DCN 856

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	Civil Action No. 92-CV-5331

DEFENDANTS' [UNOPPOSED]
MOTION FOR AWARD OF JUDGMENT

In light of the U.S. Supreme Court's opinion in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994), the Third Circuit's opinion in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) (Specter I) and this Court's October 28, 1993 opinion denying plaintiffs' motion for summary judgment, defendants move that this action be dismissed and judgment entered in their favor. A memorandum of points and authorities and a proposed judgment accompany this motion.

LOCAL RULE 20(b) CERTIFICATION

Pursuant to Local Rule 20(b), the undersigned counsel certifies that a draft copy of this motion, attached memorandum and proposed judgment were sent to plaintiffs' counsel for their review prior to the filing of this motion. Plaintiffs' counsel has advised the undersigned that plaintiffs have no objection to the entry of the proposed judgment attached hereto.

Respectfully submitted,

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Dated: June --, 1993

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR [UNOPPOSED] MOTION FOR AWARD OF JUDGMENT

In light of the U.S. Supreme Court's recent opinion in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994) [Attachment 1 hereto], the Third Circuit's opinion in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) (Specter I) and this Court's October 28, 1993 opinion denying plaintiffs' motion for summary judgment, no viable claims remain in this action. Judgment should therefore be entered for defendants on all counts.

Plaintiffs have advanced four claims: 1) the Secretary of Defense (the "Secretary") and Defense Base Closure and Realignment Commission (the "Commission") violated certain procedural requirements of the Base Closure Act in recommending the realignment of the Naval Air Warfare Center Aircraft Division Warminster ("NAWC"); 2) the Secretary and Commission made substantive errors in making these recommendations; 3) the Secretary and Commission violated the union plaintiffs' due process rights and 4) the Secretary and Commission had no authority to consider NAWC, a defense laboratory, for closure or realignment, such authority instead having been reserved by

Congress exclusively for the separate Commission on the Consolidation and Conversion of Defense, Research and Development Laboratories (the "Lab Commission"). In July, 1993, defendants moved to dismiss the second, third and fourth claims and moved to stay the first claim pending the Supreme Court's consideration of whether an identical claim made in Specter was reviewable. At the same time, plaintiffs moved for summary judgment on the fourth claim.

On October 28, 1993, this Court denied plaintiffs' motion for summary judgment, holding that the Secretary and the Commission had authority under the Base Closure Act to recommend the realignment of defense labs like NAWC. Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993). The Court, however, did not grant defendants' motion to dismiss the fourth claim. It instead denied without prejudice defendants' motion pending resolution of Specter by the Supreme Court. See Oct. 28, 1993 Memorandum and Order at 2. By Order of November 12, 1993, the Court stayed plaintiffs' remaining claims until thirty days after the Supreme Court decided Specter.[1]

Specter has now been decided. On May 23, 1994, in a unanimous decision, the Supreme Court held that actions taken by the Secretary, the Commission or the President under the Base Closure Act, whether they are substantive or procedural in

[1] Plaintiffs subsequently moved this Court for an order certifying their Lab Commission claim for appeal. On January 3, 1994, this Court denied that motion without prejudice to refile it after the Supreme Court decided Specter.

nature, are not subject to judicial review. Specter v. Dalton, No. 93-289 (U.S. May 23, 1994). The majority opinion, authored by Chief Justice Rehnquist, held that actions of the Secretary and the Commission under the Base Closure Act are not "final agency actions" subject to judicial review under the Administrative Procedure Act. Specter, slip op. at 8. In an opinion written by Justice Souter, four Justices concurred in the judgment on the ground that the text, structure and purpose of the Base Closure Act reflected Congress' intent to preclude judicial review of claims that the Secretary or Commission failed to comply with the Base Closure Act.[2]

Specter therefore disposes of plaintiffs' first claim; their contention that the Secretary and Commission violated procedural requirements of the Base Closure Act is unreviewable. Their second claim is unreviewable as well. Plaintiffs in Specter did not appeal the Third Circuit's dismissal of claims -- substantially similar to those made here -- that the Secretary and Commission made substantive errors in recommending military installations for closure or realignment. See Specter I, 971 F.2d at 950-53. The Supreme Court's decision in Specter and the Third Circuit's decision in Specter I require that plaintiffs' substantive challenges be dismissed. In addition, as the Supreme Court noted in Specter, the Third Circuit in Specter I dismissed

[2] The majority and concurring opinions also held that base closure decisions made by the President were not reviewable. Id., slip op. at 9-15. Such decisions were not challenged in this action.

plaintiffs' due process claim, a claim that was identical to the third claim made by plaintiffs here, for failure to state a claim for which relief could be granted. See Specter, slip op. at 3 n.3.

Finally, with regard to the fourth claim, this Court held in October, 1993 that, as a matter of statutory construction, the Secretary and Commission had authority to recommend NAWC for realignment. The Supreme Court's decision in Specter lends support to an alternative ground for dismissal -- that the Secretary's and Commission's decisions to consider defense labs for closure or realignment under the Base Closure Act are not reviewable. In either event, plaintiffs' Lab Commission claim should now be dismissed.

CONCLUSION

The proposed judgment attached hereto should be entered by the Court.

Respectfully submitted,

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MICHAEL R. STILES
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Attorneys for Defendants

Dated: June --, 1993

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the decision of the United States Supreme Court in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED AND ADJUDGED that the plaintiffs' complaint is dismissed with prejudice in its entirety.

_____
UNITED STATES DISTRICT JUDGE

Dated: _____

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' PARTIAL MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), defendants move to dismiss this action, except for claims that the Secretary of the Navy, Secretary of Defense or the Defense Base Closure and Realignment Commission violated procedural requirements of the Defense Base Closure and Realignment Act. A memorandum of points and authorities in support of this motion is provided herewith.

Respectfully submitted,

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Dated: July 20, 1993

Attorneys for Defendants

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

ORDER

Having considered defendants' partial motion to dismiss and all memoranda submitted in support thereof and in opposition thereto, and good cause appearing, it is this day hereby ORDERED:

1. Defendants' partial motion to dismiss is GRANTED;

2. The claims set forth in paragraphs 122-23; 126; 133-48; 162-67; 189-200; Count 1, ¶¶ 203(C)-(E), 203(G)-(H); Count 2, ¶¶ 205(D)-(F) and 205(H)-(I); Count 3, ¶¶ 207(A)-(C) and Count 4, ¶¶ 210-12 are dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

Dated: _____

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS

PRELIMINARY STATEMENT

In this action, local politicians and labor organizations ask this Court to overturn President Bush's 1991 decision to realign the Naval Air Warfare Center Aircraft Division Warminster in Warminster, Pennsylvania ("Warminster")[1] pursuant to the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Title XXIX, 104 Stat. 1808 (the "Act" or "Base Closure Act").[2] Plaintiffs' Complaint is replete with the same kinds of challenges to military judgments and determinations of the Navy, Secretary of Defense and Defense Base Closure and Realignment Commission that the Third Circuit found to be unreviewable in the substantially similar case involving the Philadelphia Naval

[1] The facility was previously called the Naval Air Development Center.

[2] Although they have no conceivable standing to do so, plaintiffs also ask the Court to enjoin the closure or realignment of all naval facilities nationwide ordered closed by President Bush in 1991.

Shipyard. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992).[3] Moreover, the Third Circuit in Specter affirmed dismissal of a due process claim identical to that advanced here by plaintiffs in Count 4 of the Complaint. As discussed in Section I, supra, Specter therefore requires dismissal of the bulk of plaintiffs' Complaint.

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[3] The Third Circuit in Specter affirmed this Court's dismissal of the bulk of plaintiffs' Complaint, the "substantive" claims against the defendants. Plaintiffs have not sought further review of this ruling. The Third Circuit, however, found two "procedural" claims to be subject to judicial review: the contention that the Defense Department failed to make all information used available to the General Accounting Office, Specter, 971 F.2d at 952, and the assertion that the Base Closure Commission failed to hold public hearings. Specter, 971 F.2d at 952-53.

After the Supreme Court decided Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), which found there to be no judicial review in a closely analogous context, defendants applied for, and the Court granted, a writ of certiorari. O'Keefe v. Specter, 113 S. Ct. 455 (1992). The Court vacated Specter and remanded the case to the Third Circuit to determine whether Franklin affected its ruling. The Third Circuit distinguished Franklin and adhered to its previous ruling. Specter, No. 91-1932 (3d Cir. May 18, 1993). However, in a virtually identical case, the First Circuit held that Franklin required the plaintiffs' "procedural" challenges to the process by which the Loring Air Force Base was selected for closure to be dismissed. Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993).

The Solicitor General has authorized defendants to file a writ of certiorari. By separate motion filed today, defendants therefore request that this Court stay further proceedings on plaintiffs' "procedural" claims pending possible resolution of this split of authority. Indeed, on July 2, the Third Circuit granted defendants' motion to stay the mandate in Specter until July 21. On July 21, defendants will file a motion for a thirty day extension of that stay during which the petition for a writ of certiorari is expected to be filed with the Supreme Court.

The Third Circuit's earlier rulings that "substantive" challenges in this area are unreviewable, however, remain good law and require the dismissal of plaintiffs' similar claims here.

Plaintiffs also raise two claims regarding the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commission"), not at issue in Cohen and Specter, which should also be dismissed. First, they contend that the Lab Commission had exclusive jurisdiction to recommend the closure or realignment of defense labs such as Warminster. Plaintiffs argue that the Navy, Defense Department and Base Closure Commission violated the statutory provision establishing the Lab Commission by recommending the closure and realignment of defense labs prior to the completion of the Lab Commission's work.[4]

In reality, as shown in Sections II(A)-(B), infra, Congress empowered the Secretary of Defense and the Base Closure Commission to recommend any "military installation" for closure or realignment. The broad definition of "military installation" supplied by Congress in the Base Closure Act plainly covers defense labs. Nothing in the Base Closure Act, in the provision establishing the Lab Commission, or in the legislative history of either statute suggests that Congress intended to remove a significant category of military facilities from the Secretary of Defense's or the Base Closure Commission's consideration. Indeed, in 1991 amendments to the Base Closure Act, Congress retroactively amended the definition of "military installation" to remove Army Corps of Engineers facilities from the Base Closure Act process, but never passed bills introduced to remove

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[4] See Complaint, ¶¶ 3-4, 65, 79, 84-90, 184, 202, 203(A).

defense labs.

Second, plaintiffs take issue with the Lab Commission's report. They claim that the Lab Commission failed to conduct an "independent, uncompromising" study of defense labs and failed to evaluate defense labs on an individual basis.[5] Plaintiffs seek a declaration voiding the Lab Commission's recommendations.

As shown in Section III, plaintiffs clearly have no standing to advance this claim. The injury plaintiffs claim to suffer results from the President's decision to approve the Base Closure Commission's recommendation to realign Warminster and Congress' failure to pass a joint resolution of disapproval. The Lab Commission's report, issued months after the President approved the recommendation to close Warminster, caused them no injury. No possible injury is traceable to the Lab Commission's work and voiding its nearly two year old report will not redress any asserted injury.

For these reasons, plaintiffs' "substantive" claims against defendants, due process claim and claims regarding the Lab Commission should be dismissed. As noted, by separate motion defendants demonstrate that proceedings on plaintiffs' remaining procedural claims should be stayed pending Supreme Court review of whether they are nonjusticiable.

STATUTORY BACKGROUND

In the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, Congress enacted both

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[5] See Complaint, ¶¶ 189-90; Count III, ¶¶ 207(A)-(C).

statutes at issue in this action: Title XXIX, 104 Stat. 1808, the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), which created the Defense Base Closure and Realignment Commission (the "Base Closure Commission") and § 246, 104 Stat. 1519, which established the Lab Commission.

1. The Base Closure Act

The Base Closure Act, like an earlier statute enacted in 1988, Pub. L. No. 100-526, was designed to break years of deadlock over the closure of unneeded domestic military bases. For years, Congress, desiring to keep local bases open, effectively blocked efforts to close these facilities. Many in Congress viewed Executive Branch base closing proposals with skepticism, believing them to be motivated by the desire to punish political opponents rather than to save taxpayer dollars. During this impasse, while foreign threats diminished and budget deficits soared, no bases were closed.

The Base Closure Act reflects Congress' recognition that unneeded military installations 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 Base Closure Act.

With two exceptions not relevant here, the Base Closure Act serves, until December 31, 1995, as the "exclusive authority for selecting for closure or realignment . . . a military installation inside the United States." § 2909(a). "Military

installation" is defined as "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." § 2910(4).

The Base Closure Act established the independent Base Closure Commission, which was authorized to make three rounds of base closure recommendations in 1991, 1993 and 1995. §§ 2902(a), (e). It required the Secretary of Defense to develop a six-year force-structure plan that assesses national security threats and the force structure needed to meet them. §§ 2903(a)(1), (2). The Secretary was also directed to provide to the congressional defense committees, and to publish in the Federal Register for notice and comment, the criteria he proposed to use to recommend military installations for closure or realignment. § 2903(b).

For the 1991 round of base closings, the Act required the Secretary to recommend closures or realignments of military installations by April 15, 1991 based on the force-structure plan and final criteria. § 2903(c)(1). Congress required the Commission to review the Secretary's recommendations and to prepare a report by July 1 for the President containing its assessment of the Secretary's proposals and its own recommendations for the closure or realignment of domestic military installations. § 2903(d)(2). In making these recommendations, the Commission was empowered to change the Secretary's recommendations if they "deviated substantially" from the force-structure plan and final criteria. § 2903(d)(2)(B).

The Secretary of Defense and Base Closure Commission both recommended that Warminster be realigned. President Bush had authority to approve or disapprove the Commission's recommendations in whole or in part by July 15, 1991. §§ 2903(e)(2), (3). He approved them. Congress then had 45 days from the date of approval or until the adjournment of Congress sine die, whichever was earlier, to pass a joint resolution (which is subject to presentment to the President) disapproving of the Commission's recommendations. §§ 2904(b), 2908. A proposed joint resolution of disapproval was, however, soundly defeated in the House by a vote of 364-60. 137 Cong. Rec. H6039 (daily ed. July 30, 1991).

2. Section 246

Section 246(a) established the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories. Section 246(b)(1) required the Lab Commission to conduct "a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." In conducting the study, the Lab Commission was directed to consider such means to do so as converting some or all laboratories to government-owned, contractor-operated labs, modifying the missions and functions of labs, and consolidating or closing labs. § 246(b)(2)(A). The Lab Commission was also to determine the costs and cost savings likely to result from consolidation, closure or conversion and a proposed schedule for each consolidation, closure or conversion

considered appropriate by the Lab Commission. § 246(b)(2)(B).

The Lab Commission was required to submit a report to the Secretary of Defense, who appointed all its members, § 246(c)(2), containing its recommendations by September 30, 1991. § 246(f). Within thirty days after submission, § 246(g) required the Secretary to furnish the report to Congress along with any comments he considered appropriate. Unlike the Base Closure Commission's report and recommendations, the Lab Commission's report triggered no required action or consideration by the Executive Branch or Congress. Instead, the Lab Commission report was purely advisory and § 246 allowed the Executive Branch and Congress to do anything, or nothing, in response to it. The Lab Commission terminated 90 days after it submitted its report. § 246(h).

ARGUMENT

I. SPECTER REQUIRES DISMISSAL OF PLAINTIFFS' SUBSTANTIVE CLAIMS UNDER THE BASE CLOSURE ACT ON NONREVIEWABLITY GROUNDS.

In Specter, defendants argued that the Base Closure Act precluded judicial review of plaintiffs' claims against the Navy, Secretary of Defense and Base Closure Commission. See 5 U.S.C. § 701(a)(1). This Court agreed, Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991), and, on appeal, the Third Circuit held that an array of "substantive" challenges to defendants' actions were indeed unreviewable. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992). As binding precedent, Specter requires the dismissal of plaintiffs' "substantive" claims against the defendants.

In Specter, the Third Circuit identified two principles by

which it determined particular claims to be unreviewable. First, following National Federation of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990), the court held that all challenges requiring the court to review the defendants' application of military and other expertise to the base closing process were not "judicially manageable" and, for that reason, unreviewable. Specter, 971 F.2d at 950-51. Thus, the Third Circuit affirmed this Court's dismissal of challenges that "go to the merits of the recommendations" of the Navy, Secretary and Commission, noting that the President and Congress are better suited for reviewing these claims than are the courts. Specter, 971 F.2d at 952.

Second, the Court found that, where Congress established an alternative method for review of claims, such as by the Base Closure Commission or the GAO, it did not intend judicial review of them. Specter, 971 F.2d at 951. No review was intended, according to the Third Circuit, when "additional review by the courts would not contribute to public confidence in this part of the process." Id.

Based upon a review of the Complaint, the Third Circuit found that most of plaintiffs' claims were, indeed, unreviewable. The Court permitted review of only two specific claims that defendants had violated particular "procedural" requirements in the Base Closure Act, because those were the "kind of issues with which courts have traditionally dealt." Specter, 971 F.2d at

952.[6] Applying these principles and comparing the specific claims determined by the Third Circuit to be unreviewable with those made here reveals that most of plaintiffs' claims must be dismissed.

Plaintiffs advance five principal substantive claims against the Base Closure Commission in Count 1: (1) the Base Closure Commission failed to apply the eight selection criteria properly to defense labs and to Warminster, Complaint, ¶¶ 136-37, 203(G); (2) the Base Closure Commission failed to analyze defense laboratories properly, particularly in assessing possible cost savings from the realignment of Warminster, id., ¶¶ 137, 163-67; (3) the Base Closure Commission failed to facilitate the GAO's performance of its duties under the Base Closure Act, id., ¶¶ 203(C)-(D); (4) the Base Closure Commission adopted the Navy's closure and realignment recommendations despite the GAO's findings regarding the Navy, id., ¶ 203(E); (5) the Base Closure Commission utilized unpublished selection criteria, id., ¶ 203(H).

Plaintiffs made claims 1, 3, 4 and 5 in Specter and the Third Circuit specifically held each of them to be unreviewable:

> [Plaintiffs] charge, for example, that the Commission failed to consider all of the Navy installations equally without regard to previous consideration for closure, that it failed to insist on adequate help from the GAO, that it accepted the recommendation of the Secretary with respect to the Shipyard even though the

[6] The Court held that claims that the Secretary of Defense failed to provide all information upon which he relied to the GAO and that the Base Closure Commission failed to hold public hearings were reviewable. Specter, 971 F.2d at 952-53.

> GAO concluded that the Navy's decisionmaking was inadequately documented, that it (the Commission) utilized unpublished criteria, and that it failed to apply the published criteria equally to all installations.
>
> We conclude that each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary.

Specter, 971 F.2d at 952; see also Cohen v. Rice, 800 F. Supp. 999, 1006 (D. Me. 1992). The second claim is even more clearly unreviewable, directly asking the Court to second-guess the Base Closure Commission's laboratory cost-saving analysis. That analysis involved the application of military and other expertise, a task that the Third Circuit regards as simply not judicially manageable. The claims advanced in paragraphs 136-37, 163-67, 203(C)-(E), (G)-(H) should therefore be dismissed.

Plaintiffs assert six substantive claims against the Navy and Secretary of Defense in Count 2: (1) the Navy and Secretary relied on inaccurate information in recommending Warminster for realignment and provided inaccurate information to the GAO and Base Closure Commission, id., ¶¶ 122-23, 162, 205(I); (2) the Navy and Secretary failed to apply the eight selection criteria properly or thoroughly, id., ¶¶ 133-137, 205(E); (3) the Navy and Secretary employed unpublished criteria in analyzing Warminster, id., ¶ 205(F); (4) the Navy and Secretary did not properly analyze Warminster, particularly the cost of its realignment, id., ¶¶ 137-148; (5) the Navy and Secretary failed to base their recommendations on the force-structure plan, id., ¶¶ 126, 205(H);

and (6) the Navy's and Secretary's recommendations to realign Warminster was insupportable and unwise, id., ¶¶ 191-200.

Each of these claims similarly challenges the merits of the Navy's and Secretary's recommendations. The military's application of closure and realignment selection criteria, use of its force structure plan, identification of appropriate military and economic information for analysis and consideration of this information in its decisionmaking processes require military and other expertise:

> While those recommendations are required to be based on the force structure plan and the base closing criteria and thus, in one sense, are standards to be applied, the Secretary was assigned the task of formulating those standards because that task required military and other expertise. So, too, do the tasks of applying those standards to the circumstances of each installation and of establishing priorities among them. Review of the Secretary's performance of these tasks would necessarily present issues that simply are not 'judicially manageable.'

Specter, 971 F.2d at 950-51; see also Cohen, 800 F. Supp. at 1005.

Each of these claims asks the Court to second-guess the Navy's and Secretary's selection of information for analysis, application of that information to selection criteria and the force structure plan and the results of that analysis. Specter clearly held not only that the judiciary is not equipped to conduct such a review, but that Congress provided for alternative methods of review, by the GAO and Base Closure Commission. Such claims are therefore unreviewable. Specter, 971 F.2d at 950-52. Paragraphs 122-23, 126, 133-48, 162, 191-200, 205(E), (F) and (H)

of the Complaint should be dismissed.[7]

Finally, here, as in Specter, the union plaintiffs argued that defendants' alleged violation of the Base Closure Act violated their right to due process. The Third Circuit in Specter held that plaintiffs had no cognizable property rights in the continued operation of the Shipyard and that the procedural requirements set forth in the Act did not create property interests either. Specter, 971 F.2d at 955-56. Count 4 raises the same due process claim and it should also be dismissed.

II. THE SECRETARY OF DEFENSE AND BASE CLOSURE COMMISSION WERE AUTHORIZED TO RECOMMEND DEFENSE RESEARCH AND DEVELOPMENT LABORATORIES FOR CLOSURE OR REALIGNMENT.

A. The Base Closure Act Authorized the Secretary of Defense and Base Closure Commission to Recommend Defense Laboratories For Closure or Realignment.

Plaintiffs claim that the Secretary of Defense and the Base Closure Commission had no authority in 1991 to recommend Department of Defense research and development laboratories, such as Warminster, for closure or realignment under the Base Closure Act. They contend that § 246 vested the Lab Commission with exclusive authority to study defense laboratories and to recommend particular laboratories for consolidation.

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[7] Plaintiffs in Specter and here contended that the Navy and Secretary failed to publish in the Federal Register a summary of the selection process and a justification for each recommendation. Complaint, ¶ 205(D). Specter specifically examined the same claim and held that, if plaintiffs allege that no publication was made, the claim is reviewable. It would, however, be groundless. See 56 Fed. Reg. 15184, 15207-08, 15226-28. If plaintiffs claim that the justifications were unpersuasive or inadequately detailed, the allegation is unreviewable. Specter, 971 F.2d at 952.

In reality, the Base Closure Act, which was part of the same defense authorization bill that established the Lab Commission, granted the Secretary of Defense and Base Closure Commission exclusive authority to recommend any "military installation" for closure or realignment. "Military installation" is defined to include defense research and development laboratories, and nothing in § 246 or its legislative history exempts such labs from 1991 closure or realignment consideration by the Secretary of Defense or Base Closure Commission.

In reviewing an agency's interpretation of its governing statute, the Court must first determine "whether Congress has directly spoken to the precise question at issue." Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). If Congress has done so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id.

If "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. This interpretation is entitled to "great weight," Clarke v. Securities Industry Ass'n., 479 U.S. 388, 403 (1987) (citation omitted), as the interpretation of an agency charged with administering a statute is given substantial deference. National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394, 1401 (1992). The agency's interpretation

need not be the only reasonable reading of the statute in order to be upheld, Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524, 532 (1985), and, indeed, must be followed "unless there are compelling indications it is wrong." CBS, Inc. v. FCC, 453 U.S. 367, 382 (1981) (citation omitted).

The Supreme Court has repeatedly observed that, "where . . . the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" West Virginia University Hospitals v. Casey, 111 S. Ct. 1138, 1147 (1991) (quoting United States v. Ray Fair Enterprises, Inc., 489 U.S. 235, 241 (1989)). Here, the Base Closure Act plainly identifies the universe of military facilities from which the Secretary of Defense and the Base Closure Commission were authorized to make closure or realignment recommendations. The Secretary of Defense was required to create a list of "military installations inside the United States" that he recommended for closure or realignment and to provide the list to the Base Closure Commission. § 2903(c)(1). Based on a review and analysis of the Secretary's recommendations, the Base Closure Commission was also charged with furnishing the President with its recommendations for the closure or realignment of "military installations inside the United States." § 2903(d)(2)(A).

The term "military installation" is defined in the Base Closure Act as any "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 (emphasis added)." § 2910(4). Warminster, like all defense research and development labs, falls squarely within the exceptionally broad definition of "military installation" and plaintiffs conspicuously do not argue otherwise. Warminster was, therefore, subject to the Secretary of Defense's and Base Closure Commission's consideration for closure or realignment.

Indeed, the Base Closure Act delegated the Secretary no authority to ignore a category of military installations for possible closure or realignment; the Secretary was directed to consider "all military installations inside the United States equally." § 2903(c)(3) (emphasis added). And, with two exceptions not relevant here, the Base Closure Act expressly serves as the "exclusive authority for selecting for closure or realignment" such military installations. § 2909(a). The plain language of the Base Closure Act is sufficient to dismiss plaintiffs' claim.

Congress imposed one and only one limitation on the range of military facilities subject to the Secretary's and Base Closure Commission's authority under the Base Closure Act -- that the military installation be located inside the United States.[8] §§

[8] The Secretary of Defense retained non-exclusive authority also to carry out narrow categories of closures or realignments of installations outside the Base Closure Act. See § 2909(c)(2) (Secretary may carry out closures and realignments to which 10 U.S.C. § 2687 does not apply). These include closure of an installation at which less than 300 civilian personnel are authorized to be employed, a realignment of an installation involving a reduction by no more than 1,000, or 50%, in the number of civilian personnel authorized to be employed at the installation, and closures or realignments of bases for reason of national security or military emergency.

2903(c)(1), 2903(d)(2)(A), 2921; see 2A Sutherland Stat. Const. § 47.11 (4th ed. 1984) ("[w]here there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied."); Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980). Congress could have easily added another limitation by, for example, defining "military installation" to exclude those facilities to be studied by the Lab Commission, which Congress established in the same legislation. That it did not do so is compelling evidence of Congressional intent. See West Virginia University Hospitals, 111 S. Ct. at 1147.[9]

If the plain language of the Base Closure Act does not dispose of plaintiffs' claim, then subsequent legislative activity should. Pursuant to the Base Closure Act, on April 15, 1991, the Secretary of Defense issued his recommendations for base closures and realignments, which included the realignment of Warminster and several other defense labs. Congress was free, at

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[9] It is well-established that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." Patterson v. Shumate, 112 S. Ct. 2242, 2248 (1992); Davis v. Michigan Dept. of the Treasury, 489 U.S. 803, 809 n.3 (1989). Even if the Court were to examine the legislative history of the Base Closure Act or § 246, however, it would find nothing to contradict this plain reading of the statute. Neither H. Rep. No. 101-665, 101st Cong., 2d Sess. 341-42 (1990), reprinted in U.S. Code Cong. & Admin. News 3067-68 (1990); S. Rep. No. 101-384, 101st Cong., 2d Sess. 203-04, 294-95 (1990), nor the subsequent Conference Report on the 1991 Defense Authorization Act, H. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 563-64, 703-07 (1990), reprinted in U.S. Code Cong. & Admin. News 3110, 3135-56, 3255-59 (1990), suggests that the existence of the Lab Commission preempted the Secretary of Defense's or the Base Closure Commission's authority to recommend laboratories for closure or realignment under the Base Closure Act.

that point, to pass corrective legislation to preclude the Commission's consideration of the Secretary's laboratory recommendations. Indeed, in May, 1991, legislation was introduced in both the House and Senate to block closure or realignment of defense labs until the Lab Commission furnished its report to Congress. See H.R. 2329, 102nd Cong., 1st Sess.; S. 1000, 102nd. Cong., 1st Sess. [Attachment 1 and 2 hereto]. Both bills died in committee.[10]

Moreover, in its consideration of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290, Congress revisited the Base Closure Act and § 2910(4), redefining "military installation," in particular. Congress amended § 2910(4) retroactively to exclude from the definition of "military installation" "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." Pub. L. No. 102-190, § 2821(h)(1), 105 Stat. 1546 (1991).

The Base Closure Commission had recommended the realignment of the Army Corps of Engineers and the President approved this

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[10] The Base Closure Act, furthermore, provides that the Congress may pass a joint resolution disapproving the Base Closure Commission's recommendations following their approval by the President. §§ 2904(b), 2908. Rep. Kostmayer, among other members of the Pennsylvania Congressional delegation, referred to Warminster and argued on the House floor in favor of House Joint Resolution 308, which called for the disapproval of the Base Closure Commission's recommendations. 137 Cong. Rec. H6038 (July 30, 1991). That resolution was soundly defeated 364-60. Id. at 6039-40.

recommendation. In the amendment, Congress overturned this determination retroactively.[11] Although Congress could have similarly amended § 2910(4) to block the realignment of defense laboratories, it did not do so. To the contrary, Congress reiterated its intention that "military installation" include all other activities "under the jurisdiction of the Department of Defense," a definition that would clearly include the defense labs.

The Supreme Court has held that, "[w]hen the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986) (citation omitted). By amending § 2910(4) to exclude some facilities, but not to exclude defense labs, Congress effectively ratified the Secretary's and Base Closure Commission's interpretation of the Base Closure Act to authorize their consideration of defense labs for closure or realignment. See Commodity Futures Trading Comm. v. Schor, 478 U.S. 833, 846 (1986); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it

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[11] See § 2821(h)(2) ("The amendment made by paragraph (1) 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 on that date.")

reenacts a statute without change").

In short, the language of the Base Closure Act and its purpose compel the conclusion that Congress intended the Secretary of Defense and Base Closure Commission to consider defense laboratories for closure or realignment. Congress has had repeated opportunities to enact legislation to codify the interpretation urged by plaintiffs, but has chosen not to do so. Plaintiffs' view that the Lab Commission's existence precluded the Secretary of Defense and the Base Closure Commission from recommending the closure or realignment of defense labs has not been accepted by Congress and should not be accepted by this Court.

B. Section 246 Did Not Preclude the Secretary of Defense and the Base Closure Commission From Recommending Defense Laboratories for Closure or Realignment.

Plaintiffs allege that the Lab Commission had "exclusive" authority to recommend laboratories for closure or realignment. See, e.g., Complaint, ¶¶ 3-4, 65-66. Section 246, however, neither delegates the Lab Commission such exclusive power, nor bars the Secretary of Defense and Base Closure Commission from considering defense labs for closure or realignment. To the contrary, the Base Closure Act, not § 246, expressly serves as the "exclusive authority for selecting for closure or realignment" military installations inside the United States. § 2909(a). Not surprisingly, the Lab Commission is not even mentioned in the Base Closure Act and the procedure set forth in the Act is in no way dependent on the Lab Commission's work.

The nature, scope, purpose and effect of the Lab Commission's work were entirely different from those of the Base Closure Commission. The Lab Commission's charter was generally to study the "feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). Congress intended that the Lab Commission begin by studying the Defense Department's Defense Management Review on defense labs. H. Conf. Rep. No. 101-923 at 3135; S. Rep. No. 101-384 at 203. Assessment of closures was but one subject the Lab Commission could study, while making specific closure and realignment recommendations was the Base Closure Commission's exclusive mandate.

Unlike the Base Closure Commission, the Lab Commission was simply a federal advisory committee, the members of which were appointed by the Secretary of Defense without congressional confirmation. See 5 U.S.C. App. 2 (the Federal Advisory Committee Act). Its authority was expressly limited to providing a report to the Secretary of Defense, who could consider or ignore it as he saw fit. § 246(f). The report was not binding on the Secretary and § 246 required nothing more of the Secretary than that he furnish the report to Congress. The members of the Base Closure Commission were, in contrast, appointed by the President after consultation with Congress, and were confirmed by the Senate. § 2902(c). Unlike the Lab Commission, the recommendations of the Base Closure Commission were required to be reviewed by the President and, if approved by the President,

would become law unless Congress passed a joint resolution of disapproval.

Not surprisingly for commissions created in the same legislation, the Lab Commission and the Base Closure Commission had different missions, were created for different purposes and the products of their work were treated differently. There is certainly no express intent that the work of the Lab Commission somehow preempted part of the Base Closure Commission's efforts. And, nothing in the purpose or product of the Lab Commission impliedly suggests that its preparation of a non-binding and purely advisory report to the Secretary preempted the Secretary's and Base Closure Commission's duties under the Base Closure Act to submit recommendations for the closure and realignment of domestic military installations, including defense labs, to the President.

Plaintiffs observe that the Secretary of Defense's and Base Closure Commission's closure and realignment recommendations were to be completed by April 15, 1991 and July 1, 1991, respectively, while the Lab Commission's recommendations were not due to the Secretary of Defense until September 30, 1991. Compare § 246(f) with §§ 2903(c)(1); 2903(d)(2)(A). They assert that, because the Secretary and the Base Closure Commission would not have the benefit of the Lab Commission's recommendations by April 15 and July 1, Congress must not have intended that the Secretary and Base Closure Commission consider labs for closure or realignment. Plaintiffs imply that the Lab Commission's recommendations would

serve no purpose unless they were considered by the Secretary and the Base Closure Commission prior to their making base closure or realignment recommendations. They are wrong for four reasons.

First, there is no indication in the legislative history that Congress intended to carve out a narrow category of military facilities for delayed closure or realignment consideration. To the contrary, the structure, timing and legislative history of the Base Closure Act demonstrate Congress' desire to proceed with the closure of unneeded and costly domestic military installations rapidly and without exception. Section 2901(b) (purpose of Act is the timely closure and realignment of military installations); see H. R. Conf. Rep. No. 101-923 at 3257, 3259; H. Rep. No. 101-665 at 3077.

Second, the Base Closure Act calls on the Secretary of Defense and the Base Closure Commission to make three rounds of base closure and realignment recommendations -- in 1991, 1993, and 1995. See §§ 2902(e), 2903(c)(1), 2903(d)(2)(A). If, as plaintiffs claim, the Secretary and the Base Closure Commission were not permitted to recommend defense labs for closure in 1991 as a result of the Lab Commission's work, such recommendations could not be made until 1993. Given rapid technological and geopolitical changes, the Lab Commission's 1991 report may be of questionable value to the Secretary's and Base Closure Commission's 1993 efforts, counseling against plaintiffs' assertion that completion of the Lab Commission report was a prerequisite to closure or realignment consideration.

Third, although not considered by the Secretary and the Base Closure Commission prior to making their recommendations in 1991, the Lab Commission report served an important purpose. Even if, as here, Congress overwhelmingly voted not to disapprove the Base Closure Commission's recommendations, Congress retains power to pass subsequent legislation that could block the closure or realignment of any one or of all defense labs ordered closed or realigned by the President pursuant to the Base Closure Act.[12] The Lab Commission report, which was furnished to Congress, § 246(g), may assist Congress in determining whether such legislation is appropriate. Indeed, the Conference Committee report indicates that this was precisely Congress' intent:

> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration.

H. Conf. Rep. No. 101-923 at 3135-36.

Fourth, the Lab Commission was not merely charged with considering lab closures or realignments. To the contrary, § 246(b)(1) required the Lab Commission to conduct "a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." The Commission was invited to consider conversion of

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[12] Closures or realignments ordered by the President need not begin for two years or be completed sooner than six years. § 2904(a)(3), (4). Congress, therefore, has a substantial window of opportunity to enact corrective legislation if it chooses.

labs to government-owned, contractor-operated labs, modification of the missions and functions of the labs in addition to consolidation or closure of labs. § 246(b)(2)(A). The Lab Commission's views on subjects other than closure and consolidation thus may assist the Secretary of Defense in determining what, if any, steps other than closure may promote the efficiency of defense labs.[13]

In short, Congress specifically authorized the Secretary and Base Closure Commission to study all domestic military installations, broadly defined to include all activities under the jurisdiction of the Department of Defense. Given Congress' clear intent to expedite the previously deadlocked process of closing unneeded and costly military installations, had it intended the Secretary of Defense and the Base Closure Commission to delay consideration of defense labs for closure or realignment, it would have so provided expressly. It did not. The Lab Commission served its purpose in providing the Secretary and Congress a report on defense labs to assist them in making legislative or administrative improvements to these installations. If plaintiffs are dissatisfied with the defense lab closure and realignment determinations made by the President and accepted by Congress, they should turn to Congress for supplemental legislation with their policy arguments rather than

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[13] The Lab Commission could also review defense labs that need not be considered for closure or realignment through the base closure process because they are not subject to 10 U.S.C. § 2687. See footnote 8, supra.

to this Court with a misconstruction of existing law.

III. PLAINTIFFS LACK STANDING TO CHALLENGE THE LAB COMMISSION AND ITS REPORT.

In Count 3, plaintiffs claim that the Lab Commission violated § 246 by failing to evaluate labs individually, failing to consider closures or realignments of labs and failing to conduct an "independent, uncompromising" study. Complaint, ¶¶ 5, 189, 190, 207. This claim warrants little attention as plaintiffs so plainly lack standing to challenge the work of this advisory commission, which disbanded by law nearly two years ago.

In Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992), the Supreme Court recently rearticulated the standards that plaintiffs are required to demonstrate to establish the "irreducible constitutional minimum of standing:"

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, no 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (citations omitted).

Plaintiffs satisfy none of these standards.

The injury plaintiffs claim from the realignment of Warminster is loss of employment at the facility. See Complaint, ¶¶ 12, 14, 16, 17. As plaintiffs acknowledge, this alleged injury is the result of President Bush's decision to approve the recommendation of the Base Closure Commission to realign

Warminster and Congress' failure to disapprove it.

In contrast, the Lab Commission, which did not produce even a recommendation to realign Warminster, did not cause the injury plaintiffs allege. Its report, as plaintiffs claim, postdated the entire 1991 base closure process. Moreover, the Lab Commission's report was purely advisory and could have had no direct and binding effect on Warminster, even if issued in connection with the base closure process. Not surprisingly, therefore, plaintiffs do not -- and cannot -- allege that the Lab Commission or its report caused them any injury.

Nor can the relief requested, declarations that the Lab Commission violated the APA and § 246, Count 3, Prayers for Relief (a) and (b), and an order voiding its recommendations, redress plaintiffs' alleged injuries. Such relief would leave intact President Bush's decision to realign Warminster. Voiding the nearly two year old recommendations, made public and provided to Congress, of an advisory committee that has long since disbanded cannot redress any injury suffered by the plaintiffs. All claims against the Lab Commission and its former Commissioners should be dismissed.

CONCLUSION

For the foregoing reasons, defendants' partial motion to dismiss should be granted.

Respectfully submitted,

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Dated: July 20, 1993

Attorneys for Defendants

Please type desired COMMAND (or 'MENU'):

LEGI-SLATE Report for the 102nd Congress Tue, September 29, 1992 12:07pm (EDT)

BILL TEXT Report for H.R.2329
As introduced in the House, May 14, 1991

I

102d CONGRESS
1st Session

H. R. 2329

To ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realign Department of Defense laboratories pursuant to the Defense Base Closure and Realignment Act of 1990.

IN THE HOUSE OF REPRESENTATIVES
May 14, 1991

Mr. McMillen of Maryland (for himself and Mrs. Morella) introduced the following bill; which was referred to the Committee on Armed Services

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A BILL

To ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realign Department of Defense laboratories pursuant to the Defense Base Closure and Realignment Act of 1990.

==========

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITATION ON THE CLOSURE AND REALIGNMENT OF DEPARTMENT OF DEFENSE LABORATORIES.

No Department of Defense laboratory may be closed or realigned pursuant to the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of the National Defense Authorization Act for Fiscal Year 1991; 104 Stat. 1808; 10 U.S.C. 2687 note) as a result of recommendations made by the Defense Base Closure and Realignment Commission during 1991 until the report of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories has been submitted to Congress pursuant to section 246 of the National Defense Authorization Act for Fiscal Year 1991 (104 Stat. 1519).

Search of 11,661 Bills and Resolutions to Find 1...

Limited to H.R.2329

H.R.2329 by MCMILLEN, TOM (D-MD) -- Actions on Closing or Realignment of Defense Department Laboratories, Restriction

Official Title (caption):
A bill to ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realign Department of Defense laboratories pursuant to the Defense Base Closure and Realignment Act of 1990.

Introduced on Tuesday, May 14, 1991

Cosponsors:
Currently 8 total (6 Democrats, 2 Republicans)
Most recent addition was on Thursday, May 23, 1991

Committee Referrals:
05/14/91 -- In The HOUSE
Referred to HOUSE COMMITTEE ON ARMED SERVICES

Pending Committee Schedules:
Currently, none

All Specified Actions:
05/14/91 -- In The HOUSE
Introduced by MCMILLEN, TOM (D-MD)
Referred to HOUSE COMMITTEE ON ARMED SERVICES
Extensions to Remarks by MCMILLEN, TOM (D-MD) in "Congressional Record" (CR Page E-1738)

05/16/91 -- In The HOUSE
Remarks by MCMILLEN, TOM (D-MD) in "Congressional Record" (CR Page H-3157)

Companion or Similar Bills:
S.1000 BY MIKULSKI (D-MD) -- Consideration of Commission on the Consolidation and Conversion of Defense Research and Development Laboratories Recommendations, Provision

---

Do you wish to store these bills in a LEGI-SLATE

Please type desired COMMAND (or 'MENU'):

LEGI-SLATE Report for the 102nd Congress Tue, September 29, 1992 12:09pm (EDT)

Search of 11,661 Bills and Resolutions to Find 1...

Limited to S.1000

S.1000 by MIKULSKI (D-MD) -- Consideration of Commission on the Consolidation and Conversion of Defense Research and Development Laboratories Recommendations, Provision

Official Title (caption):
A bill to ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realignment Department of Defense laboratories pursuant to the Defense Base Closure and Realigment Act of 1990.

Introduced on Tuesday, May 7, 1991

Cosponsors:
Currently 1 total (1 Democrat, 0 Republicans)
Most recent addition was on Friday, May 24, 1991

Committee Referrals:
05/07/91 -- In The SENATE
Referred to SENATE COMMITTEE ON ARMED SERVICES

Pending Committee Schedules:
Currently, none

All Specified Actions:
05/07/91 -- In The SENATE
Introduced by MIKULSKI (D-MD)
Referred to SENATE COMMITTEE ON ARMED SERVICES
Remarks by MIKULSKI (D-MD) in "Congressional Record" (CR Page S-5423)

Companion or Similar Bills:
H.R.2329 BY MCMILLEN, TOM (D-MD) -- Actions on Closing or Realignment of Defense Department Laboratories, Restriction

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*** Please type 'YES' or 'NO'

ATTACHMENT 2

Do you wish to store these bills in a LEGI-SLATE FILE for tracking or future reference? ('Y' or 'N')

5

LEGI-SLATE Report for the 102nd Congress Tue, September 29, 1992 12:06pm (EDT)

BILL TEXT Report for S.1000
As introduced in the Senate, May 7, 1991

II

102d CONGRESS
1st Session

S. 1000

To ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realign Department of Defense laboratories pursuant to the Defense Base Closure and Realignment Act of 1990.

IN THE SENATE OF THE UNITED STATES
May 7 (legislative day, April 25), 1991

Ms. Mikulski introduced the following bill; which was read twice and referred to the Committee on Armed Services

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A BILL

To ensure that the recommendations of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories are available for consideration before any action is taken to close or realign Department of Defense laboratories pursuant to the Defense Base Closure and Realignment Act of 1990.

==========

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITATION ON THE CLOSURE AND REALIGNMENT OF DEPARTMENT OF DEFENSE LABORATORIES

No Department of Defense laboratory may be closed or realigned pursuant to the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of the National Defense Authorization Act for Fiscal Year 1991; 104 Stat. 1808; 10 U.S.C. 2687 note) as a result of recommendations made by the Defense Base Closure and Realignment Commission during 1991 until the report of the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories has been submitted to Congress pursuant to section 246 of the National Defense Authorization Act for Fiscal Year 1991 (104 Stat. 1519).

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Defendants' Partial Motion to Dismiss; Memorandum in Support of Defendants' Partial Motion to Dismiss and proposed Order to be served on the 20th day of July, 1993, by overnight express mail to:

Peter S. Greenberg
Nicole Reimann
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103

JEFFREY S. GUTMAN

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR A PARTIAL STAY OF PROCEEDINGS

Defendants move to stay all claims that the Secretary of the Navy, the Secretary of Defense or the Defense Base Closure and Realignment Commission violated procedural requirements set forth in the Defense Base Closure and Realignment Act. A memorandum in support of this motion is provided herewith. By separate motion, defendants have moved to dismiss the rest of this action.

Respectfully submitted,

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Assistant Attorney General

MICHAEL J. ROTKO
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Dated: July 20, 1993

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PARTIAL STAY OF PROCEEDINGS

PRELIMINARY STATEMENT

By separate motion filed today, defendants have moved to dismiss most of plaintiffs' case. Specifically, defendants have moved to dismiss: (1) plaintiffs' "substantive" claims against the Secretary of the Navy, Secretary of Defense and Defense Base Closure and Realignment Commission that the Third Circuit found to be unreviewable in Specter v. Garrett ("Specter I"), 971 F.2d 936 (3d Cir. 1992), (2) Count 4 of plaintiffs' Complaint, a due process claim identical to that advanced and dismissed in Specter I, and (3) all claims regarding the Commission on Consolidation and Conversion of Defense Research and Development Laboratories.

What remains are claims that the Navy, Defense Department and Base Closure Commission violated certain procedural requirements of the Defense Base Closure and Realignment Act (the "Act").[1] In this motion, defendants move to stay these claims

[1] Plaintiffs claim that the Secretaries of Defense and the Navy failed to furnish the General Accounting Office and the Base Closure Commission all information they used in making their

pending Supreme Court review of whether essentially identical allegations made in Specter are reviewable.

The two appellate courts that have considered whether these "procedural" claims are reviewable have split on the question. In Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993), the First Circuit held that claims that the Air Force, Defense Department and Base Closure Commission violated procedural requirements of the Act in the course of recommending an Air Force base for closure are unreviewable. In Specter v. Garrett ("Specter II"), No. 91-1932 (3d Cir. May 18, 1993), a divided panel of the Third Circuit held that such claims were reviewable.

This split in the Circuits involves a matter of substantial national importance. The issue presented is the extent to which the delicate political compromise inherent in the Act to expedite closure of unneeded domestic military bases can be upset by litigation that seeks to overturn Presidential determinations to close such facilities. Such litigation seeks to invalidate Presidential orders on the ground that the entities directly or indirectly providing recommendations to the President are alleged to have violated the Act's procedural requirements. Because judicial review of such claims compromises the ability of the government to fulfill the purposes of the Act and, in our view, is not intended by Congress, the Solicitor General has authorized the filing of a petition for writ of certiorari to the Supreme

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recommendations and that the Base Closure Commission violated the public hearing requirements of the Act.

Court to resolve this split of authority. Given this split in the circuits, the significance of the issue and the Supreme Court's earlier grant of certiorari in Specter, there is good reason to expect that this petition will be granted.

Whether the "procedural" claims are ultimately found to be reviewable in Specter will determine whether essentially identical claims may be entertained in this case. Until the Supreme Court has an opportunity to review Specter II, the "procedural" claims in this case should be stayed. A stay of these claims is appropriate so that time, effort and judicial resources are not needlessly expended litigating these matters while the Supreme Court reviews whether they can be litigated at all.

PROCEDURAL BACKGROUND

The procedural history of Specter v. Garrett, the case that seeks to overturn the President's decision to close the Philadelphia Naval Shipyard, is both complex and directly relevant to this case. Most of the claims advanced in this case regarding the realignment of the Naval Air Warfare Center Aircraft Division Warminster[2] are essentially identical to those made in Specter, and their reviewability is controlled by that case.

In Specter, defendants argued that the Administrative Procedure Act ("APA") did not permit review of claims that the

[2] The facility was previously called the Naval Air Development Center.

defendants' recommendations to close the Shipyard were substantively flawed or claims that defendants had violated certain procedural requirements of the Act. This Court agreed and granted defendants' motion to dismiss the case. Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991).

In April, 1992, a divided panel of the Third Circuit partially reversed. Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992). It held that claims related to the substance of the recommendations to close the Shipyard were indeed unreviewable, but found contentions that defendants had violated certain procedural requirements of the Act to be reviewable under the APA.

In June, 1992, the Supreme Court decided Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), a case concerning the reapportionment of the House of Representatives under the 1990 decennial census. Reapportionment involves an analogous procedure to that set forth in the Act whereby the Secretary of Commerce offers a recommendation for reapportionment to the President, who is required to make the final determination on how many representatives each state is entitled to have in the House of Representatives.

The Supreme Court in Franklin held that the APA did not authorize review of Massachusetts' claims that the Secretary's and President's actions violated relevant census statutes. As to the Secretary, the Court held that her recommendation was not "final agency action" required for APA review. With regard to

the President, the Court held that the APA permitted review only of "agency action" and that the President was not an "agency." While actions of the President could be reviewed for their constitutionality, they were not subject to APA review.

Because of the clear parallels between the Act and the census statutes involved in Franklin, the defendants in Specter petitioned the Supreme Court for a writ of certiorari. Defendants argued that Franklin required dismissal of plaintiffs' remaining "procedural" claims. In November, 1992, the Supreme Court granted the petition, vacated the Third Circuit's decision, and remanded the case for reconsideration in light of Franklin. 113 S. Ct. 455 (1992).

Meanwhile, in a case involving substantially similar claims arising from recommendations to close Loring Air Force Base, a district judge in Maine held in September, 1992 that Franklin required dismissal of plaintiffs' "procedural" claims. Cohen v. Rice, 800 F. Supp. 1006 (D. Me. 1992). On May 3, 1993, the First Circuit affirmed. Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993).

On remand from the Supreme Court, however, a divided panel of the Third Circuit in Specter departed from the reasoning in Cohen and held that Franklin did not preclude review of plaintiffs' "procedural" claims. Specter II, No. 91-1932 (3d Cir. May 18, 1993). The Third Circuit subsequently denied defendants' petition for rehearing and suggestion of rehearing en banc, but granted defendants' motion to stay its mandate until July 21. The Solicitor General has now authorized defendants to

file a petition for a writ of certiorari to the Supreme Court which will urge reversal of Specter II.[3]

This action, filed in September, 1992, raises claims regarding Warminster that are essentially identical to those advanced in Specter about the Shipyard.[4] Correctly recognizing that a ruling on reviewability in Specter would govern this case, after defendants filed a motion to dismiss this action in early December, 1992, plaintiffs requested that defendants stipulate to allow them to postpone filing their opposition until fifteen days after Specter II was decided. Defendants agreed.[5] After the Third Circuit decided Specter II, but before the Third Circuit ruled on our petition for rehearing, plaintiffs agreed to permit defendants until July 21 to file a responsive pleading or renewed motion to dismiss. The Court entered that stipulation as an order on June 10.

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[3] Defendants will file on July 21 a motion to extend for thirty days the stay of the mandate granted by the Third Circuit.

[4] Plaintiffs here raise additional issues regarding the authority of the Secretaries of the Navy and Defense and of the Base Closure Commission to recommend Warminster for realignment. Defendants have moved to dismiss these claims, not present in the Specter litigation.

[5] That stipulation was tendered to the Court on or about December 15, 1992. The Court did not enter that stipulation as an order. Instead, by Order entered December 18, 1992, the Court denied defendants' motion to dismiss without prejudice to renew it after the Third Circuit decided Specter II.

ARGUMENT

I. A PARTIAL STAY OF PROCEEDINGS PENDING THE SUPREME COURT'S REVIEW OF SPECTER II IS APPROPRIATE AND SERVES THE INTERESTS OF JUDICIAL ECONOMY AND CONSERVATION OF LITIGATION RESOURCES.

It is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254 (1936); see Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 585 (1989). It is particularly appropriate for courts to exercise this discretion to "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." Bechtel Corp. v. Local 215, Laborers' Int'l. Union, 544 F.2d 1207, 1215 (1976) (citing American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1936)); see also Remington Rand Corp. v. Business Systems, 830 F.2d 1274, 1275-76 (3d Cir. 1987); Rogers v. United Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975).

Significantly, defendants do not ask for the entire lawsuit to be stayed. Rather, we request a stay only of plaintiffs' "procedural" claims, the reviewability of which will be the subject of defendants' certiorari petition in Specter. As plaintiffs recognize, resolution of the reviewability issue in Specter will govern reviewability of the essentially identical claims here. For that reason, plaintiffs requested -- and defendants agreed -- to postpone, pending resolution of Specter II, their filing of an opposition to defendants' motion to

dismiss filed in this case in December. Plaintiffs have since then been similarly accommodating in agreeing effectively to stay this case pending Specter.

The parties have, in short, proceeded in this case by recognizing that Specter controls most of it and have chosen to conserve litigation and judicial resources by waiting for Specter to be definitively decided. Because defendants will seek Supreme Court review, that has not yet happened. Sound principles of judicial economy and the conservation of litigation resources counsel in favor of continuing to await the final outcome of Specter and of staying plaintiffs' "procedural" claims pending Supreme Court review.[6]

II. A STRONG BASIS EXISTS FOR THE SUPREME COURT TO GRANT DEFENDANTS' PETITION FOR CERTIORARI.

In determining whether to exercise its discretion to grant a stay, the Court should assess the likelihood that the Supreme Court will in fact decide to review Specter II. The greater the chance that the Supreme Court will decide the reviewability issues that will be binding on this Court, the more reason exists for issuing a stay. Here, there is a substantial possibility that the Supreme Court will review Specter II.

Supreme Court Rule 10.1 lists several factors that the Court may consider in determining whether to grant a petition for certiorari. Three squarely apply here: when a court of appeals

[6] In the meantime, of course, plaintiffs can brief and the court can consider and decide defendants' accompanying motion to dismiss, which, if granted, will dispose of most of this case.

issues a decision that conflicts with the decision of another court of appeals on the same matter, S. Ct. R. 10.1(a); when a court of appeals has decided an important question of federal law which has not been, but should be settled by the Supreme Court; or when a court of appeals has decided a federal question in a way that conflicts with applicable Supreme Court precedent.

First, Cohen and Specter II are in clear conflict. The First Circuit in Cohen ruled that claims that the military services and Base Closure Commission have violated particular procedural requirements of the Act are unreviewable. The Third Circuit in Specter II held the contrary.

Second, the reviewability of actions under the Act presents an important question of federal law. The Act represents a landmark political compromise that resolved long-standing tensions between the Executive and Legislative Branches over the timely closing of domestic military installations. To allow plaintiffs to challenge base closures on the basis of alleged procedural errors and to seek to extract a single base from a package of facilities approved by the President and Congress would upset the Act's delicate procedural framework and impair the government's ability to carry out the Act. Moreover, the 1991 actions challenged here and in Specter involved but the first of three rounds of base closures to end in 1995. This issue thus retains great practical significance for the future.

Finally, in defendants' view, Specter II conflicts with Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). By granting

defendants' first petition for a writ of certiorari, vacating Specter I and remanding the case for further proceedings in light of Franklin, the Supreme Court clearly recognized a connection between the two cases. Because there is compelling argument that the Third Circuit misinterpreted recent Supreme Court precedent that the Court asked the Third Circuit to consider on remand, there is considerable reason to believe that the Court will review Specter II.

These considerations weigh in favor of granting a partial stay of this action. That stay need not be very long in duration. The Supreme Court will most likely decide whether to grant defendants' petition in the fall. Should it decide to deny it, the stay may then be lifted. If the Court grants the petition, then the Court will issue a decision next Term that will be binding on this Court. Compelling reasons therefore exist to support a stay of consideration of plaintiffs' "procedural" claims until the Supreme Court reviews the identical claims in Specter.

CONCLUSION

For the foregoing reasons, defendants' motion for a partial stay of proceedings in this action should be granted.

Respectfully submitted,

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Dated: July 20, 1993

Attorneys for Defendants

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
ADM. FRANK B. KELSO, II, Acting Secretary of the Navy, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion for a partial stay of proceedings, memorandum of points and authorities in support thereof, and any opposition thereto, and good cause having been shown, it is this day hereby ORDERED:

1. Defendants' motion for a partial stay is GRANTED;

2. All claims that defendants have not moved to dismiss by their motion filed July 21, 1993 are stayed until 30 days after the Supreme Court either denies defendants' forthcoming petition for certiorari in Specter v. Garrett or grants the petition and issues an opinion in the case.

_____
UNITED STATES DISTRICT JUDGE

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Defendants' Motion for a Partial Stay of Proceedings; Defendants' Memorandum in Support of a Partial Stay of Proceedings and proposed Order to be served on the 20th day of July, 1993, by overnight express mail to:

Peter S. Greenberg
Nicole Reimann
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103

JEFFREY S. GUTMAN

U.S. Department of Justice

7/93

Washington, DC 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 7/23/93

TO: Jack Eddy Sheila Cheston

FAX NUMBER: (703) 602-8345 or 4 (703) 696-6500

FROM: Jeff Gordon
Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 29 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

Interestingly, Pa filed a SJ motion on the Gen. Comm'n/jurisdiction issue the same day we filed our motion to dismiss. We'll be discussing a briefing schedule today. If you have any thoughts on their brief, let me know. I'm particularly interested in their argument on pages 10-11, that 1) the force structure plan did not account for Iraq and 2) The source of the Navy quote on page 11. Do you have any refutation of these points?

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

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 93-CV-5331
SEAN C. O'KEEFE, the Acting Secretary of the Navy, et al., Defendants.	:	

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT

Plaintiffs hereby move for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. The ground for plaintiffs' motion, which is more fully set forth in the accompanying memorandum of law, is that, as a matter of law, the Base Closure Commission was without jurisdiction and authority to review and make decisions about defense laboratories in its 1991 recommendations to the President.

WHEREFORE, plaintiffs respectfully request the Court to enter an Order declaring defendants' actions unlawful and void and enjoining defendants from taking any action to relocate or

realign the National Air Warfare Center-Warminster based on the Base Closure Commission's July 1, 1991 recommendations.

Respectfully submitted,

Peter S. Greenberg
Nicole Reimann
Attorneys for Plaintiffs

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Of Counsel.

Dated: July 21, 1993.

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

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
SEAN C. O'KEEFE, the Acting Secretary of the Navy, et al., Defendants.	:	

ORDER

AND NOW, this day of , 1993, upon consideration of plaintiffs' Motion for Summary Judgment, and defendants' Response thereto;

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED, and that the Secretary of Defense's and Base Closure Commission's inclusion of the National Air Warfare Center-Warminster in the 1991 Base Closure process was unlawful and is void; and

IT IS FURTHER HEREBY ORDERED that defendants are enjoined from taking any action to realign or relocate the National Air Warfare Center-Warminster based on the Base Closure Commission's July 1, 1991 recommendations.

Ronald L. Buckwalter, J.

2455-93-30475

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
SEAN C. O'KEEFE, the Acting Secretary of the Navy, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW OF PLAINTIFFS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, employees of the Naval Air Warfare Center-Warminster ("NAWC"),[1] their unions and members of Pennsylvania Congressional delegation, submit this Memorandum of Law in support of their motion for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.

INTRODUCTION AND STATEMENT OF UNDISPUTED FACTS

This case involves the proposed realignment and relocation of NAWC. Plaintiffs are entitled to summary judgment because NAWC, unlike, for example, the Philadelphia Naval Shipyard that is before this Court in Specter v. Garrett, is a naval research and development laboratory, not a military base -- but nonetheless, was improperly and illegally proposed for

1. NAWC was formerly denominated Naval Air Development Center ("NADC") and was referred to as NADC in the Complaint.

realignment and relocation by the Base Closure Commission, pursuant to congressionally adopted procedures for base closures and realignments. Summary judgment is in order because, as a matter of law, NAWC instead should have been dealt with by the Commission specifically created by Congress to deal with labs, not bases; pursuant to the procedures specifically mandated by Congress to deal with labs, not bases.

* * *

NAWC has functioned as a naval research and development laboratory within the Department of Defense's large and complex laboratory system since 1947. Its mission is to be the principal Navy research and development center for aircraft, airborne anti-submarine warfare, aircraft systems less aircraft-launched weapons systems, and surface ship, submarine and aircraft navigation. Complaint, at ¶ 45. Operations at NAWC involve 223 military and 2304 civilian personnel. Approximately sixty percent of NAWC's current staff are scientists and engineers, including approximately 33% with Master's degrees and approximately 5% with Doctoral degrees. Id. at ¶ 49.

Plaintiffs filed this action for declaratory and injunctive relief against defendants, the Secretary of the Navy, the Secretary of Defense, the Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commission") and its members and the Defense Base Closure and Realignment Commission (the "Base Closure

Commission") and its members (sometimes collectively referred to as the "Government"), on September 15, 1992. Plaintiffs' action seeks to enjoin the Secretary of Defense and the Secretary of the Navy from taking any action to realign or relocate NAWC based on the Base Closure Commission's July 1, 1991 recommendation.[2] The present motion is based on the undisputed facts that the Secretary of the Navy and Secretary of Defense included Navy laboratories in the 1991 Base Closure and Realignment Recommendations, which was submitted to the Base Closure Commission on or about April 15, 1991, and the Base Closure Commission included defense laboratories in its July 1, 1991 recommendations to the President -- notwithstanding the fact that Congress established

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2. On December 2, 1992, the Government moved to dismiss plaintiffs' complaint. Before plaintiffs' response was due, the United States Supreme Court reversed and remanded Specter v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991), rev'd and remanded, 971 F.2d 936 (3rd Cir. 1992), vacated, 61 U.S.L.W. 3354 (U.S. Nov. 9, 1992), on remand, 1993 U.S. App. LEXIS 11488 (3rd Cir. May 18, 1993), reh'g denied, 1993 U.S. App. LEXIS 14450 (3rd Cir. June 14, 1993). In Specter, employees of the Philadelphia Naval Ship yard, among others, sought to enjoin the Secretary of Defense from carrying out the Base Closure Commission's decision to close the Shipyard on the ground that that decision was substantively and procedurally marred and violated the Base Closure Act. Because one of plaintiffs' claims in this action also challenges the decision to close NADC on the ground that the Base Closure Commission violated the procedural and substantive safeguards of the Base Close Closure Act, the parties stipulated that plaintiffs' response to the Government's motion to dismiss would not be due until 15 days after the Third Circuit rendered a decision in Specter. The Court, however, did not approve the stipulation. Instead, it dismissed, without prejudice, the Government's motion and ordered that the Government file its responsive pleading within 30 days of the Third Circuit's decision in Specter. On May 18, 1993, the Third Circuit decided Specter. Thereafter, the parties stipulated that defendants' responsive pleading would be due on July 21, 1993. The Court approved the stipulation.

an independent Commission, the Lab Commission, as the exclusive entity to investigate and recommend laboratory consolidation or closure and to determine a schedule for such consolidations or closures, and provided for different procedures to deal with lab realignments and closures than those provided for base closures and realignments.

The facts relevant to plaintiffs' motion for summary judgment, which motion turns on the construction of two statutes, are straightforward and undisputed.

As part of the National Defense Authorization Act for Fiscal Year 1991 ("Defense Authorization Act"), Congress enacted two statutes to address issues relating to the domestic military infrastructure. The purpose of one -- the "Defense Base Closures and Realignment Act of 1990," (the "Base Closure Act") -- was to provide for a fair process designed to result in the timely closure and realignment of military bases. Title XXIX of the Defense Authorization Act § 2901(b). The other -- "Research, Development, Test, and Evaluation," (the "Lab Commission Act"), Title II of the Defense Authorization Act § 246 -- was to address the peculiar issues facing Department of Defense Laboratories ("defense laboratories") and to make recommendations to the Secretary of Defense and Congress on future organization and structure of defense laboratories. See H.Rep. 101-923, at 56364; reprinted at 1990 U.S. Code, Congressional and Administrative News, vol. 6, at 3135-36.

These two statutes established separate commissions with discrete jurisdictions and duties, and separate procedures for determining closures and realignments. Congress established the Defense Base Closure and Realignment Commission ("Base Closure Commission") under the Base Closure Act. That Commission was to review the realignment and closure recommendations of the Secretary of Defense, § 2903(d), conduct public hearings, § 2903(d)(1), and "transmit to the President a report containing the Commission's finding and conclusions based on an analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations in the United States." § 2903(d)(2)(A).

The independent Lab Commission established by Congress under § 246 had a separate purpose and followed entirely different procedures. The Lab Commission, which was composed of individuals with expertise on laboratories, § 246(c)(1), was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). In particular, the Act directed the Lab Commission to consider, among other things, consolidation and/or closure as a means of improving the operation of defense laboratories, § 246(b)(2)(A)(iii), and to determine a "proposed schedule" for any consolidation or closure of laboratories. § 246(b)(2)(B)(ii). Thus, unlike the Base Closure Commission which reviewed only the military bases recommended for closure or realignment by the Secretary of

Defense, the Lab Commission was charged with conducting a study comprising the entire laboratory system, including all defense laboratories, not just those included on the Secretary of Defense's Base Closure List, in order to avoid the "piece-meal" review of laboratories that the base closure process would produce.

In addition to the discrete objectives of each Commission, made plain by the unambiguous language in the two statutes, the statutes set forth entirely separate time-tables and procedures for reporting to Congress and for ultimate Congressional decision making. Under the Base Closure Act, the Secretary of Defense transmits to the Base Closure Commission a list of military installations that the Secretary recommends for closure and realignment by April 15, 1991, March 15, 1993, and March 15, 1995. § 2903(c)(1). Thereafter, by no later than July 1 of 1991, 1993 and 1995, the Base Closure Commission must transmit to the President a report containing the Base Closure Commission's findings and conclusions based on a review and analysis of the Secretary of Defense's recommendations for closures and realignments. § 2903(d)(2). The President must then by July 15 transmit to the Base Closure Commission and Congress a report containing the President's approval or disapproval of the Base Closure Commission's recommendations. § 2903(e). Congress must accept or reject en bloc all of the recommendations.

The Lab Commission Act procedures were entirely different. Under the Lab Commission Act, the Lab Commission was required to submit a report containing its recommendations to the Secretary of Defense no later than September 30, 1991. §246(f). The Secretary of Defense was then to transmit the Lab Commission's report to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g). Congress then had flexible decision-making power to accept or reject the Lab Commission's recommendations, or to develop its own set of recommendations for laboratories.

The procedures established in the Lab Commission Act, unlike the procedures set out in the Base Closure Act, reaffirmed Congress' continuing intent to oversee the functioning of, and plan and control any reform or restructuring of defense laboratories. In fact, by enacting the Lab Commission Act Congress took on an even more proactive role than it previously had undertaken. In 1989, Congress had specifically dealt with laboratories in the National Defense Authorization Act for Fiscal Years 1990 and 1991, P.L. 101-189 (November 29, 1989). There, Congress directed the Department of Defense to establish the Laboratory Demonstration Program, using selected laboratories. The legislation stated that the demonstration program would be designed to attract and retain high quality staff, streamline contracting procedures, improve personnel management, and increase laboratory directors' accountability and authority. The

Lab Commission Act increased the Congressional role by providing for direct reporting to Congress. Moreover, unlike the Base Closure Act, the Lab Commission was directed to consider options other than closure or consolidation. Congress retained flexible decision-making power -- not the all-or-nothing choice provided by the Base Closure Act -- under the Lab Commission Act.

The purpose of the Lab Commission Act and Congress' continuing intent to oversee reorganization of defense laboratories is clear from the Conference Report comment on the Lab Commission legislation:

> The Senate amendment contained a provision (sec. 853) that would direct the Secretary of Defense to establish a Commission on Laboratory Consolidation and Conversion. This Commission would review the current health and effectiveness of the defense laboratories using the recent Defense Department studies and reviews conducted under the Defense Management Review as a starting point. The Commission would make recommendations to the Secretary and the Congress on the future organization and structure of these laboratories.
>
> * * *
>
> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration. See H.Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

The reason for the decision of Congress to deal with bases and labs in entirely different ways is clear. Simply put, military bases, shipyards and air stations are quite different from defense laboratories. Unlike bases, defense laboratories have unique missions and are staffed by personnel with scientific and technological expertise. Indeed, the success of laboratories -- unlike bases -- is inextricably linked to the scientific and technical expertise of its personnel, a point that is underscored by the Lab Commission's identification of the unique attributes of a "good laboratory." The Lab Commission's September 30, 1991, report to the Secretary of Defense and Congress -- issued nearly 3 months after the Base Closure Commission transmitted its Base Closure and Realignment Report to the President, and more than 5 months after the Secretary of Defense transmitted its recommendations to the Base Closure Commission, recommending defense laboratories for closure or realignment -- identified nine "attributes . . . essential to achieving high quality and effectiveness" of defense laboratories: (1) clear and substantive mission; (2) critical mass of assigned work; (3) a highly competent and dedicated work force; (4) inspired, empowered, highly qualified leadership; (5) state-of-the-art facilities and equipment; (6) effective two-way relationship with customers; (7) strong foundation in research; (8) management authority and flexibility; (9) strong linkage to universities, industry and other Government laboratories. Complaint, at ¶ 187. According to the Lab Commission's report, these attributes of a "good

laboratory are indicators of the probability of success in providing needed products for the national defense effort." Id. at ¶ 188.

In short, a determination on whether laboratories are to be closed or consolidated -- unlike a like decision concerning bases -- requires more than an assessment of total force requirements and consolidation of fungible resources such as, tanks or aircraft. In fact, by requiring the Lab Commission to include a Chairman and several members with specific expertise pertaining to defense laboratories, Congress recognized the need for a review of laboratories to be based on fine-tuned technical considerations.

Indeed, it is undisputed that essential underpinnings of the Base Closure Commission's processes in dealing with bases were totally inapplicable to labs. Thus, the Base Closure Commission required the creation of a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet over a six-year fiscal period. Base closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act. Tellingly, the Department of Defense's force structure plan does not address laboratories or research and development.

Moreover, the Department of Defense developed eight criteria to be considered in the base closure and realignment

process. The Navy acknowledged that the eight criteria were inapplicable to laboratories in its analysis of base closures and realignments because -- just as Congress recognized -- labs, unlike bases, must be judged on the very specific and technical applications of each lab:

> ...each of the RDT&E activities have unique aspects which make them suited to do a specific range of RDT&E activities. Their missions, internal structure, mode of operations and facilities are different. For this reason there are no metrics which can be used across the entire category to evaluate the[ir] activities.

Complaint, at ¶ 135.

In sum, the undisputed facts make clear that Congress recognized the differences between labs and bases and thus created a statutory scheme by which labs were to be considered for realignment or closure by procedures entirely different than those for bases. As we discuss next, because the congressional intent was completely flaunted, plaintiffs' motion for summary judgment should be granted.

ARGUMENT

In Count I of the Complaint, plaintiffs seek a declaratory judgment that the inclusion of defense laboratories in the Base Closure Commission's July 1, 1991, recommendations to the President violated the Base Closure Act and the Lab Commission Act, and that those recommendations are, therefore, void. In

Count I, plaintiffs also seek injunctive relief to prevent the Government from taking any action to realign or relocate NAWC based on the July 1, 1991, recommendation of the Base Closure Commission.[3] As we shall show, the plain language of the Base Closure Act and the Lab Commission Act mandate the conclusion that the Base Closure Commission lacked authority or jurisdiction to include defense laboratories in its 1991 recommendations to the President.

In these circumstances, where the material facts relevant to plaintiffs' motion for summary judgment are not in dispute and the issues presented to the court are purely legal ones involving statutory construction and legislative intent, summary judgment is appropriate. See Mobil Oil Corp. v. Federal

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3. That plaintiffs' claims are reviewable by this Court was settled in Spector v. Garrett, 777 F. Supp. 1226 (E.D. Pa. 1991), rev'd and remanded 971 F.2d 936 (3rd Cir. 1992), remanded, 61 U.S.L.W. 3354 (U.S. Nov. 9, 1992), on remand, 1993 U.S. App. LEXIS 11488 (3rd Cir. May 18, 1993), reh'g denied, 1993 U.S. App. LEXIS 14450 (3rd Cir. June 14, 1993). In that case, the Third Circuit held that procedural challenges under the Base Closure Act are subject to judicial review. Moreover, even if the Third Circuit were reversed, judicial review would, nonetheless, be available here because plaintiffs' claim is that the Base Closure Commission exceeded its authority or jurisdiction, see United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929); Duke Power Company v. Federal Power Commission, 401 F.2d 930 (D.C. Cir. 1968). Likewise, it is well-settled that declaratory judgment is an appropriate form of relief in situations where, as here, federal officials have violated their statutory duties or exceeded their statutory authority. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-702 (1949); Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 139-140 (1951); Guerrero v. Garza, 418 F. Supp. 182, 190 (W.D. Wis. 1976); Redlands Foothill Groves v. Jacobs, 30 F. Supp. 995, 1008 (S.D. Cal. 1940).

Energy Administration, 435 F. Supp. 983 (N.D. Tex. 1977), aff'd 566 F.2d 67 (Temp. Emer. Ct. App. 1977) ("[s]ummary judgment provides an appropriate mechanism for disposing of a legal question of statutory construction in which the legislative history and policy are by far the most important considerations"); Holland Industries, Inc. v. Adamar of New Jersey, 550 F. Supp. 646, 648 (S.D.N.Y. 1982) (legal questions relating to statutory interpretation are appropriate matters to be resolved on a motion for summary judgment).

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE BASE CLOSURE COMMISSION WAS WITHOUT JURISDICTION AND AUTHORITY TO REVIEW AND MAKE DECISIONS ABOUT DEFENSE LABORATORIES.

It is clear that the courts provide the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); Southern California Edison Co. v. F.E.R.C., 770 F.2d 779, 782 (9th Cir. 1985) (courts are final authorities on issues of statutory construction and must reject administrative constructions that are inconsistent with a statutory mandate or that frustrate a policy that Congress sought to implement); Markair, Inc. v. Civil Aeronautics Board, 744 F.2d 1383, 1386 (9th Cir. 1984) ("it is not the role of [an administrative agency] to make policy judgments in the face of a contrary congressional determination"); Guerrero v. Garza, 418 F. Supp. 182, 186-87 (W.D. Wis. 1976), (it is "peculiarly within

the power of the judiciary to interpret a statute which gives an agency the power to act, in order to permit the judiciary to determine whether the agency has correctly construed its obligations under the statute").

Moreover, where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929).

Here, the Lab Commission Act, by its terms, created the Lab Commission and required the Lab Commission to conduct a separate and independent study of closure, realignment and consolidation of defense laboratories. The plain terms of this statute conferred a specific grant of jurisdiction upon the Lab Commission to submit its independent study and report no later than September 30, 1991, and specific procedures -- quite different from those involving base closures -- by which Congress would make the final determination after receiving the report.

The plain language of the Lab Commission Act makes it clear that Congress intended the Lab Commission systematically and uncompromisingly to evaluate defense laboratories. In particular, the Lab Commission was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). The Lab Commission Act required that the Lab Commission:

> "(A) consider such means as --
>
> (i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;
>
> (ii) modification of the missions and function of some or all such laboratories; and
>
> (iii) consolidation or closure of some or all such laboratories."

§ 246(b)(2)(A). In addition, the Act required that the Lab Commission:

> "(B) determine --
>
> (i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion
>
> (ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission."

§ 246(b)(2)(B).

The Act further required the Lab Commission to submit a report containing its recommendations to the Secretary of Defense no later than September 30, 1991, § 246(f), which report was to be transmitted by the Secretary of Defense to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g).

At that point, Congress retained flexible decision-making power concerning labs and could accept or reject the Lab

Commission's recommendations. Alternatively, it also could develop its own set of recommendations for laboratories.

Quite clearly, Congress intended to treat labs entirely differently than bases. Congress recognized the different considerations involved with labs and bases, see pp. 8-10, supra, and insisted on not lumping these "apples" and "oranges" military locations.

As a result, the Base Closure Act, in stark contrast to the Lab Commission Act, established the Base Closure Commission -- a Commission with a wholly discrete purpose and raporting scheme from the Lab Commission. The jurisdiction and duties of the Base Closure Commission are set forth in Section 2903 of the Base Closure Act. The Base Closure Act charges the Base Closure Commission with the duty of evaluating the Secretary of Defense's recommendations for closing such facilities as military bases, shipyards and air stations. Under the Base Closure Act, the Secretary of Defense prepares a list of such military installations which he recommends for closure or realignment. That list must be transmitted by no later than April 15, 1991, March 15, 1993, and March 15, 1995. Thereafter, on July 1 of 1991, 1993, and 1995, the Base Closure Commission must transmit a report with its recommendations on closures and realignments to the President. If the President accepts the recommendations and transmits them to Congress, then Congress has 45 days to accept or reject, en bloc, the recommendations.

The plain language of these statutes make it clear that the Base Closure Commission was without authority to consider defense laboratories. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same legislation . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957) (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). See also MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944). Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 720 n. 5 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). ("[W]here statutes deal with a subject in both general and detailed terms, and there is conflict between the two, the detailed expression prevails").

Here, the Lab Commission Act "specifically" deals with issues involving defense laboratories including consolidation and closure. Hence, the fact that the language of the Defense Authorization Act utilized the general term "military installations" in describing the duties of the Base Closure Commission (Title XXIX, entitled "Defense Base Closures and Realignments") does not overcome the specific grant of authority over the closure, consolidation and relocation of defense laboratories (Title II, entitled "Research, Development, Test, and Evaluation," Section 246), vested in the Lab Commission, even

assuming arguendo that a lab could be considered to be an "installation."

Instead, the well-established principle which requires that "specific terms prevail over the general" requires the clear conclusion that the specific Lab Commission provisions necessarily must prevail over the general provisions pertaining to military installations.

Otherwise, the statutory scheme would make no sense. Obviously, statutes should not be interpreted in a way that makes certain provisions irrelevant or inconsistent. Rather, federal courts have consistently concluded that "the various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation." Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 732 (D.C. Cir. 1978). See also United States V. Raynor, 302 U.S. 540, 547 (1938) ("[a] construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress").

Hence, the only possible way the statutory provisions can be harmonized is if labs are dealt with under the Lab Commission procedures. Certainly, there is no harmonization where the Lab Commission and the Lab Commission Act procedures were totally ignored.

In short, Congress intended and created a statutory scheme by which, on the one hand, the Lab Commission would thoroughly review and evaluate defense laboratories and submit its report to the Secretary of Defense, who would transmit it to Congress, with any comments, for flexible decision-making by Congress; while, by contrast, the Base Closure Commission would receive recommendations from the Secretary of Defense and, after holding hearings, would transmit a report to the President, who, if he approved, would forward it to Congress for an all-or-nothing determination. In other words, Congress mandated that the treatment of labs was to be different in almost every regard than the treatment of bases.

This intent of Congress in passing its statutory scheme has been totally flaunted. The Secretary of Defense by-passed the Lab Commission by including defense laboratories in his April 15, 1991, recommendations to the Base Closure Commission. Likewise, the Base Closure Commission by-passed the Lab Commission by including laboratories in its July 1, 1991, recommendations to the President. Both events occurred before the Lab Commission even provided a report. In effect, both the Lab Commission and Congress were presented with a fait accompli concerning labs that deprived the Lab Commission of its ability to perform its thorough study and consider options other than closure or consolidation; and that deprived Congress of its ability to exercise flexible decision-making as to labs by

accepting, rejecting, or modifying the Lab Commission's recommendations or developing its own recommendations.

Clearly the statutory schema has been violated as a matter of law and summary judgment is in order. Indeed, the only possible remedy for plaintiffs is with this Court. The illegal lumping of labs into the all-or-nothing base closure process left Congress with no ability to remedy the statutory violation other than by rejecting the entire base closure proposal. This is exactly the opposite of what Congress intended as to labs, and plaintiff's motion for summary judgment therefore should be granted.

II. EVEN ASSUMING ARGURNDO THAT THE BASE CLOSURE ACT CAN BE CONSTRUED AS GRANTING ANY AUTHORITY TO THE BASE CLOSURE COMMISSION TO INCLUDE DEFENSE LABORATORIES IN ITS RECOMMENDATIONS TO THE PRESIDENT, THAT AUTHORITY COULD ONLY BE EXERCISED AFTER THE LAB COMMISSION HAD COMPLETED ITS THROUGH EVALUATION OF DEFENSE LABORATORIES.

Even assuming arguendo that Congress intended the Base Closure Commission to have any role in the closure or consolidation of laboratories, the structure of the Base Closure Act and the Lab Commission Act makes it clear that it was the Lab Commission that was charged with performing a thorough study and analysis of labs, and that the Base Closure Commission was without authority to recommend the closure or consolidation of defense laboratories prior to September 30, 1991 -- the date on

which the Lab Commission was obligated to submit its report to the Secretary of Defense.

Under section 2903(c)(1) of the Base Closure Act, the Base Closure Commission was to review lists of "military installations" recommended and submitted by the Secretary of Defense to the Base Close Commission "by no later than April 15, 1991, March 15, 1993, and March 15, 1995." However, under the Lab Commission Act, the Lab Commission was required to transmit its report, which report was to consider "conversion," modification," and "consolidation or closure" of defense laboratories and to determine "a proposed schedule for each consolidation, closure or conversion considered appropriate by the [Lab] Commission," to the Secretary of Defense no later than September 30, 1991. The Secretary was then obligated under section 246(g) to transmit that report, together with any comments of his own, to appropriate congressional committees within 30 days after receiving it from the Lab Commission. The specific grant of jurisdiction vested in the Lab Commission, along with the later-in-time deadline of September 30, 1991, for submitting the Lab Commission's report, make it clear that even if the Base Closure Commission did have some authority to consider defense laboratories, it could only do so after the Lab Commission had done its thorough study and analysis and had made its recommendations. Any other conclusion would render the Lab Commission Act a nullity -- a result that makes no sense.

Congress obviously did not intend that its Lab Commission procedures be totally ignored. Rather, at the least Congress intended that defense laboratories, which are quite different than bases, see pp. 8-10 supra, merited special study and consideration and created the Lab Commission for this specific purpose. The later-in-time deadline of September 30, 1991, was a clear indication that, at the earliest, laboratories could not be recommended for closure until March 15, 1993, the next date in time under section 2903(c)(1) that a closure list could be submitted by the Secretary to the Base Closure Commission.

The background surrounding the creation of Lab Commission strongly suggests the Congressional recognition that consolidation and closure decisions merit special consideration. Indeed, the Conference Report on the Lab Commission legislation commented:

> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This [Lab] Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration. See H.Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

Congress designated a special process whereby this special consideration was to take place, and any attempt by the Secretary of Defense and the Base Closure Commission which attempts to bypass this procedure is a direct violation of Congressional intent.

In a report which accompanied a Department of Defense Appropriations bill for fiscal year 1992, the House Committee on Appropriations also expressed its disapproval of attempts to include defense laboratories in the April 15, 1991, Base Closure List:

> Laboratory Consolidation. The Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories is strongly endorsed by the committee in its report. The committee believes that the inclusion of research and development laboratories on the Base Closure list is in direct contravention of congressional direction. Accordingly, the committee directs DOD not to obligate or expend funds to close or consolidate any research or development laboratory until Congress received and approves the commission report.

H.R. Rep. No. 95, 102nd Cong., 1st Sess. (1991) (emphasis added).

The statutory language of Section 246, and the chain of events which led to the establishment of the Lab Commission demonstrate an intent on the part of Congress that laboratories not be considered for closure until after a thorough study and report by the Lab Commission, and not until March, 1993, at the earliest. To the extent that the Secretary of Defense and the

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Base Closure Commission have bypassed Section 246 and proceeded in their efforts to close NAWC, such actions should be declared unlawful and therefore of no effect.

CONCLUSION

For all of the reasons set forth above, plaintiffs respectfully request that judgment be entered in their favor.

Respectfully submitted,

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Dated: July 21, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Plaintiffs' Motion for Summary Judgment and Memorandum of Law of Plaintiffs in Support of Motion for Summary Judgment to be served on the 21st day of July, 1993, by United States First Class Mail, postage prepaid, to:

Jeffrey S. Gutman, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
901 E Street, N.W. - Room 952
Washington, D.C. 20530

Nicole Reimann
Nicole Reimann

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs,	)	Please refer to this number when responding 930850-5
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

It is ironic that plaintiffs, led by several Members of Congress, premise their motion for summary judgment on the notion that Congress did not intend what it so clearly provided in the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Title XXIX, 104 Stat. 1808, as amended (the "Act" or the "Base Closure Act"). The Act is a comprehensive effort to effectuate the closure or realignment of unneeded domestic military facilities after years of political gridlock that halted such cost saving measures. With narrow exceptions not applicable here, Congress consequently vested the Secretary of Defense and Base Closure Commission with authority to recommend the closure or realignment of any domestic military installation. Congress so broadly defined the military installations subject to the Act that plaintiffs all but concede, as they must, that the Naval Air Warfare Center Aircraft Division Warminster is a military installation subject to the Act.

Despite the express applicability of the Act, plaintiffs

contend that the Secretary of Defense and the Defense Base Closure and Realignment Commission ("Base Closure Commission") were nevertheless without authority to recommend the closure or realignment of defense laboratories like Warminster to the President in 1991. They do not rest this argument on any of the narrow express exceptions to the Act, but instead ask the Court to imply an additional one in the Act for defense labs based on § 246 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485.

Section 246 merely established the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commission") to study the feasibility and desirability of various means to improve the operation of defense labs, including closure or consolidation. The Base Closure Commission makes recommendations that trigger statutorily required Presidential review and result in closure or realignment of installations if approved by the President and not overturned by Congress. In contrast, the Lab Commission's recommendations were purely advisory and were simply passed to the Secretary or Defense and Congress to do with as they thought appropriate. Candidly acknowledging that the Base Closure Act and § 246 had this and other significant differences, plaintiffs nonetheless assert that a conflict between the two statutes exists and should be resolved by finding that § 246 implicitly displaces the Secretary's and Base Closure Commission's express authority under the Base Closure Act to recommend the closure and realignment of

defense labs.

In reality, the scope of the Base Closure Act is both purposefully comprehensive and without an exception for defense labs. Indeed, bills introduced in Congress to create an exception in the Act for defense labs died in committee. Plaintiffs' effort to manufacture a conflict between the Base Closure Act and § 246 as a vehicle for requesting the Court to imply an exception for defense labs that Congress chose not to make should be rejected and plaintiffs' motion for summary judgment should be denied.

ARGUMENT

I. THE BASE CLOSURE ACT VESTED THE SECRETARY OF DEFENSE AND THE BASE CLOSURE COMMISSION WITH AUTHORITY TO RECOMMEND DEFENSE LABORATORIES FOR CLOSURE OR REALIGNMENT.

Plaintiffs' argument that the Secretary of Defense and Base Closure Commission had no authority or jurisdiction to recommend the closure or realignment of defense labs under the Base Closure Act scrupulously avoids analysis of the specific terms of the Act itself, the governing statute in this case. Plaintiffs' effort to sidestep the plain language of the Act is understandable. The Act undeniably vests the Secretary and the Base Closure Commission with authority to recommend defense labs for closure or realignment. Consideration of plaintiffs' claim therefore begins and ends with an analysis of the clear terms of the Act.

The Secretary of Defense's responsibilities under the Act are unambiguous. He is directed to "consider all military installations inside the United States" for possible closure or

realignment, § 2903(c)(3) (emphasis added), and then to recommend a list of "military installations inside the United States" for closure or realignment. § 2903(c)(1). The Base Closure Commission is required to review and analyze the Secretary's recommendations and to make its own recommendations for "closures and realignments of military installations inside the United States." § 2903(d)(2)(A).[1]

Nor is there any ambiguity to the scope of the term "military installation," which is expressly defined in the Act. For the 1991 round of base closures and realignments at issue here, "military installation" was expansively defined as 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." § 2910(4) (emphasis added). Quite simply, because the Naval Air Warfare Center Aircraft Division Warminster was a "military installation," and was located inside the United States, it was subject to selection for closure or realignment under the Act.[2]

Plaintiffs halfheartedly suggest that, as a defense laboratory rather than a military "base," Warminster was not

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[1] In making its recommendations, the Base Closure Commission may make changes to the Secretary's list of recommendations if it determines that the Secretary "deviated substantially" from the force structure plan and final criteria used in making recommendations. § 2903(d)(2)(B).

[2] At the time it was slated for realignment, the Warminster installation was called the Naval Air Development Center. "Centers" are expressly listed among the "military installations" subject to the Act. Warminster was, of course, also an "activity under the jurisdiction of the Department of Defense."

subject to the Base Closure Act. Memorandum of Law of Plaintiffs in Support of Motion for Summary Judgment ("Pls' Mem.") at 1-2. The argument seems designed for rhetorical rather than legal effect; plaintiffs do not, and cannot, seriously maintain that Warminster was not a "military installation" under the Act. More than just "bases," the Act covers "military installations." As plaintiffs essentially concede, Pls' Mem. at 17-18, Warminster falls within the definition of "military installation."

