisions of §351(a) of the National Defense Authorization Act for Fiscal Year 1993, which said provisions are now and have been since the date of the President's signing in full force and effect.

2. The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-8000

JCTION AND
GISTICS

December 30, 1992

L/MD

MEMORANDUM FOR THE UNDER SECRETARIES OF THE MILITARY DEPARTMENTS

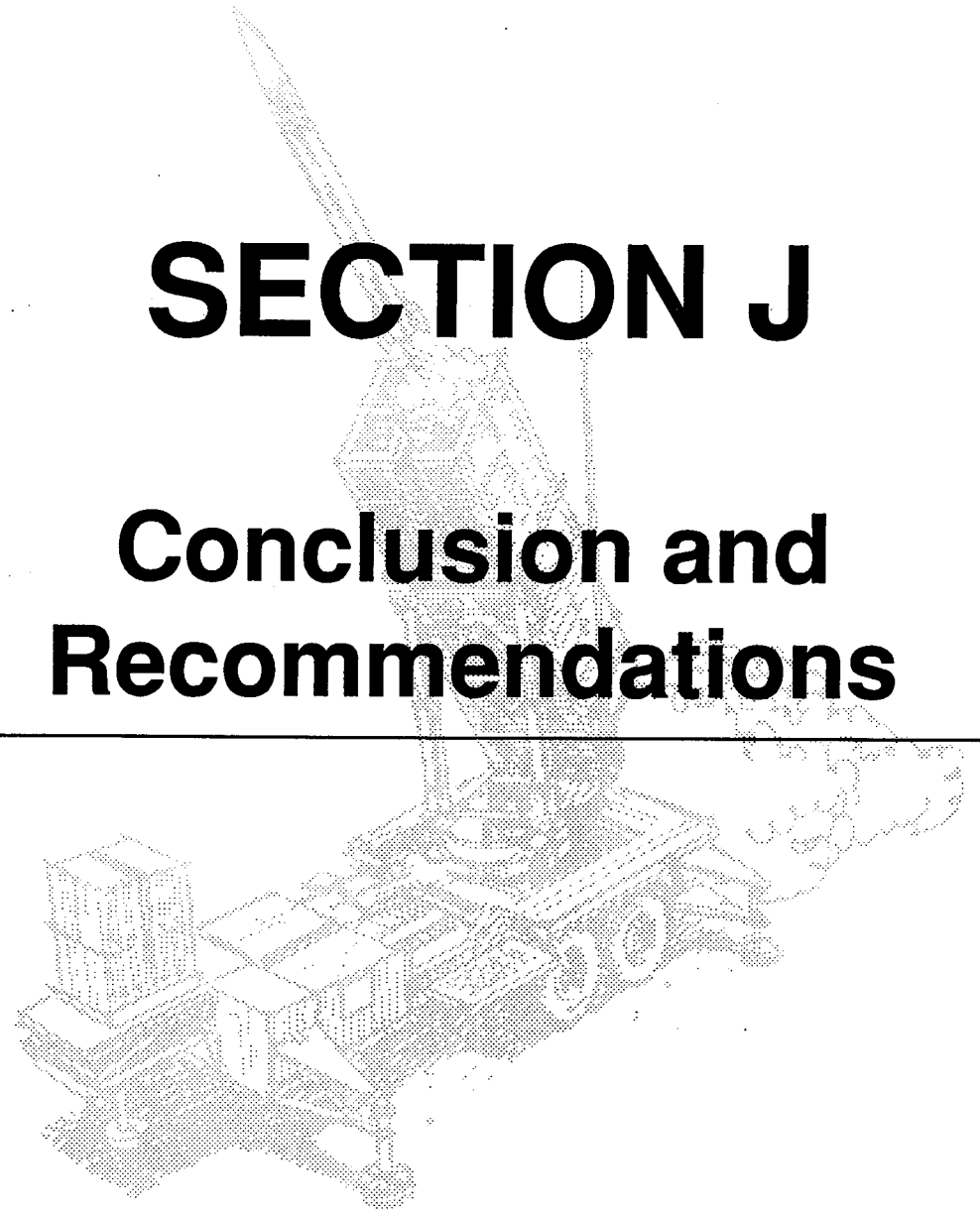
SUBJECT: Tactical Missile Maintenance Consolidation

The United States District Court for the Northern District of Alabama has determined that the effort to consolidate the depot maintenance of tactical missiles at Letterkenny Army Depot is subject to section 351(a) of the National Defense Authorization Act for Fiscal Year 1993 and section 9152 of the Department of Defense Appropriations Act, 1993. The court enjoined the transfer of any portion of the tactical missile maintenance work or facilities, and jobs and equipment related thereto, from Anniston Army Depot to Letterkenny, or any other depot, for the purpose of consolidating tactical missile maintenance, unless such transfer uses competitive procedures in accordance with section 351(a). The use of FY 93 funds to compete such a consolidation is proscribed by section 9152.

The court stated, "This effect is that the clear intent of Congress in Act (sic) 351(a) is to require competitive procedures if there is to be a consolidation action. At best, the intent in [section] 9252 (sic) is to not provide funds for such competitive procedures. If this creates a present stalemate, so be it."

In light of this decision, you are requested to cease all actions designed to implement tactical missile depot maintenance consolidation at Letterkenny Army Depot until further notice.

David J. Berteau
Principal Deputy



SECTION J

Conclusion and Recommendations

Conclusion and Recommendations

Tactical Missile Consolidation

Secretary of Defense Les Aspin has suggested that the Base Closure and Realignment Commission "examine the possibilities" of interservicing maintenance workload. Furthermore, JCS Chairman Colin Powell has adopted interservicing as one of his main objectives. As you have seen, the Tactical missile maintenance mission consolidation at Letterkenny Army Depot in Chambersburg, Pennsylvania is a proven, economical example of workload interservicing.

Accordingly, I respectfully request that you do not accept the Department of Defense recommendation and recommend that the tactical missile maintenance consolidation continue at Letterkenny.