Aside from the subsequent exemption from the Base Closure Act of Army Corps of Engineers facilities,[3] Congress provided

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[3] As explained in our opening brief, in December, 1991 Congress subsequently amended the definition of "military installation" to exclude retroactively Army Corps of Engineers facilities, but did not similarly exclude defense labs. Defendants' Memorandum in Support of Their Partial Motion to Dismiss ("Defs' Mem.") at 18-19. Legislation introduced in both houses of Congress in May 1991 to block closures or realignments of defense labs died in committee. Id. at 17-18. This subsequent legislative activity serves as further evidence, if any were needed, that Congress intended defense labs to be among the military installations that the Secretary of Defense and Base Closure Commission could recommend for closure or realignment under the Base Closure Act. See Lindahl v. OPM, 470 U.S. 768, 782 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. So too where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . .").

Plaintiffs' observation that the House Appropriations Committee in its June 4, 1991 Report on the 1992 Department of Defense Appropriations Bill, H.R. Rep. No. 102-95, 102d Cong., 1st Sess. 173 (1991), expressed agreement with their position, see Pls' Mem. at 23, hardly helps them. Plaintiffs offer no legislative history, much less subsequent legislation, that even suggests that Congress as a whole agreed with this minority position.

only three exceptions to the scope of the Base Closure Act[4] and none of them was for defense labs. To the contrary, the Secretary of Defense is directed to consider all military installations inside the United States equally for possible closure or realignment, § 2903(c)(3), not most military installations except defense labs.

In sum, in the Base Closure Act, Congress intended to overcome years of political gridlock by establishing a comprehensive process not only to recommend, but also to effectuate, the timely closure and realignment of unneeded domestic military installations. See § 2901(b). Apart from narrow, unambiguous and inapplicable exceptions in the Act, Congress empowered the Secretary of Defense and the Base Closure Commission to recommend the closure or realignment of any domestic military facility from among a broadly defined universe of installations that included defense labs.

II. SECTION 246 SHOULD NOT BE INTERPRETED AS CONFLICTING WITH THE BASE CLOSURE ACT AND DOES NOT CREATE AN IMPLIED EXCEPTION TO THE ACT.

This past Term, the Supreme Court cautioned again that, "[i]f the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Reves v.

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[4] The Secretary of Defense is permitted to carry out the base closures and realignments approved under the 1988 base closure statute and to close or realign small installations or those requiring closure for reasons of national security or military emergency. § 2909(c); see also Defs' Mem. at 16 n.8. The Base Closure Act also does not apply to overseas military installations. See, e.g., §§ 2901(b), 2921.

Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (citation omitted). Plaintiffs do not argue that the Base Closure Act's definition of "military installation" is vague. Nor do they contend that language vesting authority in the Secretary of Defense and Base Closure Commission to recommend military installations for closure or realignment is ambiguous.

Moreover, in their effort to locate "clearly expressed" legislative intent to cast doubt on the clear coverage of the Base Closure Act, plaintiffs do not claim that the Act contains an exception for defense labs among its express exemptions. Rather, plaintiffs rely solely on an entirely separate provision, § 246, and assert that it presents an additional, implied exception to the comprehensive coverage of the Base Closure Act -- an exception that is directly contrary to the express and unambiguous language of the Base Closure Act. Plaintiffs' attempt to avoid the plain language of the Act and the rule reemphasized in Reves causes them also to transgress the Court's admonition that, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." United States v. Smith, 111 S. Ct. 1180, 1185 (1991) (quoting Andrus v. Glover Constr. Co., 446 U.S. 600, 616-17 (1980). No such intent exists here.

The Base Closure Act represents a landmark political compromise designed to effectuate the timely closure and realignment of unneeded military installations. Its purpose was

both to save taxpayer dollars and to streamline our nation's military force structure in the post-Cold War era. Plaintiffs' view that defense labs, an important sector of the military establishment, were somehow immune from consideration for closure or realignment under the Base Closure Act conflicts with the plain language, structure and purpose of the Act, and the interpretation consistently given to it by the entities responsible for implementing it -- the Department of Defense and the Base Closure Commission.

Relying on § 246, plaintiffs offer four arguments. First, they suggest that the Lab Commission, rather than the Secretary of Defense and Base Closure Commission, was the "exclusive entity" assigned to recommend defense lab closures and consolidations. Pls' Mem. at 4. The contention founders on the absence of any statutory language whatsoever in § 246 that vests the Lab Commission with such exclusive authority. Section 246 simply establishes the Lab Commission, § 246(a), and requires it to conduct a study "to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). Section 246 neither provides that only the Lab Commission may recommend defense labs for closure or realignment nor states that the Base Closure Act does not apply to defense labs.

Second, plaintiffs resort to the unexceptional maxim of statutory construction that, when a general statute and a specific one dealing with same subject matter conflict, the

specific provision prevails. Pls' Mem. at 17. If anything, the principle supports the defendants, not the plaintiffs.

The Base Closure Act deals with one and only one issue -- the closure or realignment of domestic military installations. The Lab Commission's charge was far broader with respect to defense labs. See Pls' Mem. at 8 (". . . unlike the Base Closure Act, the Lab Commission was directed to consider options other than closure or consolidation."). Congress required the Lab Commission to conduct a general study "to determine the feasibility and desirability of various means to improve the operation" of defense labs. § 246(b)(1). Congress went on to list the broad topics for study: conversion of labs to Government-owned, contractor-operated labs; modification of the missions and functions of labs and consolidation or closure of labs. § 246(b)(2). While, of course, the Base Closure Commission studied an array of installations, its particular objective -- recommending facilities for closure or realignment -- was much more specific than the Lab Commission's. If plaintiffs' tool of statutory interpretation has any application here at all, it refutes their position.

In any event, the maxim on which plaintiffs rely has no application in this case. It is triggered only by a conflict between a general and a specific statutory provision and there is no such conflict here. In their effort to create such a conflict between the Base Closure Act and § 246, plaintiffs distort the language and purpose of the statutes and run afoul of another

standard principle of statutory construction -- that statutory provisions should be interpreted harmoniously with each other when possible.[5] See Louisiana Public Service Comm'n. v. FCC, 476 U.S. 355, 370 (1986); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992). The Base Closure Act and § 246 can easily be so construed.

Simply put, there is no reason why Congress did not intend exactly what it wrote into law -- that the Base Closure Commission recommend military installations, including defense labs, for closure or realignment to the President and, at the same time, that the Lab Commission conduct its overall study of defense labs for the Secretary of Defense and Congress. See Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The Base Closure Commission and Lab Commission processes were entirely separate and distinct and directed toward different ends.

The Base Closure Commission's recommendations were made to the President. § 2903(d)(2)(A); 2903(e)(1). The Act requires the President to approve or disapprove of them within two weeks. § 2903(e). If the Base Closure Commission's recommendations for closures and realignments of military installations are approved

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[5] The Base Closure Act and § 246 are in the same statute, the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510.

by the President, the Secretary of Defense is required to carry them out, § 2904(a), unless Congress disapproves of them by joint resolution. § 2904(b). The Base Closure Act process, in short, is designed to effectuate the actual closure or realignment of military facilities.

The Lab Commission, in contrast, reported to neither the Base Closure Commission nor the President. Its recommendations to the Secretary of Defense and Congress, moreover, were purely advisory. The Secretary and Congress may consider them, or not, as they deem appropriate. Nothing in either the Base Closure Act or § 246 prevented both Commissions from making their separate recommendations or impaired their abilities to do so.

The conflict plaintiffs apparently perceive arises from the fact that the Base Closure Commission did not have the Lab Commission's report when it made its recommendations to the President on July 1, 1991. Yet, the work of the Base Closure Commission did not depend on the work of the Lab Commission. Indeed, nothing in the Base Closure Act or § 246 requires the Base Closure Commission to consider, much less receive, the Lab Commission's study. An argument that the Base Closure Commission should have been required to consider the Lab Commission's report is a policy preference, not a legal conclusion.

Ultimately, plaintiffs' own argument resolves the conflict they posit. Plaintiffs correctly explain at length that the Base Closure Commission and Lab Commission had different purposes, functions, procedures and reporting requirements. Pls' Mem. at

4-8, 14-16. What plaintiffs do not explain is how Congress' intent to create two very different Commissions with different purposes yields a conflict between them. If anything, these differences demonstrate the absence of a statutory conflict rather than reveal one. Because the recommendations of the Base Closure Commission and Lab Commission were designed for different purposes and thus followed different paths, the Base Closure Act and § 246 are easily harmonized.

Third, plaintiffs assert that this construction of the Base Closure Act would effectively nullify § 246. That is hardly the case. As plaintiffs explain in detail and as we demonstrated in our opening brief, Defs' Mem. at 22-25, with regard to defense labs, the Lab Commission's charge was substantially broader than the Base Closure Commission's. More than simply assessing closures or consolidations, the Lab Commission studied means to improve the operation of defense labs. See Pls' Mem. at 6 (. . . "unlike the Base Closure Commission which reviewed only the military bases recommended for closure or realignment by the Secretary of Defense, the Lab Commission was charged with conducting a study comprising the entire laboratory system . . ."). The Base Closure Commission's responsibilities to recommend labs for closure or realignment plainly did not nullify the Lab Commission's efforts to study broader issues.

More importantly, plaintiffs lose sight of the purpose of the Lab Commission. The legislative history of § 246 demonstrates that Congress intended the Lab Commission to assess the

Defense Department's evaluations of defense lab reorganization and to "suggest alternative actions for congressional consideration." H. Conf. Rep. No. 101-923, 101st Cong. 2d Sess. 563 (1990), reprinted in U.S. Code Cong. & Admin. News 3110, 3135. The Lab Commission's efforts were intended to educate the Secretary of Defense and Congress, not the Base Closure Commission and the President. The Lab Commission accomplished the task Congress asked of it -- completion of a report on defense labs upon which the Secretary and Congress are free to act or not act as they see fit. Plaintiffs' fear that § 246 became a nullity is meritless. Plaintiffs' efforts 1) to create a conflict where none exist, and 2) to persuade this Court that, because of that asserted conflict, this Court can and should ignore the plain meaning of the Base Closure Act and write into its provisions an exception that Congress did not enact, must fail.

Fourth, plaintiffs argue that Congress treated defense labs differently than other military installations. The assertion is beside the point. The question is not whether Congress intended to deal with defense labs differently than other installations. In § 246, Congress obviously created a separate commission to perform an independent study of defense labs. The issue is whether, by doing so, Congress created an exception to the Base Closure Act and divested the Secretary of Defense and Base Closure Commission of authority to recommend defense labs for closure or realignment. Plaintiffs' point simply provides

justification for Congress' establishment of the Lab Commission, not that it intended an unwritten exception for defense labs in the Base Closure Act.

In the absence of any statutory support for their position, plaintiffs resort to what is fundamentally a policy argument -- that the Base Closure Act process was not suited to an analysis of defense labs. Plaintiffs somehow regard this assertion as "undisputed," Pls' Mem. at 10, and then support it with nothing more than citations to their Complaint, if anything at all.

Plaintiffs observe that defense labs warrant specialized study because, "[u]nlike bases, defense laboratories have unique missions and are staffed by personnel with scientific and technological expertise." Pls' Mem. at 9. They offer no legislative history or factual support for their view, and for good reason.[6] To suggest that military installations other than defense labs lack "unique missions" or scientifically or technologically expert personnel is astonishingly naive at best and disingenuous at worst. In any event, the point, again, simply supports Congress' decision to establish a Lab Commission

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[6] To the contrary, the legislative history cited by plaintiffs, Pls' Mem. at 8, in no way suggests that Congress believed specialized study of defense labs was required because defense labs somehow required more technical analysis than the Base Closure Commission was able to provide. The legislative history plaintiffs cite does not even mention the Act, the Base Closure Commission or qualitative distinctions between defense labs and other installations that purportedly would require particular study of labs. The passage cited by plaintiffs reveals only Congress' intent that the Lab Commission review recent Defense Department studies on defense labs and efforts to reorganize defense lab structure.

to study defense labs, not Congress' determination that the Base Closure Commission was either ill-equipped to study -- or legally precluded from considering -- defense labs for closure or realignment.

Plaintiffs also claim that the Secretary of Defense's force structure plan and eight selection criteria, which Congress required him to develop, §§ 2903(a), (b), and which served as the basis for his closure and realignment recommendations, § 2903(c), are inapplicable to defense labs and therefore demonstrate that defense labs were not subject to the Base Closure Act process. Pls' Mem. at 10. Plaintiffs both misunderstand the nature of the force structure plan and the Navy's application of selection criteria and confuse Executive Branch implementation of the Act with congressional intent.

Plaintiffs find "telling," Pls' Mem. at 10, the absence of defense labs from the Department of Defense's force structure plan which plaintiffs fail to attach to their motion. The unclassified force structure plan, attached hereto as Attachment 3, was not intended to -- and did not -- list every domestic military installation by type and explain its role, if any, in national defense structure during the next six years. Rather, most of the summary is devoted to a military threat assessment and overseas basing needs. The section on anticipated force structure generally describes expected future reductions in strategic and conventional forces. The plan simply notes that fewer army divisions, navy ships, carriers and carrier air wings

and Air Force tactical fighter wings will exist by FY 1995 compared to FY 1990. It does not detail how many military installations, such as air force bases, army depots and naval shipyards -- installations obviously subject to the Base Closure Act -- will be required. That defense labs are also not specifically mentioned does not in any way suggest that defense labs were not intended to be considered by the Secretary and Base Closure Commission.

Next, citing a passage from their Complaint, plaintiffs assert that the Navy "acknowledged that the eight criteria were inapplicable to laboratories." Pls' Mem. at 11. That passage is taken out of context from a portion of the Navy's Base Closure and Realignment Recommendations, Detailed Analysis, April 1991, the relevant portion of which is attached hereto as Attachment 4.[7]

As the Analysis explains, a Navy Research, Development, Test and Evaluation ("RDT&E") Facilities Consolidation Working Group studied 76 RDT&E activities, including Navy labs. The passage upon which plaintiffs rely states that, because RDT&E activities have unique aspects allowing them to perform a specific range of functions, they could not all be evaluated for possible closure or realignment against each other. Simply put, analyzing

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[7] Attachment 4 consists only of the section entitled "Description of Analysis" for RDT&E facilities. The entire analysis includes sections describing recommendations and impacts for facilities within each category and totals 194 pages. Should the Court wish to review the whole section or the Navy's entire Detailed Analysis, defendants will gladly provide them.

different kinds of labs against each other for possible closure or realignment was like comparing apples and oranges.

Plaintiffs fail to explain that the Navy therefore determined to divide the activities along mission lines into five separate categories for evaluation: Corporate Laboratories; Naval Air Warfare Centers; Naval Command, Control and Ocean Surveillance Centers; Naval Surface Warfare Centers and Naval Undersea Warfare Centers. Each category was subdivided into functional groups, similar enough to compare with each other. After determining whether excess capacity existed, the Navy then applied the eight selection criteria to facilities within each group. Far from acknowledging that the eight criteria did not apply to RDT&E facilities, the Navy properly applied them to those installations as it did to installations other than defense labs.

Plaintiffs' final argument warrants little attention. They argue that, if the Base Closure Commission had jurisdiction to recommend the closure or realignment of defense labs, it could not do so until the Lab Commission completed its work. In their view, the Base Closure Commission could not make such recommendations until 1993 and 1995. The argument is premised on the same misinterpretation of the scope of the Act and misperceived conflict between the Act and § 246 that have been refuted above. There is quite plainly nothing in the definition of "military installation" or elsewhere in the Act that disabled the Base Closure Commission from considering the closure or

realignment of defense labs in 1991, but allows it to do so in 1993 and 1995. This variation of plaintiffs' request that the Court rewrite the Base Closure Act should also be rejected.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied and defendants' partial motion to dismiss should be granted.

Respectfully submitted,

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Dated: August 26, 1993

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for Summary Judgment to be served on the 26th day of August, 1993, by overnight express mail to:

Peter S. Greenberg
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Appendix B

Force Structure Summary*

BACKGROUND

Public Law 101-510 required the Secretary of Defense to submit to the Congress and to the Commission a force structure plan for fiscal years (FY) 1992 through 1997. The Secretary submitted the plan to Congress on March 19, 1991, and to the Commission on March 23, 1991.

The force-structure plan incorporates an assessment by the Secretary of the probable threats to the national security during the FY92-97 period and takes account of the anticipated levels of funding for this period. The plan comprises three sections:

- **The military threat assessment,**
- **The need for overseas basing, and**
- **The force structure, including the implementation plan.**

The force-structure plan is classified SECRET. What follows is an unclassified summary of the plan.

MILITARY THREAT ASSESSMENT

For 40 years, the Soviet Union and its surrogates posed the principal threat to U.S. interests and objectives. However, America's security agenda is being rewritten because of the collapse of East European communism, the demise of the Warsaw Pact, ongoing changes within the Soviet Union, the reshaping of the U.S.-Soviet relationship, and a reduction in Soviet conventional military power. This redefinition of our threat perception has been accelerated by the emergence and intensification of both new and historical regional quarrels; one of which has already

*This appendix is taken verbatim from *Department of Defense Base Closure and Realignment Report*, April 1991.

brought the United States into armed conflict in the Persian Gulf. Threats to U.S. interests range from the enmity of nations like North Korea and Cuba, to pressures from friend and foe alike to reduce U.S. presence around the world. In addition, our efforts to promote regional stability and to enhance the spread of democracy will continue to be challenged by insurgencies and terrorism.

THREATS

Even with the promise of a greatly reduced Soviet force posture in Eastern Europe, certain crucial constants endure in our long-term assessment of Soviet military capability and global threats.

- The Nuclear Threat. The most enduring concern for U.S. leadership is that the Soviet Union remains the one country in the world capable of destroying the United States with a single, devastating attack. However, the rationale for such an attack is difficult to construe. Nevertheless, until and unless the Soviet strategic nuclear arsenal is vastly modified, the cornerstone of U.S. military strategy must continue to be a modern, credible, flexible, and survivable nuclear deterrent force.

- The Conventional Threat. Even though Soviet military power is reducing and changing in form and purpose, the Soviet state still will have millions of well armed men in uniform and will remain the strongest military force on the Eurasian landmass. As leader of the Free World, the United States must maintain, in conjunction with our allies, the conventional capability to counterbalance the might of the Soviet Union's huge conventional forces.

Across the Atlantic

Looking eastward from our Atlantic shore, the focus of U.S. security concern has shifted from Western Europe to the defense of both Europe and the Persian Gulf. With respect to Europe, the demise of the Warsaw Pact, Soviet retrenchment within its borders, German unification, and the prospect of economic integration embody the success of collective defense, as well as the imperatives for new approaches to collective security. Although the prospect of a concerted military threat to Western Europe from the east has faded dramatically, continuing political and economic instability in Eastern Europe and the Soviet Union presents new concerns. Consequently, we and our North Atlantic Treaty Organization (NATO) partners are conducting a thorough review of alliance strategy. The broad outlines of a new force posture are already emerging and include highly mobile units, some of which will be restructured into multinational formations. The number of active units will be scaled back, and increasing reliance will be placed on mobilization and reconstitution.

Looking across the Mediterranean to the Middle East and Persian Gulf, regional threats to U.S. vital interests and enduring obligations will place continuing demands on our Armed Forces. Escort operations in the Persian Gulf, conducted for over two years, established the precedent of U.S. military intervention to protect the free flow of oil. Then, just as the Soviets and the Iran-Iraq war receded as threats to regional stability, Iraq emerged from eight years of war with a fanatic zeal, a large arsenal, a shattered economy, overwhelming foreign debts, and a trumped-up quarrel with Kuwait. Even though Iraq has been ejected from Kuwait by the United Nations-sponsored and U.S.-led international coalition, the region still faces an uncertain future. We will maintain our commitment and expect to significantly reduce, but not entirely eliminate, our forces in this region.

- Immediate security concerns for many nations in Southwest Asia will be lessened because of the resounding defeat of the Iraqi military during Operation Desert Storm. Over the longer term, however, a number of problems including the prospect of Iraqi rearmament, the Arab-Israeli

peace process, and subsequent reconfiguration of regional security arrangement, and relationships will complicate defense planning and shape strategic choices for all parties in the region.

- While Iraq will require perhaps a decade to rebuild its military capabilities to prehostilities levels, Baghdad will likely remain a disruptive political force in the region. The calculus of regional security will shift as Western coalition forces draw down and political leaders are challenged to construct a more stable and predictable regional environment. The prospect of regional instability will likely remain the chief cause of concern among most political and military decision makers for at least the next two or three years.

Across the Pacific

The divided Korean peninsula stands in stark contrast to the dissipating Cold War in Europe. However, the U.S. security burden is being eased by the continuing surge of democracy, economic growth, and military capacity in South Korea. Our reassessment of regional security concerns concluded that the United States could undertake a prudent phased series of steps to reduce its force presence in Korea modestly – as well as Japan and elsewhere in the Pacific – and could initiate a gradual transition toward a partnership in which Republic of Korea armed forces assume the leading role. Should deterrence fail, however, in-place and reinforcing U.S. forces would still be required. For the region as a whole, a modest level of U.S. military presence – principally maritime – will be essential to preserve stability, encourage democracy, and deter aggression.

The Rest of the World

This broad characterization is not intended to either diminish or denigrate the importance of U.S. interests, friends, and allies in regions beyond Europe, the Middle East, and the Pacific. Rather, the nature and urgency of threats beyond those especially compelling locales are such that the threats can be dealt with by a judicious mix of active forces adequate to protect the most vital U.S. interests and by units with specialized capabilities and mobility for crises at the lower end of the conflict spectrum. The more important point is that many regional disputes are becoming increasingly lethal with the proliferation of advancing technological weapons.

THE NEED FOR OVERSEAS BASING

In August 1990, the President, while speaking of our changing defense strategy, said: "Our new strategy must provide the framework to guide our deliberate reductions to no more forces than we need to guard our enduring interests--the forces to exercise forward presence in key areas, to respond effectively to crises, to retain the national capacity to rebuild our forces should this be needed . . . and to . . . maintain an effective deterrent." This strategy necessitates maintaining a balance between Continental United States (CONUS) basing and overseas basing. To provide the foundation for any national military strategy, the military must maintain facilities in CONUS for active and reserve forces for such purposes as strategic offense, tactical warning and assessment of an attack on the United States, training, research and development, mobilization, maintenance and supply, homeporting, counterdrug operations, contingency planning, and day-to-day management of the various components of the military.

Balancing the need for CONUS facilities is the continuing need for robust, though reduced, forward presence. Overseas basing remains important to the execution of peacetime forward presence and to regional contingency operations during crises. Foreign bases enhance deterrence, contribute to

regional stability, and facilitate rapid response by U.S. forces in meeting threats.

In both Europe and Asia, a continuing forward-deployed presence will be maintained in sufficient strength to deter aggression and fulfill mutual security treaty obligations. However, the rapidly changing security environment has dictated changes to the overseas deployments of American forces.

Europe

These changes will be most noticeable in Europe where a dramatic reduction in U.S. forward-based forces will occur. The United States will continue to maintain an appropriate mix of conventional and nuclear forces, modernized where necessary, to serve as the keystone to deterrence. The continuing U.S. presence there signifies our commitment to deter aggression and is vital to regional stability in an uncertain era of shifting military balances and political relationships. Similarly, our ability to reinforce Europe in a crisis and maintain the necessary and scaled-back but ready reception and basing facilities there becomes increasingly important as our forward presence is reduced.

Middle East and Persian Gulf

In the Middle East and Persian Gulf, the United States and its allies will be best served by a continued, modest military presence within the region. We have an enduring commitment to this region requiring us to restore and preserve regional stability. It has become increasingly clear that the traditional terms of American presence in the Gulf region have been forever transformed, and future events in this region will shape the nature of U.S. presence.

Asia

In Asia, where potential regional aggressors have long presented a more likely threat to stability than has superpower competition, some reductions will occur. A 10 to 12 percent reduction by the end of 1992 in the 135,000 personnel currently forward-deployed in Asia is already underway. The U.S. presence at bases in Japan, Korea, and the Philippines has historically been accepted and generally welcomed as a significant contribution to regional stability. Even if the U.S. basing structure in the region experiences changes in the years to come, continuing U.S. presence and access to the region will remain important to preserve strategic interests and regional stability.

THE FORCE STRUCTURE

Reflecting the reduced chance of global conflicts, the President's FY 1992-1993 budget [and its accompanying Future Years Defense Program (FYDP)] includes reductions in the U.S. force structure that continues a prudently phased plan for reaching the force targets established for the new strategy and threat projections. By the end of 1995, U.S. forces will approximate those targets and be well below FY 1990 levels. The FY 1995 force will also be substantially restructured so as to support the new strategy most effectively and efficiently.

Strategic forces are programmed to be scaled back in accordance with expectations regarding arms reductions agreements and to enable the Department of Defense to maintain credible strategic deterrence at the least cost. Retirement of the MINUTEMEN II force will begin in 1992. Retirements of submarines with the POSEIDON missile will be accelerated. During the 1990s, the current mix of 34 POSEIDON and TRIDENT submarines will be reduced to a force of 18 TRIDENT submarines. Air Force strategic bombers will decrease from 268 in 1990 to 181 in 1995.

Conventional forces will be restructured to include significant airlift and sealift capabilities, substantial and highly effective maritime and amphibious forces, a sophisticated array of combat aircraft, special

operations forces, Marine Corps divisions, and heavy and light Army divisions.

Compared to 1990 force levels, by the end of FY 1995 the Army will have 6 fewer active divisions; the Navy will have 94 fewer battle force ships, 1 less aircraft carrier and 2 fewer carrier air wings; and the Air Force will have 10 fewer tactical fighter wings.

TAB F RDT&E/TECHNICAL PRODUCTION/ORDNANCE PRODUCTION

F.1. DESCRIPTION OF ANALYSIS

DESCRIPTION OF CATEGORY

All activities that expend Research and Development funding were initially considered by the RDT&E Facilities Consolidation Working Group. Of the initial 76 activities considered, 36 were retained for consideration. The other activities were removed from consideration or identified as candidates for tri-service consolidation and one was left autonomous by the Working Group. The activities that were removed from consideration were educational and training activities, depots, shipyards and Superintendents of Shipbuilding. They were removed due to the small amount of RDT&E funds that they expend and because their missions were not compatible with true research and development activities. The remaining activities form the Navy's full spectrum Research, Development, Test and Evaluation, Engineering and Fleet Support Centers and the DON Corporate Laboratory structure.

There is not a generic RDT&E activity that is capable of performing all aspects of the Navy's RDT&E. Each of the RDT&E activities have unique aspects which make them suited to do a specific range of RDT&E activities. Their missions, internal structure, mode of operation and facilities are different. For this reason, there are no metrics which can be used across the entire category to evaluate the activities. As a result, the activities were consolidated along mission lines into the four Warfare Centers and the Corporate Laboratory. The activities within each grouping are all involved in similar or related work. The common denominator for most of them is the type of platform to which their work applies. The Corporate Laboratory is broadly based and focused principally on Science and Technology. Its work is specifically not platform related. Within the mission areas of each of the Warfare Centers, the activities are sub-divided into functional groups. These activities are:

DON CORPORATE LABORATORY

NAVAL RESEARCH LABORATORY, WASHINGTON, DC
NAVAL OCEANOGRAPHIC AND ATMOSPHERIC RESEARCH LABORATORY
BAY ST. LOUIS, MS

NAVAL AIR WARFARE CENTER

AIRCRAFT DIVISION
NAVAL AIR TEST CENTER, PATUXENT RIVER, MD
NAVAL AIR DEVELOPMENT CENTER, WARMINSTER, PA
NAVAL AIR ENGINEERING CENTER, LAKEHURST, NJ

COMBAT & WEAPON SYSTEM ENGINEERING AND INDUSTRIAL BASE DIRECTORATE
NAVAL ORDNANCE STATION, INDIAN HEAD, MD
NAVAL ORDNANCE STATION, LOUISVILLE, KY
NAVAL WEAPONS SUPPORT CENTER, CRANE, IN

HULL, MECHANICAL & ELECTRICAL R&D AND ISE DIRECTORATE
NAVAL SHIP SYSTEMS ENGINEERING STATION
PHILADELPHIA, PA
DAVID TAYLOR RESEARCH CENTER, CARDEROCK, MD
DAVID TAYLOR RESEARCH CENTER DET, ANNAPOLIS,MD

NAVAL UNDERSEA WARFARE CENTER

COMBAT & WEAPONS SYSTEMS DIRECTORATE
TRIDENT COMMAND & CONTROL SYSTEM MAINTENANCE ACTIVITY
NEWPORT, RI
NAVAL UNDERWATER SYSTEMS CENTER, NEWPORT, RI
NAVAL UNDERWATER SYSTEMS CENTER DET, NEW LONDON, CT
NAVAL SEA COMBAT SYSTEMS ENGINEERING STATION
NORFOLK, VA

WEAPONS SYSTEMS IN-SERVICE ENGINEERING DIRECTORATE
NAVAL UNDERSEA WARFARE ENGINEERING STATION
KEYPORT, WA

RESULTS OF CAPACITY ANALYSIS

When reviewing the capacity of activities to do Research and Development, the only single consistent metric available is manpower. With some exceptions, there is little duplication of the facilities required to perform research. By this we mean facilities such as centrifuges, environmental chambers and instrumented ranges. The exceptions are facilities such as standard aircraft runways.

The consolidation of the RDT&E activities began as a Defense Management Review initiative (DMR 922) under the guidance of the Director, Defense Research and Engineering well over a year ago. In August of 1990, the Secretary of the Navy formed the RDT&E Facilities Consolidation Working Group and tasked them to develop initial plans for internal Navy consolidation. The consolidation working group examined the impact of the declining budget on the shore infrastructure. In general, the funds available for Research and Development are declining. This in turn means fewer programs and less work for the research and development community. This results in an excess capacity of personnel to perform the work.

After the consolidation planning was well underway the Defense

The BSC examined the degree to which each RDT&E facility was suited for its present and potential mission. The critical factor in this evaluation was the capability of a facility to meet the demands of more efficient and focused consolidated operations imposed by Defense Management Review (DMR) studies, by major projected operating budget reductions, and by a congressionally mandated twenty per cent RDT&E staff reduction. Accordingly, the BSC rated each RDT&E facility in the following manner:

(G) Fully capable of supporting current and foreseeable RDT&E mission requirements by providing consolidated operations in current or expanded facilities.

(Y) Limited capability of supporting current and foreseeable mission requirements by providing consolidated operations in current or expanded facilities.

(R) Not capable of supporting current and foreseeable mission requirements by providing consolidated operations in current or expanded facilities.

2. THE AVAILABILITY AND CONDITION OF LAND, FACILITIES AND ASSOCIATED AIRSPACE AT BOTH THE EXISTING AND POTENTIAL RECEIVING LOCATIONS.

In evaluating land, facilities, and airspace the BSC considered: whether there were unique, mission required geographic features which could not be found at other locations; whether there were unique technological facilities and equipment which could not be duplicated at another location without excessive cost; whether physical plant and technology were capable of supporting current and future missions; whether there were significant facilities and technology quality and capacity to support consolidated operations; and whether there was sufficient land to support consolidated operations. The overriding consideration in this review was the capability of a facility to meet the demands of more efficient and focused consolidated operations imposed by DMR studies, by major projected operating budget reductions, and by a congressionally mandated twenty per cent RDT&E staff reduction. Accordingly, the BSC rated each RDT&E facility in the following manner:

(G) Unique, mission required geographic features which cannot be found at other locations; unique technological facilities and equipment which cannot be duplicated at another location without excessive cost;

(Y) The facility is located in high cost region and/or has difficulty in recruiting and retaining appropriately skilled labor.

(R) The facility experiences very high costs due to remote location, and/or must make special arrangements for transporting and supporting workers.

EXCLUSIONS FROM FURTHER REVIEW (STEP 5 OF NAVY PROCEDURES)

No RDT&E facilities were excluded from further review because of unique value.

APPLICATION OF FINAL CRITERIA 6-8 (IMPACTS)

6. THE ECONOMIC IMPACT ON COMMUNITIES.

The BSC calculated the economic impact of closure or realignment by measuring the direct and indirect effect on employment in the communities at each RDT&E facility. Accordingly, the BSC rated each RDT&E facility in the following manner:

(G) Adverse economic impact, including cumulative impact of multiple closures, at existing or receiving location is so significant as to make closure or realignment undesirable.

(Y) Significant adverse economic impact could result if the transition is too rapid or poorly planned; potential adverse impacts may be mitigated.

(R) Overall economic impact is not significantly adverse.

7. THE ABILITY OF BOTH THE EXISTING AND POTENTIAL RECEIVING COMMUNITIES INFRASTRUCTURE TO SUPPORT FORCES, MISSIONS, AND PERSONNEL.

The BSC examined the ability of community infrastructure to support each RDT&E facility. The infrastructure evaluation included such considerations as schools and transportation access as well as professional resources and the general quality of life. Accordingly, the BSC rated each RDT&E facility in the following manner:

(G) The ability of the existing communities' infrastructure to support RDT&E facilities, missions, and personnel is so superior to that of potential receiving communities as to make closure or realignment undesirable.

The results of the Phase I and Phase II evaluations are as follows (green favors keeping the installation open; red favors closure):

Phase I						Phase II				
Overall Rating (PH 1)	Installation	Mission (1)	Land/ Facil. (2)	Cont/ Mob. (3)	Cost/ Manpower (4)	ROI * (5)	Econ Impact (6)	Comm Suppt (7)	Environ Impact (8)	
G	NOSC San Diego	G	G	G	Y			(1)		
Y	NOSC Hawaii	G	Y	G	Y	+5.6/-0.9	R	R	R	
Y	NESEC San Diego	Y	R	G	Y	+10.9/-2.7	R	R	R	
Y	NESEC Vallejo	Y	Y	G	Y	+15.3/-2.1	R	R	R	
G	NEEACTPAC Hawaii	G	Y	G	Y			(1)		
Y	NSSA Los Angeles	Y	Y	Y	Y	+2.8/-0.4	R	R	R	
Y	NESSEC Washington DC	Y	Y	Y	Y	+3.6/-0.9	R	R	R	
Y	NESEA St. Inigoes	Y	Y	G	G	+12.1/-2.4	R	R	R	
G	NESEC Portsmouth	G	Y	G	G			(1)		
Y	NESEC Charleston	Y	Y	G	G	+14.4/-3.2	R	R	R	
G	PMTC Point Mugu	G	G	G	Y	+9.2/-8.5	R	R	R	(2)
G	NWC China Lake	G	G	G	G	+8.7/-6.5	R	R	R	(2)
G	NOMTS White Sands	G	Y	G	G			(1)		
Y	NWEF Albuquerque	Y	Y	G	G	+4.4/-8.3	R	R	R	
G	NUSC Newport	G	G	G	G			(1)		
Y	NUSC Det New London	G	Y	Y	G	+59.5/-7.3	Y	Y	Y	
Y	NSCSES Norfolk	G	Y	Y	G	+10.9/-1.8	R	R	R	
G	NRL Washington DC	G	Y	G	Y			(3)		
G	NOARL Stennis	G	G	G	G			(3)		
G	NOARL Monterey	G	Y	G	Y			(3)		
Y	TRICOMSA Newport	Y	Y	Y	G	+0.7/-1.0	R	R	R	
G	NSWSES Port Hueneme	G	G	G	G			(1)		

Therefore, considering generally: the need to focus and consolidate RDT&E efforts, as imposed by Defense Management Review (DMR) studies, major projected operating budget reductions, and a congressionally mandated twenty per cent staff reduction; and specifically:

1. As part of a consolidation under the Naval Surface Warfare Center:

A. the lack of an overwater gunnery and missile range, the lack of sufficient space to expand for consolidation, and the ability to operate on a reduced basis due to proximity to a larger laboratory, the Naval Surface Warfare Center Detachment, White Oak, Maryland, is recommended for realignment to the Naval Surface Warfare Center (NSWC), Dahlgren, and to the Naval Ordnance Center, Indian Head.

B. the lack of an overwater gunnery and missile range, the lack of sufficient space to expand for consolidation, and the ability to operate on a reduced basis due to proximity to a larger laboratory, the David Taylor Research Center (DTRC), Annapolis, is recommended for realignment to DTRC, Carderock.

C. the Integrated Combat Systems Test Facility (ICSTF), San Diego, is recommended to transfer functions to the Combat and Weapons Systems ISE Division in Port Hueneme, and close.

D. the Mine Warfare Engineering Activity (NMWEA), Yorktown, is recommended to transfer functions to the Combat and Weapons System ISE Division at Dam Neck and close.

E. the Naval Coastal Systems Center (NCSC), Panama City, is recommended for realignment to merge with the Combat and Weapons Systems R&D Division as a major operating site in Panama City, and to transfer minor functions to the Naval Undersea Warfare Center at Newport, RI, and the Combat and Weapon Systems R&D Division at Dahlgren.

F. the Naval Ordnance Station (NOS), Indian Head is recommended for realignment with the Combat and Weapon System Engineering and Industrial Base Division at Crane, IN, and remain a major operating site.

G. the Naval Ordnance Station (NOS), Louisville, KY, is recommended for realignment with the Combat and Weapons System Engineering and Industrial Base Division at Crane, IN, and remain a major operating site.

B. the small size of its detachment and the ability to avoid significant military construction during laboratory consolidation, the Naval Sea Systems Combat Engineering Station (NSCSES), Norfolk, is recommended to be realigned and merged with CWSD.

C. the Trident Command and Control Systems Maintenance Activity (TRICCSMA), Newport, RI is recommended to be realigned to merge with the CWSD at Newport.

D. the Naval Undersea Warfare Engineering Station (NUWES), Keyport, WA, is recommended to be realigned to merge with the Weapons Systems ISE Division at Keyport as the center for the Division.

4. As part of the consolidation under the Naval Command, Control and Ocean Surveillance Center:

A. the lack of sufficient space to expand for consolidation, the Naval Electronic Systems Engineering Center (NESEC), Vallejo, CA is recommended to transfer its functions to the West Coast ISE Directorate in San Diego and close.

B. the lack of sufficient space to expand for consolidation, NESEC, Charleston is recommended to transfer its functions to the East Coast ISE Directorate at Portsmouth, VA, and close.

C. the lack of sufficient space to expand for consolidation and the need to use the facility for a consolidated installation of the Naval Air Warfare Center, Naval Electronics Systems Engineering Activity (NESEA), St. Inigoes, MD is recommended to transfer its functions to the East Coast ISE Directorate in Portsmouth, VA, close, and transfer property to the Naval Air Warfare Center.

D. the Naval Space Systems Activity (NSSA), Los Angeles, is recommended to transfer all functions to the RDT&E Directorate at San Diego and the Naval Warfare Systems Command in Washington, DC, and close.

E. the Naval Ocean Systems Venter (NOSC) Detachment, Kaneohe, HI, is recommended to transfer functions to the RDT&E Directorate operating site at Pearl Harbor, HI, and close.

F. the Naval Electronic Systems Security Engineering Center (NESSEC), Washington DC is recommended to transfer its functions to the East Coast ISE Directorate at Portsmouth, VA and close.

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

REPORT TO THE COURT REGARDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI IN SPECTER V. DALTON

On July 21, defendants filed a motion for a partial stay of proceedings on plaintiffs' claims that the Navy, Defense Department and Base Closure Commission had violated certain procedural requirements of the Base Closure Act. The First and Third Circuits split on whether such claims were judicially reviewable, with the Third Circuit in Specter v. Garrett holding that they were reviewable. We advised the Court in the memorandum supporting the motion that the Solicitor General had authorized the filing of a petition for a writ of certiorari in Specter and argued that the prospect of Supreme Court review of this issue warranted a stay of these claims here.

Defendants have since filed a cert petition in Specter. Prior to that filing, the Third Circuit granted three motions to stay issuing the mandate in Specter to this Court. Because the petition has now been filed, the stay of the mandate will continue until final disposition of the petition by the Supreme Court. Fed. R. App. P. 41(b). Because a stay of proceedings of

Document Separator

Please refer to this number when responding 930901-2

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of , 1993, upon consideration of defendants' Partial Motion to Dismiss, and plaintiffs' Response thereto;

IT IS HEREBY ORDERED that defendants' Partial Motion to Dismiss is DENIED.

Ronald L. Buckwalter, J.

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

MEMORANDUM OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

Plaintiffs, employees of the Naval Air Warfare Center-Warminster (the "NAWC"), their unions and members of the Pennsylvania Congressional delegation, submit this memorandum of law in opposition to defendants' partial motion to dismiss.

INTRODUCTION

This case involves the proposed realignment and relocation of the NAWC. In particular, plaintiffs seek a declaratory judgment that defendants' decision to realign and relocate the NAWC is unlawful. Plaintiffs also seek an injunction to prevent defendants from taking any action to realign or relocate the NAWC.

Plaintiffs assert four legal bases for the relief they seek. First, the NAWC was improperly and illegally proposed for

realignment and relocation by the Base Closure Commission, which lacked authority and jurisdiction to include defense laboratories in its 1991 recommendations. Second, defendants violated the Lab Commission Act by failing to conduct an independent, uncompromising study to consider the Services' proposals for consolidation and closure of defense laboratories and to determine a schedule for such closures of consolidations. Third, assuming arguendo that the Base Closure Commission had jurisdiction or authority to review and make recommendations concerning the realignment and relocation of the NAWC, defendants, nonetheless, violated the procedural and substantive safeguards and requirements set forth in the Base Closure Act. Fourth, defendants' disregard of the procedures set forth in the Base Closure Act constitutes a violation of plaintiffs' rights to due process.

Defendants' partial motion to dismiss seeks to dismiss all of plaintiffs' claims, except their claim that defendants violated the procedural mandates of the Base Closure Act.[1] Defendants seek to dismiss "the bulk of plaintiffs' complaint" on the grounds that it raises "substantive" claims against defendants and is therefore not reviewable, according to the Third Circuit's holding in Specter. Clearly, Specter controls in this case. However, that fact does not lead to the conclusion that the bulk of plaintiffs' complaint must be dismissed. As we

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1. By separate motion, defendants have moved to stay plaintiffs' procedural misconduct claim on the ground that defendants intend to file a petition for certiorari in Specter v. Garrett, 995 F.2d 404 (3rd Cir. 1993). Plaintiffs today have filed a memorandum in opposition to defendants' motion for partial stay.

shall show below, many of the claims which defendants have attempted to characterize as "substantive" are in fact procedural claims which are clearly reviewable under the Third Circuit's decision in Specter. Hence, contrary to defendants' contention Specter does not mandate dismissal of the bulk of plaintiffs' complaint.[2]

Likewise, defendants' motion to dismiss plaintiffs' claim that the NAWC was improperly and illegally proposed for realignment and relocation by the Base Closure Commission, which lacked authority and jurisdiction to include defense laboratories in its 1991 recommendations to the President, is without merit. As plaintiffs have shown in their memorandum of law in support of their motion for summary judgment, not only is dismissal inappropriate but, in fact, summary judgment for plaintiffs is in order because, as a matter of law, the NAWC should have been dealt with by the Lab Commission, which was specifically created by Congress to deal with laboratories.

Finally, defendants' contention that plaintiffs' lack standing to pursue their claim that defendants violated the Lab Commission Act by failing to conduct an independent, uncompromising study to consider the Services' proposals for consolidation

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2. For purposes of defendants' motion, should this court conclude that defendants had some authority to close or realign the NAWC under the Base Closure Act, plaintiffs will concede, without prejudice to their appellate rights, that the Third Circuit's decision in Specter v. Garrett, forecloses plaintiffs' substantive claims, as properly defined. Given the Court's holding in Specter, plaintiffs also will not oppose dismissal of their due process claim, without prejudice to renew this claim on appeal.

and closure of defense laboratories and to determine a schedule for such closure or consolidations is similarly unavailing. Plaintiff employees of the NAWC will certainly be injured by the closure or realignment of the NAWC. Likewise, the Lab Commission's failure to comply with its legislative mandate caused, at least in part, plaintiff's harm. This is so because an uncompromised study would have, for example, revealed the costs associated with relocating the NAWC and the benefits foregone -- thus drawing attention to the inappropriateness of the Base Closure Commission's recommendations and offering an opportunity for corrective action. In addition, the relief plaintiffs seek will redress plaintiffs injury because it will prevent defendants from implementing their 1991 recommendations on the ground that the Lab Commission endorsed the Base Closure Commission's recommendation.

As we shall show, for all these reasons defendants' motion to dismiss should be denied.

STATEMENT OF FACTS

The NAWC has functioned as a naval research and development laboratory since 1947. Its mission is to be the principal Navy research and development center for aircraft, airborne anti-submarine warfare, aircraft systems less aircraft-launched weapons systems, and surface ship, submarine and aircraft navigation. Complaint, at ¶ 45.

In addition to weapons systems development, the NAWC's works also involves electro-optic, acoustic, and microwave technologies. The NAWC also researches technologies for the surveillance and targeting of airborne, surface and subsurface targets. The NAWC is also the Navy's leading center for upgrading existing Navy aircraft such as F/A-18, F-14, A-6 AND AV-8B. The capacities of these aircraft are highly dependent on products conceived and developed by the NAWC.

To accomplish its mission, the NAWC has a number of unique facilities, including an ejection tower facility, which is the only man-rated facility in the United States; a fuel fire test facility; a pneumatically driven crash-impact simulator; a state-of-the-art laboratory capable of static and fatigue testing of aircraft structural specimens; four anechoic chambers, including one that was fabricated and installed after an extensive study was done assuring that no other facility in the U.S. could meet its technical requirements; 1500 tons of sophisticated computer systems and laboratory precision equipment; and a central computer system that is the largest hybrid system in the Navy.

Operations at the NAWC involve 223 military and 2304 civilian personnel. Approximately sixty percent of the NAWC's current staff are scientists and engineers, including approximately 33% with Master's degrees and approximately 5% with Doctoral degrees. Id. at ¶ 49.

The NAWC functions within the Department of Defense's large and complex laboratory system. There are currently 66 Department of Defense ("DOD") research and development laboratories (42 Army, 20 Navy and 4 Air Force). The mission of DOD laboratories is to provide technical expertise to enable the Army, Navy and Air Force ("the Services") to be smart buyers and users of new and improved weapons systems and support capabilities.

Over the years, DOD laboratories have been plagued with various problems relating to, among other things, recruitment and retention of its professional staff, personnel management and laboratory management. Congress has enacted legislation and the DOD has issued memoranda designed to address laboratory issues.

As part of the National Defense Authorization Act for Fiscal Year 1991 ("Defense Authorization Act"), Congress enacted two statutes to address issues relating to the domestic military infrastructure. The purpose of one -- the "Defense Base Closures and Realignment Act of 1990," (the "Base Closure Act") -- was to provide for a fair process designed to result in the timely closure and realignment of military bases. Title XXIX of the Defense Authorization Act § 2901(b). The other -- "Research, Development, Test, and Evaluation," (the "Lab Commission Act"), Title II of the Defense Authorization Act § 246 -- was to address the peculiar issues facing Department of Defense Laboratories ("defense laboratories") and to make recommendations to the Secretary of Defense and Congress on future organization and structure of defense laboratories. See H.Rep. 101-923, at 56364;

reprinted at 1990 U.S. Code, Congressional and Administrative News, vol. 6, at 3135-36.

These two statutes established separate commissions with discrete jurisdictions and duties, and separate procedures for determining closures and realignments. Congress established the Defense Base Closure and Realignment Commission ("Base Closure Commission") under the Base Closure Act. That Commission was to review the realignment and closure recommendations of the Secretary of Defense, § 2903(d), conduct public hearings, § 2903(d)(1), and "transmit to the President a report containing the Commission's finding and conclusions based on an analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations in the United States." § 2903(d)(2)(A).

The independent Lab Commission established by Congress under § 246 had a separate purpose and followed entirely different procedures. The Lab Commission, which was composed of individuals with expertise on laboratories, § 246(c)(1), was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). In particular, the Act directed the Lab Commission to consider, among other things, consolidation and/or closure as a means of improving the operation of defense laboratories, § 246(b)(2)(A)(iii), and to determine a "proposed schedule" for any consolidation or closure of laboratories. § 246(b)(2)(B)(ii). Thus, unlike the Base Closure Commission which reviewed only the

military bases recommended for closure or realignment by the Secretary of Defense, the Lab Commission was charged with conducting a study comprising the entire laboratory system, including all defense laboratories, not just those included on the Secretary of Defense's Base Closure List, in order to avoid the "piece-meal" review of laboratories that the base closure process would produce.

In addition to the discrete objectives of each Commission, made plain by the unambiguous language in the two statutes, the statutes set forth entirely separate time-tables and procedures for reporting to Congress and for ultimate Congressional decision making. Under the Base Closure Act, the Secretary of Defense transmits to the Base Closure Commission a list of military installations that the Secretary recommends for closure and realignment by April 15, 1991, March 15, 1993, and March 15, 1995. § 2903(c)(1). Thereafter, by no later than July 1 of 1991, 1993 and 1995, the Base Closure Commission must transmit to the President a report containing the Base Closure Commission's findings and conclusions based on a review and analysis of the Secretary of Defense's recommendations for closures and realignments. § 2903(d)(2). The President must then by July 15 transmit to the Base Closure Commission and Congress a report containing the President's approval or disapproval of the Base Closure Commission's recommendations. § 2903(e). Congress must accept or reject en bloc all of the recommendations.

The Lab Commission Act procedures were entirely different. Under the Lab Commission Act, the Lab Commission was required to submit a report containing its recommendations to the Secretary of Defense no later than September 30, 1991. §246(f). The Secretary of Defense was then to transmit the Lab Commission's report to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g). Congress then had flexible decision-making power to accept or reject the Lab Commission's recommendations, or to develop its own set of recommendations for laboratories.

The procedures established in the Lab Commission Act, unlike the procedures set out in the Base Closure Act, reaffirmed Congress' continuing intent to oversee the functioning of, and plan and control any reform or restructuring of defense laboratories. In fact, by enacting the Lab Commission Act Congress took on an even more proactive role than it previously had undertaken. In 1989, Congress had specifically dealt with laboratories in the National Defense Authorization Act for Fiscal Years 1990 and 1991, P.L. 101-189 (November 29, 1989). There, Congress directed the Department of Defense to establish the Laboratory Demonstration Program, using selected laboratories. The legislation stated that the demonstration program would be designed to attract and retain high quality staff, streamline contracting procedures, improve personnel management, and increase laboratory directors' accountability and authority. The Lab Commission Act increased the Congressional role by providing

for direct reporting to Congress. Moreover, unlike the Base Closure Act, the Lab Commission was directed to consider options other than closure or consolidation. Congress retained flexible decision-making power -- not the all-or-nothing choice provided by the Base Closure Act -- under the Lab Commission Act.

The purpose of the Lab Commission Act and Congress' continuing intent to oversee reorganization of defense laboratories is clear from the Conference Report comment on the Lab Commission legislation:

> The Senate amendment contained a provision (sec. 853) that would direct the Secretary of Defense to establish a Commission on Laboratory Consolidation and Conversion. This Commission would review the current health and effectiveness of the defense laboratories using the recent Defense Department studies and reviews conducted under the Defense Management Review as a starting point. The Commission would make recommendations to the Secretary and the Congress on the future organization and structure of these laboratories.
>
> * * *
>
> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration. See H.Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

The reason for the decision of Congress to deal with bases and labs in entirely different ways is clear. Simply put,

military bases, shipyards and air stations are quite different from defense laboratories. Unlike bases, defense laboratories have unique missions and are staffed by personnel with scientific and technological expertise. Indeed, the success of laboratories -- unlike bases -- is inextricably linked to the scientific and technical expertise of its personnel, a point that is underscored by the Lab Commission's identification of the unique attributes of a "good laboratory." The Lab Commission's September 30, 1991, report to the Secretary of Defense and Congress -- issued nearly 3 months after the Base Closure Commission transmitted its Base Closure and Realignment Report to the President, and more than 5 months after the Secretary of Defense transmitted its recommendations to the Base Closure Commission, recommending defense laboratories for closure or realignment -- identified nine "attributes . . . essential to achieving high quality and effectiveness" of defense laboratories: (1) clear and substantive mission; (2) critical mass of assigned work; (3) a highly competent and dedicated work force; (4) inspired, empowered, highly qualified leadership; (5) state-of-the-art facilities and equipment; (6) effective two-way relationship with customers; (7) strong foundation in research; (8) management authority and flexibility; (9) strong linkage to universities, industry and other Government laboratories. Complaint, at ¶ 187. According to the Lab Commission's report, these attributes of a "good laboratory are indicators of the probability of success in providing needed products for the national defense effort." Id. at ¶ 188.

In short, a determination on whether laboratories are to be closed or consolidated -- unlike a like decision concerning bases -- requires more than an assessment of total force requirements and consolidation of fungible resources such as, tanks or aircraft. In fact, by requiring the Lab Commission to include a Chairman and several members with specific expertise pertaining to defense laboratories, Congress recognized the need for a review of laboratories to be based on fine-tuned technical considerations.

Indeed, it is undisputed that essential underpinnings of the Base Closure Commission's processes in dealing with bases were totally inapplicable to labs. Thus, the Base Closure Commission required the creation of a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet over a six-year fiscal period. Base closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act. Tellingly, the Department of Defense's force structure plan does not address laboratories or research and development.

Moreover, the Department of Defense developed eight criteria to be considered in the base closure and realignment process. The Navy acknowledged that the eight criteria were inapplicable to laboratories in its analysis of base closures and realignments because -- just as Congress recognized -- labs, unlike bases, must be judged on the very specific and technical applications of each lab:

> ...each of the RDT&E activities have unique aspects which make them suited to do a specific range of RDT&E activities. Their missions, internal structure, mode of operations and facilities are different. For this reason there are no metrics which can be used across the entire category to evaluate the[ir] activities.

Complaint, at ¶ 135.

Likewise, Congress was subject to the same restrictions, and thus had no flexibility in decision-making.

In blatant disregard of the clear Congressional mandate requiring the Lab Commission to function as the independent body charged with making recommendations regarding laboratory closures or consolidations for Congress' ultimate review and flexible decision-making prior to the taking of any other action relating to laboratory consolidation, defendant Gerald Cann, Assistant Secretary of the Navy for Research, Development and Acquisition, and others, sought to and did circumvent the intent of Congress and the Lab Commission Act, and avoided Congressional oversight by unlawfully and inappropriately inserting into the 1991 Base Closure Process the consolidation and realignment of DOD laboratories, including the NAWC.

In fact, at the urging of Gerald Cann, and others, the Department of Defense accepted and recommended to the Base Closure Commission Cann's proposal to create four super facilities: Naval Air Warfare Center; Naval Command, Control and Ocean Surveillance Center; Naval Surface Warfare Center; and Naval Undersea Warfare Center, and to close 10 and realign 16 labora-

tories. This was accomplished in April 1991, in violation of Congressional intent and prior to the receipt of the Lab Commission report.

The Secretary of Defense included Navy laboratories in the 1991 Base Closure and Realignment Recommendations (the "Base Closure List"), which was submitted to the Base Closure Commission on or about April 15, 1991. The NAWC was one of the laboratories targeted for realignment. The Lab Commission did not evaluate any laboratory on an individual basis, nor did it develop an overall plan for defense laboratories or a strategy for improving them. The Lab Commission, in direct contravention of its legislative mandate, failed to conduct a study to consider closure or consolidation of laboratories and to determine a time table for such closures or consolidations. Rather, it simply rubber-stamped the Base Closure Commission's recommendations.

The folly of attempting to restructure labs via procedures that violate the intent of Congress as set out in the Lab Commission Act is dramatically demonstrated by the results. The Navy has not even determined the final organizational plan for the Naval Air Test Center, Patuxent River. While the Navy's restructuring plan calls for the NAWC to be realigned, the Navy has not determined whether the NAWC will remain a separate entity. The Navy's inability to articulate a forward-thinking plan for its research and development laboratories would, if left unchecked, result in the relocation of the NAWC at a time when a functional, fully staffed NAWC is critical.

The Navy's plan calls for realignment and relocation of the NAWC at a time when the combined technical expertise of the NAWC's professional staff is most needed. The cancellation of various weapons programs in conjunction with the apparent end of the Cold War means that the Navy likely will be unable to field any new aircraft until early in the next century. Hence the Navy will have to upgrade its existing aircraft.

The NAWC would be expected to play a principal and immediate role in developing and applying technologies associated with individual upgrades. However, the proposed realignment of the NAWC would result in the loss of key technical talent, which would have a detrimental effect on the NAWC's ability to perform the needed upgrades.

This, combined with the fact that the proposed relocation of the NAWC will be far more costly than the Navy's estimates, which are based on faulty data and inaccurate assumptions, makes it clear that the Navy's plan is unwise and, ultimately, potentially damaging to Naval aviation.

ARGUMENT

I. THE FACT THAT SPECTER HELD THAT SUBSTANTIVE CLAIMS UNDER THE BASE CLOSURE ACT ARE NOT REVIEWABLE WILL NOT PERMIT DISMISSAL OF THE BULK OF PLAINTIFFS' COMPLAINT.

In their memorandum in support of their motion to dismiss, defendants first argue that Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992) "requires dismissal of the bulk of plaintiffs' complaint." Defendants' Brief at 2. Defendants' asser-

tion is baseless. In Specter, the Third Circuit concluded only that challenges that "go to the merits of the recommendations" of the Secretary of the Navy, the Secretary of Defense and the Base Closure Commission "are not subject to second guessing by the judiciary." 971 F.2d 952. However, the fact that substantive claims are not reviewable does not lead to the conclusion that the bulk of plaintiffs' complaint should be dismissed.

As we shall show, most of the claim defendants characterize as substantive in fact challenge procedural aspects of defendants' decision-making processes and are reviewable under Specter.

For example, defendants characterize plaintiffs' allegations in paragraphs 136-37 and 203(G) of the Complaint as a claim that "the Base Closure Commission failed to apply the eight selection criteria properly to defense laboratories and to Warminster," which, according to defendants, under Specter is not reviewable.

What defendants do not mention, however, is that they have selectively cited to paragraphs of the complaint for the purpose of mischaracterizing a claim that is clearly procedural. That plaintiffs' claim is procedural and therefore reviewable is clear when paragraph 133 is read in conjunction with paragraphs 136-37. Paragraph 133 makes it clear that plaintiffs are alleging that the process was a sham that was not revealed by the offending parties. Hence, contrary to defendants' assertion, plaintiffs' claim in these paragraphs is precisely the type of

procedural claim that the Third Circuit found reviewable in Specter.

Defendants' contention that the allegations in paragraphs 137 and 163-67 set forth substantive claims that are foreclosed by Specter is likewise baseless. Defendants characterize the allegations in those paragraphs as a claim that "the Base Closure Commission failed to analyze defense laboratories properly, particularly in assessing possible cost savings from the realignment of Warminster." Defendants' Brief, at 10. Again, defendants miss the point of plaintiffs' allegations. As we have just shown, when paragraph 137 is considered in light of paragraph 133, it is clear that plaintiffs are alleging that the procedure followed by defendants was a sham.

Similarly, when paragraphs 163 through 167 are read in conjunction with paragraph 162, it is clear that plaintiffs seek review of the procedure followed by defendants. Paragraph 162 alleges explicitly the knowing use of inaccurate and faulty data that was provided to the Base Closure Commission. In short, plaintiff's claim is that due to the knowing use of false data, the procedure was a sham, not that the decision reached lacked merit. Clearly, whether someone knew that data was false and nonetheless relied on it is a question "that the judiciary is entirely competent to address." Specter, 991 F.2d at 953.

Likewise, defendants' characterization of paragraphs 203(C)-(D) and the foregoing paragraphs as a claim by plaintiffs that "the Base Closure Commission failed to facilitate the GAO's

performance of its duties under the Base Closure Act" is wrong. The claims in Paragraph 203(C)-(D) are reviewable because they allege that the Commission failed to create or transmit an administrative record to the GAO. In Specter, the Third Circuit expressly held that "judicial review of that claim presents the kind of issues with which courts have traditionally dealt . . . such a review seems entirely consistent with Congress' desire to assure the integrity of the decisionmaking processes." 971 F.2d at 952.

Defendants further assert that plaintiffs allege "six substantive claims against the Navy and Secretary of Defense in Count II." Defendants' Brief, at 11. But again, defendants' conclusion is supported only by a selective reading of the Complaint. For example, defendants state that plaintiffs claim that "the Navy and Secretary relied on inaccurate information in recommending Warminster for realignment and provided inaccurate information to the GAO and Base Closure Commission" is not reviewable. But this claim is clearly reviewable under Specter. Plaintiffs' allegation is that the procedure was a sham. Moreover, to the extent that the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all the information the Secretary relied upon in making his recommendation, it is clearly reviewable.

Defendants' contention that plaintiffs' claim, based on paragraphs 133-137, and 205(E), that the Navy and Secretary failed to apply the eight selection criteria properly or thoroughly is not reviewable under Specter is also without merit.

Paragraphs 133 through 137 clearly set out plaintiffs' allegation that defendants' application of the eight selection criteria was nothing more than a sham. Hence, again, plaintiffs are not challenging the merits, but rather are challenging the integrity of the decision-making processes.

Similarly, defendants' assertion that plaintiffs' claim that "the Navy and Secretary did not properly analyze Warminster, particularly the cost of its realignment" mischaracterizes the allegations in plaintiffs' complaint. Again, plaintiffs are not challenging the merits of defendants' actions. Instead, plaintiffs are challenging the decision-making processes. In particular, plaintiffs allege that defendants' knowingly concealed information and that by their conduct made the procedural process a sham. Such claims are clearly reviewable under Specter.

Finally, defendants assert that plaintiffs' claim (at paragraphs 126, 205(H)) that the Navy and Secretary failed to base their recommendations on the force-structure plan is not reviewable is again without merit. Defendants yet again reach their conclusion based on a selective reading of the Complaint. Reading the allegations as whole, it is clear that plaintiffs' Complaint again goes to a procedural defect. In particular, plaintiffs allege that the defendants knowingly transmitted incomplete and inaccurate information, a claim that is plainly reviewable.

In sum, defendants' motion directed to the unreviewability of plaintiffs' supposedly "substantive" claims is based

on a mischaracterization of allegations that are clearly reviewable. As a result, it should be denied.

II. THIS COURT SHOULD DENY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIM THAT THE BASE CLOSURE COMMISSION LACKED JURISDICTION OR AUTHORITY TO RECOMMEND THE NAWC FOR CLOSURE OR REALIGNMENT.

In Count I of the Complaint, plaintiffs seek a declaratory judgment that the inclusion of defense laboratories in the Base Closure Commission's July 1, 1991, recommendations to the President violated the Base Closure Act and the Lab Commission Act, and that those recommendations are, therefore, void. In Count I, plaintiffs also seek injunctive relief to prevent the Government from taking any action to realign or relocate the NAWC based on the July 1, 1991, recommendation of the Base Closure Commission. As we have shown in plaintiffs' memorandum of law in support of their motion for summary judgment, the plain language of the Base Closure Act and the Lab Commission Act mandate the conclusion that the Base Closure Commission lacked authority or jurisdiction to include defense laboratories in its 1991 recommendations to the President. Hence, defendants' motion to dismiss Count I of plaintiffs' Complaint is baseless.

A. The Base Closure Commission Was Without Jurisdiction And Authority To Review And Make Decisions About Defense Laboratories.

It is clear that the courts provide the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. Federal Election Commission v. Democratic Senatorial

Campaign Committee, 454 U.S. 27, 32 (1981); Southern California Edison Co. v. F.E.R.C., 770 F.2d 779, 782 (9th Cir. 1985) (courts are final authorities on issues of statutory construction and must reject administrative constructions that are inconsistent with a statutory mandate or that frustrate a policy that Congress sought to implement); Markair, Inc. v. Civil Aeronautics Board, 744 F.2d 1383, 1386 (9th Cir. 1984) ("it is not the role of [an administrative agency] to make policy judgments in the face of a contrary congressional determination"); Guerrero v. Garza, 418 F. Supp. 182, 186-87 (W.D. Wis. 1976), (it is "peculiarly within the power of the judiciary to interpret a statute which gives an agency the power to act, in order to permit the judiciary to determine whether the agency has correctly construed its obligations under the statute").

Moreover, where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929).

Here, the Lab Commission Act, by its terms, created the Lab Commission and required the Lab Commission to conduct a separate and independent study of closure, realignment and consolidation of defense laboratories. The plain terms of this statute conferred a specific grant of jurisdiction upon the Lab Commission to submit its independent study and report no later than September 30, 1991, and specific procedures -- quite different from those involving base closures -- by which Congress would make the final determination after receiving the report.

The plain language of the Lab Commission Act makes it clear that Congress intended the Lab Commission systematically and uncompromisingly to evaluate defense laboratories. In particular, the Lab Commission was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). The Lab Commission Act required that the Lab Commission:

> "(A) consider such means as --
>
> (i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;
>
> (ii) modification of the missions and function of some or all such laboratories; and
>
> (iii) consolidation or closure of some or all such laboratories."

§ 246(b)(2)(A). In addition, the Act required that the Lab Commission:

> "(B) determine --
>
> (i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion
>
> (ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission."

§ 246(b)(2)(B).

The Act further required the Lab Commission to submit a report containing its recommendations to the Secretary of Defense

no later than September 30, 1991, § 246(f), which report was to be transmitted by the Secretary of Defense to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g).

At that point, Congress retained flexible decision-making power concerning labs and could accept or reject the Lab Commission's recommendations. Alternatively, it also could develop its own set of recommendations for laboratories.

Quite clearly, Congress intended to treat labs entirely differently than bases. Congress recognized the different considerations involved with labs and bases, see pp. 10-13, supra, and insisted on not lumping these "apples" and "oranges" military locations.

As a result, the Base Closure Act, in stark contrast to the Lab Commission Act, established the Base Closure Commission --a Commission with a wholly discrete purpose and reporting scheme from the Lab Commission. The jurisdiction and duties of the Base Closure Commission are set forth in Section 2903 of the Base Closure Act. The Base Closure Act charges the Base Closure Commission with the duty of evaluating the Secretary of Defense's recommendations for closing such facilities as military bases, shipyards and air stations. Under the Base Closure Act, the Secretary of Defense prepares a list of such military installations which he recommends for closure or realignment. That list must be transmitted by no later than April 15, 1991, March 15,

1993, and March 15, 1995. Thereafter, on July 1 of 1991, 1993, and 1995, the Base Closure Commission must transmit a report with its recommendations on closures and realignments to the President. If the President accepts the recommendations and transmits them to Congress, then Congress has 45 days to accept or reject, en bloc, the recommendations.

The plain language of the two statutes read together makes clear that the Base Closure Commission was without authority to consider defense laboratories. Defendants argue that the Base Closure Commission had jurisdiction over labs because of the definition in § 2910(4) of "military installation." Section 2910(4) defines "military installation" as any "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense . . . " Defendants' argument that this definition includes labs is wrong for two reasons.

To begin with, the supposedly catch-all language of § 2910(4) relied upon by defendants ("or other activity under the jurisdiction of the Department of Defense"), and the use of the term "center," do not, when read sensibly in context, in any way even suggest that labs are included in the jurisdiction of the Base Closure Commission. Defendants' language must be read in the context of the type of facilities specifically denominated in § 2910(4) -- "base," "camp," "post," "station," "yard," "homeport facility for any ship." All are clearly base-type facilities, in no way similar to laboratories. The phrase "or other activity under the jurisdiction of the Department of Defense," as well as

the use of the generic term "center," must therefore be read as including only such base-type facilities. Indeed, if the "other activity" language were read as broadly as defendants suggest, it would cover virtually every piece of real estate on which any Defense Department "activity" took place -- an interpretation that is both ridiculous and which makes the specific delineation of bases, camps, etc., in § 2910(4) totally redundant. Such a reading of the statute makes no sense.

Furthermore, § 2910(4) must be read in conjunction with the Lab Commission Act. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same legislation . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957) (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). See also MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944). Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 720 n. 5 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). ("[w]here statutes deal with a subject in both general and detailed terms, and there is conflict between the two, the detailed expression prevails").

Here, the Lab Commission Act "specifically" deals with issues involving defense laboratories including consolidation and closure. Hence, the fact that the language of the Defense Authorization Act utilized the general term "military installations" in describing the duties of the Base Closure

Commission (Title XXIX, entitled "Defense Base Closures and Realignments") does not overcome the specific grant of authority over the closure, consolidation and relocation of defense laboratories (Title II, entitled "Research, Development, Test, and Evaluation," Section 246), vested in the Lab Commission, even assuming arguendo that a lab could be considered to be an "installation."

Instead, the well-established principle which requires that "specific terms prevail over the general" requires the clear conclusion that the specific Lab Commission provisions necessarily must prevail over the general provisions pertaining to military installations.

Otherwise, the statutory scheme would make no sense. Obviously, statutes should not be interpreted in a way that makes certain provisions irrelevant or inconsistent. Rather, federal courts have consistently concluded that "the various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation." Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 732 (D.C. Cir. 1978). See also United States v. Raynor, 302 U.S. 540, 547 (1938) ("[a] construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress").

Hence, the only possible way the statutory provisions can be harmonized is if labs are dealt with under the Lab Commis-

sion procedures. Certainly, there is no harmonization where the Lab Commission and the Lab Commission Act procedures were totally ignored.

In short, Congress intended and created a statutory scheme by which, on the one hand, the Lab Commission would thoroughly review and evaluate defense laboratories and submit its report to the Secretary of Defense, who would transmit it to Congress, with any comments, for flexible decision-making by Congress; while, by contrast, the Base Closure Commission would receive recommendations from the Secretary of Defense and, after holding hearings, would transmit a report to the President, who, if he approved, would forward it to Congress for an all-or-nothing determination. In other words, Congress mandated that the treatment of labs was to be different in almost every regard than the treatment of bases.

This intent of Congress in passing its statutory scheme has been totally flaunted. The Secretary of Defense by-passed the Lab Commission by including defense laboratories in his April 15, 1991, recommendations to the Base Closure Commission. Likewise, the Base Closure Commission by-passed the Lab Commission by including laboratories in its July 1, 1991, recommendations to the President. Both events occurred before the Lab Commission even provided a report. In effect, both the Lab Commission and Congress were presented with a fait accompli concerning labs that deprived the Lab Commission of its ability to perform its thorough study and consider options other than closure or consolidation; and that deprived Congress of its

ability to exercise flexible decision-making as to labs by accepting, rejecting, or modifying the Lab Commission's recommendations or developing its own recommendations.

Defendants ignore both the settled law that specific terms in a statute prevail over more general terms and the equally settled law that statutes must be harmonized to provide for consistent interpretation. Likewise, defendants' offer no credible explanation why Congress would enact a statutory scheme establishing two discrete commissions and two entirely different Congressional decision-making procedures to deal with discrete military locations when it supposedly intended only one commission to deal with every conceivable location. Of course, there is no sensible explanation for such a bizarre reading of the statutory scheme, and defendants' position is patently invalid.

Moreover, defendants' alternative contention that Congress' supposed intent that the Base Closure Commission have jurisdiction over laboratories may be gleaned from either the failure of Congress to pass corrective legislation or its failure to pass a joint resolution disapproving the Base Closure Commission's recommendations misses the mark.

That Congress did not pass a joint resolution disapproving the Base Closure Commission's recommendations is neither dispositive nor surprising. Passage of a joint resolution would have resulted in no military installations being closed in 1991. As defendants note, the Base Closure Act "was designed to break years of deadlock over the closure of unneeded domestic bases."

Defendants' Brief, at 5. Hence, that Congress chose not to subvert the entire base closure process is absolutely no evidence of Congress' intent that laboratories be considered by the Base Closure Commission, instead of by the Lab Commission -- the Commission specifically enacted by Congress to deal with labs. Likewise, Congress' failure to pass corrective legislation is not evidence of Congress' ratification of the Base Closure Commission's recommendations on labs. Again, there was a strong political incentive to avoid dealing with base closure in a piece-meal fashion. However, the fact that it may not have been politically expedient to carve out ex post exceptions to the Base Closure Process does not lead to the conclusion that Congress intended that the statutory framework it enacted would be totally flouted.

The fact is, defendants' present argument that Congress could have, but did not, reject the Base Closure Commission's lab realignments that were improperly included in the base closure process is the final step in the subversion of Congress' real intent. The clear intent of Congress in enacting the Lab Commission Act was to preserve its flexible decision-making over labs rather than have labs treated as part of the all-or-nothing process for bases that was necessary to overcome the political deadlock over base closures. Labs nonetheless were wrongly included in the Base Closure Commission's closings and realignments, thereby depriving Congress of the flexible decision-making for labs that Congress desired. Congress thus was faced with the choice of overriding the Base Closure Commission's illegal

decisions on labs -- and preserving its flexible decision-making for labs that it had mandated in the statutory scheme -- at the expense of rejecting the entire base closure process and continuing the political deadlock over bases. This, of course, is exactly the type of Hobson's choice that Congress explicitly rejected as to labs when it passed the Lab Commission Act. And now, having flouted the clear Congressional intent, defendants argue that Congress somehow has ratified their unlawful behavior because Congress did not take exactly the type of actions that defendants effectively deprived it of the ability to take! This Court should not countenance such behavior.

B. Even Assuming Arguendo That The Base Closure Act Can Be Construed As Granting Any Authority To The Base Closure Commission To Include Defense Laboratories In Its Recommendations To The President, Defendants' Motion To Dismiss Should Be Denied Because That Authority Could Only Be Exercised After The Lab Commission Had Completed Its Thorough Evaluation Of Defense Laboratories.

Even assuming arguendo that Congress intended the Base Closure Commission to have any role in the closure or consolidation of laboratories, the structure of the Base Closure Act and the Lab Commission Act makes it clear that it was the Lab Commission that was charged with performing a thorough study and analysis of labs, and that the Base Closure Commission was without authority to recommend the closure or consolidation of defense laboratories prior to September 30, 1991 -- the date on which the Lab Commission was obligated to submit its report to the Secretary of Defense.

Under section 2903(c)(1) of the Base Closure Act, the Base Closure Commission was to review lists of "military installations" recommended and submitted by the Secretary of Defense to the Base Close Commission "by no later than April 15, 1991, March 15, 1993, and March 15, 1995." However, under the Lab Commission Act, the Lab Commission was required to transmit its report, which report was to consider "conversion," modification," and "consolidation or closure" of defense laboratories and to determine "a proposed schedule for each consolidation, closure or conversion considered appropriate by the [Lab] Commission," to the Secretary of Defense no later than September 30, 1991. The Secretary was then obligated under section 246(g) to transmit that report, together with any comments of his own, to appropriate congressional committees within 30 days after receiving it from the Lab Commission. The specific grant of jurisdiction vested in the Lab Commission, along with the later-in-time deadline of September 30, 1991, for submitting the Lab Commission's report, make it clear that even if the Base Closure Commission did have some authority to consider defense laboratories, it could only do so after the Lab Commission had done its thorough study and analysis and had made its recommendations. Any other conclusion would render the Lab Commission Act a nullity -- a result that makes no sense.

Congress obviously did not intend that its Lab Commission procedures be totally ignored. Rather, at the least Congress intended that defense laboratories, which are quite different than bases, see pp. 10-13 supra, merited special study

and consideration and created the Lab Commission for this specific purpose. The later-in-time deadline of September 30, 1991, was a clear indication that, at the earliest, laboratories could not be recommended for closure until March 15, 1993, the next date in time under section 2903(c)(1) that a closure list could be submitted by the Secretary to the Base Closure Commission.

The background surrounding the creation of Lab Commission strongly suggests the Congressional recognition that consolidation and closure decisions merit special consideration. Indeed, the Conference Report on the Lab Commission legislation commented:

> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This [Lab] Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration. See H.Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

Congress designated a special process whereby this special consideration was to take place, and any attempt by the Secretary of Defense and the Base Closure Commission which attempts to bypass this procedure is a direct violation of Congressional intent.

In a report which accompanied a Department of Defense Appropriations bill for fiscal year 1992, the House Committee on Appropriations also expressed its disapproval of attempts to include defense laboratories in the April 15, 1991, Base Closure List:

> Laboratory Consolidation. The Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories is strongly endorsed by the committee in its report. The committee believes that the inclusion of research and development laboratories on the Base Closure list is in direct contravention of congressional direction. Accordingly, the committee directs DOD not to obligate or expend funds to close or consolidate any research or development laboratory until Congress received and approves the commission report.

H.R. Rep. No. 95, 102nd Cong., 1st Sess. (1991) (emphasis added).

The statutory language of Section 246, and the chain of events which led to the establishment of the Lab Commission demonstrate an intent on the part of Congress that laboratories not be considered for closure until after a thorough study and report by the Lab Commission, and not until March, 1993, at the earliest. To the extent that the Secretary of Defense and the Base Closure Commission have bypassed Section 246 and proceeded in their efforts to close the NAWC, such actions should be declared unlawful and therefore of no effect.

No argument put forth by defendants in their memorandum in support of their motion to dismiss alters this result. To the contrary, defendants' contentions fly in the face of the statutory scheme and are without merit. For example, defendants concede

(Defendants' Brief, at 21) that "[t]he nature, scope, purpose and effect of the Lab Commission's work were entirely different from those of the Base Closure Commission." Defendants also acknowledge that the Lab Commission's mission was to conduct a study "to determine the feasibility of various means to improve the operations of laboratories of the Department of Defense," §§ 246(b)(1), including consolidation and conversion. But having conceded the clear mission of the Lab Commission vis-a-vis defense laboratories, defendants reach the unsupported conclusion that "making specific closure and realignment recommendations was the Base Closure Commission's exclusive mandate." Defendants' Brief, at 21.

For another example, defendants make much of the fact that the Lab Commission was "a federal advisory committee." However defendants offer no legal basis for their implied assertion that because the Lab Commission was an advisory commission its role was of necessity subordinated to that of the Base Closure Commission.

For another example, defendants impliedly argue that the fact that the Lab Commission Act gave Congress flexible decision-making power somehow negated the Lab Commission's mandate to function over labs. Defendants contention is baseless. That Congress was not left with an all-or-nothing choice on laboratories does not mean that Congress did not intend the Lab Commission to function on labs. To the contrary, it shows that Congress intended the Lab Commission to be part of a deci-

sion-making process for labs that was entirely different from the one established for bases.

Likewise, defendants' four-part explanation of why plaintiffs' conclusion that Congress did not intend that labs be included in the 1991 Base Closure Process is wrong and does not withstand scrutiny. First, defendants baldly assert that "there is no indication in the legislative history that Congress intended to carve out a narrow category of military facilities for delayed closure or realignment consideration." Defendants' Brief, at 23. However, this Court need not resort to legislative history to determine that Congress intended that laboratories be dealt with separately. As we have shown, the statutory scheme makes this clear.

Second, defendants argue that "[g]iven rapid technological and geopolitical changes, the Lab Commission's report may be of questionable value to the Secretary's and Base Closure Commission's 1993 efforts . . ." Defendants' Brief, at 23. According to defendants' argument, however, realignment or relocation based on the 1991 Base Closure Recommendations also would be suspect. However, the Base Closure Act does not require the Secretary of Defense to "initiate" closures and realignments for two years following the Base Closure Commission's recommendations. Hence, the Base Closure Commission's recommendations at that time would be no less questionable, even assuming arguendo the accuracy of defendants' argument.

Third, defendants assert that the Lab Commission's report "may assist Congress in determining whether [corrective] legislation is appropriate." Defendants' Brief, at 24. However, as we have shown, the plain language of the statute evidences Congress' intent to deal with labs proactively. Moreover, given the delicate political compromise reached in the Base Closure Act, it seems clear that Congress did not intend to deal with labs by piece-meal legislation that might undermine the political compromise reached in the Base Closure Act.

Finally, defendants contend that the fact that the Lab Commission's mission was broader than simply evaluating labs for consolidation and closure somehow demonstrates that the Lab Commission was not required to function on labs. Defendants' contention does not make sense. Defendants assert (Defendants' Brief, at 24) that "The Lab Commission's views on subjects other than closure and consolidation . . . may assist the Secretary of Defense in determining what, if any, steps other than closure may promote the efficiency of defense labs." However, defendants fail to explain how this assistance would be useful, if, for example, the lab had been slated for closure by the Base Closure Commission.

In sum, defendants' arguments merely reinforce the conclusion that, even assuming arguendo that the Base Closure Commission had any jurisdiction over labs, such jurisdiction only could be exercised after real and thorough evaluation by the Lab Commission.

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE LAB COMMISSION'S ACTIONS.

In Count III, plaintiffs seek a declaratory judgment that the Lab Commission and its members violated the Defense Authorization Act of 1990 by failing to conduct an independent, uncompromising study to consider, among other things, consolidation or closure of labs and to determine a schedule for such closures or consolidation and that the Lab Commission's recommendations are therefore void. Complaint, at ¶ 207(a). In Count III, plaintiffs also seek injunctive relief to prevent the defendants from taking any action based on the July 1, 1991 recommendations of the Base Closure Commission and such other relief as this Court deems just and equitable. Complaint, at ¶ 207(c)(d).

Defendants seek to dismiss this claim, contending that it "warrants little attention as plaintiffs so plainly lack standing to challenge the work of this advisory commission, which disbanded by law nearly two years ago." Defendants' Brief, at 26. Defendants' contention that plaintiffs lack standing is baseless.

In order to establish standing plaintiffs must show that (1) they suffered injury in fact that is concrete and particularized, actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 2136 (1992); Horizon House v. Township of Upper Southampton,

804 F.Supp. 683 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3rd Cir. 1993). Plaintiffs clearly satisfy each of these elements.

First, plaintiff employees of NAWC will certainly be injured by the closure and realignment of the NAWC. Clearly, jobs will be lost or moved.

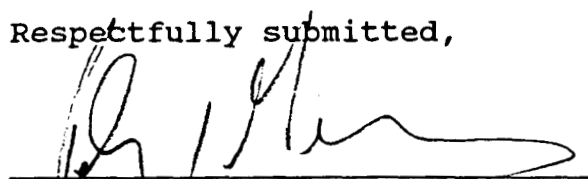
Second, defendants caused the inevitable loss of employment by failing to follow the Congressionally mandated procedures for lab consolidation or closure. An uncompromising study would have revealed the true costs associated with relocating the NAWC. The study well might have tempered the Base Closure Commission's recommendations.

Third, a declaratory judgment that the Lab Commission violated the Lab Commission Act, and an order voiding its recommendations, may redress plaintiff injury in two ways. See Los Angeles County Bar Ass'n. v. Eu, 979 F.2d 697 (9th Cir. 1992) (redressability standard satisfied where by ruling in party's fayor the alleged injury is to some extent ameliorated). First, the relief will redress plaintiffs' injuries because it will prevent defendants from implementing their 1991 recommendations on the ground that the Lab Commission endorsed the Base Closure Commission's recommendation. Second, the relief would likely influence political sentiment to support reconsideration of the unlawful decision to realign and relocate NAWC.

CONCLUSION

For all of the reasons set forth above, defendants' motion to dismiss should be denied.

Respectfully submitted,



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Dated: August 27, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Memorandum of Plaintiffs in Opposition to Defendants' Partial Motion to Dismiss to be served on the 27th day of August, 1993, by United States First Class Mail, postage prepaid, to:

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	Civil Action No. 92-CV-5341

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

It is ironic that plaintiffs, led by several Members of Congress, premise their motion for summary judgment on the notion that Congress did not intend what it so clearly provided in the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Title XXIX, 104 Stat. 1808 (the "Act" or the "Base Closure Act"). Congress created the Act as the "exclusive authority for selecting for closure or realignment . . . a military installation inside the United States." § 2909(a). Congress, moreover, so broadly defined "military installation" that plaintiffs all but concede, as they must, that the Naval Air Warfare Center Aircraft Division Warminster is a "military installation" under the Act.

Despite the express and exclusive applicability of the Act, plaintiffs contend that the Secretary of Defense and the Defense Base Closure and Realignment Commission ("Base Closure Commission") were nevertheless without authority to recommend the closure or realignment of defense laboratories like Warminster to

the President in 1991. They do not rest this argument on any of the express exceptions to the Act, but instead ask the Court to imply an additional one in the Act's comprehensive base closure and realignment process for defense labs based on § 246 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485.

Section 246 merely established the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commission") to study the feasibility and desirability of various means to improve the operation of defense labs and to report its findings to the Secretary of Defense and Congress. Candidly acknowledging that the Base Closure Act and § 246 had different purposes, objectives and procedures, plaintiffs nonetheless assert that a conflict between the two statutes should be resolved by finding that § 246 implicitly displaces the Secretary's and Base Closure Commission's express authority under the Base Closure Act to recommend the closure and realignment of defense labs.

In reality, the scope of the Base Closure Act, designed to break years of political gridlock that halted closure of any major military installations, is both purposefully comprehensive and without relevant exception. Indeed, bills introduced in Congress to create an exception for defense labs died in committee. Plaintiffs' effort to manufacture a conflict between the Base Closure Act and § 246 as a vehicle for requesting the Court to imply an exception for defense labs that Congress chose

not to make expressly should be rejected and plaintiffs' motion for summary judgment should be denied.

ARGUMENT

I. THE BASE CLOSURE ACT VESTED THE SECRETARY OF DEFENSE AND THE BASE CLOSURE COMMISSION WITH EXCLUSIVE AUTHORITY TO RECOMMEND DEFENSE LABORATORIES FOR CLOSURE OR REALIGNMENT.

Plaintiffs' argument that the Secretary of Defense and Base Closure Commission had no authority or jurisdiction to recommend the closure or realignment of defense labs under the Base Closure Act scrupulously avoids analysis of the specific terms of the Act itself, the governing statute in this case. Plaintiffs' effort to sidestep the plain language of the Act is understandable. The Act not only vested the Secretary and the Base Closure Commission with authority to study defense labs and to recommend them for closure or realignment, but the Act also served as the exclusive statutory authority for the selection of any "military installation," including defense labs, for closure or realignment. Consideration of plaintiffs' claim therefore begins and ends with an analysis of the clear terms of the Act.

The Secretary of Defense's responsibilities under the Act are unambiguous. He is directed to "consider all military installations inside the United States" for possible closure or realignment, § 2903(c)(3) (emphasis added), and then to recommend a list of "military installations inside the United States" for closure or realignment. § 2903(c)(1). The Base Closure Commission is required to review and analyze the Secretary's recommendations and to make its own recommendations for "closures

and realignments of military installations inside the United States." § 2903(d)(2)(A).[1]

Nor is there any ambiguity to the scope of the term "military installation," which is expressly defined in the Act. For the 1991 round of base closures and realignments at issue here, "military installation" was expansively defined as 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." § 2910(4) (emphasis added). Quite simply, because the Naval Air Warfare Center Aircraft Division Warminster was a "military installation," and was located inside the United States, it was subject to selection for closure or realignment under the Act.[2]

Plaintiffs halfheartedly suggest that, as a defense laboratory rather than a military "base," Warminster was not subject to the Base Closure Act. Memorandum of Law of Plaintiffs in Support of Motion for Summary Judgment ("Pls' Mem.") at 1-2. The argument seems designed for rhetorical rather than legal effect; plaintiffs do not, and cannot, seriously maintain that Warminster was not a "military installation" under the Act. As

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[1] In making its recommendations, the Base Closure Commission may make changes to the Secretary's list of recommendations if it determines that the Secretary "deviated substantially" from the force structure plan and final criteria used in making recommendations. § 2903(d)(2)(B).

[2] At the time it was slated for closure, the Warminster installation was called the Naval Air Development Center. "Centers" are expressly listed among the "military installations" subject to the Act. Warminster was, of course, also an "activity under the jurisdiction of the Department of Defense."

plaintiffs essentially concede, Pls' Mem. at 17-18, Warminster falls within the definition of "military installation."

Aside from the subsequent exemption from the Base Closure Act of Army Corps of Engineers facilities,[3] Congress provided only three exceptions to the scope of the Base Closure Act[4] and none of them were for defense labs. To the contrary, the Secretary of Defense is directed to consider all military installations inside the United States for possible closure or realignment, § 2903(c)(3), not most military installations except defense labs. There can be no doubt that Congress in the Base Closure Act authorized the Secretary of Defense and the Base

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[3] As explained in our opening brief, in December, 1991 Congress subsequently amended the definition of "military installation" to exclude retroactively Army Corps of Engineers facilities, but did not similarly exclude defense labs. Defendants' Memorandum in Support of Their Partial Motion to Dismiss ("Defs' Mem.") at 18-19. Legislation introduced in both houses of Congress in May 1991 to block closures or realignments of defense labs died in committee. Id. at 17-18. This subsequent legislative activity serves as further evidence, if any were needed, that Congress intended defense labs to be among the military installations that the Secretary of Defense and Base Closure Commission could recommend for closure or realignment under the Base Closure Act. See Lindahl v. OPM, 470 U.S. 768, 782 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpreation of a statute and to adopt that interpretation when it reenacts a statute without change. So too where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . .").

Plaintiffs' observation that the House Appropriations Committee in its June 4, 1991 Report on the 1992 Department of Defense Appropriations Bill, H.R. Rep. No. 102-95, 102d Cong., 1st Sess. 173 (1991), expressed agreement with their position, see Pls' Mem. at 23, hardly helps them. Plaintiffs offer no legislative history, much less subsequent legislation, that even suggests that Congress as a whole agreed with this minority position.

[4] The Secretary of Defense is permitted to carry out the base closures and realignments approved under the 1988 base closure statute and to close or realign small installations or those requiring closure for reasons of national security or military emergency. § 2909(c); see also Defs' Mem. at 16 n.8.

Closure Commission to recommend defense labs, like Warminster, for closure or realignment.

Moreover, reflecting a desire to break years of impasse over the closure and realignment of military installations, Congress clearly intended the Base Closure Act's comprehensive and carefully balanced procedures to serve as the only method for selection of installations for closure or realignment. Apart from the two exceptions set forth in § 2909(c), Congress declared the Act to be "the exclusive authority for selecting for closure or realignment . . . a military installation inside the United States. § 2909(a) (emphasis added). To make the point yet clearer, except as provided in § 2909(c), Congress specifically prohibited the Department of Defense from spending any funds prior to the end of 1995, other than those authorized under the Base Closure Act, 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." § 2909(b)(2).

In sum, in the Base Closure Act, Congress intended to overcome years of political gridlock by establishing a comprehensive process to effectuate the timely closure and realignment of unneeded domestic military installations. See § 2901(b). In doing so, Congress empowered the Secretary of Defense and the Base Closure Commission to recommend the closure or realignment of any domestic military facility from among a

broadly defined universe of installations that included defense labs. In keeping with its intent that the Base Closure Act be a comprehensive method for selecting military instalations for closure or realignment, Congress specified only narrow exceptions to its scope and did so expressly. Congress also established the Base Closure Act process as the exclusive statutory method for effectuating closures or realignments of these military installations.

The Supreme Court recently cautioned that, "[i]f the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (citation omitted). As we show below, there is no clearly expressed legislative intent in § 246 to imply an exception for defense labs in the otherwise unambiguous Base Closure Act.

II. SECTION 246 SHOULD NOT BE INTERPRETED AS CONFLICTING WITH THE BASE CLOSURE ACT AND DOES NOT CREATE AN IMPLIED EXCEPTION TO THE ACT.

Plaintiffs do not argue that the Base Closure Act contains an exception for defense labs among its express exemptions. Rather, they ask this Court to find that § 246, which creates the Lab Commission, presents an implied exception to the comprehensive coverage of the Base Closure Act. The Supreme Court, however, has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of

evidence of a contrary legislative intent." United States v. Smith, 111 S. Ct. 1180, 1185 (1991) (quoting Andrus v. Glover Constr. Co., 446 U.S. 600, 616-17 (1980). No such intent exists here.

To the contrary, the Base Closure Act represents a landmark political compromise designed to effectuate the timely closure and realignment of unneeded military installations. Its purpose was both to save taxpayer dollars and to streamline our nation's military force structure in the post-Cold War era. Plaintiffs' view that defense labs, an important sector of the military establishment, were somehow immune from consideration from closure or realignment under the Base Closure Act conflicts with the structure and purpose of the Act.

Plaintiffs offer four arguments. First, they suggest that the Lab Commission, rather than the Secretary of Defence and Base Closure Commission, was the "exclusive entity" assigned to recommend defense lab closures and consolidations. Pls' Mem. at 4. The contention founders on the absence of any statutory language whatsoever in § 246 that vests the Lab Commission with such exclusive authority. Rather, § 246 simply establishes the Lab Commission, § 246(a), and requires it to conduct a study "to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). Section 246 neither provides that only the Lab Commission may recommend defense labs for closure or realignment nor states that the Base Closure Act does not apply

to defense labs.

Furthermore, plaintiffs do not and cannot square their assertion with §§ 2909(a) and 2909(b)(1) of the Base Closure Act which establish its base closure process as the exclusive means for selecting military installations, including defense labs, for closure or realignment. Not only, therefore, is there no statutory support in § 246 for plaintiffs' assertion that the Lab Commission had exclusive authority to recommend defense labs for closure or realignment, but the Base Closure Act expressly contradicts that view.

Second, plaintiffs argue that Congress treated defense labs differently than other military installations. The assertion is beside the point. The question is not whether Congress intended to deal with defense labs differently than other installations. In § 246, Congress obviously created a separate commission to perform an independent study of defense labs. The issue is whether by doing so, Congress intended to imply an additional exception to the Base Closure Act and implicitly divest the Secretary of Defense and Base Closure Commission of authority to recommend defense labs for closure or realignment. Plaintiffs' point simply provides justification for Congress' establishment of the Lab Commission, not that it intended an unwritten exception for defense labs in the Base Closure Act.

In the absence of any statutory support for their position, plaintiffs resort to what is fundamentally a policy argument -- that the Base Closure Act process was not suited to an analysis

of defense labs. Plaintiffs somehow regard this assertion as "undisputed," Pls' Mem. at 10, and then support it with nothing more than citations to their Complaint, if anything at all.

Plaintiffs observe that defense labs warrant specialized study because "[u]nlike bases, defense laboratories have unique missions and are staffed by personnel with scientific and technological expertise." Pls' Mem. at 9. They offer no legislative history or factual support for their view, and for good reason.[5] To suggest that military installations other than defense labs lack "unique missions" or scientifically or technologically expert personnel is astonishingly naive at best and disingenuous at worst. In any event, the point, again, simply supports Congress' decision to establish a Lab Commission, not Congress' determination that the Base Closure Commission was either ill-equipped or legally precluded from considering defense labs for closure or realignment.

Plaintiffs also claim that the Secretary of Defense's force structure plan and eight closure and realignment criteria, which Congress required him to develop, §§ 2903(a), (b), and which served the basis for his closure and realignment recommendations,

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[5] To the contrary, the legislative history cited by plaintiffs, Pls' Mem. at 8, in no way suggests that Congress believed specialized study of defense labs was required because defense labs somehow required more technical analysis than the Base Closure Commission was able to provide. Rather, the legislative history that plaintiffs cite shows that, without even mentioning the Act, the Base Closure Commission or qualitative distinctions between defense labs and other installations that required particular study of labs, Congress merely intended the Lab Commission to review recent Defense Department studies on defense labs and efforts to reorganize defense lab structure.

§ 2903(c), are inapplicable to defense labs and therefore demonstrate that defense labs were not subject to the Base Closure Act process. Pls' Mem. at 10. Plaintiffs confuse Executive Branch implementation of the Act with congressional intent, and misunderstand the nature of the force structure plan and application of closure and realignment criteria.

Plaintiffs find "telling," Pls' Mem. at 10, the absence of defense labs from the Department of Defense's force structure plan which plaintiffs fail to attach to their motion. The unclassified force structure plan, attached as Attachment 3, was not intended to -- and did not -- list every domestic military installation by type and explain its role, if any, in national defense structure during the next six years. Rather, most of the summary is devoted to a military threat assessment and overseas basing needs. The section on anticipated force structure generally describes expected future reductions in strategic and conventional forces. The plan simply notes that fewer army divisions, navy ships, carriers and carrier air wings and Air Force tactical fighter wings will exist by FY 1995 compared to FY 1990. It does not detail how many military installations, such as air force bases, army depots and naval shipyards -- installations obviously subject to the Base Closure Act -- will be required. That defense labs are also not specifically mentioned either in no way proves the defense labs were not intended to be considered by the Secretary and Base Closure Commission.

Next, citing a passage from their Complaint, plaintiffs

assert that the Navy "acknowledged that the eight criteria were inapplicable to laboratories." Pls' Mem. at 11. That passage is taken out of context from a portion of the Navy's Base Closure and Realignment Recommendations, Detailed Analysis, April 1991, a relevant portion of which is attached as Attachment 4.[6]

As the Analysis explains, a Research, Development, Test and Evaluation ("RDT&E") Facilities Consolidation Working Group studied 76 RDT&E activities, including Navy labs. The passage upon which plaintiffs rely states that, because RDT&E activities have unique aspects allowing them to perform a specific range of functions, they could not all be evaluated for possible closure or realignment against each other. Simply put, analyzing different kinds of labs against each other for possible closure or realignment was like comparing apples and oranges. Plaintiffs neglect to reveal that the Navy therefore determined to divide the activities along mission lines into five separate categories for evaluation: Corporate Laboratories; Naval Air Warfare Centers; Naval Command, Control and Ocean Surveillance Centers; Naval Surface Warfare Centers and Naval Undersea Warfare Centers. Each category was subdivided into functional groups, similar enough to compare with each other. After determining whether excess capacity existed, the Navy then applied the eight closure

[6] Attachment 4 consists only of the section entitled "Description of Analysis" for RDT&E facilities. The entire analysis includes sections describing recommendations and impacts for facilities within each category and totals 194 pages. Should the Court wish to review the whole section or the Navy's entire Detailed Analysis, defendants will gladly provide them.

and realignment criteria to facilities within each group. Far from acknowledging that the eight criteria did not apply to RDT&E facilities, the Navy properly applied the criteria to those installations as it did to installations other than defense labs.

Third, plaintiffs rely on the unexceptional maxim of statutory construction that, when a general statute and a specific one dealing with same subject matter conflict, the specific provision prevails. Pls' Mem. at 17. If anything, the principle supports the defendants, not the plaintiffs.

The Base Closure Act deals with one and only one issue -- the closure or realignment of domestic military installations. The Lab Commission's charge was far broader with respect to defense labs. See Pls' Mem. at 8 (". . . unlike the Base Closure Act, the Lab Commission was directed to consider options other than closure or consolidation."). Congress required the Lab Commission to conduct a general study "to determine the feasibility and desirability of various means to improve the operation" of defense labs. § 246(b)(1). Congress went on to list the broad topics for study: conversion of labs to Government-owned, contractor-operated labs; modification of the missions and functions of labs and consolidation or closure of labs. § 246(b)(2). While, of course, the Base Closure Commission studied a broad array of installations, its particular objective -- recommending facilities for closure or realignment -- was much more specific than the Lab Commission's. If plaintiffs' tool of statutory interpretation has any application

here at all, it offers them no support.

In any event, plaintiffs' proposed principle of interpretation is only triggered by a conflict between a general and a specific statutory provision. In their effort to find a conflict between the Base Closure Act and § 246, plaintiffs run afoul of another standard principle of statutory construction -- that provisions within statutes should be interpreted harmoniously with each other when possible.[7] See Louisiana Public Service Comm'n. v. FCC, 476 U.S. 355, 370 (1986); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992). The Base Closure Act and § 246 can easily be so construed.

Simply put, there is no reason why Congress did not intend exactly what it wrote into law -- that the Base Closure Commission recommend military installations, including defense labs, for closure or realignment to the President and, at the same time, that the Lab Commission conduct its study of defense labs for the Secretary of Defense and Congress. No statutory provision prevents both Commissions from discharging their respective duties as required. See Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

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[7] The Base Closure Act and § 246 are in the same statute, the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510.

The conflict plaintiffs apparently perceive arises from the fact that the Base Closure Commission did not have the Lab Commission's later report when it made its recommendations to the President on July 1, 1991. Yet, the work of the Base Closure Commission did not depend on the work of the Lab Commission; that it should have is a policy preference, not a legal conclusion. Indeed, nothing in the Base Closure Act or § 246 requires the Base Closure Commission to consider, much less receive, the Lab Commission's study. Rather, the Lab Commission's report was to be submitted to the Secretary of Defense, § 246(f), who in turn provided it to Congress. § 246(g). And, nothing in the Base Closure Act prevented the Lab Commission from considering consolidations and closures and reporting its findings to the Secretary of Defense and Congress.

Ultimately, plaintiffs' own argument resolves the conflict they posit. Plaintiffs correctly explain at length that the Base Closure Commission and Lab Commission had different purposes, functions, procedures and reporting requirements. Pls' Mem. at 4-8, 14-16. What plaintiffs do not explain is how Congress' intent to create two very different Commissions with different purposes yields a conflict between them. If anything, these differences demonstrate the absence of a statutory conflict rather than reveal one.

Fourth, plaintiffs assert that defendants' construction of the Base Closure Act would effectively nullify § 246. This contention, too, relies on the presence of a conflict between the

Base Closure Act and § 246. In any event, plaintiffs' own argument again undermines their point.

As plaintiffs explain in detail and as we demonstrated in our opening brief, Defs' Mem. at 22-25, the Lab Commission's charge was substantially broader than the Base Closure Commission's. Far more than simply assessing closures or consolidations, the Lab Commission studied means to improve the operation of defense labs. See Pls' Mem. at 6 (. . . "unlike the Base Closure Commission which reviewed only the military bases recommended for closure or realignment by the Secretary of Defense, the Lab Commission was charged with conducting a study comprising the entire laboratory system . . ."). Even assuming arguendo the existence of some conflict over realignment recommendations, the Lab Commission's general duty to study other means to improve lab operation was hardly nullified.

More importantly, plaintiffs lose sight of the purpose of the Lab Commission. The legislative history of § 246 demonstrates that Congress intended the Lab Commission to assess the Defense Department's evaluations of defense lab reorganization and to "suggest alternative actions for congressional consideration." H. Conf. Rep. No. 101-923, 101st Cong. 2d Sess. 563 (1990), reprinted in U.S. Code Cong. & Admin. News 3110, 3135. As plaintiffs note repeatedly, Congress retains "flexible decision-making power" over defense labs, Pls' Mem. at 7, 8, 19. Far from being a nullity, the Lab Commission report can at any time serve as the basis of legislation that not only deals with

the structure and function of the defense lab establishment generally, but can modify the outcome of any round of base closings and realignments.

In short, the Lab Commission's efforts were intended to educate the Secretary of Defense and Congress, not the Base Closure Commission. It is curious, to say the least, that plaintiffs, led by several members of Congress, assert that defendants have somehow deprived Congress of its flexible decision-making authority. Pls' Mem. at 19. To the contrary, Congress plainly retains that authority and is free to use the Lab Commission's report as a basis for exercising it. Plaintiffs' fear that § 246 became a nullity because the Base Closure Act was interpreted as written is meritless.

Plaintiffs' final argument warrants little attention. They argue that, if the Base Closure Commission had jurisdiction to recommend the closure or realignment of defense labs, it could not do so until the Lab Commission completed its work. In their view, the Base Closure Commission could not make such recommendations until 1993 and 1995. The argument is premised on the same misinterpretation of the scope of the Act and misperceived conflict between the Act and § 246 that have been refuted above. There is quite plainly nothing in the Act that disabled the Base Closure Commission from considering the closure or realignment of defense labs in 1991, but allows it to do so in 1993 and 1995. This variation of plaintiffs' request that the Court rewrite the Base Closure Act should also be rejected.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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Dated: August 26, 1993

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this day of , 1993, upon consideration of defendants' Motion for Partial Stay, and plaintiffs' Response thereto;

IT IS HEREBY ORDERED that defendants' Motion for Partial Stay is DENIED.

Ronald L. Buckwalter, J.

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

MEMORANDUM OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL STAY OF PROCEEDINGS

Plaintiffs, employees of the Naval Air Warfare Center-Warminster ("NAWC"), their unions and members of the Pennsylvania Congressional Delegation, submit this memorandum of law in opposition to defendants' motion for partial stay.

INTRODUCTION

Defendants' motion for partial stay arises in the context of an action brought by plaintiffs seeking a declaratory judgment that defendants' decision to realign and relocate the NAWC is unlawful and seeking an injunction to prevent defendants from taking such action.

Plaintiffs assert four legal bases for the relief they seek. First, the NAWC was improperly and illegally proposed for realignment and relocation by the Base Closure Commission, which lacked authority or jurisdiction to include defense laboratories

in its 1991 recommendations to the President. Second, defendants violated the Lab Commission Act by failing to allow the Lab Commission to conduct an independent, uncompromising study to consider the Services' proposals for consolidation and closure of defense laboratories and to determine a schedule for such closures or consolidations. Third, assuming arguendo that the Base Closure Commission had jurisdiction or authority to review and make recommendations concerning the realignment and relocation of the NAWC, defendants nonetheless violated the procedural safeguards and requirements set forth in the Base Closure Act. Fourth, defendants' disregard of the procedures set forth in the Base Closure Act constitutes a violation of plaintiffs' rights to due process.

Defendants' motion seeks to stay plaintiffs' claims concerning the failure to follow the procedures mandated in the Base Closure Act merely because "the Solicitor General has authorized the filing of a petition for writ of certiorari to the Supreme Court in Specter v. Garrett, 995 F.2d 404 (3rd Cir. 1993)" ("Specter II").

Defendants' motion for partial stay is a transparent attempt to postpone litigating substantial claims of plaintiffs under the settled law of this circuit merely because that law does not favor defendants. Although defendants may wish and hope that the Supreme Court might grant certiorari in Specter II and might possibly render a decision that alters in some way the settled law of this Circuit, the mere fact that the Solicitor

General has authorized the filing of a petition for certiorari does not support entry of a stay which would suspend plaintiffs' rights to pursue significant claims in this case.

Moreover, defendants do not deny -- nor could they -- the substantial likelihood that employees of the NAWC will be damaged by a stay. Indeed, it is beyond doubt that as defendants proceed in implementing the Base Closure Commission's recommendation to close the NAWC, hundreds of employees will either lose their jobs or be compelled to relocate. Hence, in order for this Court to enter a stay, defendants must demonstrate that they will otherwise suffer some clear hardship or inequity. Defendants have not even argued, much less demonstrated, that they would suffer some hardship or inequity if there is no stay. For these reasons, defendants' motion should be denied.

PROCEDURAL HISTORY

On September 15, 1992, plaintiffs filed a complaint asserting, inter alia, that defendants violated the procedural mandates set forth in the Base Closure Act -- a claim that was also made by plaintiffs in Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992) ("Specter I"). In Specter I, the Third Circuit held, inter alia, that the decision to close the Philadelphia Shipyard was reviewable based on plaintiffs' allegation that the decision was the product of a process inconsistent with certain procedural mandates of the Base Closure Act.

On November 9, 1992, the Supreme Court vacated and remanded Specter I to the Third Circuit for review in light of the Supreme Court's holding in Franklin v. Massachusetts, 112 S. Ct. 2767 (1992).

On December 2, 1992, defendants -- without regard for the fact that the Supreme Court's decision in Specter I left the law in this Circuit unsettled -- moved to dismiss plaintiffs' complaint. Because the law in this Circuit was unsettled, the parties stipulated that plaintiffs' response to defendants' motion to dismiss would not be due until 15 days after the Third Circuit rendered a decision in Specter II. This Court, however, did not approve the stipulation. Instead, it dismissed defendants' motion without prejudice and ordered that defendants file their responsive pleading within 30 days of the Third Circuit's decision in Specter II. Thus, the parties and the Court clearly contemplated that this case would go forward once the Third Circuit had decided Specter II.

On May 18, 1993, the Third Circuit decided Specter II, reaffirming its decision in Specter I that plaintiffs' claims concerning violations of the procedures mandated by the Base Closure Act were reviewable:

> " . . . we conclude that nothing in Franklin suggests that our prior approach to this case was incorrect. We reaffirm our prior opinion and we will remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court

should conduct those proceedings as expeditiously as possible." (emphasis added).

995 F.2d at 411. Following the Third Circuit's decision in Specter II, the parties herein stipulated that defendants' responsive pleading would be due on July 21, 1993. The Court approved the stipulation.

On July 21, 1993, plaintiffs filed a motion for summary judgment on their claim that the Base Closure Commission lacked jurisdiction or authority to review or recommend closure or realignment of defense laboratories. Defendants filed a motion to dismiss all of plaintiffs' claims, except the claim that is the subject of this motion for partial stay -- that defendants violated the procedural mandates set forth in the Base Closure Act.

The procedural history of this case makes clear that there is no valid basis for granting defendants' stay motion. The parties clearly contemplated that litigation would proceed when the Third Circuit settled the relevant law. Defendants should not be permitted to suspend litigation of that claim based on the mere hope that the Supreme Court may at some point alter the law of this Circuit and without any showing at all that defendants would suffer hardship if there is no stay. Thus, defendants' motion for partial stay should be denied.

ARGUMENT

I. THE MOTION FOR STAY SHOULD BE DENIED BECAUSE THERE IS, AT THE LEAST, A FAIR POSSIBILITY THAT THE STAY WILL DAMAGE PLAINTIFFS AND DEFENDANTS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER HARDSHIP OR INEQUITY IF THE STAY IS NOT ENTERED.

It is well settled that before a stay may be entered, the petitioner must demonstrate "a clear case of hardship or inequity" if there is "even a fair possibility" the stay will damage the other party. See Landis v. North American Co., 299 U.S. 248 (1936); Gold v. Johns-Manville Sales Corp., 723 F.2d 1068 (3rd Cir. 1983). Hence, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while the litigant in another settles the rule of law that will define the rights of both." Id.

Defendants do not assert that there is no fair possibility that the employees of the NAWC will be damaged by a stay of their procedural claim, which seeks, in part, to enjoin any action by defendants to realign or relocate the NAWC. Indeed, given that implementation of defendants' decision will result in hundreds of employees either losing their jobs or being compelled to relocate, such a contention would be frivolous. Thus, under well-settled law defendants must show that hardship or inequity would be caused by the litigation of plaintiffs' procedural claim.

Defendants have not even attempted to show that hardship or inequity would result if plaintiffs' procedural claim is

not stayed. Instead, apparently aware of the fact that they cannot possibly meet this standard, defendants simply assert that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Defendants' Brief, at 7. This general and irrelevant statement of law simply does not address the issue of whether a stay is appropriate here under the clear law controlling the granting of stays.

Defendants further contend that "[t]he parties have . . . proceeded in this case by recognizing that Specter controls most of it and have chosen to conserve litigation and judicial resources by waiting for Specter to be definitely decided. Because defendants will seek Supreme Court review, that has not yet happened." Defendants' Brief, at 8. This argument is without merit. To begin with, plaintiffs have not "proceeded in this case by recognizing that Specter controls most of it." Indeed, two of plaintiffs' claims are entirely different from the claims in Specter. Moreover, although the parties previously agreed to defer plaintiffs' response to defendants' then-pending motion to dismiss until the Third Circuit decided Specter on remand from the Supreme Court, that fact is not relevant to the issue of whether a stay is now appropriate.

At the time that plaintiffs agreed to defer their response to defendants' motion to dismiss, the law in this Circuit was not settled. That is no longer the case. In Specter

II, the Third Circuit squarely held that Franklin v. Massachusetts does not preclude review based on allegations of failing to follow mandated procedures. Now that the Third Circuit has decided Specter II, this case can proceed as previously agreed to by defendants.

Defendants' desire to have the Supreme Court review Specter II does not alter the fact that the law in this Circuit is now settled. And defendants' intention to petition for certiorari is not an appropriate basis for staying plaintiffs' procedural claim. See Tarlov v. Paine Webber Cashfund, Inc., 559 F. Supp. 429 (D. Conn. 1983) (awaiting possible grant of certiorari by the Supreme Court is too speculative a ground upon which to stay a proceeding).

Defendants' further assertion that "[s]ound principles of judicial economy and the conservation of litigation resources counsel in favor of . . . staying plaintiffs' 'procedural' claims pending Supreme Court review," Defendants' Brief, at 8, is, likewise, baseless. Given the Third Circuit's clear holding in Specter II, there is no reason to suspend plaintiffs' right to pursue their procedural claim.

In sum, because defendants cannot deny the existence of a fair possibility that plaintiffs will be damaged by a stay and do not demonstrate that they will suffer hardship or inequity if a stay is not granted, defendants' motion for partial stay should be denied.

II. DEFENDANTS' ASSERTION THAT THERE IS A STRONG BASIS FOR THE SUPREME COURT TO GRANT DEFENDANTS' PETITON FOR CERTIORARI IS NOT RELEVANT AND WILL NOT SUPPORT THEIR MOTION FOR STAY.

Defendants next argue that "[i]n determining whether to exercise its discretion to grant a stay, the Court should assess the likelihood that the Supreme Court will in fact decide to review Specter II." Defendants' Brief, at 8. Defendants cite no authority for their contention. This is hardly surprising in light of the well-known fact that the decision whether or not a petition for certiorari will be granted is wholly within the jurisdiction of the Supreme Court and need not be based at all on substantive considerations. Indeed, trying to predict the likelihood of whether certiorari petitions will be granted would be as thankless a task as attempting to guess whether it will be sunny or raining six months from now.

In any event, whether or not certiorari might be granted in Specter II is not even relevant to a determination of whether a stay is appropriate. Specter II is the law of this Circuit. The fact that there is a split between the Third and First Circuits does not alter this conclusion. Nor does the fact that Specter II decided an important question of federal law or the fact that "in defendants' view, Specter II conflicts with Franklin v. Massachusetts". Defendants do not have the right to postpone litigation of this action because of the possibility that the Supreme Court may grant certiorari in Specter II. See Tarlov, supra.; see also Gold v. Johns-Manville Sales Corp., 723

F.2d 1068 (3d Cir. 1983) (hardship of being forced to wait an indefinite time to get their case heard is sufficient damage to require defendants to make a showing of hardship and inequity).

CONCLUSION

For all the reasons set forth above, plaintiffs respectfully request that defendants' motion for partial stay be denied.

Respectfully submitted,

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Of Counsel.

Dated: August 27, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Memorandum of Plaintiffs in Opposition to Defendants' Motion for Partial Stay of Proceedings to be served on the 27th day of August, 1993, by United States First Class Mail, postage prepaid, to:

Jeffrey S. Gutman, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
901 E Street, N.W. - Room 952
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Nicole Reimann

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Washington, D.C. 20530

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THERE ARE A TOTAL OF 22 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

Our reply brief. I need comments on this and the stay opp by COB tomorrow if possible. It needs to be in Philly by 9/10. Thanks.

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

DRAFT 1
9/7

REP. JAMES C. GREENWOOD, et al.,

Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,

Defendants.

Civil Action No. 92-CV-5331

Is there a page limit?

Add argument that Anne Weismann made in crystal city that claims against Comm. should also be dismissed because no relief available from Comm. which Plaintiffs no longer challenge

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS

INTRODUCTION

In defendants' partial motion to dismiss, we moved to dismiss four sets of claims: 1) the "substantive" challenges to military judgments and determinations found unreviewable in Specter v. Garrett ("Specter I"), 971 F.2d 936 (3rd Cir. 1992); 2) the due process claim rejected in Specter I; 3) the contention that the Lab Commission's report was inadequate; and 4) the claim that the Secretary of Defense and Base Closure Commission lacked authority to recommend defense laboratories like Warminster for closure or realignment.[1] Plaintiffs now concede, as they must, that Specter I requires the dismissal of their "substantive" challenges and due process claim. See Memorandum of Plaintiffs in Opposition to Defendants' Partial Motion to Dismiss ("Pls' Dism. Opp.") at 3 n.2.

[1] Defendants moved to stay proceedings on a final category of claims -- challenges that the Department of Defense, Department of the Navy and Base Closure Commission violated certain procedural requirements of the Base Closure Act. That motion has been fully briefed; defendants' reply memorandum accompanies this brief.

of "procedural" claims that the Specter I majority found subject to judicial review--

Nevertheless, in the first part of their brief, plaintiffs try to ~~exploit~~ evade the holding in Specter I that "substantive" challenges to actions taken by the military departments and Base Closure Commission under the Base Closure Act are not reviewable by arguing that their substantive claims fall within the category - that is, ~~while~~ "procedural" claims that these ~~entities~~ military depts and Comm. failed to satisfy explicit document ~~transfer~~ and open hearing requirements of the Act ~~are subject to judicial review~~. Plaintiffs recast some of their unreviewable "substantive" claims simply by baldly labelling the allegedly erroneous military judgments and determinations made by defendants as "shams" and therefore somehow "procedural" errors. As shown in Section I, infra, plaintiffs' ~~revisionist~~ latest interpretation of these claims is neither faithful to their Complaint nor to Specter I.

Plaintiffs offer a token defense to defendants' showing that they lack standing to challenge the non-binding advisory report of the Lab Commission, which ceased to exist nearly two years ago. Plaintiffs appear to retreat from the baseless request in their Complaint that the Lab Commission's allegedly faulty report requires the Court to enjoin the closure or realignment of all Navy installations ordered closed or realigned by President Bush in 1991. Count 3, Request for Relief (c). As shown in Section II, infra, they fail, however, to demonstrate that the Lab Commission's September 30, 1991 Report caused the injury they claim -- loss of employment following the July, 1991 decision by the President to accept the Base Closure Commission's recommendation to realign Warminster. Nor does logic permit plaintiffs to show that voiding the Lab Commission's report could

possibly redress their alleged injury.

With one remarkable exception, plaintiffs largely repeat arguments made in their summary judgment motion to oppose ~~our~~ defendants' motion to dismiss their claim that the Lab Commission had exclusive authority to recommend defense labs for realignment. We will not repeat at length here arguments already made in opposition to plaintiffs' motion for summary judgment. Yet, plaintiffs' astonishing assertion that the Naval Air Development Center was not a "military installation" -- expressly defined to include "centers" and all "activities under the jurisdiction of the Department of Defense" -- and thus not subject to the Base Closure Act warrants a specific response. As explained in section III, infra, plaintiffs' resort to the Orwellian contentions that a center is not a center and an activity is not an activity, arguments understandably not made in their summary judgment brief, speaks volumes about the weakness of their claim.

Moreover, plaintiffs' unpersuasive argument in favor of standing to challenge the Lab Commission's nonbinding advisory report undermines their claim. The gist of their argument is that § 246 and the Lab Commission report are meaningless if defense labs are covered by the Base Closure Act process. Yet, plaintiffs speculate that an order voiding the Lab Commission's report would "likely influence political sentiment to support reconsideration of the unlawful decision to realign . . . [Warminster]," Pls' Dism. Mem. at 38. The point reflects plaintiffs' acknowledgement that the political branches of

government retain authority to act on defense labs. Far from being nullified by the Base Closure Act, § 246 and the Lab Commission's report were intended to serve as the basis for such action if the Secretary of Defense or Congress believed it appropriate.

For these reasons, and the reasons detailed in defendants' memorandum in support of their motion to dismiss and in opposition to plaintiffs' motion for summary judgment, defendants' partial motion to dismiss should be granted and plaintiffs' motion for summary judgment should be denied.

ARGUMENT

I. THE COURT SHOULD REJECT PLAINTIFFS' EFFORT TO RELABEL UNREVIEWABLE "SUBSTANTIVE" CHALLENGES AS REVIEWABLE "PROCEDURAL" ONES AND SHOULD DISMISS THESE CLAIMS.

In Specter I, the Third Circuit reviewed the allegations made in the Specter Complaint, which are substantially similar to the ones made here,[2] and determined that a "majority" of them were unreviewable. Specter I, 971 F.2d at 953. Indeed, the Third Circuit found only two allegations, claiming violations of specific procedures required by the Base Closure Act, to be reviewable: 1) that the Secretary of Defense failed to transmit information used in making his recommendations to the Base Closure Commission and the General Accounting Office (GAO) in violation of § 2903(c)(4), Specter I, 971 F.2d at 952, 953 n.15;

[2] Indeed, paragraphs 203, 203(B)-(H), 205, 205(A)-(H) of the Complaint, which summarize and advance allegations as to each Count are either drawn verbatim from the Specter Complaint, or employ language very nearly identical to that used in Specter.

and 2) that the Base Closure Commission failed to hold public hearings in violation of § 2903(d)(1). Specter I, 971 F.2d at 952-53.[3] The court found "substantive" challenges to the Secretary's and Base Closure Commission's recommendations, and to be unreviewable. Specter I, 971 F.2d at 950-52.

In an effort to avoid the concededly preclusive effect Specter I has in this case, see Pls' Dism. Opp. at 2 ("[c]learly, Specter controls in this case"), plaintiffs attempt to recharacterize some of their "substantive" claims as somehow "procedural" and thus reviewable under Specter I. They continually disclaim any attempt to challenge the "merits" of the Navy's, Department of Defense's or Base Closure Commission's recommendations and repeatedly assert that these recommendations were the product of a "sham" process. Pls' Dism. Opp. at 16-20. In so doing, plaintiffs expand Specter I's narrow scope of reviewable "procedural" claims beyond all recognizable bounds. Relying on repetition rather than analysis, plaintiffs empty Specter I of virtually any meaning and claim entitlement to challenge precisely the military judgments and determinations that Specter I held to be unreviewable.

As a threshold matter, Beyond simply

[3] Plaintiffs have made similar claims here and defendants have moved to stay them.

explicit and direct

affirming dismissal of challenges to the "merits" of the defendants' recommendations, the court in Specter I found unreviewable many other challenges as well, such as claims that the recommendations were based on inadequate data and that or improper defendants failed to apply the force structure plan and selection criteria properly. See Specter I, 971 F.2d at 950-53.

move to p5

Plaintiffs' assertion that Specter I held only "merits" challenges to be unreviewable, Pls' Dism. Mem. at 16, is simply wrong, and their insistence that they make no such claims, see Pls' Dism. Mem. at 17, 19, gets them nowhere.

Moreover, labelling a claim as "procedural" does not necessarily mean that it is reviewable. The court in Specter I determined several claims that ~~sought of~~ relate to any error in process to be alleged unreviewable, such as that the Secretary of Defense relied on insufficiently documented advice and data from the Navy and that the Base Closure Commission did not obtain sufficient help from the GAO. Specter I, 971 F.2d at 950, 952. The only "procedural" claims the Third Circuit determined to be reviewable were allegations that defendants had violated ~~document transfer and~~ public hearing ~~provisions of the Base Closure Act~~.

By failing to recognize that many claims of faulty "process" may present "judicially unmanageable" issues or issues Congress intended for the Base Closure Commission or GAO's review, not judicial review, plaintiffs' exercise in relabelling their claims was destined for failure at the outset. A specific examination of each of plaintiffs' points demonstrates that their relabeled

specific procedural requirements of the Act -- requirements to make certain documents available and to hold

claims must nevertheless be dismissed.[4]

First, defendants moved to dismiss plaintiffs' claims, set forth in ¶¶ 133-37, 203(G), 205(E), that the Navy, Secretary of Defense and Base Closure Commission failed to consider Warminster and other labs "properly . . . under the eight [selection] criteria." Complaint, ¶ 137.[5] Defendants also moved to dismiss the similar claim advanced in ¶¶ 126 and 205(H) that the Navy and Secretary of Defense failed to base their recommendation on the force structure plan.[6]

Aside from a claim that particular closure or realignment recommendations lacked military justification (an argument

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[4] Even plaintiffs apparently recognize the limits of their argument. In Defendants' Memorandum in Support of Their Partial Motion to Dismiss ("Defs' Dism. Mem.") at 10-13, defendants identified five unreviewable challenges against the Base Closure Commission, see Defs' Mem. at 10, and six unreviewable challenges against the Secretary of Defense or Secretary of the Navy, see Defs' Mem. at 11, in plaintiffs' Complaint. Plaintiffs offer no response to defendants' argument that claims 4 and 5 against the Base Closure Commission (that the Commission adopted the Navy's recommendation despite the GAO report and that the Commission used unpublished selection criteria) and claims 3 and 6 against the Navy or Secretary of Defense (that they used unpublished selection criteria and that the recommendation to realign Warminster was unwise) should be dismissed. For the Court's convenience, defendants will refer to the remaining claims by number and by paragraph in plaintiffs' Complaint so that the claims defendants believe should be dismissed may be more easily identified.

[5] These were claim 1 against the Base Closure Commission and claim 2 against the Navy. Defs' Dism. Mem. at 10-11. Plaintiffs defend these claims separately, Pls' Dism. Opp. at 16 (claim against the Commission) and Pls' Dism. Opp. at 18 (claim against the Navy). Because the claims are the same and unreviewable for the same reason, we respond to both arguments together here.

[6] This was claim 5 against the Navy and Secretary of Defense. Defs' Dism. Opp. at 11.

plaintiffs resort to in pages 14-15 of their brief), it is difficult to imagine challenges that more directly ask the Court to review and overturn the use of military judgment. Military expertise is required to apply the force structure plan and selection criteria to each military installation.[7] The criteria include, for example, current and future mission requirements and ability to accommodate contingency, mobilization and future total force requirements at the existing and potential receiving locations.[6] By asserting that defendants misapplied the force structure plan and selection criteria when recommending Warminster for realignment, plaintiffs do nothing more than invite this court to second-guess defendants' military judgment and to find that an appropriate analysis of complex military considerations would have yielded a different result.

In no uncertain terms, the Third Circuit rejected the notion that such claims ~~were~~ are reviewable. The court held that the "tasks of applying [the force structure plan and selection criteria] to the circumstances of each installation and of establishing priorities among them," required "military and other expertise." Specter I, 971 F.2d at 950-51. The court concluded that review of defendants' performance of these tasks "would necessarily

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[7] Examination of the Navy's April 1991 Detailed Analysis supporting its Base Closure and Realignment Recommendations, which is over an inch and a half thick, and which defendants will gladly provide, should quickly dispel any thought to the contrary.

[6] These are just two of the eight selection criteria, which are reprinted in Specter I, 971 F.2d at 950 n.14.

present issues that are not 'judicially manageable.'" Id. at 951. The Third Circuit therefore upheld this Court's dismissal of identical claims made in Specter I as unreviewable. Specter I, 971 F.2d at 950-52; see also National Federation of Federal Employees v. United States, 905 F.2d 400, 405-06 (D.C. Cir. 1990).[9]

In response, plaintiffs do not directly contend that such claims are reviewable. Rather, they claim that these allegations should be read in conjunction with other allegations in the Complaint and conclusorily assert that, so read, defendants' application of the eight selection criteria and base structure plan was an unrevealed "sham" or "a procedural defect." Pls' Dism. Opp. at 16, 18, 19. Simply relabelling an unreviewable "substantive" claim as one challenging a "sham" does not make it either "procedural" or reviewable. In any event, plaintiffs cannot square their semantics with Specter I. No meaningful distinction exists between a claim that defendants failed to apply the eight selection criteria or force structure plan properly, found unreviewable in Specter I and NFFE, and an assertion that the analysis was perfunctory or a "sham."

If plaintiffs assert that the Navy's failure to reveal the alleged "sham" is procedural error and reviewable, see Complaint,

[9] The Third Circuit articulated an additional ground for nonreviewablility as well. The court observed that "Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis," Specter I, 971 F.2d at 951, and put review of these questions in the hands of the Base Closure Commission and the GAO, not the courts. Because "additional review by the courts would not contribute to public confidence in this part of the process," the court held that Congress did not intend judicial review of them. Id.

¶ 133; Pls' Dism. Opp. at 16, they nevertheless cannot avoid Specter I. ~~To prove such a claim, the plaintiffs still would need to show first~~ that the Navy's application of the selection criteria was ~~a "sham"~~ improper -- an assertion that cannot be reviewed ~~before even reaching whether~~ the Navy failed to reveal that ~~to be the case~~. Dressing this substantive claim with procedural trappings gets plaintiffs nowhere.

Second, defendants moved to dismiss very similar claims made in ¶¶ 137-148, 163-67 that the Navy and Base Closure Commission failed to analyze properly defense labs generally and Warminster in particular, especially the cost savings associated with the recommended closures and realignments.[10] ~~Review of~~ With these claims too, ~~plainly requires the~~ Court to review the analysis and ~~analyze the~~ military judgments of ~~supporting~~ the Navy and the Base Closure Commission ~~recommendations~~ and to assess the complex evaluations required to estimate cost savings from the closure or realignment of certain installations rather than others. These claims, like those discussed above, are plainly unreviewable.

Implicitly conceding that these claims should be dismissed, plaintiffs assert that the allegation made in ¶ 162 -- that the Navy knowingly provided inaccurate data to the Secretary of Defense and Base Closure Commission -- is reviewable.[11] Pls'

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[10] These contentions were claim 2 against the Base Closure Commission and claim 4 against the Secretary of Defense and Navy. Defs' Dism. Mem. at 10-11.

[11] Paragraph 162 states that, the "faulty and inaccurate data the Navy knowingly provided to DOD and the Base Closure Commission invalidated any projected cost savings associated with

Dism. Opp. at 17. Plaintiffs in Specter I made a similar claim, asserting that the Navy's recommendations were insufficiently documented and explained. Specter I, 971 F.2d at 950. The Third Circuit held it to be unreviewable. Id. at 950-52; see also NFFE, 905 F.2d at xxx (claim that military and Base Closure Commission used inaccurate data is unreviewable).

~~If anything,~~ Plaintiffs' claim that the Navy's recommendations were based on ~~false~~ incorrect information is ~~more~~ equally judicially unmanageable ~~than the Specter plaintiffs' contention that the recommendations were inadequately documented or supported by the data~~. To prove that the Navy ~~knowingly~~ provided inaccurate information to the Secretary of Defense and Base Closure Commission would require plaintiffs first to prove that the data was faulty.

The assessment of literally millions of pieces of data to develop the factual basis for a base closure or realignment recommendation requires military judgment and expertise. To estimate cost savings resulting from a realignment, for example, requires complex determinations about which military assets will be relocated elsewhere, where they will be relocated, how they will be integrated into other facilities, when materiel and personnel will be moved, the cost of relocation, what the costs of would have been without relocating, and the costs of environmental and other clean-up projects, among many, many other factors.

For the Court to assess whether the Navy's cost saving estimate was accurate would require the Court to make the military

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relocating NADC."

Again, the essence of plaintiffs' 11 claim is that the recommendation is wrong because it is based on improper data. Plaintiffs' cannot avoid that by saying their claim is that the Navy provided improper data.

judgments and determinations inherent in developing the assumptions upon which to base an analysis, selecting relevant data for analysis, choosing among competing figures and analyses and developing models for estimating costs. In Specter I, the Third Circuit held that such an effort would not only be judicially unmanageable, but also one intended by Congress to be conducted by the Base Closure Commission and the GAO, not the courts. Plaintiffs' claim that the Navy relied on and forwarded inaccurate data should be dismissed.

Finally, defendants moved to dismiss ¶¶ 203(C)-(D) of the Complaint.[12] As pled, the allegation that the Base Closure Commission failed to facilitate the GAO's performance of its duties set forth in §§ 2903(d)(5) never stated a claim because the Commission has no statutory duty to assist the GAO. Section 2903(d)(5) imposes duties on the GAO, not the Commission. Apparently recognizing that Specter I also found the same claim unreviewable, Specter I, 971 F.2d at 952, plaintiffs now claim that these paragraphs actually allege that the Base Closure Commission "failed to create or transmit an administrative record to the GAO." Pls' Dism. Opp. at 18.

This new claim is more far-fetched that the one actually pled. The GAO's report was due to the Commission on May 15, 1991, § 2903(d)(5)(B) and the Commission's report to the President was not due until July 1, 1991. § 2903(d)(2)(A).

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[12] These allegations form claim 3 against the Base Closure Commission. Defs' Dism. Mem. at 10.

Neither the Base Closure Act nor logic required the Commission to furnish the GAO with an administrative record. The claims advanced in paragraphs 122-23, 126, 133-48, 162-67, 191-200, 203(C)-(E), 203(G)-(H), 205(D)-(F) and 205(H) should be dismissed.

II. PLAINTIFFS LACK STANDING TO CHALLENGE THE LAB COMMISSION'S REPORT.

In Count 3, plaintiffs claim that the Lab Commission violated § 246 by failing to evaluate labs individually, failing to consider closures or realignments ~~or~~ of labs and failing to conduct an independent, uncompromising study. They request that the Court declare its report void and not only enjoin the realignment of Warminster, but of all other Navy facilities ordered closed or realigned by President Bush in 1991.[13] Plaintiffs' defense of their standing to assert this claim is singularly unpersuasive. ~~But~~ Moreover, as we show in § III, infra, what argument plaintiffs do make undermines the basis of their contention that the Lab Commission, ~~not the Base Closure Commission,~~ had exclusive authority to recommend the closure or realignment of defense labs.

Plaintiffs recognize that, to establish standing, they must demonstrate that they have suffered actual, concrete injury in fact; that a fairly traceable causal connection exists between the injury and the conduct complained of and that the injury will likely be redressed by a favorable decision. Pls' Dism. Opp. at

[13] Plaintiffs appear to abandon the latter claim for relief. Pls' Dism. Opp. at 38.

37. The burden of showing that plaintiffs have standing to challenge a purely advisory report written in September, 1991 for a purpose unrelated to the Base Closure Act process that resulted in President Bush's July, 1991 decision to realign Warminster by a Commission that expired nearly two years ago is formidable, to say the least. Plaintiffs do not really try to discharge it, resorting to blurring beyond recognition Count 3 -- the narrow claim that the Lab Commission's study was flawed -- with their other claims.

The injury plaintiffs claim is loss of employment, but the cause of that injury was not the Lab Commission's allegedly inadequate advisory report, but the President's decision to accept the Base Closure Commission's recommendation to realign Warminster and Congress' ~~failure~~ decision not to ~~overturn that recommendation.~~ disapprove it. Without causation, plaintiffs have no standing.

Plaintiffs offer two responses. First, they contend that defendants caused this injury by "failing to follow the Congressionally mandated procedures for lab consolidation or closure." Pls' Dism. Opp. at 38. Confusing Count 3 with the claim that the Secretary of Defense and Base Closure Commission were prohibited from considering defense labs for closure or realignment, this non sequitur is no answer to why the Lab Commission's allegedly deficient report caused them injury.

Second, plaintiffs claim that an "uncompromising" study would have revealed the "true" costs of realigning Warminster and "might have tempered the Base Closure Commission's recom-

results of this study issued in September 1991 would have influenced the

mendations." Id. This response is remarkable because it entirely contradicts plaintiffs' principal claim that the Base Closure Commission had no business assessing defense labs. Moreover, it relies on an unsupported string of speculation that a "proper" ~~an adequate~~ study would have revealed different ~~"true"~~ costs of realigning Warminster, that the Base Closure Commission's July 1991 recommendations ~~would have credited~~ and caused ~~the study, that~~ the Commission to ~~would have~~ recommended rejection of the Secretary's recommendation to realign Warminster, and that the President and Congress would have decided to ~~accepted~~ the Commission's recommendation not to realign Warminster. Such unadorned chains of speculation have no place in satisfying Article III's "case or controversy" requirements. See Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

Furthermore, if the Court were to review Count 3 and find that the Lab Commission's report did not comply with § 246, it could issue no relief that could possibly redress plaintiffs' alleged injury. Voiding the Commission's two year old public advisory report cannot keep Warminster's gates open. Nor is there any conceivable basis for overturning the President's decision to approve the Base Closure Commission's recommendation to realign Warminster on the ground that the Lab Commission's subsequent report was flawed. Plaintiffs plainly have no standing to challenge the Lab Commission's report.

III. THE SECRETARY OF DEFENSE AND BASE CLOSURE COMMISSION HAD AUTHORITY TO RECOMMEND THE REALIGNMENT OF WARMINSTER.

Plaintiffs' response to defendants' motion to dismiss their claim that the Secretary of Defense and Base Closure Commission had no authority to recommend Warminster for realignment is

essentially a rehash of their summary judgment motion. Defendants have already responded to these arguments in an opposition to that motion. Nonetheless, some new assertions made by plaintiffs warrant a brief response.

Plaintiffs turn the venerable maxim that the Court should give effect to the unambiguous language of a statute, see Negonsett v. Samuels, 113 S. Ct. 1119, 1122-23 (1993), on its head in interpreting the definition of "military installation" in the Base Closure Act. § 2910(4). As we have shown, the Act vests the Secretary of Defense and Base Closure Commission with express and explicit authority to recommend domestic "military installations" for closure or realignment, §§ 2903(c)(1), (c)(3), (d)(2)(A). In 1991, "military installation" was, in turn, defined as "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." § 2910(4) (emphasis added). Because defendants determined Warminster, like all defense labs, to be a "military installation," a determination that is worthy of substantial deference if there is any ambiguity at all, Good Samaritan Hospital v. Shalala, 113 S. Ct. 2151, 2159 (1993), it is subject to the Base Closure Act.

It is difficult to imagine a broader definition of "military installation,"[14] Plaintiffs nevertheless advance the stunning

[14] The breadth of the definition reflects Congress' intent to break the deadlock that had prevented the closure of unneeded military installation with a comprehensive mechanism to

claim, never made before expressly, that the Naval Air Development Center Warminster was neither a "center" nor an "activity under the jurisdiction of the Department of Defense." Pls' Dism. Mem. at 24-25. Excising camps, posts, stations, yards and homeport facilities from the statute, plaintiffs assert that "centers" only refers to "base-type facilities," and further write "other activit[ies]" out of § 2910(4) by implying that it overlaps the enumerated facilities in the statute. Id.

It is one thing to argue that expansive, unambiguous statutory language should yield to clear legislative intent or compelling public policy considerations; although even such arguments nonetheless prevail in only the "most extraordinary circumstance[s]." Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2599 (1992). It is quite another to claim that the Warminster center is not a center and that defense labs -- known as Research, Development, Test and Evaluation activities[15] -- are not Defense Department activities without a shred of legislative history, overriding policy rationale or logic to support it. Plaintiffs' assertion that "military installation" encompasses only an undefined group of "base-type facilities," is

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effectuate such cost-saving closures. Given this undisputed intent, Congress should be presumed to have included defense labs within the scope of "military installations" subject to the Act unless there is a very clearly expressed intention to the contrary. Plaintiffs have located no such express intention.

[15] See Navy Detailed Analysis, a portion of which was provided as Attachment 4 to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

utterly frivolous.[16]

Because the Base Closure Act so clearly encompasses defense labs, plaintiffs' entire argument consists of a quest for an unwritten, implied exception to the Act's express coverage for defense labs. Plaintiffs find refuge in principles of statutory construction which offer them no solace. In arguing that the specific statute prevails over the general, Pls' Dism. Opp. at 25-26, plaintiffs forget that the Base Closure Act narrowly deals with only closures and realignments while § 246 allows the Lab Commission to study a host of general issues relating to defense labs. While ~~contending~~ purporting to agree that statutes must be harmonized if possible, Pls' Dism. Opp. at 26-27, plaintiffs tear defense labs from the Base Closure Act's express scope.

At bottom, the thrust of plaintiffs' argument is that, if defense labs could be recommended for closure or realignment in the Base Closure Act process, § 246 and the Lab Commission report would be meaningless. Plaintiffs discern a conflict between the Base Closure Act and § 246 that requires the Base Closure Commission's express authority to recommend defense labs and other military installations for closure or realignment for the President's statutorily required review and action to be impliedly displaced by the Lab Commission, charged only with

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[16] Plaintiffs make no effort to square their contention with Congress' subsequent amendment of § 2919(4) to exclude retroactively Army Corps of Engineers installations. Pub. L. No. 102-190, § 2821(h)(1), 105 Stat. 1546 (1991). See Defs' Dism. Mem. at 18-19. If Congress intended "military installation" to include only "base-type" installations, such an amendment would have presumably been unnecessary.

issuing a nonbinding advisory report to the Secretary of Defense and to Congress to do with as they wish.

A key to unlocking this purported conflict lies in plaintiffs' own brief. In arguing that they have standing to challenge the Lab Commission's report, plaintiffs claim to satisfy the redressability prong of standing by claiming that an order voiding the report "would likely influence political sentiment to support reconsideration" of the 1991 decision to realign Warminster. Pls' Dism. Opp. at 38. This conjecture hardly helps their claim to standing, but reflects a recognition that, far from somehow losing "flexible decision-making power," Pls' Dism. Opp. at 28, the poltical branches of government retain authority to act on defense labs. That was exactly the reason why § 246 was enacted and is so easily harmonized with the Base Closure Act.

Very simply, while the comprehensive Base Closure Act process is underway between 1991 and 1995, the Lab Commission's report was intended to serve as a basis for Congressional action on defense labs if it believed such action was appropriate. That intent is plain from the legislative history: "[the Lab Commission] will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department [of Defense's] findings [on reorganizing defense lab structure] and may suggest alternative actions for congressional consideration." H. Conf. Rep. No. 101-923, 101st Cong. 2d Sess. 563 (1990), reprinted in

, addressing different issues)

U.S. Code Cong. & Admin. News 3110, 3135 (emphasis added). Far from nullifying § 246, the Base Closure Act allowed the Lab Commission to do precisely what Congress intended -- to write a report for their consideration. How Congress wished to act on the report, if at all, was and is entirely up to it to decide.

Plaintiffs' quest for statutory harmony is easily satisfied by simply interpreting the Base Closure Act and § 246 to allow the respective Commissions to write their reports for the ~~very~~ different purposes Congress intended. Severing a substantial part of the Base Closure Commission's express jurisdiction undercuts the Act's objective to effectuate a comprehensive set of closures and realignments of military installations.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied and defendants' partial motion to dismiss should be granted.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

giving plain meaning to the words Congress chose to enact and thereby

DAVID J. ANDERSON

This court must give effect to what Congress did, not what plaintiffs think Congress should have done.

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Dated: September 9, 1993

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

REP. JAMES C. GREENWOOD, et al.,	)	Please refer to this number when recording 930913-2
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PARTIAL STAY OF PROCEEDINGS

Well over a year after President Bush's July 1991 decision to accept the Base Closure Commission's recommendation to realign the Naval Air Development Center,[1] plaintiffs filed this action to overturn that determination. Among several claims is plaintiffs' contention that the defendants violated certain procedural requirements of the Base Closure Act in recommending Warminster for realignment. After defendants filed a timely motion to dismiss both that claim and the remaining ones in December 1992, the parties stipulated, at plaintiffs' request,[2] that plaintiffs not be required to respond to the motion until

[1] The installation is now called the Naval Air Warfare Center Aircraft Division Warminster.

[2] Plaintiffs describe this stipulation as the product of their "agree[ment] to defer their response to defendants' motion to dismiss." Memorandum of Plaintiffs in Opposition to Defendants' Motion for Partial Stay of Proceedings ("Pls' Mem.") at 7. In reality, plaintiffs requested defendants' consent to postpone filing their opposition to the motion until the Third Circuit decided Specter v. Garrett. Plaintiffs' suggestion that, after filing a comprehensive, thirty-one page memorandum in support of our motion to dismiss, we would then request that plaintiffs agree not to respond to it is simply wrong.

after the Third Circuit decided in Specter v. Garrett whether identical "procedural" claims in that case were reviewable.[3]

Instead of resolving the issue, the Third Circuit panel's divided opinion in Specter v. Garrett ("Specter II"), 995 F.2d 404 (3d Cir. 1993), brought it squarely in conflict with the First Circuit's holding in Cohen v. Rice, 992 F.2d 376 (1st Cir. 1993). Because of this split of authority and the importance of maintaining the integrity of the Base Closure Act's process to effectuate the prompt closure and realignment of unneeded military installations, the government has filed a petition for a writ of certiorari in Specter II.[4]

Although plaintiffs regard it as somehow irrelevant, Pls' Opp. at 7, it is nevertheless true that this Court has virtually unbounded discretion to control its docket "to promote full and efficient adjudication" of the cases before it. Gold v. Johns-Manville Sales Corp., 723 F.2d 1068, 1077 (3d Cir. 1983); see Landis v. North American Co., 299 U.S. 248, 254 (1936). The significant possibility that the Supreme Court will again grant

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[3] The Court did not approve that stipulation, but instead denied defendants' motion without prejudice. The parties then stipulated that defendants' renewed motion to dismiss or responsive pleading would not be due until thirty days after Specter was decided. The Court approved that stipulation. Specter was decided in May 1993. Pending defendants' petition for rehearing in Specter, which was later denied, the parties here agreed that defendants' responsive pleading or renewed motion to dismiss would be due on or before July 21, 1993. On July 21, defendants moved to dismiss this action except for the "procedural" claims, which are the subject of this motion to stay.

[4] See Report to the Court Regarding the filing of a Petition for a Writ of Certiorari in Specter v. Garrett, filed August 27.

certiorari in Specter in order to resolve this split in the circuits on this important issue justifies an exercise of this Court's discretion to stay plaintiffs' identical "procedural" claims for a limited period of time while proceeding to consider defendants' motion to dismiss the remainder of plaintiffs' claims. Cf. Deering Milliken v. FTC, 647 F.2d 1124 (D.C. Cir. 1980).

Moreover, the "procedural" claims that the Third Circuit held to be reviewable in Specter II have themselves been stayed. Following the Third Circuit's denial of defendants' motion for rehearing in Specter II, see 995 F.2d at 414, Fed. R. App. P. 41(a) required the Third Circuit to issue its mandate to this Court within seven days. Receipt of the mandate would have allowed this Court to resume proceedings on the Specter plaintiffs' "procedural" claims. Over the strenuous objections of plaintiffs, the Third Circuit granted each of defendants' three motions to stay the mandate to allow defendants an opportunity to file a petition for certiorari.[5] Now that the certiorari petition has been filed in Specter, the mandate is automatically stayed until final disposition by the Supreme Court. Fed. R. App. P. 41(b); see also Board of Education v. Harris, 444 U.S. 130, 138 (1979) (noting that the granting of

[5] Fed. R. App. P. 41(b) provides that granting such stays is discretionary and that stays may not exceed 30 days in duration. Because these stays are shorter than the 90 days allowed for the filing of a certiorari petition, see S. Ct. R. 13.1, Fed. R. App. P. 41(b) permits extensions of stays "for cause shown." Of the three motions for a stay, the latter two were for extensions to allow completion of the certiorari petition.

certiorari causes stay granted by appellate court to remain in effect).

The rationales for Fed. R. App. P. 41(b) and the Third Circuit's stays in Specter are plain. It makes little sense to expend litigation and judicial resources on a case or claims in the district court when the Supreme Court may review the issue and render further litigation unnecessary. Similarly, no purpose is served by proceeding here on the "procedural" claims, identical to those at issue and stayed in Specter II, when the Supreme Court may well elect to determine whether these claims are subject to judicial review at all.[6]

After over two years marked by apparent indecision whether to file this lawsuit and by willingness, if not eagerness, to stay their "procedural" claims pending resolution of the issue of reviewability by higher courts, plaintiffs now oppose defendants' motion for a partial stay. Plaintiffs, however, fail to demonstrate why this Court should not stay these claims when the Third Circuit in Specter II exercised its discretion to stay its mandate, a stay that Fed. R. App. 41(b) now requires to remain in place until the Supreme Court disposes of Specter II. Nor do

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[6] That plaintiffs' "procedural" claims are identical to the ones at issue in Specter II, and would therefore be dismissed if Specter II were reversed, distinguishes Tarlov v. Paine Webber Cashfund, Inc., 559 F. Supp. 429, 433 (D. Conn. 1983). See Pls' Opp. at 8. In Tarlov, defendants sought a stay of proceedings on a claim which the Second Circuit, disagreeing with the First and Third Circuits, held in a previous case was not subject to dismissal. Because, unlike here, the claim at issue in Tarlov would not necessarily be dismissed if the Second Circuit precedent were reversed, the court denied the motion for a stay.

plaintiffs explain why it makes sense for the "procedural" claims here to proceed while the same ones in Specter II are stayed.

If anything, plaintiffs' argument here is considerably weaker than that offered by the Specter II plaintiffs in opposition to the motions for a stay of the mandate. Not only did plaintiffs here wait over a year to file this suit and ask defendants to agree to stay this case pending resolution of Specter II, but, unlike what remains in Specter II, plaintiffs advance other claims for injunctive relief. See Pls' Opp. at 1-2. With the filing of this and the accompanying reply brief to plaintiffs' opposition to defendants' partial motion to dismiss, briefing on those other claims will be complete. Plaintiffs present no reason why this Court should not consider these claims first while staying the "procedural" claims pending Supreme Court review of Specter II.

Plaintiffs assert that they would be injured by a stay. The Third Circuit was not persuaded by the Specter plaintiffs' similar argument in opposition to defendants' motions to stay the mandate. The contention is particularly suspect here given plaintiffs' leisurely approach to this case. In any event, plaintiffs do not demonstrate, much less claim, that they will suffer injury during the limited stay requested here. The Supreme Court's October 1993 Term begins in less than a month and the Court should be expected to grant or deny defendants' certiorari petition within two or three months. If the Court grants the petition in Specter II, the stay would, of course, be

somewhat longer, but the need for it correspondingly greater as Specter II would be superseded by binding Supreme Court precedent.

Plaintiffs also assert that defendants have not shown hardship in the absence of a stay. The hardship parallels the harm found sufficiently persuasive by the Third Circuit to grant three motions to stay the Specter II mandate. Although we believe that at least one of plaintiffs' "procedural" claims rests on a misinterpretation of the Base Closure Act that can be resolved as a matter of law, any discovery, or possibly trial, on their claims is inherently disruptive. The expenditure of defendants', as well as judicial, resources on an issue that the Supreme Court may shortly determine is unreviewable makes little sense.

Finally, plaintiffs assert that the likelihood of whether the Supreme Court would accept certiorari in Specter is irrelevant to whether this Court should grant defendants' motion. Surely, however, if this motion were premised on a case that neither involved a direct split in the Circuits nor an important issue of federal law, and therefore was one in which the prospect of Supreme Court review was quite low, plaintiffs would make much of it. Defendants ask the Court to stay proceedings on certain claims on the ground that the Supreme Court may likely choose to decide whether the claims are reviewable in an identical case. The chances that the Court will actually accept the case for review are plainly relevant to the Court's consideration of this

motion. See Deering Milliken, 647 F.2d at 1129 (staying district court order and denying motion to issue mandate in case where questions presented to Supreme Court in certiorari petition were "substantial" and likelihood of Supreme Court action "relatively near at hand").

Although predicting whether the Court will grant certiorari in any particular case is not a scientific exercise, Supreme Court Rule 10.1 lists several factors that the Court will examine in considering certiorari petitions. Citing Rule 10, Rule 14.1(j) requests parties to explain why certiorari should be granted in certiorari petitions. Plaintiffs do not deny that these factors are present here or refute the significant possibility that the Supreme Court will grant certiorari in Specter.

Specter II creates a split in the Circuits. See, e.g., Braxton v. United States, 111 S. Ct. 1854, 1857 (1991) (a principal purpose for use of certiorari jurisdiction is to resolve circuit splits). Moreover, not only did the Court grant certiorari once in Specter before and remand it for reconsideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), see Specter, 113 S. Ct. 455 (1992), but there is also a strong argument that the resulting divided opinion in Specter II conflicts with Franklin. See Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 112 S. Ct. 2109, 2023 (1992) (Court grants certiorari because of concern that lower court decision conflicts with Supreme Court authority). Finally, the issue

presents an important question of federal law with continuing application through the three rounds of base closures ending in 1995 called for in the Base Closure Act. See, e.g., Burson v. Freeman, 112 S. Ct. 1846, 1849 (1992) (Court grants certiorari because of importance of issue).

In short, a number of factors weigh strongly in favor of granting defendants' motion to stay pending final disposition of Specter II by the Supreme Court. The motion seeks a stay of only one of several issues before the Court and a stay of limited duration. The motion follows the Third Circuit's decisions to grant defendants' three motions to stay the Specter mandate, decisions that implicitly reflect its judgment that the Supreme Court should be given the opportunity to decide whether the "procedural" claims are reviewable before the district court assesses their merits. Plaintiffs can neither distinguish the persuasive force of that judgment here nor offer any rationale for allowing the expenditure of litigation and judicial resources on a claim that quite possibly will be heard by the Supreme Court this Term.

CONCLUSION

For the foregoing reasons, defendants' motion for a partial stay of proceedings in this action should be granted.

Respectfully submitted,

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Dated: September 9, 1993

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Defendants' Reply Memorandum in Support of Their Motion for a Partial Stay of Proceedings to be served on the 9th day of September, 1993, by overnight express mail to:

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Nicole Reimann
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JEFFREY S. GUTMAN

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CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing and Defendants' Reply Memorandum in Support of Their Partial Motion to Dismiss to be served on the 9th day of September, 1993, by overnight express mail to:

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JEFFREY S. GUTMAN

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

Please refer to this number when responding 930913-1

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT
OF THEIR PARTIAL MOTION TO DISMISS

INTRODUCTION

In defendants' partial motion to dismiss, we moved to dismiss four sets of claims: 1) the "substantive" challenges to military judgments and determinations found unreviewable in Specter v. Garrett ("Specter I"), 971 F.2d 936 (3d Cir. 1992); 2) the due process claim rejected in Specter I; 3) the contention that the Lab Commission's report was inadequate; and 4) the claim that the Secretary of Defense and Base Closure Commission lacked authority to recommend defense laboratories like Warminster for closure or realignment.[1] Plaintiffs now concede, as they must, that Specter I requires the dismissal of their "substantive" challenges and due process claim. See Memorandum of Plaintiffs in Opposition to Defendants' Partial Motion to Dismiss ("Pls' Dism. Opp.") at 3 n.2.

[1] Defendants moved to stay proceedings on a final category of claims -- challenges that the Department of Defense, Department of the Navy and Base Closure Commission violated certain express procedural requirements of the Base Closure Act. That motion has been fully briefed; defendants' reply memorandum accompanies this brief.

Nevertheless, plaintiffs try to evade the holding of Specter I that "substantive" challenges to actions taken by the military departments and Base Closure Commission under the Base Closure Act are not reviewable. Plaintiffs attempt to recast some of their unreviewable "substantive" claims by baldly labelling the challenged military judgments and determinations made by defendants as "shams" and are therefore somehow among the "procedural" claims that Specter I held to be subject to judicial review. As shown in Section I, infra, Specter I held only that allegations that defendants failed to satisfy express document and public hearing requirements of the Act were reviewable, allegations that defendants have not moved to dismiss in this case. In any event, plaintiffs' designation of these claims as "procedural" fails to mask the fact that their allegations present judicially unmanageable challenges to military judgments found unreviewable in Specter I.

Plaintiffs offer a token defense to defendants' showing that they lack standing to challenge the non-binding advisory report of the Lab Commission, which ceased to exist nearly two years ago. Plaintiffs appear to retreat from the baseless request in their Complaint that the Lab Commission's allegedly faulty report requires the Court to enjoin the closure or realignment of all Navy installations ordered closed or realigned by President Bush in 1991. Count 3, Request for Relief (c). As shown in Section II, infra, they fail, however, to demonstrate that the Lab Commission's September 30, 1991 Report caused the injury they

claim -- loss of employment following the July, 1991 decision by the President to accept the Base Closure Commission's recommendation to realign Warminster. Nor does logic permit plaintiffs to show that voiding the Lab Commission's report could possibly redress their alleged injury.

With one remarkable exception, plaintiffs largely repeat arguments made in their summary judgment papers to oppose defendants' motion to dismiss their claim that the Lab Commission had exclusive authority to recommend defense labs for realignment. We will not repeat at length here arguments already made in opposition to plaintiffs' motion for summary judgment. Yet, plaintiffs' assertion that the Naval Air Development Center was not a "military installation" -- expressly defined to include "centers" and all "activities under the jurisdiction of the Department of Defense" -- and thus not subject to the Base Closure Act warrants a specific response. As explained in section III, infra, plaintiffs' resort to Orwellian contentions that a center is not a center and that an activity is not an activity, arguments understandably not made in their summary judgment brief, is stark testimony to the weakness of their claim.

For these reasons, and the reasons detailed in defendants' memorandum in support of their motion to dismiss and in opposition to plaintiffs' motion for summary judgment, defendants' partial motion to dismiss should be granted and plaintiffs' motion for summary judgment should be denied.

ARGUMENT

I. THE COURT SHOULD REJECT PLAINTIFFS' EFFORT TO RELABEL UNREVIEWABLE "SUBSTANTIVE" CHALLENGES AS REVIEWABLE "PROCEDURAL" ONES AND SHOULD DISMISS THESE CLAIMS.

In Specter I, the Third Circuit reviewed the allegations made in the Specter Complaint, which are substantially similar or identical to the ones made here,[2] and determined that a "majority" of them were unreviewable. Specter I, 971 F.2d at 953. Indeed, the Third Circuit found only two allegations, claiming violations of specific procedural requirements of the Base Closure Act, to be reviewable: 1) that the Secretary of Defense failed to make information used to prepare his recommendations available to the Base Closure Commission and the General Accounting Office (GAO) in violation of § 2903(c)(4), Specter I, 971 F.2d at 952, 953 n.15; and 2) that the Base Closure Commission failed to hold public hearings in violation of § 2903(d)(1). Specter I, 971 F.2d at 952-53.[3] The court found numerous "substantive" challenges to the Secretary's and Base Closure Commission's recommendations, and to the manner in which they were developed, to be unreviewable. Specter I, 971 F.2d at 950-52.

In an effort to avoid the concededly preclusive effect Specter I has on their "substantive" claims in this case, see

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[2] Indeed, paragraphs 203, 203(B)-(H), 205 and 205(A)-(H) of the Complaint, which set forth the allegations supporting Counts 1 and 2, are either drawn verbatim from the Specter Complaint, or employ language very nearly identical to that used in Specter.

[3] Plaintiffs have made similar claims here and defendants have moved to stay them.

Pls' Dism. Opp. at 2 ("[c]learly, Specter controls in this case"), plaintiffs recharacterize some of these claims as "procedural" and thus reviewable under Specter I. They continually disclaim any attempt to challenge the "merits" of the Navy's, Department of Defense's or Base Closure Commission's recommendations but repeatedly assert that these recommendations resulted from a "sham" process. Pls' Dism. Opp. at 16-20. In so doing, plaintiffs attempt to expand Specter I's narrow scope of reviewable "procedural" claims beyond all recognizable bounds. Relying on repetition rather than analysis, plaintiffs empty Specter I of virtually any meaning and claim entitlement to challenge precisely the military judgments and determinations that Specter I held to be unreviewable.

As a threshold matter, plaintiffs' assertion that Specter I held only "merits" challenges to be unreviewable, Pls' Dism. Mem. at 16, is simply wrong, and their insistence that they make no such claims, see Pls' Dism. Mem. at 17, 19, gets them nowhere. Beyond simply affirming dismissal of direct challenges to the "merits" of the defendants' recommendations, the court in Specter I found unreviewable many other challenges as well, such as claims that the recommendations were based on inadequate data and that defendants failed to apply the force structure plan and selection criteria properly. See Specter I, 971 F.2d at 950-53; see also Cohen v. Rice, 800 F. Supp. 999, 1005-06 (D. Me. 1992).

Moreover, labelling a claim as "procedural" does not necessarily mean that it is reviewable. The court in Specter I found

several claims related to alleged errors in process to be unreviewable, such as that the Secretary of Defense relied on insufficiently documented advice and data from the Navy and that the Base Closure Commission did not obtain sufficient help from the GAO. Specter I, 971 F.2d at 950, 952. The only "procedural" claims that the Third Circuit determined to be reviewable were allegations that defendants violated specific procedural requirements of the Act to make documents available (§ 2903(d)(4)) and to hold public hearings (§ 2902(e)(2)(a)).

By failing to recognize that many claims of faulty "process" may present "judicially unmanageable" issues, or issues Congress intended for the Base Closure Commission's or GAO's review, not judicial review, plaintiffs' exercise in relabelling their claims was destined for failure at the outset. A specific examination of each of plaintiffs' points demonstrates that their relabeled claims must be dismissed.[4]

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[4] Even plaintiffs apparently recognize the limits of their argument. In Defendants' Memorandum in Support of Their Partial Motion to Dismiss ("Defs' Dism. Mem.") at 10-13, defendants identified five unreviewable challenges against the Base Closure Commission, see Defs' Dism. Mem. at 10, and six unreviewable challenges against the Secretary of Defense or Secretary of the Navy, see Defs' Dism. Mem. at 11, in plaintiffs' Complaint. Plaintiffs offer no response to defendants' argument that claims 4 and 5 against the Base Closure Commission (that the Commission adopted the Navy's recommendation despite the GAO report and that the Commission used unpublished selection criteria) and claims 3 and 6 against the Navy or Secretary of Defense (that they used unpublished selection criteria and that the recommendation to realign Warminster was unwise) should be dismissed. Defendants assume that plaintiffs have no objection to dismissal of these claims. For the Court's convenience, defendants will refer to the remaining claims by number and by paragraph in plaintiffs' Complaint so that the claims defendants believe should be dismissed may be more easily identified.

First, defendants moved to dismiss plaintiffs' claims, set forth in ¶¶ 133-37, 203(G), 205(E), that the Navy, Secretary of Defense and Base Closure Commission failed to consider Warminster and other labs "properly . . . under the eight [selection] criteria." Complaint, ¶ 137.[5] Defendants also moved to dismiss the similar claim advanced in ¶¶ 126 and 205(H) that the Navy and Secretary of Defense failed to base their recommendation on the force structure plan.[6]

Aside from a claim that particular closure or realignment recommendations lacked military justification (an argument plaintiffs resort to in pages 14-15 of their brief), it is difficult to imagine challenges that more directly ask the Court to review and overturn the use of military judgment. Military expertise is required to apply the force structure plan and selection criteria to each military installation.[7] The selection criteria include, for example, four military value criteria to be given priority consideration in analysis, such as

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[5] These were claim 1 against the Base Closure Commission and claim 2 against the Navy. Defs' Dism. Mem. at 10-11. Plaintiffs defend these claims separately, Pls' Dism. Opp. at 16 (claim against the Commission) and Pls' Dism. Opp. at 18 (claim against the Navy). Because the claims are the same and unreviewable for the same reason, we respond to both arguments together here.

[6] This was claim 5 against the Navy and Secretary of Defense. Defs' Dism. Mem. at 11.

[7] Examination of the Navy's April 1991 Detailed Analysis supporting its Base Closure and Realignment Recommendations, which is over an inch and a half thick, and which defendants will provide upon request, should quickly dispel any thought to the contrary.

current and future mission requirements and an installation's ability to accommodate contingency, mobilization and future total force requirements.[8] By asserting that defendants misapplied the force structure plan and selection criteria when recommending Warminster for realignment, plaintiffs do nothing more than invite this court to second-guess defendants' military judgment and to find that an appropriate analysis of complex military considerations would have yielded a different result.

In no uncertain terms, the Third Circuit rejected the notion that these claims are reviewable. The court held that the "tasks of applying [the force structure plan and selection criteria] to the circumstances of each installation and of establishing priorities among them," requires "military and other expertise." Specter I, 971 F.2d at 950-51. The court concluded that review of defendants' performance of these tasks "would necessarily present issues that are not 'judicially manageable.'" Id. at 951; see Cohen, 800 F. Supp. at 1005-06 (dismissing claims that defendants' recommendations departed from selection criteria and the force structure plan). The Third Circuit therefore upheld this Court's dismissal of identical claims made in Specter I as unreviewable. Specter I, 971 F.2d at 950-52; see also National Federation of Federal Employees v. United States, 905 F.2d 400, 405-06 (D.C. Cir. 1990).

The Third Circuit articulated an additional ground for

[8] These are just two of the eight selection criteria, which are reprinted in Specter I, 971 F.2d at 950 n.14.

nonreviewablility as well. The court observed that "Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis," Specter I, 971 F.2d at 951, and put review of these questions in the hands of the Base Closure Commission and the GAO, not the courts. Because "additional review by the courts would not contribute to public confidence in this part of the process," the court held that Congress did not intend judicial review of these issues. Id.

In response, plaintiffs do not directly contend that such claims are reviewable. Rather, they claim that these allegations should be read in conjunction with other allegations in the Complaint and conclusorily assert that, so read, defendants' application of the eight selection criteria and base structure plan was an unrevealed "sham" or "a procedural defect." Pls' Dism. Opp. at 16, 18, 19. Simply relabelling an unreviewable "substantive" claim as one alleging a "sham" does not make it either "procedural" or reviewable. In any event, plaintiffs cannot square their semantics with Specter I. No meaningful distinction exists between a claim that defendants failed to apply the selection criteria or force structure plan properly, found unreviewable in Specter I and Cohen, and an assertion that the analysis was superficial, perfunctory or a "sham."

Plaintiffs also cannot avoid Specter I by attempting to restyle their claim further to allege that the Navy failed to reveal the alleged "sham." See Complaint, ¶ 133; Pls' Dism. Opp. at 16. In terms of reviewability, there is no distinction

between a claim that the Navy failed to analyze an installation properly and that it failed to disclose the allegedly inadequate analysis. See Cohen, 800 F. Supp. at 1005. To prove the latter claim, the plaintiffs still would need to show first that the Navy's application of the selection criteria was flawed -- an assertion that cannot be reviewed -- before even reaching whether the Navy failed to reveal that it improperly applied the criteria. Dressing this substantive claim with procedural trappings gets plaintiffs nowhere.

Second, defendants moved to dismiss claims made in ¶¶ 137-148, 163-67 that the Navy and Base Closure Commission failed to analyze properly defense labs generally and Warminster in particular, especially the cost savings associated with the recommended closures and realignments.[9] These claims are essentially no different than the assertion that defendants failed to apply the selection criteria properly because cost savings is one of those criteria. With this claim, too, plaintiffs ask the Court to review the analyses and military judgments of the Navy and the Base Closure Commission, and to assess the complex evaluations required to estimate cost savings from the closure or realignment of certain installations rather than others. These claims, like those discussed above, are plainly unreviewable.

Implicitly conceding that these claims should be dismissed,

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[9] These contentions were claim 2 against the Base Closure Commission and claim 4 against the Secretary of Defense and Navy. Defs' Dism. Mem. at 10-11.

plaintiffs assert instead that the allegation made in ¶ 162 -- that the Navy knowingly provided inaccurate data to the Secretary of Defense and Base Closure Commission -- is reviewable.[10] Pls' Dism. Opp. at 17. Plaintiffs in Specter I made a similar claim, asserting that the Navy's recommendations were insufficiently documented and explained. Specter I, 971 F.2d at 950. The Third Circuit held it to be unreviewable. Id. at 950-52; see Cohen, 800 F. Supp. at 1005 (dismissing claim that the Air Force failed to reveal reliance on inaccurate and inadequate data to the Base Closure Commission).

Again, plaintiffs recast their substantive claim that the recommendation to realign Warminster was wrong because it was based on faulty data as a flaw in process. In any event, the assertion is as unmanageable as the claim dismissed in Specter I. To prove that the Navy knowingly provided inaccurate information to the Secretary of Defense and Base Closure Commission would require plaintiffs first to prove that the data was erroneous.

The assessment of literally millions of pieces of data to develop the factual basis for a base closure or realignment recommendation requires military judgment and expertise. To estimate cost savings resulting from a realignment, for example, requires complex determinations about which military assets will be relocated elsewhere, where they will be relocated, how they

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[10] Paragraph 162 states that, the "faulty and inaccurate data the Navy knowingly provided to DOD and the Base Closure Commission invalidated any projected cost savings associated with relocating NADC."

will be integrated into other facilities, and the means by which materiel and personnel will be moved and redeployed, among many, many other factors.

For the Court to assess whether the Navy's cost saving estimate was accurate would require the Court to second-guess the military judgments and determinations inherent in developing the assumptions upon which to base an analysis, selecting relevant data for analysis, choosing among competing figures and analyses and developing models for estimating costs. In Specter I, the Third Circuit held that such an effort would not only be judicially unmanageable, but was also one intended by Congress to be conducted by the Base Closure Commission and the GAO, not the courts. Specter I, 971 F.2d at 950-51. Plaintiffs' claim that the Navy relied on and forwarded inaccurate data should be dismissed.

Finally, defendants moved to dismiss ¶¶ 203(C)-(D) of the Complaint.[11] As pled, the allegation that the Base Closure Commission failed to facilitate the GAO's performance of its duties set forth in §§ 2903(d)(5) never stated a claim because the Commission has no statutory duty to assist the GAO. Section 2903(d)(5) imposes duties on the GAO, not the Commission. Apparently recognizing that Specter I also found the same claim unreviewable, Specter I, 971 F.2d at 952, plaintiffs now claim that these paragraphs actually allege that the Base Closure

[11] These allegations form claim 3 against the Base Closure Commission. Defs' Dism. Mem. at 10.

Commission "failed to create or transmit an administrative record to the GAO." Pls' Dism. Opp. at 18.

This new claim is more far-fetched than the one actually pled. The GAO's report was due to the Commission on May 15, 1991, § 2903(d)(5)(B), and the Commission's report to the President was not due until July 1, 1991. § 2903(d)(2)(A). Neither the Base Closure Act nor logic required the Commission to furnish the GAO with an administrative record. The claims advanced in ¶¶ 122-23, 126, 133-48, 162-67, 191-200, 203(C)-(E), 203(G)-(H), 205(D)-(F) and 205(H) should be dismissed.

II. PLAINTIFFS LACK STANDING TO CHALLENGE THE LAB COMMISSION'S REPORT.

In Count 3, plaintiffs claim that the Lab Commission violated § 246 by failing to evaluate labs individually, failing to consider closures or realignments of labs and failing to conduct an independent, uncompromising study. They request that the Court declare its report void and not only enjoin the realignment of Warminster, but also all other Navy facilities ordered closed or realigned by President Bush in 1991.[12] Plaintiffs' defense of their standing to assert this claim is singularly unpersuasive.

Plaintiffs recognize that, to establish standing they must demonstrate that they have suffered actual, concrete injury in fact; that a fairly traceable causal connection exists between the injury and the conduct complained of and that the injury will

[12] Plaintiffs appear to abandon the latter claim for relief. Pls' Dism. Opp. at 38.

likely be redressed by a favorable decision. Pls' Dism. Opp. at 37. The injury plaintiffs claim is loss of employment, but the cause of that injury was not the Lab Commission's allegedly inadequate report, but the President's decision to accept the Base Closure Commission's recommendation to realign Warminster and Congress' decision not to disapprove it. The Lab Commission's advisory report, written for a purpose unrelated to and completed well after the President's July, 1991 decision to realign Warminster cannot possibly a cause of their injury.

Plaintiffs offer two responses. First, they contend that defendants caused this injury by "failing to follow the Congressionally mandated procedures for lab consolidation or closure." Pls' Dism. Opp. at 38. Confusing Count 3 with the claim that the Secretary of Defense and Base Closure Commission were prohibited from considering defense labs for closure or realignment, this non sequitur is no answer to why the Lab Commission's allegedly deficient report caused them injury.

Second, plaintiffs claim that an "uncompromising" study would have revealed the "true" costs of realigning Warminster and "might have tempered the Base Closure Commission's recommendations." Id. This response is remarkable because it entirely contradicts plaintiffs' principal claim that the Base Closure Commission had no business assessing defense labs. Moreover, it relies on an unsupported and illogical string of speculation that an "adequate" study would have revealed different costs of realigning Warminster; that the results of the

September 1991 report would have influenced the Base Closure Commission's July 1991 recommendations and caused the Commission to recommend rejection of the Secretary's recommendation to realign Warminster, and that the President and Congress would have accepted the Commission's recommendation not to realign Warminster. Such unadorned chains of speculation have no place in satisfying Article III's "case or controversy" requirements. See Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

Furthermore, if the Court were to review Count 3 and find that the Lab Commission's report did not comply with § 246, it could issue no relief that could possibly redress plaintiffs' alleged injury. Voiding the Commission's two year old public advisory report cannot prevent Warminster's realignment. Nor is there any conceivable basis for overturning the President's decision to approve the Base Closure Commission's recommendation to realign Warminster on the ground that the Lab Commission's subsequent report was flawed.[13] Plaintiffs plainly have no standing to challenge the Lab Commission's report.

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[13] Plaintiffs contend that voiding the Lab Commission report will prevent the realignment of Warminster "on the ground that the Lab Commission endorsed the Base Closure Commission's recommendation." Pls' Dism. Opp. at 38. The point is mystifying. Plaintiffs do not explain how declaring the report void can somehow have injunctive effect on this "endorsement" theory. Plaintiffs' final point that declaratory relief may "influence political sentiment" in favor of legislative reconsideration of the realignment of Warminster is not only grossly speculative, but reflects plaintiffs' inappropriate desire to use the judicial process to prompt a legislative outcome that they have thus far failed to achieve.

III. THE SECRETARY OF DEFENSE AND BASE CLOSURE COMMISSION HAD AUTHORITY TO RECOMMEND THE REALIGNMENT OF WARMINSTER.

Plaintiffs' response to defendants' motion to dismiss their claim that the Secretary of Defense and Base Closure Commission had no authority to recommend Warminster for realignment is essentially a rehash of their summary judgment motion. Defendants have already responded to these arguments in their August 27 opposition to that motion and will not repeat those points here in the interest of brevity. Nonetheless, some new assertions made by plaintiffs warrant a brief response.

Plaintiffs turn on its head the venerable maxim that the Court should give effect to the unambiguous language of a statute, see Negonsett v. Samuels, 113 S. Ct. 1119, 1122-23 (1993), in interpreting the Act's definition of "military installation." § 2910(4). As we have shown, the Act vests the Secretary of Defense and Base Closure Commission with express and explicit authority to recommend domestic "military installations" for closure or realignment, §§ 2903(c)(1), (d)(2)(A), and requires the Secretary to "consider all military installations in the United States equally." § 2903(c)(3) (emphasis added). For the 1991 round of closings, "military installation" was, in turn, defined as "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." § 2910(4) (emphasis added). Defendants' determination, compelled by the unambiguous language of the Act, that defense labs like Warminster are "military installations" subject to the Act is

worthy of substantial deference. Good Samaritan Hospital v. Shalala, 113 S. Ct. 2151, 2159 (1993).

True to its intent to cut wasteful defense spending, Congress' definition of "military installation" is enormously broad. Plaintiffs nevertheless advance the stunning claim, never made before expressly, that the Naval Air Development Center Warminster was neither a "center" nor an "activity under the jurisdiction of the Department of Defense." Pls' Dism. Mem. at 24-25. Excising camps, posts, stations, yards and homeport facilities from the statute, plaintiffs assert that "centers" only refers to "base-type facilities," and further write "other activit[ies]" out of § 2910(4) by implying that it overlaps the enumerated facilities in the statute. Id.[14]

It is one thing to argue that expansive, unambiguous statutory language should yield to clear legislative intent or compelling public policy considerations, although even such arguments prevail in only the "most extraordinary circumstance[s]." Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2599 (1992). It is quite another to claim that the Warminster center is not a center and that defense labs -- known

[14] Plaintiffs seem to suggest that by including the term "other activity under the jurisdiction of the Department of Defense" in § 2910(4), Congress was merely confirming its intent that only large "base-type" facilities be subject to the Act. To the contrary, Congress' intent that the Act be nearly all-encompassing is reflected in the express exception only for small facilities, § 2909(c)(2), an exception that would have been unnecessary if plaintiffs' interpretation were correct.

as Research, Development, Test and Evaluation activities[15] -- are not Defense Department activities without a shred of legislative history, overriding policy rationale or logic to support it. Plaintiffs' assertion that "military installation" encompasses only an undefined group of "base-type facilities," is utterly meritless.[16]

Because the Base Closure Act so clearly encompasses defense labs, plaintiffs' entire argument consists of a quest for an unwritten, implied exception to the Act's express coverage for defense labs. Plaintiffs attempt to find refuge in principles of statutory construction which offer them no solace because such maxims apply only when ambiguity exists. In arguing that the specific statute prevails over the general, Pls' Dism. Opp. at 25-26, plaintiffs overlook that the Base Closure Act narrowly deals with only closures and realignments while § 246 allows the Lab Commission to study a host of general issues relating to defense labs. Further, while contending that statutes must be harmonized if possible, Pls' Dism. Opp. at 26-27, plaintiffs tear defense labs from the Base Closure Act's express scope.

At bottom, the thrust of plaintiffs' argument is that, if

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[15] See Navy Detailed Analysis, a portion of which was provided as Attachment 4 to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

[16] Plaintiffs make no effort to square their contention with Congress' subsequent amendment of § 2910(4) to exclude retroactively Army Corps of Engineers installations. Pub. L. No. 102-190, § 2821(h)(1), 105 Stat. 1546 (1991). See Defs' Dism. Mem. at 18-19. If Congress intended "military installation" to include only "base-type" installations, such an amendment would have presumably been unnecessary.

defense labs could be recommended for closure or realignment in the Base Closure Act process, § 246 and the Lab Commission report would be meaningless. Plaintiffs discern a conflict between the Base Closure Act and § 246 that requires the Base Closure Commission's express authority to recommend defense labs among other military installations for closure or realignment for the President's statutorily required review and action to be impliedly displaced by the Lab Commission, charged only with issuing a nonbinding advisory report on labs in general to the Secretary of Defense and to Congress to do with as they wish. In reality, the Lab Commission served two important purposes which are easily harmonized with the Base Closure Act.

First, the Lab Commission's report on the structure and organization of defense labs was intended provide advice and information to Congress that could possibly serve as a basis for future broad-based Congressional action on defense labs if Congress determined such action was appropriate. That intent is plain from the legislative history: "[the Lab Commission] will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department [of Defense's] findings [on reorganizing defense lab structure] and <u>may suggest alternative actions for congressional consideration</u>." H. Conf. Rep. No. 101-923, 101st Cong. 2d Sess. 563 (1990), <u>reprinted in</u> U.S. Code Cong. & Admin. News 3110, 3135 (emphasis added). Far from nullifying § 246, the Base Closure Act did not in any way prevent the Lab Commission from doing

precisely what Congress intended -- writing a report for their consideration. How Congress wished to act on the report, if at all, was and is entirely up to it to decide.