Depot Systems Command

Modify the BRAC 91 law to establish both an Industrial Operations Command (IOC) at Letterkenny and a Munitions and Chemical Command at Rock Island.

Defense Distribution Depot (DLA)

Retain at Letterkenny to support missile and artillery maintenance mission.

Artillery Mission (Paladin)

Retain at Letterkenny until program completion in FY 1998.

Systems Integration and Management Activity

Concur with DoD Recommendation to Retain Sima-East at Letterkenny DITSO

Document Separator

5/25/93

MEMORANDUM FOR GENERAL COUNSEL, DBCRC

FROM: GLENN KNOEPFLE

SUBJECT: Legal questions concerning consolidation of tactical missile maintenance at Letterkenny Army Depot.

DISCUSSION: In 1991, DOD announced that it would consolidate tactical missile maintenance workload at Letterkenny Army Depot. DOD's BRAC decisions for 1991 included a decision to relocate the Depot System Command (DESCOM) from Letterkenny to Rock Island Arsenal and included a comment that the personnel losses would be partially offset by concurrent movement of missile maintenance workload into Letterkenny from a number of other Defense Depots.

Several pieces of legislation and a court decision have delayed and could even prevent completion of the tactical missile maintenance consolidation plan. For example:

- FY 93 Appropriations Act, section 9252, passed October 6, 1992, prohibited expenditures for competing missile maintenance workload.

- FY 93 Authorization Act, section 351(a), passed October 23, 1992, contained a provision requiring competition procedures before any missile workload could be transferred.

- Section 9062 of the attached legislation would also prevent transfer of Depot Systems Command employees from Letterkenny Army Depot to Rock Island Arsenal until after 50 percent of the joint tactical missile work is transferred to Letterkenny.

- Section 353 of Public Law 102-484, passed October 28, 1992 states that DOD can not change depot-level workload with a threshold value over $3,000,000 unless competitive procedures are used.

- A US District Court decision, rendered December 21,1992 enjoined the Army from transferring missile workloads from Anniston to Letterkenny, unless competitive procedures were used. DOD's Office of General Counsel later ruled that any further action to consolidate missile maintenance workload would violate one or both of the acts.

- On December 30, 1992 OSD announced that plans to suspend the missile maintenance consolidation workloads were suspended indefinitely.

QUESTIONS:

1. How long does the court decision remain valid? Do the provisions of the FY 93 Authorization and Appropriations Act terminate at the end of the fiscal year?

2. If a decision is made to force interservicing between defense

depots, would the workload need to be assigned on the basis of competition?

cc: Bob Cook, Issues Team Leader
Ed Brown, Army Team Leader

of an organization, unit, activity or function of the Department of Defense into or within the National Capital Region: *Provided*, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and Senate that such a relocation is required in the best interest of the Government: *Provided further*, That no funds appropriated or made available in this Act shall be used for the relocation into the National Capital Region of the Air Force Office of Medical Support located at Brooks Air Force Base.

SEC. 9061A. Notwithstanding any other provision of law, each contract awarded by the Department of Defense in fiscal year 1993 for construction or service performed in whole or in part in a State which is not contiguous with another State and has an unemployment rate in excess of the national average rate of unemployment as determined by the Secretary of Labor shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in such State that is not contiguous with another State, individuals who are residents of such State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills: *Provided*, That the Secretary of Defense may waive the requirements of this section in the interest of national security.

SEC. 9062. The Secretary of Defense shall ensure that at least 50 percent of the Joint Service Missile Mission is in place at Letterkenny Army Depot by the time Systems Integration Management Activity and Depot Systems Command are scheduled to relocate to Rock Island Arsenal, Illinois. This provision is in no way intended to affect the move of the 2.5- and 5-ton truck maintenance mission from Letterkenny Army Depot to Tooele Army Depot.

SEC. 9062A. Notwithstanding any other provision of law, of the funds made available by this Act to the Department of the Navy, $500,000, to remain available until September 30, 1993, shall be available only for the expenses of the Kahoolawe Island Commission which is hereby authorized to delay until March 31, 1993, the submission of its final report: *Provided*, That the Secretary of the Navy shall provide the Commission such assistance and facilities as may be necessary to carry out its proceedings.

SEC. 9063. None of the funds appropriated in this Act shall be used to produce more than two-thirds of the liquid gas requirements in-house at Andersen Air Force Base on Guam. At least one-third of Andersen Air Force Base's liquid gas requirements shall be met by acquiring liquid gas from commercial sources on Guam.

SEC. 9064. During the current fiscal year, funds appropriated or otherwise available for any Federal agency, the Congress, the judicial branch, or the District of Columbia may be used for the pay, allowances, and benefits of an employee as defined by section 2105 of title 5 or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the armed forces, as described in section 261 of title 10, or the National Guard, as described in section 101 of title 32;

(2) performs, for the purpose of providing military aid to enforce the law or providing assistance to civil authorities in the protection or saving of life or property or prevention of injury—

Document Separator

08-17-93 08:11AM FROM ARMY LIT

8/17 T/C AM 1) + 10 AM wanted to review these things ahead of time
2) will send cc Pet.
3) D's want to brief issue. Due 8/27. OGC due 1 wk later. 9/3 Reply 1 wk. Draft out 8/31

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

REPLY TO ATTENTION OF

ARMY LITIGATION DIVISION

Facsimile Transmission Cover Sheet

TO: ED BROWN

FAX NUMBER: 696-0550

PHONE NUMBER:

FROM: MAJOR J. MACKEY IVES **DATE:** 17 Aug 93

COMMENTS: Per phone con. Hope you had a nice vacation. Will keep you posted.
Mack.

PAGES: ________ plus this cover

TELEPHONE: (703) 696-1630 **FAX:** (703) 696-~~1587~~ 2532
DSN 226-1630

MAILING ADDRESS:

Major J. Mackey Ives
Army Litigation Division
901 N. Stuart St. Suite 400
Arlington, VA 22203-1837

CONFIDENTIALITY NOTICE

U.S. Department of Justice

VMG:PAMoreau:lr
35-1-222

Washington, D.C. 20530

Telephone:
(202) 616-8263

August 6, 1993

Graham L. Sisson, Jr.
GORHAM & WALDREP
Suite 700
2101 6th Avenue North
Birmingham, Alabama 35203

In re: AFGE v. Cheney, C.A. No. CV-92-PT-2453-E

Dear Mr. Sisson:

This letter supplements my comments to you on the government's position with regard to plaintiffs' recently filed petition to designate the Defense Base Closure and Realignment Commission ("Commission") as a defendant in the above-referenced action. For the reasons that follow, we believe that the Court would not and, in any event, could not issue the relief requested by plaintiffs. Accordingly, we request that you withdraw the petition voluntarily.

At the outset, it is important to point out that, contrary to plaintiffs' assertion, see Petition ¶ 1, the Commission is not "an agent of the Secretary of Defense, Secretary of the Army and Department of Defense." The Defense Base Closure and Realignment Act of 1990 ("BRAC") makes clear that the Commission, composed of eight members appointed by the President, by and with the advise and consent of the Senate, is an "independent commission." Pub. L. No. 101-510, § 2902, 104 Stat. 1815 (codified at 10 U.S.C. § 2687, note (Supp. 1993)). Since injunctions are binding only upon parties to the action and their agents, see Fed. R. Civ. P. 65(d), the Commission would not be subject to the Court's December 21, 1992 Order (hereinafter "Order").

Furthermore, the Court would not make the Commission a defendant subject to its Order because the Commission's appearance presents new factual and legal issues which were not considered by the Court in making its ruling, and Judge Propst specifically declined to address matters which were not before the Court. Final Judgment ¶ 1. Specifically, in issuing his Order, Judge Propst assumed, correctly, that defendants were not proceeding under BRAC. See AFGE v. Cheney, No. CV-92-PT-2453-E, slip op. at 3 n.5 (N.D. Ala. Dec. 21, 1992) (hereinafter "slip opinion"). Since that time, the Commission has acted pursuant to its statutory authority to place Anniston on its list of

recommendations for closures and realignments. We believe that this situation presents issues which are unrelated to the prior litigation.

Assuming, arguendo, that the Commission was joined as a party defendant, the Court is limited in the type of relief it could provide in three respects. First, BRAC expressly trumps certain statutes that might be deemed to divest the Secretary of Defense of his authority to close or realign military bases. Section 2905 provides that

> The Secretary of Defense may close or realign military installations under this part without regard to --
> (1) any provision of law restricting the use of funds for closing or realigning military installations included in any appropriations or authorization Act . . . .

Clearly, the intent of Congress in placing this provision in BRAC was to prevent the political infighting and inconsistent legislation that would inhibit the inevitable downsizing of the nation's military establishment. See, e.g., H.R. Conf. No. 923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News at 2931, 3257. Indeed, with limited exception not applicable here, Congress intended BRAC to be the exclusive means of carrying out base closures and realignments. BRAC, § 2909(a).

Second, by its express terms, § 351(a) of the Authorization Act applies to the Secretary of Defense and not to the Commission. Judge Propst's narrowly drawn Order provides that "[i]t is not intended to enjoin any action except that which must be in compliance with the provisions of said 351(a)." Final Judgment ¶ 3. Thus, even if the Commission was properly made a party defendant, § 351(a) would not control the Commission's actions.

Third, the addition of the Commission as a party defendant would not afford plaintiffs any relief at this time because there has been no final agency action and the controversy is not ripe for judicial review. In Specter v. Garrett, 971 F.2d 936, 945-46 (3d Cir.), vacated on other grounds sub nom O'Keefe v. Specter, 113 S.Ct. 455 (1992), the Court ruled that there could be no judicial review of BRAC actions prior to the effective date of the President's decision concerning recommended military base closures. 971 F.2d at 945-46. See also Cohen v. Rice, 992 F.2d 376, 381-82 (1st Cir. 1993) (Commission's Report to the President is not final agency action and, therefore, not subject to judicial review under the Administrative Procedure Act).

Judicial review would come, if at all, only after the BRAC process has run its course. In this case, in accordance with the

procedures outlined in BRAC, the Commission submitted its report to the President and the President was to submit his report to Congress by July 15, 1993. BRAC, § 2903(e). The President's report was in fact submitted on July 13, 1993. Congress has 45 legislative days[1] from the report's submission date in which to pass a joint resolution disapproving the recommendations of the Commission. BRAC, § 2904(b). We understand that there has been no definitive congressional action on the proposed recommendations, and that Congress is scheduled to adjourn on August 6, 1993, until the first week of September. Thus, any rights that plaintiffs might have to challenge the actions would arise, if at all, only after the President's recommendations for base closures and realignments have become effective.

In sum, we believe that the Court would not make the Commission a party defendant subject to its December 21, 1992 Order because the Commission is not an agent of defendants and because new factual and legal issues exist. Even if the Commission could be made a party defendant, the relief plaintiffs seek would not be available because the Court is limited by BRAC and by § 351(a) as to the type of relief that could be afforded.

After you have had a chance to review our position, please call to let me know how you want to proceed with this case.

Sincerely,

/s/

Pamela A. Moreau
Department of Justice
Civil Division - Rm. 935
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530

cc: Major J. Mackey Ives
Earl H. Stockdale

---

[1] BRAC provides that "the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period." BRAC, § 2904(b)(2).

Document Separator

Ed –

Does the Comm's Letterkenny rec. require DoD to consolidate tactical missile maintenance work at a single site, or more than one site?

Sheila

The recommendation states to consolidate in accordance with the "Tactical Missile Maintenance Consolidation Plan for Letterkenny Army Depot" which envisions consolidation at Letterkenny for Anniston, Red River, Tobyhanna, NWS Seal Beach, NADEP Alameda, NADEP Norfolk, and Ogden ALC. The recommendation added NCLB Barstow. No other gainer was specifically mentioned.

↳ as a receiver site? no

Maybe >1 site because not all being moved to L –

check w/ DOA

→ Tobyhanna – for interservicing not to until expire –

→ Contractors do the support.