Second, the Secretary of Defense could, if he chose, consider the Lab Commission's report in preparing his 1993 or 1995 round of base closure and realignment recommendations. The Base Closure Act calls for three rounds of closure recommendations in 1991, 1993 and 1995. Preparations for the 1993 round began in the fall of 1991. The Lab Commission's September 1991 report on defense labs would thus be a timely addition to the Secretary's renewed efforts to make further closure and realignment recommendations.[17]

Plaintiffs' quest for statutory harmony is easily satisfied by simply giving effect to the plain language Congress used in the Base Closure Act and in § 246. Congress simply intended the Commissions to write different reports on different issues for different purposes to different recipients. No conflict exists between them. In contrast, plaintiffs' request that the Court sever a substantial part of the Base Closure Commission's express jurisdiction would, if granted, undermine the Base Closure Act's

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[17] It is noteworthy that the Lab Commission's Chairman testified before the Base Closure Commission that the Lab Commission did not have exclusive jurisdiction to recommend closures and realignments of defense labs. See Attachment 5 (Testimony of Chairman Adolph, June 7, 1991). The Lab Commission's position was that the Base Closure Act required the Base Closure Commission to make recommendations regarding defense labs and that the Lab Commission's report could be part of the Secretary of Defense's consideration for his 1993 and 1995 recommendations under the Base Closure Act.

objective to effectuate a comprehensive set of closures and realignments of military installations. The Court must instead read the Act as Congress wrote and intended it, not as plaintiffs wish it had been written.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied and defendants' partial motion to dismiss should be granted.

Respectfully submitted,

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Dated: September 9, 1993

ORIGINAL

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DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

DELIBERATION HEARINGS
VOLUME II

OFFICE OF THRIFT SUPERVISION
AMPHITHEATER
SECOND FLOOR
1700 G Street, N.W.
Washington, D.C.

Friday, June 7, 1991
9:30 a.m.

COMMISSIONERS PRESENT:

Jim Courter, Chairman
William L. Ball, III, Commissioner
Howard H. (Bo) Callaway, Commissioner
General Duane Cassidy, Commissioner
Arthur Levitt, Commissioner
James Smith, Commissioner
Robert Stuart, Commissioner

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C O N T E N T S

MR. ADOLPH: Mr. Chairman, I am Pete Adolph. I have a brief statement. In May, I was designated by the Secretary of Defense to perform the duties of the Director of Defense in Research and Engineering until a new Director is appointed. And of course in that capacity, I am also Chairman of the Federal Advisory Commission on Consolidation and Conversion of Defense R&D labs. We have already introduced Dr. Steve Kimmel, who is the Executive Director; Colonel Larry Hourcle, who is a member of the DOD General Counsel, and he has been working base closure and realignment issues; and also Mike Heeb, who is the Executive Secretary.

I know you are aware that consolidation, conversion and realignment of the Defense laboratory system has been the subject of intense study since the summer of '89, when the Deputy Secretary of Defense established the Defense Management Review of Laboratory Consolidation Working Group. This office of the Secretary of Defense and tri-service working group studied various Management alternatives in addition to closures, consolidations and realignments. I want to emphasize that these studies were in the final stages when Congress directed the Secretary to establish a Commission on laboratory consolidation and conversion to review the health

and effectiveness of the Defense laboratories, using the Defense Management studies as a starting point, and to make recommendations to the Secretary on means to improve the operation of the laboratories.

The Federal Advisory Commission has initiated its review. Dr. Hertzfeld, who is the former director of the Defense Research and Engineering, chaired the Commission's first two meetings -- which consisted primarily of information gathering and policy decisions -- and I chaired a part of the third meeting. The Commission has been briefed in detail by the services under consolidation plans. The Base Closure Office has briefed the Commission on the Secretary's proposal for the Base Closure and Realignment Commission.

Our Commission has been briefed on the lab demo program, and they have interviewed staff from the House and Senate Armed Services Committee and the Congressional Research Service to become better acquainted with the history and origins of the Congressional action that created the Commission, and the Commission will meet our mandated 30 September 1991 reporting date to the Secretary of Defense.

The Department is certainly aware of the concerns that the Commission will not be able to provide advice before

the Base Closure and Realignment Commission makes its recommendations. However, the Department must conform to the reporting dates established by Congress for the Base Closure Realignment Commission. As you know, the Secretary of Defense transmitted his recommended closures and realignment to your Commission and the Congress in April. The Defense Base Closure and Realignment Act of 1990 requires that the Department, and I will quote: "consider all military installations inside the United States equally." To comply with this legislation, the Defense laboratories were not excluded from the Department's review of bases for closure or realignment.

Budget realities require the Department to begin implementation of the major components of this restructuring, including laboratory consolidation during fiscal '91. For example, the Budget Enforcement Act of 1990 reduces the Department's total obligation authority by over 20 percent. In addition, the Defense Authorization Act mandates the 20 percent reduction in the acquisition work force.

To achieve these mandated reductions, the Department and the services must begin implementation this year. If the Department were to wait for the Advisory Commission on

Laboratory Consolidation to report to the Secretary of Defense, then any laboratory realignment actions that exceed the thresholds of the Base Closure and Realignment Act would have to wait until late 1993 before they could be implemented. This would seriously reduce the ability of the Department to manage the required reductions. The recommendations of the Laboratory Consolidation Commission will be available for consideration in the '93 and '95 rounds of closure and realignment decision.

Mr. Chairman, that completes my prepared remarks.

CHAIRMAN COURTER: Let me ask you the following question, and I know that others will have questions as well: Did the Executive Director have anything to add to that, let me just ask?

DR. KIMMEL: No, sir.

CHAIRMAN COURTER: The Chairman spoke for the Executive Director, I see.

So, you -- Basically, if I can interpret your testimony, you take the position that, number one, clearly your reading of the applicable statutes mandates that we take up laboratories because of the language saying we had to, and we are to take all bases equally, no exception for labs; that

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

Please refer to this number when responding 930920-1

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for summary judgment seeks to prevent defendants (sometimes referred to herein as the "Government") from taking any action to realign or relocate the NAWC based on the Base Closure Commission's 1991 recommendations to the President on the ground that the Base Closure Commission -- established by Congress to deal with military bases, not labs -- usurped the authority Congress specially and specifically vested in the Lab Commission to consider and determine a schedule for lab consolidation and closure.

The Government has now twice tried to convince this Court that the Base Closure Commission's inclusion of defense laboratories in its 1991 recommendations to the President was lawful. However, neither of the Government's memoranda has sensibly explained why Congress would have established the Lab Commission and directed it to consider consolidation or closure

of labs and to determine a proposed schedule for such consolidation or closure, which Congress then would consider on a flexible, case-by-case basis, when -- as the Government asserts -- Congress supposedly intended that labs be dealt with by the Base Closure Commission and submitted to Congress on an all-or-nothing basis. Of course, there is no sensible explanation for so bizarre a statutory scheme as the one the Government argues for here, and none is provided by defendants.

Instead, the Government's entire argument hinges on a reading of the Base Closure Act that makes no sense and is contrary to settled law. Moreover, the Government now explicitly concedes a number of points that make clear that Congress plainly intended the Lab Commission to deal with issues relevant to the future of labs, including consolidation or closure by a process separate and apart from the apparatus Congress put into place to deal with bases. Therefore, the Government's own filings confirm that summary judgment for plaintiffs is in order.

1. The NAWC is not a "military installation."

Relying on the time-honored device of claiming that the opposing party supposedly has "conceded" an argument that plainly has no merit, the Government asserts (at 5) that plaintiffs "essentially concede" that the NAWC, by definition, is a "military installation." The Government is wrong. Plaintiffs do not concede, "essentially" or otherwise, that the NAWC is a "military installation," as that term is defined in the Base Closure Act.

Indeed, we already have made clear that the Government's contention that labs fall within the definition in § 2910(4) of "military installation" fails for two reasons. First, the supposedly catch-all language of § 2910(4) relied on by the Government ("or other activity under the jurisdiction of the Department of Defense"), and the use of the term "center," must be read in the context of the type of facilities specifically denominated in § 2910(4) -- "base," "camp," "post," "station," "yard," "homeport facility for any ship." All are base-type facilities, in no way similar to labs. The phrase "or other activity under the jurisdiction of the Department of Defense," as well as the use of the generic term "center," must therefore be read as including only such base-type facilities. Indeed, if the "other activity" language were read as broadly as defendants suggest, it would make the specific delineation of bases, camps, etc., in § 2910(4) totally redundant.

Furthermore, § 2910(4) must be read in conjunction with the Lab Commission Act. Because the Lab Commission Act specifically deals with issues involving labs, including consolidation and closure, the use of the general term "military installation" in the Base Closure Act does not overcome the specific grant of authority over consolidation and closure vested in the Lab Commission. See Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957).

2. The Government's explicit concession that "[t]he Base Closure Commission and the Lab Commission processes were entirely separate and distinct and directed toward different ends" confirms the conclusion that the Base Closure Commission lacked authority to deal with labs.

The Government's papers concede (p. 10) that the Lab Commission and Base Closure Commission processes "were entirely separate and distinct and directed toward different ends." Moreover, the Government concedes (pp. 10-11) that the decision-making authority retained by Congress under the two statutes was entirely different. Conceding these points, the Government, nonetheless, argues (p. 10) that ". . . there is no reason why Congress did not intend exactly what it wrote into law -- that the Base Closure Commission recommend military installations, including defense labs, for closure or realignment to the President and, at the same time that the Lab Commission conduct its overall study of defense labs for the Secretary of Defense and Congress."

Of course, there is a very good reason why Congress did not intend the result that the Government argues for -- it defies common sense. The Government offers no conceivable reason why Congress would have enacted an entirely separate and distinct process for labs, by which Congress retained flexible decision-making authority, if Congress intended that process to be wholly ignored so that the Base Closure Commission could deal with labs

that included bases.[1] Stated simply, this Court should not interpret the statutury scheme in the ludicrous manner proposed by the Government.

3. The clear intent of Congress in enacting the Lab Commission Act was to preserve its flexible decision-making over labs rather than have labs treated as part of the all-or-nothing process established in the Base Closure Act to overcome the political deadlock over base closures.

The Government correctly observes (p. 7) that "the Base Closure Act represents a landmark political compromise" and that (p. 1) "The [Base Closure] Act is a comprehensive effort to effectuate the closure or realignment of unneeded military facilities after years of political gridlock that halted such cost saving measures." To achieve its "political compromise," under the Base Closure Act Congress relinquished any flexible decision-making authority in the base closure process, enacting an all-or-nothing approach to its ratification or rejection of the Base Closure Commission's recommendations in order to avoid further "political gridlock."

Congress, however, made plain that it did not intend to relinquish its flexible decision-making power over labs. Instead, in enacting the Lab Commission Act, Congress was careful to preserve its flexible decision-making authority. As the Government itself concedes (pp. 12-13), "The Legislative history

---

1. On page 3 of its Opposition, the Government notes that "bills introduced in Congress to create an exception in the [Base Closure] Act for defense labs died in Committee" -- a peculiar argument in light of the Congressional decision to adopt an entirely separate statutory scheme for labs.

Government itself concedes (pp. 12-13), "The Legislative history of § 246 demonstrates that Congress intended the Lab Commission to assess the Defense Department's evaluations of defense lab reorganization and to 'suggest alternative action for congressional consideration.'" Of course, if Congress had intended that labs be included in the Base Closure Commission's recommendation which Congress could only accept or reject en bloc, there would be no "alternative action for congressional consideration." Clearly, by agreeing that Congress intended that it be able to consider "alternative action" for labs, the Government has agreed that labs should not have been included in the Base Closure Commission process.

For all the reasons set forth in plaintiffs' prior memoranda and above, plaintiffs respectfully request that judgment be entered in their favor.

Respectfully submitted,

Peter S. Greenberg
I.D. No. 12562
Nicole Reimann
I.D. No. 57707
Attorneys for Plaintiffs

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
215-751-2144

Of Counsel.

Dated: September 10, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Plaintiffs' Reply Memorandum in Further Support of Motion for Summary Judgment to be served on the 10th day of September, 1993, by United States First Class Mail, postage prepaid, to:

Jeffrey S. Gutman, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
901 E Street, N.W. - Room 952
Washington, D.C. 20530

Nicole Reimann

Nicole Reimann

Document Separator

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 10/15/93

TO: Dick Eddy
Mary Ann Hook

FAX NUMBER: (703) 602-3245 (703) 696-0550

FROM: Jeff Gutman
Fax No: (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 2 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

I CALLED Ps' COUNSEL TO MAKE A PITCH FOR 30 DAYS TO ANSWER. SHE'LL GET BACK TO ME MONDAY. SHE ALSO MUMBLED SOMETHING ABOUT SERVING PAPER DISCOVERY. 10/15 MN

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 8th day of OCTOBER, 1993, upon consideration of defendants' Motion for Partial Stay, and plaintiffs' Response thereto;

IT IS HEREBY ORDERED that defendants' Motion for Partial Stay is DENIED.

Ronald L. Buckwalter, J.

ENTERED: 10/8/93

CLERK OF COURT

< CONFIRMATION REPORT >

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				2	0°01'13"		

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

DRAFT

REP. JAMES C. GREENWOOD, et al.,

Plaintiffs,

v.

JOHN H. DALTON, Secretary of the Navy, et al.,

Defendants.

Civil Action No. 92-CV-5331

ANSWER

Defendants hereby answer those allegations set forth in Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint") which defendants did not move to dismiss in their Partial Motion to Dismiss, filed July 21, 1993. Defendants do not here answer the remaining allegations of the Complaint because a motion to dismiss those claims pursuant to Fed. R. Civ. P. 12(b)(6) has been timely filed and pending.

First Defense

The allegations answered here fail to state claims upon which relief can be granted.

Second Defense

The Court lacks jurisdiction to review the allegations answered here.

Third Defense

Plaintiffs lack standing to pursue the allegations answered here. (Already decided by Cann -)

Fourth Defense

Gerald Cann, former Assistant Secretary of the Navy, and the

former members of the 1991 Defense Base Closure and Realignment Commission, 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. are not proper parties to the claims answered here.

also current members

Fifth Defense

Defendants specifically answer particular numbered paragraphs of plaintiffs' Complaint as follows. The numbered paragraphs not answered are those which advance factual allegations or claims that defendants previously moved to dismiss:

1. To the extent that this paragraph advances allegations which defendants have not moved to dismiss, defendants deny these allegations.

6. This paragraph summarizes plaintiffs' requests and basis for relief to which no response is required.

7. To the extent that this paragraph advances allegations which defendants have not moved to dismiss, defendants deny these allegations.

8. This paragraph summarizes plaintiffs' requests and basis for relief to which no response is required.

9. Defendants deny that Peter H. Kostmayer is currently a United States Representative. Defendants are without knowledge or information sufficient to form a belief as to the present truth of the remaining allegations in this paragraph.

10-11. Admit. [I assume someone knows where Specter and

Wofford live.]

12-17. **Does the Navy have any information to respond to these allegations??**

18-20. Denied [I assume Cann is out.]

34. Defendants deny the allegations made in this paragraph, but aver that the Defense Base Closure and Realignment Commission is an independent commission with duties specified in the Defense Base Closure and Realignment Act, as amended. Pub. L. No. 101-510, Title XXIX.[1]

35. Admit.

36-40. Denied.

41. Admit. [if answer is filed before end of first session of 103rd Congress.]

42-43. These allegations set forth statements of law to which no response is required. Insofar as a response is deemed required, defendants deny that this Court has jurisdiction over the allegations answered here and admit that venue is proper in this District.

44-56. **NAVY TO ANSWER ALLEGATIONS**

57-58. **I LOOKED IN THIS ACT AND DID NOT SEE A REFERENCE TO THE LABORATORY DEMONSTRATION PROGRAM. DID I MISS IT?**

59-62. **NAVY TO ANSWER ALLEGATIONS**

63. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation

[1] This and all following citations to the Base Closure Act are to provisions of the 1991 version of the Act at issue in this case rather than subsequent amended versions of the Act.

made in this paragraph because the allegation offers no factual basis that allows defendants to understand to what plaintiffs are referring.

77-78. These paragraphs characterize the provisions of the 1988 base closure legislation to which no response is required. The Court is referred to Pub. L. No. 100-526 for a complete statement of its terms and provisions.

81. Defendants admit that the Secretary of Defense included Naval research, development, testing and engineering facilities among his recommendations for base closures and realignments, submitted to the Base Closure Commission on April 12, 1991. Defendants aver that the term "Base Closure List" was created by plaintiffs, not the defendants.

82. Defendants admit that the Secretary of Defense recommended NADC for realignment.

83. Defendants admit that the Secretary of Defense issued his recommendations for base closures and realignments pursuant to the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Title XXIX, § 2903(c)(1) and that the Base Closure Act was part of the Defense Authorization Act of [year].

91-94. Admit. **[Note: the allegations made in ¶¶ 92-94 are drawn almost verbatim from the 1991 Commission report.]**

95. Defendants admit that the Base Closure Act of 1990 established a new independent commission called the Defense Base Closure and Realignment Commission. Defendants deny that the remainder of the paragraph is a complete and accurate summary of

the Base Closure Commission's responsibilities. The Court is refered to §§ 2903(d)(1)-(4) of the Base Closure Act of 1990 for a statement of the Commission's statutory duties.

96. This paragraph summarizes several provisions of the Base Closure Act to which no response is required. The Court is referred to the Act for a complete statement of its terms and provisions.

97. **NAVY NEEDS TO CHECK ON THIS. I DON'T HAVE THE DOD REPORT.**

98. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(5) for the Act's provisions on the GAO.

99. **TRUE???**

100. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(5) for the Act's provisions on the GAO.

101. SEE #97.

102. Defendants deny the allegations in this paragraph, but aver that the July 1, 1991 Report to the President by the Base Closure Commission stated, among other things, at page 1-3 that ". . . GAO has been an integral part of the process."

103. Defendants admit that the Base Closure Act of 1990 established a new independent commission called the Defense Base Closure and Realignment Commission. Defendants deny that the

remainder of the paragraph is a complete and accurate summary of the Base Closure Commission's responsibilities. The Court is refered to §§ 2903(d)(1)-(4) of the Base Closure Act of 1990 for a statement of the Commission's statutory duties.

104. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2902(c) for the Act's provisions on the appointment of members of the Base Closure Commission.

105-06. Admit.

107. **COMMISSION TO ANSWER**

108. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2902(f) regarding vacancies on the Base Closure Commission.

109. **COMMISSION TO ANSWER**

110. Denied.

111. Defendants deny that the procedures listed in this paragraph were the only ones established or employed by the Base Closure Commission to gather evidence to review the Secretary of Defense's recommendations. Defendants, however, aver that the Base Closure Commission conducted xx [**the report lists 14 hearings, including deliberations, so the number 15 may not be right -- the Commission should check**] public hearings in Washington, D.C. to receive information from the Defense Department, legislators and others; that the Base Closure Commission conducted 14 regional hearings to obtain public

comment; that Commissioners visited many of the installations and that the Commission's staff reviewed the military services' processes and data.

112. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(2), (3) for the Act's provisions the timing and content of the Base Closure Commission's report.

113. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(a)-(c) for a partial statement of the Secretary of Defense's responsibilities under the Act.

114. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2903(b) regarding the Secretary of Defense's responsibilities over selection criteria.

115. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2903(b)(1) for a statement of the Act's requirements regarding publication of the Secretary of Defense's proposed selection criteria.

116. **CHECK ON THE DATE**

117. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph because the terms "closely" and "notable" are ambiguous and undefined.

118. Defendants admit that criteria (1)-(4) and (6)-(8) were

among the selection criteria, but aver that criteria (5) listed by plaintiffs should read "the economic impact on local communities."

119-121. **NAVY TO ANSWER.**

124. **CHECK WHEN DOD PUBLISHED THE FINAL CRITERIA.** Defendants admit that Congress did not disapprove the Secretary of Defense's final selection criteria by joint resolution on or before March 15, 1991.

125. This paragraph summarizes and characterizes provisions in the Base Closure Act to which no response is required. The Court is referred to §§ 2903(a), (c) which describes the Secretary of Defense's responsibilities concerning the force structure plan.

138-148 **NAVY TO COMPLETE**

149-50. This paragraph summarizes and characterizes a provision of the Base Closure Act to which no response is required. The Court is referred to § 2903(d)(5) for a statement of GAO's responsibilties.

151. **NAVY TO COMPLETE**

152-61. These allegations summarize and characterize a public GAO report to which no response is required. The Court is referred to the GAO report, which speaks for itself.

168. Denied.

169. This allegation characterizes the reason why Congress allegedly enacted legislation to which no response is required. The Court is referred to the legislative history of the Base

Closure Act for a complete statement of Congress' stated reasons for enacting the Act.

170. This allegation summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2902(e) which deals with the meetings of the Base Closure Commission.

171-74. **COMMISSION TO ANSWER**

175-77. Denied.

178-80. **COMMISSION TO ANSWER**

181. Defendants admit that the Base Closure Commission submitted its Report to the President on July 1, 1991.

203(B). Denied.

203(F). Denied.

205(A)-(C). Denied.

205(G). Denied.

The remainder of plaintiffs' Complaint contains their prayer for relief and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, defendants deny that plaintiffs are entitled to the relief prayed for or to any relief whatsoever.

Defendants hereby specifically deny any and all allegations of plaintiffs' Complaint not otherwise answered or not otherwise subject to defendants' motion to dismiss.

Wherefore, having fully responded to the Complaint, defendants pray that this action be dismissed and that the Court grant such other and further relief as may be appropriate.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
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(202) 514-4775

Dated:

Attorneys for Defendants

< CONFIRMATION REPORT >

10-26-1993(TUE) 15:41

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NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
7285	10-26	15:35		11	0°05'47"	NORMAL	OK
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 92-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J. October 28, 1993

Defendants have filed a partial motion to dismiss the complaint in the above captioned matter. I have concluded in an opinion filed this date in response to plaintiffs' motion for summary judgment that the Base Closure Commission had the authority to close or realign NAWC under the Base Closure Act without regard to any recommendations made by the Lab Commission. In the brief filed in opposition to defendants' motion to dismiss, plaintiffs stated: "For purposes of defendants' motion, should this court conclude that defendants had some authority to close or realign the NAWC under the Base Closure Act, plaintiffs will concede, without prejudice to their appellate rights, that the Third Circuit's decision in Specter v. Garrett forecloses plaintiffs' substantive claims as properly defined. Given the court's holding in Specter, plaintiffs' also will not oppose dismissal of their due process cla[illegible] renew

this claim on appeal." See memorandum of plaintiffs in opposition to defendants' partial motion to dismiss, page 3, note 2.

I will decline to accept plaintiffs' offer in this regard, since existing case law of this circuit permits plaintiffs to pursue their due process claims. Unfortunately, in the present complaint, it is difficult for me to make the distinction that defendants request between a substantive and a procedural claim, the former of which could properly be dismissed. Discovery should help to better define the claims which can or cannot be pursued under the Specter case analyses. A motion for summary judgment, or at least partial summary judgment may then be appropriate.

Finally, in light of the present posture of Specter v. Garrett, this motion will be denied without prejudice.

Accordingly, the following order is entered:

O R D E R

AND NOW, this 28th day of October, 1993, it is hereby ORDERED that the defendants' partial motion to dismiss is DENIED without prejudice.

BY THE COURT:

RONALD L. BUCKWALTER, J.

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

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 92-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J. October 28, 1993

Plaintiffs have moved for summary judgment based upon the theory that the Naval Air Warfare Center - Warminster (NAWC), unlike the Philadelphia Naval Shipyard, is a naval research and development laboratory, not a military base, and therefore was improperly and illegally proposed for realignment and relocation by the Base Closure Commission pursuant to congressionally adopted procedures for base closures and realignments. NAWC, plaintiffs argue, should have been dealt with by the commission specifically created by Congress to deal with labs, not bases, pursuant to the procedures specifically mandated by Congress to deal with labs, not bases.

By way of background, as part of the National Defense Authorization Act for fiscal year 1991 (Defense Authorization Act), Congress enacted Title XXIX of the Defense Authorization Act known as the Defense Base Closure and Realignment Act of 1990

(Base Closure Act). Congress also enacted Title II of the Defense Authorization Act, Section 246, by which it established a commission to be known as the "Commission on the Consolidation and Conversion of Defense, Research and Development Laboratories" (Lab Commission Act).

Based on what is set forth in those two acts, plaintiffs now seek to enjoin the Secretary of Defense and the Secretary of the Navy from taking any action to realign or relocate NAWC based on the Base Closure Commission's July 1, 1991 recommendation. Plaintiffs argue that the Base Closure Commission included defense laboratories in its July 1, 1991 recommendations to the President, despite the fact that Congress had under the Lab Commission Act established an independent commission as the exclusive entity to investigate and recommend laboratory consolidation or closure and to determine a schedule for such consolidations or closures. Further, Congress provided for different procedures to deal with lab realignments and closures than those provided for base closures and realignments.

The crux of plaintiffs' argument, then, is that even though the Base Closure Act provided that the authority provided by that act "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" (Section 2909(a)), NAWC is not a military installation but falls under an exception to the Base Closure Act in light of the provisions of the Lab Commission Act.

Specifically, the Lab Commission Act provides that the commission created by it should no later than September 30, 1991 submit to the Secretary a report containing the commission's recommendations regarding the matters considered and determined by the commission pursuant to subsection (b) no later than thirty (30) days after the date of the submission of the report. The Secretary was obligated by the Act to transmit such report to each House of the Congress, together with any comments that the Secretary considered appropriate. The matters to be considered by the Commission are set forth under subsection (b) of Section 246 as follows:

> 1. The commission shall conduct a study to determine the feasibility or desirability of various means to improve the operation of laboratories of the Department of Defense.
>
> 2. In conducting the study described in this subsection, the commission shall -
>
> (A) consider such means as -
>
> (i) Conversion of some or all such laboratories to government-owned contractor-operated laboratories;
>
> (ii) Modification of the missions and functions of some or all such laboratories; and
>
> (iii) Consolidation or closure of some or all such laboratories.
>
> (B) determine -
>
> (i) The short-term costs and long-term costs savings that are likely to result from such consolidation, closure or conversion; and

(ii) A proposed schedule for each consolidation, closure or conversion of a laboratory considered appropriate by the Commission.

The plaintiffs essentially makes two arguments as to why I should grant summary judgment.

One of plaintiffs' arguments is that NAWC is not a military installation. The Base Closure Act defines the term "military installation" as meaning: "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 lease to facility." Section 2910(4).

I disagree with plaintiffs' argument that NAWC is not a military installation. Plaintiffs themselves in their complaint (paragraphs 44, et seq.) refer to the NADC, now the NAWC, as having functioned as a Naval Research and Development Lab since 1947. Its mission has been to be the principal Navy Research and Development Center for aircraft, airborne anti-submarine warfare, aircraft systems less aircraft-launched weapons systems and surface ship, submarine and aircraft navigation. In addition to weapons systems development, NAWC's work also involves electro-optic, acoustic and micro wave technologies as well as research for the surveillance and targeting of airborne, surface and subsurface targets. NAWC is also the Navy's leading center for upgrading existing Navy aircraft such as F/A-18, F-14, A-6 and AV-8B. The capacities of these aircraft are highly dependent on products conceived and developed by NAWC. Accordingly, I believe

that NAWC would be considered a military installation under the Base Closure Act definition.

Plaintiffs' second and primary argument, it seems to me, is that the Lab Commission Act specifically dealt with issues involving defense laboratories, including consolidation and closure. Therefore, the fact that the language of the Base Closure Act utilized the general term "military installations" does not overcome the specific grant of authority given to the Lab Commission in Section 246 of Title II.

The pertinent question is essentially this:

Through the Lab Commission Act, by which it created a separate commission to perform an independent study of defense labs, did Congress create an exception to the Base Closure Act and divest the Secretary of Defense and Base Closure Commission of authority to recommend defense labs for closure or realignment?

Counsel for both plaintiff and defendant have pointed out various maxims to be applied in the statutory construction which I must undertake. They are:

1. Where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific, R.Co. 278 U.S. 269 (1929).

2. However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same legislation. . .specific

terms prevail over the general in the same or another statute which otherwise might be controlling. (Citations omitted).

3. Where statutes deal with a subject in both general and detailed terms, and there is a conflict between the two, the detailed expression prevails. (Citation omitted).

4. The various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation. (Citations omitted).

5. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress. (Citation omitted).

6. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. Reves v, Ernst & Young, 113 S.Ct. 1163, 1169 (1993).

7. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent. United States v. Smith, 111 S.Ct. 1180, 1185 (1991).

8. Statutory provisions should be interpreted harmoniously with each other when possible. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992).

9. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551 (1974).

With the above maxims of statutory construction in mind, I conclude that the answer to the question posed earlier in this memorandum is: No, Congress did not create an exception to the Base Closure Act divesting the Secretary of Defense and Base Closure Commission of the authority to recommend defense labs for closure or alignment when it created a separate commission to perform an independent study of defense labs under Section 246.

There is absolutely nothing in the record before me to indicate that Congress intended the Lab Commission Act to create an exception to the Base Closure Act. The two statutes are capable of co-existence and indeed are quite different. For example, the Lab Commission's recommendations were made to the Secretary of Defense and Congress. The Secretary was only required to submit the report of the Lab Commission to each house of Congress, together with any comments he considered appropriate. Congress was not required under the Act to do anything with the recommendations.

The Base Closure Commission's recommendations on the other hand were made to the President. The President was required to act upon the recommendations by either approving or disapproving of them within two weeks. If the President approves

the recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving the Commission's recommendations in their entirety.

Finally, the purposes of the Acts are substantially different. The Base Closure Act's purpose is to "provide a fair process that will result in the timely closure and realignment of military installations inside the United States." (Section 2901(b).

The purpose of the Lab Commission Act, on the other hand, was to establish a commission that would "conduct a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." (Section 246(b)). This study also involved the consideration of, among other things, such matters as consolidation or closure of some or all of such laboratories.

The plaintiffs finally argue that even if the Base Closure Commission did have some authority to consider defense laboratories, the specific grant of jurisdiction vested in the Lab Commission along with the later in time deadline of September 30, 1991, for submitting its report, makes it clear that the Base Closure Commission could only exercise its authority after the Lab Commission had made its recommendations. Any other conclusion, plaintiffs suggest, would render the Lab Commission a nullity -- a result that makes no sense. If that were correct, the plaintiffs might have a stronger argument. But there is nothing to suggest on the record before me that the only

conclusion one can reach is that the Base Closure Commission's recommendations as to closings prior to the Lab Commission's report would render the Lab Commission a nullity. That would occur, it seems to me, only if the Base Closure Commission had recommended the closure of all laboratories, and both the President and Congress had under the Base Closure Act agreed with that recommendation.

Moreover, if Congress wished to ensure that the recommendations of the Lab Commission were available for consideration before any action was taken to close or realign defense laboratories pursuant to the Base Closure Act, it could have so provided either in the acts themselves or separate legislation. The defendant has stated in its brief and plaintiffs have not denied it in their reply brief that legislation was introduced in both the House and Senate to block closure or realignment of defense labs until the Lab Commission finished its report to Congress. Both bills died in committee.

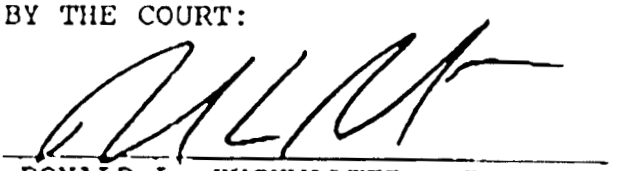
These two statutes in question can, in my judgment, co-exist. The Base Closure Act grants authority to close or realign NAWC without regard to any recommendations made by the Lab Commission established under Section 246.

Accordingly, the following order is entered:

O R D E R

AND NOW, this 28th day of October, 1993, it is hereby ORDERED that the plaintiffs' motion for summary judgment is DENIED.

BY THE COURT:



RONALD L. BUCKWALTER, J.

U.S. Department of Justice

[redacted], DC 20530

CIVIL DIVISION

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FROM: J. Gutman

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THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

(2) Mary Ann Hook

703-696-0550

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				13	0°07'17"		

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Please refer to this number when responding 931115-5

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS DIRECTED TO DEFENDANTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs request that defendants produce for inspection and copying the documents specified below.

DEFINITIONS

As used herein:

(A) The term "NAWC" refers to the Naval Air Warfare Center at Warminster, Pennsylvania, formerly denominated Naval Air Development Center.

(B) The term "Lab Commission" refers to the Commission on Consolidation and Conversion of Defense Research and Development Laboratories.

(C) The term "Base Closure Commission" refers to Defense Base Closure and Realignment Commission.

(D) The word "document" includes but is not limited to the original and any nonidentical copy of any of the following (regardless of however or by whomever prepared, produced, or reproduced): books, records, reports, memoranda, drafts, notes, letters, minutes, telegrams, correspondence, messages, diaries, calendar or diary entries, schedules, maps, graphs, charts, contracts, releases, appraisals, valuations, estimates, opinions, studies, analyses, summaries, speeches, magazines, booklets, pamphlets, circulars, bulletins, instructions, photographs, purchase orders, bills, checks, tabulations, questionnaires, films or tapes, surveys, records (of meetings, conferences, and telephone or other conversations or communications), tables, drawings, sketches, tax reports, working papers, financial statements, and computer data as well as any other tangible thing on which information is recorded in writing, sound, or in any other manner, and any preliminary versions, drafts, or revisions of any of the foregoing and any supporting, underlying, or preparatory material.

INSTRUCTIONS

1. The documents requested should be made available for inspection and copying during regular business hours at the offices of Schnader, Harrison, Segal and Lewis, Suite 3600, 1600 Market Street, Philadelphia, Pennsylvania 19103, within thirty days of the service of this request.

2. If you do not produce a document in whole or in part because of a claim of privilege, set forth the privilege

claimed; identify the facts upon which you rely to support the claim of privilege; and identify all documents for which such privilege is claimed. In particular, if you refuse to identify a communication because of a claim of attorney-client privilege, identify the author of the communication; the capacity in which the author was acting when he made the communication; the recipient of the communication; any persons present when the communication was made; persons to whom the communication was disclosed; and the subjects or topics discussed in the communication.

3. If any document responsive to any request was, but is no longer, in your possession or subject to your control, or in existence, state whether it:

(a) is missing or lost;

(b) has been destroyed;

(c) has been transferred voluntarily to others and, if so, the circumstances surrounding the authorization for such disposition and state the date or approximate date thereof.

DOCUMENTS REQUESTED

1. All documents relating to, referring to, evidencing or concerning internal communications, meetings or conferences regarding the Navy's or Department of Defense's implementation of the Laboratory Demonstration Program.

2. All documents relating to, referring to, evidencing or concerning internal communications, meetings or confer-

ences within the Navy or Department of Defense regarding any conclusions or results of the Laboratory Demonstration Program.

3. All documents relating to, referring to, evidencing or concerning internal communications, meetings or conferences within the Navy, the Department of Defense or the Base Closure Commission regarding the NAWC closure and realignment process or recommendations.

4. All documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Base Closure Commission and the Navy regarding the base closure and realignment process or recommendations.

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

6. All documents relating to, referring to, evidencing or concerning communications, meetings or conferences between the Base Closure Commission or the Navy and the GAO regarding the Naval base closure and realignment process or recommendations.

7. All documents submitted by the Navy to the Base Closure Commission and/or the GAO relating to, referring to, evidencing or concerning base closures and realignments.

8. All documents, not otherwise produced, relating to, referring to, evidencing or concerning base closures or realignments for all Navy facilities that were signed, received,

prepared, reviewed by or otherwise within the possession of the Base Closure Commission.

9. All documents received by, created by or in the possession of Gerald Cann referring or relating to laboratory realignment, relocation, consolidation or closure.

10. All documents, not otherwise produced, relating to a reduction in force or layoffs at the NAWC.

11. All documents, not otherwise produced, relating to the cost of closing the NAWC.

12. All documents, not otherwise produced, relating to, referring to, evidencing or concerning environmental clean-up costs at the NAWC and the Navy's plan to clean up NAWC after closure.

13. All documents evidencing or relating to Department of Defense's or Navy's recommendations for restructuring research and development laboratories from the period January 1989 to December 1991.

14. All documents relating to the December 1989 memorandum issued by the Under Secretary of Defense for Acquisition entitled "Strengthening and Improving Technology Management."

15. All documents evidencing or relating to the Navy's response to the December 1989 memorandum issued by the Under

Secretary of Defense for Acquisition entitled "Strengthening and Improving Technology Management."

16. All documents referring, evidencing or relating to the Department of Defense's February 13, 1991 memorandum requiring the implementation of an "internal control plan" to be implemented in connection with Base Closure recommendations.

17. All documents referring, evidencing or relating to the directive issued by the Navy that anyone providing information as part of the Base Closure Process certify that the information provided is true and correct.

18. All documents relating or referring to the use of the Cost of Base and Realignment (COBRA) model to generate cost and savings figures for laboratories.

19. All documents relating or referring to any communications, meetings or conferences regarding any limitations of COBRA model to accurately forecast cost and savings associated with realignment of laboratories.

20. All documents relating or referring to any communications regarding the data provided by NAWC to be Navy for input into the COBRA model.

21. All cost estimates for the realignment of NAWC.

22. All documents relating or referring to NAVSEA's vacating the St. Inigoes facility.

23. All documents relating or referring to the cost of constructing a facility for NAWC in the Patuxent River.

24. All contracts, construction documents, timetables and schedules relating to the realignment of NAWC in Patuxent River.

25. All documents that relate or refer to the environmental and/or economic impact on Warminster and the surrounding communities of the relocation of NAWC.

Nicole Reimann

Peter S. Greenberg
Nicole Reimann
Attorneys for Plaintiffs

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
215-751-2144

Of Counsel.

Dated: November 2, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Plaintiffs' First Set of Requests for Production of Documents Directed to Defendants to be served on the 2nd day of November, 1993, by United States First Class Mail, postage prepaid, to:

Jeffrey S. Gutman, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
901 E Street, N.W. - Room 952
Washington, D.C. 20530

Nicole Reimann

Nicole Reimann

Document Separator

DRAFT Z

11/8

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	Civil Action No. 92-CV-5331

ANSWER

Defendants hereby answer those allegations set forth in Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint") except those that relate to the Commission on Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commission"). By Memorandum and Order of November 1, 1993, the Court denied, as a matter of law, plaintiffs' motion for summary judgment on their claim that the Lab Commission had exclusive authority in 1991 to recommend the closure or realignment of the Naval Air Warfare Center Aircraft Division Warminster. Because claims involving the Lab Commission are, therefore, subject to dismissal, defendants do not here respond to those claims.

First Defense

The Complaint fails to state claims upon which relief can be granted.

Second Defense

The Court lacks jurisdiction to review the allegations answered here.

Third Defense

Plaintiffs lack standing to pursue the allegations answered here.

Fourth Defense

Gerald Cann, former Assistant Secretary of the Navy; the former members of the 1991 Defense Base Closure and Realignment Commission, 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.; the Lab Commission and its former members, Charles E. Adolph, William C. McCorkle, Victor Reis, James F. Decker, James C. McGroddy, Frank D. Verderame, Earle L. Messere, O'Dean P. Judd, Solomon J. Buchsbaum, Robert M. Hillyer, John Michael Palms, Richard R. Paul and John W. Lyons are not proper parties to this action.

Fifth Defense

Defendants specifically answer particular numbered paragraphs of plaintiffs' Complaint as follows. The numbered paragraphs not answered are those which advance factual allegations or claims relating to the Lab Commission.

The following paragraphs or subparagraphs contain allegations that the Third Circuit has determined in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992), are either unreviewable or fail to state a claim for which relief can be granted:

By answering these, or any other claims, defendants do not waive

any defenses to them.

1-2. NAVY AND COMMISSION

6. This paragraph summarizes plaintiffs' requests and basis for relief to which no response is required.

7. NAVY AND COMMISSION very broad- unspecific

8. This paragraph summarizes plaintiffs' requests and basis for relief to which no response is required.

9. Defendants deny that Peter H. Kostmayer is currently a United States Representative. Defendants are without knowledge or information sufficient to form a belief as to the present truth of the remaining allegations in this paragraph.

10-11. Admit. [I assume someone knows where Specter and Wofford live.]

12-17. **Does the Navy have any information to respond to these allegations??**

18-20. Denied [I assume Cann is out.]

34. Defendants deny the allegations made in this paragraph, but aver that the Defense Base Closure and Realignment Commission is an independent commission with duties specified in the Defense Base Closure and Realignment Act, as amended. Pub. L. No. 101-510, Title XXIX.[1] ✓

past Lab members?

35. Admit. ✓

36-40. Denied. ✓ formal ~~except~~ ~~Stet~~

41. Admit. [if answer is filed before end of first session

---

[1] This and all following citations to the Base Closure Act are to provisions of the 1991 version of the Act at issue in this case rather than subsequent amended versions of the Act.

of 103rd Congress.]

42-43. These allegations set forth statements of law to which no response is required. Insofar as a response is deemed required, defendants deny that this Court has jurisdiction over the allegations answered here and admit that venue is proper in this District.

44-54. **NAVY TO ANSWER ALLEGATIONS** — sat-yes!

55-80. **LOOKING AT THESE ALLEGATIONS AGAIN, I SEE THESE AS CONNECTED TO THE LAB COMMISSION CLAIM. LETS NOT ANSWER THEM.** it is ok?

81. Defendants admit that the Secretary of Defense included Naval research, development, testing and engineering facilities among his recommendations for base closures and realignments, submitted to the Base Closure Commission on April 12, 1991. Defendants aver that the term "Base Closure List" was created by plaintiffs, not the defendants.

82. Defendants admit that the Secretary of Defense recommended NADC for realignment and aver that NADC is now known as the Naval Air Warfare Center Aircraft Division Warminster.

83. Defendants admit that the Secretary of Defense issued his recommendations for base closures and realignments pursuant to the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Title XXIX, § 2903(c)(1) and that the Base Closure Act was part of the Defense Authorization Act of [**year**].

84-90 NO ANSWER -- LAB COMMISSION STUFF

91-94. Admit. [**Note: the allegations made in ¶¶ 92-94 are drawn almost verbatim from the 1991 Commission report.**]

95. Defendants admit that the Base Closure Act of 1990 established a new independent commission called the Defense Base Closure and Realignment Commission. Defendants deny that the remainder of the paragraph is a complete and accurate summary of the Base Closure Commission's responsibilities. The Court is referred to §§ 2903(d)(1)-(4) of the Base Closure Act of 1990 for a statement of the Commission's statutory duties.

96. This paragraph summarizes several provisions of the Base Closure Act to which no response is required. The Court is referred to the Act for a complete statement of its terms and provisions.

97. **NAVY NEEDS TO CHECK ON THIS. I DON'T HAVE THE DOD REPORT.**

98. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(5) for the Act's provisions on the GAO.

99. **TRUE???** DK ?

100. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(5) for the Act's provisions on the GAO.

101. SEE #97.

102. Defendants deny the allegations in this paragraph, but aver that the July 1, 1991 Report to the President by the Base Closure Commission stated, among other things, at page 1-3 that

". . . GAO has been an integral part of the process."

103. Defendants admit that the Base Closure Act of 1990 established a new independent commission called the Defense Base Closure and Realignment Commission. Defendants deny that the remainder of the paragraph is a complete and accurate summary of the Base Closure Commission's responsibilities. The Court is referred to §§ 2903(d)(1)-(4) of the Base Closure Act of 1990 for a statement of the Commission's statutory duties.

104. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2902(c) for the Act's provisions on the appointment of members of the Base Closure Commission.

105-06. Admit.

107. **COMMISSION TO ANSWER**

108. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2902(f) regarding vacancies on the Base Closure Commission.

109. **COMMISSION TO ANSWER**

110. Denied.

111. Defendants deny that the procedures listed in this paragraph were the only ones established or employed by the Base Closure Commission to gather evidence to review the Secretary of Defense's recommendations. Defendants, however, aver that the Base Closure Commission conducted xx [**the report lists 14 hearings, including deliberations, so the number 15 may not be**

right -- the Commission should check] public hearings in Washington, D.C. to receive information from the Defense Department, legislators and others; that the Base Closure Commission conducted 14 regional hearings to obtain public comment; that Commissioners visited many of the installations and that the Commission's staff reviewed the military services' processes and data.

112. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(d)(2), (3) for the Act's provisions the timing and content of the Base Closure Commission's report.

113. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to §§ 2903(a)-(c) for a partial statement of the Secretary of Defense's responsibilities under the Act.

114. This paragraph summarizes and characterizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2903(b) regarding the Secretary of Defense's responsibilities over selection criteria.

115. This paragraph summarizes provisions of the Base Closure Act to which no response is required. The Court is referred to § 2903(b)(1) for a statement of the Act's requirements regarding publication of the Secretary of Defense's proposed selection criteria.

116. **CHECK ON THE DATE**

117. Defendants are without knowledge or information

sufficient to form a belief as to the truth of the allegations made in this paragraph because the terms "closely" and "notable" are ambiguous and undefined.

118. Defendants admit that criteria (1)-(4) and (6)-(8) were among the selection criteria, but aver that criteria (5) listed by plaintiffs should read "the economic impact on local communities." Other errors - see com - # Selection criteria 1991

119-121. **NAVY TO ANSWER.**

122. Denied.

123. **NAVY TO ANSWER.** - be very specific - "deliberations"

124. **CHECK WHEN DOD PUBLISHED THE FINAL CRITERIA.** — Defendants admit that Congress did not disapprove the Secretary of Defense's final selection criteria by joint resolution on or before March 15, 1991.

125. This paragraph summarizes and characterizes provisions in the Base Closure Act to which no response is required. The Court is referred to §§ 2903(a), (c) which describes the Secretary of Defense's responsibilities concerning the force structure plan.

126. **NAVY**

127. I think this true, but I don't recall the date the BSC was set up or how many members it had. Nhil

128. Denied [the BSC only looked at Navy and Marine facilities, eh eh]

129. Defendants admit that Phase I in the BSC's analysis for the 1991 round of base closures and realignments involved a

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

U.S. REP. JAMES C. GREENWOOD, et al.,	:	Please refer to this number when responding 931112-Y
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	:	
Defendants.	:	

MEMORANDUM OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S DENIAL OF THEIR MOTION FOR PARTIAL STAY OF PROCEEDINGS

Plaintiffs, employees of the Naval Air Warfare Center-Warminster ("NAWC"), their unions and members of the Pennsylvania Congressional Delegation, submit this memorandum of law in opposition to defendants' motion for reconsideration of this Court's denial of their motion for partial stay of proceedings.

INTRODUCTION

On October 8, 1993, this Court denied defendants' motion for partial stay. Defendants' motion sought to stay plaintiffs' claims concerning defendants' failure to follow the procedures mandated in the Base Closure Act. The ground for defendants' motion was that they intended to petition for certiorari in Specter v. Garrett, 995 F.2d 404 (3d Cir. 1993) ("Specter II").

Defendants now move for reconsideration of this Court's denial of their motion for partial stay on the ground that the United States Supreme Court has granted defendants' petition for writ of certiorari. However, the fact that the Supreme Court has granted certiorari in Specter II does not alter the conclusion that a stay of these proceedings would be inappropriate because there is, at the least, a fair possibility that employees of the NAWC will be damaged by a stay and defendants have not argued, much less demonstrated, that defendants will suffer some hardship or inequity if a stay is not granted. Thus, defendants' motion for reconsideration should be denied.

ARGUMENT

Defendants' motion for reconsideration is ostensibly motivated by the fact that the Supreme Court has granted certiorari in Specter II. In particular, defendants contend that any concerns this Court may have had based on either the uncertainty of whether the Supreme Court would hear Specter II or the indefiniteness of the delay that would result in awaiting resolution of Specter II have been put to rest by the Supreme Court's grant of certiorari. In addition, defendants contend that "staying these claims would be consistent with the stays to which the same claims in Specter continue to be subject." Defendants' Memorandum at 3. However, neither the Supreme Court's grant of certiorari nor the Third Circuit's stay of the mandate in Specter II is relevant to the issue of whether a stay is appropriate here. Indeed, as plaintiffs argued in their memorandum in opposition to defendants' motion for partial stay, defendants'

motion for stay is nothing more than a transparent attempt to postpone litigating substantial claims of plaintiffs under the settled law of this circuit merely because the law does not favor defendants.

As plaintiffs showed in their memorandum in opposition to defendants' motion for stay, before a stay may be entered, defendants must demonstrate "a clear case of hardship or inequity" if there is "even a fair possibility" a stay will damage plaintiffs. See Landis v. North American Co., 299 U.S. 248 (1936); Gold v. Johns-Manville Sales Corp., 723 F.2d 1068 (3d Cir. 1983).

Patently, implementation of defendants' decision to relocate the NAWC will result in hundreds of employees either losing their jobs or being compelled to relocate. That defendants have deliberately avoided any discussion of the damage plaintiffs will suffer if they are forced to await a decision in Specter II does not change the fact that there can be no doubt that there is, at the least, a fair possibility that plaintiffs will be damaged by a stay. Indeed, plaintiffs have been informed that the contract for the two buildings in Patuxent River, the site to which the NAWC is to be relocated, was awarded on September 27, 1993, and ground breaking for those two buildings was scheduled for October 29, 1993. Plainly, defendants are moving ahead with their plans to relocate and realign the NAWC.[1]

---

1. Of course, defendants proceed with the challenged relocation and realignment of the NAWC at their own peril. Having chosen to proceed, defendants cannot be heard to complain, (continued...)

Notwithstanding this, at the least, fair possibility that plaintiffs will be damaged by a stay, defendants have not demonstrated that hardship or inequity would result if plaintiffs' procedural claim is not stayed. Thus, according to well-settled law, defendants' motion for reconsideration should be denied.

Moreover, this conclusion is not altered by the fact that the Third Circuit has stayed its mandate in Specter II. That the Court in Specter II stayed its mandate pursuant to Fed.R.App.P. 41(b) has no relevance to whether a stay is appropriate here. Plaintiffs here are not the same as the Specter II plaintiffs, nor is the facility proposed for relocation the same. Under these circumstances plaintiffs here should not be required to await the outcome of Specter II. Compare Bechtel Corp. v. Local 215, Laborers' Int'l. Union, 544 F.2d 1207 (3d Cir. 1976) (court did not abuse its discretion by staying tort claim between the parties pending arbitration of contract claim between the same parties where arbitration of contract claim might resolve tort claim).

1.(...continued)
notwithstanding any work completed or monies spent, if this Court determines that the relocation is unlawful and enjoins further action to realign the NAWC.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that defendants' motion for reconsideration be denied.

Respectfully submitted,

Nicole Reimann

Peter S. Greenberg (No. 12562)
Nicole Reimann (No. 57707)

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
215-751-2144

Of Counsel.

Dated: November 4, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Memorandum of Plaintiffs in Opposition to Defendants' Motion for Reconsideration of the Court's Denial of Their Motion for Partial Stay of Proceedings to be served on the 4th day of November, 1993, by United States First Class Mail, postage prepaid, to:

Jeffrey S. Gutman, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
901 E Street, N.W. - Room 952
Washington, D.C. 20530

Nicole Reimann

Nicole Reimann

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11-10-1993(WED) 09:47

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				7	0°03'49"		

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Washington, D.C. 20530

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TO: Mary Ann Hooks

Dick Epp

FAX NUMBER: (703) 696-0550
(703) 602-3245

FROM: Jeff Gutman
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				6	0°04'04"		

DEFENSE BASE CLOSURE
AND REALIGNMENT COMMISSION
Suite 1425
1700 North Moore Street
Arlington, Virginia 22209

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DATE: NOV 15

TO: Jeff Gutman

FAX #:

FROM: Mary Hook
Toby G. Messitt
→ Director of the Executive Secretariat

NUMBER OF PAGES (including cover): 6

CONTENTS:

Comments to Letter —

YKX

U.S. Department of Justice

VMG:JGutman
145-6-3245

Telephone:
(202) 514-4775

Washington, DC 20530

Ms. Nicole Reimann
Schnader, Harrison, Segal & Lewis
1600 Market St. Suite 3600
Philadelphia, PA 19103

Re: Greenwood, et al., v. Dalton, et al.,
No. 92-CV-5331

Dear Nicole:

During our conversation of November 10, you invited defendants to propose a discovery plan in response to Plaintiffs' First Set of Requests for Production of Documents Directed to Defendants (hereinafter the "discovery request"). By proposing such a plan, defendants neither concede that responsive documents exist to each of your requests, waive any privileges that may attach to responsive documents, nor waive any relevancy objections.

Moreover, we agreed that implementation of such a plan would relieve defendants from the requirement that they respond to the entire discovery request in thirty days. Pursuant to Fed. R. Civ. P. 29, attached hereto is a proposed stipulation that waives that requirement.

At the outset, defendants advance four relevancy and overbreadth objections to the discovery request. First, as you know, ~~the President approved the~~ realignment of NAWC was a result of the during the 1991 round of base closings and realignments. The Defense Base Closure and Realignment Commission (the "Base Closure Commission") has since made recommendations in the 1993 round of base closings and realignments. Only documents relating to the 1991 round are relevant in this case. Your requests do not distinguish between the two rounds or contain any date restrictions. To the extent, therefore, that plaintiffs request documents related to the 1993 round of base closings and realignments to which NAWC was not subject, see, e.g., Requests 4, 6, 7, 9, 18, 19, defendants object to that request.[1]

[1] Similarly, to the extent that any of the discovery requests can be read as seeking documents related to the 1988 Defense Secretary's Commission on Base Realignment and Closure or the process by which that Commission recommended military

Second, several of plaintiffs' requests generally seek or can be interpreted to seek documents related to any and all naval installations, including, for example, naval stations, naval air stations, and naval shipyards. See Requests 4, 6, 7, 8. Other requests are yet broader, and seek not only Navy documents, but any Department of Defense document relating to the "COBRA" model. See Requests 18, 19. This action, however, challenges the realignment only of one naval facility -- NAWC. Documents dealing with other installations involved in the 1991 base closure and realignment process or documents relating to other services' use of the "COBRA" model are irrelevant to this action.

Third, several of plaintiffs' requests seek documents relating to the claim that the Commission on Consolidation and Conversion of Defense Research and Development Laboratories (the "Lab Commis-sion"). By Memorandum and Order entered November 1, the Court denied plaintiffs' motion for summary judgment on that claim as a matter of law. The Court's failure to dismiss that claim appears unintentional rather than the product of any view that the claim remains legally viable. As a result, requests relating to the Lab Commission claim are no longer relevant, if they ever were, and defendants will not produce any documents responsive to these requests.

Specifically, paragraphs 54-89 of the Complaint contain allegations related to Congressional oversight of defense labs and the services' responses to it that form the basis of plaintiffs' claim that Congress intended the Lab Commission to have exclusive authority to recommend defense labs for closure or consolidation. Paragraph 58, for example, alleges that Congress required the Defense Department to establish the Laboratory Demonstration Program. Paragraph 61 alleges that the Under Secretary of Defense for Acquisition issued a memorandum entitled "Strengthening and Improving Technology Management" as part of an effort to implement the Congressional directive.

Requests 1 and 2 seek documents related to the Laboratory Demonstration Program. Requests 13-15 seek documents dealing with the memorandum referred to in paragraph 61 and actions alleged to have resulted from that memorandum. None of these requests are relevant to plaintiffs' remaining claims of violations of the Base Closure Act.

Moreover, paragraphs 79-80 of the Complaint alleges that defendant Gerald Cann recommended closure or realignment of defense labs in violation of the Lab Commission Act. Request 9 seeks documents received, created or possessed by Mr. Cann concerning this allegation. The Court has rejected plaintiffs' claim that the Lab Commission Act was violated and, therefore, any documents relating to that claim are irrelevant.

---

installations for closure or realignment, defendants object to such requests as irrelevant to this action.

Fourth, plaintiffs appear to request documents relating to the process by which NAWC has been or will be realigned following the President's decision to accept the Base Closure Commission's recommendation to realign NAWC, see Requests 3, 4, 5, 6, 10, 12, 24, as well as documents relating to costs of realignment that may have been created after the President's decision. See Requests Nos. 11, 12, 21, 23, 25. Post-decisional materials of this sort are irrelevant to the claims that certain actions of the defendants during the 1991 base closure process were unlawful.

With regard to the discovery plan, defendants propose that the first stage of discovery occur at the Base Closure Commission. As you know, it is the Commission's policy that all unclassified documents that it creates or receives are open to the public. I understand that all such documents relating to the 1991 and 1993 rounds of base closures and realignments have been indexed and filed in the Commission's library. Notwithstanding the objections above, given the Commission's document access policy, plaintiffs are welcome to examine any and all unclassified Commission documents. Plaintiffs may copy Commission documents at self-service ~~xerox~~ machines located in the library at Commission expense. If the volume of documents plaintiffs intend to copy becomes excessive, the Commission reserves the right to reconsider its offer to allow free copying.

You are welcome to begin reviewing Commission documents at your convenience during regular business hours, 9 a.m. to 5 p.m. The Commission asks only that you provide ~~three~~ day's notice prior to ~~arrival.~~ Please contact Toby Messitt at (703) 696-~~0550~~ to do so. Should substantive questions arise about Commission documents during your review, please contact the Commission's counsel, Mary Ann Hook. If necessary, she will consult with me and will provide you a prompt response.

Your review of the Commission's documents should assist you in focusing and defining the categories of documents you may wish to review at the Navy. The extensive amounts of information that you have requested from the Navy are located in several different offices and commands. The Navy is in the process of determining which offices and commands maintain relevant materials and of assessing the volume of documents that may be responsive. I have asked the Navy first to identify and review documents relating to the costs of realigning NAWC created or received prior to or during the base closure process.

Once you have completed your review of Commission documents,

I would ask that you provide me with a list of categories of Navy documents of most interest to you. Depending on when you begin your examination of Commission documents and when you complete that review, we should be able to tell you fairly quickly where

the relevant and responsive Navy documents of greatest interest to you are located and roughly how many documents there are. We can then arrange a mutually convenient date for your review of these documents at the Navy. During or after your review of these records, you may notify me of additional categories of documents that you wish to review. I expect that your examination of Navy documents that we agree are relevant and responsive would continue in stages that both accommodates the Navy's need to locate and review documents and your schedule.

Defendants understand that your review of Navy documents that we determine are relevant and responsive in accordance with the four points above does not waive any claim that plaintiffs many have that additional categories of documents are relevant.

Should you have any questions regarding this proposal, please do not hesitate to call me.

Very truly yours,

Jeffrey S. Gutman
Trial Attorney
Federal Programs Branch
Civil Division

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	

STIPULATION AND ORDER

By their undersigned counsel and pursuant to Fed. R. Civ. P. 29, plaintiffs and defendants hereby stipulate as follows:

1. Defendants shall not be required to respond to Plaintiffs' First Set of Requests for Production of Documents Directed to Defendants (the "Requests") within thirty days of service;

2. Defendants shall make available to plaintiffs categories of nonprivileged (nonclassified) documents responsive to the Requests in a manner and under a timetable agreed upon by counsel;

3. This stipulation does not preclude either party from seeking relief from this Court.

David J. Anderson
Vincent M. Garvey
Jeffrey S. Gutman
Attorneys for Defendants

Peter S. Greenberg
Nicole Reimann
Attorneys for Plaintiffs

IT IS SO ORDERED.

Dated:

UNITED STATES DISTRICT JUDGE

< CONFIRMATION REPORT >

11-15-1993(MON) 16:33

[TRANSMIT]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
7426	11-15	16:30	92026168202	5	0°02'41"	NORM.E	U05000
				5	0°02'41"		

WRONG PAGE COUNT.

Document Separator

U.S. Department of Justice

Washington, DC 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 12/1/93 — dsaves 12/2 ✓

TO: ① Dick Eddy
② MaryAnn Hook

FAX NUMBER: ① 703-602-3245 ② 703-696-0550

FROM: Jeff Gutman
Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FTS)
9th FLOOR

THERE ARE A TOTAL OF 5 **PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.**

Please review and comment by COB Thursday.

Sorry for the short turnaround time.

-Jeff

DRAFT 1
12/1

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	Civil Action No. 92-CV-5331

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
OF THEIR MOTION FOR CERTIFICATION

By Memorandum and Order entered November 1, 1993, this Court denied plaintiffs' motion for summary judgment on their claim that § 246 of the 1991 Defense Authorization Act, which established the Lab Commission, divested the Secretary of Defense and the Base Closure Commission of jurisdiction to recommend the closure or realignment of defense laboratories such as Warminster under the Defense Base Closure and Realignment Act. Pursuant to 28 U.S.C. § 1292(b), plaintiffs move this Court to certify for this issue for appeal. Such motions should be granted "sparingly," Seligson v. Plum Tree, 61 F.R.D. 343, 347 (E.D. Pa. 1973) (citing Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958)), and this motion should be denied for two reasons.

First, § 1292(b) authorizes certifications only in cases in which the Court finds that the question sought to be certified involves a "substantial ground for a difference of opinion." The Court's rejection of plaintiffs' claim is alone not enough to satisfy this standard, particularly where, as here, plaintiffs cannot cite to conflicting authority. See 16 C. Wright and A.

in their support.

1

matter, the Court concluded that "[t]here is absolutely nothing in the record before me to indicate that Congress intended the Lab Commission Act to create an exception to the Base Closure Act." Memorandum and Order at 7 (emphasis added). Equally emphatically, the Court found "nothing on the record before me" to support plaintiffs' argument that such a conclusion would nullify the Lab Commission Act. Id. at 8-9.

In short, the Court fully accepted defendants' arguments that plaintiffs' claim was insubstantial. Plaintiffs certainly disagree, but that disagreement alone is insufficient to generate a "substantial ground for a difference of opinion" on an issue of statutory construction so definitively and unequivocally decided by this Court.

Second, plaintiffs observe that the chief purpose of certifying issues for interlocutory appeal is to speed the resolution of dispositive issues. Plaintiffs, however, are in no position to request such expedition when they waited so long to move for summary judgment on the claim at issue. Not only did they wait until September, 1992 -- over a year after the President approved the Base Closure Commission's recommendation to realign Warminster -- to file this suit, but plaintiffs did not move for summary judgment on this purely legal claim until July, 1993. Plaintiffs' failure to seek a prompt resolution of this issue in the district court counsels against this Court's exercise of its discretion to certify the issue for interlocutory appeal prior to final judgment.

Miller, Federal Practice and Procedure: Jurisdiction § 3930 at 157 (1977) ("District judges have not been bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression."). Consequently, courts have found the standard synonymous with substantial likelihood of success on appeal. Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167, 172 (N.D. Ill. 1959); Berger v. United States, 170 F. Supp. 795, 796 (S.D.N.Y. 1959).

Here, the Court had no difficulty disposing of plaintiffs' claim and they are unlikely to prevail on appeal. The Court first rejected plaintiffs' assertion that Warminster was not a "military installation" subject to the Base Closure Act. The Court noted that the Base Closure Act expansively defines the military installations that the Secretary and Base Closure Commission are authorized to recommend for closure or realignment. See § 2910(4); Memorandum and Order at 4. Citing extensively from plaintiffs' own Complaint which detailed the military functions of Warminster, the Court concluded that Warminster was a "military installation." Memorandum and Order at 4-5.

Next, the Court rejected plaintiffs' claim that Congress' creation of the Lab Commission implied an exception to the Base Closure Act and divested the Secretary and Base Closure Commission of authority to recommend defense labs for closure or realignment. Hardly employing language suggesting that a "substantial ground for a difference of opinion" existed over the

CONCLUSION

For the foregoing reasons, plaintiffs' motion for certification should be denied.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
U.S. Department of Justice
Civil Division
901 E St., N.W. Room 952
Washington, D.C. 20530
(202) 514-4775

Attorneys for Defendants

Dated: December 3, 1993

< CONFIRMATION REPORT >

12-01-1993(WED) 14:49

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
7542	12-01	14:45		5	0°03'03"	NORMAL	OK
				5	0°03'03"		

Document Separator

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

Please refer to this number when responding 93207-6

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION

By Memorandum and Order entered November 1, 1993, this Court denied plaintiffs' motion for summary judgment on their claim that § 246 of the 1991 Defense Authorization Act, which established the Lab Commission, divested the Secretary of Defense and the Base Closure Commission of jurisdiction to recommend the closure or realignment of defense laboratories such as Naval Air Warfare Center Aircraft Division Warminster (NAWC) under the Defense Base Closure and Realignment Act. Pursuant to 28 U.S.C. § 1292(b), plaintiffs have moved this Court to certify this issue for appeal. Such motions should be granted "sparingly," Seligson v. Plum Tree, 61 F.R.D. 343, 347 (E.D. Pa. 1973) (citing Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958)), and this motion should be denied for two reasons.

First, § 1292(b) authorizes certifications only in cases in which the Court finds that the question sought to be certified involves a "substantial ground for a difference of opinion." The Court's rejection of plaintiffs' claim, without more, is not sufficient to demonstrate that this standard is met, particularly

where, as here, plaintiffs cannot cite to conflicting authority in their motion. See 16 C. Wright and A. Miller, Federal Practice and Procedure: Jurisdiction § 3930 at 157 (1977) ("District judges have not been bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression."). Consequently, courts have found the standard synonymous with substantial likelihood of success on appeal. Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167, 172 (N.D. Ill. 1959); Berger v. United States, 170 F. Supp. 795, 796 (S.D.N.Y. 1959).

Here, the Court had no difficulty disposing of plaintiffs' claim, and they are unlikely to prevail on appeal. The Court first rejected plaintiffs' assertion that NAWC was not a "military installation" subject to the Base Closure Act. The Court noted that the Base Closure Act expansively defines the military installations that the Secretary and Base Closure Commission are authorized to recommend for closure or realignment. See § 2910(4); Memorandum and Order at 4. Citing extensively from plaintiffs' own Complaint, which detailed the military functions of NAWC, the Court concluded that NAWC was a "military installation." Memorandum and Order at 4-5.

Next, the Court rejected plaintiffs' claim that Congress' creation of the Lab Commission implied an exception to the Base Closure Act and divested the Secretary and Base Closure Commission of authority to recommend defense labs for closure or realignment. Far from suggesting that a "substantial ground for

a difference of opinion" existed over the matter, the Court concluded unequivocally that, "[t]here is absolutely nothing in the record before me to indicate that Congress intended the Lab Commission Act to create an exception to the Base Closure Act." Memorandum and Order at 7 (emphasis added). Equally emphatically, the Court found "nothing on the record before me" to support plaintiffs' argument that such a conclusion would nullify the Lab Commission Act. Id. at 8-9.

In short, this was not a close question. The Court fully accepted defendants' arguments that plaintiffs' claim was insubstantial. Plaintiffs certainly disagree, but that disagreement alone is insufficient to generate a "substantial ground for a difference of opinion" on an issue of statutory construction so definitively and unequivocally decided by this Court.

Second, plaintiffs observe that the chief purpose of certifying issues for interlocutory appeal is to speed the resolution of dispositive issues. Plaintiffs, however, are in no position to request such expedition when they waited so long to move for summary judgment on the claim at issue. Not only did they wait until September, 1992 -- over a year after the President approved the Base Closure Commission's recommendation to realign NAWC -- to file this suit, but plaintiffs did not move for summary judgment on this purely legal claim until July, 1993. Plaintiffs' failure to seek a prompt resolution of this issue in the district court counsels against this Court's exercise of its

discretion to certify the issue for interlocutory appeal prior to final judgment.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for certification should be denied.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. ROTKO
United States Attorney

DAVID J. ANDERSON
VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
U.S. Department of Justice
Civil Division
901 E St., N.W. Room 952
Washington, D.C. 20530
(202) 514-4775

Dated: December 2, 1993

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Defendants' Opposition to Plaintiffs' Motion for Certification to be served on the 2nd day of December, 1993, by first class mail, postage prepaid, to:

Peter S. Greenberg
Nicole Reimann
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103

JEFFREY S. GUTMAN

Document Separator

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

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	:	NO. 92-5331

FILED JAN - 4 1994

O R D E R

AND NOW, this 3rd day of January, 1994, it is hereby ORDERED that plaintiffs' motion for certification is DENIED without prejudice to refile after the Supreme Court decides Specter v. Dalton.

BY THE COURT:

RONALD L. BUCKWALTER, J.

ENTERED 1/4/94

< CONFIRMATION REPORT >

01-07-1994(FRI) 11:20

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
7724	1-07	11:18		2	0°01'20"	NORMAL	OK
				2	0°01'20"		

U.S. Department of Justice

Greenwood

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER STREET

DATE: 6/8/94

TO: (1) DICK EDDY (2) MARY ANN HOOK

FAX NUMBER: (703) 602-3245 (703) 696-0550

FROM: JEFF GUTMAN
FAX NUMBER(S) ROOM 900
COMMERCIAL: 202-616-8202
CONFIRMATION NO.: 202-616-8300

read 6/9
spoke to Jeff Gutman ok'd

THERE ARE A TOTAL OF 9 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMITTAL

PLAINTIFFS' COUNSEL CALLED ME RECENTLY AND WANTS TO GET GREENWOOD IN A POSITION FROM WHICH THEY CAN APPEAL THE LAB COMMISSION ISSUE. THIS SHOULD TRIM UP THE CASE. LET ME KNOW BY THE END OF THE WEEK IF YOU HAVE ANY COMMENTS. THANKS,

JEFF
(202) 514-4775

→ want to → filed interlocutory appeal already
→ final judgment to which they can appeal
→ appeal → full comm has exclusive

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	

DEFENDANTS' [UNOPPOSED]
MOTION FOR AWARD OF JUDGMENT

In light of the U.S. Supreme Court's opinion in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994), the Third Circuit's opinion in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) (Specter I) and this Court's October 28, 1993 opinion denying plaintiffs' motion for summary judgment, defendants move that this action be dismissed and judgment entered in their favor. A memorandum of points and authorities and a proposed judgment accompany this motion.

LOCAL RULE 20(b) CERTIFICATION

Pursuant to Local Rule 20(b), the undersigned counsel certifies that a draft copy of this motion, attached memorandum and proposed judgment were sent to plaintiffs' counsel for their review prior to the filing of this motion. Plaintiffs' counsel has advised the undersigned that plaintiffs have no objection to the entry of the proposed judgment attached hereto.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL R. STILES
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
U.S. Department of Justice
Civil Division
901 E St., N.W. Room 952
Washington, D.C. 20530
(202) 514-4775
Attorneys for Defendants

Dated: June --, 1993

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	Civil Action No. 92-CV-5331

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR [UNOPPOSED] MOTION FOR AWARD OF JUDGMENT

In light of the U.S. Supreme Court's recent opinion in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994) [Attachment 1 hereto], the Third Circuit's opinion in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) (Specter I) and this Court's October 28, 1993 opinion denying plaintiffs' motion for summary judgment, no viable claims remain in this action. Judgment should therefore be entered for defendants on all counts.

Plaintiffs have advanced four claims: 1) the Secretary of Defense (the "Secretary") and Defense Base Closure and Realignment Commission (the "Commission") violated certain procedural requirements of the Base Closure Act in recommending the realignment of the Naval Air Warfare Center Aircraft Division Warminster ("NAWC"); 2) the Secretary and Commission made substantive errors in making these recommendations; 3) the Secretary and Commission violated the union plaintiffs' due process rights and 4) the Secretary and Commission had no authority to consider NAWC, a defense laboratory, for closure or realignment, such authority instead having been reserved by

Congress exclusively for the separate Commission on the Consolidation and Conversion of Defense, Research and Development Laboratories (the "Lab Commission"). In July, 1993, defendants moved to dismiss the second, third and fourth claims and moved to stay the first claim pending the Supreme Court's consideration of whether an identical claim made in Specter was reviewable. At the same time, plaintiffs moved for summary judgment on the fourth claim.

On October 28, 1993, this Court denied plaintiffs' motion for summary judgment, holding that the Secretary and the Commission had authority under the Base Closure Act to recommend the realignment of defense labs like NAWC. Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993). The Court, however, did not grant defendants' motion to dismiss the fourth claim. It instead denied without prejudice defendants' motion pending resolution of Specter by the Supreme Court. See Oct. 28, 1993 Memorandum and Order at 2. By Order of November 12, 1993, the Court stayed plaintiffs' remaining claims until thirty days after the Supreme Court decided Specter.[1]

Specter has now been decided. On May 23, 1994, in a unanimous decision, the Supreme Court held that actions taken by the Secretary, the Commission or the President under the Base Closure Act, whether they are substantive or procedural in

[1] Plaintiffs subsequently moved this Court for an order certifying their Lab Commission claim for appeal. On January 3, 1994, this Court denied that motion without prejudice to refile it after the Supreme Court decided Specter.

nature, are not subject to judicial review. Specter v. Dalton, No. 93-289 (U.S. May 23, 1994). The majority opinion, authored by Chief Justice Rehnquist, held that actions of the Secretary and the Commission under the Base Closure Act are not "final agency actions" subject to judicial review under the Administrative Procedure Act. Specter, slip op. at 8. In an opinion written by Justice Souter, four Justices concurred in the judgment on the ground that the text, structure and purpose of the Base Closure Act reflected Congress' intent to preclude judicial review of claims that the Secretary or Commission failed to comply with the Base Closure Act.[2]

Specter therefore disposes of plaintiffs' first claim; their contention that the Secretary and Commission violated procedural requirements of the Base Closure Act is unreviewable. Their second claim is unreviewable as well. Plaintiffs in Specter did not appeal the Third Circuit's dismissal of claims -- substantially similar to those made here -- that the Secretary and Commission made substantive errors in recommending military installations for closure or realignment. See Specter I, 971 F.2d at 950-53. The Supreme Court's decision in Specter and the Third Circuit's decision in Specter I require that plaintiffs' substantive challenges be dismissed. In addition, as the Supreme Court noted in Specter, the Third Circuit in Specter I dismissed

---

[2] The majority and concurring opinions also held that base closure decisions made by the President were not reviewable. Id., slip op. at 9-15. Such decisions were not challenged in this action.

plaintiffs' due process claim, a claim that was identical to the third claim made by plaintiffs here, for failure to state a claim for which relief could be granted. See Specter, slip op. at 3 n.3.

Finally, with regard to the fourth claim, this Court held in October, 1993 that, as a matter of statutory construction, the Secretary and Commission had authority to recommend NAWC for realignment. The Supreme Court's decision in Specter lends support to an alternative ground for dismissal -- that the Secretary's and Commission's decisions to consider defense labs for closure or realignment under the Base Closure Act are not reviewable. In either event, plaintiffs' Lab Commission claim should now be dismissed.

CONCLUSION

The proposed judgment attached hereto should be entered by the Court.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL R. STILES
United States Attorney

DAVID J. ANDERSON

VINCENT M. GARVEY
JEFFREY S. GUTMAN

Attorneys
U.S. Department of Justice
Civil Division
901 E St., N.W. Room 952
Washington, D.C. 20530
(202) 514-4775
Attorneys for Defendants

Dated: June --, 1993

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	

JUDGMENT

In accordance with the decision of the United States Supreme Court in Specter v. Dalton, No. 93-289 (U.S. May 23, 1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED AND ADJUDGED that the plaintiffs' complaint is dismissed with prejudice in its entirety.

UNITED STATES DISTRICT JUDGE

Dated: _____

< CONFIRMATION REPORT >

06-08-1994(WED) 09:11

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
9636	6-08	09:06		9	0°04'47"	NORMAL	OK
				9	0°04'47"		

U.S. Department of Justice

Washington, D.C. 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER STREET

DATE: 6/28

TO: (1) Dick Eddy (2) Mary Ann Hook

FAX NUMBER: (703) 602-3245 (703) 696-0550

FROM: Jeff Gorman

FAX NUMBER(S) ROOM 900
COMMERCIAL: 202-616-8202
CONFIRMATION NO.: 202-616-8300

THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMITTAL

Not a moment too soon, the judgment in Greenwood has arrived. Andrea Newmark will take over this case, if nothing else to watch out for a notice of appeal from the plaintiffs. If one arrives, she will fax it to you. Andrea can be reached at 514-4267.

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the decision of the United States Supreme Court in Specter v. Dalton, 114 S. Ct. 1719 (1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED AND ADJUDGED that the plaintiffs' complaint is dismissed with prejudice in its entirety.

R. L. Buckwalter

RONALD L. BUCKWALTER
UNITED STATES DISTRICT JUDGE

Dated: JUNE 23 1994

ENTERED 6/24/94

CLERK OF COURT

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

EXECUTIVE CORRESPONDENCE TRACKING SYSTEM (ECTS) # 940629-1

FROM:	TO: MARY ANN HOOK
TITLE:	TITLE: GENERAL COUNSEL
ORGANIZATION:	ORGANIZATION: DBCRC
INSTALLATION (s) DISCUSSED:	

OFFICE OF THE CHAIRMAN	INFO COPY	ACTION COPY	INIT
CHAIRMAN COURTER	✓		
STAFF DIRECTOR	✓		
SPECIAL ASSISTANT		✓	
[redacted]			
MILITARY EXECUTIVE			
DIR./CONGRESSIONAL LIAISON			
PRESS SECRETARY			
DIR./EXECUTIVE SECRETARIAT			
DIRECTOR OF ADMINISTRATION			
CHIEF FINANCIAL OFFICER			
DIRECTOR OF TRAVEL			
SYSTEMS ADMINISTRATOR			
DIR./INFO SERVICES DIVISION			

COMMISSION MEMBERS	INFO COPY	ACTION COPY	INIT
COMMISSIONER BOWMAN			
COMMISSIONER BYRON			
COMMISSIONER COX			
COMMISSIONER JOHNSON			
COMMISSIONER LEVITT			
COMMISSIONER MCPHERSON			
COMMISSIONER STUART			
REVIEW AND ANALYSIS			
DIRECTOR OF R & A	✓		
DEPUTY DIRECTOR OF R & A			
ARMY TEAM LEADER			
NAVY TEAM LEADER	✓		
AIR FORCE TEAM LEADER			
ISSUES TEAM LEADER			
COBRA MODEL ANALYST			
DATABASE ANALYST (GIS)			

TYPE OF ACTION REQUIRED

	Prepare Reply for Chairman's Signature		Prepare Reply for Commissioner's Signature
	Prepare Reply for Staff Director's Signature		Prepare Direct Response (coordinate w/ Exec.Sec.)
	Offer Comments and/or Suggestions	✓	FYI

Subject/Remarks:

⇒ ORDER OF TRANSFER OUT OF CIVIL SUSPENSE FILE; DISMISSAL OF COMPLAINT WITH PREJUDICE IN ITS ENTIRETY.

↳ GREENWOOD V. DALTON

Due Date:	Routing Date: 6/29/94	Date Received: 6/29/94	Mail Date:

FILED JUN 23 1994

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

REP. JAMES C. GREENWOOD, et al.	:	CIVIL ACTION
vs.	:	Please refer to this number when responding 940629-1
JOHN H. DALTON, Secretary of the Navy, et al.	:	NO. 92-5331

ORDER OF TRANSFER OUT OF CIVIL SUSPENSE FILE

AND NOW, this 23rd day of July , 1994, it appearing to the court that the above entitled case should be transferred from the Civil Suspense File, it is

ORDERED that the Clerk of Court transfer said case from the Civil Suspense File to the current docket for final disposition.

BY THE COURT:

ATTEST:

Matthew J. Higgins
MATTHEW J. HIGGINS
DEPUTY CLERK

ENTERED: 6/24/94

CLERK OF COURT

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs, v. JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	)	Civil Action No. 92-CV-5331

JUDGMENT

In accordance with the decision of the United States Supreme Court in Specter v. Dalton, 114 S. Ct. 1719 (1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED AND ADJUDGED that the plaintiffs' complaint is dismissed with prejudice in its entirety.

RONALD L. BUCKWALTER
UNITED STATES DISTRICT JUDGE

Dated: JUNE 23 1994

ENTERED 6/24/94

CLERK OF COURT

DNL:SRMcIntosh
145-6-3245

September 28, 1994

TO: Mary Ann Hook
Dick Eddy

FR: Scott McIntosh SRM

RE: Greenwood

Here is a draft of our brief in the Greenwood case. I welcome any comments or suggestions you may have.

The brief must be mailed out by COB Monday, October 3. If you are able to get me your comments by COB Friday, I would be grateful, but Monday morning is OK if necessary. My number is (202) 514-4052.

NO. 94-1734

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES C. GREENWOOD, et al.,

Plaintiffs-Appellants,

v.

JOHN H. DALTON, et al.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1734

JAMES C. GREENWOOD, et al.,

Plaintiffs-Appellants,

v.

JOHN H. DALTON, et al.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

1. This is a suit for declaratory and injunctive relief under the Defense Base Closure and Realignment Act of 1990 and Section 246 of the National Defense Authorization Act for Fiscal Year 1991. The jurisdiction of the district court was asserted under 5 U.S.C. § 702 and 28 U.S.C. § 1331.

2. The judgment under appeal was entered on June 24, 1994. The judgment is a final decision and is within this Court's jurisdiction under 28 U.S.C. § 1291. The notice of appeal was

filed on July 12, 1994, within the time allowed by Rule 4(a)(4) of the Federal Rules of Appellate Procedure.

QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act") authorizes the Secretary of Defense, with the concurrence of an independent commission and the President, to close unneeded domestic "military installations." The Act defines "military installation" as "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense * * * ." The questions presented are:

1. Whether military research and development laboratories are "military installations" subject to closure under the Base Closure Act.

2. If so, whether Section 246 of the National Defense Authorization Act for Fiscal Year 1991, which created a temporary advisory commission to study "various means to improve the operation of laboratories of the Department of Defense," including closures, implicitly withdrew the Secretary's authority to close military laboratories under the Base Closure Act.

STATEMENT OF THE CASE

I. Nature of Case and Proceedings Below

In 1991, as part of a Congressionally mandated effort to close unneeded domestic military installations, the Secretary of Defense proposed the closure of a number of military research and development laboratories, including a Naval air warfare laboratory in Warminster, Pennsylvania. The Secretary's proposal was endorsed by an independent base closure commission, approved by the President, and sustained by Congress. The same proposal was also endorsed shortly thereafter by the "Lab Commission," an advisory commission charged by Congress with reviewing the military laboratory system.

More than a year later, the present suit was brought to block the Secretary of Defense from carrying out the closure of the Warminster laboratory. The plaintiffs, affected employees and unions and their Congressional representatives, claimed that the Secretary and the base closure commission lacked statutory authority to recommend the closure of the Warminster facility. The district court rejected this claim, holding that the Defense Base Closure and Realignment Act of 1990 ("Base Closure Act") grants the Secretary and the commission jurisdiction over all domestic "military installations," including military laboratories. The district court specifically rejected the plaintiffs' argument that Section 246 of the National Defense Authorization Act for Fiscal Year 1991, which created the Lab Commission to review the operation of the military laboratory system, impli-

citly withdrew the authority that the Base Closure Act conferred on the Secretary and the base closure commission. The plaintiffs now appeal, renewing their argument that military laboratories, unlike all other domestic military facilities, are exempt from closure under the Base Closure Act and may not be closed at all without additional legislative authorization by Congress.

II. Statement of Facts

A. Statutory Background

1. The central issue in this appeal is whether the Base Closure Act applies to military research and development laboratories. To place this issue in context, we begin with a brief review of the statutory background of the Base Closure Act. The Act is the latest in a series of legislative initiatives governing the closure of domestic military installations, and a review of the legislative background casts light on the statutory questions in this case.

Prior to 1977, the Secretary of Defense enjoyed broad authority to close military installations without further Congressional authorization. Under 10 U.S.C. § 125(a), the Secretary was (and still is) vested with general authority "to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense."[1] Acting pursuant to this statutory authority, and pur-

[1] In its present form, 10 U.S.C. § 125(a) requires the Secretary to obtain Congressional approval before substantially transferring, reassigning, consolidating, or abolishing a "function, power, or duty * * * vested by law" in the Department of (continued...)

suant to the constitutional authority of the President as Commander-in-Chief, the Department of Defense closed a large number of domestic military installations in the 1960's and early 1970's. See Defense Base Closure and Realignment Commission, Report to the President, p. 1-1 (1991) ("Base Closure Commission Report"), reprinted in House Doc. No. 111, 102d Cong., 1st Sess. 3-___ (1991).

In 1977, Congress enacted legislation to restrict the closure of major domestic military installations. The 1977 legislation, codified at 10 U.S.C. § 2687, required the Department of Defense to comply with a variety of procedural requirements, including the National Environmental Policy Act, before carrying out major closures. 10 U.S.C. § 2687(b)(1)-(4) (Supp. I 1977). The new procedural restrictions, together with Congress's own reluctance to close major military facilities, effectively blocked any significant base closure for more than a decade. See H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News ("USCCAN") 3403; Base Closure Commission Report, p. 1-1.

The 1977 legislation applies to all "military installations" of a specified size. 10 U.S.C. § 2687(a)(1)-(2). The legis-

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[1](...continued)
Defense or one of its agencies or officials. However, individual military installations do not constitute a "function, power, or duty * * * vested by law" in the Department of Defense, and hence this restriction does not affect the Secretary's general authority to close or realign military installations. See, e.g., Armstrong v. United States, 354 F.2d 648, 649 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966).

lation defines "military installation," in relevant part, as any "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense * * * ." Id. § 2687(e)(1). If a facility does not come within this broad definition of "military installation," it is not subject to the restrictions of the 1977 legislation, and may be closed on the basis of the Secretary's general authority under 10 U.S.C. § 125(a).

2. In 1988, Congress temporarily lifted the restrictions of the 1977 legislation, by enacting the Base Closure and Realignment Act of 1988 ("1988 Act"). Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). The 1988 Act is the immediate predecessor to the current Base Closure Act, and it parallels the current Act in respects that are relevant to this appeal.

The 1988 Act created an independent commission to identify unnecessary domestic military installations. 1988 Act §§ 201(1), 203(b)(1)-(2). The commission's recommended closures were presented to the Secretary of Defense, who was required to approve or disapprove them in their entirety. Id. §§ 201(1), 202. If the Secretary approved the commission's recommendations, the 1988 Act allowed Congress 45 days to override the Secretary's decision by passing a joint resolution of disapproval. Id. §§ 202(b), 208. If Congress did not do so, the Secretary was authorized (and indeed required) to carry out the closures, without having to comply with the restrictions of the 1977 legislation.

Like the 1977 legislation, the 1988 Act applied to "military installations," and it borrowed its definition of "military installations" verbatim from the 1977 legislation. [Cite.] The 1988 base closure commission understood this definition to cover military laboratories, and the commission included a major laboratory, the Army Military Technology Laboratory, in its list of recommended closures. See Base Realignments and Closures: Report of the Defense Secretary's Commission 60-61 (December 1988). The Secretary of Defense approved the commission's recommendations, including the recommendation to close the Army Military Technology Laboratory, and Congress sustained the Secretary's decision. [Cite.]

3. In 1990, Congress enacted the current Base Closure Act as a successor to the 1988 Act. The current Act provides for three rounds of closures, in 1991, 1993, and 1995. [Cite.][2]

Like the 1977 and 1988 legislation, the current Act governs the closure of "military installations." [Cite.] As noted above, the definition of "military installation" in the 1988 Act had been interpreted by the 1988 base closure commission to cover military laboratories. Knowing that, Congress chose to adopt the identical definition of "military installation" in the current Act: "base, camp, post, station, yard, center, homeport facility * * * , or other activity under the jurisdiction of the Department of Defense * * * ." Act § 2910(4).

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[2] The text of the Base Closure Act, as amended, is set forth in the statutory addendum to this brief.

Under the current Act, the Secretary of Defense prepares a list of recommended closures for each biennial round. Act § 2903(c)(1).[3] The Act requires the Secretary to "consider all military installations inside the United States equally" when selecting bases for closure. Id. § 2903(c)(3). The Secretary's recommendations are presented to the Defense Base Closure and Realignment Commission ("Base Closure Commission"), which prepares a report for the President regarding the proposed closures. Id. § 2903(d)(2)(A). The Base Closure Commission has authority in certain circumstances to change the Secretary's recommendations. Id. § 2903(d)(2)(B).

The Act authorizes the President to approve or disapprove the Commission's recommendations. Act § 2903(e)(1). If the President approves the recommendations, Congress may override the President's decision by enacting a joint resolution of disapproval. Id. §§ 2904(b), 2908. If Congress does not do so, the Act obligates the Secretary to close all military installations approved for closure in the Commission's report. Id. § 2904(a)(1)-(2).

The process of selecting military installations for closure under the Act is subject to a highly expedited statutory timetable. [Cite.] The process of actually closing the selected

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[3] The Act provides for both "closures" and "realignments." See, e.g., Act § 2904(a)(1)-(2). A "realignment" is defined as "any action which both reduces and relocates functions and civilian personnel positions * * * ." Id. § 2910(5). Nothing in this appeal turns on the distinction between closures and realignments. For the sake of simplicity, this brief uses "closure" to refer both to closures and realignments.

bases, however, takes far longer. The Act provides the Department of Defense with up to 2 years after the completion of each round to begin the closures, and up to 6 years to complete them. Id. § 2904(a)(3)-(4). As a result of this extended timetable, Congress has an opportunity to revisit closure decisions through the ordinary legislative process even after the biennial selection process has been completed.