Anniston → Letterkenny tactical missile maintenance work

Authorization Act – 10/22/92 signed
§351(a) – if consolidate tactical missile maint. wk, select depot thru competitive procedures

Appropriations Act – 10/7/92 signed
§9252 – notw/std §351(a), no funds shall be used to prevent/delay transfer tactical missile maint. to Letterkenny; no funds for competitive selection.
– treat Act as having been enacted after Auth. Act §351(a).

Ct found not reconcilable + no implicit repeal.
Eg: compet, just not in FY93, as no $.

Neither party contends transfer governed by BRAC (dlfs originally did)
§2905(d) – DoDef may close/realign w/out regard to any prov. restricting use of funds for closure/realign. in any approps or auth. bill.; + §§2662 + 2687 (cls) 10 USC
– § wd effective

LK submission:
1991 DoD recommended to BRAC consolidate Anniston + ⇒ Ltky.
BRAC – silent? [noted as concurrent action, not rec for BRAC review?
DoD views as part of final BRAC rec. [thereby dep't cannot appeal?]
[See Ref Doc #1, 13]
1993 Military rec'd sust. dont consol @ LK; [downsize]; no alt proposed.
Suggest modify 91 law.

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 9/10/93

TO: Sheila Cheston

FAX NUMBER: 703-696-0550

FROM: Pamela A. Moreau

Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 16 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

Sheila - The Approp. Act cite is § 9152. The Judge got it wrong in his Dec. opinion. I confirmed this w/ Army.

Thanks!

Pam

Document Separator

1. OBJECTIVE/GOAL:

a. The Defense Depot Maintenance Council (DDMC) directed that LEAD become the consolidated tactical missile maintenance depot for the DOD. This is documented in the Joint Service Business Plan, February 1991, and the DDMC Corporate Business Plan, May 1991. The directed consolidation was also included in the Army's Base Realignment and Closure 1991 (BRAC 91) submittal, and therefore, all construction and most Operations and Maintenance (O&M) requirements may be funded by the Base Closure Account. (See page 14).

b. The DDMC directed the Army at their 12 December 1991 meeting to prepare a single plan for the consolidation of tactical missile maintenance at LEAD, and submit this plan to the Assistant Secretary of Defense for Production and Logistics [ASD(P&L)]. Personnel from all services and other DOD organizations met in early January 1992 to develop this plan. Current programmed workload levels are the basis for the planning process. Section 3, Workload Requirements, contains the revised workload levels. These differ significantly from the workload data developed for the Tactical Missile Study, January 1990, that was the basis for most of the prior planning. The workload planned for transition dropped from 2,292,200 direct labor hours to 1,326,400 direct labor hours. This was due to errors in earlier data, reductions in support to certain systems, and total elimination of depot maintenance for some systems. This workload of 1,326,400 direct labor hours, or future revisions will be the baseline for application of the FY92 Defense Appropriation Act, Section 8064.

c. The 1992 Defense Appropriation Act stated:

Sec. 8064. The Secretary of Defense shall ensure that at least 50 percent of the Joint Service Missile Mission is in place at LEAD by the time U.S. Army Materiel Command Systems Integration and Management Activity (SIMA) and U.S. Army Depot System Command (DESCOM) are scheduled to relocate to Rock Island Arsenal, Illinois. This provision is in no way intended to affect the move of the 2.5 and 5-ton truck maintenance mission from LEAD to Tooele Army Depot (TEAD).

LETTERKENNY ARMY DEPOT

It is not the intention of the conferees to impede the realignment of SIMA and HQDESCOM, but to ensure that the Army's plan to establish the Joint Missile Service mission at LEAD is implemented.

d. This plan defines the weapon systems considered part of the Joint Services Tactical Missile workload, and to be consolidated to comply with this Act. LEAD will be postured as the DOD specialized missile components and missile support equipment center of technical excellence and integrated depot-level maintenance facility. This consolidates guidance and control section repair for all current and future air, ground, and surface

launched missiles. The missile support equipment includes Army-only launchers, radars, associated ancillary equipment, and subsystem repair of missile platforms mounted on track or wheeled vehicles for which system integrity is not impacted by their removal and repair at LEAD. This plan shows 50 percent of the total missile workload transitions to LEAD (using the latest requirements for these systems) by October 1994. The total missile workload includes those systems identified in the Tactical Missile Study, January 1990, with workloads revised to account for current programmed levels, and minus the older systems planned for elimination with zero workload. The schedule depicted in Table 3-3 was developed to meet the "50 percent" constraint specified above. Any changes required to this schedule will be forwarded through Service channels for approval by ASD (P&L).

The LEAD Strategic Business Office is the primary action office responsible for the execution of this plan. Mr. Charles H. Fritz, DSN 570-9564, is the Director, Strategic Business Office and should be contacted with any questions concerning the plan.

2. ACTION:

a. The Tactical Missile Study, January 1990, was one of 18 commodity studies completed for the Defense Management Review Decision (DMRD) 908 - Consolidation of Depot Maintenance. The study proposed a schedule of weapon systems to transition to LEAD by year, and the programmed level of workload. From the study recommendations, savings estimates were developed. These were based upon the cancellation of associated military construction projects and through efficiencies to be gained in the consolidation to a single site. This Implementation Plan is the first in a series of documents that will be used to provide the framework for implementing this consolidation. The schedule in Table 3-3 has been developed to meet the "50 percent" constraint specified above. Any changes required in this schedule will be forwarded through service channels for department level approval.

b. The services have established a formal working group to oversee the tactical missile consolidation, and to insure proper approvals and coordination are accomplished within each service. This group consists of representatives from the January meeting, and includes personnel from ASD (P&L), Assistant Secretary of the Army (Research, Development and Acquisition) (SARDA), U.S. Army Materiel Command (HQAMC), HQDESCOM, U.S. Army Missile Command (HQMICOM), Department of Army, Deputy Chief of Staff for Logistics (DA DCSLOG), LEAD, Joint Depot Maintenance Analysis Group (JDMAG), U.S. Naval Air Systems Command (NAVAIR), U.S. Naval Sea Systems Command (NAVSEA), U.S. Air Force Logistics Command (AFLC), Warner-Robbins Air Logistics Center (WR-ALC), Ogden Air Logistics Center (OO-ALC), and Marine Corps Logistics Base Albany (MCLB). This group provides primary oversight of the missile consolidation and is known as the Tactical Missile Implementation Working Group (TMIWG). They will meet on a recurring basis until completion of the consolidation. The 7 to 9 January 1992 meeting is considered the activation of the TMIWG. Attachment 1 lists the TMIWG membership.

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See re memo ① mil depot ② Letterkenny

Capital asset subaccount (sec. 342)

The House bill contained a provision (sec. 332) that would limit the use of the capital asset subaccount within the Defense Business Operations Fund and would also require a report by the Secretary of Defense on this account.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

Limitations on obligations against Defense Business Operations Fund (sec. 343)

The Senate amendment contained a provision (sec. 352) that would prohibit the Secretary of Defense from incurring obligations against the Defense Business Operations Fund during fiscal year 1993, except for obligations for fuel, subsistence and commissary items, retail operations, repair of equipment, and the cost of operations, in excess of 65 percent of the sales from the Defense Business Operations Fund during the fiscal year. This provision would allow the Secretary of Defense to waive this 65 percent limitation cap if he determines that such action is essential to the national security of the United States.

The House bill contained no similar provision.

The House recedes.

SUBTITLE E—DEPOT-LEVEL ACTIVITIES

Competitive bidding for tactical missile maintenance (sec. 351)

The House bill contained a provision (sec. 341) that would require the Secretary of Defense to use competitive procedures if the Secretary decides to consolidate tactical missile maintenance.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would require the Secretary of Defense to ensure that the Systems Management Activity and the Depot Systems Command are relocated to Rock Island Arsenal, Illinois, in accordance with the recommendation of the Base Closure and Realignment Commission dated July 1, 1991.

Limitations on the performance of depot-level maintenance of material (sec. 352)

The House bill contained a provision (sec. 342) that would establish a limit of no more than 40 percent of the depot-level maintenance workload by each type of equipment and materiel that may be offered for contract by non-governmental personnel. The provision would also extend the limitations on the performance of depot-level maintenance by the Army and Air Force in section 2466 of title 10, United States Code, to the Navy.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

The conferees agree to include the Navy under the limitations on the performance of depot-level maintenance in section 2466 of title 10, United States Code. The conferees do not agree to establish a limit of no more than 40 percent of the depot-level maintenance workload by each type of equipment and materiel that may be offered for contract by non-governmental personnel. However, the conferees agree that the Secretary of the Army shall provide for

the performance by employees of the Department of Defense of not less than 50 percent in fiscal year 1993, 55 percent in fiscal year 1994 and 60 percent in fiscal year 1995 of Army aviation depot-level maintenance. The Secretary concerned may not cancel a depot-level maintenance contract in effect on the date of enactment of this act in order to comply with the requirements of this provision.

Requirement of competition for the performance of workloads previously performed by depot-level activities of the Department of Defense (sec. 353)

The House bill contained a provision (sec. 343) that would require the Department of Defense to use competitive procedures for awarding any workload currently being performed in a military depot.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would provide that the Secretary of Defense or the Secretary of a military department may not change the performance of a depot-level maintenance workload that has a threshold value of $3.0 million and that is being performed by a depot-level activity of the Department of Defense to performance by a private contractor unless, prior to selection of the private contractor, the Secretary uses competitive procedures for the selection.

Repeal of requirement for competition pilot program for depot-level maintenance of materials (sec. 354)

The House bill contained a provision (sec. 345) that would amend section 314 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190) to increase the limit of non-core workload that can be competed among depots or with private industry from 10 percent to 20 percent.

The Senate amendment contained a provision (sec. 358) that would amend section 314 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 by deleting the limitation on the amount of depot maintenance workload in the Army and the Air Force above the core level that can be opened to competition during fiscal year 1993.

The House recedes. The conferees direct that depot maintenance workload selected for competition not be drawn disproportionately from one or several depot maintenance activities of the military Services.

SUBTITLE F—COMMISSARIES AND MILITARY EXCHANGES

Standardization of certain programs and activities of military exchanges (sec. 361)

The House bill contained a provision (sec. 351) that would require the Secretary of Defense to standardize among the military departments certain programs and activities of the military exchanges of the military departments not later than October 1, 1993. The provision would also require the Secretary of Defense to submit to the Congress a report on other programs and activities of the military exchanges that the Secretary determines can be eco-

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[page 230]

SECTION 333—PROHIBITION ON MANAGEMENT OF COMMISSARY FUNDS THROUGH DEFENSE BUSINESS OPERATIONS FUND

This section would prohibit the inclusion of the Defense Commissary Agency in the Defense Business Operations Fund.

SECTION 341—COMPETITIVE BIDDING AMONG CERTAIN DEFENSE DEPOT-LEVEL ACTIVITIES FOR TACTICAL MISSILE MAINTENANCE

This section would require the Secretary of Defense to use competitive procedures if the Secretary decides to consolidate tactical missile maintenance.

SECTION 342—LIMITATIONS ON THE PERFORMANCE OF DEPOT-LEVEL MAINTENANCE OF MATERIEL

This section would establish a limit of no more than 40 percent of a depot-level maintenance workload by each type of equipment and materiel that may be offered for contract by non-governmental personnel.

SECTION 343—REQUIREMENT OF COMPETITION FOR SELECTION OF PRIVATE CONTRACTORS TO PERFORM WORKLOADS PREVIOUSLY PERFORMED BY DEPOT-LEVEL ACTIVITIES OF THE DEPARTMENT OF DEFENSE

This section would require the Department of Defense to use competitive procedures for awarding any workload currently being performed in a military depot.