4. The Base Closure Act is part of the National Defense Authorization Act for Fiscal Year 1991. [Cite.] A different section of that legislation, Section 246, created the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories ("Lab Commission"). The appellants' claim in this appeal rests principally on the relationship between the Base Closure Act and Section 246.[4]

Section 246 charged the Lab Commission with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). The Lab Commission was directed to consider "such means as" establishing government-owned, contractor-operated ("GOCO") laboratories; modifying laboratory missions and functions; and consolidating or closing some or all laboratories. Id. § 246(b)(2)(A). The Lab Commission was required to present a report to the Secretary of Defense by September 30, 1991, and the Secretary was directed to transmit

[4] The text of Section 246 is set forth in the statutory addendum to this brief.

the report to Congress within 30 days thereafter. Id. § 246(f)-(g). The Commission went out of existence 90 days after presenting its report to the Secretary. Id. § 246(h).

For present purposes, four aspects of Section 246 should be borne in mind. First, the subject of closing military laboratories was only one part of the Lab Commission's general mandate "to determine the feasibility and desirability of various means to improve the operation of [DoD] laboratories." Second, the report of the Lab Commission, unlike that of the Base Closure Commission, was purely advisory. Third, Section 246 does not itself impose any restriction on the closure of military laboratories. Fourth, Section 246 does not contain any provision expressly limiting the authority and jurisdiction of the Secretary of Defense and the Base Closure Commission under the Base Closure Act.

B. The Present Controversy

1. In April 1991, the Secretary of Defense issued his first list of recommended closures under the Base Closure Act. 56 Fed. Reg. 15184 (April 15, 1991). The Secretary's recommendations included the closure of a large number of Army and Navy military laboratories. Id. at 15203-15206, 15226-15239 (Navy). The Secretary proposed restructuring the Navy's laboratory system into four major "warfare centers," including a Naval Air Warfare Center. Id. at 15226-15228.

As one step in the creation of the Naval Air Warfare Center, the Secretary proposed disestablishing the Naval Air Development

Center in Warminster, Pennsylvania ("Warminster Center"), and transferring the bulk of its functions to a facility in Maryland. Id. at 15227. The Secretary determined that the Warminster Center was lower in military value than alternative facilities, for a variety of reasons, including restricted airspace and limited room for expansion to accommodate consolidation. Id. at 15226.

After an intensive review process, the Base Closure Commission approved virtually all of the Secretary's recommendations regarding the closure of military laboratories. Base Closure Commission Report, pp. 5-12 to 5-13, 5-15 to 5-16, 5-29 to 5-30. The Commission specifically approved the Secretary's plan to consolidate existing naval laboratories into "warfare centers," including the planned realignment of the Warminster Center. Id. pp. vii, 5-29 to 5-30.

Before acting on the Secretary's recommendations, the Base Closure Commission satisfied itself that its jurisdiction "did include authority to recommend realignment and closure of laboratories[,] without the input of the [Lab] Commission." Base Closure Commission Report, p. 5-16. However, the Base Closure Commission recommended that the Secretary defer implementation the principal laboratory closure plans until January 1992, "in order to give the Secretary time to consider the findings and recommendations of the [Lab] Commission * * * and to consult with the appropriate committees of Congress." Id. p. 5-30. The Base Closure Commission further noted that "there is a clear role for

the [Lab] Commission to advise the Secretary of how best to implement this consolidation plan so as to minimize the impact of the turbulence it could create * * * ." Ibid.

In July 1991, the President approved the Base Closure Commission's recommendations, and Congress sustained the President's decision when the House of Representatives overwhelmingly rejected a proposed joint resolution of disapproval. [Cite.] As a result, the Secretary of Defense became obligated by law to "close all military installations recommended for closure by the [Base Closure] Commission * * * ." Act § 2904(a)(1).

2. Two months later, in September 1991, the Lab Commission issued its report to the Secretary of Defense. The Lab Commission presented almost 50 principal recommendations and findings, covering both department-wide and service-specific laboratory issues. Federal Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories, Report to the Secretary of Defense (September 1991) ("Lab Commission Report"), pp. ES-2 to ES-9.

Among other things, the Lab Commission reviewed the Secretary's plans for closing and realigning Army and Navy laboratories. Lab Commission Report, pp. 9-16. As a general matter, the Lab Commission endorsed those plans. Id. at 11, 15. At the same time, the Lab Commission recommended a number of specific modifications and adjustments in these plans. For example, the Lab Commission recommended deferring the Army's planned construction of a microelectronics research facility and

consideration of an alternative interservice facility. Id. at pp. ES-4, ES-6, 10-12. However, the Lab Commission did not recommend any change in the Secretary's plan to close the Warminster Center. Id. at 13-16.

3. In September 1992, over a year after the President approved the 1991 closure recommendations, the appellants brought suit to enjoin the Secretary from carrying out the closure of the Warminster Center. App. 1. Among other things, the appellants claimed that Section 246 of the National Defense Authorization Act vested the Lab Commission with exclusive jurisdiction over the closure of military laboratories, and that the Secretary of Defense and the Base Closure Commission had exceeded their authority under the Base Closure Act by recommending closures and realignments of military labs. The appellants also advanced a variety of other claims, all of which they subsequently have abandoned in light of the Supreme Court's decision in Dalton v. Specter, 114 S. Ct. 1719 (1994), and this Court's decision in Specter v. Dalton, 971 F.2d 736 (3d Cir. 1992).[5]

In October 1993, the District Court for the Eastern District of Pennsylvania (Buckwalter, J.) denied a motion by the appellants for summary judgment on the Lab Commission claim. App. 72. The district court held that the Warminster Center is a "military installation" within the definition of that term in the Base

[5] The decisions of the Supreme Court and this Court in the Specter litigation preclude judicial review of all claims that the government has failed to comply with the substantive or procedural requirements of the Base Closure Act.

Closure Act, and hence the closure of the Warminster Center was within the authority of the Secretary of Defense and the Base Closure Commission under that Act. Id. at 75-76. The court then held that Congress, by enacting Section 246, "did not create an exception to the Base Closure Act divesting the Secretary of Defense and [the] Base Closure Commission of authority to recommend defense labs for closure or realignment." Id. at 78. The court concluded that Section 246 and the Base Closure Act "are capable of co-existence" and that "absolutely nothing in the record" indicated that Congress meant for Section 246 to create an exception to the scope of the Base Closure Act. Ibid.

In June 1994, the district court entered a final judgment resolving all claims in favor of the appellees. This appeal, which is limited to the Lab Commission issue, followed.

SUMMARY OF ARGUMENT

[To be added.]

ARGUMENT

THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT AUTHORIZES THE SECRETARY OF DEFENSE TO CLOSE MILITARY LABORATORIES

I. Military Laboratories Are "Military Installations" under the Act

A. With exceptions that are not relevant here, the Base Closure Act applies to all domestic "military installations," and directs the Secretary of Defense to "consider all military installations inside the United States equally * * * ." Act § 2903(c)(3). In carrying out their responsibilities under the Act, the Secretary of Defense and the Base Closure Commission have concluded that military laboratories are "military installations" under the Act, and therefore may (and indeed must) be considered for closure.

Whether military laboratories are "military installations" under the Base Closure Act is the threshold issue in this case. It is an issue, however, that the appellants avoid until the very end of their brief. When they finally turn to it, they dutifully argue that the Act's definition of "military installation" does not cover military laboratories, but their argument (at pp. 35-36) is half-hearted at best. Their reluctance to address the issue is understandable, for it is clear beyond reasonable argument that military laboratories <u>are</u> "military installations" under the Act, and hence that the Base Closure Act squarely provides statutory authority for the closure of the Warminster Center.

The text of the Base Closure Act is sufficient to dispose of the appellants' position. The Act defines "military installation" in sweeping terms as any "base, camp, post, station, yard, center, homeport facility * * * , or other activity under the jurisdiction of the Department of Defense * * * ." Act § 2910(4) (emphasis added). This is an exceptionally broad definition, and as the underscored language shows, military laboratories come squarely within its terms. All military laboratories engage in "activit[ies] under the jurisdiction of the Department of Defense." And the Warminster laboratory is a "center" -- formerly the Naval Air Development Center, now the Naval Air Warfare Center -- for good measure. To argue that the Warminster Center is not a "center," and that its activities are not "activit[ies] under the jurisdiction of the Department of Defense," is not to interpret the statutory language but to ignore it.

The appellants assert (at p. 36) that when Congress included "center" and "other activit[ies] under the jurisdiction of the Department of Defense" in the definition of "military installation," it meant to cover only what the appellants call "base-type facilities." This argument is simply an ipse dixit. If Congress had wished to limit the definition of "military installation" to "base-type facilities" (whatever that means), it hardly would have included an unqualified, all-encompassing term like "other activit[ies] under the jurisdiction of the Department of Defense"

in the definition. That term, far from supporting the narrowing construction offered by the appellants, directly undermines it.

Even if the text were less clear, any uncertainty would be dispelled by the record of how term has been employed, administratively and legislatively. Both before and after the enactment of the Base Closure Act, the definition of "military installation" used in the Act has been applied administratively to military laboratories. And Congress, far from rejecting that administrative interpretation, has accepted it -- and indeed relied on it -- legislatively.

When Congress set out to define "military installation" for purposes in the Base Closure Act, it chose to adopt a definition that already had been applied to military laboratories. As noted above, the Base Closure Act's immediate predecessor, the 1988 base closure act, had used the same definition, and the independent commission created by the 1988 act had employed that definition to recommend the closure of a major military laboratory. See p. _ supra. Congress reviewed the commission's recommendations in 1988, and hence was fully aware that "military installation" had been interpreted to include military laboratories. Knowing that, Congress adopted precisely the same definition for the Base Closure Act. Congress would hardly have adopted that definition, without alteration, if it wished to exclude military laboratories from the scope of the Act. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a

statute without change." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1982).

Since the enactment of the Base Closure Act, the Secretary of Defense and the Base Closure Commission have continued to interpret "military installation" to include military laboratories. They did so during the 1991 round, of course, as this case itself demonstrates. And they did so again in the 1993 round, recommending the closure or realignment of a number of additional Navy laboratories. Defense Base Closure and Realignment Commission, Report to the President, pp. vi, ix (1993) ("Base Closure Commission Report"), reprinted in House Doc. No. 115, 103d Cong., 1st Sess. 7, 10 (1993).

Presented with this consistent, ongoing administrative interpretation, Congress has left the statutory definition of "military installation" undisturbed with respect to military laboratories. At the same time, it has revised the statutory definition in other respects. After the Base Closure Commission recommended the realignment of the Army Corps of Engineers in 1991, Congress retroactively amended the definition of "military installation" to exclude "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." Pub. L. No. 102-190, § 2821(h), 105 Stat. 1546 (1991) (amending Act § 2910(4)). Congress hardly would have left the statutory definition of "military installation" undisturbed with respect to military laboratories, at the

same time that it was revising the definition in other respects, if the Secretary and the Commission had misconstrued the definition as fundamentally as the appellants claim. To the contrary, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986).

B. Ironically, if the appellants' reading of "military installations" were correct, that reading would not advance the appellants' claim, but instead would destroy it. For if military laboratories are not "military installations," the Secretary of Defense is free to close them at will, without recourse to the Base Closure Act.

As explained above (see pp. _-_ supra), the Secretary of Defense has the general statutory authority to "provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense" (10 U.S.C. § 125(a)), and he employed this authority on numerous occasions before 1977 to close unneeded domestic military facilities. See, e.g., Armstrong v. United States, 354 F.2d 648 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966). Congress limited this statutory authority in 1977, of course, by enacting 10 U.S.C. § 2687 (see pp. _-_ supra). But that restriction, like the Base Closure Act itself, applies only to "military installa-

tions," and it uses precisely the same definition of "military installation" as the Base Closure Act uses. [Cite.] Thus, if military laboratories are not "military installations" under the Base Closure Act, they are not "military installations" under 10 U.S.C. § 2687 either. And if that is so, then the Secretary of Defense, far from lacking statutory authority to close military laboratories, would enjoy unqualified authority under 10 U.S.C. § 125(a) to close them as he deems appropriate. That authority would not be impaired by Section 246 of the National Defense Authorization Act, for that provision does not itself impose any legal restriction whatsoever on the Secretary's authority over military labs.

In pointing out the self-defeating nature of the appellants' argument, we should stress that we are not inviting this Court to hold that military laboratories are not "military installations" under the Base Closure Act. For the reasons given above, that holding would be incorrect. But if this Court were to conclude, notwithstanding our reasoning, that military laboratories are not "military installations," it is important to recognize that the necessary result would be to sustain, rather than to overturn, the Secretary's decision to close the Warminster Center.

II. Section 246 of the National Defense Authorization Act Does Not Exempt Military Laboratories from the Base Closure Act

A. Introduction

As shown in Part I, military laboratories like the Warminster Center are "military installations" under the Base

Closure Act. By its terms, the Act requires the Secretary of Defense to consider all domestic military installations for closure, and to close all military installations approved for closure by the Base Closure Commission and the President. [Cite.] Thus, unless some other legislation has withdrawn the jurisdiction of the Secretary and the Commission over military installations, the Base Closure Act not only authorizes but obligates the Secretary to carry out the closure of the Warminster Center.

The appellants argue, of course, that other legislation -- Section 246 of the National Defense Authorization Act -- does withdraw the jurisdiction of the Secretary and the Commission over military laboratories, and thereby exempts military labs altogether from closure under the Act. In making this argument, the appellants face an obvious threshold difficulty: Section 246 itself says nothing whatsoever about the authority of the Secretary and the Base Closure Commission under the Base Closure Act. It does not expressly restrict the jurisdiction of the Secretary and the Base Closure Commission; indeed, it makes no reference to the Base Closure Act at all. The appellants are thus in the awkward position of arguing that Congress, at the same time that it was expressly authorizing the closure of all unneeded domestic military installations under the Base Closure Act, was simultaneously placing a significant limitation on that authority, in an entirely different statutory provision, without bothering to say so.

The appellants try to overcome this problem by arguing, in a variety of ways, that placing military laboratories under the concurrent jurisdiction of the Base Closure Act and Section 246 makes no sense. In particular, the appellants argue that allowing military laboratories to be closed under the Base Closure Act defeats the purposes of Section 246, and that Congress's intent can be vindicated only if the now-defunct Lab Commission is deemed to have had sole and exclusive jurisdiction over the closure of military labs.

As we show below, these arguments are wrong: allowing the Secretary of Defense and the Base Closure Commission to consider military installations does not in any way nullify Section 246 or obstruct the mandate of the Lab Commission. Before we turn to the merits of these arguments, however, it is instructive to compare the appellants' views with the response of Congress.

As indicated above, two of the Base Closure Act's three biennial base selection rounds are now complete, and the third round will take place in 1995. In both of the completed rounds, the Secretary of Defense has proposed extensive closures of military laboratories, the Base Closure Commission has approved those proposals, and the President has adopted the recommendations. See pp. __-__ supra.

For its part, Congress has amended the Base Closure Act extensively since its original enactment in 1991. [Cites.] In doing so, Congress has been well aware that the Act has been applied in the past, and can be expected to be applied in the

future, to military laboratories. Yet Congress has chosen not to amend the statute to withdraw military laboratories from the Act's operation. In May 1991, shortly after the Secretary of Defense issued his first closure recommendations, legislation was introduced in both Houses of Congress to block the closure of military laboratories until the Lab Commission presented its report to Congress. H.R. 2329, 102nd Cong., 1st Sess.; S. 1000, 102nd. Cong., 1st Sess. But neither bill was reported out of committee (App. 80), and Congress has never adopted any legislation restricting the authority of the Secretary of Defense and the Base Closure Commission to consider military laboratories.[6]

The basic theme of the appellants' brief is that the Secretary of Defense and the Base Closure Commision have "blatant[ly] disregard[ed] * * * the clear Congressional mandate" by selecting military laboratories for closure (p. 18). If that were true, it is simply inconceivable that Congress would not have responded legislatively, especially when Congress has actively revised the Base Closure Act is any number of other respects.

The appellants suggest (p. 33) that Congress stayed its hand, not because it approves of the treatment of military installations, but because "it may not have been politically expedient to carve out ex post exceptions to the base closure

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[6] The appellants quote (at p. 34) a 1991 report by the House Committee on Appropriations that criticized the Secretary's inclusion of military laboratories in his proposed closure list. But the report did not lead to legislation restricting the closure of military labs under the Base Closure Act.

process." But Congress has "carved out ex post exceptions" to the base closure process. That is, after all, precisely what Congress did when it retroactively amended the Base Closure Act to withdraw the Army Corps of Engineers from the jurisdiction of the Act (see pp. __-__ supra). Congress has thus shown itself perfectly willing to intervene legislatively, not just prospectively but retroactively, when it believes that the Secretary and the Base Closure Commission have strayed into inappropriate areas.

Against this background, Congress's acceptance of the continuing application of the Base Closure Act to military laboratories is compelling evidence that the objectives of Section 246 have not been frustrated. As we now show, the appellants' arguments to the contrary are without merit.

B. Applying the Base Closure Act To Military Laboratories Did Not Interfere With The Operation of Section 246

As interpreted by the Secretary of Defense and the Base Closure Commission, the Base Closure Act and Section 246 are partially overlapping statutory schemes. Under the Base Closure Act, the Secretary and the Base Closure Commission are to consider military laboratories for closure, along with all other domestic military installations. At the same time, Section 246 directed the Lab Commission to address the subject of laboratory closures in its advisory report, along with an array of other measures to improve the operation of the military laboratory system. This jurisdictional overlap, it should be noted, was

partial rather than complete: the mandate of the Secretary and the Base Closure Commission under the Base Closure Act is not limited to laboratories, and the mandate of the Lab Commission under Section 246 was not confined to closures. See pp. __-__ supra.

The appellants argue that Congress could not have intended to create this kind of concurrent jurisdiction over the closure of military laboratories. They assert that if Congress had meant to subject military laboratories to the machinery of the Base Closure Act, it would not have created an advisory commission under Section 246 to address the closure of military labs. Conversely, they argue that given the creation of the Lab Commission, it would have made no sense for Congress to place military labs within the simultaneous purview of the Base Closure Act, because allowing the Secretary of Defense and the Base Closure Commission to select military laboratories for closure would vitiate the role of the Lab Commission. These arguments are wrong -- wrong in theory, and wrong in fact.

1. The appellants reason that since the process of selecting military installations for closure under the Base Closure Act was to be completed before before the Lab Commission was required to issue its advisory report under Section 246, any recommendations the Lab Commission might make regarding laboratory closures would be rendered a nullity. The appellants overlook a simple but critical fact: while the Base Closure Act creates a highly expedited procedure for selecting military installations to be

closed, the process of closing military installations takes far longer.

As noted above, the Base Closure Act itself provides the Secretary of Defense with up to 2 years after each biennial round to begin the closure of the selected military installations, and up to 6 years to complete the closures. [Cite.] This extended timetable simply reflects the practical realities of the base closure process. Closing a military installation, especially a major one, takes extensive preparation and a major commitment of resources over an extended period of time, especially if functions are to be transferred from one installation to another. For example, the planned restructuring of the Navy's military laboratory system, which the Secretary of Defense presented to the Base Closure Commission and the Lab Commission in 1991, involved a phased plan that was not expected to be completed until the end of Fiscal Year 1995. Lab Commission Report, p. 14.

Given the extended time frame for carrying out the closure of military installations under the Base Closure Act, it becomes obvious why the advisory role of the Lab Commission under Section 246 was not compromised by placing military laboratories within the ambit of the Base Closure Act. The Lab Commission's report was required to be issued by September 30, 1991 -- long before any military laboratory selected in the 1991 base closure round could actually be closed. [Cite.] If the Lab Commission had concluded that some or all military laboratories slated for closure should not be closed, the Secretary of Defense and Con-

gress would have had ample opportunity to act on those views, and the Lab Commission's advisory function would have been fulfilled.

In addition, the appellants overlook the fact that the Base Closure Act creates a three-round selection process, with separate selection cycles in 1991, 1993, and 1995. [Cite.] Even if the Lab Commission's recommendations had arrived too late to assist the Secretary of Defense and Congress regarding the 1991 round -- and for the reasons just given, they did not -- those recommendations would nonetheless be available to assist the Secretary and Congress in the 1993 and 1995 rounds.

If further proof is needed that the application of the Base Closure Act to military laboratories did not obstruct the work of the Lab Commission under Section 246, one need only look at the actual operation of the two schemes in 1991. By the time that the Lab Commission issued its report, in September 1991, the selection process under the Base Closure Act was complete, and a number of military laboratories had been approved for closure. Contrary to the appellants' suggestion (p. 32), the Lab Commission did not regard this state of affairs as a fait accompli that rendered its own mission a nullity. To the contrary, the Lab Commission itself reviewed the Secretary's laboratory restructuring plans, including the planned closures and realignments. And, with exceptions that are not relevant here, it endorsed them. See pp. _-_ supra.

Nowhere in its report did the Lab Commission itself suggest that its mission had been compromised in the slightest by the

actions of the Secretary of Defense and the Base Closure Commission under the Base Closure Act. Neither did the Lab Commission suggest that it enjoyed, or should have enjoyed, exclusive jurisdiction over the subject of laboratory closures. Thus, the appellants' reading of Section 246 conflicts not only with the views of the Secretary of Defense and the Base Closure Commission, but with the views of the very commission that Congress charged with carrying out Section 246.

2. The appellants are likewise wrong when they argue (pp. __-__) that the closure of military laboratories under the Base Closure Act undermined the role that Congress meant to reserve for itself by enacting Section 246. The short answer to this argument has already been suggested above. If Congress believed that its own role in the closure of military laboratories had been compromised in the 1991 base closure round, it surely would have acted legislatively to undo the damage and forestall a repetition in future rounds, as it in fact did with respect to the Army Corps of Engineers. See pp. __-__ supra. Congress's acceptance of the handling of military laboratories in 1991 puts paid to the notion that its role under Section 246 was somehow undermined.

The appellants go astray by misapprehending Congress's intended role under Section 246. The appellants envision a process in which Congress was to be the sole decisionmaker regarding laboratory closures, a process in which the Secretary of Defense was (evidently) to play no role whatsoever. In this account,

Congress wished to decide which military laboratories to close on a "flexible," "lab-by-lab" basis (pp. 23, 29, 31-32), a goal that was defeated when military laboratories were drawn into the all-or-nothing machinery of the Base Closure Act.

This vision of Congress's role simply has no foundation in the provisions or legislative history of Section 246. Section 246 does not purport to exclude the Secretary of Defense from the decisionmaking process; to the contrary, the Lab Commission's report was to be sent to the Secretary himself in the first instance. [Cite.] Neither does Section 246 cast Congress in the role of making "flexible," "lab-by-lab" closure decisions. The legislative history of Section 246 merely indicates that Congress wanted the Lab Commission to provide a "critical assessment" of the Secretary's laboratory reorganization plans and to "suggest alternative actions for congressional consideration." [Cite.] Congress simply wished to be in a position to make an informed response to the Secretary's reorganization plans. And for the reasons indicated above, allowing military laboratories to be selected for closure under the Base Closure Act in no way obstructed that goal.

3. The appellants also argue (pp. 16-18) that the decisionmaking process for closing military laboratories is inherently different from that for closing other military installations.[7] They therefore claim (p. 17) that the "essential

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[7] For reasons that are unclear, this argument appears in the appellants' Statement of Facts, rather than in the Argument section of their brief.

underpinnings of the Base Closure Commission's proceses in dealing with bases were totally inapplicable to labs." This claim, far from being "undisputed" (p. 17), is wrong.

The appellants argue (p. 16) that military laboratories require specialized study because, unlike other military installations, they "have unique missions and are staffed by personnel with scientific and technological expertise." Apart from citing their own complaint, they offer no support for this supposed distinction, and none exists. To suggest that military installations other than defense laboratories, such as nuclear submarine bases or intercontinental ballistic missile sites, lack "unique missions" or scientifically or technologically expert personnel is simply and obviously incorrect. In any event, even if the distinction were a real one, it simply would support a decision to establish a Lab Commission to study defense labs -- not a determination that the Base Closure Commission was ill-equipped to study (or legally precluded from considering) military laboratories for closure.

In a related vein, the appellants point to the fact (pp. 17-18) that the Secretary of Defense's force structure plan, developed to govern the selection of installations under the Base Closure Act (Act §§ 2903(a), (b)), did not refer to military laboratories or research and development. But the force structure plan -- or, more precisely, the unclassified summary of

the plan on which the appellants rely[8] -- was not intended to exhaustively list every domestic military installation by type and to explain its role, if any, in the national defense structure during the next six years. Rather, most of the summary is devoted to a military threat assessment and overseas basing needs. See Base Closure Commission Report, Appendix B. The section on anticipated force structure generally describes expected future reductions in strategic and conventional forces. The plan simply notes that fewer army divisions, navy ships, carriers and carrier air wings and Air Force tactical fighter wings will exist by FY 1995 than in FY 1990. It does not detail how many military installations, such as air force bases, army depots and naval shipyards -- installations obviously subject to the Base Closure Act -- will be required. That military laboratories are also not specifically mentioned does not in any way suggest that they were not intended to be considered, or were not suited for consideration, by the Secretary and Base Closure Commission.

Finally, the appellants cite a brief passage from the Navy's 1991 base closure recommendations (p. 18) as a supposed "concession" that the criteria adopted by the Secretary of Defense for closing military installations were inapplicable to military laboratories. The passage seized on by the appellants is a frag-

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[8] The actual force structure plan is a classified document and is not publicly available. The appellants cite an unclassified summary of the plan, which the Base Closure Commission reproduced as Appendix B in the Commission's 1991 report.

ment taken out of context from a more extensive discussion, and when it is placed in context, the "concession" disappears.[9]

4. As the foregoing discussion shows, placing military laboratories under the concurrent jurisdiction of the Base Closure Act and Section 246 results in a perfectly sensible and workable statutory scheme, one that does not compromise either of the two statutes. In contrast, the appellants' reading of Section 246 seriously and unjustifiably interferes with the goal of Congress and the Executive Branch to create a less expensive, more efficient military establishment.

The Base Closure Act is a landmark measure designed to produce the timely closure and realignment of unneeded military

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[9] The relevant portion of the Navy report is reproduced in the Defendants' Memorandum in opposition to Plaintiffs' Motion for Summary Judgment, Attachment 4 [docket cite]. The report explains that a Navy Research, Development, Test and Evaluation ("RDT&E") Facilities Consolidation Working Group studied 76 RDT&E activities, including Navy laboratories. [Cite.] The passage relied on by the appellants states that, because RDT&E activities have unique aspects allowing them to perform a specific range of functions, they could not all be evaluated for possible closure or realignment against each other. In other words, analyzing different kinds of laboratories against each other for possible closure or realignment was like comparing apples and oranges.

What the appellants fail to explain is that the Navy therefore divided the activities along mission lines into five separate categories for evaluation: Corporate Laboratories, Naval Air Warfare Centers, Naval Command, Control and Ocean Surveillance Centers, Naval Surface Warfare Centers, and Naval Undersea Warfare Centers. [Cite.] Each category was subdivided into functional groups, similar enough to compare with each other. [Cite.] After determining whether excess capacity existed, the Navy then applied the eight selection criteria to facilities within each group. [Cite.] Thus, far from acknowledging that the selection criteria did not apply to RDT&E facilities, the Navy properly applied them to those installations, as it did to installations other than military laboratories.

installations. Its purpose is to streamline the Nation's domestic military force structure in the post-Cold War era, to save taxpayers billions of dollars, and to break the political log jam between the Executive Branch and Congress over the closure of domestic military installations, a log jam embodied in 10 U.S.C. § 2687.

Closing unneeded military laboratories is an important part of this effort, for the military laboratory system constitutes a significant part of DoD's overall domestic military structure. In 1991 alone, DoD's military laboratories spent $6.5 billion and employed nearly 60,000 people, including over 26,000 scientists and engineers. Lab Commission Report, p. ES-1. If the appellants' view of Section 246 were correct, this vast commitment of money and resources would be altogether exempt from the Base Closure Act, insulated from serious restructing by 10 U.S.C. § 2687, at the same time that every other component of the Nation's domestic military structure was being rigorously cut back under the Base Closure Act.

It simply would make no sense for Congress to exempt military laboratories from the overall belt-tightening that the Base Closure Act was designed to effect. The result of such an exemption not only would be to delay potentially significant savings, but also to produce an imbalance between the military laboratory system and the rest of the Nation's military force structure. Simply put, a military laboratory system designed for the expanded military structure of the 1980's makes no sense for

the smaller military structure of the 1990's and beyond. Yet if the appellants' claims were accepted, that is precisely what would result. The appellants face a heavy burden in arguing that Congress intended this result, and they have not come close to satisfying that burden.

C. The Government's Interpretation of the Statute Is Consistent With Principles of Statutory Construction

Finally, the appellants invoke various maxims of statutory construction, all of which are said to be confounded by the district court's decision. The appellants rely on two rules of construction in particular. The first (at pp. __-__) is that an interpretation that harmonizes different statutory provisions should prevail over an interpretation that places the provisions in conflict. The second (at pp. __-__) is that when two statutory provisions address the same subject, to the extent they are inconsistent, the more specific provision controls over the more general one. Neither of these maxims, however, offers the appellants any assistance.

In invoking the first maxim, the appellants assume that the statutory construction adopted by the Secretary of Defense and the Base Closure Commission creates a conflict between the Base Closure Act and Section 246. That assumption is simply wrong. Interpreting the Base Closure Act and Section 246 to cover military laboratories does not place the two statutory schemes in conflict. To the contrary, as the foregoing discussion has shown (see pp. __-__ supra), the two schemes coexist perfectly well.

And the appellants' contrary interpretation "harmonizes" the two schemes simply by discarding one scheme in favor of the other -- hardly a satisfactory solution.

The second maxim is inapposite because, like the first, it wrongly assumes that there is a conflict to be overcome between the Base Closure Act and Section 246. It is also inapposite for another, independent reason: Section 246 cannot meaningfully be said to be "more specific" than the Base Closure Act in an overall sense. In one respect, of course, Section 246 arguably is more specific: it is limited to military laboratories, while the Base Closure Act applies to all military installations. In another, equally important respect, however, the Base Closure Act is more specific: its subject matter is limited to closures, while the subject matter of Section 246 encompasses a far wider range of administrative actions and reforms, such as conversion of military laboratories to "GOCO" (government-owned, contractor-operated) labs. [Cite.] With respect to the specific issue at hand -- the closure of military laboratories -- each of the two statutory schemes is more specific in one respect and more general in another. The maxim that specific provisions prevail over general ones offers no guidance in these circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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September 14, 1994

TO: Mary Ann Hook
Dick Eddy

FR: Scott McIntosh

RE: Greenwood

Here is the appellants' opening brief in Greenwood. Our brief is due on Monday, October 3. I am tied up on other matters at the moment, but I will start working on a draft shortly, and I expect to circulate the draft for your comments about one week before the brief is due. If you have any thoughts you'd like to pass along in the meantime, let me know. My number is (202) 514-4052.

Document Separator

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1734

U.S. REP. JAMES C. GREENWOOD, et al.,

Appellants,

v.

JOHN H. DALTON, Secretary of the Navy, et al.

On Appeal from Judgment
of the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF APPELLANT

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August 29, 1994

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STATEMENT OF JURISDICTION

1. Subject Matter Jurisdiction

This is action for declaratory and injunctive relief brought by employees of the Naval Air Warfare Center-Warminster ("NAWC"), their unions and members of Pennsylvania's Congressional delegation against the Secretary of the Navy, the Secretary of Defense, the Assistant Secretary of the Navy, the Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories and its members and the Defense Base Closure and Realignment Commission and its members. Plaintiffs seek to prevent the Secretary of Defense and Secretary of the Navy from taking any action to realign or relocate NAWC pursuant to the Defense Base Closure and Realignment Commission's recommendations made in contravention of Title II of the National Defense Authorization Act for Fiscal Year 1991, § 246. Federal subject matter jurisdiction was based on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, 28 U.S.C. §§ 1331, 1337, 1346 and 1361; the National Defense Authorization Act for Fiscal Year 1991, Public Law 101-510, Title II, § 246 (November 5, 1990); the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title XXIX, §§ 2901-2910 (November 5, 1990); and the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

2. Appellate Jurisdiction

This is an appeal from a final judgment entered on June 24, 1994 by the United States District Court for the Eastern District of Pennsylvania. The notice of appeal

was filed timely on July 12, 1994. (App. 83). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the district court err in concluding that the Base Closure Commission, pursuant to congressionally adopted procedures for base closures, had jurisdiction or authority to include defense laboratories, including NAWC, in its 1991 recommendations to the President where Congress had specifically established a separate commission -- the Lab Commission -- under a discrete statutory scheme, Title II of the Defense Authorization Act for Fiscal Year 1991, § 246, to consider and determine a proposed schedule for any consolidation or closure of such laboratories?

The issue of whether the Base Closure Commission had jurisdiction to include defense laboratories in its 1991 recommendations to the President was raised by plaintiffs' motion for summary judgment. (App. 9). By Memorandum and Order entered November 1, 1993, the district court denied plaintiffs' motion for summary judgment. (App. 11, 72-81). Thereafter, on June 24, 1994, the district court entered judgment in favor of the Government, dismissing plaintiffs' complaint in its entirety. (App. 12, 82).

Review of the denial of plaintiffs' motion for summary judgment is plenary, Pennsylvania Power Co. v. Local Union No. 272 Intern. Broth. of Elec. Workers, AFL-CIO, 886 F.2d 46 (3d Cir. 1989), as is the legal question concerning whether the Base Closure Commission had jurisdiction or authority to include defense laboratories in its recommendations to the President. See Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981).

STATEMENT OF THE CASE

This is an action brought by employees of the Naval Air Warfare Center - Warminster ("NAWC")[1], their unions and members of the Pennsylvania Congressional Delegation to prevent the Secretary of Defense and Secretary of the Navy from carrying out the recommendation of the Base Closure Commission to close NAWC. The Secretary of Defense and Secretary of the Navy should not be permitted to implement the recommendations of the Base Closure Commission to close NAWC because the Base Closure Commission had no authority to consider NAWC to begin with and was not permitted to include NAWC in its recommendations. Rather, Congress expressly created an entirely different avenue of consideration, the Lab Commission, for defense laboratories such as NAWC. This appeal, therefore, is unlike the matter that was before this Court in Specter v. Garrett, 971 F.2d 936 (3d Cir. 1992) ("Specter I"), and Specter v. Dalton, 995 F.2d 404 (1993) ("Specter II"), which involved whether the proper commission, the Base Closure Commission, acted in a procedurally proper or fair manner in recommending the closing of a military base, the Philadelphia Naval Shipyard. Here, by contrast, the Base Closure Commission's recommendations to close NAWC were actions undertaken by the wrong Commission pursuant to the wrong statutory mandate.

* * *

Plaintiffs filed a complaint on September 15, 1992, against the Secretary of the Navy, the Secretary of Defense, Advisory Commission on Consolidation and Conversion of

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1. NAWC was formerly denominated Naval Air Development Center ("NADC") and was referred to as NADC in the Complaint.

Defense Research and Development Laboratories (the "Lab Commission") and its members, and the Defense Base Closure and Realignment Commission ("Base Closure Commission") and its members (sometimes collectively referred to as the "Government"), seeking a declaratory judgment that the Government's decision to realign and relocate NAWC is unlawful and an injunction to prevent the Government from taking such action. (App. 8, 14-69). In the district court, plaintiffs maintained that the Government's decision to realign and relocate NAWC was unlawful on four independent grounds: (1) the Base Closure Commission lacked authority or jurisdiction to include defense laboratories in its 1991 recommendations to the President; (2) the Government violated the Lab Commission Act by failing to allow the Lab Commission to conduct an independent, uncompromising study to consider consolidation and closure of defense laboratories and to determine a schedule for such closures or consolidations; (3) the Government violated the procedural safeguards and requirements of the Base Closure Act; and (4) the Government's disregard of the procedures set forth in the Base Closure Act constituted a violation of plaintiffs' rights to due process.

On December 2, 1992, the Government moved to dismiss plaintiffs' complaint in its entirety. Because two of the claims in the district court -- that the Government violated (1) the procedural safeguards and requirements of the Base Closure Act, and (2) plaintiffs' due process rights -- were identical to the claims made by the Specter plaintiffs in Specter v. Garrett, 777 F.Supp. 1226 (E.D. Pa. 1991), rev'd and remanded, 971 F.2d 936 (3d Cir.), cert. granted, vacated and remanded, sub nom. O'Keefe v. Specter, 113 S. Ct. 455 (1992) ("Specter I"), the parties stipulated that plaintiffs' response to the Government's motion to

dismiss would not be due until 15 days after this Court decided Specter I on remand.[2] Instead of approving the stipulation, the district court dismissed, without prejudice, the Government's motion and ordered that the Government file its responsive pleading within 30 days of this Court's decision in Specter II. (App. 8).

On May 18, 1993, this Court rendered its decision in Specter II. Thereafter, the parties stipulated that the Government's responsive pleading would be due on July 21, 1993. The district court approved the stipulation. (App. 8).

On July 21, 1993, the Government moved to dismiss all plaintiffs' claims, except plaintiffs' claim that defendants violated the procedural mandates of the Base Closure Act -- the claim that this Court held reviewable in Specter II. (App. 9). By separate motion, defendants moved to stay plaintiffs' procedural misconduct claim on the ground that defendants intended to file a petition for certiorari in Specter II. (App. 9).

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2. This case was filed in the district court as an action related to Specter I because those two claims were identical. In Specter I, this Court held that judicial review of the decision to close the Philadelphia Naval Shipyard was available to ensure that various participants in the selection process had complied with the procedural mandates established by Congress. Specter v. Garett, 971 F.2d 936 (3d Cir. 1992). The Supreme Court vacated and remanded Specter I, O'Keefe v. Specter, 113 S. Ct. 455 (1992), for further consideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), in which the Court concluded that the Secretary of Commerce's report was not final agency action under the APA and that the APA does not apply to the President, and, therefore, judicial review of the decennial reapportionment of the House of Representatives was not available. On remand, this Court adhered to its decision in Specter I and held that Franklin did not affect reviewability of the procedural claims. Specter v. Dalton, 995 F.2d 404 (1993) ("Specter II"). Ultimately, the Supreme Court granted certiorari, Dalton v. Specter, 114 S. Ct. 342 (1993), and on May 23, 1994, reversed, holding that judicial review was not available for Specter plaintiffs' claims under the Base Closure Act. Dalton v. Specter, 114 S. Ct. 1719 (1994). Plaintiffs, here, therefore, do not press their claims under the Base Closure Act, which claims are foreclosed by the Supreme Court's decision in Specter II.

Simultaneously, on July 21, 1993, plaintiffs moved for summary judgment on their claim that the Base Closure Commission lacked authority and jurisdiction to include the NAWC in its recommendations to the President. (App. 9). Plaintiffs' summary judgment motion raised a purely legal issue of statutory construction and legislative intent: whether, as a matter of law, the NAWC was improperly and illegally proposed for realignment and relocation by the Base Closure Commission pursuant to congressionally adopted procedures for base closures where Congress had created a separate commission -- the Lab Commission, pursuant to Title II of the Defense Authorization Act for Fiscal Year 1991, § 246 -- to consider and determine a proposed schedule for consolidation of defense laboratories.

The district court disposed of the parties' motions by three separate orders. First, by Order of October 8, 1993, the district court denied defendants' motion for partial stay. (App. 11).

Second, by Memorandum and Order dated October 28, 1993, and entered November 1, 1993, the district court denied plaintiffs' motion for summary judgment, not because some factual issue remained for trial, but because, according to the Court, "The Base Closure Act grants authority to close or realign NAWC without regard to any recommendations made by the Lab Commission established under Section 246." (App. 80). The district court reasoned that "NAWC would be considered a military installation under the Base Closure Act definition," (App. 76), and that "Congress did not create an exception to the Base Closure Act divesting the Secretary of Defense and Base Closure Commission of the authority to recommend defense labs for closure or alignment when it created a separate

commission to perform an independent study of defense labs under Section 246." (App. 78).

Finally, by separate Memorandum and Order dated October 28, 1993, and entered November 1, 1993, the district court denied defendants' motion to dismiss "in light of the present posture of Specter v. Garrett." (App. 70-71). The district court, however, reiterated that "the Base Closure Commission had the authority to close or realign NAWC under the Base Closure Act without regard to any recommendations made by the Lab Commission." (App. 70).

On October 25, 1993, the Government moved for reconsideration of the district court's denial of its motion for partial stay on the ground that the Supreme Court had granted certiorari in Specter II. (App. 11). On November 12, 1993, the district court granted the Government's motion and ordered that "All claims are stayed until 30 days after the Supreme Court decides Specter v. Dalton." (App. 12; see also Order of November 12, 1993, entered November 15, 1993). The district court further ordered that "the Clerk of Court mark this action closed for statistical purposes and place the matter in the Civil Suspense File." (App. 12); see also Order of November 12, 1993, entered November 15, 1993).

On November 16, 1993, plaintiffs moved, pursuant to 28 U.S.C. § 1292(b), for certification for interlocutory appeal of the district court's Order denying plaintiffs' motion for summary judgment, (App. 12), and on November 19, 1993, filed a supplemental memorandum in light of the district court's grant of the Government's motion to stay. (App.

12). The district court denied plaintiffs' motion by Order dated January 4, 1994. (App. 12).

On May 23, 1994, the Supreme Court reversed Specter v. Dalton, 995 F.2d 404 (3d Cir. 1993), holding that judicial review was not available for Specter plaintiffs' claims under the Base Closure Act. Dalton v. Specter, 114 S. Ct. 1719 (1994).

Thereafter, by Order dated June 23, 1994, and entered June 24, 1994, the district court entered judgment in favor of the Government and dismissed plaintiffs' complaint in its entirety, stating:

> In accordance with the decision of the United States Supreme Court in Specter v. Dalton, 114 S. Ct. 1719 (1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED and ADJUDGED that plaintiffs' complaint is dismissed with prejudice in its entirety.

(App. 82).

This appeal followed.

STATEMENT OF FACTS

The facts relevant to this appeal, which turns on the construction of two statutes, are straightforward and undisputed. There is no question in this case whether some factual issue remains for trial.

I. THE NAVAL AIR WARFARE CENTER -- WARMINSTER

The NAWC, which is at the center of this dispute, has functioned as a naval research and development laboratory within the Department of Defense's large and complex laboratory system since 1947. (App. 25, Complaint, at ¶ 45). Its mission is to be the principal Navy research and development center for aircraft, airborne anti-submarine warfare, aircraft systems less aircraft-launched weapons systems, and surface ship, submarine and aircraft navigation. Id. In addition to weapons systems development, the NAWC's work also involves electro-optic, acoustic, and microwave technologies. (App. 25, Complaint, at ¶ 46). The NAWC also researches technologies for the surveillance and targeting of airborne, surface and subsurface targets. Id. The NAWC is also the Navy's leading center for upgrading existing Navy aircraft such as F/A-18, F-14, A-6 and AV-8B. (App. 25, Complaint, at ¶ 47). The capacities of these aircraft are highly dependent on products conceived and developed by the NAWC. Id.

To accomplish its mission, the NAWC has a number of unique facilities, including an ejection tower facility, which is the only man-rated facility in the United States; a fuel fire test facility; a pneumatically driven crash-impact simulator; a state-of-the-art

laboratory capable of static and fatigue testing of aircraft structural specimens; four anechoic chambers, including one that was fabricated and installed after an extensive study was done assuring that no other facility in the U.S. could meet its technical requirements; 1500 tons of sophisticated computer systems and laboratory precision equipment; and a central computer system that is the largest hybrid system in the Navy. (App. 25-26, Complaint, at ¶ 48). Operations at NAWC involve 223 military and 2304 civilian personnel. (App. 26, Complaint, at ¶ 49). Approximately sixty percent of NAWC's current staff are scientists and engineers, including approximately 33% with Master's degrees and approximately 5% with Doctoral degrees. Id.

II. THE DISCRETE STATUTORY SCHEMES CREATED BY CONGRESS TO DEAL SEPARATELY WITH BASES AND LABORATORIES

Over the years, Department of Defense ("DOD") laboratories have been plagued with various problems relating to, among other things, recruitment and retention of its professional staff, personnel management and laboratory management. Congress has enacted legislation and the DOD has issued memoranda designed to address laboratory issues. (App. 26-27, Complaint, at ¶¶ 54-55).

Recently, in part in an effort to address issues facing laboratories, as part of the National Defense Authorization Act for Fiscal Year 1991 ("Defense Authorization Act"), Congress enacted two statutes to address issues relating to the domestic military infrastructure. The purpose of one -- the "Defense Base Closures and Realignment Act of 1990," (the "Base Closure Act") -- was to provide for a fair process designed to result in the timely closure and realignment of military bases. Title XXIX of the Defense Authorization Act

§ 2901(b). The other -- "Research, Development, Test, and Evaluation," (the "Lab Commission Act"), Title II of the Defense Authorization Act § 246 -- was to address the peculiar issues facing DOD laboratories ("defense laboratories") and to make recommendations to the Secretary of Defense and Congress on future organization and structure of defense laboratories. See H.Rep. 101-923, at 563-64; reprinted at 1990 U.S. Code, Congressional and Administrative News, vol. 6, at 3135-36. (For the convenience of the Court, a copy of each of these statutes is appended hereto.)

These two statutes established separate commissions with discrete jurisdictions and duties, and separate procedures for determining closures and realignments. Congress established the Defense Base Closure and Realignment Commission ("Base Closure Commission") under the Base Closure Act. The Base Closure Commission was to review the realignment and closure recommendations of the Secretary of Defense, § 2903(d), conduct public hearings, § 2903(d)(1), and "transmit to the President a report containing the Commission's findings and conclusions based on review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations in the United States." § 2903(d)(2)(A).

By contrast, the independent Lab Commission established by Congress under § 246 had a separate purpose and followed entirely different procedures. The Lab Commission, which was composed of individuals with expertise on laboratories, § 246(c)(1), was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). In particular, the Act directed the Lab Commission to consider, among other things,

consolidation and/or closure as a means of improving the operation of defense laboratories, § 246(b)(2)(A)(iii), and to determine a "proposed schedule" for any consolidation or closure of laboratories. § 246(b)(2)(B)(ii).

Thus, unlike the Base Closure Commission which reviewed only the military bases recommended for closure or realignment by the Secretary of Defense, the Lab Commission was charged with conducting a study comprising the entire laboratory system, including all defense laboratories, not just those included on the Secretary of Defense's Base Closure List. Unlike the process established pursuant to the Base Closure which would result in the "piece-meal" review of defense laboratories, the Lab Commission Act provided for a comprehensive review of all laboratories.

In addition to the discrete objectives of each Commission, made plain by the unambiguous language in the two statutes, the statutes set forth entirely separate time-tables and procedures for reporting to Congress and for ultimate Congressional decision making. Under the Base Closure Act, the Secretary of Defense transmits to the Base Closure Commission a list of military installations that the Secretary recommends for closure and realignment by April 15, 1991, March 15, 1993, and March 1, 1995. § 2903(c)(1). Thereafter, by no later than July 1 of 1991, 1993 and 1995, the Base Closure Commission must transmit to the President a report containing the Base Closure Commission's findings and conclusions based on a review and analysis of the Secretary of Defense's recommendations for closures and realignments. § 2903(d)(2). The President must then by July 15

transmit to the Base Closure Commission and Congress a report containing the President's approval or disapproval of the Base Closure Commission's recommendations. § 2903(e). If the President approves, Congress may, within 45 days of receiving the President's approval (or by the date Congress adjourns for the session, whichever is earlier), enact a joint resolution of disapproval. § 2904(b); § 2908. If such a resolution is passed, the Secretary may not carry out any closures pursuant to the Act; if such a resolution is not passed, the Secretary must close all military installations recommended for closure by the Commission. § 2904(a) and (b)(1). Thus under the Base Closure Act scheme, Congress must accept or reject en bloc all the recommendations.

The Lab Commission Act procedures were entirely different. Under the Lab Commission Act, the Lab Commission was required to submit a report containing its recommendations to the Secretary of Defense no later than September 30, 1991. §246(f). The Secretary of Defense was then to transmit the Lab Commission's report to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g). Congress then had flexible decision-making power to accept or reject the Lab Commission's recommendations, or to develop its own set of recommendations for laboratories. The President was not involved.

The procedures established in the Lab Commission Act, unlike the procedures set out in the Base Closure Act, reaffirmed Congress' continuing intent to oversee the functioning of, and plan and control any reform or restructuring of defense laboratories. In fact, by enacting the Lab Commission Act Congress took on an even more proactive role

than it previously had undertaken. In 1989, Congress had specifically dealt with laboratories in the National Defense Authorization Act for Fiscal Years 1990 and 1991, P.L. 101-189 (November 29, 1989). There, Congress directed the Department of Defense to establish the Laboratory Demonstration Program, using selected laboratories. (App. 27, Complaint, at ¶ 58). The legislation stated that the demonstration program would be designed to attract and retain high quality staff, streamline contracting procedures, improve personnel management, and increase laboratory directors' accountability and authority. Id.

The Lab Commission Act increased the Congressional role by providing for direct reporting to Congress. See § 246(g). Moreover, unlike the Base Closure Act, the Lab Commission was directed to consider options other than closure or consolidation. See § 246(b)(1); (b)(2)(A). Congress retained flexible decision-making power -- not the all-or-nothing choice provided by the Base Closure Act -- under the Lab Commission Act.

The purpose of the Lab Commission Act and Congress' continuing intent to oversee reorganization of defense laboratories is clear from the Conference Report comment on the Lab Commission legislation:

> The Senate amendment contained a provision (sec. 853) that would direct the Secretary of Defense to establish a Commission on Laboratory Consolidation and Conversion. This Commission would review the current health and effectiveness of the defense laboratories using the recent Defense Department studies and reviews conducted under the Defense Management Review as a starting point. The Commission would make recommendations to the Secretary and the Congress on the future organization and structure of these laboratories.
>
> * * *

> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration.

See H. Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

The reason for the decision of Congress to deal with bases and labs in entirely different ways is clear. Simply put, military bases, shipyards and air stations are quite different from defense laboratories. Unlike bases, defense laboratories have unique missions and are staffed by personnel with scientific and technological expertise. (App. 25-26, Complaint, at ¶¶ 45-49). Indeed, the success of defense laboratories -- unlike bases -- is inextricably linked to the scientific and technical expertise of its personnel, a point that is underscored by the Lab Commission's identification of the unique attributes of a "good laboratory." The Lab Commission's September 30, 1991, report to the Secretary of Defense and Congress -- issued nearly 3 months after the Base Closure Commission transmitted its Base Closure and Realignment Report to the President, and more than 5 months after the Secretary of Defense transmitted its recommendations to the Base Closure Commission, recommending defense laboratories for closure or realignment -- identified nine "attributes . . . essential to achieving high quality and effectiveness" of defense laboratories: (1) clear and substantive mission; (2) critical mass of assigned work; (3) a highly competent and dedicated work force; (4) inspired, empowered, highly qualified leadership; (5) state-of-the-art facilities and equipment; (6) effective two-way relationship with customers; (7) strong foundation in

research; (8) management authority and flexibility; (9) strong linkage to universities, industry and other Government laboratories. (App. 56-57, Complaint, at ¶ 187). According to the Lab Commission's report, these attributes of a "good laboratory are indicators of the probability of success in providing needed products for the national defense effort." (App. 57, Complaint, at ¶ 188).

In short, a determination on whether laboratories are to be closed or consolidated -- unlike a like decision concerning bases -- requires more than an assessment of total force requirements and consolidation of fungible resources such as, tanks or aircraft. In fact, Congress recognized this fact and required in the Lab Commission Act that Lab Commission to include a Chairman and several members with specific expertise pertaining to defense laboratories. § 246(c)(1)(A) & (B).

Indeed, it is undisputed that essential underpinnings of the Base Closure Commission's processes in dealing with bases were totally inapplicable to labs. Thus, the Base Closure Act required the creation of a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet over a six-year fiscal period. (App. 45, Complaint, at ¶ 125). Base closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act. Tellingly, the Department of Defense's force structure plan does not address laboratories or research and development. (App. 45; Complaint, at ¶ 126).

Moreover, the Department of Defense developed eight criteria to be considered in the base closure and realignment process. (App. 42; Complaint, at ¶ 118). The Navy

acknowledged that the eight criteria were inapplicable to laboratories in its analysis of base closures and realignments because -- just as Congress recognized -- labs, unlike bases, must be judged on the very specific and technical applications of each lab:

> ...each of the RDT&E activities have unique aspects which make them suited to do a specific range of RDT&E activities. Their missions, internal structure, mode of operations and facilities are different. For this reason there are no metrics which can be used across the entire category to evaluate the[ir] activities.

(App. 46-47, Complaint, at ¶ 135).

III. THE UNLAWFUL DECISION TO CLOSE NAWC

In blatant disregard of the clear Congressional mandate requiring the Lab Commission to function as the independent body charged with making recommendations regarding laboratory closures or consolidations for Congress' ultimate review and flexible decision-making prior to the taking of any other action relating to laboratory consolidation, defendant Gerald Cann, Assistant Secretary of the Navy for Research, Development and Acquisition, and others, sought to and did circumvent the intent of Congress and the Lab Commission Act, and avoided Congressional oversight by unlawfully and inappropriately inserting into the 1991 Base Closure Process the consolidation and realignment of DOD laboratories, including the NAWC. (App. 32-33, Complaint, at ¶ 79).

In fact, at the urging of Gerald Cann, and others, the Department of Defense accepted and recommended to the Base Closure Commission Cann's proposal to create four super facilities: Naval Air Warfare Center; Naval Command, Control and Ocean

Surveillance Center; Naval Surface Warfare Center; and Naval Undersea Warfare Center, and to close 10 and realign 16 laboratories. (App. 33, Complaint, at ¶ 80).

The Secretary of Defense included Navy laboratories in the 1991 Base Closure and Realignment Recommendations (the "Base Closure List"), which was submitted to the Base Closure Commission on or about April 15, 1991. (App. 33, Complaint, at ¶ 81). The NAWC was one of the laboratories targeted for realignment. (App. 33, Complaint, at ¶ 82).

The folly of attempting to restructure labs via procedures that violate the intent of Congress as set out in the Lab Commission Act is dramatically demonstrated by the results. At the time the complaint was filed, the Navy had not even determined the final organizational plan for the Naval Air Test Center, Patuxent River. (App. 57, Complaint, at ¶ 191). While the Navy's restructuring plan calls for the NAWC to be realigned, the Navy had not determined whether the NAWC would remain a separate entity. (App. 58, Complaint, ¶ 192). The Navy's inability to articulate a forward-thinking plan for its research and development laboratories would, if left unchecked, result in the relocation of the NAWC at a time when a functional, fully staffed NAWC is critical. (App. 58, Complaint, at ¶ 193).

The Navy's plan calls for realignment and relocation of the NAWC at a time when the combined technical expertise of the NAWC's professional staff is most needed. (App. 58, Complaint, at ¶ 194). The cancellation of various weapons programs in conjunction with the apparent end of the Cold War means that the Navy likely will be unable to field any new aircraft until early in the next century. (App. 58, Complaint, at ¶ 195). Hence the Navy will have to upgrade its existing aircraft. (App. 58, Complaint, at ¶ 196).

The NAWC would be expected to play a principal and immediate role in developing and applying technologies associated with individual upgrades. (App. 58, Complaint, at ¶ 196). However, the proposed realignment of the NAWC would result in the loss of key technical talent, which would have a detrimental effect on the NAWC's ability to perform the needed upgrades. (App. 58, Complaint, at ¶ 197).

This, combined with the fact that the proposed relocation of the NAWC will be far more costly than the Navy's estimates, which are based on faulty data and inaccurate assumptions, makes it clear that the Navy's plan is unwise and, ultimately, potentially damaging to Naval aviation. (App. 59, Complaint, at ¶ 199).

In order to avoid such a result, Congress enacted a separate statutory scheme to deal with labs. Congress expressly recognized the need for review of laboratories to be based on fine-tuned technical considerations and thus created a statutory scheme by which labs were to be considered for realignment or closure by procedures entirely different than those for bases. As we discuss below, because the congressional intent was completely flaunted, plaintiffs' were entitled to summary judgment in the district court, and this Court should reverse the district court's denial of summary judgment and direct that judgment to be entered in favor of plaintiffs.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case was filed in the district court as an action related to Specter v. Garrett, 971 F.2d 936 (3d Cir.), cert. granted, vacated and remanded, sub nom. O'Keefe v. Specter, 113 S. Ct. 455 (1992) ("Specter I"), because plaintiffs' claims that the Government violated both the procedural safeguards of the Base Closure Act and plaintiffs' due process rights were identical to the claims raised in Specter I. In Dalton v. Specter, 114 S. Ct. 1719 (1994) ("Specter II"), the Supreme Court held that those claims of procedural impropriety are not subject to judicial review. Plaintiffs, therefore, do not press those claims on appeal. Instead, on appeal plaintiffs argue only that the Base Closure Commission was without authority or jurisdiction to recommend defense laboratories for realignment or closure. Specter II does not bear on the resolution of this issue. Thus, for purposes of this appeal, this case is not related in any way to Specter II.

STATEMENT OF STANDARD OR SCOPE OF REVIEW

In accordance with Rule 28.1(a)(i) of the Third Circuit Local Appellate Rules, the standard and scope of review for each issue on appeal is set forth in the Statement of Issues on p. 3 of this Brief.

SUMMARY OF ARGUMENT

This case involves the proposed realignment and relocation of NAWC. NAWC was improperly and illegally proposed for realignment and relocation by the Base Closure Commission, pursuant to congressionally adopted procedures for base closures and realignments. Plaintiffs were entitled to summary judgment below because unlike, for example, the Philadelphia Naval Shipyard that was before this Court in Specter I and Specter II, NAWC is a naval research and development laboratory, not a military base, and should have been considered under the statutory procedures that reflect explicitly Congress' intent to deal with laboratories in a manner wholly apart from the way Congress legislated on base closures. Summary judgment was mandated because NAWC should have been dealt with by the Commission specifically created by Congress to deal with labs, not bases, pursuant to the procedures specifically mandated by Congress to deal with labs, not bases. Nonetheless, the district court denied plaintiffs' motion for summary judgment and ultimately entered judgment in favor of the Government, concluding that "The Base Closure Act grants authority to close or realign NAWC without regard to any recommendations made by the Lab Commission established under Section 246." (App. 80).

The district court's holding results in a statutory interpretation that borders on the absurd. Section 246 directed the Lab Commission to, among other things, consider and propose a schedule for consolidation and/or closure of defense laboratories on a lab-by-lab basis for final determination by Congress, which retained flexible decision-making. To affirm, this Court must conclude that Congress enacted § 246 with the intent that the Lab Commission's recommendations would have no impact on any decision to close or consolidate

laboratories and that the procedures for lab-by-lab Congressional determination would be totally avoided. As we shall next show, that result flies in the face of well-established rules of statutory construction and must be rejected out of hand.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE BASE CLOSURE COMMISSION WAS WITHOUT JURISDICTION AND AUTHORITY TO REVIEW AND MAKE DECISIONS ABOUT DEFENSE LABORATORIES.

The issue before this Court is whether the wrong Commission took action under the wrong statute to close NAWC. It is clear that the courts provide the final authority on such an issue of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); Southern California Edison Co. v. F.E.R.C., 770 F.2d 779, 782 (9th Cir. 1985) (courts are final authorities on issues of statutory construction and must reject administrative constructions that are inconsistent with a statutory mandate or that frustrate a policy that Congress sought to implement); Markair, Inc. v. Civil Aeronautics Board, 744 F.2d 1383, 1386 (9th Cir. 1984) ("it is not the role of [an administrative agency] to make policy judgments in the face of a contrary congressional determination"); Guerrero v. Garza, 418 F. Supp. 182, 186-87 (W.D. Wis. 1976), (it is "peculiarly within the power of the judiciary to interpret a statute which gives an agency the power to act, in order to permit the judiciary to determine whether the agency has correctly construed its obligations under the statute").[3]

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3. Moreover, there can be no doubt that judicial review is available where, as here, plaintiffs claim that federal officials -- the Base Closure Commission -- have exceeded their authority or jurisdiction, see United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929); Duke Power Company v. Federal Power Commission, 401 F.2d 930 (D.C. Cir. 1968). Likewise, it is well-settled that declaratory judgment is an appropriate form of relief, in situations where, as here, federal officials have violated

(continued...)

Moreover, where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929).

In its Memorandum and Order, the district court acknowledged this rule of statutory construction and in a laundry list recitation of many of the rules relied on by plaintiffs in their motion for summary judgment gave a passing nod to the law relevant to resolution of the issue before it:

> 1. Where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific R.Co., 278 U.S. 269 (1929).
>
> 2. However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same legislation. . .specific terms prevail over the general in the same or another statute which otherwise might be controlling. (Citations omitted).
>
> 3. Where statutes deal with a subject in both general and detailed terms, and there is a conflict between the two, the detailed expression prevail. (Citation omitted).
>
> 4. The various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation. (Citations omitted).
>
> 5. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which

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3.(...continued)
their statutory duties or exceeded their statutory authority. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 701-702 (1949); Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 139-140 (1951); Guerrero v. Garza, 418 F. Supp. 182, 190 (W.D. Wis. 1976). Redlands Foothill Groves v. Jacobs, 30 F. Supp. 995, 1008 (S.D. Cal. 1940). Tellingly, neither the Government nor the district court challenged the availability of judicial review on this claim.

will not do violence to the plain words of the act, and will carry out the intention of Congress. (Citation omitted).

6. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. Reves v. Ernst & Young, 113 S.Ct. 1163, 1169 (1993).

7. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent. United States v. Smith, 111 S.Ct. 1180, 1185 (1991).

8. Statutory provisions should be interpreted harmoniously with each other when possible. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992).

9. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551 (1974).

(App. 77-78).

It is clear from its opinion and holding that the district court went on to ignore this fundamental law. The plain language of the two statutes at issue here makes clear that the Base Closure Commission was without authority to consider defense laboratories.

The Lab Commission Act, by its terms, created the Lab Commission and required the Lab Commission to conduct a separate and independent study of closure, realignment and consolidation of defense laboratories. The plain terms of this statute conferred a specific grant of jurisdiction upon the Lab Commission to submit its independent study and report no later than September 30, 1991, and specific procedures -- quite different

from those involving base closures -- by which Congress would make the final determination after receiving the report.

The plain language of the Lab Commission Act makes it clear that Congress intended the Lab Commission systematically and uncompromisingly to evaluate defense laboratories. In particular, the Lab Commission was charged with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). The Lab Commission Act required that the Lab Commission:

> "(A) consider such means as --
>
> (i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;
>
> (ii) modification of the missions and function of some or all such laboratories; and
>
> (iii) consolidation or closure of some or all such laboratories."

§ 246(b)(2)(A). In addition, the Act required that the Lab Commission:

> "(B) determine --
>
> (i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion
>
> (ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission."

§ 246(b)(2)(B).

The Act further required the Lab Commission to submit a report containing its recommendations to the Secretary of Defense no later than September 30, 1991, § 246(f), which report was to be transmitted by the Secretary of Defense to each House of Congress "together with any comments that the Secretary considers appropriate" within 30 days of his receipt of the report from the Lab Commission. § 246(g).

At that point, Congress retained flexible decision-making power concerning labs and could accept or reject the Lab Commission's recommendations. Alternatively, it also could develop its own set of recommendations for laboratories.

Quite clearly, Congress intended to treat labs entirely differently than bases. Congress recognized the different considerations involved with labs and bases, see pp. 14-16, supra, and insisted on not lumping these "apples" and "oranges" military locations.

As a result, the Base Closure Act, in stark contrast to the Lab Commission Act, established the Base Closure Commission -- a Commission with a wholly discrete purpose and reporting scheme from the Lab Commission. The jurisdiction and duties of the Base Closure Commission are set forth in Section 2903 of the Base Closure Act. The Base Closure Act charges the Base Closure Commission with the duty of evaluating the Secretary of Defense's recommendations for closing such facilities as military bases, shipyards and air stations. Under the Base Closure Act, the Secretary of Defense prepares a list of such military installations which he recommends for closure or realignment. That list must be transmitted by no later than April 15, 1991, March 15, 1993, and March 15, 1995. Thereafter, on July 1 of 1991, 1993, and 1995, the Base Closure Commission must transmit

a report with its recommendations on closures and realignments to the President. If the President accepts the recommendations and transmits them to Congress, then Congress has 45 days to accept or reject, en bloc, the recommendations.

Although the district court acknowledged that specific terms control and that courts may not pick and choose between statutes, it nonetheless did just what the law prohibits. Framing the issue as whether Congress created "an exception to the Base Closure Act," (App. 76), the district court found that "[t]here is absolutely nothing in the record before me to indicate that Congress intended the Lab Commission to create an exception to the Base Closure Act," (App. 78), and, therefore, concluded that the Base Closure Commission had authority to close or realign NAWC "without regard to any recommendations made by the Lab Commission." (App. 80) -- a holding that eviscerates the Lab Commission.

The district court's holding flies in the face of the settled law that specific terms in a statute prevail over more general terms and the equally settled law that statutes must be harmonized to provide for consistent interpretation. Moreover, the district court offers no credible explanation why Congress would enact a statutory scheme establishing two discrete commissions and two entirely different Congressional decision-making procedures to deal with discrete military locations when it supposedly intended only one commission to deal with every conceivable location. Of course, there is no sensible explanation for such a bizarre reading of the statutory scheme.

Obviously, statutes should not be interpreted in a way that makes certain provisions irrelevant or inconsistent. Rather, federal courts have consistently concluded that

"the various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation." Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 732 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). See also United States v. Raynor, 302 U.S. 540, 547 (1938) ("[a] construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress").

The only possible way the statutory provisions can be harmonized is if labs are dealt with under the Lab Commission procedures. Certainly, there is no harmonization where the Lab Commission and the Lab Commission Act procedures were totally ignored.

In short, Congress intended and created a statutory scheme by which, on the one hand, the Lab Commission would thoroughly review and evaluate defense laboratories and submit its report to the Secretary of Defense, who would transmit it to Congress, with any comments, for flexible decision-making by Congress; while, by contrast, the Base Closure Commission would receive recommendations from the Secretary of Defense and, after holding hearings, would transmit a report to the President, who, if he approved, would forward it to Congress for an all-or-nothing determination. In other words, Congress mandated that the treatment of labs was to be different in almost every regard than the treatment of bases.

This intent of Congress in passing its statutory scheme has been totally flaunted. The Secretary of Defense by-passed the Lab Commission by including defense laboratories in his April 15, 1991, recommendations to the Base Closure Commission.

Likewise, the Base Closure Commission by-passed the Lab Commission by including laboratories in its July 1, 1991, recommendations to the President. Both events occurred before the Lab Commission even provided a report. In effect, both the Lab Commission and Congress were presented with a fait accompli concerning labs that deprived the Lab Commission of its ability to perform its thorough study and consider options other than closure or consolidation; and that deprived Congress of its ability to exercise flexible decision-making as to labs by accepting, rejecting, or modifying the Lab Commission's recommendations or developing its own recommendations.

Clearly the statutory scheme has been violated and plaintiffs are entitled to judgment as a matter of law. Indeed, the only possible remedy for plaintiffs is with this Court. The illegal lumping of labs into the all-or-nothing base closure process left Congress with no ability to remedy the statutory violation other than by rejecting the entire base closure proposal. For this reason, the district court's observation that "legislation was introduced in both the House and Senate to block closure or realignment of defense labs. . . . Both bills died in Committee," (App. 80), misses the mark. That Congress did not pass a joint resolution disapproving the Base Closure Commission's recommendations is neither dispositive nor surprising. Passage of a joint resolution would have resulted in no military installations being closed in 1991. As the Government noted in its papers below, the Base Closure Act "is a comprehensive effort to effectuate the closure or realignment of unneeded domestic military facilities after years of political gridlock that halted such cost saving measures." See Defendants' Opposition to Plaintiffs' Motion for Summary Judgment. Hence, that Congress chose not to subvert the entire base closure process is absolutely no

evidence of Congress' intent that laboratories be considered by the Base Closure Commission, instead of by the Lab Commission -- the Commission specifically enacted by Congress to deal with labs.

Likewise, Congress' failure to pass corrective legislation is not evidence of Congress' ratification of the Base Closure Commission's recommendations on labs. Again, there was a strong political incentive to avoid dealing with base closure in a piece-meal fashion. However, the fact that it may not have been politically expedient to carve out ex post exceptions to the Base Closure Process does not lead to the conclusion that Congress intended that the statutory framework it enacted would be totally flouted.

The fact is, the district court's observation that Congress could have, but did not, reject the Base Closure Commission's lab realignments that were improperly included in the base closure process is the final step in the subversion of Congress' real intent. The clear intent of Congress in enacting the Lab Commission Act was to preserve its flexible decision-making over labs rather than have labs treated as part of the all-or-nothing process for bases that was necessary to overcome the political deadlock over base closures. This is exactly the opposite of what Congress intended as to labs, and plaintiff's motion for summary judgment, therefore, should have been granted.

The background surrounding the creation of Lab Commission strongly suggests the Congressional recognition that consolidation and closure decisions merit special consideration. Indeed, the Conference Report on the Lab Commission legislation commented:

> The conferees understand that the Department of Defense is currently evaluating a reorganization of the entire defense laboratory structure with potential laboratory closures and consolidations. This [Lab] Commission will provide the Committees on Armed Services of the Senate and the House of Representatives with a critical assessment of the Department's findings and may suggest alternative actions for congressional consideration. See H.Rept. 101-923, at pages 563 and 564; reprinted at 1990 U.S. Code, Congressional and Administrative News, volume 6, at pages 3135 and 3136.

Congress designated a special process whereby this special consideration was to take place, and any attempt by the Secretary of Defense and the Base Closure Commission which attempts to bypass this procedure is a direct violation of Congressional intent.

In a report which accompanied a Department of Defense Appropriations bill for fiscal year 1992, the House Committee on Appropriations also expressed its disapproval of attempts to include defense laboratories in the April 15, 1991, Base Closure List:

> Laboratory Consolidation. The Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories is strongly endorsed by the committee in its report. The committee believes that the inclusion of research and development laboratories on the Base Closure list is in direct contravention of congressional direction. Accordingly, the committee directs DOD not to obligate or expend funds to close or consolidate any research or development laboratory until Congress received and approves the commission report.

H.R. Rep. No. 95, 102nd Cong., 1st Sess. (1991) (emphasis added).

Labs nonetheless were wrongly included in the Base Closure Commission's closings and realignments, thereby depriving Congress of the flexible decision-making for labs that Congress desired. Congress thus was faced with the choice of overriding the Base

Closure Commission's illegal decisions on labs -- and preserving its flexible decision-making for labs that it had mandated in the statutory scheme -- at the expense of rejecting the entire base closure process and continuing the political deadlock over bases. This, of course, is exactly the type of Hobson's choice that Congress explicitly rejected as to labs when it passed the Lab Commission Act. And now, having seen this flouting of the clear Congressional intent, this Court should not endorse the improper reasoning that Congress somehow has ratified the Government's unlawful behavior because Congress did not take exactly the type of actions that the Government effectively deprived it of the ability to take. The district court erred when it relied on the fact that Congress did not reject en bloc the recommendations of the Base Closure Commission.

Finally, in denying plaintiffs' motion, the district court erred in its determination that "NAWC would be considered a military installation under the Base Closure definition." (App. 76). The only articulated basis for its conclusion was that plaintiffs' Complaint describes NAWC as "the principal Naval Research and Development Center for Aircraft." (App. 75). However, the fact that NAWC is denominated a "center" does not mean it falls within the definition of Section 2910(4).

Section 2910(4) defines "military installation" as any "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense . . . " However, the use of the term "center" does not, when read sensibly in context, in any way even suggest that labs are included in the jurisdiction of the Base Closure Commission. This language must be read in the context of the type of facilities specifically denominated in § 2910(4) -- "base," "camp," "post," "station," "yard,"

"homeport facility for any ship." All are clearly base-type facilities, in no way similar to laboratories. The phrase "or other activity under the jurisdiction of the Department of Defense," as well as the use of the generic term "center," must therefore be read as including only such base-type facilities.

Moreover, § 2910(4) must be read in conjunction with the Lab Commission Act. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same legislation . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957), quoting, D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). See also Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944). Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, 720 n. 5 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). ("[w]here statutes deal with a subject in both general and detailed terms, and there is conflict between the two, the detailed expression prevails").

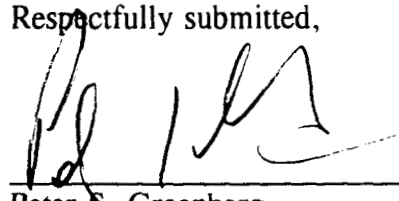
Here, the Lab Commission Act "specifically" deals with issues involving defense laboratories including consolidation and closure. Hence, the fact that the language of the Defense Authorization Act utilized the general term "military installations" in describing the duties of the Base Closure Commission (Title XXIX, entitled "Defense Base Closures and Realignments") does not overcome the specific grant of authority over the closure, consolidation and relocation of defense laboratories (Title II, entitled "Research, Development, Test, and Evaluation," Section 246), vested in the Lab Commission, even assuming arguendo that a lab could be considered to be an "installation."

In sum, the Government's efforts to close NAWC should be declared unlawful and therefore of no effect.

CONCLUSION

For all the reasons set forth above, this Court should reverse the district court's denial of plaintiffs' motion for summary judgment and direct the district court to enter judgment in favor of plaintiffs and against the Government.

Respectfully submitted,



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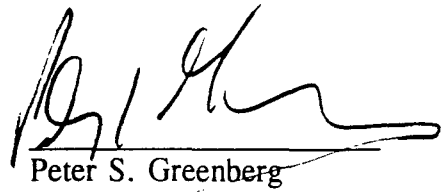
Of Counsel.

Dated: August 29, 1994.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that Peter S. Greenberg is a member of the bar of this Court.



Peter S. Greenberg

August 29, 1994

SEC. 245. COMPETITION IN CONTRACTING FOR COMPUTERS AND SOFTWARE

(a) CONGRESSIONAL CONCERNS REGARDING DEFENSE COMPUTER PROCUREMENT.—The Congress notes the concern regarding the manner in which solicitations are performed for computer procurement for components of the Department of Defense.

(b) GAO REVIEW.—The Comptroller General of the United States shall conduct a review of a selected number of planned and recently completed computer procurements for components of the Department of Defense to determine if those solicitations provide any barriers to full and open competition for United States computer suppliers. The procurements reviewed shall include the Air Force procurement for Tactical Air Force Workstations under solicitation F19630-90-R-0014 and the Army procurement for Light Weight Computer Unit under solicitation DAAB07-90-R-L100.

(c) MATTERS TO BE INCLUDED IN REVIEW.—The review shall determine in the case of each solicitation reviewed—

(1) whether unnecessary or non-germane specifications, evaluation factors, unwarranted performance requirements, packaging requirements, or other limiting bias factors are present;

(2) whether the solicitation contains restrictive requirements in excess of minimum Government needs;

(3) whether Government developed applications software is favored over commercial "off the shelf" software solutions and the sufficiency of the rationale to support Government development;

(4) the need for components of the Department of Defense to agree upon a standard prescribed architecture and operating system; and

(5) the cost effectiveness of computer procurements based on the realism of specifications as compared to intended use.

Statements regarding the degree of assessment supporting the specification development and rigidity as they limit or tend to limit offerers or contract awards are to be included.

(d) REPORT TO CONGRESS.—The Comptroller General shall complete the study and submit a report on the results of the study to the Committees on Armed Services of the Senate and House of Representatives not later than three months after the date of the enactment of this Act.

SEC. 246. ADVISORY COMMISSION ON CONSOLIDATION AND CONVERSION OF DEFENSE RESEARCH AND DEVELOPMENT LABORATORIES

(a) ESTABLISHMENT.—There is established a commission to be known as the "Commission on the Consolidation and Conversion of Defense Research and Development Laboratories" (hereinafter in this section referred to as the "Commission").

(b) DUTIES.—(1) The Commission shall conduct a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense.

(2) In conducting the study described in this subsection, the Commission shall—

(A) consider such means as—

(i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;

(ii) modification of the missions and functions of some or all such laboratories; and

(iii) consolidation or closure of some or all such laboratories; and

(B) determine—

(i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion; and

(ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission.

(c) COMPOSITION.—(1) The Commission shall be composed of 13 members, as follows:

(A) The Director of Defense Research and Engineering who shall be the chairman of the Commission.

(B) Six members appointed by the Secretary of Defense from among officers and employees of the Federal Government, including at least one director of a research and development laboratory of each military department.

(C) Six members appointed by the Secretary from among persons in the private sector.

(2) The Secretary of Defense shall make all appointments under subparagraphs (B) and (C) of paragraph (1) within 60 days after the date of the enactment of this Act.

(3) Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(d) MEETINGS; QUORUM.—(1) The Commission shall convene its first meeting within 15 days after the first date on which all members of the Commission have been appointed. Thereafter, the Commission shall meet at the discretion of its Chairman or at the call of a majority of its members.

(2) Seven members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(e) COMPENSATION OF MEMBERS; TRAVEL EXPENSES.—(1) Each member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of the duties of the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(2) The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(3) Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(f) REPORT TO SECRETARY.—Not later than September 30, 1991, the Commission shall submit to the Secretary a report containing the Commission's recommendations regarding the matters considered and determined by the Commission pursuant to subsection (b).

(g) REPORT BY SECRETARY.—Not later than 30 days after the date of the submission of the report pursuant to subsection (f), the Secretary shall transmit such report to each House of the Congress, together with any comments that the Secretary considers appropriate.

(h) TERMINATION.—The Commission shall terminate 90 days after the date on which the Commission submits its report to the Secretary pursuant to subsection (g).

SEC. 247. NATIONAL DEFENSE SCIENCE AND ENGINEERING EDUCATION

(a) IN GENERAL.—(1) Chapter 111 of title 10, United States Code, is amended by adding at the end the following:

"§ 2192. Science, mathematics, and engineering education

"(a) The Secretary of Defense, in consultation with the Secretary of Education, shall, on a continuing basis—

"(1) identify actions which the Department of Defense may take to improve education in the scientific, mathematics, and engineering skills necessary to meet the long-term national defense needs of the United States for personnel proficient in such skills; and

"(2) establish and conduct programs to carry out such actions.

"(b) The Secretary shall designate an individual within the Office of the Secretary of Defense to advise and assist the Secretary regarding matters relating to science, mathematics, and engineering education and training.

"§ 2193. Science and mathematics education improvement program

"(a)(1) The Secretary of Defense may, in accordance with the provisions of this subsection, carry out a program for awarding grants to students who have been accepted for enrollment in, or who are enrolled in, an institution of higher education as undergraduate or graduate students in scientific and engineering disciplines critical to the national security functions of the Department of Defense. Grant programs.

"(2) Grant proceeds shall be disbursed on behalf of students awarded grants under this subsection to the institutions of higher education at which the students are enrolled. No grant proceeds shall be disbursed on behalf of a student until the student is enrolled at an institution of higher education.

"(3) The amount of a grant awarded a student under this subsection may not exceed the student's cost of attendance.

"(4) The amount of a grant awarded a student under this subsection shall not be reduced on the basis of the student's receipt of other forms of Federal student financial assistance, but shall be taken into account in determining the eligibility of the student for those other forms of Federal student financial assistance.

"(5) The Secretary shall give priority to awarding grants under this subsection in a manner likely to stimulate the interest of women and members of minority groups in pursuing scientific and engineering careers. The Secretary may consider the financial need of applicants in making awards in accordance with such priority.

"(b) The Secretary of Defense, in coordination with the Secretary of Education, may establish programs for the purpose of improving the mathematics and scientific knowledge and skills of elementary and secondary school students and faculty members.

"(c) In this section:

(c)(1) Except as provided in paragraphs (2) and (3), the Secretary concerned shall establish and enforce as the minimum drinking age on a military installation located in a State the age established by the law of that State as the State minimum drinking age.

(2)(A) In the case of a military installation located—

(i) in more than one State; or

(ii) in one State but within 50 miles of another State or Mexico or Canada,

the Secretary concerned may establish and enforce as the minimum drinking age on that military installation the lowest applicable age.

(B) In subparagraph (A), the term "lowest applicable age" means the lowest minimum drinking age established by the law—

(i) of a State in which a military installation is located; or

(ii) of a State or jurisdiction of Mexico or Canada that is within 50 miles of such military installation.

(3)(A) The commanding officer of a military installation may waive the requirement of paragraph (1) if such commanding officer determines that the exemption is justified by special circumstances.

(B) The Secretary of Defense shall define by regulations what constitutes special circumstances for the purposes of this paragraph.

(4) In this subsection:

(A) The term "State" includes the District of Columbia.

(B) The term "Minimum drinking age" means the minimum age or ages established for persons who may purchase, possess, or consume alcoholic beverages.

(As amended Pub. L. 99–145, Title XII, § 1224(a), (b)(1), (c)(1), Nov. 8, 1985, 99 Stat. 728, 729; Pub.L. 99–661, Div. A, Title XIII, § 1343(a)(18), Nov. 14, 1986, 100 Stat. 3993; Pub.L. 100–526, Title I, § 106(b)(2), Oct. 24, 1988, 102 Stat. 2625.)

1 So in original.

HISTORICAL AND STATUTORY NOTES

1988 Amendment

Subsec. (c)(2)(B). Pub.L. 100–526, § 106(b)(2)(A), substituted "the term 'lowest possible age'" for "'lowest possible age'".

Subsec. (c)(4)(A). Pub.L. 100–526, § 106(b)(2)(B)(i), substituted "The term 'State'" for "'State'".

Subsec. (c)(4)(B). Pub.L. 100–526, § 106(b)(2)(B)(ii), substituted "The term 'minimum'" for "'Minimum'".

1986 Amendment

Subsec. (b). Pub.L. 99–661 struck out "this" preceding "subsection (a)".

1985 Amendment

Heading. Pub.L. 99–145, § 1224(c)(1), inserted "; minimum drinking age on military installations".

Subsec. (b). Pub. L. 99–145, § 1224(b)(1), substituted "subsection (a)" for "section" preceding "this".

Subsec. (c). Pub. L. 99–145, § 1224(a), added subsec. (c).

Effective Date of 1985 Amendment

Section 1224(d) of Pub. L. 99–145, provided that: "The amendments made by this section [amending subsecs. (b) and (c) of this section and section 473 of Appendix to Title 50, War and National Defense] shall take effect 90 days after the date of the enactment of this Act [Nov. 8, 1985]."

Legislative History

For legislative history and purpose of Pub. L. 99–145, see 1985 U.S. Code Cong. and Adm. News, p. 472. See, also, Pub.L. 99–661, 1986 U.S. Code Cong. and Adm. News, p. 6413; Pub.L. 100–526, 1988 U.S.Code Cong. and Adm. News, p. 3355.

NOTES OF DECISIONS

1. Long-arm jurisdiction

Following recession by the United States to Kentucky of power to serve process on Fort Campbell, actions within the Fort have the same effect, so far as submitting to long-arm jurisdiction of Kentucky is concerned, as actions elsewhere within Kentucky. In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985, W.D.Ky.1987, 660 F.Supp. 1202, on subsequent motion 684 F.Supp. 927.

§ 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.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (e)(1). Pub.L. 101–510, § 2911, included a homeport facility for any ship, in the definition of "military installation" and substituted "under the jurisdiction of the Department of Defense, including any leased facility," for "under the jurisdiction of the Secretary of a military department".

1987 Amendment

Subsec. (e)(1) to (4). Pub.L. 100–180, § 1231(17), inserted "This term" after each par.

designation and revised the first word in quotes in each par. to make the initial letter of such word lower case.

1985 Amendment

Subsec. (a). Pub. L. 99–145 incorporated in par. (1) provision reading "at which at least 300 civilian personnel are authorized to be employed", deleted from former subsec. (d)(1)(B) of this section; in par. (2): inserted "referred to in paragraph (1)" following "military installation" and substituted "subsection (b) of the Secretary's plan to close or realign such installation" for "subsection (b)(1) that such installation is a candidate for closure or realignment"; and deleted from par. (3) parenthetical phrase "(regardless of whether such facility is a military installation as defined in subsection (d))" preceding "which will or may be required".

Subsec. (b). Pub. L. 99–145 inserted in introductory text "referred to in such subsection" preceding "may be taken"; in par. (1): deleted requirement of a public announcement and specific provision for notification in writing, included provision for an annual request to the Committees for authorization of appropriations, combined par. (1) and former par. (3) provisions, substituting in par. (1) provision for submission of an evaluation of the consequences of closure or realignment for former par. (3) provision for submission of the final decision for closure or realignment including detailed justification for the decision covering estimated consequences of closure or realignment; redesignated former par. (4) as (2), substituting "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" for "period of sixty days expires following the date on which the justification referred to in clause (3) has been submitted"; and struck out former par. (2) provision for compliance with requirements of the National Environmental Policy Act of 1969 respecting closure or realignment.

Subsec. (c). Pub. L. 99–145 reenacted provision without any change.

Subsec. (d). Pub. L. 99–145 added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (e). Pub. L. 99–145 redesignated former subsec. (d) as (e); substituted "In this section" for "As used in this section"; in par. (1): deleted subpar. (A) designation for listed installation locations, included American Samoa and Virgin Island installations, and deleted subpar. (B) requirement that the military installation be authorized to employ not less than three hundred civilian personnel, now covered in subsec. (a)(1); in par. (2), inserted a comma following "direct-hire"; added par. (4); and deleted former subsec. (e), which made the section applicable to any closure of a military installation, and any realignment with respect to a military installation, which was first publicly announced after Sept. 30, 1977, except as provided in subsec. (c), such provision now covered in Effective Date of 1985 Amendment note below.

1984 Amendment

Subsec. (a)(2). Pub.L. 98–525, § 1405(41)(A), substituted "1,000" for "one thousand".

Subsec. (b)(2). Pub.L. 98–525, § 1405(41)(B), inserted "(42 U.S.C. 4321 et seq.)" following "National Environmental Policy Act of 1969".

Subsec. (b)(4). Pub.L. 98–525, § 1405(41)(C), substituted "60" for "sixty".

Subsec. (d)(1)(B). Pub.L. 98–525, § 1405(41)(D), substituted "300" for "three hundred".

Effective Date of 1985 Amendment

Section 1202(b) of Pub. L. 99–145 provided that: "The amendment made by subsection (a) [of this section] shall apply to closures and realignments completed on or after the date of the enactment of this Act [Nov. 8, 1985], except that any action taken to effect or implement any closure or realignment for which a public announcement was made pursuant to section 2687(b)(1) of title 10, United States Code [former subsec. (b)(1) of this section], after April 1, 1985, and before the date of enactment of this Act [Nov. 8, 1985] shall be subject to the provisions of section 2687 of such title [this section] as in effect on the day before such date of enactment [Nov. 8, 1985]."

Short Title of 1988 Amendment

Pub.L. 100–526, § 1, Oct. 24, 1988, 102 Stat. 2623, provided that: "This Act [amending sections 1095a, 2324, 2683, and 4415 of this title, enacting provisions set out as notes under sections 154, 2306, and 2687 of this title and amending provisions set out as notes under section 2324 of this title] may be cited as the 'Defense Authorization Amendments and Base Closure and Realignment Act'."

Congressional Findings with Respect to Base Closure Community Assistance

Pub.L. 103–160, Div. B, Title XXIX, § 2901, Nov. 30, 1993, 107 Stat. 1909, provided that: "Congress makes the following findings:

"(1) The closure and realignment of military installations within the United States is a necessary consequence of the end of the Cold War and of changed United States national security requirements.

"(2) A military installation is a significant source of employment for many communities, and the closure or realignment of an installation may cause economic hardship for such communities.

"(3) It is in the interest of the United States that the Federal Government facilitate the economic recovery of communities that experience adverse economic circumstances as a result of the closure or realignment of a military installation.

"(4) It is in the interest of the United States that the Federal Government assist communities that experience adverse economic circumstances as a result of the closure of military installations by working with such communities to identify and implement means of reutilizing or redeveloping such installations in a beneficial manner or of otherwise revitalizing such communities and the economies of such communities.

"(5) The Federal Government may best identify and implement such means by requiring that the head of each department or agency of the Federal Government having jurisdiction

over a matter arising out of the closure of a military installation under a base closure law, or the reutilization and redevelopment of such an installation, designate for each installation to be closed an individual in such department or agency who shall provide information and assistance to the transition coordinator for the installation designated under section 2915 [of Pub.L. 103–160, set out as a note under this section] on the assistance, programs, or other activities of such department or agency with respect to the closure or reutilization and redevelopment of the installation.

"(6) The Federal Government may also provide such assistance by accelerating environmental restoration at military installations to be closed, and by closing such installations, in a manner that best ensures the beneficial reutilization and redevelopment of such installations by such communities.

"(7) The Federal Government may best contribute to such reutilization and redevelopment by making available real and personal property at military installations to be closed to communities affected by such closures on a timely basis, and, if appropriate, at less than fair market value."

Consideration of Economic Needs with Respect to Reutilization and Redevelopment of Closed Military Installations

Pub.L. 103–160, Div. B, Title XXIX, § 2903(c), Nov. 30, 1993, 107 Stat. 1915, provided that: "In order to maximize the local and regional benefit from the reutilization and redevelopment of military installations that are closed, or approved for closure, pursuant to the operation of a base closure law, the Secretary of Defense shall consider locally and regionally delineated economic development needs and priorities into the process by which the Secretary disposes of real property and personal property as part of the closure of a military installation under a base closure law. In determining such needs and priorities, the Secretary shall take into account the redevelopment plan developed for the military installation involved. The Secretary shall ensure that the needs of the homeless in the communities affected by the closure of such installations are taken into consideration in the redevelopment plan with respect to such installations."

Cooperation with State and Local Governments, Redevelopment Authorities, and Other Interested Persons in Disposal of Real and Personal Property at Closed Military Installations

Pub.L. 103–160, Div. B, Title XXIX, § 2903(d), Nov. 30, 1993, 107 Stat. 1915, provided that: "The Secretary of Defense shall cooperate with the State in which a military installation referred to in subsection (c) [set out as a note under this section] is located, with the redevelopment authority with respect to the installation, and with local governments and other interested persons in communities located near the installation in implementing the entire process of disposal of the real property and personal property at the installation."

Promulgation of Regulations to Carry Out Amendments by Section 2908 of Pub.L. 103–160

Pub.L. 103–160, Div. B, Title XXIX, § 2908(c), Nov. 30, 1993, 107 Stat. 1924, provided that: "Not later than nine months after the date of the enactment of this Act [Nov. 30, 1993], the Secretary of Defense, in consultation with the Administrator of the Environmental Protection Agency, shall prescribe any regulations necessary to carry out subsection (d) of section 204 of the Defense Authorization Amendments and Base Closure and Realignment Act (title II of Public Law 100–526; 10 U.S.C. 2687 note), as added by subsection (a) [set out as a note under this section], and subsection (e) of section 2905 of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note), as added by subsection (b) [set out as a note under this section]."

Compliance With Certain Environmental Requirements Relating to Closure of Installations

Pub.L. 103–160, Div. B, Title XXIX, § 2911, Nov. 30, 1993, 107 Stat. 1924, provided that: "Not later than 12 months after the date of the submittal to the Secretary of Defense of a redevelopment plan for an installation approved for closure under a base closure law, the Secretary of Defense shall, to the extent practicable, complete any environmental impact analyses required with respect to the installation, and with respect to the redevelopment plan, if any, for the installation, pursuant to the base closure law under which the installation is closed, and pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)."

Preference for Local and Small Businesses

Pub.L. 103–160, Div. B, Title XXIX, § 2912, Nov. 30, 1993, 107 Stat. 1925, provided that:

"(a) **Preference required.**—In entering into contracts with private entities as part of the closure or realignment of a military installation under a base closure law, the Secretary of Defense shall give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small business concerns and small disadvantaged business concerns. Contracts for which this preference shall be given shall include contracts to carry out activities for the environmental restoration and mitigation at military installations to be closed or realigned.

"(b) **Definitions.**—In this section:

"(1) The term 'small business concern' means a business concern meeting the requirements of section 3 of the Small Business Act (15 U.S.C. 632).

"(2) The term 'small disadvantaged business concern' means the business concerns referred to in section 637(d)(1) of such Act (15 U.S.C. 637(d)(1)).

"(3) The term 'base closure law' includes section 2687 of title 10, United States Code [this section]."

Transition Coordinators for Assistance to Communities Affected by the Closure of Installations

Pub.L. 103–160, Div. B, Title XXIX, § 2915, Nov. 30, 1993, 107 Stat. 1926, provided that:

"(a) **In general.**—The Secretary of Defense shall designate a transition coordinator for each military installation to be closed under a base closure law. The transition coordinator shall carry out the activities for such coordinator set forth in subsection (c).

"(b) **Timing of designation.**—A transition coordinator shall be designated for an installation under subsection (a) as follows:

"(1) Not later than 15 days after the date of approval of closure of the installation.

"(2) In the case of installations approved for closure under a base closure law before the date of the enactment of this Act [Nov. 30, 1993], not later than 15 days after such date of enactment.

"(c) **Responsibilities.**—A transition coordinator designated with respect to an installation shall—

"(1) encourage, after consultation with officials of Federal and State departments and agencies concerned, the development of strategies for the expeditious environmental cleanup and restoration of the installation by the Department of Defense;

"(2) assist the Secretary of the military department concerned in designating real property at the installation that has the potential for rapid and beneficial reuse or redevelopment in accordance with the redevelopment plan for the installation;

"(3) assist such Secretary in identifying strategies for accelerating completion of environmental cleanup and restoration of the real property designated under paragraph (2);

"(4) assist such Secretary in developing plans for the closure of the installation that take into account the goals set forth in the redevelopment plan for the installation;

"(5) assist such Secretary in developing plans for ensuring that, to the maximum extent practicable, the Department of Defense carries out any activities at the installation after the closure of the installation in a manner that takes into account, and supports, the redevelopment plan for the installation;

"(6) assist the Secretary of Defense in making determinations with respect to the transferability of property at the installation under section 204(b)(5) of the Defense Authorization Amendments and Base Closure and Realignment Act (title II of Public Law 100–526; 10 U.S.C. 2687 note), as added by section 2904(a) of this Act [set out as a note under this section], and under section 2905(b)(5) of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note), as added by section 2904(b) of this Act [set out as a note under this section], as the case may be;

"(7) assist the local redevelopment authority with respect to the installation in identifying real property or personal property at the installation that may have significant potential for reuse or redevelopment in accordance with the redevelopment plan for the installation;

"(8) assist the Office of Economic Adjustment of the Department of Defense and other departments and agencies of the Federal Government in coordinating the provision of assistance under transition assistance and transition mitigation programs with community redevelopment activities with respect to the installation;

"(9) assist the Secretary of the military department concerned in identifying property located at the installation that may be leased in a manner consistent with the redevelopment plan for the installation; and

"(10) assist the Secretary of Defense in identifying real property or personal property at the installation that may be utilized to meet the needs of the homeless by consulting with the Secretary of Housing and Urban Development and the local lead agency of the homeless, if any, referred to in section 210(b) of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11320(b)) for the State in which the installation is located."

Definitions Relating to Base Closure Community Assistance Provisions

Pub.L. 103–160, Div. B, Title XXIX, § 2918(a), Nov. 30, 1993, 107 Stat. 1927, provided that:

"(a) **Subtitle A of Title XXIX.**—In this subtitle [amending sections 2391 and 2667 of this title and enacting provisions set out as notes under this section and section 9620 of Title 42, The Public Health and Welfare, and amending provisions set out as notes under this section]:

"(1) The term 'base closure law' means the following:

"(A) The provisions of title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note) [set out as a note under this section].

"(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note) [amending this section and enacting provisions set out as a note under this section].

"(2) The term 'date of approval', with respect to a closure or realignment of an installation, means the date on which the authority of Congress to disapprove a recommendation of closure or realignment, as the case may be, of such installation under the applicable base closure law expires.

"(3) The term 'redevelopment authority', in the case of an installation to be closed under a base closure law, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation and for directing the implementation of such plan.

"(4) The term 'redevelopment plan', in the case of an installation to be closed under a base closure law, means a plan that—

"(A) is agreed to by the redevelopment authority with respect to the installation; and

"(B) provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation."

Limitation on Expenditures from Defense Base Closure Account 1990 for Military Construction in Support of Transfers of Functions

Pub.L. 103–160, Div. B, Title XXIX, § 2922, Nov. 30, 1993, 107 Stat. 1930, provided that:

"(a) **Limitation.**—If the Secretary of Defense recommends to the Defense Base Closure and Realignment Commission pursuant to section 2903(c) of the 1990 base closure Act [Pub.L. 101–510, § 2903(c), set out as a note under this section] that an installation be closed or realigned, the Secretary identifies in documents submitted to the Commission one or more installations to which a function performed at the recommended installation would be transferred, and the recommended installation is closed or realigned pursuant to such Act [Pub.L. 101–510], then, except as provided in subsection (b), funds in the Defense Base Closure Account 1990 may not be used for military construction in support of the transfer of that function to any installation other than an installation so identified in such documents.

"(b) **Exception.**—The limitation in subsection (a) ceases to be applicable to military construction in support of the transfer of a function to an installation on the 60th day following the date on which the Secretary submits to the Committees on Armed Services of the Senate and House of Representatives a notification of the proposed transfer that—

"(1) identifies the installation to which the function is to be transferred; and

"(2) includes the justification for the transfer to such installation.

"(c) **Definitions.**—In this section:

"(1) The term '1990 base closure Act' means the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 10 U.S.C. 2687 note) [set out as a note under this section].

"(2) The term 'Defense Base Closure Account 1990' means the account established under section 2906 of the 1990 base closure Act [Pub.L. 101–510, § 2906, set out as a note under this section]."

Sense of Congress on Development of Base Closure Criteria

Pub.L. 103–160, Div. B, Title XXIX, § 2925, Nov. 30, 1993, 107 Stat. 1932, provided that:

"(a) **Sense of Congress.**—It is the sense of Congress that the Secretary of Defense consider, in developing in accordance with section 2903(b)(2)(B) of the Defense Base Closure and Realignment Act of 1990 (Public Law 101–510; 10 U.S.C. 2687 note) [set out as a note under this section] amended criteria, whether such criteria should include the direct costs of such closures and realignments to other Federal departments and agencies.

"(b) **Report on amendment.**—(1) The Secretary shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on any amended criteria developed by the Secretary under section 2903(b)(2)(B) of the Defense Base Closure and Realignment Act of 1990 [set out as a note under this section] after the date of the enactment of this Act [approved Nov. 30, 1993]. Such report shall include a discussion of the amended criteria and include a justification for any decision not to propose a criterion regarding the direct costs of base closures and realignments to other Federal agencies and departments.

"(2) The Secretary shall submit the report upon publication of the amended criteria in accordance with section 2903(b)(2)(B) of the Defense Base Closure and Realignment Act of 1990 [set out as a note under this section]."

Military Base Closure Report

Pub.L. 102–581, Title I, § 107(d), Oct. 31, 1992, 106 Stat. 4879, provided that: "Within 30 days after the date on which the Secretary of Defense recommends a list of military bases for closure or realignment pursuant to section 2903(c) of the Defense Base Closure and Realignment Act of 1990 (Public Law 101–510; U.S.C. 2687 note) [set out in a note under this section], the Administrator of the Federal Aviation Administration shall submit to Congress and the Defense Base Closure and Realignment Commission a report on the effects of all those recommendations involving military airbases, including but not limited to, the effect of the proposed closures or realignments on civilian airports and airways in the local community and region; potential modifications and costs necessary to convert such bases to civilian aviation use; and in the case of air traffic control or radar coverage currently provided by the Department of Defense, potential installations or adjustments of equipment and costs necessary for the Federal Aviation Administration to maintain existing levels of service for the local community and region."

Indemnification of Transferees of Closing Defense Property

Pub.L. 102–484, Div. A, Title III, § 330, Oct. 23, 1992, 106 Stat. 2371, as amended Pub.L. 103–160, Title X, § 1002, Nov. 30, 1993, 107 Stat. 1745, provided that:

"(a) **In general.**—(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of Defense shall hold harmless, defend, and indemnify in full the persons and entities described in paragraph (2) from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

"(2) The persons and entities described in this paragraph are the following:

"(A) Any State (including any officer, agent, or employee of the State) that acquires ownership or control of any facility at a military installation (or any portion thereof) described in paragraph (1).

"(B) Any political subdivision of a State (including any officer, agent, or employee of the State) that acquires such ownership or control.

"(C) Any other person or entity that acquires such ownership or control.

"(D) Any successor, assignee, transferee, lender, or lessee of a person or entity described in subparagraphs (A) through (C).

"(3) To the extent the persons and entities described in paragraph (2) contributed to any such release or threatened release, paragraph (1) shall not apply.

"(b) **Conditions.**—No indemnification may be afforded under this section unless the person or entity making a claim for indemnification—

"(1) notifies the Department of Defense in writing within two years after such claim accrues or begins action within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Department of Defense;

"(2) furnishes to the Department of Defense copies of pertinent papers the entity receives;

"(3) furnishes evidence or proof of any claim, loss, or damage covered by this section; and

"(4) provides, upon request by the Department of Defense, access to the records and personnel of the entity for purposes of defending or settling the claim or action.

"(c) **Authority of Secretary of Defense.**—(1) In any case in which the Secretary of Defense determines that the Department of Defense may be required to make indemnification payments to a person under this section for any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage referred to in subsection (a)(1), the Secretary may settle or defend, on behalf of that person, the claim for personal injury or property damage.

"(2) In any case described in paragraph (1), if the person to whom the Department of Defense may be required to make indemnification payments does not allow the Secretary to settle or defend the claim, the person may not be afforded indemnification with respect to that claim under this section.

"(d) **Accrual of action.**—For purposes of subsection (b)(1), the date on which a claim accrues is the date on which the plaintiff knew (or reasonably should have known) that the personal injury or property damage referred to in subsection (a) was caused or contributed to by the release or threatened release of a hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative as a result of Department of Defense activities at any military installation (or portion thereof) described in subsection (a)(1).

"(e) **Relationship to other law.**—Nothing in this section shall be construed as affecting or modifying in any way section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) [section 9620(h) of Title 42, The Public Health and Welfare].

"(f) **Definitions.**—In this section:

"(1) The terms 'facility', 'hazardous substance', 'release', and 'pollutant or contaminant' have the meanings given such terms under paragraphs (9), (14), (22), and (33) of section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, respectively (42 U.S.C. 9601(9), (14), (22), and (33)) [section 9601(9), (14), (22), and (33) of Title 42].

"(2) The term 'military installation' has the meaning given such term under section 2687(e)(1) of title 10, United States Code [subsec. (e)(1) of this section].

"(3) The term 'base closure law' means the following:

"(A) The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note) [set out as notes under this section].

"(B) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note) [set out as notes under this section].

"(C) Section 2687 of title 10, United States Code [this section].

"(D) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of the enactment of this Act [Oct. 23, 1992]."

Demonstration Project for the Use of a National Relocation Contractor to Assist the Department of Defense

Pub.L. 102–484, Div. B, Title XXVIII, § 2822, Oct. 23, 1992, 106 Stat. 2608, provided that:

"(a) **Use of national relocation contractor.**—Subject to the availability of appropriations therefor, the Secretary of Defense shall enter into a one-year contract with a private relocation contractor operating on a nationwide basis to test the cost-effectiveness of using national relocation contractors to administer the Homeowners Assistance Program. The contract shall be competitively awarded not later than 30 days after the date of the enactment of this Act [Oct. 23, 1992].

"(b) **Report on contract.**—Not later than one year after the date on which the Secretary of Defense enters into the contract under subsection (a), the Comptroller General shall submit to Congress a report containing the Comptroller General's evaluation of the effectiveness of using the national contractor for administering the program referred to in subsection (a). The report shall compare the cost and efficiency of such administration with the cost and efficiency of—

"(1) the program carried out by the Corps of Engineers using its own employees; and

"(2) the use of contracts with local relocation companies at military installations being closed or realigned."

Secretary of Defense and NATO Host Country Joint Accounts for Residual Value Settlements for U.S. Military Installations

Pub.L. 102–396, Title IX, § 9047A, Oct. 6, 1992, 106 Stat. 1913, provided that: "Notwithstanding any other provision of law, the Secretary of Defense may, by Executive Agreement, establish with host nation governments in NATO member states a separate account into which such residual value amounts negotiated in the return of United States military installations in NATO member states may be deposited, in the currency of the host nation, in lieu of direct monetary transfers to the United States Treasury: *Provided*, That such credits may be utilized only for the construction of facilities to support United States military forces in that host nation, or such real property maintenance and base operating costs that are currently executed through monetary transfers to such host nations: *Provided further*, That the Department of Defense's budget submission for each fiscal year shall identify such sums anticipated in residual value settlements, and identify such construction, real property maintenance or base operating costs that shall be funded by the host nation through such credits: *Provided further*, That all military construction projects to be executed from such accounts must be previously approved in a prior Act of Congress: *Provided further*, That each such Executive Agreement with a NATO member host nation shall be reported to the Committees on Appropriations and Armed Services of the House of Representatives and the Senate thirty days prior to the conclusion and endorsement of any such agreement established under this provision."

Reconvening of Environmental Response Task Force; Duties; Annual Report to Congress; Membership

Pub.L. 102–380, § 125, Oct. 5, 1992, 106 Stat. 1372, provided that:

"(a) The environmental response task force established in section 2923(c) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 104 Stat. 1821) [set out as a note under this section] shall reconvene and shall, until the date (as determined by the Secretary of Defense) on which all base closure activities required under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 102 Stat. 2627) [set out as a note under this section] are completed—

"(1) monitor the progress of relevant Federal and State agencies in implementing the recommendations of the task force contained in the report submitted under paragraph (1) of such section; and

"(2) annually submit to the Congress a report containing—

"(A) recommendations concerning ways to expedite and improve environmental response actions at military installations (or portions of installations) that are being closed or subject to closure under such title;

"(B) any additional recommendations that the task force considers appropriate; and

"(C) a summary of the progress made by relevant Federal and State agencies in implementing the recommendations of the task force.

"(b) The task force shall consist of—

"(1) the individuals (or their designees) described in section 2923(c)(2) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 104 Stat. 1821) [set out as a note under this section]; and

"(2) a representative of the Urban Land Institute (or such representative's designee), appointed by the Speaker of the House of Representatives and the Majority Leader of the Senate."

Environmental Restoration Requirements at Military Installations to be Closed

Pub.L. 102–190, Div. A, Title III, § 334, Dec. 5, 1991, 105 Stat. 1340, provided that:

"(a) **Requirements for installations to be closed under 1989 base closure list.**—(1) All draft final remedial investigations and feasibility studies related to environmental restoration activities at each military installation described in paragraph (2) shall be submitted to the Environmental Protection Agency not later than 24 months after the date of the enactment of this Act [Dec. 5, 1991].

"(2) Paragraph (1) applies to each military installation—

"(A) which is to be closed pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note)[Title II of Pub.L. 100–526, Oct. 24, 1988, 102 Stat. 2627, set out as a note under this section]; and

"(B) which is on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.)[section 9601 et seq. of Title 42, The Public Health and Welfare].

"(b) **Requirements for installations to be closed under 1991 base closure list.**—(1) All draft final remedial investigations and feasibility studies related to environmental restoration activities at each military installation described in paragraph (2) shall be submitted to the Environmental Protection Agency not later than 36 months after the date of the enactment of this Act [Dec. 5, 1991].

"(2) Paragraph (1) applies to each military installation—

"(A) which is to be closed pursuant to the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510)[part A (sections 2901–2910) of Title XXIX of Pub.L. 101–510, Div. B, Nov. 5, 1990, 104 Stat. 1808, set out as a note under this section] as a result of being recommended for closure in the report transmitted to Congress by the President pursuant to section 2903(e) of such Act on or before September 1, 1991, and

"(B) which is on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act of

1980 (42 U.S.C. 9601 et seq.)[section 9601 et seq. of Title 42].

"(c) Deadline extension.—(1) Subject to paragraph (2), the Secretary of Defense, after consultation with the Administrator of the Environmental Protection Agency, may extend for a 6-month period the period of time in which the requirements of subsection (a) or (b) must be met with respect to a military installation covered by subsection (a) or (b) if, within the scope of the Federal Facility Agreement governing cleanup at the installation, any of the following conditions exists at the installation:

"(A) There are newly discovered sites or areas on the installation where a hazardous substance has been released, stored, or disposed of. For purposes of this subparagraph, the term 'newly discovered' means discovered after the expiration of the 6-month period beginning on the date of enactment of this Act [Dec. 5, 1991].

"(B) There are technical engineering difficulties in carrying out the investigations and studies.

"(C) Expediting the investigations and studies would constitute a substantial endangerment to the public health and the environment.

"(D) Adequate funds have not been appropriated to the Department of Defense, or adequate resources are not available to any party to the Federal Facility Agreement, to carry out or oversee the investigations and studies by the applicable deadline.

"(2)(A) An extension under paragraph (1) shall take effect if—

"(i) the Secretary of Defense submits to Congress a notification containing a certification that, to the best of the Secretary's knowledge and belief, the requirements of subsection (a) or (b) cannot be met with respect to the military installation by the applicable deadline because one of the conditions set forth in paragraph (1) exists; and

"(ii) a period of 30 calendar days after receipt by Congress of such notice has elapsed.

"(B) In the computation of the 30-day period under subparagraph (A)(ii), there shall be excluded each day on which either House of Congress is not in session because of an adjournment of more than 3 calendar days to a day certain.

"(3) The Secretary may grant more than one 6-month extension for a military installation under paragraph (1), but each such extension is subject to paragraphs (1) and (2).

"(d) Budget estimate.—Each year the President shall include, in the budget submitted to Congress for a fiscal year (pursuant to section 1105 of title 31, United States Code [section 1105 of Title 31, Money and Finance]), an estimate of the funding levels required for the Department of Defense to comply with this section during the fiscal year for which the budget is submitted."

Withholding Information from Congress, Committee or Subcommittee of Congress, or Comptroller General

Pub.L. 102-190, Div. B, Title XXVIII, § 2821(i), Dec. 5, 1991, 105 Stat.1546, provided that: "Nothing in this section [enacting and amending provisions set out as notes below] or in the Defense Base Closure and Realignment Act of 1990 [set out as a note below] shall be construed to authorize the withholding of information from Congress, any committee or subcommittee of Congress, or the Comptroller General of the United States."

Consistency in Budget Data

Pub.L. 102-190, Div. B, Title XXVIII, § 2822, Dec. 5, 1991, 105 Stat. 1546, as amended Pub.L. 102-484, Div. B, Title XXVIII, § 2825, Oct. 23, 1992, 106 Stat. 2609, provided that:

"(a) Military construction funding requests.—In the case of each military installation considered for closure or realignment or for comparative purposes by the Defense Base Closure and Realignment Commission, the Secretary of Defense shall ensure, subject to subsection (b), that the amount of the authorization requested by the Department of Defense for military construction relating to the closure or realignment of the installation in each of the fiscal years 1992 through 1999 for the following fiscal year does not exceed the estimate of the cost of such construction (adjusted as appropriate for inflation) that was provided to the Commission by the Department of Defense.

"(b) Explanation for inconsistencies.—The Secretary may submit to Congress for a fiscal year a request for the authorization of military construction referred to in subsection (a) in an amount greater than the estimate of the cost of the construction (adjusted as appropriate for inflation) that was provided to the Commission if the Secretary determines that the greater amount is necessary and submits with the request a complete explanation of the reasons for the difference between the requested amount and the estimate.

"(c) Investigation.—(1) The Inspector General of the Department of Defense shall investigate the military construction for which the Secretary is required to submit an explanation to Congress under subsection (b) if the Inspector General determines (under standards prescribed by the Inspector General) that the difference between the requested amount and the estimate for such construction is significant.

"(2) The Inspector General shall submit to the congressional defense committees a report describing the results of each investigation conducted under paragraph (1)."

Disposition of Facilities of Depository Institutions on Military Installations to be Closed

Pub.L. 102-190, Div. B, Title XXVIII, § 2825, Dec. 5, 1991, 105 Stat. 1549; amended Pub.L. 103-160, Div. B, Title XXIX, § 2928(a), (b)(1), (c), Nov. 30, 1993, 107 Stat. 1934, 1935, provided that:

"(a) Authority to convey facilities.—(1) Subject to subsection (c) and notwithstanding any other provision of law, the Secretary of the

military department having jurisdiction over a military installation being closed pursuant to a base closure law may convey all right, title, and interest of the United States in a facility located on that installation to a depository institution that—

"(A) conducts business in the facility; and

"(B) constructed or substantially renovated the facility using funds of the depository institution.

"(2) In the case of the conveyance under paragraph (1) of a facility that was not constructed by the depository institution but was substantially renovated by the depository institution, the Secretary shall require the depository institution to pay an amount determined by the Secretary to be equal to the value of the facility in the absence of the renovations.

"(b) **Authority to convey land.**—As part of the conveyance of a facility to a depository institution under subsection (a), the Secretary of the military department concerned shall permit the depository institution to purchase the land upon which that facility is located. The Secretary shall offer the land to the depository institution before offering such land for sale or other disposition to any other entity. The purchase price shall be not less than the fair market value of the land, as determined by the Secretary.

"(c) **Limitation.**—The Secretary of a military department may not convey a facility to a depository institution under subsection (a) if the Secretary determines that the operation of a depository institution at such facility is inconsistent with the redevelopment plan with respect to the installation.

"(d) **Base closure law defined.**—For purposes of this section, the term 'base closure law' means the following:

"(1) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; 104 Stat. 1808; 10 U.S.C. 2687 note) [set out as a note below].

"(2) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 102 Stat. 2627; 10 U.S.C. 2687 note) [set out as a note below].

"(3) Section 2687 of title 10, United States Code [this section].

"(4) Any other similar law enacted after the date of the enactment of this Act [Dec. 5, 1991].

"(e) **Depository institution defined.**—For purposes of this section [this note], the term 'depository institution' has the meaning given that term in section 19(b)(1)(A) of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A))."

Report on Environmental Restoration Costs for Installations to be Closed Under 1990 Base Closure Law

Pub.L. 102–190, Div. B, Title XXVIII, § 2827(b), Dec. 5, 1991, 105 Stat. 1551, provided that:

"(1) Each year, at the same time the President submits to Congress the budget for a fiscal year (pursuant to section 1105 of title 31, United States Code) [section 1105 of Title 31, Money and Finance], the Secretary of Defense shall submit to Congress a report on the funding needed for the fiscal year for which the budget is submitted, and for each of the following four fiscal years, for environmental restoration activities at each military installation described in paragraph (2), set forth separately by fiscal year for each military installation.

"(2) The report required under paragraph (1) shall cover each military installation which is to be closed pursuant to the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510) [set out as a note below]."

Required Contents of Base Closure and Realignment Plans

Pub.L. 102–172, Title VIII, § 8063, Nov. 26, 1991, 105 Stat. 1185, provided that: "The Secretary of Defense shall include in any base closure and realignment plan submitted to Congress after the date of enactment of this Act [Nov. 26, 1991], a complete review for the five-year period beginning on October 1, 1991, which shall include expected force structure and levels for such period, expected installation requirements for such period, a budget plan for such period, the cost savings expected to be realized through realignments and closures of military installations during such period, an economics model to identify the critical local economic sectors affected by proposed closures and realignments of military installations and an assessment of the economic impact in each area in which a military installation is to be realigned or closed."

Sense of Congress Regarding Joint Resolution of Disapproval of 1991 Base Closure Commission Recommendation

Pub.L. 102–172, Title VIII, § 8131, Nov. 26, 1991, 105 Stat. 1208, provided that: "It is the sense of the Congress that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendation, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990 [Pub.L. 101–510, Title XXIX, Part A, Nov. 5, 1990, 104 Stat. 1808, amending this section and enacting provisions set out as a note under this section]. Further, the vote on the resolution of disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base Closure and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission."

Requirements for Base Closure and Realignment Plans

Pub.L. 103–139, Title VIII, § 8045, Nov. 11, 1993, 107 Stat. 1450, provided that: "The Secretary of Defense shall include in any base closure and realignment plan submitted to Congress after the date of enactment of this Act [Nov. 11, 1993], a complete review for the five year period beginning on October 1, 1993, which shall include expected force structure and levels for such period, expected installation requirements

for such period, a budget plan for such period, the cost savings expected to be realized through realignments and closures of military installations during such period, an economics model to identify the critical local economic sectors affected by proposed closures and realignments of military installations and an assessment of the economic impact in each area in which a military installation is to be realigned or closed."

Similar provisions were contained in the following prior appropriation Acts:

Pub.L. 102–396, Title IX, § 9060, Oct. 6, 1992, 106 Stat. 1915.

Pub.L. 101–511, Title VIII, § 8081, Nov. 5, 1990, 104 Stat. 1894.

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; Pub.L. 102–484, Div. A, Title X, § 1054(b), Div. B, Title XXVIII, §§ 2821(b), 2823, Oct. 23, 1992, 106 Stat. 2502, 2607, 2608; Pub.L. 103–160, Div. B, Title XXIX, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), 2921(b), (c), 2923, 2926, 2930(a), Nov. 30, 1993, 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935, 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.

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

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

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

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

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

"(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(f) **Vacancies.**—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the

unexpired portion of the term for which the individual's predecessor was appointed.

"(g) **Pay and travel expenses.**—(1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, [section 5315 of Title 5, Government Organization and Employees], for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

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

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

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

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

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

"(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title [sections 5101 et seq. and 5331 et seq., respectively, of Title 5] relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS–18 of the General Schedule.

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

"(B)(i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

"(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

"(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person participated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

"(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may—

"(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

"(ii) review the preparation of such a report; or

"(iii) approve or disapprove such a report.

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

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

"(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

"(A) There may not be more than 15 persons on the staff at any one time.

"(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

"(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

"(j) **Other authority.**—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code [section 3109 of Title 5].

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

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

"(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100–526 [set out as a note under this section]. Such funds shall remain available until expended.

"(l) **Termination.**—The Commission shall terminate on December 31, 1995.

"(m) **Prohibition against restricting communications.**—Section 1034 of title 10, United States Code [section 1034 of this title], shall apply with respect to communications with the Commission.

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

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

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

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

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

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

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

"(b) **Selection criteria.**—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that 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 1, 1995, publish in the Federal Register and transit to the congressional defense committees and 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. The Secretary shall transmit the matters referred to in the preceding sentence not later than 7 days after the date of the transmittal to the congressional defense committees and the Commission of the list referred to in paragraph (1).

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

"(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

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

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

"(i) The Secretaries of the military departments.

"(ii) The heads of the Defense Agencies.

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

"(6) Any information provided to the Commission by a person described in paragraph (5)(B) shall also be submitted to the Senate and the House or 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

House of Representatives within 24 hours after the submission of the information to the Commission.

"(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. All testimony before the Commission at a public hearing conducted under this paragraph shall be presented under oath.

"(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 45 days before transmitting its recommendations to the President pursuant to paragraph (2); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"**Sec. 2904. Closure and realignment of military installations**

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

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

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

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

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

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

"(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483) [section 483 of Title 40 Public Buildings, Property, and Works];

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

"(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)) [section 1622(g) of Title 50, War and National Defense]; and

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

"(2)(A) Subject to subparagraph (C) and paragraphs (3), (4), (5), and (6), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

"(i) all regulations in effect on the date of the enactment of this Act [Nov. 5, 1990] governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949 [Act June 30, 1949, c. 288, 63 Stat. 378, for classification of which see Short Title note set out under section 471 of Title 40, Public Buildings Property, and Works]; and

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

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

"(C) The authority required to be delegated by paragraph (1) to the Secretary by the Admin-

istrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

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

"(E) Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned.

"(3)(A) Not later than 6 months after the date of approval of the closure of a military installation under this part, the Secretary, in consultation with the redevelopment authority with respect to the installation, shall—

"(i) inventory the personal property located at the installation; and

"(ii) identify the items (or categories of items) of such personal property that the Secretary determines to be related to real property and anticipates will support the implementation of the redevelopment plan with respect to the installation.

"(B) If no redevelopment authority referred to in subparagraph (A) exists with respect to an installation, the Secretary shall consult with—

"(i) the local government in whose jurisdiction the installation is wholly located; or

"(ii) a local government agency or State government agency designated for the purpose of such consultation by the chief executive officer of the State in which the installation is located.

"(C)(i) Except as provided in subparagraphs (E) and (F), the Secretary may not carry out any of the activities referred to in clause (ii) with respect to an installation referred to in that clause until the earlier of—

"(I) one week after the date on which the redevelopment plan for the installation is submitted to the Secretary;

"(II) the date on which the redevelopment authority notifies the Secretary that it will not submit such a plan;

"(III) twenty-four months after the date of approval of the closure of the installation; or

"(IV) ninety days before the date of the closure of the installation.

"(ii) The activities referred to in clause (i) are activities relating to the closure of an installation to be closed under this part as follows:

"(I) The transfer from the installation of items of personal property at the installation identified in accordance with subparagraph (A).

"(II) The reduction in maintenance and repair of facilities or equipment located at the installation below the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes.

"(D) Except as provided in paragraph (4), the Secretary may not transfer items of personal property located at an installation to be closed under this part to another installation, or dispose of such items, if such items are identified in the redevelopment plan for the installation as items essential to the reuse or redevelopment of the installation.

"(E) This paragraph shall not apply to any personal property located at an installation to be closed under this part if the property—

"(i) is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

"(ii) is uniquely military in character, and is likely to have no civilian use (other than use for its material content or as a source of commonly used components);

"(iii) is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary and the redevelopment authority);

"(iv) is stored at the installation for purposes of distribution (including spare parts or stock items); or

"(v)(I) meets known requirements of an authorized program of another Federal department or agency for which expenditures for similar property would be necessary, and (II) is the subject of a written request by the head of the department or agency.

"(F) Notwithstanding subparagraphs (C)(i) and (D), the Secretary may carry out any activity referred to in subparagraph (C)(ii) or (D) if the Secretary determines that the carrying out of such activity is in the national security interest of the United States.

"(4)(A) The Secretary may transfer real property and personal property located at a military installation to be closed under this part to the redevelopment authority with respect to the installation.

"(B)(i)(I) Except as provided in clause (ii), the transfer of property under subparagraph (A) may be for consideration at or below the estimated fair market value of the property transferred or without consideration. Such consideration may include consideration in kind (including goods and services), real property and improvements, or such other consideration as the Secretary considers appropriate. The Secretary shall determine the estimated fair market value of the property to be transferred under this subparagraph before carrying out such transfer.

"(II) The Secretary shall prescribe regulations that set forth guidelines for determining the amount, if any, of consideration required for a transfer under this paragraph. Such regulations shall include a requirement that, in the case of each transfer under this paragraph for consideration below the estimated fair market value of the property transferred, the Secretary provide an explanation why the transfer is not for the estimated fair market value of the property transferred (including an explanation why the transfer cannot be carried out in accordance with the authority provided to the Secretary pursuant to paragraph (1) or (2)).

"(ii) The transfer of property under subparagraph (A) shall be without consideration in the case of any installation located in a rural area whose closure under this part will have a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for the economic recovery of such communities from such closure. The Secretary shall prescribe in the regulations under clause (i)(II) the manner of determining whether communities are eligible for the transfer of property under this clause.

"(iii) In the case of a transfer under subparagraph (A) for consideration below the fair market value of the property transferred, the Secretary may recoup from the transferee of such property such portion as the Secretary determines appropriate of the amount, if any, by which the sale or lease of such property by such transferee exceeds the amount of consideration paid to the Secretary for such property by such transferee. The Secretary shall prescribe regulations for determining the amount of recoupment under this clause.

"(C)(i) The transfer of personal property under subparagraph (A) shall not be subject to the provisions of sections 202 and 203 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483, 484) if the Secretary determines that the transfer of such property is necessary for the effective implementation of a redevelopment plan with respect to the installation at which such property is located.

"(ii) The Secretary may, in lieu of the transfer of property referred to in subparagraph (A), transfer property similar to such property (including property not located at the installation) if the Secretary determines that the transfer of such similar property is in the interest of the United States.

"(D) The provisions of section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) shall apply to any transfer of real property under this paragraph.

"(E) The Secretary may require any additional terms and conditions in connection with a transfer under this paragraph as such Secretary considers appropriate to protect the interests of the United States.

"(5)(A) Except as provided in subparagraph (B), the Secretary shall take such actions as the Secretary determines necessary to ensure that final determinations under subsection (b)(1) regarding whether another department or agency of the Federal Government has identified a use for any portion of a military installation to be closed under this part, or will accept transfer of any portion of such installation, are made not later than 6 months after the date of approval of closure of that installation.

"(B) The Secretary may, in consultation with the redevelopment authority with respect to an installation, postpone making the final determinations referred to in subparagraph (A) with respect to the installation for such period as the Secretary determines appropriate if the Secretary determines that such postponement is in the best interests of the communities affected by the closure of the installation.

"(6)(A) Except as provided in this paragraph, nothing in this section shall limit or otherwise affect the application of the provisions of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11301 et seq.) to military installations closed under this part.

"(B)(i) Not later than the date on which the Secretary of Defense completes the determination under paragraph (5) of the transferability of any portion of an installation to be closed under this part, the Secretary shall—

"(I) complete any determinations or surveys necessary to determine whether any building or property referred to in clause (ii) is excess property, surplus property, or unutilized or underutilized property for the purpose of the information referred to in section 501(a) of such Act (42 U.S.C. 11411(a)); and

"(II) submit to the Secretary of Housing and Urban Development information on any building or property that is so determined.

"(ii) The buildings and property referred to in clause (i) are any buildings or property located at an installation referred to in that clause for which no use is identified, or of which no Federal department or agency will accept transfer, pursuant to the determination of transferability referred to in that clause.

"(C) Not later than 60 days after the date on which the Secretary of Defense submits information to the Secretary of Housing and Urban Development under subparagraph (B)(ii), the Secretary of Housing and Urban Development shall—

"(i) identify the buildings and property described in such information that are suitable for use to assist the homeless;

"(ii) notify the Secretary of Defense of the buildings and property that are so identified;

"(iii) publish in the Federal Register a list of the buildings and property that are so identified, including with respect to each building or property the information referred to in section 501(c)(1)(B) of such Act [section 11411(c)(1)(B) of Title 42, The Public Health and Welfare]; and

"(iv) make available with respect to each building and property the information referred to in section 501(c)(1)(C) of such Act [section 11411(c)(1)(C) of Title 42] in accordance with such section 501(c)(1)(C).

"(D) Any buildings and property included in a list published under subparagraph (C)(iii) shall be treated as property available for application for use to assist the homeless under section 501(d) of such Act [section 11411(d) of Title 42].

"(E) The Secretary of Defense shall make available in accordance with section 501(f) of such Act [section 11411(f) of Title 42] any buildings or property referred to in subparagraph (D) for which—

"(i) a written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act [section 11411(d)(2) of Title 42];

"(ii) an application for use of such buildings or property for such purpose is submitted to the Secretary of Health and Human Servic-

es in accordance with section 501(e)(2) of such Act [section 11411(e)(2) of Title 42]; and

"(iii) the Secretary of Health and Human Services—

"(I) completes all actions on the application in accordance with section 501(e)(3) of such Act [section 11411(e)(3) of Title 42]; and

"(II) approves the application under section 501(e) of such Act [section 11411(e) of Title 42].

"(F)(i) Subject to clause (ii), a redevelopment authority may express in writing an interest in using buildings and property referred to subparagraph (D), or use such buildings and property, in accordance with the redevelopment plan with respect to the installation at which such buildings and property are located as follows:

"(I) If no written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act [section 11411(d)(2) of Title 42] during the 60–day period beginning on the date of the publication of the buildings and property under subparagraph (C)(iii).

"(II) In the case of buildings and property for which such notice is so received, if no completed application for use of the buildings or property for such purpose is received by the Secretary of Health and Human Services in accordance with section 501(e)(2) of such Act [section 11411(e)(2) of Title 42] during the 90–day period beginning on the date of the receipt of such notice.

"(III) In the case of buildings and property for which such application is so received, if the Secretary of Health and Human Services rejects the application under section 501(e) of such Act [section 11411(e) of Title 42].

"(ii) Buildings and property shall be available only for the purpose of permitting a redevelopment authority to express in writing an interest in the use of such buildings and property, or to use such buildings and property, under clause (i) as follows:

"(I) In the case of buildings and property referred to in clause (i)(I), during the one-year period beginning on the first day after the 60–day period referred to in that clause.

"(II) In the case of buildings and property referred to in clause (i)(II), during the one-year period beginning on the first day after the 90–day period referred to in that clause.

"(III) In the case of buildings and property referred to in clause (i)(III), during the one-year period beginning on the date of the rejection of the application referred to in that clause.

"(iii) A redevelopment authority shall express an interest in the use of buildings and property under this subparagraph by notifying the Secretary of Defense, in writing, of such an interest.

"(G)(i) Buildings and property available for a redevelopment authority under subparagraph (F) shall not be available for use to assist the homeless under section 501 of such Act [section 11411 of Title 42] while so available for a redevelopment authority.

"(ii) If a redevelopment authority does not express an interest in the use of buildings or property, or commence the use of buildings or property, under subparagraph (F) within the applicable time periods specified in clause (ii) of such subparagraph, such buildings or property shall be treated as property available for use to assist the homeless under section 501(a) of such Act [section 11411(a) of Title 42].

"(7)(A) Subject to subparagraph (C), the Secretary may contract with local governments for the provision of police services, fire protection services, airfield operation services, or other community services by such governments at military installations to be closed under this part if the Secretary determines that the provision of such services under such contracts is in the best interests of the Department of Defense.

"(B) The Secretary may exercise the authority provided under this paragraph without regard to the provisions of chapter 146 of title 10, United States Code [section 2461 et seq. of this title].

"(C) The Secretary may not exercise the authority under subparagraph (A) with respect to an installation earlier than 180 days before the date on which the installation is to be closed.

"(D) The Secretary shall include in a contract for services entered into with a local government under this paragraph a clause that requires the use of professionals to furnish the services to the extent that professionals are available in the area under the jurisdiction of such government.

"(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].

"(e) **Transfer authority in connection with payment of environmental remediation costs.**—(1)(A) Subject to paragraph (2) of this subsection and section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)), the Secretary may enter into an agreement to transfer by deed real property or facilities referred to in subparagraph (B) with any person who agrees to perform all environmental restoration, waste management, and environmental compliance activities that are required for the property or facilities under Federal and State laws, administrative decisions, agreements (including schedules and milestones), and concurrences.

"(B) The real property and facilities referred to in subparagraph (A) are the real property and facilities located at an installation closed or to be closed under this part that are available exclusively for the use, or expression of an interest in a use, of a redevelopment authority under subsection (b)(6)(F) during the period provided for that use, or expression of interest in use, under that subsection.

"(C) The Secretary may require any additional terms and conditions in connection with an agreement authorized by subparagraph (A) as the Secretary considers appropriate to protect the interests of the United States.

"(2) A transfer of real property or facilities may be made under paragraph (1) only if the Secretary certifies to Congress that—

"(A) the costs of all environmental restoration, waste management, and environmental compliance activities to be paid by the recipient of the property or facilities are equal to or greater than the fair market value of the property or facilities to be transferred, as determined by the Secretary; or

"(B) if such costs are lower than the fair market value of the property or facilities, the recipient of the property or facilities agrees to pay the difference between the fair market value and such costs.

"(3) As part of an agreement under paragraph (1), the Secretary shall disclose to the person to whom the property or facilities will be transferred any information of the Secretary regarding the environmental restoration, waste management, and environmental compliance activities described in paragraph (1) that relate to the property or facilities. The Secretary shall provide such information before entering into the agreement.

"(4) Nothing in this subsection shall be construed to modify, alter, or amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

"(5) Section 330 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102–484; 10 U.S.C. 2687 note) shall not apply to any transfer under this subsection to persons or entities described in subsection (a)(2) of such section 330 [set out as a note under this section].

"(6) The Secretary may not enter into an agreement to transfer property or facilities under this subsection after the expiration of the five-year period beginning on the date of the enactment of the National Defense Authorization Act for Fiscal Year 1994 [Nov. 30, 1993].

"**Sec. 2906. Account**

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

"(2) There shall be deposited into the Account—

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

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

"(C) except as provided in subsection (d), proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part; and

"(D) proceeds received after September 30, 1995, from the transfer or disposal of any property at a military installation closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note) [set out as a note under this section].

"(b) **Use of funds.**—(1) The Secretary may use the funds in the Account only for the purposes described in section 2905 [this note] or, after September 30, 1995, for environmental restoration and property management and disposal at installations closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100–526; 10 U.S.C. 2687 note) [set out as a note under this section].

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

regard to section 2802(a) of title 10, United States Code [section 2802(a) of this title].

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

"(B) The report for a fiscal year shall include the following:

"(i) The obligations and expenditures from the Account during the fiscal year, identified by subaccount, for each military department and Defense Agency.

"(ii) The fiscal year in which appropriations for such expenditures were made and the fiscal year in which funds were obligated for such expenditures.

"(iii) Each military construction project for which such obligations and expenditures were made, identified by installation and project title.

"(iv) A description and explanation of the extent, if any, to which expenditures for military construction projects for the fiscal year differed from proposals for projects and funding levels that were included in the justification transmitted to Congress under section 2907(1) [this note], or otherwise, for the funding proposals for the Account for such fiscal year, including an explanation of—

"(I) any failure to carry out military construction projects that were so proposed; and

"(II) any expenditures for military construction projects that were not so proposed.

"(2) Unobligated funds which remain in the Account after the termination of the authority of the Secretary to carry out a closure or realignment under this part shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

"(3) No later than 60 days after the termination of the authority of the Secretary to carry out a closure or realignment under this part, the Secretary shall transmit to the congressional defense committees a report containing an accounting of—

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

"(B) any amount remaining in the Account.

"(d) **Disposal or transfer of commissary stores and property purchased with nonappropriated funds.**—(1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropriated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note) [set out as a note under this section].

"(2) The amount so deposited shall be equal to the depreciated value of the investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

"(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving—

"(A) commissary stores; and

"(B) real property and facilities for nonappropriated fund instrumentalities.

"(4) As used in this subsection:

"(A) The term 'commissary store funds' means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code [section 2685 of this title].

"(B) The term 'nonappropriated funds' means funds received from a nonappropriated fund instrumentality.

"(C) The term 'nonappropriated fund instrumentality' means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

"(e) **Account exclusive source of funds for environmental restoration projects.**—Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

"Sec. 2907. Reports

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

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

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

"Sec. 2908. Congressional consideration of commission report

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

"(1) which does not have a preamble;

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

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

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

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

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

"(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.

"(8) The term 'date of approval', with respect to a closure or realignment of an installation, means the date on which the authority of Congress to disapprove a recommendation of closure or realignment, as the case may be, of such installation under this part expires.

"(9) The term 'redevelopment authority', in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation and for directing the implementation of such plan.

"(10) The term 'redevelopment plan' in the case of an installation to be closed under this part, means a plan that—

"(A) is agreed to by the local redevelopment authority with respect to the installation; and

"(B) provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation."

[Section 2902(c) of Pub.L. 103–160 provided that: "For the purposes of section 2905(b)(3) of the Defense Base Closure and Realignment Act of 1990, as added by subsection (b) [section 2905(b)(3) of this note], the date of approval of closure of any installation approved for closure before the date of the enactment of this Act [Nov. 30, 1993] shall be deemed to be the date of the enactment of this Act [Nov. 30, 1993]."]

[Section 2904(c) of Pub.L. 103–160 provided that: "The Secretary of Defense shall make the determinations required under section 2905(b)(5) of the Defense Base Closure and Realignment Act of 1990, as added by subsection (b) [section 2905(b)(5) of this note], in the case of installations approved for closure under such Act [Title XXIX of Pub.L. 101–510, amending this section and enacting this note] before the date of the enactment of this Act [Nov. 30, 1993], not later than 6 months after the date of the enactment of this Act [Nov. 30, 1993]."]

[Section 2930(b) of Pub.L. 103–160 provided that: "The amendment made by this section [Pub.L. 103–160, § 2930(a), amended Pub.L. 101–510, § 2903(d)(1), set out as a note under this section] shall apply with respect to all public hearings conducted by the Defense Base Closure and Realignment Commission after the date of the enactment of this Act [approved Nov. 30, 1993]."]

[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]."]

Closure of Foreign Military Installations

Pub.L. 101–510, Div. B, Title XXIX, § 2921, Nov. 5, 1990, 104 Stat. 1819, as amended Pub.L. 102–190, Div. A, Title III, § 344(b)(2), Dec. 5, 1991, 105 Stat. 1345; Pub.L. 102–484, Div. B, Title XXVIII, §§ 2821(c), 2827, Oct. 23, 1992, 106 Stat. 2608, 2609; Pub.L. 103–160, Div. B, Title XXIX, § 2924(b), Nov. 30, 1993, 107 Stat. 1931, provided that:

"(a) **Sense of Congress.**—It is the sense of the Congress that—

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

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

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

"(4) the determination of the fair market value of such improvements released to host countries in whole or in part by the United States should be handled on a facility-by-facility basis.

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

"(2) For purposes of this section:

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

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

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

"(2) Money deposited in the Department of Defense Overseas Military Facility Investment Recovery Account shall be available to the Secretary of Defense for payment, as provided in appropriation Acts, of costs incurred by the Department of Defense in connection with—

"(A) facility maintenance and repair and environmental restoration at military installations in the United States; and

"(B) facility maintenance and repair and compliance with applicable environmental laws at military installations outside the United States that the Secretary anticipates will be occupied by the Armed Forces for a long period.

"(3) Funds in the Department of Defense Overseas Facility Investment Recovery Account shall remain available until expended.

"(d) **Amounts corresponding to the value of property purchased with nonappropriated funds.**—(1) In the case of a payment referred to in subsection (c)(1) for the residual value of real property or improvements at an overseas military facility, the portion of the payment that is equal to the depreciated value of the investment made with nonappropriated funds shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act [section 204(b)(4)(C) of Pub.L. 100–526, Title II, Oct. 24, 1988, 102 Stat. 2627, as amended, set out as a note under this section]. The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance by appropriation Acts) for the purpose of acquiring, constructing, or improving commissary stores and nonappropriated fund instrumentalities.

"(2) As used in this subsection:

"(A) The term 'nonappropriated funds' means funds received from—

"(i) the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code [section 2685 of this title]; or

"(ii) a nonappropriated fund instrumentality.

"(B) The term 'nonappropriated fund instrumentality' means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces."

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

U.S. REP. JAMES C. GREENWOOD, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 92-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J. October 28, 1993

Plaintiffs have moved for summary judgment based upon the theory that the Naval Air Warfare Center - Warminster (NAWC), unlike the Philadelphia Naval Shipyard, is a naval research and development laboratory, not a military base, and therefore was improperly and illegally proposed for realignment and relocation by the Base Closure Commission pursuant to congressionally adopted procedures for base closures and realignments. NAWC, plaintiffs argue, should have been dealt with by the commission specifically created by Congress to deal with labs, not bases, pursuant to the procedures specifically mandated by Congress to deal with labs, not bases.

By way of background, as part of the National Defense Authorization Act for fiscal year 1991 (Defense Authorization Act), Congress enacted Title XXIX of the Defense Authorization Act known as the Defense Base Closure and Realignment Act of 1990

(Base Closure Act). Congress also enacted Title II of the Defense Authorization Act, Section 246, by which it established a commission to be known as the "Commission on the Consolidation and Conversion of Defense, Research and Development Laboratories" (Lab Commission Act).

Based on what is set forth in those two acts, plaintiffs now seek to enjoin the Secretary of Defense and the Secretary of the Navy from taking any action to realign or relocate NAWC based on the Base Closure Commission's July 1, 1991 recommendation. Plaintiffs argue that the Base Closure Commission included defense laboratories in its July 1, 1991 recommendations to the President, despite the fact that Congress had under the Lab Commission Act established an independent commission as the exclusive entity to investigate and recommend laboratory consolidation or closure and to determine a schedule for such consolidations or closures. Further, Congress provided for different procedures to deal with lab realignments and closures than those provided for base closures and realignments.

The crux of plaintiffs' argument, then, is that even though the Base Closure Act provided that the authority provided by that act "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" (Section 2909(a)), NAWC is not a military installation but falls under an exception to the Base Closure Act in light of the provisions of the Lab Commission Act.

Specifically, the Lab Commission Act provides that the commission created by it should no later than September 30, 1991 submit to the Secretary a report containing the commission's recommendations regarding the matters considered and determined by the commission pursuant to subsection (b) no later than thirty (30) days after the date of the submission of the report. The Secretary was obligated by the Act to transmit such report to each House of the Congress, together with any comments that the Secretary considered appropriate. The matters to be considered by the Commission are set forth under subsection (b) of Section 246 as follows:

> 1. The commission shall conduct a study to determine the feasibility or desirability of various means to improve the operation of laboratories of the Department of Defense.
>
> 2. In conducting the study described in this subsection, the commission shall -
>
> (A) consider such means as -
>
> (i) Conversion of some or all such laboratories to government-owned contractor-operated laboratories;
>
> (ii) Modification of the missions and functions of some or all such laboratories; and
>
> (iii) Consolidation or closure of some or all such laboratories.
>
> (B) determine -
>
> (i) The short-term costs and long-term costs savings that are likely to result from such consolidation, closure or conversion; and

(ii) A proposed schedule for each consolidation, closure or conversion of a laboratory considered appropriate by the Commission.

The plaintiffs essentially makes two arguments as to why I should grant summary judgment.

One of plaintiffs' arguments is that NAWC is not a military installation. The Base Closure Act defines the term "military installation" as meaning: "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 lease to facility." Section 2910(4).

I disagree with plaintiffs' argument that NAWC is not a military installation. Plaintiffs themselves in their complaint (paragraphs 44, et seq.) refer to the NADC, now the NAWC, as having functioned as a Naval Research and Development Lab since 1947. Its mission has been to be the principal Navy Research and Development Center for aircraft, airborne anti-submarine warfare, aircraft systems less aircraft-launched weapons systems and surface ship, submarine and aircraft navigation. In addition to weapons systems development, NAWC's work also involves electro-optic, acoustic and micro wave technologies as well as research for the surveillance and targeting of airborne, surface and subsurface targets. NAWC is also the Navy's leading center for upgrading existing Navy aircraft such as F/A-18, F-14, A-6 and AV-8B. The capacities of these aircraft are highly dependent on products conceived and developed by NAWC. Accordingly, I believe

that NAWC would be considered a military installation under the Base Closure Act definition.

Plaintiffs' second and primary argument, it seems to me, is that the Lab Commission Act specifically dealt with issues involving defense laboratories, including consolidation and closure. Therefore, the fact that the language of the Base Closure Act utilized the general term "military installations" does not overcome the specific grant of authority given to the Lab Commission in Section 246 of Title II.

The pertinent question is essentially this:

Through the Lab Commission Act, by which it created a separate commission to perform an independent study of defense labs, did Congress create an exception to the Base Closure Act and divest the Secretary of Defense and Base Closure Commission of authority to recommend defense labs for closure or realignment?

Counsel for both plaintiff and defendant have pointed out various maxims to be applied in the statutory construction which I must undertake. They are:

1. Where the plain meaning of a statute is clear and its terms do not yield impossible or plainly unreasonable results, a court is bound by the words employed. United States v. Missouri Pacific, R.Co. 278 U.S. 269 (1929).

2. However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same legislation. . .specific

terms prevail over the general in the same or another statute which otherwise might be controlling. (Citations omitted).

3. Where statutes deal with a subject in both general and detailed terms, and there is a conflict between the two, the detailed expression prevails. (Citation omitted).

4. The various parts of a statute should, if possible, be harmonized so as to provide throughout for a consistent interpretation. (Citations omitted).

5. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress. (Citation omitted).

6. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. Reves v. Ernst & Young, 113 S.Ct. 1163, 1169 (1993).

7. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent. United States v. Smith, 111 S.Ct. 1180, 1185 (1991).

8. Statutory provisions should be interpreted harmoniously with each other when possible. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992).

9. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551 (1974).

With the above maxims of statutory construction in mind, I conclude that the answer to the question posed earlier in this memorandum is: No, Congress did not create an exception to the Base Closure Act divesting the Secretary of Defense and Base Closure Commission of the authority to recommend defense labs for closure or alignment when it created a separate commission to perform an independent study of defense labs under Section 246.

There is absolutely nothing in the record before me to indicate that Congress intended the Lab Commission Act to create an exception to the Base Closure Act. The two statutes are capable of co-existence and indeed are quite different. For example, the Lab Commission's recommendations were made to the Secretary of Defense and Congress. The Secretary was only required to submit the report of the Lab Commission to each house of Congress, together with any comments he considered appropriate. Congress was not required under the Act to do anything with the recommendations.

The Base Closure Commission's recommendations on the other hand were made to the President. The President was required to act upon the recommendations by either approving or disapproving of them within two weeks. If the President approves

the recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving the Commission's recommendations in their entirety.

Finally, the purposes of the Acts are substantially different. The Base Closure Act's purpose is to "provide a fair process that will result in the timely closure and realignment of military installations inside the United States." (Section 2901(b).

The purpose of the Lab Commission Act, on the other hand, was to establish a commission that would "conduct a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." (Section 246(b)). This study also involved the consideration of, among other things, such matters as consolidation or closure of some or all of such laboratories.

The plaintiffs finally argue that even if the Base Closure Commission did have some authority to consider defense laboratories, the specific grant of jurisdiction vested in the Lab Commission along with the later in time deadline of September 30, 1991, for submitting its report, makes it clear that the Base Closure Commission could only exercise its authority after the Lab Commission had made its recommendations. Any other conclusion, plaintiffs suggest, would render the Lab Commission a nullity -- a result that makes no sense. If that were correct, the plaintiffs might have a stronger argument. But there is nothing to suggest on the record before me that the only

conclusion one can reach is that the Base Closure Commission's recommendations as to closings prior to the Lab Commission's report would render the Lab Commission a nullity. That would occur, it seems to me, only if the Base Closure Commission had recommended the closure of all laboratories, and both the President and Congress had under the Base Closure Act agreed with that recommendation.

Moreover, if Congress wished to ensure that the recommendations of the Lab Commission were available for consideration before any action was taken to close or realign defense laboratories pursuant to the Base Closure Act, it could have so provided either in the acts themselves or separate legislation. The defendant has stated in its brief and plaintiffs have not denied it in their reply brief that legislation was introduced in both the House and Senate to block closure or realignment of defense labs until the Lab Commission finished its report to Congress. Both bills died in committee.

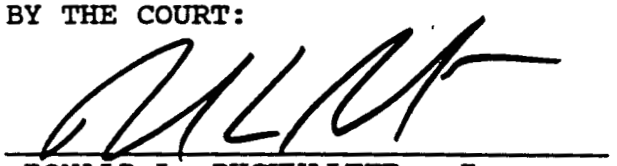
These two statutes in question can, in my judgment, co-exist. The Base Closure Act grants authority to close or realign NAWC without regard to any recommendations made by the Lab Commission established under Section 246.

Accordingly, the following order is entered:

O R D E R

AND NOW, this 28th day of October, 1993, it is hereby ORDERED that the plaintiffs' motion for summary judgment is DENIED.

BY THE COURT:



RONALD L. BUCKWALTER, J.

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

REP. JAMES C. GREENWOOD, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the decision of the United States Supreme Court in Specter v. Dalton, 114 S. Ct. 1719 (1994); the decision of the United States Court of Appeals for the Third Circuit in Specter v. Dalton, 971 F.2d 936 (3d Cir. 1992), and this Court's Memorandum Opinion and Order of October 28, 1993, Greenwood v. Dalton, No. 92-5331, 1993 WL 441716 (E.D. Pa. Oct. 28, 1993), it is hereby ORDERED AND ADJUDGED that the plaintiffs' complaint is dismissed with prejudice in its entirety.

RONALD L. BUCKWALTER
UNITED STATES DISTRICT JUDGE

Dated: JUNE 23 1994

ENTERED: 6/24/94

CLERK OF COURT

0000082

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Brief of Appellants and one copy of the Appendix to be served on the 29th day of August, 1994, by United States First Class Mail, postage prepaid, to:

Scott R. McIntosh, Esquire
Room 3127, Civil Division
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Nicole Reimann

Nicole Reimann

Document Separator

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1734

JAMES C. GREENWOOD, et al.,

Plaintiffs-Appellants,

v.

JOHN H. DALTON, et al.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

1. This is a suit for declaratory and injunctive relief under the Defense Base Closure and Realignment Act of 1990, as amended, and Section 246 of the National Defense Authorization Act for Fiscal Year 1991. The jurisdiction of the district court was asserted under 5 U.S.C. § 702 and 28 U.S.C. § 1331.

2. The judgment under appeal was entered on June 24, 1994. The judgment is a final decision and is within this Court's jurisdiction under 28 U.S.C. § 1291. The notice of appeal was

filed on July 12, 1994, within the time allowed by Rule 4(a)(4) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act") authorizes the Secretary of Defense, with the concurrence of an independent commission and the President, to close unneeded domestic "military installations." The Act defines "military installation" as "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense * * * ." The issues presented are:

1. Whether military research and development laboratories are "military installations" subject to closure under the Base Closure Act.

2. If so, whether Section 246 of the National Defense Authorization Act for Fiscal Year 1991, which created a temporary advisory commission to study "various means to improve the operation of laboratories of the Department of Defense," including closures, implicitly withdrew the Secretary's authority to close military laboratories under the Base Closure Act.

STATUTORY PROVISIONS

The text of the Base Closure Act, as amended, and Section 246 of the National Defense Authorization Act for Fiscal Year 1991 are reproduced in the statutory addendum to this brief.

STATEMENT OF THE CASE

I. Nature of Case and Proceedings Below

In 1991, as part of a Congressionally mandated effort to close unneeded domestic military installations, the Secretary of Defense proposed the closure of a number of military research and development laboratories, including a Navy air warfare laboratory in Warminster, Pennsylvania. The Secretary's proposal was endorsed by an independent base closure commission, approved by the President, and sustained by Congress. The same proposal was also endorsed shortly thereafter by the "Lab Commission," an advisory commission charged by Congress with reviewing the military laboratory system.

More than a year later, the present suit was brought to block the Secretary of Defense from carrying out the closure of the Warminster facility. The plaintiffs, affected employees and unions and their Congressional representatives, claimed that the Secretary and the base closure commission lacked statutory authority to recommend the closure of the Warminster facility. The district court rejected this claim, holding that the Defense Base Closure and Realignment Act of 1990 ("Base Closure Act") grants the Secretary and the commission jurisdiction over all domestic "military installations," including military laboratories. The district court specifically rejected the plaintiffs' argument that Section 246 of the National Defense Authorization Act for Fiscal Year 1991, which created the Lab Commission to review the operation of the military laboratory system, impli-

citly withdrew the authority that the Base Closure Act conferred on the Secretary and the base closure commission. The plaintiffs now appeal, renewing their argument that military laboratories, unlike other domestic military facilities, are exempt from closure under the Base Closure Act and may not be closed at all without additional legislative authorization by Congress.

II. Statement of Facts

A. Statutory Background

1. The central issue in this appeal is whether the Base Closure Act applies to military research and development laboratories. To place this issue in context, we begin with a brief review of the statutory background of the Base Closure Act. The Act is the latest in a series of legislative initiatives governing the closure of domestic military installations, and a review of the legislative background casts light on the statutory questions in this case.

Prior to 1977, the Secretary of Defense enjoyed broad authority to close military installations without further Congressional authorization. Under 10 U.S.C. § 125(a), the Secretary was (and still is) vested with general authority "to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense."[1] Acting pursuant to this statutory authority, and

[1] In its present form, 10 U.S.C. § 125(a) requires the Secretary to obtain Congressional approval before substantially transferring, reassigning, consolidating, or abolishing a "function, power, or duty * * * vested by law" in the Department of (continued...)

pursuant to the constitutional authority of the President as Commander-in-Chief, the Department of Defense closed a large number of domestic military installations in the 1960's and early 1970's. See Defense Base Closure and Realignment Commission, Report to the President, p. 1-1 (1991) ("Base Closure Commission Report"), reprinted in House Doc. No. 111, 102d Cong., 1st Sess. 3 (1991).

In 1977, Congress enacted legislation to restrict the closure of major domestic military installations. The 1977 legislation, codified at 10 U.S.C. § 2687, required the Department of Defense to comply with a variety of procedural requirements, including the National Environmental Policy Act, before carrying out major closures. 10 U.S.C. § 2687(b)(1)-(4) (Supp. I 1977). The new procedural restrictions, together with Congress's own reluctance to close major military facilities, effectively blocked any significant base closure for more than a decade. See H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3403; Base Closure Commission Report, p. 1-1.

The 1977 legislation applies to all "military installations" of a specified size. 10 U.S.C. § 2687(a)(1)-(2). The legis-

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[1](...continued)
Defense or one of its agencies or officials. However, individual military installations do not constitute a "function, power, or duty * * * vested by law" in the Department of Defense, and hence this restriction does not affect the Secretary's general authority to close or realign military installations. See, e.g., Armstrong v. United States, 354 F.2d 648, 649 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966).

lation defines "military installation," in relevant part, as any "base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense * * * ." Id. § 2687(e)(1). If a facility does not come within this broad definition of "military installation," it is not subject to the restrictions of the 1977 legislation, and may be closed on the basis of the Secretary's general authority under 10 U.S.C. § 125(a).

2. In 1988, Congress temporarily lifted the restrictions of the 1977 legislation, by enacting Title II of the Defense Authorization Amendments and Base Closure and Realignment Act ("1988 Act"). Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2627-34 (1988). The 1988 Act is the immediate predecessor to the current Base Closure Act, and it parallels the current Act in respects that are significant to this appeal.

The 1988 Act created an independent commission to identify unnecessary domestic military installations. 1988 Act §§ 201(1), 203(b)(1)-(2). The commission's recommended closures were presented to the Secretary of Defense, who was required to approve or disapprove them in their entirety. Id. §§ 201(1), 202. If the Secretary approved the commission's recommendations, the 1988 Act allowed Congress 45 days to override the Secretary's decision by passing a joint resolution of disapproval. Id. §§ 202(b), 208. If Congress did not do so, the Secretary was authorized (and indeed required) to carry out the closures, without having

to comply with the restrictions of the 1977 legislation. Id. § 201(1)-(2).

Like the 1977 legislation, the 1988 Act applied to "military installations," and it borrowed its definition of "military installation" from the 1977 legislation. See 1988 Act § 209(6), 102 Stat. 2634. The 1988 base closure commission understood this definition to cover military laboratories, and the commission included a major laboratory, the Army Military Technology Laboratory, in its list of recommended closures. See Base Realignments and Closures: Report of the Defense Secretary's Commission 60-61 (December 1988). The Secretary of Defense approved the commission's recommendations, including the recommendation to close the Army Military Technology Laboratory, and Congress sustained the Secretary's decision. 135 Cong. Rec. H1317 (daily ed. April 18, 1989).

3. In 1990, Congress enacted the current Base Closure Act as a successor to the 1988 Act. Pub. L. No. 101-510, §§ 2901-2911, 104 Stat. 1808-1819 (1990) (codified as amended at 10 U.S.C. § 2687 note). The current Act provides for three closure rounds, in 1991, 1993, and 1995. Act § 2903.

Like the 1977 and 1988 legislation, the current Act applies to the closure of "military installations." Act § 2904(a). As noted above, the definition of "military installation" in the 1988 statute had been interpreted by the 1988 base closure commission to cover military laboratories. Knowing that, Congress chose to adopt the same definition of "military installa-

tion" in the current Act: "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 * * * ." Act § 2910(4).[2]

Under the current Act, the Secretary of Defense prepares a list of recommended closures for each biennial round. Act § 2903(c)(1).[3] The Act requires the Secretary to "consider all military installations inside the United States equally" when selecting bases for closure. Id. § 2903(c)(3). The Secretary's recommendations are presented to the Defense Base Closure and Realignment Commission ("Base Closure Commission"), which prepares a report for the President regarding the proposed closures. Id. § 2903(d)(2)(A). The Base Closure Commission has authority in certain circumstances to change the Secretary's recommendations. Id. § 2903(d)(2)(B).

The Act authorizes the President to approve or disapprove the Commission's recommendations. Act § 2903(e)(1). If the

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[2] The 1988 statute had defined "military installation" in terms of "activit[ies] under the jurisdiction of the Secretary of a military department." 102 Stat. 2634. The 1990 Act broadened this definition somewhat by referring to "activit[ies] under the jurisdiction of the Department of Defense." Act § 2910(4). At the same time, Congress amended the corresponding definition of "military installation" in 10 U.S.C. § 2687, the 1977 provision restricting base closures, to incorporate this change. Id. § 2911(2).

[3] The Act provides for both "closures" and "realignments." See, e.g., Act § 2904(a)(1)-(2). A "realignment" is defined as "any action which both reduces and relocates functions and civilian personnel positions * * * ." Id. § 2910(5). Nothing in this appeal turns on the distinction between closures and realignments. For the sake of simplicity, this brief uses "closure" to refer both to closures and realignments.

President approves the recommendations, Congress may override the President's decision by enacting a joint resolution of disapproval. Id. §§ 2904(b), 2908. If Congress does not do so, the Act obligates the Secretary to close all military installations approved for closure in the Commission's report. Id. § 2904(a)(1)-(2).

The process of selecting military installations for closure under the Act is subject to a highly expedited statutory timetable. See Act §§ 2903(b)(1)-(2), 2903(c)(1) (Secretary of Defense), 2903(d)(2)(A) (Commission), 2903(e)(1) (President), 2908 (Congress). The process of actually closing the selected installations, however, takes far longer. The Act provides the Department of Defense with up to 2 years after the completion of each round to begin the closures, and up to 6 years to complete them. Id. § 2904(a)(3)-(4). As a result of this extended timetable, Congress has an opportunity to revisit closure decisions through the ordinary legislative process even after the biennial selection process has been completed.

4. The Base Closure Act was enacted as part of the National Defense Authorization Act for Fiscal Year 1991. Pub. L. No. 101-510, 104 Stat. 1485 (1990). A different section of that legislation, Section 246, created the Commission on the Consolidation and Conversion of Defense Research and Development Laboratories ("Lab Commission"). 104 Stat. 1519-21. The plaintiffs' claim in this appeal rests principally on the relationship between the Base Closure Act and Section 246.

Section 246 charged the Lab Commission with "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." § 246(b)(1). The Lab Commission was directed to consider "such means as" establishing government-owned, contractor-operated ("GOCO") laboratories; modifying laboratory missions and functions; and consolidating or closing some or all laboratories. Id. § 246(b)(2)(A). The Lab Commission was required to present a report to the Secretary of Defense by September 30, 1991, and the Secretary was directed to transmit the report to Congress within 30 days thereafter. Id. § 246(f)-(g). The Commission went out of existence 90 days after presenting its report to the Secretary. Id. § 246(h).

For present purposes, four aspects of Section 246 should be borne in mind. First, the subject of closing military laboratories was only one part of the Lab Commission's general mandate "to determine the feasibility and desirability of various means to improve the operation of [DoD] laboratories." Second, the report of the Lab Commission, unlike that of the Base Closure Commission, was purely advisory. Third, Section 246 does not itself impose any restriction on the closure of military laboratories. Fourth, Section 246 does not contain any provision expressly limiting the authority and jurisdiction of the Secretary of Defense and the Base Closure Commission under the Base Closure Act.

B. The Present Controversy

1. In April 1991, the Secretary of Defense issued his first list of recommended closures under the Base Closure Act. 56 Fed. Reg. 15184 (April 15, 1991). The Secretary's recommendations included the closure of a large number of Army and Navy military laboratories. Id. at 15203-15206, 15226-15239 (Navy). The Secretary proposed restructuring the Navy's laboratory system into four major "warfare centers," including a Naval Air Warfare Center. Id. at 15226-15228.

As one step in the creation of the Naval Air Warfare Center, the Secretary proposed disestablishing a Navy laboratory in Pennsylvania, currently known as Naval Air Warfare Center Aircraft Division Warminster ("Warminster Center"), and transferring the bulk of its functions to another facility. Id. at 15227. The Secretary determined that the Warminster Center was lower in military value than alternative facilities, for a variety of reasons, including restricted airspace and limited room for expansion to accommodate consolidation. Id. at 15226.[4]

After an intensive review process, the Base Closure Commission approved virtually all of the Secretary's recommendations regarding the closure of military laboratories. Base Closure Commission Report, pp. 5-12 to 5-13, 5-15 to 5-16, 5-29 to 5-30.

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[4] The plaintiffs (at pp. 19-20) repeat allegations in their complaint that the decision to close the Warminster Center was "unwise" and "potentially damaging to Naval aviation." Because those allegations are wholly irrelevant to the legal issue in this appeal, we will not respond to them here, except to point out that they are merely unproven allegations, which the Department of Defense strongly contests.

The Commission specifically approved the Secretary's plan to consolidate existing naval laboratories into "warfare centers," including the planned realignment of the Warminster Center. Id. pp. vii, 5-29 to 5-30.

Before acting on the Secretary's recommendations, the Base Closure Commission satisfied itself that its jurisdiction "did include authority to recommend realignment and closure of laboratories[,] without the input of the [Lab] Commission." Base Closure Commission Report, p. 5-16. However, the Base Closure Commission recommended that the Secretary defer implementation of the principal laboratory closure plans until January 1992, "in order to give the Secretary time to consider the findings and recommendations of the [Lab] Commission * * * and to consult with the appropriate committees of Congress." Id. p. 5-30. The Base Closure Commission further noted that "there is a clear role for the [Lab] Commission to advise the Secretary of how best to implement this consolidation plan so as to minimize the impact of the turbulence it could create * * * ." Ibid.

In July 1991, the President approved the Base Closure Commission's recommendations, and Congress sustained the President's decision when the House of Representatives overwhelmingly rejected a proposed joint resolution of disapproval. 137 Cong. Rec. H6039 (daily ed. July 30, 1991). As a result, the Secretary of Defense became obligated by law to "close all military installations recommended for closure by the [Base Closure] Commission * * * ." Act § 2904(a)(1).

2. Two months later, in September 1991, the Lab Commission issued its report to the Secretary of Defense. The Lab Commission presented almost 50 principal recommendations and findings, covering both department-wide and service-specific laboratory issues. Federal Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories, Report to the Secretary of Defense (September 1991) ("Lab Commission Report"), pp. ES-2 to ES-9.

Among other things, the Lab Commission reviewed the Secretary's plans for closing and realigning Army and Navy laboratories. Lab Commission Report, pp. 9-16. As a general matter, the Lab Commission endorsed those plans. Id. at 11, 15. At the same time, the Lab Commission recommended a number of specific modifications and adjustments in these plans. For example, the Lab Commission recommended deferring the Army's planned construction of a microelectronics research facility and consideration of an alternative interservice facility. Id. at pp. ES-4, ES-6, 10-12. However, the Lab Commission did not recommend any change in the Secretary's plan to close the Warminster Center. Id. at 13-16.

3. In September 1992, over a year after the President approved the 1991 closure recommendations, the plaintiffs brought suit to enjoin the Secretary from carrying out the closure of the Warminster Center. App. 1. Among other things, the plaintiffs claimed that Section 246 of the National Defense Authorization Act vested the Lab Commission with exclusive jurisdiction over

the closure of military laboratories, and that the Secretary of Defense and the Base Closure Commission had exceeded their authority under the Base Closure Act by recommending closures and realignments of military labs. The plaintiffs also advanced a variety of other claims, all of which they subsequently have abandoned in light of the Supreme Court's decision in Dalton v. Specter, 114 S. Ct. 1719 (1994), and this Court's decision in Specter v. Dalton, 971 F.2d 736 (3d Cir. 1992).[5]

In October 1993, the District Court for the Eastern District of Pennsylvania (Buckwalter, J.) denied a motion by the plaintiffs for summary judgment on the Lab Commission claim. App. 72. The district court held that the Warminster Center is a "military installation" within the definition of that term in the Base Closure Act, and hence the closure of the Warminster Center was within the authority of the Secretary of Defense and the Base Closure Commission under that Act. Id. at 75-76. The court then held that Congress, by enacting Section 246, "did not create an exception to the Base Closure Act divesting the Secretary of Defense and [the] Base Closure Commission of authority to recommend defense labs for closure or realignment." Id. at 78. The court concluded that Section 246 and the Base Closure Act "are capable of co-existence" and that "absolutely nothing in the

[5] The decisions of the Supreme Court and this Court in the Specter litigation preclude judicial review of all claims that the government has failed to comply with the substantive or procedural requirements of the Base Closure Act.

record" indicated that Congress meant for Section 246 to create an exception to the scope of the Base Closure Act. Ibid.

In June 1994, the district court entered a final judgment resolving all claims in favor of the appellees. This appeal, which is limited to the Lab Commission issue, followed.

STATEMENT OF RELATED CASES

The subject matter of this appeal is related to the subject matter of Specter v. Garrett, 971 F.2d 736 (3d Cir.), vacated sub nom. O'Keefe v. Specter, 113 S. Ct. 455 (1992), opinion on remand, 995 F.2d 404 (3d Cir. 1993), rev'd in part sub nom. Dalton v. Specter, 114 S. Ct. 1719 (1994).

STATEMENT OF STANDARD OF REVIEW

The issues presented by this appeal are issues of law that are subject to de novo review.

SUMMARY OF ARGUMENT

1. With exceptions not relevant here, the Base Closure Act applies to all "military installations." Military laboratories fit squarely within the sweeping statutory definition of "military installation," and therefore are subject to the Base Closure Act. In defining "military installation," Congress chose a definition that already had been construed to apply to military laboratories under the Base Closure Act's predecessor statute. And while Congress subsequently has revised the statutory definition in other respects, it conspicuously has not changed the definition to exclude military laboratories. Ironically, if the

plaintiffs were correct, and military laboratories were not "military installations" under the Base Closure Act, then they would not be subject to the closure restrictions in 10 U.S.C. § 2687 in the first instance, and the Secretary of Defense could close them at will -- precisely the opposite of the result sought by the plaintiffs.

2. Nothing in Section 246 of the National Defense Authorization Act for Fiscal Year 1991 withdraws the authority over military laboratories conferred by the Base Closure Act. The text and legislative history of Section 246 say nothing about limiting the jurisdiction of the Secretary of Defense or the Base Closure Commission under the Act. And, contrary to the plaintiffs' argument, it is not necessary to read an unwritten limitation into the Base Closure Act in order to preserve the operation of Section 246. Instead, the two statutory schemes can -- and did -- coexist perfectly well. The informational and advisory goals of Section 246 were not compromised by allowing the Base Closure Commission to select military laboratories for closure during the 1991 round. Because the process of closing military installations takes years to complete, the Lab Commission was not deprived of the opportunity to offer meaningful advice to Congress about laboratory closures. In contrast, if Section 246 were read to implicitly withdraw military laboratories from the Base Closure Act, Congress's goal of comprehensively downsizing the Nation's domestic military infrastructure would be seriously jeopardized.

If the plaintiffs were correct that the Secretary of Defense and the Base Closure Commission nullified Section 246 by selecting military laboratories for closure in 1991, one would have expected a response from the Lab Commission or Congress to this supposed encroachment. But the Lab Commission endorsed the Secretary's plans for closing military laboratories, without suggesting in any way that its functions had been compromised. And Congress, while it has made a number of other changes to the Base Closure Act, has never acted legislatively to remove military laboratories from the ambit of the Base Closure Act. This acceptance of the use of the Base Closure Act to close military laboratories cannot be squared with the plaintiffs' theory that Section 246 has been fundamentally subverted.

ARGUMENT

THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT AUTHORIZES THE SECRETARY OF DEFENSE TO CLOSE MILITARY LABORATORIES

I. Military Laboratories Are "Military Installations" under the Act

A. With exceptions that are not relevant here, the Base Closure Act applies to all domestic "military installations," and directs the Secretary of Defense to "consider all military installations inside the United States equally * * * ." Act § 2903(c)(3). In carrying out their responsibilities under the Act, the Secretary of Defense and the Base Closure Commission have concluded that military laboratories are "military installations" under the Act, and therefore may (and indeed must) be considered for closure.

Whether military laboratories are "military installations" under the Base Closure Act is the threshold issue in this case. It is an issue, however, that the plaintiffs avoid until the very end of their brief. When they finally turn to it, they dutifully argue that the Act's definition of "military installation" does not cover military laboratories, but their argument (at pp. 35-36) is half-hearted at best. Their reluctance to address the issue is understandable, for it is clear beyond reasonable argument that military laboratories are "military installations" under the Act, and hence that the Base Closure Act squarely provides statutory authority for the closure of the Warminster Center.

The text of the Base Closure Act is sufficient to dispose of the plaintiffs' position. The Act defines "military installation" in sweeping terms as any "base, camp, post, station, yard, center, homeport facility * * * , or other activity under the jurisdiction of the Department of Defense * * * ." Act § 2910(4) (emphasis added). This is an exceptionally broad definition, and, as the underscored language shows, military laboratories come squarely within its terms. All DoD military laboratories engage in "activit[ies] under the jurisdiction of the Department of Defense." And the Warminster laboratory is, quite literally, a "center" as well (Naval Air Warfare Center Aircraft Division Warminster). To argue that a military research center is not a "center," and that its activities are not "activit[ies] under the

jurisdiction of the Department of Defense," is to ignore the statutory language rather than interpret it.

The plaintiffs assert (at p. 36) that when Congress included "center" and "other activit[ies] under the jurisdiction of the Department of Defense" in the definition of "military installation," it meant to cover only "base-type facilities" -- a term of the plaintiffs' devising, which appears nowhere in the Act itself. This argument is simply an ipse dixit. If Congress had wished to limit the definition of "military installation" to "base-type facilities" (whatever that means), it hardly would have included an unqualified, all-encompassing term like "other activit[ies] under the jurisdiction of the Department of Defense" in the definition. That term, far from supporting the narrowing construction offered by the plaintiffs, directly undermines it. The plaintiffs are inviting this court to read the statutory language as if it said, "activities under the jurisdiction of the Department of Defense other than research and development activities." It says nothing of the kind.

Even if the text were less clear, any uncertainty would be dispelled by the record of how term has been employed, administratively and legislatively. Both before and after the enactment of the Base Closure Act, the definition of "military installation" used in the Act has been applied administratively to military laboratories. And Congress, far from rejecting that administrative interpretation, has accepted it -- and indeed relied on it -- legislatively.

When Congress set out to define "military installation" for purposes in the Base Closure Act, it chose to adopt a definition that already had been applied to military laboratories. As noted above, the Base Closure Act's immediate predecessor, the 1988 base closure statute, had used the same definition, and the independent commission created by the 1988 act had employed that definition to recommend the closure of a major military laboratory. See p. 7 supra. Congress reviewed the commission's recommendations in 1988, and hence was fully aware that "military installation" had been interpreted to include military laboratories. Knowing that, Congress adopted precisely the same definition for the Base Closure Act. Congress would hardly have adopted that definition, without alteration, if it wished to exclude military laboratories from the scope of the Act. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1982).

Since the enactment of the Base Closure Act, the Secretary of Defense and the Base Closure Commission have continued to interpret "military installation" to include military laboratories. They did so during the 1991 round, as this case itself demonstrates. And they did so again in the 1993 round, recommending the closure or realignment of a number of additional Navy laboratories. Defense Base Closure and Realignment Commission,

Report to the President, pp. vi, ix (1993), reprinted in House Doc. No. 115, 103d Cong., 1st Sess. 7, 10 (1993).

Presented with this consistent, ongoing administrative interpretation, Congress has left the statutory definition of "military installation" undisturbed with respect to military laboratories. At the same time, it has revised the statutory definition in other respects. After the Base Closure Commission recommended the realignment of the Army Corps of Engineers in 1991, Congress retroactively amended the definition of "military installation" to exclude "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." National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 2821(h), 105 Stat. 1546 (1991) (amending Act § 2910(4)). Congress hardly would have left the statutory definition of "military installation" undisturbed with respect to military laboratories, at the same time that it was revising the definition in other respects, if the Secretary and the Commission had misconstrued the definition as fundamentally as the plaintiffs claim. To the contrary, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986).

B. Ironically, the plaintiffs' reading of "military installations" creates a major problem for the plaintiffs themselves, one that they seem to be unaware of. If the plaintiffs' reading were correct, it would not advance the plaintiffs' claim, but instead would defeat it. For if military laboratories are not "military installations," the Secretary of Defense is free to close them at will, without recourse to the Base Closure Act.

As explained above (see pp. 4-5 supra), the Secretary of Defense has the general statutory authority to "provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense" (10 U.S.C. § 125(a)), and he employed this authority on numerous occasions before 1977 to close unneeded domestic military facilities. See, e.g., Armstrong v. United States, 354 F.2d 648 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966). To be sure, Congress limited this statutory authority in 1977 by enacting 10 U.S.C. § 2687 (see pp. 5-6 supra). But that restriction, like the Base Closure Act itself, applies only to "military installations," and it uses precisely the same definition of "military installation" as the Base Closure Act uses. 10 U.S.C. § 2687(e)(1); see p. 6 supra. Thus, if military laboratories are not "military installations" under the Base Closure Act, they are not "military installations" under 10 U.S.C. § 2687 either. And if that is so, then the Secretary of Defense, far from lacking statutory authority to close military laboratories, would enjoy unqualified authority under 10 U.S.C. § 125(a) to close them as

he deems appropriate. That authority would not be impaired by Section 246 of the National Defense Authorization Act, for that provision does not itself impose any legal restriction whatsoever on the Secretary's authority over military labs.

In pointing out the self-defeating nature of the plaintiffs' argument, we should stress that we are not inviting this Court to hold that military laboratories are not "military installations" under the Base Closure Act. For the reasons given above, that holding would be incorrect. But if this Court were to conclude, notwithstanding our reasoning, that military laboratories are not "military installations," it is important to recognize that the necessary result would be to sustain, rather than to overturn, the Secretary's decision to close the Warminster Center.

II. Section 246 of the National Defense Authorization Act Does Not Exempt Military Laboratories from the Base Closure Act

A. Introduction

As shown in Part I, military laboratories like the Warminster Center are "military installations" under the Base Closure Act. By its terms, the Act requires the Secretary of Defense to consider all domestic military installations for closure, and to close all military installations approved for closure by the Base Closure Commission and the President. Act §§ 2903(c)(3), 2904(a). Thus, unless some other legislation has withdrawn the jurisdiction of the Secretary and the Commission over military installations, the Base Closure Act not only

authorizes but obligates the Secretary to carry out the closure of the Warminster Center.

The plaintiffs argue, of course, that other legislation -- Section 246 of the National Defense Authorization Act -- does withdraw the jurisdiction of the Secretary and the Commission over military laboratories, and thereby exempts military labs from closure under the Act. In making this argument, the plaintiffs face an obvious threshold difficulty: Section 246 itself says nothing whatsoever about the authority of the Secretary and the Base Closure Commission under the Base Closure Act. It does not expressly restrict the jurisdiction of the Secretary and the Base Closure Commission; indeed, it makes no reference to the Base Closure Act at all. The plaintiffs are thus in the awkward position of arguing that Congress, at the same time that it was expressly authorizing the closure of all unneeded domestic military installations under the Base Closure Act, was simultaneously placing a significant limitation on that authority, in an entirely different statutory provision, without bothering to say so.

The plaintiffs try to overcome this problem by arguing, in a variety of ways, that placing military laboratories under the concurrent jurisdiction of the Base Closure Act and Section 246 makes no sense. In particular, the plaintiffs argue that allowing military laboratories to be closed under the Base Closure Act defeats the purposes of Section 246, and that Congress's intent can be vindicated only if the now-defunct Lab

Commission is deemed to have had sole and exclusive jurisdiction over the closure of military labs.

As we show below, these arguments are wrong: allowing the Secretary of Defense and the Base Closure Commission to consider military installations does not in any way nullify Section 246 or obstruct the mandate of the Lab Commission. Before we turn to the merits of these arguments, however, it is instructive to compare the plaintiffs' views with the response of Congress.

As indicated above, two of the Base Closure Act's three biennial base selection rounds are now complete, and the third round will take place in 1995. In both of the completed rounds, the Secretary of Defense has proposed extensive closures of military laboratories, the Base Closure Commission has approved those proposals, and the President has adopted the recommendations. See pp. 11-12, 20-21 supra.

For its part, Congress has amended the Base Closure Act extensively and repeatedly since its original enactment in 1991. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 344(b)(1), 2821, 2827, 105 Stat. 1345, 1544-46, 1551 (1991); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1054(b), 2821(b), 2823, 106 Stat. 2502, 2607, 2608 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), 2921(b)-(c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935 (1993). In doing

so, Congress has been well aware that the Act has been applied in the past, and can be expected to be applied in the future, to military laboratories. Yet Congress has chosen not to amend the statute to withdraw military laboratories from the Act's operation.

In May 1991, shortly after the Secretary of Defense issued his first closure recommendations, legislation was introduced in both Houses of Congress to block the closure of military laboratories until the Lab Commission presented its report to Congress. H.R. 2329, 102d Cong., 1st Sess.; S. 1000, 102d Cong., 1st Sess. But neither bill was reported out of committee (App. 80), and Congress has never adopted any legislation restricting the authority of the Secretary of Defense and the Base Closure Commission to consider military laboratories.[6]

The basic theme of the plaintiffs' brief is that the Secretary of Defense and the Base Closure Commission have "blatant[ly] disregard[ed] * * * the clear Congressional mandate" by selecting military laboratories for closure (p. 18). If that were true, it is hard to fathom why Congress would not have responded legislatively, especially when Congress has actively revised the Base Closure Act in so many other respects.