SECTION 344—REQUIREMENT OF COMPARABLE OFFERING FROM PRIVATE CONTRACTOR CONTRACTS AND DEPARTMENT OF DEFENSE CONTRACTS FOR CONTRACTS OFFERED FOR COMPETITION

This section would require the Secretary of Defense, in offering for competition contracts for the performance of depot-level maintenance workloads, to offer contracts for the performance of workloads that are being performed by private contractors at least to the same extent as offers for contracts performed by depot-level activities of the Department of Defense.

SECTION 345—EXPANSION OF COMPETITION PILOT PROGRAM

This section would increase the limit of non-core workload that can be competed among depots or with private industry from 10 percent to 20 percent.

SECTION 351—STANDARDIZATION OF CERTAIN PROGRAMS AND ACTIVITIES OF MILITARY EXCHANGES

This section would require the Secretary of Defense to provide a single agency of the Department of Defense for the operation and management of all military exchange stores.

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SECTION 311—PROHIBITION ON PAYMENT OF SEVERENCE PAY TO FOREIGN NATIONALS IN THE EVENT OF CERTAIN BASE CLOSURES

As part of the new base rights treaty with Spain, the Spanish Government has given the United States three years to withdraw the 401st Tactical Fighter Wing and accompanying operational forces from the Torrejon Air Base. This termination action was a sovereign decision by the Spanish Government that the U.S. Government protested. As a result of this action, the U.S. Government may have to pay severance pay to approximately 440 foreign nationals at an estimated cost of $11 million.

Base rights treaties are continuously being negotiated, and several agreements are currently in that status. The United States has put billions of dollars into the construction and operation of these bases. Paying for severance of host nation employees when the host nation forces base closure should not be permitted. Section 311 would prohibit use of funds for this purpose when employment is terminated as a result of closing of a United States military facility in the country at the request of the host government. This prohibition would also apply to severance pay for foreign national employees of contractors when the contract is terminated as a result of a base closure.

SECTION 312-PROHIBITION ON RELEASING CIVILIAN PERSONNEL AT THE SAN ANTONIO REAL PROPERTY MAINTENANCE AGENCY

Section 312 would prohibit the Secretary of Defense from terminating or laying off any full time, on-call or temporary employees of the San Antonio Real Property Maintenance Agency starting from the date of enactment of this Act until the disestablishment of the Real Property Maintenance Agency.

SECTION 313—PROHIBITION ON JOINT USE OF THE MCAS AT EL TORO, CA WITH CIVIL AVIATION

Section 313 would prohibit any commercial expansion of MCAS El Toro, California. This section would ensure that El Toro remains available for military training.

SECTION 314—CLARIFICATION OF PROHIBITION ON CERTAIN DEPOT MAINTENANCE WORKLOAD COMPETITIONS

Section 326 of the fiscal year 1989 Defense Authorization Act (Public Law 100-456) prohibits the Secretary of Defense from requiring the Secretary of the Army or the Secretary of the Air Force from competing workloads between themselves or with private industry.

During fiscal year 1989 such workload competition studies have continued at the request of the Secretary of the Air Force. Section 314 would specify that the Secretary of Defense shall prohibit the Secretary of the Army and the Secretary of the Air Force from competing workload competitions between themselves or with private industry.

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consultation with the Secretary of Education, up to $10 million in assistance to eligible local educational agencies.

Prohibition on payment of severance pay to foreign nationals in the event of certain base closures (sec. 311)

The House bill contained a provision (sec. 311) that would prohibit the Department of Defense from paying severance pay to foreign

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employees whose employment is terminated when an overseas U.S. military facility is closed or curtailed at the request of the host government.

The Senate amendment contained no similiar provision.

The Senate recedes with an amendment that would apply the prohibition on the payment of severance pay to employees who work at overseas U.S. military facilities that are closed or curtailed as the result of agreements entered into with the host countries after the date of the enactment of this Act.

Prohibition on joint use of the Marine Corps Air Station at El Toro, California (sec. 312)

The House bill contained a provision (sec. 313) that would prohibit the Secretary of the Navy from entering into any agreement to permit use of civil aircraft at Marine Corps Air Station, El Toro, California.

The Senate amendment contained a similar provision (sec. 822).

The House recedes.

Clarification of prohibition on certain depot maintenance workload competitions (sec. 313)

The House bill contained a provision (sec. 314) that would require the Secretary of Defense to prohibit the Secretary of the Army and the Secretary of the Air Force from competing workload competitions between themselves or with private industry.

The Senate amendment contained no similar provision.

The Senate recedes.

Reduction in the number of civilian personnel authorized for duty in Europe (sec. 314)

The House bill contained a provision (sec. 316) that would reduce civilian employees of the Defense Department in Europe by October 1, 1991 by a number equal to the number related to the U.S. intermediate-range nuclear forces on December 8, 1987.

The Senate amendment contained no similar provision.

The Senate recedes with a clarifying amendment.

Repeal of limitation on the use of operation and maintenance funds to purchase investment items (sec. 315).

The Senate amendment contained a similar provision (sec. 821) that would repeal section 303 of the National Defense Authorization Act for Fiscal years 1988 and 1989 which provided that operation and maintenance funds may not be used to purchase items costing more than $5,000 in fiscal year 1990 if purchases of the items prior to 1988 were chargeable to procurement appropriations.

The House bill contained no provision

The House recedes.

Qualifications for head of auditing function in Military Departments (sec. 325)

The House bill contained a provision (sec. 325) that would establish minimum qualifications for auditors general within each Service and would give the Department of Defense Inspector General authority to approve each new auditor general selectee. In addition, this provision would prohibit the use of military personnel in certain key supervisory positions within the Naval Audit Service.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

The conferees agree to establish minimum qualifications for auditors general within each Service, and agree to prohibit the use of military personnel in certain key supervisory positions within the Naval Audit Service. The conferees also agree that the Navy should replace the militiary officers serving in these key supervisory positions within one year with highly skilled and professional civilian audit managers. The conferees direct the Navy to conduct a thorough and extensive search for candidates to fill these positions. The conferees do not agree that approval by the Department of Defense Inspector General of each auditor general selectee should be required.