The plaintiffs suggest (p. 33) that Congress stayed its hand, not because it approves of the treatment of military

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[6] The appellants quote (at p. 34) a 1991 report by the House Committee on Appropriations that criticized the Secretary's inclusion of military laboratories in his proposed closure list. But the report did not lead to legislation restricting the closure of military labs under the Base Closure Act.

laboratories, but because "it may not have been politically expedient to carve out ex post exceptions to the base closure process." But Congress has "carved out ex post exceptions" to the base closure process. That is, after all, precisely what Congress did when it retroactively amended the Base Closure Act to withdraw the Army Corps of Engineers from the jurisdiction of the Act (see p. 21 supra). Congress has thus shown itself perfectly willing to intervene legislatively, not just prospectively but retroactively, when it believes that the Secretary and the Base Closure Commission have strayed into inappropriate areas.

Against this background, Congress's acceptance of the continuing application of the Base Closure Act to military laboratories is compelling evidence that the objectives of Section 246 have not been frustrated. As we now show, the plaintiffs' arguments to the contrary are without merit.

B. Applying the Base Closure Act To Military Laboratories Does Not Interfere With The Operation of Section 246

As interpreted by the Secretary of Defense and the Base Closure Commission, the Base Closure Act and Section 246 are partially overlapping statutory schemes. Under the Base Closure Act, the Secretary and the Base Closure Commission are to consider military laboratories for closure, along with all other domestic military installations. At the same time, Section 246 directed the Lab Commission to address the subject of laboratory closures in its advisory report, along with an array of other

measures to improve the operation of the military laboratory system. This jurisdictional overlap was partial rather than complete: the mandate of the Secretary and the Base Closure Commission under the Base Closure Act is not limited to laboratories, and the mandate of the Lab Commission under Section 246 was not confined to closures. See p. 10 supra.

The plaintiffs argue that Congress could not have intended to create this kind of concurrent jurisdiction over the closure of military laboratories. They assert that if Congress had meant to subject military laboratories to the machinery of the Base Closure Act, it would not have created an advisory commission under Section 246 to address the closure of military labs. Conversely, they argue that, given the creation of the Lab Commission, it would have made no sense for Congress to place military labs within the simultaneous purview of the Base Closure Act, because allowing the Secretary of Defense and the Base Closure Commission to select military laboratories for closure would vitiate the role of the Lab Commission. These arguments are wrong -- wrong in theory, and wrong in fact.

1. First, the plaintiffs devote considerable effort (e.g., pp. 12-15, 29-31) to showing that the Base Closure Act and Section 246 are different statutory schemes, with different procedural and substantive provisions. From this unremarkable premise, the appellants infer that Congress must have meant for the two schemes to be mutually exclusive: Section 246 governs laboratories, the Base Closure Act does not. The premise ("the

statutory schemes are different") is correct, but the inference ("the schemes are mutually exclusive") is a non sequitur.

The differences between the two schemes do not imply that Section 246 was directed at military laboratories, while the Base Closure Act was directed at other military facilities. Instead, they simply reflect the fact that Section 246 was designed to produce advice, while the Base Closure Act was designed to produce results. The task of the Lab Commission under Section 246 was limited to providing information and recommendations about restructuring the military laboratory system. In contrast, the task of the Secretary of Defense and the Base Closure Commission under the Base Closure Act was to carry out "a fair process that will result in the timely closure and realignment of [domestic] military installations * * * ." Act § 2901(b). The statutory differences pointed out by the plaintiffs merely reflect these different goals.

2. Next, the plaintiffs reason that, since the process of selecting military installations for closure under the Base Closure Act was to be completed before the Lab Commission was required to issue its advisory report under Section 246, any recommendations the Lab Commission might make regarding laboratory closures would be rendered a nullity. The plaintiffs overlook a simple but critical fact: while the Base Closure Act creates a highly expedited procedure for selecting military installations to be closed, the process of closing military installations takes far longer.

As noted above, the Base Closure Act itself provides the Secretary of Defense with up to 2 years after each biennial round to begin the closure of the selected military installations, and up to 6 years to complete the closures. Act § 2903(a)(3)-(4). This extended timetable reflects the practical realities of the base closure process. Closing a military installation, especially a major one, takes extensive preparation and a major commitment of resources over an extended period, especially if functions are to be transferred from one installation to another. For example, the planned restructuring of the Navy's military laboratory system, which the Secretary of Defense presented to the Base Closure Commission and the Lab Commission in 1991, involved a phased plan that is not expected to be completed until the end of Fiscal Year 1995. Lab Commission Report, p. 14.

Given the extended time frame for carrying out the closure of military installations under the Base Closure Act, it becomes obvious why the advisory role of the Lab Commission under Section 246 was not compromised by placing military laboratories within the ambit of the Base Closure Act. The Lab Commission's report was required to be issued by September 30, 1991 -- long before any military laboratory selected in the 1991 base closure round could actually be closed. 104 Stat. 1520. If the Lab Commission had concluded that some or all military laboratories slated for closure should not be closed, Congress would have had ample opportunity to act on those views, and the Lab Commission's advisory function would have been fulfilled.

In addition, the plaintiffs overlook the fact that the Base Closure Act creates a three-round selection process, with separate selection cycles in 1991, 1993, and 1995. See p. 7 supra. Even if the Lab Commission's recommendations had arrived too late to assist Congress regarding the 1991 round -- and for the reasons just given, they did not -- those recommendations would nonetheless be available to for use in the 1993 and 1995 rounds.

If further proof is needed that the application of the Base Closure Act to military laboratories did not obstruct the work of the Lab Commission under Section 246, one need only look at the actual operation of the two schemes in 1991. By the time that the Lab Commission issued its report, in September 1991, the selection process under the Base Closure Act was complete, and a number of military laboratories had been approved for closure. Contrary to the plaintiffs' suggestion (p. 32), the Lab Commission did not regard this state of affairs as a fait accompli that rendered its own mission a nullity. To the contrary, the Lab Commission itself reviewed the Secretary's laboratory restructuring plans, including the planned closures and realignments. And, with exceptions that are not relevant here, it endorsed them. See p. 13 supra.

Nowhere in its report did the Lab Commission itself suggest that its mission had been compromised in the slightest by the actions of the Secretary of Defense and the Base Closure Commission under the Base Closure Act. Neither did the Lab

Commission suggest that it enjoyed, or should have enjoyed, exclusive jurisdiction over the subject of laboratory closures. Thus, the plaintiffs' reading of Section 246 conflicts not only with the views of the Secretary of Defense and the Base Closure Commission, but with the views of the very commission that Congress charged with carrying out Section 246.

3. The plaintiffs are likewise wrong when they argue (e.g., at p. 33) that the closure of military laboratories under the Base Closure Act undermined the role that Congress meant to reserve for itself by enacting Section 246. The short answer to this argument has already been suggested above. If Congress believed that its own role in the closure of military laboratories had been compromised in the 1991 base closure round, it surely would have acted legislatively to undo the damage and forestall a repetition in future rounds, as it in fact did with respect to the Army Corps of Engineers. See p. 21 supra. Congress's acceptance of the handling of military laboratories in 1991 contradicts the notion that its role under Section 246 was somehow undermined.

The plaintiffs go astray by misapprehending Congress's intended role under Section 246. The plaintiffs envision a process in which Congress was to be the sole decisionmaker regarding laboratory closures, a process in which the Secretary of Defense was (evidently) to play no role whatsoever. In this account, Congress wished to decide which military laboratories to close on a "flexible," "lab-by-lab" basis (pp. 23, 29, 31-32), a goal that

was defeated when military laboratories were drawn into the machinery of the Base Closure Act.

This vision of Congress's role simply has no foundation in the provisions or legislative history of Section 246. Section 246 does not purport to exclude the Secretary of Defense from the decisionmaking process; to the contrary, Section 246(f) provides for the Lab Commission's report to be sent to the Secretary himself in the first instance. Neither does Section 246 cast Congress in the role of making "flexible," "lab-by-lab" closure decisions. The legislative history of Section 246 merely states that Congress wanted the Lab Commission to provide a "critical assessment" of the Secretary's laboratory reorganization plans and to "suggest alternative actions for congressional consideration." H. Conf. Rep. No. 923, 101st Cong., 2d Sess. 564 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 3135-36. Congress simply wished to be in a position to make an informed response to the Secretary's reorganization plans. And for the reasons indicated above, allowing military laboratories to be selected for closure under the Base Closure Act in no way obstructed that goal.

4. The plaintiffs also argue (pp. 16-18) that the decision-making process for closing military laboratories is inherently different from that for closing other military installations.[7] They therefore claim (p. 17) that the "essential underpinnings of

[7] For reasons that are unclear, this argument appears in the appellants' Statement of Facts, rather than in the Argument section of their brief.

the Base Closure Commission's processes in dealing with bases were totally inapplicable to labs." This claim, far from being "undisputed" (p. 17), is wrong.

The plaintiffs argue (p. 16) that military laboratories require specialized study because, unlike other military installations, they "have unique missions and are staffed by personnel with scientific and technological expertise." Apart from citing their own complaint, they offer no support for this supposed distinction, and none exists. To suggest that military installations other than laboratories, such as nuclear submarine bases or intercontinental ballistic missile sites, lack "unique missions" or scientifically or technologically expert personnel is obviously incorrect. In any event, even if the distinction were a real one, it simply would support a decision to establish a Lab Commission to study military laboratories -- not a determination that the Base Closure Commission was ill-equipped to study (or legally precluded from considering) military laboratories for closure.

In a related vein, the plaintiffs point to the fact (pp. 17-18) that the Secretary of Defense's force structure plan, developed to govern the selection of installations under the Base Closure Act (Act §§ 2903(a), (b)), did not refer to military laboratories or research and development. But the force structure plan -- or, more precisely, the unclassified summary of

the plan on which the plaintiffs rely[8] -- was not intended to exhaustively list every domestic military installation by type and to explain its role, if any, in the national defense structure during the next six years. Rather, most of the summary is devoted to a military threat assessment and overseas basing needs. See Base Closure Commission Report, Appendix B. The section on anticipated force structure generally describes expected future reductions in strategic and conventional forces. The plan simply notes that fewer army divisions, navy ships, carriers and carrier air wings and Air Force tactical fighter wings will exist by FY 1995 than in FY 1990. It does not detail how many military installations, such as air force bases, army depots and naval shipyards -- installations obviously subject to the Base Closure Act -- will be required. That military laboratories are also not specifically mentioned does not in any way suggest that they were not intended to be considered, or were not suited for consideration, by the Secretary and Base Closure Commission.

Finally, the plaintiffs cite a brief passage from the Navy's 1991 base closure recommendations (p. 18) as a supposed "concession" that the criteria adopted by the Secretary of Defense for closing military installations were inapplicable to military laboratories. The passage seized on by the plaintiffs is a frag-

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[8] The actual force structure plan is a classified document and is not publicly available. The appellants cite an unclassified summary of the plan, which the Base Closure Commission reproduced as Appendix B in the Commission's 1991 report.

ment taken out of context from a more extensive discussion, and when it is placed in context, the "concession" disappears.[9]

5. As the foregoing discussion shows, placing military laboratories under the concurrent jurisdiction of the Base Closure Act and Section 246 results in a perfectly sensible and workable statutory scheme, one that does not compromise either of the two statutes. In contrast, the plaintiffs' reading of Section 246 seriously and unjustifiably interferes with the goal of Congress and the Executive Branch to create a less expensive, more efficient military establishment.

The Base Closure Act is a landmark measure designed to produce the timely closure and realignment of unneeded military

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[9] The relevant portion of the Navy report is reproduced in the Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, Attachment 4 (Aug. 27, 1993) (Docket Entry 16). The report explains that a Navy Research, Development, Test and Evaluation ("RDT&E") Facilities Consolidation Working Group studied 76 RDT&E activities, including Navy laboratories. The passage relied on by the appellants states that, because RDT&E activities have unique aspects allowing them to perform a specific range of functions, they could not all be evaluated for possible closure or realignment against each other. In other words, analyzing different kinds of laboratories against each other for possible closure or realignment was like comparing apples and oranges.

What the appellants fail to explain is that the Navy therefore divided the activities along mission lines into five separate categories for evaluation: Corporate Laboratories, Naval Air Warfare Centers, Naval Command, Control and Ocean Surveillance Centers, Naval Surface Warfare Centers, and Naval Undersea Warfare Centers. Each category was subdivided into functional groups, similar enough to compare with each other. After determining whether excess capacity existed, the Navy then applied the eight selection criteria to facilities within each group. Thus, far from acknowledging that the selection criteria did not apply to RDT&E facilities, the Navy properly applied them to those installations, as it did to installations other than military laboratories.

installations. Its purpose is to streamline the Nation's domestic military force structure in the post-Cold War era, to save taxpayers billions of dollars, and to break the political log jam between the Executive Branch and Congress over the closure of domestic military installations, a log jam embodied in 10 U.S.C. § 2687.

Closing unneeded military laboratories is an important part of this effort, for the military laboratory system constitutes a significant part of DoD's overall domestic military structure. In 1991 alone, DoD's military laboratories spent $6.5 billion and employed nearly 60,000 people, including over 26,000 scientists and engineers. Lab Commission Report, p. ES-1. If the plaintiffs' view of Section 246 were correct, this vast commitment of money and resources would be altogether exempt from the Base Closure Act, insulated from serious restructuring by 10 U.S.C. § 2687, at the same time that every other component of the Nation's domestic military structure was being rigorously cut back under the Base Closure Act.

It simply would make no sense for Congress to exempt military laboratories from the overall belt-tightening that the Base Closure Act was designed to effect. The result of such an exemption not only would be to delay potentially significant savings, but also to produce an imbalance between the military laboratory system and the rest of the Nation's military force structure. Simply put, a military laboratory system designed for the expanded military structure of the 1980's makes no sense for

the smaller military structure of the 1990's and beyond. Yet if the plaintiffs' claims were accepted, that is precisely what would result. The plaintiffs face a heavy burden in arguing that Congress intended this result, and they have not come close to satisfying that burden.

C. The Government's Interpretation of the Statute Is Consistent With Principles of Statutory Construction

Finally, the plaintiffs invoke various maxims of statutory construction, all of which are said to be confounded by the district court's decision. The plaintiffs rely on two rules of construction in particular. The first is that an interpretation that harmonizes different statutory provisions should prevail over an interpretation that places the provisions in conflict. The second is that when two statutory provisions address the same subject, to the extent they are inconsistent, the more specific provision controls over the more general one. Neither of these maxims, however, offers the plaintiffs any assistance.

In invoking the first maxim, the plaintiffs assume that the statutory construction adopted by the Secretary of Defense and the Base Closure Commission creates a conflict between the Base Closure Act and Section 246. That assumption is simply wrong. Interpreting the Base Closure Act and Section 246 to cover military laboratories does not place the two statutory schemes in conflict. To the contrary, as the foregoing discussion has shown, the two schemes coexist perfectly well. And the plaintiffs' contrary interpretation "harmonizes" the two schemes

simply by discarding one scheme in favor of the other -- hardly a satisfactory solution.

The second maxim is inapposite because, like the first, it wrongly assumes that there is a conflict to be overcome between the Base Closure Act and Section 246. It is also inapposite for another, independent reason: Section 246 cannot meaningfully be said to be "more specific" than the Base Closure Act in an overall sense. In one respect, to be sure, Section 246 arguably is more specific: it is limited to military laboratories, while the Base Closure Act applies to all military installations. In another, equally important respect, however, the Base Closure Act is more specific: its subject matter is limited to closures, while the subject matter of Section 246 encompasses a far wider range of administrative actions and reforms, such as conversion of military laboratories to "GOCO" (government-owned, contractor-operated) labs. With respect to the specific issue at hand -- the closure of military laboratories -- each of the two statutory schemes is more specific in one respect and more general in another. The maxim that specific provisions prevail over general ones offers no guidance in these circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

Section 246, National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 510, 104 Stat. 1519 (1990):

Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories

(a) Establishment.--There is established a commission to be known as the "Commission on the Consolidation and Conversion of Defense Research and Development Laboratories" (hereinafter in this section referred to as the "Commission").

(b) Duties.--(1) The Commission shall conduct a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense.

(2) In conducting the study described in this subsection, the Commission shall--

(A) consider such means as--

(i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;

(ii) modification of the missions and functions of some or all such laboratories; and

(iii) consolidation or closure of some or all such laboratories; and

(B) determine--

(i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion; and

(ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission.

(c) Composition.--(1) The Commission shall be composed of 13 members, as follows:

(A) The Director of Defense Research and Engineering who shall be the chairman of the Commission.

(B) Six members appointed by the Secretary of Defense from among officers and employees of the Federal Government, including at least one director of a research and development laboratory of each military department.

(C) Six members appointed by the Secretary from among persons in the private sector.

(2) The Secretary of Defense shall make all appointments under subparagraphs (B) and (C) of paragraph (1) within 60 days after the date of the enactment of this Act.

(3) Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(d) Meetings; quorum.--(1) The Commission shall convene its first meeting within 15 days after the first date on which all members of the Commission have been appointed. Thereafter, the Commission shall meet at the discretion of its Chairman or at the call of a majority of its members.

(2) Seven members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(e) Compensation of members; travel expenses.--(1) Each member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of the duties of the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(2) The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(3) Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(f) Report to Secretary.--Not later than September 30, 1991, the Commission shall submit to the Secretary a report containing the Commission's recommendations regarding the matters considered and determined by the Commission pursuant to subsection (b).

(g) Report by Secretary.--Not later than 30 days after the date of the submission of the report pursuant to subsection (f), the Secretary shall transmit such report to each House of the Congress, together with any comments that the Secretary considers appropriate.

(h) Termination.--The Commission shall terminate 90 days after the date on which the Commission submits its report to the Secretary pursuant to subsection (g).

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 510, §§ 2901-2910, 104 Stat. 1808 (1990), as amended:

Sec. 2901. Short Title and Purpose

(a) Short Title.--This part may be cited as the "Defense Base Closure and Realignment Act of 1990".

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

Sec. 2902. The Commission

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

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

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

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

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

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

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

(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

annual rate of basic pay payable for GS-18 of the General Schedule.

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

(B)(i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person participated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may--

(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

(ii) review the preparation of such a report; or

(iii) approve or disapprove such a report.

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

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

(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

(A) There may not be more than 15 persons on the staff at any one time.

(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

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

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

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

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

(l) Termination.--The Commission shall terminate on December 31, 1995.

(m) Prohibition against restricting communications.--Section 1034 of title 10, United States Code, shall apply with respect to communications with the Commission.

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

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

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

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

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

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

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

(b) Selection criteria.--(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that 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 1, 1995, publish in the Federal Register and transit to the congressional defense committees and 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. The Secretary shall transmit the matters referred to in the preceding sentence not later than 7 days after the date of the transmittal to the congressional defense committees and the Commission of the list referred to in paragraph (1).

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

(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

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

(B) Subparagraph (A) applies to the following persons:

(i) The Secretaries of the military departments.

(ii) The heads of the Defense Agencies.

(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe,

regulations which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

(6) Any information provided to the Commission by a person described in paragraph (5)(B) shall also be submitted to the Senate and the House or 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 House of Representatives within 24 hours after the submission of the information to the Commission.

(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. All testimony before the Commission at a public hearing conducted under this paragraph shall be presented under oath.

(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 45 days before transmitting its recommendations to the President pursuant to paragraph (2); and

(iv) conducts public hearings on the proposed change.

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

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

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

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

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

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

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

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

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

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

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

(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval.

The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

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

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

Sec. 2904. Closure and realignment of military installations

(a) In general.--Subject to subsection (b), the Secretary shall--

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

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

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

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

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

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

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

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

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

(2)(A) Subject to subparagraph (C) and paragraphs (3), (4), (5), and (6), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with--

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

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

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

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

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

(E) Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned.

(3)(A) Not later than 6 months after the date of approval of the closure of a military installation under this part, the Secretary, in consultation with the redevelopment authority with respect to the installation, shall--

(i) inventory the personal property located at the installation; and

(ii) identify the items (or categories of items) of such personal property that the Secretary determines to be related to real property and anticipates will support the implementation of the redevelopment plan with respect to the installation.

(B) If no redevelopment authority referred to in subparagraph (A) exists with respect to an installation, the Secretary shall consult with--

(i) the local government in whose jurisdiction the installation is wholly located; or

(ii) a local government agency or State government agency designated for the purpose of such consultation by the chief executive officer of the State in which the installation is located.

(C)(i) Except as provided in subparagraphs (E) and (F), the Secretary may not carry out any of the activities referred to in clause (ii) with respect to an installation referred to in that clause until the earlier of--

(I) one week after the date on which the redevelopment plan for the installation is submitted to the Secretary;

(II) the date on which the redevelopment authority notifies the Secretary that it will not submit such a plan;

(III) twenty-four months after the date of approval of the closure of the installation; or

(IV) ninety days before the date of the closure of the installation.

(ii) The activities referred to in clause (i) are activities relating to the closure of an installation to be closed under this part as follows:

(I) The transfer from the installation of items of personal property at the installation identified in accordance with subparagraph (A).

(II) The reduction in maintenance and repair of facilities or equipment located at the installation below the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes.

(D) Except as provided in paragraph (4), the Secretary may not transfer items of personal property located at an installation to be closed under this part to another installation, or dispose of such items, if such items are identified in the redevelopment plan for the installation as items essential to the reuse or redevelopment of the installation.

(E) This paragraph shall not apply to any personal property located at an installation to be closed under this part if the property--

(i) is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

(ii) is uniquely military in character, and is likely to have no civilian use (other than use for its material content or as a source of commonly used components);

(iii) is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary and the redevelopment authority);

(iv) is stored at the installation for purposes of distribution (including spare parts or stock items); or

(v)(I) meets known requirements of an authorized program of another Federal department or agency for which expenditures for similar property would be necessary, and (II) is the subject of a written request by the head of the department or agency.

(F) Notwithstanding subparagraphs (C)(i) and (D), the Secretary may carry out any activity referred to in subparagraph (C)(ii) or (D) if the Secretary determines that the carrying out of such activity is in the national security interest of the United States.

(4)(A) The Secretary may transfer real property and personal property located at a military installation to be closed under this part to the redevelopment authority with respect to the installation.

(B)(i)(I) Except as provided in clause (ii), the transfer of property under subparagraph (A) may be for consideration at or below the estimated fair market value of the property transferred or without consideration. Such consideration may include consideration in kind (including goods and services), real property and improvements, or such other consideration as the Secretary considers appropriate. The Secretary shall determine the estimated fair market value of the property to be transferred under this subparagraph before carrying out such transfer.

(II) The Secretary shall prescribe regulations that set forth guidelines for determining the amount, if any, of consideration required for a transfer under this paragraph. Such regulations shall include a requirement that, in the case of each transfer under this paragraph for consideration below the estimated fair market value of the property transferred, the Secretary provide an explanation why the transfer is not for the estimated fair market value of the property transferred (including an explanation why the transfer cannot be carried out in accordance with the authority provided to the Secretary pursuant to paragraph (1) or (2)).

(ii) The transfer of property under subparagraph (A) shall be without consideration in the case of any installation located in a rural area whose closure under this part will have a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for the economic recovery of such communities from such closure. The Secretary shall prescribe in the regulations under clause (i)(II) the manner of determining whether communities are eligible for the transfer of property under this clause.

(iii) In the case of a transfer under subparagraph (A) for consideration below the fair market value of the property transferred, the Secretary may recoup from the transferee of such

property such portion as the Secretary determines appropriate of the amount, if any, by which the sale or lease of such property by such transferee exceeds the amount of consideration paid to the Secretary for such property by such transferee. The Secretary shall prescribe regulations for determining the amount of recoupment under this clause.

(C)(i) The transfer of personal property under subparagraph (A) shall not be subject to the provisions of sections 202 and 203 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483, 484) if the Secretary determines that the transfer of such property is necessary for the effective implementation of a redevelopment plan with respect to the installation at which such property is located.

(ii) The Secretary may, in lieu of the transfer of property referred to in subparagraph (A), transfer property similar to such property (including property not located at the installation) if the Secretary determines that the transfer of such similar property is in the interest of the United States.

(D) The provisions of section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)) shall apply to any transfer of real property under this paragraph.

(E) The Secretary may require any additional terms and conditions in connection with a transfer under this paragraph as such Secretary considers appropriate to protect the interests of the United States.

(5)(A) Except as provided in subparagraph (B), the Secretary shall take such actions as the Secretary determines necessary to ensure that final determinations under subsection (b)(1) regarding whether another department or agency of the Federal Government has identified a use for any portion of a military installation to be closed under this part, or will accept transfer of any portion of such installation, are made not later than 6 months after the date of approval of closure of that installation.

(B) The Secretary may, in consultation with the redevelopment authority with respect to an installation, postpone making the final determinations referred to in subparagraph (A) with respect to the installation for such period as the Secretary determines appropriate if the Secretary determines that such postponement is in the best interests of the communities affected by the closure of the installation.

(6)(A) Except as provided in this paragraph, nothing in this section shall limit or otherwise affect the application of the provisions of the Stewart B. McKinney Homeless Assistance Act (42

U.S.C. 11301 et seq.) to military installations closed under this part.

(B)(i) Not later than the date on which the Secretary of Defense completes the determination under paragraph (5) of the transferability of any portion of an installation to be closed under this part, the Secretary shall--

(I) complete any determinations or surveys necessary to determine whether any building or property referred to in clause (ii) is excess property, surplus property, or unutilized or underutilized property for the purpose of the information referred to in section 501(a) of such Act (42 U.S.C. 11411(a)); and

(II) submit to the Secretary of Housing and Urban Development information on any building or property that is so determined.

(ii) The buildings and property referred to in clause (i) are any buildings or property located at an installation referred to in that clause for which no use is identified, or of which no Federal department or agency will accept transfer, pursuant to the determination of transferability referred to in that clause.

(C) Not later than 60 days after the date on which the Secretary of Defense submits information to the Secretary of Housing and Urban Development under subparagraph (B)(ii), the Secretary of Housing and Urban Development shall--

(i) identify the buildings and property described in such information that are suitable for use to assist the homeless;

(ii) notify the Secretary of Defense of the buildings and property that are so identified;

(iii) publish in the Federal Register a list of the buildings and property that are so identified, including with respect to each building or property the information referred to in section 501(c)(1)(B) of such Act; and

(iv) make available with respect to each building and property the information referred to in section 501(c)(1)(C) of such Act in accordance with such section 501(c)(1)(C).

(D) Any buildings and property included in a list published under subparagraph (C)(iii) shall be treated as property available for application for use to assist the homeless under section 501(d) of such Act.

(E) The Secretary of Defense shall make available in accordance with section 501(f) of such Act any buildings or property referred to in subparagraph (D) for which--

(i) a written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act;

(ii) an application for use of such buildings or property for such purpose is submitted to the Secretary of Health and Human Services in accordance with section 501(e)(2) of such Act; and

(iii) the Secretary of Health and Human Services--

(I) completes all actions on the application in accordance with section 501(e)(3) of such Act; and

(II) approves the application under section 501(e) of such Act.

(F)(i) Subject to clause (ii), a redevelopment authority may express in writing an interest in using buildings and property referred to subparagraph (D), or use such buildings and property, in accordance with the redevelopment plan with respect to the installation at which such buildings and property are located as follows:

(I) If no written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act during the 60-day period beginning on the date of the publication of the buildings and property under subparagraph (C)(iii).

(II) In the case of buildings and property for which such notice is so received, if no completed application for use of the buildings or property for such purpose is received by the Secretary of Health and Human Services in accordance with section 501(e)(2) of such Act during the 90-day period beginning on the date of the receipt of such notice.

(III) In the case of buildings and property for which such application is so received, if the Secretary of Health and Human Services rejects the application under section 501(e) of such Act.

(ii) Buildings and property shall be available only for the purpose of permitting a redevelopment authority to express in writing an interest in the use of such buildings and property, or to use such buildings and property, under clause (i) as follows:

(I) In the case of buildings and property referred to in clause (i)(I), during the one-year period beginning on the first day after the 60-day period referred to in that clause.

(II) In the case of buildings and property referred to in clause (i)(II), during the one-year period beginning on the first day after the 90-day period referred to in that clause.

(III) In the case of buildings and property referred to in clause (i)(III), during the one-year period beginning on the date of the rejection of the application referred to in that clause.

(iii) A redevelopment authority shall express an interest in the use of buildings and property under this subparagraph by notifying the Secretary of Defense, in writing, of such an interest.

(G)(i) Buildings and property available for a redevelopment authority under subparagraph (F) shall not be available for use to assist the homeless under section 501 of such Act while so available for a redevelopment authority.

(ii) If a redevelopment authority does not express an interest in the use of buildings or property, or commence the use of buildings or property, under subparagraph (F) within the applicable time periods specified in clause (ii) of such subparagraph, such buildings or property shall be treated as property available for use to assist the homeless under section 501(a) of such Act.

(7)(A) Subject to subparagraph (C), the Secretary may contract with local governments for the provision of police services, fire protection services, airfield operation services, or other community services by such governments at military installations to be closed under this part if the Secretary determines that the provision of such services under such contracts is in the best interests of the Department of Defense.

(B) The Secretary may exercise the authority provided under this paragraph without regard to the provisions of chapter 146 of title 10, United States Code.

(C) The Secretary may not exercise the authority under subparagraph (A) with respect to an installation earlier than 180 days before the date on which the installation is to be closed.

(D) The Secretary shall include in a contract for services entered into with a local government under this paragraph a clause that requires the use of professionals to furnish the services to the extent that professionals are available in the area under the jurisdiction of such government.

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

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

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

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

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

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

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

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

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

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

(e) Transfer authority in connection with payment of environmental remediation costs.--(1)(A) Subject to paragraph (2) of this subsection and section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

(42 U.S.C. 9620(h)), the Secretary may enter into an agreement to transfer by deed real property or facilities referred to in subparagraph (B) with any person who agrees to perform all environmental restoration, waste management, and environmental compliance activities that are required for the property or facilities under Federal and State laws, administrative decisions, agreements (including schedules and milestones), and concurrences.

(B) The real property and facilities referred to in subparagraph (A) are the real property and facilities located at an installation closed or to be closed under this part that are available exclusively for the use, or expression of an interest in a use, of a redevelopment authority under subsection (b)(6)(F) during the period provided for that use, or expression of interest in use, under that subsection.

(C) The Secretary may require any additional terms and conditions in connection with an agreement authorized by subparagraph (A) as the Secretary considers appropriate to protect the interests of the United States.

(2) A transfer of real property or facilities may be made under paragraph (1) only if the Secretary certifies to Congress that--

(A) the costs of all environmental restoration, waste management, and environmental compliance activities to be paid by the recipient of the property or facilities are equal to or greater than the fair market value of the property or facilities to be transferred, as determined by the Secretary; or

(B) if such costs are lower than the fair market value of the property or facilities, the recipient of the property or facilities agrees to pay the difference between the fair market value and such costs.

(3) As part of an agreement under paragraph (1), the Secretary shall disclose to the person to whom the property or facilities will be transferred any information of the Secretary regarding the environmental restoration, waste management, and environmental compliance activities described in paragraph (1) that relate to the property or facilities. The Secretary shall provide such information before entering into the agreement.

(4) Nothing in this subsection shall be construed to modify, alter, or amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(5) Section 330 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 10 U.S.C. 2687 note)

shall not apply to any transfer under this subsection to persons or entities described in subsection (a)(2) of such section 330.

(6) The Secretary may not enter into an agreement to transfer property or facilities under this subsection after the expiration of the five-year period beginning on the date of the enactment of the National Defense Authorization Act for Fiscal Year 1994.

Sec. 2906. Account

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

(2) There shall be deposited into the Account--

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

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

(C) except as provided in subsection (d), proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part; and

(D) proceeds received after September 30, 1995, from the transfer or disposal of any property at a military installation closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(b) Use of funds.--(1) The Secretary may use the funds in the Account only for the purposes described in section 2905 or, after September 30, 1995, for environmental restoration and property management and disposal at installations closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project

may be carried out without regard to section 2802(a) of title 10, United States Code.

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

(B) The report for a fiscal year shall include the following:

(i) The obligations and expenditures from the Account during the fiscal year, identified by subaccount, for each military department and Defense Agency.

(ii) The fiscal year in which appropriations for such expenditures were made and the fiscal year in which funds were obligated for such expenditures.

(iii) Each military construction project for which such obligations and expenditures were made, identified by installation and project title.

(iv) A description and explanation of the extent, if any, to which expenditures for military construction projects for the fiscal year differed from proposals for projects and funding levels that were included in the justification transmitted to Congress under section 2907(1), or otherwise, for the funding proposals for the Account for such fiscal year, including an explanation of--

(I) any failure to carry out military construction projects that were so proposed; and

(II) any expenditures for military construction projects that were not so proposed.

(2) Unobligated funds which remain in the Account after the termination of the authority of the Secretary to carry out a closure or realignment under this part shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

(3) No later than 60 days after the termination of the authority of the Secretary to carry out a closure or realignment under this part, the Secretary shall transmit to the congressional defense committees a report containing an accounting of--

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

(B) any amount remaining in the Account.

(d) Disposal or transfer of commissary stores and property purchased with nonappropriated funds.--(1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropriated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note).

(2) The amount so deposited shall be equal to the depreciated value of the investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving--

(A) commissary stores; and

(B) real property and facilities for nonappropriated fund instrumentalities.

(4) As used in this subsection:

(A) The term "commissary store funds" means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code.

(B) The term "nonappropriated funds" means funds received from a nonappropriated fund instrumentality.

(C) The term "nonappropriated fund instrumentality" means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

(e) Account exclusive source of funds for environmental restoration projects.--Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

Sec. 2907. Reports

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

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

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

Sec. 2908. Congressional consideration of commission report

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

(1) which does not have a preamble;

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

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

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

Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

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

(d) Consideration.--(1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been discharged (under subsection (c)) from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. A member may make the motion only on the day after the calendar day on which the Member announces to the House concerned the Member's intention to make the motion, except that, in the case of the House of Representatives, the motion may be made without such prior announcement if the motion is made by direction of the committee to which the resolution was referred. All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint 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 and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

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

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

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

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

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

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

Sec. 2910. Definitions

As used in this part:

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

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

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

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

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

(8) The term "date of approval", with respect to a closure or realignment of an installation, means the date on which the authority of Congress to disapprove a recommendation of closure or realignment, as the case may be, of such installation under this part expires.

(9) The term "redevelopment authority", in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation and for directing the implementation of such plan.

(10) The term "redevelopment plan" in the case of an installation to be closed under this part, means a plan that--

(A) is agreed to by the local redevelopment authority with respect to the installation; and

(B) provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation.

CERTIFICATE OF BAR MEMBERSHIP

Counsel for the appellees are federal attorneys and are permitted to practice before this Court without being admitted to the Bar of the Court.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 1994, I served the foregoing BRIEF FOR THE APPELLEES by mailing true copies, postage prepaid, to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1734

U.S. REP. JAMES C. GREENWOOD, et al.,

Appellants,

v.

JOHN H. DALTON, Secretary of the Navy, et al.

On Appeal from Judgment
of the United States District Court
for the Eastern District of Pennsylvania

REPLY BRIEF OF APPELLANTS

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October 19, 1994

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INTRODUCTION AND SUMMARY

In their opening brief, plaintiffs showed that the district court erred in denying plaintiffs' motion for summary judgment because the plain language of the Base Closure Act and Lab Commission Act makes clear that the wrong commission took action under the wrong statute to close NAWC. In particular, plaintiffs showed that the Base Closure Commission -- established by Congress to deal with military bases, not labs, as part of an entirely different decision-making process than the Lab Commission would follow -- usurped the authority Congress specially vested in the Lab Commission to consider consolidation and closure of labs and to propose a schedule for any such consolidations or closures. By including labs in the Base Closure Process, the Base Closure Commission subverted Congress' intent that it would retain flexible decision-making authority to make decisions on the future of labs on a lab-by-lab basis, armed with the report containing recommendations on, among other things, consolidations and closures that it commissioned the Lab Commission to provide.

Nothing in the Government's response detracts from the conclusion that the district court erred when it denied plaintiffs' motion for summary judgment. Instead, the Government begs the pivotal question to which it has no response -- why would Congress have established the Lab Commission and directed it to consider consolidation or closure of labs and to determine a proposed schedule for such consolidation or closure -- which Congress would then consider on a flexible, case-by-case basis -- when, according to the Government, Congress supposedly intended that labs be dealt with by the Base Closure Commission and submitted to Congress on an all-or-nothing basis?

Indeed, the Government's response, for the most part, ignores and asks this Court to ignore the fact that Congress enacted a discrete statutory scheme to deal with laboratories -- the Lab Commission Act. Thus, the Government, argues that "military laboratories fit squarely within the sweeping statutory definition of 'military installation', and therefore are subject to the Base Closure Act." Brief of Appellees at 15. Alternatively, the Government asserts that if labs are not military installations the Secretary of Defense may close them at will. The problem with both of these arguments is that they ignore the essential point of this case -- that the Lab Commission Act was passed and exists.

To begin with, nothing in the definition of "military installation" in the Base Closure Act mandates the conclusion that labs, which are not expressly included in the list of facilities delineated in § 2910(4), fall within the 2910(4) definition. In any event, the Government's irrelevant and ineffectual attempt to dissect the definition of "military installation" ignores the law because no matter how broad a scope this definition is given, it cannot override the more specific grant of jurisdiction embodied in the Lab Commission Act. Likewise, the Government's alternative argument -- if labs do not come within the definition in Section 2910(4) then the Secretary of Defense may close them at will -- blissfully ignores the Lab Commission Act, which prevents any such arbitrary closures.

When the Government finally focuses on the Lab Commission Act, the infirmities of its position are blatant. The Government first argues that "the text and legislative history of Section 246 say nothing about limiting the jurisdiction of the Secretary of Defense or the Base Closure Commission under the Act," Response at 16. But this argument ignores the plain language of the Lab Commission Act by which Congress

established a commission to consider, among other things, consolidation and closure of labs and to propose a schedule for such closure and consolidation to assist Congress in its decision-making on labs.

The Government goes on to argue that the Lab Commission Act was designed to produce advice and the Base Closure Act was designed to produce results. This argument makes no sense. Both statutes were intended to produce results. Brief of Appellees at 29. The difference between the statutes is the decision-making authority retained by Congress in the Lab Commission Act that was subverted here.

Finally, the Government argues that Section 246 does not provide for "flexible," "lab-by-lab" decision making by Congress. Brief of Appellees at 32-33. This contention simply flies in the face of the Lab Commission Act and the legislative history and must be rejected.

We shall elaborate on these points below and show that the Government's response merely confirms that this Court should reverse the district court and order that judgment in plaintiffs' favor be entered.

ARGUMENT

I. THE NAWC IS NOT A "MILITARY INSTALLATION" IN THE CONTEXT OF THE STATUTORY SCHEME DEALING WITH LABORATORIES.

In their opening brief, plaintiffs demonstrated that labs such as NAWC do not come within the definition of "military installations" contained in Section 2910(4). Brief of Appellants at 35-36. In response, the Government makes two principal arguments: (1) the definition of "military installation" embraces labs; and (2) even if the language were unclear, the record of how the term has been employed administratively and legislatively, Brief of Appellees at 19, supports the broad interpretation advocated by the Government. Neither argument withstands scrutiny.

To begin with, the supposedly catch-all language of § 2910(4) relied on by the Government, (" . . . , or other activity under the jurisdiction of the Department of Defense. . . . "), must be read in the context of the type of facilities specifically denominated in § 2910(4). Labs are not mentioned. The localities that are listed all are base-type facilities, in no way similar to labs. The phrase "or other activity under the jurisdiction of the Department of Defense" must therefore be read as including only such base-type facilities. Indeed, if the "other activity" language were read as broadly as the Government suggests, it would make the specific delineation of the bases, camps, etc., in § 2910(4) totally redundant.

Furthermore, Section 2910(4) must be read in conjunction with the Lab Commission Act. Because the Lab Commission Act specifically deals with issues involving

labs, including consolidation and closure, the use of the general term "military installation" in the Base Closure Act does not overcome the specific grant of authority over consolidation and closure vested in the Lab Commission. See Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228-29 (1957).

The Government's contention that "[e]ven if the text were less clear, any uncertainty would be dispelled by the record of how the term has been employed, administratively and legislatively," Brief of Appellees at 19, is likewise unavailing. First of all, this Court -- not the Secretary of Defense or the Base Closure Commission -- has the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981).

Moreover, the Government's argument that Congress has somehow endorsed the Secretary of Defense's and Base Closure Commission's interpretation of the scope of the Base Closure Act by supposedly carrying forward without modification the definition of military installation contained in the 1988 Base Closure Act blissfully ignores the very statutory action that is at issue here and that covers labs -- the Lab Commission Act. Congress quite clearly did not respond to the 1988 Base Closure Commission's decision to close a military lab by carrying forward the definition of military installation as applied to labs in 1988. Instead, Congress chose to establish a wholly discrete legislative scheme to deal with labs.

Finally, the fact that Congress retroactively amended the definition of "military installation" to exclude "any facility used primarily for civil works, rivers and harbor projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense," National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 2821(h), 105 Stat. 1546 (1991), is of no comfort to the Government. To the contrary, the amendment only makes clear that Congress did not intend the definition in § 2910(4) to be as broad as the Government suggests. Indeed, by the time it adopted the Army Corps of Engineers exclusion, Congress had no need likewise to amend the Base Closure Act to exclude labs, because -- unlike the facilities used primarily within the civil works function of the Army Corps of Engineers -- Congress had already expressly dealt with labs in the Lab Commission Act. That Act makes it clear that consolidation and closure of labs was to be dealt with by a process wholly discrete from the process enacted by Congress in the Base Closure Act. Certainly, Congress had no obligation to reiterate in an amended Base Closure Act that it really, really meant what it said when it passed the Lab Commission Act, and the Government's reliance on Commodity Future Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986), thus, makes no sense.

II. THE FACT THAT LABS ARE NOT "MILITARY INSTALLATIONS" DOES NOT LEAD TO THE CONCLUSION THAT THE SECRETARY OF DEFENSE MAY CLOSE THEM AT WILL.

The Government's contention that if labs are not "military installations" then the Department of Defense may close them at will, suffers from the same infirmity as its argument that labs are military installations -- the argument ignores the Lab Commission Act.

Just as surely as the specific provisions in the Lab Commission Act governing closure and consolidation of labs prevail over the general provisions in the Base Closure Act, those same specific provisions prevail over the general language in 10 U.S.C. § 125(a), which purports to give the Secretary of Defense general statutory authority to "provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense."

Here too, the Government's argument simply makes no sense. What possible reason could there be for Congress to set up the Lab Commission Act procedures, which culminate with flexible decision-making by Congress, if the Secretary of Defense retained untrammeled discretion to close labs? Obviously, Congress did not intend so ridiculous a result.

III. THE BASE CLOSURE COMMISSION WAS WITHOUT JURISDICTION AND AUTHORITY TO REVIEW AND MAKE DECISIONS ABOUT DEFENSE LABS.

In their opening brief, plaintiffs showed that the plain language of the Base Closure Act and the Lab Commission Act are dispositive of Congress' intent to create two separate mechanisms for dealing with bases on the one hand and labs on the other hand. In particular, plaintiffs showed that Congress created a statutory scheme by which the Lab Commission would thoroughly review and evaluate defense laboratories and submit its report to the Secretary of Defense, who would transmit it to Congress, with any comments for flexible decision-making by Congress. In contrast, the Base Closure Commission would receive recommendations from the Secretary of Defense and after holding hearings, would

transmit a report to the President, who, if he approved, would forward it to Congress for an all-or-nothing determination.

Apparently aware that these wholly different decisional paths make clear that labs were not within the jurisdiction of the Base Closure Commission, the Government avoids this central point for much of its response. When the Government finally confronts the fact that Congress created a legislative scheme by which labs would be treated differently, in almost every regard, from the way bases were treated, it offers no sensible explanation of why Congress would have established the Lab Commission if it supposedly intended that labs be dealt with by the Base Closure Commission. Instead, while conceding that the schemes are different, it makes the remarkable assertion that "[t]he differences between the two schemes do not imply that Section 246 was directed at military laboratories, while the Base Closure Act was directed at other military installations," arguing that the difference "simply reflect the fact that Section 246 was designed to produce advice, while the Base Closure Act was designed to produce results." Brief of Appellees at 29.

This distinction is completely fallacious. Plainly, both statutes were designed to provide results. The Base Closure Commission was to make recommendations on base closures and the Lab Commission was to make recommendations on lab closures. Neither commission had authority to carry out those recommendations, and the recommendations of neither commission were binding absent Congressional approval. Thus, the Base Closure Commission's recommendations were of no greater force than the Lab Commission's recommendations. Indeed, the differences in the statutory schemes centers on Congress' decision-making authority under each. With respect to the Base Closure Commission's

recommendations Congress retained only an all-or-nothing choice. With respect to labs, it retained flexible decision-making. There is no logical reason why Congress would have opted for this difference in its own decision-making processes if it had intended that labs be included in the base closure procedures.

When the Government finally acknowledges the different decisional paths and attempts to reconcile them with its position (Brief of Appellees at 32-33), it falls back on the argument that if Congress were dissatisfied, it could "have acted legislatively to undo the damage." Id. at 32. However, the fact that Congress did not pass corrective legislation is evidence of nothing more than the fact that Congress, presented with a Hobson's choice by the improper inclusion of labs in the all-or-nothing base closure package, was unable to disturb the political compromise reached to deal with bases. That Congress chose not to upset this compromise does not mean that it intended that labs be dealt with by the Base Closure Commission. Indeed, it was exactly the Hobson's choice with which Congress was confronted that the Lab Commission process would have avoided had it not been disregarded.

Next, the Government attempts to show that Congress did not retain "flexible," "lab-by-lab" decision-making authority. The Government asserts that plaintiffs "misapprehend[] Congress's intended role under Section 246." Brief of Appellees at 32. However, it is the Government that misunderstands the plain language of the Lab Commission Act and plaintiffs' argument. First, plaintiffs do not argue that "the Secretary of Defense was (evidently) to play no role whatsoever." Id. To the contrary, the Lab Commission Act provided that the Lab Commission was to submit its report to the Secretary

of Defense and that the Secretary of Defense was to pass the report on to Congress with any comments.

Second, as the Government concedes, (Brief of Appellees at 33), the legislative history demonstrates that "Congress wanted the Lab Commission to provide a 'critical assessment' of the Secretary's laboratory reorganization plans and to 'suggest alternative actions for congressional consideration.'" Of course, if Congress had intended that labs be included in the Base Closure Commission's recommendation which Congress could only accept or reject en bloc, there would be no "alternative actions for congressional consideration." Clearly by conceding that Congress intended that it be able to consider "alternative actions" for labs, the Government has agreed that labs should not have been included in the Base Closure process.

Finally, the Government's argument that because "the process of closing military installations takes far longer" than "the highly expedited procedure for selecting military installations," Brief of Appellees at 29, "[i]f the Lab Commission had concluded that some or all the military laboratories slated for closure should not be closed, Congress would have had ample opportunity to act on those views, and the Lab Commission's advisory function would have been fulfilled." Id. at 30. Again, the Government's argument is wholly inconsistent with Congress' intent as evidenced in the discrete statutes. The plain language of the Lab Commission Act makes clear that Congress intended to retain flexible decision-making authority vis-a-vis labs. At the same time, Congress relinquished flexible decision-making power for bases and legislated an all-or-nothing process for bases. As the Government concedes the "purpose [of the Base Closure Act] is to streamline the Nation's domestic

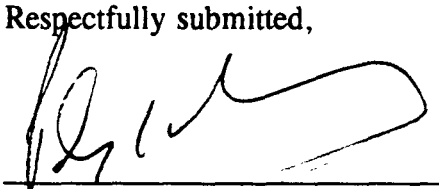
military force structure . . . and to break the political log jam between the Executive Branch and Congress over closure of domestic military installations. . ." Brief of Appellees at 37. Thus, as noted above, Congress was faced with the Hobson's choice that the Lab Commission Act was designed to prevent: overriding the Base Closure Commission's illegal decisions on labs -- and preserving its flexible decision-making for labs that it had mandated in the statutory scheme -- at the expense of rejecting the entire base closure process and continuing the political deadlock over bases. Under these circumstances, Congress' failure to pass corrective legislation is not evidence of Congress' ratification of the Base Closure Commission's recommendations on labs. Rather, it is evidence only of how successfully and illegally the intended process was subverted.

Moreover, that Congress amended the Base Closure Act to exclude the Army Corps of Engineers hardly supports the Government's argument here. With labs, there already was a statute in place -- the Lab Commission Act excluded labs from the base closure process. No such exclusion had been established to deal with the Army Corps. In other words, unlike labs, Congress had not previously made its intent to exclude Army Corps facilities explicit. Congress had already dealt separately with labs and the legislative process does not require that it amend the Base Closure Act to reiterate that intent.

CONCLUSION

For all the reasons set forth in their opening brief and above, this Court should reverse the district court's denial of summary judgment and remand this case with instructions that judgment be entered in favor of plaintiffs and against the Government.

Respectfully submitted,



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Of Counsel.

Dated: October 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Reply Brief of Appellants to be served on the 19th day of October, 1994, by United States First Class Mail, postage prepaid, to:

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* * * * * * *

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THERE ARE A TOTAL OF 3 PAGES, INCLUDING THIS COVER PAGE, IN THIS TRANSMISSION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1734

JAMES C. GREENWOOD, REPRESENTATIVE; ARLEN SPECTER, U.S. SENATOR; HARRIS WOFFORD, U.S. SENATOR; BRUNO SPOSATO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1928; MICHAEL F. RUSSO; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 36; JOSEPH MANCINI; GERALD GREGORY,
Appellants

v.

JOHN DALTON*, Secretary of the Navy; NORA SLADKIN*, Assistant Secretary of the Navy; WILLIAM PERRY*, the Secretary of Defense; THE ADVISORY COMMITTEE ON CONSOLIDATION AND CONVERSION OF DEFENSE RESEARCH DEVELOPMENT LABORATORIES, and its members; CHARLES E. ADOLPH; WILLIAM C. McCORKLE; VICTOR H. REIS; JAMES F. DECKER; JAMES C. McGRODDY; FRANK D. VERDERAME; EARLE L. MESSERE; O'DEAN P. JUDD; SOLOMON J. BUCHSBAUM; ROBERT M. HILLYER; JOHN MICHAEL PALMS; RICHARD R. PAUL; JOHN W. LYONS; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, and its members; JAMES COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,
Appellees

*(Pursuant to F.R.A.P. 43(c))

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-cv-05331)

District Judge: Honorable Ronald L. Buckwalter

Argued: January 25, 1995

PRESENT: MANSMANN, HUTCHINSON and WEIS, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered June 24, 1994 be and is hereby affirmed.

Costs shall be taxed against appellants.

By the Court,

William D Hutchinson
Circuit Judge

ATTEST:

P Douglas Sisk
P. Douglas Sisk, Clerk

DATED: FEB 8 1995

JUDGE HUTCHINSON
JUDGE MANNHEIMER
WEIS

Julie 1108 ? next week

Weis + Mannheimer all ayes

Greenberg

- aren't included in doses
  - are they not military installations
  - where does ~~it~~ not include labs excluded
- why if def so broad is ~~not~~ sure labs excluded

A: moves so much - why deviate if very broad

must read this + lab together

there is role for lab

Scott

- what role would lab community play
- what if lab had said Warminster said stay open

He'll have big questions 523-5737

- you think Bare Closure Act + then you find out it does a totally different type of animal
- Ella thinking your horse is going

1124

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

June 27, 1991

Memorandum regarding inclusion of DoD laboratories on the base closure and realignment list.

The Secretary's list of recommendations of bases for closure and realignment was issued on April 12, 1991. Included in this list were defense research and development laboratories. Joint jurisdiction over the disposition of these laboratories had been established between the Defense Base Closure and Realignment Commission (Commission) and the Advisory Commission on Consolidation and Conversion of Defense Research and Development Laboratories (Advisory Commission). An analysis of the two sections of Pub. L. No. 101-510 concluded that the Commission was not statutorily prohibited from recommending the closure or realignment of DoD laboratories. This conclusion is based upon the definition of "military installation", and the Commission's authority to reviewing the Secretary's recommendations,

The consideration of these laboratories for closure or realignment is within the statutory jurisdiction of the Commission. As previously set forth in this report, the term "military installation" is broadly defined and does not exclude defense research and development laboratories from consideration for closure or realignment. In addition, the commission is to examine the recommendations made by the Secretary, but may make changes to the list where a substantial deviation from the Force-Structure plan and final criteria are discovered. The Secretary's inclusion of laboratories into the recommended list of closure and realignments serves to strengthen the Commission's authority.

The Advisory Commission was chartered with the duty of "conduct[ing] a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense." The Advisory Commission's report is a recommendation to the Secretary regarding the disposition of laboratories, but imposes no legal requirement on the Secretary to follow those recommendations. The Advisory Commission's report is not required by law to be a part of the Secretary's list of recommendations.

Accordingly, the Commission has decided to included DoD laboratories within the analysis of bases for Closure or realignment.

FAX FROM THE PENTAGON

AF/XOFM
MOBILITY FORCES DIVISION

OFFICE: (703) 697-8300
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DSN 225-2586

FROM: Jeff Miller

TO: M Hoot | Base Closure + Real Comm | 60504
NAME | ORG/OFFICE SYMBOL | PHONE

3 **PAGES (INCLUDING COVER SHEET)**

REMARKS:

Cobra Definition

Mary Ann

Sorry it took this long to respond. I called the Navy Cobra guys (Dave Winnergren and Merle Coast 824-2971), but they are not around today.

Bottom line: It may be easier to have a definition without a list of what is being analyzed. I'd probably go with the following more generic definition lifted from the COBRA manual (page attached).

The COBRA model is designed to estimate the costs and savings associated with a proposed base closure or realignment action, using data that is readily available to the Service staffs without extensive field studies. In addition, the model can be used to compare the relative cost differences between various stationing alternatives. It is not designed to produce budget estimates, but to provide a consistent method of evaluating closure and realignment options.

If you expect a lot of these, it might make sense to talk to services and insure same definition used by service and Commission on every case. There's going to be a meeting of COBRA people on 16 Nov. It would be a good time to bring this up.

Jeff Miller

1 Atch
Pg 3 of Cobra Users Manual

but with several limitations. R&K Engineering subsequently converted COBRA to a true computer model using the Pascal programming language. Several versions of this new COBRA program were developed and used for the 1991 Commission. The latest version in general use was V1.42.

In early 1992, R&K was again tasked to make a series of enhancements to COBRA in preparation for the 1993 Commission. The result is as described in this manual.

1.3 CAPABILITIES AND OPERATIONS

The COBRA model is designed to estimate the costs and savings associated with a proposed base closure or realignment action, using data that is readily available to the Service staffs without extensive field studies. In addition, the model can be used to compare the relative cost differences between various stationing alternatives. It is not designed to produce budget estimates, but to provide a consistent method of evaluating closure and realignment options. Although COBRA produces data formatted similarly to Service budget data, an exact match between the two should not be expected.

COBRA calculates the costs and savings of base closure/realignment scenarios over a period of 20 years, or longer if necessary. It models all activities (moves, construction, procurements, sales, closures) as taking place during the first 6 years, and thereafter all costs and savings are treated as steady-state. The key output value produced is the Payback Period or Return on Investment Year. This is the point in time where savings generated equal (and then exceed) costs incurred. In other words, this is the point when the realignment/closure has paid for itself and net savings start to accrue.

COBRA allows closure/realignment scenarios to be compared in terms of how soon Return on Investment is achieved and thereafter, how many dollars are saved. Should Return on Investment not be achieved for a specific scenario, that action will have a net cost rather than savings during the period of analysis. Similarly, if a scenario has a long Payback Period (late Return on Investment) it will not start to generate net savings until well after the action would have been completed. Not only would such an action generally be less beneficial than one with earlier Return on Investment, but the accuracy of the estimated Payback Period would be dependent on the long-term validity of COBRA inputs (e.g. Inflation Rate, Discount Rate, etc.).

Net Present Value costs and savings figures generated are reported as Present Value dollars. In simple terms, this is the amount of dollars that would have to be invested during the Base Year at the assumed discount (interest) rate to cover the costs or match the savings at a specific point in the future. This is important because it eliminates artificial distinctions between scenarios based on inflation, while highlighting the affects of timing on model results.

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Congress of the United States
House of Representatives

MEMORANDUM

To: Members of the Base Closure Commission
From: Congressman C. Thomas McMillen
Re: The Inclusion of Federal RDT&E Laboratories in the FY91 Base Closure Process.
Date: April 25, 1991

BACKGROUND ON LAB CONSOLIDATION:

The 1988 Base Closure Commission recommended that a task force be established to review the defense laboratory system. The Carnegie Commission on Science, Technology and Government, concurred with the Commission's recommendation regarding the need to restructure the defense labs. In November of 1989, as part of the Defense Management Review (DMR), the Secretary of Defense requested a review of the DOD R&D lab. Consequently, a follow-up memorandum was circulated the next month by the Under Secretary of Defense for Acquisition requesting OSD and the Services to recommend ways to consolidate/restructure the RDT&E activities.

As a result of these two actions, the Services' began to prepare their laboratory restructuring proposals. The goal was to reduce costs and improve effectiveness. Four underlying issues were identified by the Under Secretary:

(1) What is the mission of the DOD R&D activities and is it being met.

(2) What is the most effective structure to develop and meet the quality technology needs of future military systems.

(3) What is the most effective structure to put that technology into actual products/weapon systems.

(4) What combination of structure and management will obtain the greatest productivity from DOD scientists and engineers.

On a separate track, as part of the FY91 Defense Authorization Bill, the Senate Armed Services Committee recommended, and Congress enacted, legislation to establish the Advisory Commission on the Consolidation and Conversion of Defense Research and Development Laboratories (CCC). This is modeled after the 1988 Base Closure Commission, and was to independently study the current health and effectiveness of defense labs.

The LCCC's work was to begin by evaluating the Services' proposals for consolidating their labs as directed by the DMR, and report to Congress with an assessment of the Services' consolidation proposals. (See attached legislative and report language from FY91 Defense Authorization Bill.) The LCCC can also suggest alternative proposals. Ultimately, though, it is up to Congress or the Administration to implement the LCCC recommendations.

STATISTICS:

(1) Laboratories on past years' Base Closure Lists: According to the R&D Subcommittee staff, there were no labs on last year's list, and only 1 on the 1988 list.

(2) Origins of the LCCC -- The provision creating the LCCC was attached during the Mark-up session of the Senate Defense Authorization bill. This was the FY91 Defense Authorization, the same bill which created the Base Closure Commission.

(3) 90 percent of all Navy Labs are affected by the Base Closure list.

(4) Of the 73 bases on the base closure list where employees will be lost at the facilities, 27 are Navy laboratories. 37 percent of this list group are composed of Navy labs.

POLICY CONSIDERATIONS:

(1) Personnel issues:

In the next decade we will see a "shift in competence" as a result of a continual degradation of the quality of personnel who work in our labs. Wholescale statutory reform regarding payscales, management practices, future personnel trends and regulatory exemption is necessary. Although a "Laboratory Demonstration Program" has recently been set up to address such issues as attracting and retaining quality staff and improving management, there are concerns that this is not sufficient and what is needed is statutory reform. It is clear that consolidation by itself will do little to solve such long standing problems, and may even exacerbate them.

(2) Cost issues:

The most important issue, however, is the cost-effectiveness

of the restructuring proposal. To begin with, it costs a great deal to close facilities (moving people, replacing facilities) and the money will take years to recoup. Furthermore, there are serious allegations that the cost estimates in both the Army and Navy plans are inaccurate, and may have even been manipulated to appear acceptable. Considering the fact that the consolidation is aimed at saving taxpayer dollars, it would behoove us to ensure that this goal is achieved.

Whatever estimates do exist, all concur that the upfront costs will be significant. Estimated cost of the total Navy closures/realignments: One time upfront implementation cost is $2.7 billion, and environmental cleanup is projected at $5 million. Total price tag: $3.2 billion (See Attachment--). Again, it is unclear where these numbers are coming from, and the environmental number is admittedly amorphous. The real question, though is where lies the return on investment?

Movover, in a publication, "Inside Defense Electronics Weekly," the March 22nd issue notes sources say the proposal to close labs is promoted by Assistant Secretary of the Navy Gerald Cann (see attached). However, according to the article, "Cann rejected a recent study written by the Director of Navy Labs that showed that significant cost increases resulting from the Cann consilidation proposal...adding that Cann had another study performed which showed cost savings if his version of laboratory consolidation is followed."

In addition, there is an article in the New London Day which questions the cost savings of this proposal.

(3) Restructuring issues:

The impact of the laboratory issue transcends the budgetary issues of consolidation, and raises questions about what the future mission of our R&D system will be, and who will carry it out. Aside from the fact that the inclusion of laboratories to the base closure list runs counter to the Congressional intent of last year's defense authorization bill, such a complete overhaul without Congressional oversight or input is a circumvention of the policy process.

(4) Future mission and U.S. competitiveness:

A recent DOD report to the Senate Armed Services Committee states:

> "A strong free enterprise economy and industrial base -- here and abroad -- are the essential underpinning of our defense posture. Investment in our technology base and maintenance of our technology strength are critical to the long-term security of the U.S. and our allies."

The consolidation proposals say little about the development of dual-use technologies and the transfer of technology to the commercial sector. This is an issue which is integrally linked to America's future competitiveness, but is not addressed in the

consolidation proposals. Many will argue that this issue should be addressed by Congress. I agree. If the consolidation proposals are enacted, however, this debate will not occur.

SUMMARY:

The Administration argues that "the Department (of Defense) must conform to the dates established by Congress with regard to base closure. ... The Act also requires that the Department consider all military installations inside the United States equally. In order to comply with this legislation, the Defense laboratories were not excluded from the Department's review of bases for closure or realignment." (From Herzfeld letter of March 29, 1991)

Technically, they may be right. Congress passed a law which had conflicting provisions. However, it is clear that the DOD is choosing to follow the base closure provisions since it wishes to push through the laboratory restructuring without oversight. There are serious allegations regarding the accuracy of the costs, there is a distinct lack of independent comment on the consolidation proposals, and the time frame is so short that it is highly unlikely that either the LCCC or the GAO analysts asigned to the Base Closure Commission can adequately review these issues before the restructuring is implemented.

The U.S. economy and our national defense are both technology based, the cutting edge of development being the federal R&D system. To allow federal labs to continue to degenerate into second rate facilities will ultimately have an adverse impact on the economy and our defense.

There is a motto in the Defense Department which goes: "We will overcome numerically superior adversaries with superior technology." If our R&D structure falls behind, where does that leave us in the New World Order? There is another saying that "First class labs are expensive, second class labs are a waste of money." These are fundamental questions which underlie our laboratory system, and which are currently not being addressed in this debate. Rather, the debate is being avoided, and the base closure list is the getaway car. Considering the value of the Federal R&D structure, and the importance of our technological base to America's defense and commercial infrastructure, it would behoove all concerned to ensure the restructuring is based on sound policy and well thought out.

LAB Issue

000675

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

May 14, 1991

Mr. James Courter
Chairman, Base Realignment and
Closure Commission
Washington, D.C.

Dear Chairman Courter:

I have been informed that the Base Realignment and Closure Commission is reviewing the inclusion by the Department of Defense (DoD) of research and development centers and laboratories on its Base Closure list. The Defense Base Closure and Realignment Act directs the Secretary of Defense to select bases for closure and realignment using his force structure plan; it does not specifically address military laboratories.

Clearly, force structure and the overall defense budget are declining. Nonetheless, the research and development (R&D) component of the DoD budget request for fiscal year 1992 includes 11.2% real growth over fiscal year 1991 spending. This increase reflects the prudent decision to invest more in R&D to preserve our qualitative military edge. Consequently, spending our research and development dollars more wisely does not automatically mean that consolidation of essential and unique military laboratories is justified.

Therefore, the Air Force, and to some extent the Army, have chosen to separately consider base closures and laboratory consolidation. The Navy, however, is attempting to implement a major laboratory reorganization through the base closure process. As you know, Congress legislated formation of a Commission on Consolidation and Conversion (Laboratories Commission) to study the feasibility and desirability of various means to improve the operation of defense laboratories.

I urge your Commission to allow the Laboratories Commission to complete its studies and consideration of the entire DoD laboratory structure. We should not act now in a manner which would prejudge that work.

Furthermore, I believe the inclusion of research and development laboratories in the Base Closure process is wrong for several compelling reasons.

First, the charter of the Base Closure Commission is to identify bases for closure according to the Defense Secretary's force structure plan and other proposed criteria. Currently, the applicability of the proposed force structure reductions and other closure criteria to suggested laboratory realignments is questionable.

The justification for consolidating laboratories based on a hypothetical force structure plan is tenuous.

It is difficult, if not impossible, to associate the defense research, development, test and evaluation (RDT&E) laboratory infrastructure with any specific force structure. The Navy's own Detailed Analysis for the Base Closure recommendations confirms this by stating "the RDT&E workload is not directly correlated to force structure." Similarly, it is very difficult to relate R&D infrastructure to Secretary Cheney's other criteria, such as the impact on operational readiness and the ability to accommodate future total force requirements.

Second, the success of high technology systems in the Persian Gulf has led DoD to increase R&D spending and emphasize the need for highly-integrated smart weapons, platforms, and command/control/communications systems. This increased spending and emphasis will require a more productive defense laboratory infrastructure, not an arbitrarily smaller one. It is clear that bases will close as personnel, ships, aircraft, and ground unit levels decrease. It is not clear how the defense laboratory infrastructure should change. The Navy's goal of decreasing RDT&E personnel levels by 20% must be challenged in view of stable or increasing RDT&E spending.

Third, the Navy's decision process on laboratory realignments did not permit adequate time for sufficient assessment and reflection of the many complex issues connected with changing or closing unique R&D assets. The entire Navy infrastructure was reviewed in less than three months and included two, three-hour decision meetings. Based on this abbreviated research, decisions were made to close or consolidate R&D laboratories which developed and evolved during the course of 50 years.

These serious deficiencies with respect to including DoD laboratories, in general, and Navy laboratories, in particular, on the Base Closure list are mirrored by the notable flaws in the Navy's recommendation to close the Naval Ocean Systems Center (NOSC) Detachment at Kaneohe Bay, Hawaii.

First, the Navy's Detailed Analysis supporting the inclusion of NOSC-Kaneohe estimate a one-time cost of $5.6 million to transfer NOSC-Kaneohe functions and 190 government personnel to NOSC-San Diego. This estimate assumes a move cost of $20,000 per person, yet more realistic estimates indicate relocation costs of $30,000-$60,000 per employee. These estimates alone would add $1.9-$7.6 million to the one-time costs. More detailed analyses indicate that the one-time costs to relocate NOSC-Kaneohe personnel, equipment, and marine mammals are between $10-$25 million, excluding costs associated with project delays caused by the turbulence of the moves.

The Navy also projected annual savings of $900,000 by closing NOSC-Kaneohe. Using the Navy's one-time cost estimate, with its likely understatement, the pay-back period for this closure action is eleven years. This period is much longer than those projected for other Navy base closure proposals. Since the Navy may well lose many skilled and valuable researchers who will choose not to relocate, it is difficult to justify an investment producing an eleven year recoupment period. The potential costs and the limited savings also neglect the loss of skilled government and contractor scientists and technical personnel and the disruption of important research programs. The loss of valuable RDT&E results from this disruption is incalculable.

Second, the Navy's Detailed Analysis states that "NOSC Detachment Kaneohe is constrained due to limited facilities and land availability." The focus of NOSC-Kaneohe's research and development efforts are ocean sciences and supporting technologies, such as teleoperations and fiber optic technologies. Thus, the availability of the laboratory's 60x80x15-foot deep salt water test pool and the unrestrained, nearby access to Kaneohe Bay, a deep water sound channel, and the Pacific Ocean contradict the Navy's analysis. Furthermore, NOSC-Kaneohe occupies 79,000 square feet of office, laboratory, and engineering spaces on 30 acres of land, which is sufficient for mission accomplishment.

Finally, the Navy's objective in consolidating laboratories is to reduce overhead costs. NOSC-Kaneohe already benefits from such decreased costs since it operates now within a consolidated overhead structure with NOSC-San Diego. I have been informed that NOSC-Kaneohe relies on NOSC-San Diego to write major contracts, to administer payroll and personnel functions, and to process expense and other reports. The Kaneohe Bay Marine Corps Air Station, where the NOSC detachment is located, already processes the laboratory's small purchases.

Military utility and facility capability also strongly support retaining NOSC-Kaneohe as currently configured. The laboratory makes major contributions in the following militarily-significant areas: marine mammal research, development, production, and fleet support; prototype military land and undersea teleoperated robotic systems; deep and shallow water surveillance systems; rapidly deployable surveillance systems; land and undersea fiber optic data links; bionics research; and sonar research and development.

NOSC-Kaneohe provides direct support to Navy, Marine Corps, and Air Force operational headquarters and units. This includes upgrading the command centers for the Commanders-in Chief Pacific Command, U.S. Pacific Fleet, and Pacific Air Forces, and conducting operations analysis for the Commanders of the Seventh and Third Fleets and Submarine Forces Pacific. Such operations analysis has developed tactics for fleet exercises and enhanced over-the-horizon targeting capabilities.

The unique facilities, ocean access, and RDT&E capabilities of NOSC-Kaneohe are demonstrated further by a brief review of two of these activities:

(1) <u>Marine Mammal Research, Development, Production</u> -- NOSC-Kaneohe provides marine mammals for classified fleet support functions in an environment which cannot be duplicated at NOSC-San Diego. Kaneohe Bay is a much quieter training environment free from a heavy volume of recreational, commercial, or military traffic. Such traffic, as is found off the California coast, would interrupt training time and compromise the security of the training activities. The physical size and configuration of Kaneohe Bay permit the conduct of multiple training exercises simultaneously. The clarity of the bay waters is required for effective training procedures.

The available water temperatures average 9-20 degrees Fahrenheit higher than those off San Diego, and air temperatures are 8-18 degrees Fahrenheit higher. These warmer temperatures allow divers and trainers in Kaneohe Bay to work longer, and year-round, with the marine mammals and other undersea equipment than is possible off the California coast. A third training site, off the Florida coast, is unacceptable because training is impossible where similar marine mammals are indigenous.

Thus, NOSC-Kaneohe's location on Kaneohe Bay provides a unique environment for the most cost-effective and productive training of the marine mammals required by the Navy.

(2) **Teleoperator/Presence Project** -- This project develops a remotely-operated, agile manipulator system for remote, deep ocean military missions, such as repairing undersea surveillance systems. Mounted on an unmanned undersea vehicle and directed through a high-resolution video link, this equipment will be installed and tested in NOSC-Kaneohe's deep salt water test pool. A similar pool is unavailable at San Diego due to conflicts with submarine sonar testing. Water clarity and boat traffic off California also make such testing much more difficult.

NOSC-Kaneohe's other unique natural and man-made facilities are important to sonar research and development for anti-submarine warfare. These assets offer a full range of resources for future military test programs.

The natural facilities are the bay and surrounding Pacific Ocean. These afford close access to water depths from surf zone to 20,000 feet and to varied bottom types, such as sand, mud, and coral. A researcher can investigate the characteristics of sound propagation in depths to 1,000 fathoms within four miles of NOSC-Kaneohe. The same depths are 40 miles from the San Diego location.

Thus, NOSC-Kaneohe's special and convenient environment satisfies the "unique mission-required geographic features" criteria stated in the Navy's Detailed Analysis.

The man-made facilities include an on-pier special sonar signal range, hydrophone arrays at variable water depths, and nearby access to the Navy's major Barking Sands Tracking Underwater Range (BARSTUR).

Deep ocean surveillance demonstrations and evaluation of underwater work systems are accomplished by NOSC-Kaneohe on the BARSTUR range. BARSTUR recently expanded its acoustic sensor network into deep (15,000-20,000 feet) water. NOSC-Kaneohe's existing hydrophones are located at depths of 1,600 and 2,500 feet. Taken together, these acoustic sensor networks provide unparalleled capabilities to test underwater systems and sound signal propagation at a full range of variable depths of military significance.

Finally, NOSC-Kaneohe is a vital asset to the State of Hawaii and its citizens. This reality starkly contradicts the Navy's suggestion that its closure will have no impact on the local community. Previous testimony to your Commission indicated that NOSC-Kaneohe funding makes up about 25% of the research and development support for high technology activities in the State. In addition, NOSC facilities and funding allow the University of Hawaii and local support contractors to complete additional advanced research.

NOSC-Kaneohe works closely with the state university and provides unique academic and professional opportunities to students and graduates. More than 70 undergraduates gain work experience and financial assistance through the University's Marine Option Program, which provides work at NOSC-Kaneohe. The NOSC swath ship Kaimalino also supports the university and the State of Hawaii in the ocean thermal energy conversion project, the Hawaii Deep Water Cable, the Deep Underwater Muon and Neutrino Detector, and other research programs.

For all these reasons, I strongly urge the Commission to delete defense research and development laboratories from the base closure list to permit the Congressionally-mandated laboratories study to proceed unimpeded. At a minimum, I believe the inaccuracies in the Navy's Detailed Analysis of the recommendation to close NOSC-Kaneohe demonstrate that NOSC-Kaneohe should be removed from the base closure list.

I recognize that the work before you is not easy. Clearly, we must close bases as force structure reductions occur. But, we must be careful not to do irreparable harm to our national defense infrastructure. I wish you success in this difficult but critical task. Thank you for your consideration of the issues I have raised.

Sincerely,

Daniel K. Inouye
Chairman
Senate Appropriations
Subcommittee on Defense

Lab Closure

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d neurodegenerative diseases.
uch a contribution may be made only for

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GRANT.—Of the amount authorized to be
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ble for a grant to be awarded through the
res to an institution of higher education
advanced science and technology.
e Secretary of Defense shall select an
grant under subsection (a) based upon
of the institution's faculty. The institu-
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Technologies Plan as required by Public

NCED RESEARCH PROJECTS

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available for the support (through the
arch Projects Agency) of advanced
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SEC. 245. COMPETITION IN CONTRACTING FOR COMPUTERS AND SOFTWARE

(a) CONGRESSIONAL CONCERNS REGARDING DEFENSE COMPUTER PROCUREMENT.—The Congress notes the concern regarding the manner in which solicitations are performed for computer procurement for components of the Department of Defense.

(b) GAO REVIEW.—The Comptroller General of the United States shall conduct a review of a selected number of planned and recently completed computer procurements for components of the Department of Defense to determine if those solicitations provide any barriers to full and open competition for United States computer suppliers. The procurements reviewed shall include the Air Force procurement for Tactical Air Force Workstations under solicitation F19630-90-R-0014 and the Army procurement for Light Weight Computer Unit under solicitation DAAB07-90-R-L100.

(c) MATTERS TO BE INCLUDED IN REVIEW.—The review shall determine in the case of each solicitation reviewed—

(1) whether unnecessary or non-germane specifications, evaluation factors, unwarranted performance requirements, packaging requirements, or other limiting bias factors are present;

(2) whether the solicitation contains restrictive requirements in excess of minimum Government needs;

(3) whether Government developed applications software is favored over commercial "off the shelf" software solutions and the sufficiency of the rationale to support Government development;

(4) the need for components of the Department of Defense to agree upon a standard prescribed architecture and operating system; and

(5) the cost effectiveness of computer procurements based on the realism of specifications as compared to intended use.

Statements regarding the degree of assessment supporting the specification development and rigidity as they limit or tend to limit offerers or contract awards are to be included.

(d) REPORT TO CONGRESS.—The Comptroller General shall complete the study and submit a report on the results of the study to the Committees on Armed Services of the Senate and House of Representatives not later than three months after the date of the enactment of this Act.

SEC. 246. ADVISORY COMMISSION ON CONSOLIDATION AND CONVERSION OF DEFENSE RESEARCH AND DEVELOPMENT LABORATORIES

(a) ESTABLISHMENT.—There is established a commission to be known as the "Commission on the Consolidation and Conversion of Defense Research and Development Laboratories" (hereinafter in this section referred to as the "Commission").

(b) DUTIES.—(1) The Commission shall conduct a study to determine the feasibility and desirability of various means to improve the operation of laboratories of the Department of Defense.

(2) In conducting the study described in this subsection, the Commission shall—

(A) consider such means as—

(i) conversion of some or all such laboratories to Government-owned, contractor-operated laboratories;

(ii) modification of the missions and functions of some or all such laboratories; and

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(iii) consolidation or closure of some or all such laboratories; and

(B) determine—

(i) the short-term costs and long-term cost savings that are likely to result from such consolidation, closure, or conversion; and

(ii) a proposed schedule for each consolidation, closure, or conversion of a laboratory considered appropriate by the Commission.

(c) COMPOSITION.—(1) The Commission shall be composed of 13 members, as follows:

(A) The Director of Defense Research and Engineering who shall be the chairman of the Commission.

(B) Six members appointed by the Secretary of Defense from among officers and employees of the Federal Government, including at least one director of a research and development laboratory of each military department.

(C) Six members appointed by the Secretary from among persons in the private sector.

(2) The Secretary of Defense shall make all appointments under subparagraphs (B) and (C) of paragraph (1) within 60 days after the date of the enactment of this Act.

(3) Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(d) MEETINGS; QUORUM.—(1) The Commission shall convene its first meeting within 15 days after the first date on which all members of the Commission have been appointed. Thereafter, the Commission shall meet at the discretion of its Chairman or at the call of a majority of its members.

(2) Seven members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(e) COMPENSATION OF MEMBERS; TRAVEL EXPENSES.—(1) Each member of the Commission who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of the duties of the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(2) The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(3) Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(f) REPORT TO SECRETARY.—Not later than September 30, 1991, the Commission shall submit to the Secretary a report containing the Commission's recommendations regarding the matters considered and determined by the Commission pursuant to subsection (b).

(g) REPORT BY SECRETARY.—Not later than 30 days after the date of the submission of the report pursuant to subsection (f), the Secretary shall transmit such report to each House of the Congress, together with any comments that the Secretary considers appropriate.

(h) TERMINATION.—The Commission shall terminate 90 days after the date on which the Commission submits its report to the Secretary pursuant to subsection (g).

SEC. 247. NATIONAL DEFENSE SCIENCE AND ENGINEERING EDUCATION

(a) IN GENERAL.—(1) Chapter 111 of title 10, United States Code, is amended by adding at the end the following:

"§ 2192. Science, mathematics, and engineering education

"(a) The Secretary of Defense, in consultation with the Secretary of Education, shall, on a continuing basis—

"(1) identify actions which the Department of Defense may take to improve education in the scientific, mathematics, and engineering skills necessary to meet the long-term national defense needs of the United States for personnel proficient in such skills; and

"(2) establish and conduct programs to carry out such actions.

"(b) The Secretary shall designate an individual within the Office of the Secretary of Defense to advise and assist the Secretary regarding matters relating to science, mathematics, and engineering education and training.

"§ 2193. Science and mathematics education improvement program

Grant prog

"(a)(1) The Secretary of Defense may, in accordance with the provisions of this subsection, carry out a program for awarding grants to students who have been accepted for enrollment in, or who are enrolled in, an institution of higher education as undergraduate or graduate students in scientific and engineering disciplines critical to the national security functions of the Department of Defense.

"(2) Grant proceeds shall be disbursed on behalf of students awarded grants under this subsection to the institutions of higher education at which the students are enrolled. No grant proceeds shall be disbursed on behalf of a student until the student is enrolled at an institution of higher education.

"(3) The amount of a grant awarded a student under this subsection may not exceed the student's cost of attendance.

"(4) The amount of a grant awarded a student under this subsection shall not be reduced on the basis of the student's receipt of other forms of Federal student financial assistance, but shall be taken into account in determining the eligibility of the student for those other forms of Federal student financial assistance.

"(5) The Secretary shall give priority to awarding grants under this subsection in a manner likely to stimulate the interest of women and members of minority groups in pursuing scientific and engineering careers. The Secretary may consider the financial need of applicants in making awards in accordance with such priority.

"(b) The Secretary of Defense, in coordination with the Secretary of Education, may establish programs for the purpose of improving the mathematics and scientific knowledge and skills of elementary and secondary school students and faculty members.

"(c) In this section:

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denied 104 S.Ct. 524, 525, 464 U.S. 1007, 78 L.Ed.2d 708.

In bribery prosecution in which person implanting illegal purpose in defendant's mind was "ignorant pawn of the government," trial court, which instructed jury that inducement to commit a crime from a private citizen cannot be deemed sufficient to support a claim of entrapment unless that private citizen was an "agent" of a government officer, committed reversible error in failing to explain the appropriate rules of agency. U.S. v. Anderton, C.A.Tex.1980, 629 F.2d 1044.

In view of want of any evidence whatever tending to show government inducement or defendant's lack of predisposition to commit offense charged, and in view of lack of any evidence of government involvement when defendant first sought out official of company which he had investigated, evidence was insufficient even to raise issue of entrapment to solicit value for work performed as public official, and thus giving instruction on entrapment was not reversible error even though it was assertedly confusing by reason of distinguishing between "legal" and "illegal" entrapment. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

In view of disclosures that internal revenue service agent insisted on meeting personally with accused in connection with audit despite accused's efforts to make available all necessary financial papers through his accountant, and in view of fact that accused and accountant both testified that agent repeatedly told accused he had problems with certain claimed expenses and deductions and asked accused what accused wanted agent to do about the problems, denial of accused's request to submit entrapment defense to jury on count two charging offense of gratuitous payment for an official act was erroneous. U.S. v. Cohen, C.A.N.Y.1970, 431 F.2d 830.

Where most defendant who was charged with payment of a bribe or gratuity to internal revenue agents could testify to was that an agent suggested a general financial need several days before $50 was given to the agent, and where there was no evidence given sufficient to warrant a jury finding that the agent induced or initiated the crime, refusal to charge as to entrapment was proper. U.S v. Barash, C.A.N.Y.1969, 412 F.2d 26, certiorari denied 90 S.Ct. 86, 396 U.S. 832, 24 L.Ed.2d 82.

153. —— Coercion of jury

Supplemental instruction in bribery prosecution that "you have an obligation to attempt to agree on a verdict" and "to see if you cannot agree without giving up what you believe to be a verdict based on the evidence" and not to "arbitrarily and capriciously give up what [you feel] to be a proper verdict based on the evidence for the sake of unanimity" represented proper attempt to avoid necessity for retrial and was not coercive, even if judge knew that jurors were split 11 to 1 in favor of conviction when instruction was given. U.S. v. Jennings, C.A.N.Y.1973, 471 F.2d 1310, certiorari

154. Deliberations of jury

In prosecution for bribing Internal Revenue Service agent during criminal tax investigation, trial judge did not err in replaying at jury's request all three tape recordings containing defendants' incriminating conversations, even though jury requested that only two of those tapes be replayed, in view of fact that subject matter of tape which jury had not requested was closely related to that of the other two tapes and thus, jury could not have thought that additional playing of that tape indicated any prejudice by judge. U.S. v. Gentile, C.A.N.Y.1975, 525 F.2d 252, certiorari denied 96 S.Ct. 1493, 425 U.S. 903, 47 L.Ed.2d 753.

155. Verdict

Where, with regard to two of the three objects of the conspiracy, indictment rested in large part on acts occurring without limitations period, defendant was entitled to an instruction requiring jury to find an overt act committed within limitations period before it could find him guilty of conspiracy to achieve illegal objectives and trial court's failure to give such instruction as requested constituted reversible error where basis for jury's general verdict could not be perceived with reasonable certainty. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

Despite fact that defendant was found not guilty of accepting a bribe but was found guilty of lesser included offense of accepting a gratuity, defendant's conviction of engaging in interstate travel in aid of racketeering enterprises was neither logically nor legally inconsistent; even if logical inconsistency existed, there was no legal inconsistency where each verdict was independently supported by evidence. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

156. Sentence

Defendant was properly sentenced on both Hobbs Act and bribery convictions, even though convictions were based on the same acts, in absence of evidence of congressional intent to proscribe dual punishment under the two statutes. U.S. v. Stephenson, C.A.2 (N.Y.) 1990, 895 F.2d 867.

Where, in prosecution for soliciting money in exchange for promise not to testify at trial of another, each telephone call made by defendant required proof distinct from other, the two calls did not constitute single continuing violation or transaction, for sentencing purposes, though defendant's purpose of making calls, i.e., to market his testimony, was constant. U.S. v. Moore, C.A.Cal.1981, 653 F.2d 384, certiorari denied 102 S.Ct. 680, 454 U.S. 1102, 70 L.Ed.2d 646.

In prosecution wherein defendant was found guilty of asking for or receiving thing of value because of official act performed or to be performed, defendant was not shown to be innocent of bribery and thus no abuse of discretion was shown in imposition of sentence even if judge imposed maximum sentence only or largely because he thought defendant could have been convicted of bribery, but, in any event, defendant was

ant to rule 35, Federal Rules of Criminal Procedure, this title. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

Where essentially the same evidence was relied on to prove both the substantive offenses, i.e., aiding and abetting in offering a bribe and accepting a bribe, and the conspiracy count, the defendant was doubly punished in violation of double jeopardy clause when he was sentenced on both the substantive and conspiracy counts; sentence on conspiracy count, being the longer sentence, would be vacated first so as to avoid any incentive for the government seeking similar multiple punishments in the future. U.S. v. Austin, C.A.Tenn. 1976, 529 F.2d 559.

156a. Restitution

General rule, that seized property other than contraband should be returned to its rightful owner at conclusion of criminal proceedings, did not apply to money which was voluntarily given to public officials as gratuity in violation of criminal statute. U.S. v. Kim, E.D.Va.1990, 738 F.Supp. 1002.

158. Review

Where district court dismissed indictment against former senator for solicitation and acceptance of bribes, on ground that this section, as applied to the senator would violate speech or debate clause of Constitution, U.S.C.A. Const. art. 1, § 6, cl. 1, Supreme Court had jurisdiction of direct appeal by Government, despite district judge's statement "based on the facts of this case," which, in context, referred to facts alleged in the indictment. U.S. v. Brewster, Dist.Col.1972, 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

Admission of irrelevant evidence regarding defendant's flight was reversible error, in bribery case in which defendant admitted to willfully offering bribe and in which only remaining question was whether defendant had been entrapped into committing offense. U.S. v. Kang, C.A. 5 (Tex.) 1991, 934 F.2d 621.

Although defense counsel interposed general objection to admission of alleged hearsay testimony of an IRS agent that government's chief witness had admitted to him that he had paid a bribe to defendant in a tax case, objection was insufficient to preserve asserted hearsay claim for appeal, in absence of plain error, where defendant did not request instructions which he claimed should have been given and did not object to trial court's charge on subject. U.S. v. Lipton, C.A.N.Y.1972, 467 F.2d 1161, certiorari denied 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 587.

Contention that defendant had been entrapped into conspiring to bribe a government official, bribery of a government official and conspiring to smuggle marijuana into the country would not be considered by reviewing court where such defense was not presented in the court below. U.S. v. Cambre, C.A.Cal.1972, 467 F.2d 216.

Where flaw in bribery indictment under the D.C. Code was highly technical, government's decision to prosecute under such Code rather than under this section, and its decision to appeal dismissal of the original indictment rather than immediately seek a federal indictment did not, in relation to denial of claim of speedy trial, reflect arbitrary, negligent or purposefully oppressive behavior on the part of the Government. U.S. v. Bishton, 1972, 463 F.2d 887, 150 U.S.App.D.C. 51.

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means—

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term—

(1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;

(2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch; and

(3) "legislative branch" means—

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(As amended Pub.L. 100-191, § 3(a), Dec. 15, 1987, 101 Stat. 1306; Pub.L. 101-194, Title IV, § 401, Nov. 30, 1989, 103 Stat. 1747; Pub.L. 101-280, § 5(a), May 4, 1990, 104 Stat. 158.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (c). Pub.L. 101-280, § 5(a)(1), added provisions relating to section 218 of this title and struck out provisions referring to definitions of "officers" and "employees" found in sections 2104 and 2105, respectively, of Title 5, Government Organization and Employees.

Subsec. (d). Pub.L. 101-280, § 5(a)(2), substituted "means" for "shall include".

Subsec. (e)(1). Pub.L. 101-280, § 5(a)(3)(1), substituted "includes each" for "means any".

Subsec. (e)(3)(A). Pub.L. 101-280, § 5(a)(3)(2)(A), substituted provisions relating to the Congress for provisions relating to Members of Congress and any officers or employees of the Senate or of the House of Representatives.

Subsec. (e)(3)(B). Pub.L. 101-280, § 5(a)(3)(2)(B), substituted "the Office" for "an officer or employee".