Prohibition on certain depot maintenance workload competitions (sec. 326)

The House bill contained a provision (sec. 326) that would prohibit the Secretary of Defense from requiring the Secretary of the Army or the Secretary of the Air Force from competing depot workloads between themselves or with private contractors.

The Senate amendment contained no similar provision.

The Senate recedes with a technical amendment.

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Report on manpower, mobility, sustainability and equipment (sec. 327)

The House bill contained a provision (sec. 328) that would make permanent the annual reporting requirement contained in section 317 of the fiscal year 1988/1989 Defense Authorization Act (Public Law 100-180). Under this requirement, the Secretary of Defense must submit a report to the Committees on Armed Services of the Senate and House of Representatives on the status of Department of Defense efforts to identify and measure readiness and to relate such indicators and measurements to the budget process.

The Senate amendment contained no similar provision. However, the Senate report (S. Rept. 100-326) directed the Secretary of Defense to submit a consolidated report on manpower, mobilization, sustainability and readiness to the Committees on Armed Services of the Senate and House of Representatives not later than February 15, 1988.

The Senate recedes with an amendment. The conferees agree to require a report from the Secretary of Defense for fiscal year 1989 as outlined in the Senate report.

are completed, including the development and implementation of the required automatic data processing systems. The Defense Department would have to report to Congress on the results of its analysis before it began any further consolidations.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

Limitation on depot maintenance workload competitions (sec. 314)

The House bill contained a provision (sec. 322) that would allow the Department of Defense to compete annually between $5.0 to $15.0 million of depot maintenance workload with the private sector. This provision would also limit the competition to not more than 40 percent of each depot's workload.

The Senate amendment contained a provision (sec. 313) that would amend section 922(a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510) to extend the depot maintenance workload competition pilot program through fiscal year 1992. This provision would also repeal section 2464 of title 10, United States Code, which currently prohibits the Army and the Air Force from competing depot maintenance tasks between the Army and the Air Force or between the Army or the Air Force and a private contractor.

The Senate recedes with an amendment. The conference provision would provide that not less than 60 percent of the total depot maintenance of material in the Army and the Air Force shall be performed by employees of the Department of Defense. This percentage limitation should be measured in dollars. The conference provision would also provide that the civilian employees of the Department of Defense involved in the depot-level maintenance of material may not be managed on the basis of any end-strength constraint or limitation on the number of such employees who may be employed on the last day of a fiscal year. Such employees shall be managed solely on the basis of the available workload and the funds made available for such depot-level maintenance.

The Secretary of the Army and the Secretary of the Air Force may not cancel a depot-level maintenance contract in effect on the date of enactment of this Act in order to comply with the requirements of this provision. The Secretary of the Army and the Secretary of the Air Force may waive the operation of this provision for their respective Services if the Secretary concerned determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver. Not later than January 15 of 1992 and 1993, the Secretary of the Army and the Secretary of the Air Force shall jointly submit to Congress a report describing the progress during the preceding fiscal year to achieve and maintain the percentage limitation of depot-level maintenance required to be performed by employees of the Department of Defense pursuant to this provision.

The conference provision would also authorize a depot maintenance competition pilot program for the Army and the Air Force. During fiscal years 1992 and 1993, the Secretary of Defense shall conduct a pilot program under which competitive procedures are used to select entities to perform depot-level maintenance of material for the Army and the Air Force. The program may not involve

more than 10 percent of all depot-level maintenance of material that is not required to be performed by employees of the Department of Defense pursuant to the limitations in this provision. The conferees direct that depot maintenance programs selected for this competition pilot program not be drawn disproportionately from one or several Army or Air Force depot maintenance activities. Not later than December 1, 1993, the Secretary of Defense shall submit a report to Congress containing a five-year strategy of the Department of Defense to use competitive procedures for the selection of entities to perform depot maintenance workloads and describing the cost savings anticipated through the use of these procedures.

Authority of base commanders over contracting for commercial activities (sec. 315)

The House bill contained a provision (sec. 323) that would make permanent the authority of base commanders over contracting for commercial activities in section 2468 of title 10, United States Code.

The Senate amendment contained a provision (sec. 314) that would repeal section 2468 of title 10, United States Code.

The Senate recedes with an amendment that would extend the temporary authority of base commanders over contracting for commercial activities through September 30, 1993. The conferees direct the Secretary of Defense to submit a report to the congressional defense committees no later than March 1, 1993, pertaining to the impact of this provision on the commercial activities of the Department of Defense.

Defense Business Operations Fund (sec. 316)

The House bill contained a provision (sec. 341) that would prohibit the Department of Defense from establishing a Defense Business Operations Fund (DBOF).

The Senate amendment contained no similar provision, and would authorize funds for the DBOF for fiscal year 1992.

The Senate recedes with an amendment that would authorize the establishment and operation of the DBOF through April 15, 1993. This fund would consolidate the activities previously funded in the existing stock and industrial funds, as well as the Defense Finance and Accounting Service, the Defense Commissary Agency, the Defense Technical Information Center (including the Information Analysis Centers), the Defense Reutilization and Marketing Service, and the Defense Industrial Plant Equipment Center. The Defense Department shall maintain the separate identity of each working-capital fund and industrial, commercial, or support type activity managed through the DBOF for purposes of accounting, financial reporting, and auditing. The conferees endorse the concept of capital budgeting for equipment for the DBOF, but disapprove funding military construction projects through this new fund.

The conferees direct that no new activities be funded through the DBOF in fiscal year 1993 in order to give Congress an opportunity to evaluate the execution of this fund in fiscal year 1993 before any further expansion. No later than January 1, 1992, the Defense Department shall provide overall policy, implementation plans, and management performance factors to the congressional defense com-

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Capital asset subaccount (sec. 342)

The House bill contained a provision (sec. 332) that would limit the use of the capital asset subaccount within the Defense Business Operations Fund and would also require a report by the Secretary of Defense on this account.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

Limitations on obligations against Defense Business Operations Fund (sec. 343)

The Senate amendment contained a provision (sec. 352) that would prohibit the Secretary of Defense from incurring obligations against the Defense Business Operations Fund during fiscal year 1993, except for obligations for fuel, subsistence and commissary items, retail operations, repair of equipment, and the cost of operations, in excess of 65 percent of the sales from the Defense Business Operations Fund during the fiscal year. This provision would allow the Secretary of Defense to waive this 65 percent limitation cap if he determines that such action is essential to the national security of the United States.

The House bill contained no similar provision.

The House recedes.

SUBTITLE E—DEPOT-LEVEL ACTIVITIES

Competitive bidding for tactical missile maintenance (sec. 351)

The House bill contained a provision (sec. 341) that would require the Secretary of Defense to use competitive procedures if the Secretary decides to consolidate tactical missile maintenance.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would require the Secretary of Defense to ensure that the Systems Management Activity and the Depot Systems Command are relocated to Rock Island Arsenal, Illinois, in accordance with the recommendation of the Base Closure and Realignment Commission dated July 1, 1991.

Limitations on the performance of depot-level maintenance of material (sec. 352)

The House bill contained a provision (sec. 342) that would establish a limit of no more than 40 percent of the depot-level maintenance workload by each type of equipment and materiel that may be offered for contract by non-governmental personnel. The provision would also extend the limitations on the performance of depot-level maintenance by the Army and Air Force in section 2466 of title 10, United States Code, to the Navy.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

The conferees agree to include the Navy under the limitations on the performance of depot-level maintenance in section 2466 of title 10, United States Code. The conferees do not agree to establish a limit of no more than 40 percent of the depot-level maintenance workload by each type of equipment and materiel that may be offered for contract by non-governmental personnel. However, the conferees agree that the Secretary of the Army shall provide for

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of an organization, unit, activity or function of the Department of Defense into or within the National Capital Region: *Provided*, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and Senate that such a relocation is required in the best interest of the Government: *Provided further*, That no funds appropriated or made available in this Act shall be used for the relocation into the National Capital Region of the Air Force Office of Medical Support located at Brooks Air Force Base.

SEC. 9061A. Notwithstanding any other provision of law, each contract awarded by the Department of Defense in fiscal year 1993 for construction or service performed in whole or in part in a State which is not contiguous with another State and has an unemployment rate in excess of the national average rate of unemployment as determined by the Secretary of Labor shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in such State that is not contiguous with another State, individuals who are residents of such State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills: *Provided*, That the Secretary of Defense may waive the requirements of this section in the interest of national security.

SEC. 9062. The Secretary of Defense shall ensure that at least 50 percent of the Joint Service Missile Mission is in place at Letterkenny Army Depot by the time Systems Integration Management Activity and Depot Systems Command are scheduled to relocate to Rock Island Arsenal, Illinois. This provision is in no way intended to affect the move of the 2.5- and 5-ton truck maintenance mission from Letterkenny Army Depot to Tooele Army Depot.

SEC. 9062A. Notwithstanding any other provision of law, of the funds made available by this Act to the Department of the Navy, $500,000, to remain available until September 30, 1993, shall be available only for the expenses of the Kahoolawe Island Commission which is hereby authorized to delay until March 31, 1993, the submission of its final report: *Provided*, That the Secretary of the Navy shall provide the Commission such assistance and facilities as may be necessary to carry out its proceedings.

SEC. 9063. None of the funds appropriated in this Act shall be used to produce more than two-thirds of the liquid gas requirements in-house at Andersen Air Force Base on Guam. At least one-third of Andersen Air Force Base's liquid gas requirements shall be met by acquiring liquid gas from commercial sources on Guam.

SEC. 9064. During the current fiscal year, funds appropriated or otherwise available for any Federal agency, the Congress, the judicial branch, or the District of Columbia may be used for the pay, allowances, and benefits of an employee as defined by section 2105 of title 5 or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the armed forces, as described in section 261 of title 10, or the National Guard, as described in section 101 of title 32;

(2) performs, for the purpose of providing military aid to enforce the law or providing assistance to civil authorities in the protection or saving of life or property or prevention of injury—

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
1700 NORTH MOORE STREET SUITE 1425
ARLINGTON, VA 22209
703-696-0504

December 2, 1993

The Honorable Bud Shuster
U.S. House of Representatives
2188 Rayburn House Office Building
Washington, D.C. 20515

Please refer to this number when responding 931028-2R1

Dear Congressman ~~Shuster~~ Bud:

Thank you for your recent correspondence regarding the Defense Base Closure and Realignment Commission's 1993 recommendations.

As you are aware, the Commission forwarded its recommendations to the President on July 1, 1993. The recommendations were approved by the President on July 2 and forwarded to Congress. Since a motion of disapproval was not passed in either chamber, the Commission's recommendations officially took the force of law on September 27, 1993.

The Commission stands by its report and its recommendation that the Army consolidate tactical-missile maintenance at Letterkenny Army Depot. The Commission acknowledged during the deliberation hearings and in its report to the President that some of the missile systems are due to be retired in the next few years and it may not make economic sense to transfer those workloads to Letterkenny. In addition, the Commission found that the amount of work currently being performed by contractors which would transition to Letterkenny could not be predicted with any certainty. This uncertainty is fueled by recent Clinton Administration statements that a great share of DoD maintenance work should go to the private sector.

Consequently, the one-time costs and steady state savings included in the Commission's report assume that maintenance of the Shillelagh, Land Combat Support System, Chaparral, and the AN/TSQ-73 would not transfer. Additionally, the Commission used a floor estimate of only 20 percent of the contract maintenance in transition to Letterkenny. The Commission recognized that a 100 percent contract workload transition to Letterkenny was not realistic and wanted to develop a low cost or "bottom-line" estimate for the consolidation of tactical missile maintenance. Further, the Commission recognized that even this worst-case savings estimate from the Letterkenny consolidation generated substantial savings to the Department of Defense.

Bud, I hope this information is useful and helps to clarify the Commission's 1993 recommendation to the President. As you know, the Secretary of Defense is charged with the implementation of our recommendations and must initiate them as they have the full force of law. Please feel free to contact me if I can be of any further assistance.

Sincerely,

JIM COURTER
Chairman

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