1989 Amendment

Subsecs. (c) to (e). Pub.L. 101-194 added subsecs. (c) to (e).

1987 Amendment

Subsec. (a). Pub.L. 100-191 expanded the definition of "special Government employee" to include an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28, regardless of the number of days of

Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101-650, set out as a note under section 631 of Title 28.

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date of 1987 Amendment

Amendment by Pub.L. 100-191 effective Dec. 15, 1987, applicable both to independent counsel proceedings initiated prior to, and still pending on, that date as well as to independent counsel proceedings initiated and independent counsels appointed on and after that date, see section 591 of

Legislative History

For legislative history and purpose of Pub.L. 100-191, see 1987 U.S.Code Cong. and Adm. News, p. 2150. See, also, Pub.L. 101-194, 1989 U.S.Code Cong. and Adm.News, p. 1225; Pub.L. 101-280, 1990 U.S.Code Cong. and Adm.News, p. 169.

FEDERAL PRACTICE AND PROCEDURE

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

CODE OF FEDERAL REGULATIONS

Officers and employees of U.S., claims against and matters affecting governmental activities of—Practice of special government employee permitted, see 14 CFR 300.12.

Temporary disqualification of former Board Members and employees in matters formerly under their responsibility, see 14 CFR 300.14.

LAW REVIEW COMMENTARIES

And gifts and travel for all—A summary explanation of the Ethics Reform Act of 1989—The move toward greater parity. June E. Edmondson, 37 Fed.B.News & J. 402 (1990).

Mandatory summary jury trial in federal court: Foundationally flawed. 16 Pepperdine L.Rev. 251 (1989).

Proposed standards of conduct for presidential transition workers. Phillip J. Harter Esquire, 36 Fed.B.News & J. 130 (March/April 1989).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

NOTES OF DECISIONS

Special government employees 1

1. Special government employees

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

So long as Board of Inquiry members, appointed under section 183 of Title 29, Labor, are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 130 days in any period of 365 consecutive days, they would qualify as special Government employees under this section, and supplementation of their compensation would not be prohibited by section 209 of this title. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 264.

Where an informal Presidential adviser has departed from his usual role in connection with his work on a social issue by calling and chairing a number of meetings that were attended by employees of various agencies, in relationship to this work, and assuming considerable responsibility for coordinating the administration's activities in that area, he is engaging in a governmental function when he performs these duties and should be designated as a special government employee for purposes of the Federal conflict-of-interest laws in connection with the work. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 20.

§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another—

(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or

(B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another, at a time when such person is an officer or employee of the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the District of Columbia is a party or has a direct and substantial interest, before any department, agency, court, officer, or commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was an officer or employee of the District of Columbia;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a particular matter involving a specific party or parties—

(1) in which such employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise; or

(2) which is pending in the department or agency of the Government in which such employee is serving except that paragraph (2) of this subsection shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(d) Nothing in this section prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for or otherwise representing his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except—

(1) in those matters in which he has participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) in those matters that are the subject of his official responsibility,

subject to approval by the Government official responsible for appointment to his position.

(e) Nothing in this section prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(f) Nothing in this section prevents an individual from giving testimony under oath or from making statements required to be made under penalty of perjury.

As amended Pub.L. 91–405, Title II, § 204(d)(2), (3), Sept. 22, 1970, 84 Stat. 853; Pub.L. 99–646, § 47(a), Nov. 10, 1986, 100 Stat. 3604; Pub.L. 101–194, Title IV, § 402, Nov. 30, 1989, 103 Stat. 748; Pub.L. 101–280, § 5(b), May 4, 1990, 104 Stat. 159.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (a)(1)(B). Pub.L. 101–280, § 5(b)(1), inserted "or Federal judge" following "employee".

Subsec. (a)(2). Pub.L. 101–280, § 5(b)(2), inserted "Commissioner Elect, Federal judge," after "commissioner,".

Subsec. (b)(2). Pub.L. 101–280, § 5(b)(3), inserted "representational" preceding "services".

Subsec. (d)(1). Pub.L. 101–280, § 5(b)(4), substituted "Government employee or as a special Government employee" for "Government employee".

Subsec. (f). Pub.L. 101–280, § 5(b)(5), added subsec. (f).

1989 Amendment

Subsec. (a). Pub.L. 101–194, § 402(3), substituted the punishment provision "shall be subject to the penalties set forth in section 216 of this title" for "shall be fined under this title or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States".

Subsec. (a)(1). Pub.L. 101–194, § 402(1), (2), substituted: in the introductory text "representational services, as agent or attorney or otherwise" for "services"; and in the concluding text, "department, agency, court," for "department, agency,".

Subsec. (a)(1)(B). Pub.L. 101–194, § 402(7), struck following "of the United States," the phrase "including the district of Columbia,".

Subsec. (a)(2). Pub.L. 101–194, § 402(4) to (6), substituted "representational services" for "services" and included reference to Member Elect and Delegate Elect, respectively.

Subsec. (b). Pub.L. 101–194, § 402(9), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub.L. 101–194, § 402(8)(A), (B), redesignated subsec. (b) as (c) and substituted in the introductory text "subsections (a) and (b)" for "subsection (a)".

Subsecs. (d), (e). Pub.L. 101–194, § 402(10), added subsecs. (d) and (e).

1986 Amendment

Text. Pub.L. 99–646, § 47(a)(3)(D), directed that the margins of each subsection, paragraph, and subparagraph are to be flush, indented 2ems, and indented 4ems, respectively.

Subsec. (a)(1). Pub.L. 99–646, § 47(a)(1), substituted "indirectly—" for "indirectly", "(1) demands, seeks, receives, accepts, or agrees to receive or accept any" for "receives or agrees to receive, or asks, demands, solicits, or seeks, any", and "personally or by" for "by himself or", redesignated par. (1) as subpar. (A), and in subpar. (A) as so redesignated, substituted "such person" for "he" and "Delegate, Delegate elect" for "Delegate from the District of Columbia, Delegate Elect from the District of Columbia", and redesignated par. (2) as subpar. (B), and in subpar. (B) as so redesignated, substituted "such person" for "he" and "commission; or" for "commission, or".

Subsec. (a)(2). Pub.L. 99–646, § 47(a)(2), redesignated subsec. (b) as par. (2), and in par. (2) as so redesignated, substituted "knowingly gives" for "Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives", "employee;" for "employee—", and "shall be fined under this title" for "Shall be fined not more than $10,000".

Subsec. (b). Pub.L. 99–646, § 47(a)(3), redesignated subsec. (c) as (b), and in subsec. (b) as so redesignated, substituted "parties—" for "parties", "such employee" for "he", "otherwise; or" for "otherwise, or", and "in which such employee is serving except that paragraph (2) of this subsection" for "in which he is serving: *Provided*, That clause (2)". Former subsec. (b) redesignated as subsec. (c). Pub.L. 99–646, § 47(a)(4), redesignated subsec. (b) as (c).

1970 Amendment

Subsec. (a)(1). Pub.L. 91–405, § 204(d)(2), included references to Delegate from District of Columbia and Delegate Elect from District of Columbia.

Subsec. (b). Pub.L. 91–405, § 204(d)(3), included reference to Delegate.

Effective Date of 1990 Amendment

Amendment by Pub.L. 101–280 effective on May 4, 1990, see section 11 of Pub.L. 101–280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date of 1986 Amendment

Section 47(b) of Pub.L. 99–646 provided that: "The amendments made by this section [to this section] shall take effect 30 days after the date of enactment of this Act [Nov. 10, 1986]."

Effective Date of 1970 Amendment

Amendment by Pub.L. 91–405 effective on Sept. 22, 1970, see section 206(b) of Pub.L. 91–405, summarized in a note set out under section 25 of Title 2, The Congress.

Private Sector Representatives on United States Delegations to International Telecommunications Meetings and Conferences

Pub.L. 97–241, Title I, § 120, Aug. 24, 1982, 96 Stat. 280, provided that:

"(a) Sections 203, 205, 207, and 208 of title 18, United States Code [sections 203, 205, 207, and 208 of this title], shall not apply to a private sector representative on the United States delegation to an international telecommunications meeting or conference who is specifically designated to speak on behalf of or otherwise represent the interests of the United States at such meeting or conference with respect to a particular matter, if the Secretary of State (or the Secretary's designee) certifies that no Government employee on the delegation is as well qualified to represent United States interests with respect to such matter and that such designation serves the national interest. All such representatives shall have on file with the Department of State the financial disclosure report required for special Government employees.

"(b) As used in this section, the term 'international telecommunications meeting or conference' means the conferences of the International Telecommunications Union, meetings of its International Consultative Committees for Radio and for Telephone and Telegraph, and such other international telecommunications meetings or conferences as the Secretary of State may designate."

Legislative History

For legislative history and purpose of Pub.L. 91–405, see 1970 U.S. Code Cong. and Adm. News, p. 3833. See, also, Pub.L. 99–646, 1986 U.S. Code Cong. and Adm. News, p. 6139; Pub.L. 101–194, 1989 U.S. Code Cong. and Adm. News, p. 1225; Pub.L. 101-280, 1990 U.S.Code

CODE OF FEDERAL REGULATIONS

Departmental proceedings, representation before Department of Agriculture, see 7 CFR 1.26.

Matters and claims affecting government, activities and compensation of employees, see 28 CFR 45.735–6.

Persons who may practice before Bureau of Alcohol, Tobacco and Firearms, see 31 CFR 8.2.

LAW REVIEW COMMENTARIES

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

NOTES OF DECISIONS

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2. Construction

Offense of conflict of interest under subsec. (a) of this section, was not lesser included offense of bribe receiving under section 201(c) of this title. U.S. v. Alexandro, C.A.N.Y.1982, 675 F.2d 34, certiorari denied 103 S.Ct. 78, 459 U.S. 835, 74 L.Ed.2d 75.

Assuming arguendo that former Congressman, whom United States was suing to recover share received by him of his law firm's fee in violation of this section prohibiting members of Congress from receiving compensation in matters affecting government, had properly read this section in arguing that much of his share of fee reflected "services" which were not performed "before any department or agency," within meaning of this section, this would not mean that United States' claims for relief were subject of dismissal, but, rather, would only mean that amount ultimately recoverable by United States would be reduced pro tanto. U.S. v. Eilberg, D.C.Pa.1980, 507 F.Supp. 267.

3. Purpose

Purpose of this section and section 201 of this title is to reach any situation in which judgment of government agent might be clouded because of payments or gifts made to him by reason of his position otherwise than as provided by law for proper discharge of official duty; even if corruption is not intended by either donor or donee, there is still tendency in such situation to provide conscious or unconscious preferential treatment of donor by donee, or inefficient management of public affairs, and statutes are congressional effort to eliminate temptation inherent in such situation. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

4. Receiving or agreeing to receive compensation—Generally

There is no conflict of interest or other legal problem whatever if an Executive Branch official leases an airplane at his own expense and for his own use as the need arises. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 8.

5. —— Elements of offense

Under this section and section 201 of this title, gravamen of each offense is not intent to be corrupted or influenced but simply acceptance of unauthorized compensation. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

Intent to influence the federal agency is not a necessary element of the offense of knowingly receiving compensation for services rendered or to be rendered before a federal agency. U.S. v. Eilberg, D.C.Pa.1979, 465 F.Supp. 1076; U.S. v. Freeman, C.A.10 (N.M.) 1987, 813 F.2d 303.

Violation of this section demonstrates a breach of trust; to fall within its prohibition, member of Congress must shed the duty of disinterested advocacy owed to the government and to his constituents in favor of championing private interests potentially inconsistent with that charge. U.S. v. Podell, D.C.N.Y.1977, 436 F.Supp. 1039, affirmed 572 F.2d 31.

6. —— Knowledge and intent

Criminal intent required under federal antibribery statute turns not on what contributor expects recipient to do with money, but on what contributor expects to receive for money. Stern v. General Elec. Co., C.A.2 (N.Y.) 1991, 924 F.2d 472.

Specific intent is not element of either this section or section 201 of this title. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

Knowledge of illegality was not necessary for substantive conviction of Congressman and codefendant under this section relating to conflict of interest and conspiracy to defraud the United States. U.S. v. Podell, C.A.N.Y.1975, 519 F.2d 144, certiorari denied 96 S.Ct. 270, 423 U.S. 926, 46 L.Ed.2d 252.

This section applicable to members of Congress, implicitly required scienter. U.S. v. Johnson, C.A.Md.1969, 419 F.2d 56, certiorari denied 90 S.Ct. 1235, 397 U.S. 1010, 25 L.Ed.2d 423.

10. Nature of service rendered

Congressman could not be convicted of violation of this section merely by accepting money for giving advice about immigration. U.S. v. Myers, C.A.N.Y.1982, 692 F.2d 823, certiorari denied

10a. Length of service

Even if a conflict of interest situation arose out of fact that special assistant to Watergate special prosecutor did not terminate his law firm practice upon becoming a member of special prosecution force, special assistant, who did not serve more than 60 days prior to return of indictment, qualified for exemption proviso of this section. U.S. v. Mitchell, 1974, 397 F.Supp. 166, affirmed 559 F.2d 31, 181 U.S.App.D.C. 254, certiorari denied 97 S.Ct. 2641, 431 U.S. 933, 53 L.Ed.2d 250.

12. Officers and employees within section

Coast Guard reserve officer was "officer of the United States" within meaning of federal conflict of interest statute prohibiting officer from receiving or agreeing to receive compensation from third party, even though officer was under orders to serve 69 days at time of events charged in indictment; officer had been continuously serving for over 130 days. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

12a. Prosecutor and defender exchange programs

Subsec. (a) of this section does not restrict Department of Justice attorneys from participation in an exchange program with a Federal Public Defender office. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 110.

13. Proceedings and other matters within section—Contracts

Under this section, pleading or proof of single contract identified by contract number or similar individualized detail is not required and it is sufficient if compensation has been received for services to be rendered with respect to particular category of contracts. U.S. v. Williams, C.A.N.Y.1983, 705 F.2d 603, certiorari denied 104 S.Ct. 524, 525, 464 U.S. 1007, 78 L.Ed.2d 708.

15. —— Departmental or agency proceedings

The detailing of Environmental Protection Agency employees to important positions in state agencies, the duties of which may require them to represent the state before the Environmental Protection Agency, is integral to the substantive environmental programs which the Agency administers, and is not prohibited by this section or section 205 of this title. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 498.

22. —— Dismissal

If in fact the Justice Department abused the secrecy of the grand jury, that is, gave the House Ethics Committee secret grand jury materials, the proper remedy would be a finding of contempt, not dismissal of the indictment charging defendant with agreement to receive and the receipt of compensation in violation of this section prohibiting the knowing receipt of compensation for services rendered or to be rendered before a federal agency. U.S. v. Eilberg, D.C.Pa.1979, 465 F.Supp. 1076.

25. —— Joinder of offenses

There was no improper misjoinder of charges of making false statements on immigration documents and unlawfully receiving money for services

incident in which defendant helped another obtain unlawful student visa and a falsified social security number and on a second incident in which she allegedly attempted to circumvent proper immigration channels for the benefit of two sisters and, also, refusal to sever the offenses was not abuse of discretion. U.S. v. Rox, C.A.Mich.1982, 692 F.2d 453.

26. —— Requisites and sufficiency

Omission in indictment, which charged defendant with offering illegal gratuity to federal employee, of sentence "in which the United States is a party or has a direct and substantial interest" did not render indictment fatally defective; indictment specifically stated dates and individual acts for which defendant was indicted, and omitted sentence did not have to do with substantial element of violation charged. U.S. v. Freeman, C.A.10 (N.M.) 1987, 813 F.2d 303.

26a. —— Variance

Evidence that defendant was officer of United States, not special government employee, within conflict of interest statute was not at variance with indictment charging that defendant was officer and employee of United States and was special government employee. U.S. v. Baird, D.D.C. 1991, 778 F.Supp. 540.

33. Evidence—Admissibility

Evidence to rebut Government's argument that Coast Guard employee knew that he was violating conflict of interest statute would have been irrelevant, in that employee was charged with general intent crime. U.S. v. Baird, D.D.C.1990, 778 F.Supp. 534.

35a. Pleas

Where defendant who was charged with conspiracy, solicitation and acceptance of bribes, criminal conflict of interest, and perjury entered guilty plea to conspiracy to defraud United States and to violate this section after Government had presented its case, and guilty plea was entered primarily and exclusively to avoid possible conviction on bribery charge which would have resulted in automatic disbarment, defendant was not entitled to withdraw guilty plea even though letter sent by Government to judge prior to sentencing may have violated spirit of agreement relating to not recommending jail sentence. U.S. v. Podell, C.A.N.Y.1975, 519 F.2d 144, certiorari denied 96 S.Ct. 270, 423 U.S. 926, 46 L.Ed.2d 252.

37a. Argument of counsel

Prosecutor's rebuttal closing argument that defense attorney was attempting to mislead jury by raising issue of consciousness of wrongdoing did not substantially influence jury or infect trial with unfairness and was harmless in prosecution of Coast Guard employee under conflict of interest statute for receiving or agreeing to receive compensation from third party. U.S. v. Baird, D.D.C.1990, 778 F.Supp. 534.

38. Instructions

Failure of instructions to include "knowingly" as element of conflict of interest was not fatal to conviction of Coast Guard employee for receiving or agreeing to receive compensation from third

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of offense, court instructed jury that offense required general intent that defendant knowingly committed the act. U.S. v. Baird, D.D.C.1990, 778 F.Supp. 534.

44. Suspension

Unlawful receipt of compensation for representation of client by Congressman's law firm before federal agency warrants suspension for period of five years. Office of Disciplinary Counsel v. Eilberg, Pa.1982, 441 A.2d 1193.

45. Defenses

Where defendant, a cattle farm owner, was introduced by a friend to a paid consultant in Federal Bureau of Investigation's ABSCAM operation and at consultant's invitation attended a yacht party which was employed by Bureau and while there defendant volunteered, apparently without solicitation, that he could put interested persons in contact with a source of illegal green cards and passports and, when asked, defendant acted as a go-between in a scheme to obtain an illegal green card, the government's action did not rise to level of outrageous overinvolvement violating due process and did not bar prosecution to commit bribery and conflict of interest. U.S. v. Carpentier, C.A.N.Y.1982, 689 F.2d 21, certiorari denied 103 S.Ct. 735, 459 U.S. 1108, 74 L.Ed.2d 957.

Coast Guard employee's ignorance of federal conflict of interest statute and its commands and his consultation with lawyers prior to appearing before board would not have provided basis for valid defense to receiving or agreeing to receive compensation from third party, in that the crime required only general intent. U.S. v. Baird, D.D.C.1990, 778 F.Supp. 534.

45a. Exemptions

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

46. Scope of section

This section reaches only services performed or to be performed before the federal forums listed in the section. U.S. v. Myers, C.A.N.Y.1982, 692 F.2d 823, certiorari denied 103 S.Ct. 2437, 2438.

§ 204. Practice in United States Claims Court or the United States Court of Appeals for the Federal Circuit by Members of Congress

Whoever, being a Member of Congress or Member of Congress Elect, practices in the United States Claims Court or the United States Court of Appeals for the Federal Circuit shall be subject to the penalties set forth in section 216 of this title.

(As amended Pub.L. 91–405, Title II, § 204(d)(2), Sept. 22, 1970, 84 Stat. 853; Pub.L. 97–164, Title I, § 147, Apr. 2, 1982, 96 Stat. 45; Pub.L. 101–194, Title IV, § 403, Nov. 30, 1989, 103 Stat. 1749.)

HISTORICAL AND STATUTORY NOTES

1989 Amendment

Pub.L. 101–194 struck from the enumeration of punishable individuals the Delegate from the District of Columbia, the Delegate Elect from the District of Columbia, and the Resident Commissioner or Resident Commissioner elect and substituted provision respecting penalties set forth in section 216 of this title for provision for a fine of not more than $10,000 or imprisonment for not more than two years, or both, and making offenders incapable of holding any office of honor, trust, or profit under the United States.

1982 Amendment

Pub.L. 97–164 substituted "United States Claims Court or the United States Court of Appeals for the Federal Circuit" for "Court of Claims".

1970 Amendment

Pub.L. 91–405 included references to Delegate from District of Columbia and Delegate Elect from District of Columbia.

Change of Name

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1982 Amendment

Amendment by Pub.L. 97–164 effective Oct. 1, 1982, see section 402 of Pub.L. 97–164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1970 Amendment

Amendment by Pub.L. 91–405 effective on Sept. 22, 1970, see section 206(b) of Pub.L. 91–405, summarized in a note set out under section 25 of Title 2, The Congress.

Legislative History

For legislative history and purpose of Pub.L. 91–405, see 1970 U.S. Code Cong. and Adm. News, p. 3833. See, also, Pub.L. 97–164, 1982 U.S. Code Cong. and Adm. News, p. 11; Pub.L. 101–194, 1989 U.S. Code Cong. and Adm. News, p. 1225.

§ 205. Activities of officers and employees in claims against and other matters affecting the Government

(a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, otherwise than in the proper discharge of official duties—

(1) acts as agent or attorney for prosecuting any claim against the District of Columbia, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, officer, or commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a covered matter involving a specific party or parties—

(1) in which he has at any time participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) which is pending in the department or agency of the Government in which he is serving.

Paragraph (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(d) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

(e) Nothing in subsection (a) or (b) prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for, or otherwise representing, his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except—

(1) in those matters in which he has participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or

(2) in those matters which are the subject of his official responsibility,

subject to approval by the Government official responsible for appointment to his position.

(f) Nothing in subsection (a) or (b) prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(g) Nothing in this section prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(h) For the purpose of this section, the term "covered matter" means any judicial or other proceeding, application, request for a ruling or other determination, con-

tract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.

(As amended Pub.L. 101–194, Title IV, § 404, Nov. 30, 1989, 103 Stat. 1750; Pub.L. 101–280, § 5(c), May 4, 1990, 104 Stat. 159.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (a)(2). Pub.L. 101–280, § 5(c)(1), substituted "civil" for "any civil".

Subsec. (b)(2). Pub.L. 101–280, § 5(c)(2), substituted "commission" for "any commission".

1989 Amendment

Subsec. (a). Pub.L. 101–194 designated the first par. as subsec. (a); transferred coverage of officer or employee of the District of Columbia to subsec. (b); reenacted par. (1); reenacted par. (2), substituting "covered matter" for "proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter"; and substituted punishment provision "shall be subject to the penalties set forth in section 216 of this title" for "Shall be fined not more than $10,000 or imprisoned for not more than two years, or both".

Subsec. (b). Pub.L. 101–194 designated the part of the first par. including an officer or employee of the District of Columbia as subsec. (b); extended coverage to include an officer or employee of the Office of the United States Attorney for the District of Columbia; reenacted par. (1), as applicable to the District of Columbia; reenacted par. (2), as applicable to the District of Columbia, deleting reference to acting before any court-martial and substituting "covered matter" for "proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter"; and substituted punishment provision "shall be subject to the penalties set forth in section 216 of this title" for "Shall be fined not more than $10,000 or imprisoned for not more than two years, or both".

Subsec. (c). Pub.L. 101–194 designated the second par. as subsec. (c); substituted "subject to subsections (a) and (b)" and "covered matter" for "subject to the preceding paragraphs" and "particular matter"; designated as pars. (1) and (2) existing cls. (1) and (2); and set out the proviso provision as the second sentence, substituting "Paragraph (2) shall not apply" for "Provided, That clause (2) shall not apply".

Subsec. (d). Pub.L. 101–194 designated the third par. as subsec. (d) and substituted "Nothing in subsection (a) or (b) prevents" for "Nothing herein prevents" and "attorney for, or otherwise representing, any person" for "attorney for any person".

Subsec. (e). Pub.L. 101–194 designated the fourth par. as subsec. (e); substituted "Nothing in subsection (a) or (b) prevents" for "Nothing herein or in section 203 prevents" and "attorney for, or otherwise representing, his parents" for "attorney for his parents"; designated existing provisions as pars. (1) and (2); included in par. (1) reference to participation as a special Government employee; and substituted "subject to approval by the Government official responsible for appointment to his position" for "provided that the government official responsible for appointment to his position approves".

Subsec. (f). Pub.L. 101–194 consolidated the fifth and sixth pars. and designated the same as subsec. (f), substituting "Nothing in subsection (a) or (b)" for "Nothing herein or in section 203" and "if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register" for "provided that the head of the department or agency concerned with the grant or contract shall certify in writing that the national interest so requires" and "Such certification shall be published in the Federal Register."

Subsec. (g). Pub.L. 101–194 designated the seventh par. as subsec. (g), substituting therein "Nothing in this section" for "Nothing herein".

Subsec. (h). Pub.L. 101–194 added subsec. (h), incorporating part of par. (2) of former first sentence providing for punishment of one acting "in connection with any proceeding, application, request for a ruling or other determination, contract, claim controversy, charge, accusation, arrest, or other particular matter".

Effective Date of 1990 Amendment

Amendment by Pub.L. 101–280 effective on May 4, 1990, see section 11 of Pub.L. 101–280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Legislative History

For legislative history and purpose of Pub.L. 101–194, see 1989 U.S. Code Cong. and Adm. News, p. 1225. See, also, Pub.L. 101–280, 1990 U.S. Code Cong. and Adm. News, p. 169.

CODE OF FEDERAL REGULATIONS

Departmental proceedings, representation before Department of Agriculture, see 7 CFR 1.26.

Officers and employees of U.S., claims and matters affecting governmental activities of—

Disqualification of government officers and employees in representation before Board, see 14 CFR 300.11.

Practice of special government employees permitted before Board, see 14 CFR 300.12.

Persons who may practice before Bureau of Alcohol, Tobacco and Firearms, see 31 CFR 8.2.

LAW REVIEW COMMENTARIES

Public service by public servants. Lisa G. Lerman, 19 Hofstra L.Rev. 1141 (1991).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

NOTES OF DECISIONS

2. Generally

Strict common-law notion of "agency" does not necessarily exhaust meaning of prohibition of this section against officers and employees of United States acting as agent for another in matter affecting United States. U.S. v. Sweig, D.C.N.Y.1970, 316 F.Supp. 1148.

3. Officers or employees within section

This section which prohibits federal employees from appearing as agent or attorney on behalf of anyone in a proceeding to which the United States is a party bars federal employees enrolled in part-time legal studies from entering an appearance under court rule on behalf of indigent criminal appellants entitled to assignment of counsel, despite contention that role of a law student so appearing is neither that of an attorney nor that of an agent for appellant and that such appearance would not frustrate the legislative intent of this section. U.S. v. Bailey, 1974, 498 F.2d 677, 162 U.S.App.D.C. 135.

Veterans Administration's decision not to accept bid of contractor which had been preselected by Small Business Administration and which was only company negotiating with VA for construction of VA facility was not arbitrary or capricious, and contractor was not entitled to recover its bid preparation and negotiating costs; decision not to award contract was based on appearance of conflict of interest caused by contractor's representation during negotiation process by VA employee, in violation of executive order, VA regulations, and statute prohibiting government employee from acting as agent for anyone in connection with matter in which Government is party or has direct and substantial interest. Refine Const. Co., Inc. v. U.S., 1987, 12 Cl.Ct. 56.

4. Prosecution of claims

One who was still employee of Federal Trade Commission could not accept any compensation for his legal services in prosecuting class action in which it was alleged that Commission discriminated on account of race in failing to award promotions. Bachman v. Pertschuk, D.C.D.C. 1977, 437 F.Supp. 973.

A government attorney owning a corporation involved in a quiet title action with the United States government and having a financial interest in the action is not involved in any real or apparent conflict of interest with his duties and responsibilities where he does not intend to participate in the litigation on behalf of the United States or to act as agent or attorney on behalf of the corporation. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 7.

5. Contracts

Generally, carriers' earnings in excess of authorized rate of return are not subject to refund orders by Federal Communications Commission (FCC), but rates carrier charges in future may be lowered if there is history of consistent overearnings. Ohio Bell Telephone Co. v. F.C.C., C.A.6 1991, 949 F.2d 864.

9. Assistance of counsel

In this section forbidding federal employee from representing anyone before agency or court, exclusion permitting one to act without compensation as agent or attorney for any person who is subject of disciplinary, loyalty or other personnel administration proceedings in connection with those proceedings is applicable only in "administration proceedings" and not in proceedings before courts. Bachman v. Pertschuk, D.C.D.C.1977, 437 F.Supp. 973.

Petitioner being investigated by Army to determine his suitability for retention in Army ROTC program and whether he should be ordered to active duty was not entitled to legally qualified counsel; in any event, petitioner knowingly and voluntarily waived any right that he had, if any such right existed, to legally qualified counsel. Scarth v. Geraci, D.C.Tex.1974, 382 F.Supp. 876, affirmed 510 F.2d 1363.

This section does not prohibit government attorneys from representing federal employees in personnel administration proceedings in court as well as before agencies, so long as the representation does not conflict with the attorney's official duties. 1982 (Counsel–Inf.Op.) 6 O.L.C. 461.

10. Representation of relatives

Attorneys employed by the federal government are barred by this section from participating in any case in which the District of Columbia is a party or has a direct and substantial interest. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 800.

An employee in the office of a United States Attorney may appear on behalf of his daughter in an Internal Revenue Service office audit of her tax return. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 148.

11. Prosecutor and defender exchange programs

This section is not a bar to having one or more Assistant United States Attorneys and assistant Federal Public Defenders temporarily exchange duties. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 110.

12. Agency personnel exchanges

The detailing of Environmental Protection Agency employees to important positions in state agencies, the duties of which may require them to represent the state before the Environmental Protection Agency, is integral to the substantive environmental programs which the Agency administers, and is not prohibited by this section or section 203 of this title. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 110.

13. Union activities

The representational bar of this section applies to union organizing activities of a federal employee in which he acts as "agent or attorney" for other federal employees before their agency. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 194.

14. Class actions

This section does not bar Assistant United States Attorneys from participating as plaintiffs in a class action suit challenging the authority of the Office of Personnel Management to reduce the cost of living allowance paid to all federal employees in Alaska, though they may not accept any compensation for assisting in prosecuting the claims of the class or act as agents or attorneys for the class. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 74.

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies.—

(1) Permanent restrictions on representation on particular matters.—Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.—Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

(3) Clarification of restrictions.—The restrictions contained in paragraphs (1) and (2) shall apply—

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

(b) One-year restrictions on aiding or advising.—

(1) In general.—Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) Definition.—For purposes of this paragraph—

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) One-year restrictions on certain senior personnel of the executive branch and independent agencies.—

(1) Restrictions.—In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.—(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule;

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O–7 or above.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of

respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that—

(I) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(II) granting the waiver would not create the potential for use of undue influence or unfair advantage.

(d) Restrictions on very senior personnel of the executive branch and independent agencies.—

(1) Restrictions.—In addition to the restrictions set forth in subsections (a) and (b), any person who—

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,

and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) Persons who may not be contacted.—The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are—

(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in sections 5312, 5313, 5314, 5315, or 5316 of title 5.

(e) Restrictions on members of Congress and officers and employees of the legislative branch.—

(1) Members of congress and elected officers.—(A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.

(2) Personal staff.—(A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(I) the Senator or Member of the House of Representatives for whom that person was an employee; and

(II) any employee of that Senator or Member of the House of Representatives.

(3) Committee staff.—Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) Leadership staff.—(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(I) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives; and

(II) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.

(5) Other legislative offices.—(A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that persons's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(6) Limitation on restrictions.—(A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level V of the Executive Schedule.

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, an an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

(f) Restrictions relating to foreign entities.—

(1) **Restrictions.**—Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) **Special rule for trade representative.**—With respect to a person who is the United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities within 3 years after the termination of that person's service as the United States Trade Representative.

(3) **Definition.**—For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

(g) Special rules for detailees.—For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

(h) Designations of separate statutory agencies and bureaus.—

(1) **Designations.**—For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

(2) **Inapplicability of designations.**—No agency or bureau within the Executive Office of the President may be designated under paragraph (1) as a separate department or agency. No designation under paragraph (1) shall apply to persons referred to in subsection (c)(2)(A)(i) or (iii).

(i) Definitions.—For purposes of this section—

(1) the term "officer or employee", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include—

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, and Members of Congress;

(2) the term "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action; and

(3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

(j) Exceptions.—

(1) **Official government duties.**—The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.

(2) **State and local governments and institutions, hospitals, and organizations.**—The restrictions contained in subsections (c), (d), and (e) shall not apply

(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or

(B) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

(3) **International organizations.**—The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

(4) **Special knowledge.**—The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

(5) **Exception for scientific or technological information.**—The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.

(6) **Exception for testimony.**—Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence—

(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and

(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.

(k)(1)(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.

(B)(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person's Federal Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Federal Government employment began.

(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person's Federal G[illegible]

employment by any such national laboratory after the person's employment by the Federal Government is terminated.

(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and shall identify—

(A) the officer or employee covered by the waiver by name and by position, and

(B) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(4) The President may not delegate the authority provided by this subsection.

(5)(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.

(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.

(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title 5.

(As amended Pub.L. 95–521, Title V, § 501(a), Oct. 26, 1978, 92 Stat. 1864; Pub.L. 96–28, §§ 1, 2, June 22, 1979, 93 Stat. 76; Pub.L. 101–189, Div. A, Title VIII, § 814(d)(2), Nov. 29, 1989, 103 Stat. 1499; Pub.L. 101–194, Title I, § 101(a), Nov. 30, 1989, 103 Stat. 1716; Pub.L. 101–280, §§ 2(a), 5(d), May 4, 1990, 104 Stat. 149, 159; Pub.L. 101–509,Title V, § 529 [Title I, § 101 (b)(8)(A)], Nov. 5, 1990, 104 Stat.440; Pub.L. 102–25, Title VII, § 705(a), Apr. 6, 1991, 105 Stat. 120; Pub.L. 102–190, Div. B, Title XXXI, § 3138(a), Dec. 5, 1991, 105 Stat. 1579; Pub.L. 102–395, Title VI, § 609(a), Oct. 6, 1992, 106 Stat. 1873.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 1102 of the Omnibus Trade and Competitiveness Act of 1988, referred to in subsec. (b)(2)(A), is classified to section 2902 of Title 19, Customs Duties.

The effective date set forth in section 102(a) of the Ethics Reform Act of 1989, referred to in subsec. (e)(7)(L), (M), is the effective date of the amendment to this section by section 101(a) of Pub.L. 101–194. See section 102 of Pub.L. 101–194, set out as an Effective Date of 1989 Amendment note under this section.

Section 1(e), (f) of the Foreign Agents Registration Act of 1938, as amended, referred to in subsec. (f)(2), is classified to section 611(e), (f) of Title 22, Foreign Relations and Intercourse.

Section 1201(a) of the Higher Education Act of 1965, referred to in subsec. (j)(2)(B), is classified

Section 501(c)(3) of the Internal Revenue Code of 1986, referred to in subsec. (j)(2)(B), is section 501(c)(3) of Title 26, Internal Revenue Code.

Codification

Section 501(a) of Pub.L. 95–521, which amended this section, was completely revised by Pub.L. 101–194, Title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1760, which reenacted such provisions as section 501(a) of Appendix 7 to Title 5, Government Organization and Employees. Such revision and reenactment is effective Jan. 1, 1991, except that under certain conditions provisions of section 601(a) of Pub.L. 101–194 shall cease to be effective insofar as they enact section 501(a) of Appendix 7, and provisions of section 501(a) of Pub.L. 95–521 as they amended this section shall be deemed to be reenacted, see section 603 of Pub.L. 101–194, set out as a note under section [illegible]

1992 Amendments

Subsec. (f)(2). Pub.L. 102-395, § 609(a)(1), redesignated former par. (2) as (3).

Pub.L. 102-395, § 609(a)(2), added par. (2).

Subsec. (f)(3). Pub.L. 102-395, § 609(a)(1), redesignated former par. (2) as (3).

1991 Amendments

Subsec. (k). Pub.L. 102-25 reinstated subsec. (k), as originally enacted by Pub.L. 101-189, § 814(d)(2), and omitted in revision of section 207 by Pub.L. 101-194, § 101(a).

Subsec. (k)(1)(B). Pub.L. 102-190, § 3138(a)(1), redesignated former subsec. (k)(1)(B) as (k)(1)(B)(i).

Subsec. (k)(1)(B)(i). Pub.L. 102-190, § 3138(a)(1), redesignated former subsec. (k)(1)(B) as (k)(1)(B)(i).

Subsec. (k)(1)(B)(ii). Pub.L. 102-190, § 3138(a)(2), added cl. (ii).

1990 Amendments

Subsec. (a)(1). Pub.L. 101-280, § 2(a)(1)(A)-(E), inserted "(including any special Government employee)" following "who is an officer or employee", substituted "(except the United States or the District of Columbia)" for "(except the United States)", struck out "Government" following "United States" each place it appeared, struck out "and any special Government employee" following "any independent agency of the United States" and struck out "as the case may be," following "District of Columbia" each place it appeared.

Subsec. (a)(1)(A). Pub.L. 101-280, § 2(a)(1)(F), inserted "or the District of Columbia" following "United States".

Subsec. (a)(2). Pub.L. 101-280, § 2(a)(2)(A), (B), substituted "or the District of Columbia" for "Government" and "(except the United States or the District of Columbia)" for "(except the United States)".

Subsec. (a)(2)(A). Pub.L. 101-280, § 2(a)(2)(C), inserted "or the District of Columbia" following "United States".

Subsec. (a)(2)(B). Pub.L. 101-280, § 2(a)(2)(D), struck out "Government" following "United States".

Subsec. (a)(3). Pub.L. 101-280, § 2(a)(3), added par. (3).

Pub.L. 101-280, § 2(a)(4)(B), substituted "or any person who is a former officer or employee of the legislative branch or a former Member of Congress" for "and any person described in subsection (e)(7)".

Pub.L. 101-280, § 2(a)(4)(C), substituted "which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent" for "and which is so designated by the appropriate department or agency, shall not, on the basis of that information, which the person knew or should have known was so designated, knowingly represent".

Pub.L. 101-280, § 2(a)(4)(D), inserted "a period of" preceding "1 year".

Pub.L. 101-280, § 2(a)(4)(E), struck out "Government" preceding "[illegible]".

Subsec. (b)(1). Pub.L. 101-280, § 2(a)(4)(A), substituted "a former officer or employee of the executive branch of the United States (including any independent agency) and is" for "a former officer or employee".

Subsec. (c). Pub.L. 101-280, § 5(d), substituted "shall be subject to the penalties set forth in section 216 of this title" for "shall be fined not more than $10,000 or imprisoned for not more than two years, or both".

Subsec. (c)(1). Pub.L. 101-280, § 2(a)(5)(A), substituted "(including any special Government employee) of the executive branch of the United States" for "of the executive branch".

Subsec. (c)(2)(A)(i). Pub.L. 101-280, § 2(a)(5)(B)(i), inserted "specified in or" following "employed at a rate of pay" and struck out "or a comparable or greater rate of pay under other authority," following "chapter 53 of title 5".

Subsec. (c)(2)(A)(ii). Pub.L. 101-280, § 2(a)(5)(B)(ii), substituted "rate of basic" for "basic rate of" wherever appearing.

Pub.L. 101-509, § 108(b)(8)(A)(i), substituted provisions making restrictions applicable to employees for which basic rate of pay, excluding Title 5, § 5302 or comparable adjustments, is equal to or greater than the basic pay payable for level V of the Executive Schedule, for provisions making restrictions applicable to employees for which basic rate of pay is equal to or greater than the basic pay payable for GS-17 of the General Schedule.

Subsec. (c)(2)(C). Pub.L. 101-280, § 2(a)(5)(B)(iii), redesignated former subpar. (D) as (C). Former subpar. (C), which related to the inclusion of persons employed in the Senior Executive Service at the basic rate of pay of GS-17 or greater as persons to whom the restrictions of this subsection apply, was struck out.

Subsec. (c)(2)(D). Pub.L. 101-280, § 2(a)(5)(B)(iii), redesignated former subpar. (D) as (C).

Subsec. (d)(1)(B). Pub.L. 101-280, § 2(a)(6)(A), substituted "in the executive branch of the United States (including any independent agency)" for "paid".

Subsec. (d)(2). Pub.L. 101-280, § 2(a)(6)(B)(i), substituted "Persons who may not be contacted" for "Entities to which restrictions apply" in the par. caption.

Subsec. (d)(2)(B). Pub.L. 101-280, § 2(a)(6)(B)(ii), struck out "other" following "any".

Subsec. (e)(6). Pub.L. 101-280, § 2(a)(7)(A), substituted "rate of basic" for "basic rate of" wherever appearing.

Subsec. (e)(6)(A), (B). Pub.L. 101-509, § 101(b)(8)(A)(ii), designated existing text as subpar. (A) and, in subpar. (A) as so designated, substituted reference to amount 75% of the basic rate of pay payable for a Member of the employee's House of Congress, for reference to the basic rate of pay payable for GS-17 of the General Schedule under Title 5, § 5332, and struck out reference to par. (5) restrictions; and added subpar. (B).

Subsec. (e)(7)(L), (M). Pub.L. 101-280, § 2(a)(7)(B), inserted "on or" preceding "after the

Subsec. (f)(1). Pub.L. 101-280, § 2(a)(8)(A), substituted "such subsection" for "subsection (c), (d), or (e), as the case may be".

Subsec. (f)(1)(A). Pub.L. 101-280, § 2(a)(8)(B)(i), struck out "the interests of" following "represents".

Pub.L. 101-280, § 2(a)(8)(B)(ii), struck out "of the Government" following "department or agency".

Subsec. (f)(1)(B). Pub.L. 101-280, § 2(a)(8)(C), struck out "of the Government" preceding "of the United States."

Subsec. (i)(1). Pub.L. 101-280, § 2(a)(9), added par. (1). Former par. (1), which related to the definition of "intent to influence" as the intent to affect any official action by a government entity of the United States, including officers, employees and Members of Congress, was struck out.

Subsec. (j)(1). Pub.L. 101-280, § 2(a)(10)(A), substituted "this section" for "subsections (a), (c), (d), and (e)", "on behalf of" for "as an officer or employee of" and "or the District of Columbia" for "Government".

Subsec. (j)(3). Pub.L. 101-280, § 2(a)(10)(B), substituted "this section" for "subsections (c), (d), and (e) of this section" and "in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States" for "of which the United States is a member."

Subsec. (j)(4). Pub.L. 101-280, § 2(a)(10)(C)(i), substituted "Special" for "Personal matters and special" in the paragraph caption.

Pub.L. 101-280, § 2(a)(10)(C)(ii), struck out "apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibitions of those subsections" following "(c), (d), and (e) shall not".

Pub.L. 101-280, § 2(a)(10)(C)(iii), substituted "prevent an individual" for "prevent a former officer or employee".

Pub.L. 101-280, § 2(a)(10)(C)(iv), substituted "individual's" for "former officer's or employee's".

Pub.L. 101-280, § 2(a)(10)(C)(v), struck out ", other than that regularly provided for by law or regulation for witnesses" following "if no compensation is thereby received".

Subsec. (j)(5). Pub.L. 101-280, § 2(a)(10)(D), added "For the purposes of this paragraph, the term 'officer or employee' includes the Vice President." and substituted "and (d)" for "(d), and (e)".

Subsec. (j)(6). Pub.L. 101-280, § 2(a)(10)(E)(i), substituted provisions relating to an individual for provisions relating to former Members of Congress or officers or employees of the executive or legislative branches, or of independent agencies, including the Vice President and special Government employees.

Subsec. (j)(6)(A), (B). Pub.L. 101-280, § 2(a)(10)(E)(ii), redesignated existing provisions as subpar. (A), and as so redesignated, added provisions relating to independent agencies, and,

1989 Amendments

Catchline. Pub.L. 101-194 substituted "Restrictions on former officers, employees, and elected officials of the executive and legislative branches" for "Disqualification of former officers and employees; disqualification of partners of current officers and employees".

Subsec. (a). Pub.L. 101-194 substituted the provisions relating to restrictions on all officers and employees of the executive branch and certain other agencies for former provision which read:

"Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

"(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

"(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

"(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed;

shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Subsec. (b). Pub.L. 101-194 substituted the provisions relating to one-year restrictions on aiding or advising for former provision which read:

"Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

"(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

"(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controver-

other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

"(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee;

shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Subsec. (c). Pub.L. 101–194 substituted the provisions relating to one-year restrictions on certain senior personnel of the executive branch and independent agencies for former provision which read:

"Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

"(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

"(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

"(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Subsec. (d). Pub.L. 101–194 substituted the provisions relating to restrictions on very senior personnel of the executive branch and independent agencies for former provision which read:

"(1) Subsection (c) of this section shall apply to a person employed—

"(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority [covered in subsec. (c)(2)(A)(i) of this section];

"(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O–9 or above as described in section 201 of title 37, United States Code [covered in subsec. (c)(2)(A)(iv) of this section]; or

"(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions [illegible] within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O–7 or O–8, as described in section 201 of title 37, United States Code, may be designated [covered in subsec. (c)(2)(A)(ii), (C), (A)(iv) of this section]. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service [covered in subsec. (c)(2)(D)(ii) of this section]. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph [next to last and last sentence reenacted in subsec. (h)(1) of this section].

"(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

"(A) an elected official of a State or local government, or

"(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization [covered in subsec. (i)(1), (2) of this section]."

Subsec. (e). Pub.L. 101–194 added subsec. (e). Former subsec. (e) redesignated (h).

Subsec. (f). Pub.L. 101–194 added subsec. (f). Former subsec. (f) redesignated (j)(5).

Subsec. (g). Pub.L. 101–194 substituted provision relating to special rules for detailees for former provision relating to disqualification of partners of current officers and employees which read:

"Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both."

Subsec. (h). Pub.L. 101–194 redesignated subsec. (e) as (h); enacted subsec. and par. headings; in revising the provision substituted par. (1), first sentence, and par. (2) for provision which had read:

"For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau."; and reenacted as the second and third sentences of par. (1) such sentences previously set out as the fourth and fifth sentences of former subsec. (d)(1)(C) of this section. Former subsec. (h) redesignated subsec. (j)(6).

Subsec. (i). Pub.L. 101–194 added subsec. (i). Former subsec. (i) redesignated subsec. (j)(4).

Subsec. (j). Pub.L. 101–194 enacted heading "Exceptions" and struck out former provision which authorized the department or agency head to prohibit a former officer or employee violating subsec. (a), (b), or (c) of this section from making any appearances before the department or agency for not to exceed a five year period or to take other appropriate disciplinary action, subject to judicial review; and required departments and agencies, in consultation with the Director of the Office of Government Ethics, to establish procedures to carry out such provision.

Subsec. (j)(1). Pub.L. 101–194 enacted par. (1), consolidating the four subsec. (a) and (b) "(except the United States)", the subsec. (c) "other than the United States" and the subsec. (d)(2)(A) representation provisions respecting performance of official duties as an officer or employee of the United States Government or as an elected official of a State or local government.

Subsec. (j)(2). Pub.L. 101–194 enacted par. (2) which incorporated provisions of former subsec. (d)(2)(B) which provided that the prohibition of subsection (c) not apply to appearances, communications, or representation by a former officer or employee, whose principal occupation or employment is with an agency or instrumentality of a State or local government, an accredited degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

Subsec. (j)(3). Pub.L. 101–194 added par. (3).

Subsec. (j)(4). Pub.L. 101–194 redesignated subsec. (i) as par. (4); enacted par. heading "Personal matters and special knowledge"; and substituted "restrictions contained in subsections (c), (d), and (e)", "prohibitions of those subsections", and "if no compensation" for "prohibition contained in subsection (c)", "prohibition of that subsection", and "provided that no compensation", respectively.

Subsec. (j)(5). Pub.L. 101–194 redesignated subsec. (f) as par. (5); enacted par. heading "Exception for scientific or technological information"; and substituted "restrictions contained in subsections (a), (c), (d), and (e)" for "prohibitions of subsections (a), (b), and (c)" and ", if such communications are made under procedures" for "under procedures".

Subsec. (j)(6). Pub.L. 101–194 redesignated subsec. (h) as par. (6); enacted par. heading "Exception for testimony"; substituted "former Member of Congress or officer or employee of the executive or legislative branch or an independent agency (including the Vice President and any special Government employee)" for "former officer or employee"; and added provision respecting service as an expert witness pursuant to court order.

Subsec. (k). Pub.L. 101–189, § 814(d)(2), added subsec. (k).

1979 Amendment

Subsec. (b). Pub.L. 96–28, § 1, substituted "by personal presence at any formal or informal appearance" for "concerning any formal or informal appearance" in cl. (ii) of the provisions preceding par. (1), and, in par. (3), inserted "as to (i)," preceding "which was actually pending" and ", as to (ii)," preceding "in which he participated".

Subsec. (d). Pub.L. 96–28, § 2, designated existing provisions as par. (1), designated existing pars. (1) and (3) as subpars. (A) and (B) of par. (1) as so designated, and added subpar. (C) of par. (1) and par. (2), incorporated into the new par. and subpar. portions of former provisions relating to positions for which the basic rate of pay was equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of Title 5 and who had significant decision-making or supervisory responsibility, as designated by the Director of the Office of Government Ethics, in consultation with the head of the department or agency concerned, and provisions relating to the designation of positions by the Director of the Office of Government Ethics.

1978 Amendment

Pub.L. 95–521 expanded section to include provisions designed to more effectively deal with the problem of the disproportionate influence former officers and employees might have upon the government processes and decision-making in their previous departments or agencies when they return in the role of representatives or advocates of nongovernmental groups or interests before those same departments or agencies.

Effective Date of 1992 Amendments

Section 609(b) of Pub.L. 102-395 provided that: "This section [amending this section] shall not apply to the person serving as the United States Trade Representative at the date of enactment of this Act [Oct. 6, 1992]."

Effective Date of 1991 Amendment

Section 3138(b) of Pub.L. 102-190 provided that: "The amendments made by subsection (a) [amending subsec. (k)(1)(B) of this section] shall take effect on the date of the enactment of this Act [Dec. 5, 1991] and shall apply to persons granted waivers under section 207(k)(1) of title 18, United States Code [subsec. (k) of this section], on or after that date."

Section 705(a) of Pub.L. 102-25 provided in part that subsec. (k) [reinstatement of subsec. (k) added by Pub.L. 101-189, § 814(d)(2) and omitted in revision of section by Pub.L. 101-194, § 101(a)] be effective Jan. 1, 1991.

Effective Date of 1990 Amendments

Section 101(b)(8)(B) of Pub.L. 101-509 provided that: "The amendments made by subparagraph (A) [amending subsecs. (c)(2)(A)(ii) and (e)(6) of this section] take effect on January 1, 1991."

Amendment to this section (and enactment or amendment of any note hereunder) by the Federal Employees Pay Comparability Act of 1990, as incorporated in section 529 of Pub L. 101-509, to take effect on May 4, 1991, except that the Office of Personnel Management may establish an earlier effective date, but not earlier than Feb. 3, 1991, for any such provisions with respect to which the Office determines an earlier effective date to be appropriate, see Ex.Ord. No. 12748, Feb. 1, 1991, 56 F.R. 4521, set out as a note under section 5304 of Title 5, Government Organization and Employees.

Amendment by section 2(a) of Pub.L. 101-280 effective May 4, 1990, but to be executed to this section as this section had been amended in 1989 by section 101 of Pub.L. 101-194. Since the 1989 amendment by section 101 of Pub.L. 101-194 is effective Jan. 1, 1991, pursuant to section 102 of Pub L. 101-194, the amendments under section 2(a) of Pub.L. 101-280 will be effective Jan. 1, 1991.

Amendment by section 5(d) of Pub.L. 101-280 effective May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date of 1989 Amendment

Section 102 of Pub.L. 101-194, as amended Pub L. 101-280, § 2(b), May 4, 1990, 104 Stat. 152, provided that:

"(a) In general.—(1) Subject to paragraph (2) and to subsection (b), the amendments made by section 101 [amending this section] take effect on January 1, 1991.

"(2) Subject to subsection (b), the amendments made by section 101 [amending this section] take effect at noon on January 3, 1991, with respect to Members of Congress (within the meaning of section 207 of title 18, United States Code).

"(b) Effect on Employment.—(1) The amendments made by section 101 [amending this section] apply only to persons whose service as a Member of Congress, the Vice President, or an officer or employee to which such amendments apply terminates on or after the effective date of such amendments.

"(2) With respect to service as an officer or employee which terminates before the effective date set forth in subsection (a), section 207 of title 18, United States Code [this section] as in effect at the time of the termination of such service, shall continue to apply, on and after such effective date, with respect to such service."

Effective Date of 1978 Amendment

Section 503 of Pub.L. 95-521, which formerly provided that the amendments made by section 501 [amending this section] would become effective on July 1, 1979, was completely revised by Pub.L. 101-194, Title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1760, and is now set out as section 502 of Appendix 7 of title 5, Government Organization and Employees. See Codification note under this section.

Application to Individuals Who Left Government Service Prior to July 1, 1979

Section 502 of Pub.L. 95-521, which provided that the amendments made by section 501 [amending this section] shall not apply to those individuals who left Government service prior to the effective date of such amendments [July 1, 1979] or, in the case of individuals who occupied positions designated pursuant to section 207(d) of title 18, United States Code [subsec. (d) of this section] prior to the effective date of such designation; except that any such individual who returns to Government service on or after the effective date of such amendments or designation shall be thereafter covered by such amendments or designation, was completely revised by Pub.L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1760, and is now set out as Section 502 or Appendix 7 to Title 5, Government Organization and Employees. See Codification note under this section.

Legislative History

For legislative history and purpose of Pub.L. 95-521, see 1978 U.S. Code Cong. and Adm. News, p. 4216. See, also, Pub.L. 96-28, 1979 U.S. Code Cong. and Adm. News, p. 328; Pub.L. 101-189, 1989 U.S.Code Cong. and Adm.News, p. 838; Pub.L. 101-194, 1990 U.S. Code Cong. and Adm. News, p. 1225; Pub.L. 101-280, 1990 U.S. Code Cong. and Adm. News, p. 169; Pub.L. 102-25, 1991 U.S. Code Cong. and Adm. News, p. 36; Pub.L. 102-190, 1991 U.S. Code Cong. and Adm. News, p. 918.

CROSS REFERENCES

American Institute in Taiwan, employees in representing Institute to be exempt from this section, see section 3310(c) of Title 22, Foreign Relations and Intercourse.

Management and disposal of Government property, see section 471 et seq. of Title 40, Public Buildings, Property, and Works.

WEST'S FEDERAL PRACTICE MANUAL

Contract solicitation, see § 1529.

ADMINISTRATIVE LAW

Federal personnel practices, revolving door problem, see Koch § 2.49.

Professional responsibility in administrative practice, see Koch § 1.13.

CODE OF FEDERAL REGULATIONS

Agency for International Development, International Development Cooperation Agency, see 22 CFR 223.1 et seq.

Bureau of Alcohol, Tobacco and Firearms, practice by former government employees, see 31 CFR 8.37.

Civil Aeronautics Board, permanent disqualification of former Board members and employees in matters in which they personally participated, see 14 CFR 300.13 et seq.

Commodity Futures Trading Commission, regulations concerning conduct of members and employees and former members and employees, see 17 CFR 140.735-1 et seq.

Consumer Products Safety Commission, disciplinary action on postemployment conflict of interest of employees, see 16 CFR 1030.1201 et seq.

Department of Justice, disqualification of former employee and partners of current employees, see 28 CFR 45.735-7, 28 CFR 45.735-7a.

Department of State, postemployment conflict of interest of employees, see 22 CFR 18.1 et seq.

Interstate Commerce Commission, canons of conduct of employees, see 49 CFR 1000 et seq.

National Defense, Selective Service System, employees, postemployment conflict of interest, see 32 CFR 1690.1 et seq.

Nuclear Regulatory Commission, disqualification of former officers and employees in matters connected with former duties or responsibilities, see 10 CFR 0.735-26.

Office of the Secretary, Department of Housing and Urban Development, employees, standards of conduct, see 24 CFR 0.735-101 et seq.

Office of Secretary of Agriculture, regular employee and special government employee, conflict of interest, see 7 CFR 0.735-14.

Office of the Secretary of the Interior, employee responsibilities and conduct, see 43 CFR 20.735-1 et seq.

Office of the Secretary of Labor, conduct and ethics of employees, see 29 CFR 0.735-1 et seq.

Office of the Secretary of Labor, ethics and conduct of Department of Labor employees, see 29 CFR 0.735-1 et seq.

Office of the Secretary of the Treasury, administrative enforcement of postemployment conflict of interest, see 31 CFR 15.737-7 et seq.

Overseas Private Investment Corporation, postemployment restrictions, administrative enforcement of, see 22 CFR 710.1 et seq.

Pennsylvania Avenue Development Corp., conduct and responsibilities of employees, see 36 CFR 905.735-101 et seq.

Pension Benefit Guaranty Corporation, administrative enforcement of postemployment conflict of interest restrictions, see 29 CFR 2604.1 et seq.

Postemployment conflict of interest, regulations concerning, see 5 CFR 1304.4601 et seq.

United States Information Agency, postemployment restrictions, administrative enforcement procedures, see 22 CFR 525.1 et seq.

United States International Trade Commission, administrative enforcement of postemployment conflict of interest restrictions, see 19 CFR 200.735-124.

LAW REVIEW COMMENTARIES

Amendment of the post-government employment laws. Wendy L. Gerlach, 33 Ariz.L.Rev. 401 (1991).

America for sale: When well-connected former federal officials peddle their influence to the highest foreign bidder. Michael I. Spak, 78 Ky.L.J. 237 (1989-90).

Finally, government ethics as if people mattered: Some thoughts on the Ethics Reform Act of 1989. Eric J. Murdock, 58 Geo.Wash.L.Rev. 502 (1990).

The incompatibility of the practice of law and the practice of politics. Clyde D. McKee, Jr. (1985) 59 Conn.Bar J. 416.

NOTES OF DECISIONS

½. Constitutionality

This section does not violate U.S.C.A. Const. Amend. 5 because of vagueness, on ground that the employee must decide at his own risk whether

¾. Construction with other laws

Failure of this section to prescribe a penalty for the client, regardless of his degree of guilty knowledge or culpable intent, precludes punishment for the client rather than leaving punishment for client with guilty knowledge up to the operation

ipation is encompassed by the statutory words "or otherwise"; avoiding conflicts of interest is a traditional ethic of the legal profession and the standards are matters of common understanding and practice among attorneys; this section proscribed as precisely as possible an unethical practice that can manifest itself in infinite forms. U.S. v. Nasser, C.A.Ill.1973, 476 F.2d 1111.

1. Officers and employees within section

Appointment of former acting special counsel for the Department of Energy as special master, in petroleum marketer's action against refiner for selling gasoline allegedly at prices in excess of maximum allowable under mandatory petroleum allocation and price regulations, did not violate federal employee conflict of interest statute, which addressed problem of attempts by officers and employees to use knowledge and influence gained in government service to further private ends. Martin Oil Service, Inc. v. Koch Refining Co., N.D.Ill.1989, 718 F.Supp. 1334.

Attorney was "employee" of executive branch of United States government within meaning of Ethics in Government Act, where attorney was appointed to her position as bankruptcy analyst pursuant to statute providing that United States trustee may employ staff and other employees upon approval of Attorney General. In re Restaurant Development of Puerto Rico, Inc., Bkrtcy.D.Puerto Rico 1991, 128 B.R. 498.

Provisions of this section apply to federal and District of Columbia employees in government service and operate to prohibit only physical appearances before agency by the former employee and only participation in matters in which the former employee participated while in government service. Committee for Washington's Riverfront Parks v. Thompson, D.C.App.1982, 451 A.2d 1177.

Subsec. (c) of this section generally restricts certain kinds of contact between former senior government employees and their former agencies, but does not apply where former employee of Veterans Administration is awarded contract by Navy Department. 1983, 62 Op.Comp.Gen. 230.

This section applies of its own force to the General Accounting Office since such Office would appear to be an "independent agency of the United States", and is accordingly subject to the requirements of the interim regulations issued by the Office of Personnel Management. 1979 (Counsel-Inf.Op.) 3 Op.O.L.C. 433.

1a. Elements of offense

Regulation giving departments and agencies primary responsibility for administrative enforcement of postemployment restrictions found in Ethics in Government Act was not prosecution policy of Department of Justice, and, thus, fact that Department of Justice was allowed to initiate criminal enforcement in cases involving "aggravated circumstances" was not element of any offense. In re Nofziger, C.A.D.C.1992, 969 F.2d 1138.

In order to obtain conviction under Ethics in Government Act, Government had to prove that former government employee knew that his communication with his former agency about a matter that was either pending before the agency or of direct and substantial interest to it was unlawful. U.S. v. Nofziger, 1989, 878 F.2d 442, 278 U.S.App.D.C. 340, certiorari denied 110 S.Ct. 564, 493 U.S. 1003, 107 L.Ed.2d 559.

Agreement by client that former government employee, charged with violating this section, act as agent or attorney for client in a matter of the type specified in this section is impliedly required; however, it is immaterial whether the client had ee guilty of the offense. U.S. v. Nasser, C.A.Ill. 1973, 476 F.2d 1111.

2. Acting as attorney or agent

There was insufficient evidence that former Air Force reserve officer served as "agent" for private contractor at meeting with government officials after officer was employed by contractor, and thus evidence did not support conviction under statute which prohibits former officers of executive branch from acting as agents for any person before any department of United States in connection with contract in which former government employee participated personally and substantially while employed by Government; parties stipulated that officer attended meeting as employee of contractor, that he did not participate other than to discuss delivery schedules, and that contractor asked officer to attend meeting "in order to listen." U.S. v. Schaltenbrand, C.A.11 (Ga.) 1991, 930 F.2d 1554, rehearing denied 942 F.2d 798, certiorari denied 112 S.Ct. 640, 116 L.Ed.2d 658.

Act of defendant when, within one year of his retirement from employment with Internal Revenue Service, he attended meetings between IRS officer, to whom some of his cases had been transferred, and each of three taxpayers whose tax collection had been his personal responsibility immediately prior to his retirement fell within "otherwise represents" proscription of statute making it a crime when a federal employee, within two years of retirement, knowingly acts as agent or attorney for, or otherwise represents, any other person in any formal or informal affairs before any agency on any matter for which former employee had official responsibility. U.S. v. Coleman, C.A.3 (Del.) 1986, 805 F.2d 474.

Client could not be found guilty of conspiring with former Internal Revenue Service employee, who had agreed to act as attorney for client in regard to income tax matters in which he had substantially participated while a Service employee, nor former employee with client, solely by reason of their agreement, knowing and wilful, that former employee would act as attorney for client in forbidden matters. U.S. v. Nasser, C.A.Ill.1973, 476 F.2d 1111.

By personally delivering bidder's bids to industrial liaison office at Naval Sea Systems Command (NAVSEA), former employee of NAVSEA did not make "appearance" as representative of bidder before NAVSEA within meaning of Ethics in Government Act resulting in award to bidder being void ab initio, where former employee was acting as mere messenger, and not in professional capacity when he delivered proposals to NAVSEA. Robert E. Derecktor of Rhode Island, Inc. v. U.S., D.R.I.1991, 762 F.Supp. 1019.

A former United States attorney would not be permitted to appear as additional counsel for a defendant who was indicted after the attorney left office but as result of investigation occurring during term of office, even though attorney had recused himself from the particular investigation and had, at time of taking office, recused himself from participating in any matters involving such defendant who had been represented by firm in which attorney had been partner. U.S. v. Dorfman, D.C.Ill.1982, 542 F.Supp. 402.

ment was barred from participating in that litigation when he left the government's employment and joined a law firm which was representing certain plaintiffs in that action. In re Asbestos Cases, D.C.Va.1981, 514 F.Supp. 914.

Government attorney's participation in data collection, deregulation and international negotiations did not furnish grounds for disqualification to represent private parties in subsequent lawsuit, there being no showing of his participation of any "matter" within terms of D.C. Code of Prof. Resp., DR9-101(B). Laker Airways Ltd. v. Pan American World Airways, D.C.D.C.1984, 103 F.R.D. 22.

That a member of the law firm representing the developer and two consultants who assisted in preparation for the hearings on the proposed waterfront development were involved in the subject matter of the proceedings while they were government employees was insufficient to establish a conflict of interest which rendered the order of the mayor's agent with respect to the project unlawful where the task force agreement and guidelines in which the individuals participated, though reflected in the developer's first design, constituted a matter distinct from the design considered by the mayor's agent in the instant hearing. Committee for Washington's Riverfront Parks v. Thompson, D.C.App.1982, 451 A.2d 1177.

7. —— Tort claims

Attorney, who was former government employee and who sought advice under this section as to whether his proposed activities in private practice would present any unlawful conflicts of interest, was barred from bringing action under the Federal Tort Claims Act sections 1346(b) and 2671 et seq. of Title 28 against the government for failure to respond within time requested by attorney, thus allegedly delaying his employment at private firm with attendant loss of wages and benefits; such action fell within both the "contract interference" and "discretionary function" exceptions under section 2671 et seq. of Title 28. Shapiro v. U.S., D.C.Pa.1983, 566 F.Supp. 886.

7a. —— Patent claims

Where all correspondence from Patent Office in regards to reissue patent was written by a person other than plaintiff, who was a patent examiner prior to time he was hired by patentee, so that plaintiff was not patent official responsible for evaluating claims made by patentee, and plaintiff's signatures on letters mailed from Patent Office in regards to reissue patent were affixed to comply with internal policies of Patent Office and not to signify that he had personally evaluated patent application, violation of this section was not established, and was not a basis for patentee's premature discharge of plaintiff on grounds of misconduct. Beall v. Kearney & Trickel Corp., D.C.Md.1972, 350 F.Supp. 978.

9. Contracts—Generally

Contract modification and original contract were the same "contract" for purposes of application of conflict of interest statute to former army contracting officer now working for private firm where both concerned the same artillery shells and modification did little except add to the number to before leaving army. U.S. v. Medico Industries, Inc., C.A.7 (Ill.) 1986, 784 F.2d 840.

Under general rule that estoppel does not apply against the Government where the public fisc is threatened and Government is charged with less than affirmative misconduct, and where there was not asserted any worse conduct on the part of the Government than silent acquiescence in contracting officer's violation of conflict of interest statute, defenses of estoppel and unclean hands were unavailable to defeat Government's claim that contract modification was unenforceable. U.S. v. Medico Industries, Inc., D.C.Ill.1985, 609 F.Supp. 98.

Fact that project manager on competing bidder's proposal had retired three years earlier as director of supply at army depot which had invited bids did not raise any serious concern about conflict of interest, which would justify unsuccessful bidder's recovery of its bid preparation expenses on ground that government breached its duty to fairly and honestly consider its bid, where director retired before cost analysis, in-house bid, or statement of work for first contract was completed, and his role in review which led to invitation for bids was limited to action of general nature to ensure that others were moving promptly with their assignments. Space Age Engineering, Inc. v. U.S., 1984, 4 Cl.Ct. 739.

10. —— Annulment

That corporate officer who had served as contracting officer for the Army might have acted improperly in pursuing contractor's claim for adjustment did not necessarily dictate conclusion that his negotiation of contract modification also violated the federal conflict of interest statute, 18 U.S.C.A. § 207, but in view of circumstances, including fact that he negotiated such contracts with former subordinate, thus presenting further danger of undue influence, there was violation of such statute, and the contract modification was therefore unenforceable. U.S. v. Medico Industries, Inc., D.C.Ill.1985, 609 F.Supp. 98.

10a. —— Bidders' proposals

For this section to have barred former chief of information systems support group in antitrust division of Department of Justice from acting on behalf of successful bidder in formulating and presenting response to proposal to division, proposal had to have been the same "particular matter" in which former chief "participated personally and substantially" while he was chief of group. Caci, Inc.—Federal v. U.S., C.A.Fed.1983, 719 F.2d 1567.

Evidence which reasonably allowed conclusion that individual defendant, who had prepared affidavits stating that he had been told by federal employee that employee had job offer from successful bidder for Department of Health and Human Services contract, and which allowed conclusion that individual defendant knew that affidavit was to be attached to bid protest letter alleging that federal employee had violated Ethics in Government Act [18 U.S.C.A. § 207 et seq.], supported finding that communications were capable

11a. Official responsibility

Attorney was disqualified from acting as attorney for Chapter 11 trustee on ground of her previous employment as bankruptcy analyst by United States trustee, where attorney's position as bankruptcy analyst required her to review and analyze many aspects of Chapter 11 petitions and recommend courses of conduct to staff attorneys and assistant United States trustees based upon her conclusions and Chapter 11 case was filed before attorney left position with United States Trustee; Chapter 11 trustee might have violated Ethics in Government Act. In re Restaurant Development of Puerto Rico, Inc., Bkrtcy.D.Puerto Rico 1991, 128 B.R. 498.

A former Justice Department attorney is not prohibited by subsec. (b) of this section from appearing in a condemnation case even though it may have been under his "official responsibility" during the year preceding his resignation where his resignation became effective more than one year ago. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 10.

A former United States Attorney associated with a law firm representing a party in a case which was pending in the United States Attorney's Office at the time of his departure is personally barred by subsec. (b) of this section, for one year from the date he left, from appearing as agent or attorney in the case because it was under his "official responsibility" during his tenure, but this bar is not imputed to the partners and associates of his firm. However, his participation in the matter was not sufficiently substantial to give rise to the permanent bar in subsec. (a) of this section. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 1.

13. Evidence

By physically delivering bidder's proposal to Naval Sea Systems Command (NAVSEA), former employee of NAVSEA was communicating solely for purpose of furnishing technological information to Government and not to influence award of contract so as to require voiding of award, where employee's mission was to make absolutely certain that bidder's proposal was delivered to right place and at right time and employee followed NAVSEA procedures in delivering proposal to industrial liaison office. Robert E. Derecktor of Rhode Island, Inc. v. U.S., D.R.I.1991, 762 F.Supp. 1019.

16. Recusal

That consulting firm which was alter ego of chairman of Federal Trade Commission had received substantial amounts from automobile manufacturer for consulting services, that consent decree which was approved with vote of such chairman was favorable to the automobile manufacturer and that he refused to rule out a return to such consulting firm did not, in context, require recusal of the chairman from participation in so-called defects case against such manufacturer, wherein chairman participated in approval of consent decree. Center for Auto Safety v. F.T.C., D.C.D.C. 1984, 586 F.Supp. 1245.

17. Estoppel

Government was not estopped from asserting conflict of interest violation of former army procurement officer by failure of Commanding General of Army Armament Command to answer letter requesting opinion as to whether former procurement officer could represent supplier in seeking further modifications where opinion was sought after former officer had already represented firm in negotiations. U.S. v. Medico Industries, Inc., C.A.7 (Ill.) 1986, 784 F.2d 840.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general[1] partner, organization in which he is serving as officer, director, trustee, general[1] partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been

exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve Banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall—

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

(As amended Pub.L. 95-188, Title II, § 205, Nov. 16, 1977, 91 Stat. 1388; Pub.L. 101-194, Title IV, § 405, Nov. 30, 1989, 103 Stat. 1751; Pub.L. 95-188, Title II, § 205, Nov. 16, 1977, 91 Stat. 1388; Pub.L. 101-194, Title IV, § 405, Nov. 30, 1989, 103 Stat. 1751; Pub.L. 101-194, Title IV, § 405(1)(C), amended Pub.L. 101-280, § 5(e)(2), May 4, 1990, 104 Stat. 159; Pub.L. 101-280, § 5(e)(1), May 4, 1990, 104 Stat. 159.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Federal Advisory Committee Act, referred to in subsec. (b)(3), is Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix 2 to Title 5, Government Organization and Employees.

Sections 107 and 105 of the Ethics in Government Act of 1978, referred to in subsecs. (b)(3) and (d)(1), respectively, are sections 107 and 105 of Pub.L. 95-521, which are set out in Appendix 6 to Title 5, Government Organization and Employees.

The Alaska Native Claims Settlement Act, referred to in subsec. (b)(4)(A), is Pub.L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (section 1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43, and Tables.

Codification

Amendment by Pub.L. 101—194, SF405(1)(c), striking "partner" and inserting "general partner" has been executed to subsec. (a) in two places in view of absence of specific Congressional directory language with respect to placement of text.

1990 Amendment

Subsec. (a). Pub.L. 101-280, § 5(e)(2), as amending Pub.L. 101-194, § 405(1)(C), inserted "general" preceding "partner" wherever appearing.

Subsec. (b)(2). Pub.L. 101-280, § 5(e)(1)(A), substituted "subsection (a)" for "paragraph (1)".

Subsec. (b)(3). Pub.L. 101-280, § 5(e)(1)(B), struck out "section 107 of" following "individual pursuant to".

Subsec. (d)(1). Pub.L. 101-280, § 5(e)(1)(C), substituted provisions making any agency determination granting an exemption pursuant to subsection (b)(1) or (b)(3) of this section available upon request and pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978 and authorizing the withholding from public disclosure any information contained in the determination that would be exempt from disclosure under 5 U.S.C. section 552 for provisions requiring that a copy of all agency determinations granting exemption pursuant to subsection (b)(1) or (b)(3) of this section be made available to the Director, who made all determinations received available to the public pursuant to section 105 of the Ethics in Government Act of 1978.

1989 Amendment

Subsec. (a). Pub.L. 101-194, § 405(1)(C), as amended by Pub.L. 101-280, § 5(e)(2), inserted "general" preceding "partner" wherever appearing.

Pub.L. 101-194, § 405(1)(A) to (D), substituted: "or of any independent agency" for "of any independent agency"; "an officer or employee of the District of Columbia" for "of the District of Columbia"; "general partner" for "partner"; and "Shall be subject to the penalties set forth in section 216 of this title" for "Shall be fined not more than $10,000 or imprisoned not more than

Subsec. (b). Pub.L. 101-194, § 405(2), struck out second sentence of former subsec. (b) reading "In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.", now covered in subsec. (c)(1) of this section.

Subsec. (b)(1). Pub.L. 101-194, § 405(2), designated existing cl. (1) as par. (1) and substituted "Subsection (a)" for "Subsection (a) hereof", "his or her position" for "his position", and a semicolon for a comma.

Subsec. (b)(2). Pub.L. 101-194, § 405(2), designated existing cl. (2) as par. (2); substituted "regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published" for "general rule or regulation published", "paragraph (1)" for "clause (1) hereof", and "integrity of the services which the Government may expect from such officer or employee;" for "integrity of Government officers' or employees' services.".

Subsec. (b)(3), (4). Pub.L. 101-194, § 405(2), added pars. (3) and (4).

Subsec. (c)(1). Pub.L. 101-194, § 405(2), which struck second sentence of former subsec. (b), redesignated the provision as par. (1), substituting "For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve Banks" for "In the case of class A and B directors of Federal Reserve Banks".

Subsec. (c)(2). Pub.L. 101-194, § 405(2), added par. (2).

Subsec. (d). Pub.L. 101-194, § 405(2), added subsec. (d).

1977 Amendment

Subsec. (a). Pub.L. 95-188, § 205(a), extended the conflicts of interest prohibition to a Federal Reserve bank director, officer, or employee.

Subsec. (b). Pub.L. 95-188, § 205(b), added sentence "In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."

Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date

"Particular Matter" Defined. Pub.L. 100-446, Title III, § 319, Sept. 27, 1988, 102 Stat. 1826, which provided that: notwithstanding any other provision of law, for the purposes of this section the term "particular matter", as applied to employees of the Department of the Interior and the Indian Health Service, would mean "particular matter involving specific parties", was repealed by Pub.L. 101-194, Title V, § 505(b), Nov. 30, 1989, 103 Stat. 1756, as amended Pub.L. 101-280, § 6(c), May 4, 1990, 104 Stat. 160. Similar provisions had previously appeared in Pub.L. 100-202, § 101(g) [Title III, § 318], Dec. 22,

Legislative History

For legislative history and purpose of Pub.L. 95-188, see 1977 U.S. Code Cong. and Adm. News, p. 3636. See, also, Pub.L. 101-194, 1989 U.S.Code Cong. and Adm. News, p. 1225; Pub.L. 101-280, 1990 U.S.Code Cong. and Adm.News, p. 169.

CROSS REFERENCES

Advisory Commission on Conferences in Ocean Shipping, members appointed from private sector not subject to this section, see section 1717(e)(3) of Title 46 Appendix, Shipping.

WEST'S FEDERAL PRACTICE MANUAL

Contract solicitation, see § 1529.

ADMINISTRATIVE LAW

Professional responsibility in administrative practice, see Koch § 1.13.

CODE OF FEDERAL REGULATIONS

Department of Justice, employees, disqualification arising from private financial interests, see 28 CFR 45.735-5.

Federal Reserve System, reserve bank directors, actions and responsibilities, 12 CFR 264a.1 et seq.

Federal Trade Commission—

Criminal sanction for conflict of interest, see 16 CFR 5.14.

Exemption of insubstantial financial conflicts, see 16 CFR 5.8.

Office of the Secretary of Commerce, employees, conflict of financial interest, see 15 CFR 0.735-13.

Tennessee Valley Authority, employees, disclosure of financial interests of, see 18 CFR 1301.4.

U.S. Arms Control and Disarmament Agency, employees, financial interests of, see 22 CFR 606.735-1 et seq.

LAW REVIEW COMMENTARIES

Deferred taxation of gains realized upon divestiture of property to avoid conflicts of interest: A proposal. Stuart A. Smith, 36 Fed.B.News & J. 126 (March/April 1989).

Finally, government ethics as if people mattered: Some thoughts on the Ethics Reform Act of 1989. Eric J. Murdock, 58 Geo.Wash.L.Rev. 502 (1990).

Will the Ethics Reform Act change the way the government conducts business in the 1990's? 37 Fed.B.News & J. 414 (1990).

NOTES OF DECISIONS

½. Constitutionality

It was not necessary to require pleading of "specific acts of negotiating" or "specific bilateral arrangements or acts of arranging" in order to save this section from vagueness, as terms "negotiating" and "arrangement" were not exotic or abstruse words, requiring detailed etymological study or judicial analysis, but, rather, were common words of universal usage, so that people of ordinary intelligence would have fair notice of conduct proscribed by this section, and fact that there may be marginal cases was not sufficient reason to hold that this section was too ambiguous to define criminal offense. U.S. v. Conlon, 1980, 628 F.2d 150, 202 U.S.App.D.C. 150.

1a. Construction with other laws

Enactment of Civil Service Reform Act, which problem of nepotism in federal employment, would not be considered to preclude application of federal criminal statute prohibiting conflicts of interest to internal agency nepotism on theory civil penalties were intended to be exclusive remedy for personnel practices prohibited by CSRA and criminal statute was impliedly repealed as it applied to internal agency nepotism. U.S. v. Lund, C.A.4 (Va.) 1988, 853 F.2d 242.

2. Purpose

In enacting the general reform of the federal bribery, graft and conflict of interest laws, Congress plainly intended that prohibiting participation by government employees in decisions affecting organizations with whom the employees were negotiating or had arrangements concerning prospective employment would expand the reach of this section; however, since it was evident that Congress was concerned with permitting qualified persons to move between the public and private sectors and with facilitating government's recruitment and retention of talented personnel, to penalize by criminal prosecution indefinite and inchoate links to outside firms such as unsolicited offers of future employment or even unilateral hopes and plans would defeat the congressional purpose. U.S. v. Conlon, D.C.D.C.1979, 481 F.Supp. 654.

Purpose of this section prohibiting a government employee from having any present or prospective financial interest in government decisions in which he participates is to insure honesty in the government's business dealings by preventing fed-

the government from advancing their own interests at expense of public welfare. Exchange Nat. Bank of Chicago v. Abramson, D.C.Minn.1969, 295 F.Supp. 87, appeal dismissed 407 F.2d 865.

3. Officers and employees within section

The Secretary of the Department of Transportation was not required to recuse himself from an airline fitness investigation involving a client of a law firm which was the Secretary's potential employer, where the firm did not represent the client in the matter at issue, but did represent the client in other matters pending before the Department. Air Line Pilots Ass'n, Intern. v. U.S. Dept. of Transp., 1990, 899 F.2d 1230, 283 U.S.App.D.C. 245.

This section had no application to chairman of the Federal Trade Commission who had no present interest in motor vehicle manufacturer which was party to proceeding, request for recusal arising out of his previous relationship with economic consulting firm whose largest client was such automobile manufacturer. Center for Auto Safety v. F.T.C., D.C.D.C.1984, 586 F.Supp. 1245.

Plaintiff bank, which claimed that receiver violated this section in serving both as an employee of the Justice Department and as a state court-appointed receiver, was not within class designed to be protected by this chapter. Exchange Nat. Bank of Chicago v. Abramson, D.C.Minn.1969, 295 F.Supp. 87, appeal dismissed 407 F.2d 865.

The staff director for the American members of the U.S.-Japan Consultative group on Economic Relations should be considered an "officer" or "employee" of the United States to whom the conflict of interest restrictions imposed on such persons apply. 1979 (Counsel-Inf.Op.) 3 Op. O.L.C. 321.

3a. Offenses within section

Former employee of Army Corps of Engineers, who provided contractor with significant assistance in connection with the letting and performance of certain contracts in return for percentage of profits, violated this section. K & R Engineering Co., Inc. v. U.S., 1980, 616 F.2d 469, 222 Ct.Cl. 340.

A government attorney owning a corporation involved in a quiet title action with the United States government and having a financial interest in the action is not involved in any real or apparent conflict of interest with his duties and responsibilities where he does not intend to participate in the litigation on behalf of the United States or to act as agent or attorney on behalf of the corporation and the action is not being handled by his departmental section. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 7.

4. Standard of conduct

Statute that prohibits federal employee from taking government action while having conflicting financial interest creates strict liability offense; general intent or scienter does not have to be shown in order to establish violation of the statute. U.S. v. Hedges, C.A.11 (Ala.) 1990, 912 F.2d 1397.

Assuming, arguendo, that bank, which claimed that state court-appointed receiver had violated this section by serving both as a federal employee

in civil suit wherein receiver sought recovery of $10,500,000 from the bank for alleged fraudulent and conspiratorial conduct, record failed to show that conduct of the receiver, in working for the Justice Department as a fact witness and technical advisor for 90 days in connection with a criminal prosecution against number of defendants growing out of activities of insolvent insurance company with which the bank had had dealings, violated either the letter or spirit of the conflict of interest statute. Exchange Nat. Bank of Chicago v. Abramson, D.C.Minn.1969, 295 F.Supp. 87, appeal dismissed 407 F.2d 865.

5. Knowledge and approval of superiors

Defendant's acts of causing delivery of equipment to be made pursuant to contract and of receiving payment of monies under the contract for such equipment constituted participation in the contract, for purposes of this section proscribing participation through "decision, approval, disapproval, recommendation, the rendering of advice, or otherwise" in contracts involving conflict of interest. U.S. v. Irons, C.A.Ill.1981, 640 F.2d 872.

7. Negotiation and execution of contracts

Actions of Air Force reserve officer and private contractor constituted "negotiations" for purposes of statute that prohibits federal employee from participating in matter in which he or organization with whom he is negotiating concerning prospective employment has financial interests; officer approached contractor about possibility of employment and submitted application, contractor told officer during interviews that they needed someone who spoke Spanish, officer replied that he would learn to speak Spanish, and some months later officer received exact position he had discussed at interview. U.S. v. Schaltenbrand, C.A.11 (Ga.) 1991, 930 F.2d 1554, rehearing denied 942 F.2d 798, certiorari denied 112 S.Ct. 640, 116 L.Ed.2d 658.

In order to save this section from constitutionally impermissible vagueness, it was necessary to construe term "negotiating", as requiring allegations of specific acts of negotiating by the defendant in concert with a prospective employer. U.S. v. Conlon, D.C.D.C.1979, 481 F.Supp. 654.

7a. —— Evaluation of bids

Evidence that two of Department of Justice officials involved in evaluation of successful bidder's bid on contract with information systems support group of Department's antitrust division had discussions with former chief of group, who was vice-president of successful bidder, about possible employment with successful bidder did not establish violation of this section. Caci, Inc.—Federal v. U.S., C.A.Fed.1983, 719 F.2d 1567.

8. Validity and enforcement of contracts

Plaintiff contractor, which was involved in an arrangement prohibited by this section could not enforce contract against Government nor recover under quantum meruit theory. K & R Engineering Co., Inc. v. U.S., 1980, 616 F.2d 469, 222 Ct.Cl. 340.

11. Accounting and restitution

were procured as consequence of contractor's participation in an arrangement prohibited by this section. K & R Engineering Co., Inc. v. U.S., 1980, 616 F.2d 469, 222 Ct.Cl. 340.

14. Instructions

Refusing requested instruction on entrapment by estoppel defense and giving charge that any advice given by standards of conduct officer to defendant was not defense to offense charged was reversible error in prosecution for taking government action while having conflicting financial interest; defendant, who was air force officer, claimed that he complied with applicable regulations, followed advice of the standards of conduct officer, and generally exercised extreme care to avoid breaking the law. U.S. v. Hedges, C.A.11 (Ala.) 1990, 912 F.2d 1397.

15. Exemptions

The scope of the prohibition of this section against federal employees' connections with outside interests related to employment should be read in pari materia with similar prohibitions of outside financial interests and this section which prohibits a government employee from participating substantially in a manner in which he has any "financial interest" makes clear that insubstantial interests are to be exempted. U.S. v. Conlon, D.C.D.C.1979, 481 F.Supp. 654.

16. Indictment

Indictment charging federal employee with 13 counts of having personal interest in government contract was multiplicious; employee could be indicted for only one conflict of interest in connection with signature of authorizations of payment, which were written under single contract. U.S. v. Jewell, C.A.9 (Nev.) 1987, 827 F.2d 586.

In absence of any allegation of specific facts showing the existence of a bilateral agreement or ongoing events of negotiating, indictment charging defendant, a former federal employee, with violating this section by participating as a government officer in a proposal by a corporation while he was "negotiating and had an arrangement concerning prospective employment" with the corporation failed to state an offense. U.S. v. Conlon, D.C.D.C.1979, 481 F.Supp. 654.

17. Employment arrangements

Statute that prohibits federal employee from taking government action while having conflicting financial interest was not vague as applied to air force officer who participated in negotiations for employment before his terminal leave commenced. U.S. v. Hedges, C.A.11 (Ala.) 1990, 912 F.2d 1397.

Involvement by regional administrator of Small Business Administration in affairs of defense contractor after being promised position at law firm for which defense contractor would partially pay salary violated conflict-of-interest statute, which prohibits public official from participating in matter in which prospective employer has financial interest. U.S. v. Biaggi, C.A.2 (N.Y.) 1990, 909 F.2d 662, certiorari denied 111 S.Ct. 1102, 113

Evidence established that defendant, who was employed as assistant United States attorney, entered into employment negotiations with third party who had cognizable financial interest in outcome of criminal investigation conducted by defendant, for purposes of federal conflict of interest statute; third party had ten percent contingent fee arrangement with bankrupt's creditors, and defendant was conducting criminal investigation against banks accused of cooperating with criminal bankrupt. U.S. v. Gorman, C.A.6 (Ohio) 1986, 807 F.2d 1299, certiorari denied 108 S.Ct. 68, 98 L.Ed.2d 32.

In order to save this section from being impermissibly vague, it was necessary to construe term "arrangement", as requiring allegations of specific bilateral arrangements or acts of arranging. U.S. v. Conlon, D.C.D.C.1979, 481 F.Supp. 654.

There is no statute or administrative regulation that precludes an officer or employee of the Department of Justice who came to it after departing another place of employment, including a law firm in which he was a partner, from returning to that place of employment pursuant to a pre-departure agreement to do so. 1979 (Counsel-Inf.Op.) 3 Op.O.L.C. 278.

18. Prosecutors

It is improper for a prosecutor to participate in a case when he has a pecuniary interest in the outcome. U.S. v. Heldt, 1981, 668 F.2d 1238, 215 U.S.App.D.C. 206, certiorari denied 102 S.Ct. 1971.

19. Independent agency

Production credit association was not an "independent agency" of the United States for purposes of federal criminal conflicts of interest statute, 18 U.S.C.A. § 208, which imposes penalties on certain classes of government employees if they participate in government decision in which they have present or prospective financial interest. U.S. v. Haynes, D.C.Tenn.1985, 620 F.Supp. 474.

20. Other particular matters

Participation in deliberations of advisory committees in the Food and Drug Administration concerning a class of related products or an ingredient common to many products involves participation in a "particular matter" within the meaning of subsec. (a) of this section. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 151.

21. Independent contractor

One who in fact will serve as a government employee may not be hired as an independent contractor to avoid the application of the conflict of interest laws. 1980 (Counsel-Inf.Op.) 4B Op. O.L.C. 441.

22. Ex officio trustee

The Attorney General, as an ex officio trustee of the National Trust for Historic Preservation, does not serve as an officer, director, or trustee within the meaning of this section. 1982 (Coun-

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

REP. JAMES C. GREENWOOD, et al., Plaintiffs,	
v.	Civil Action No. 92-CV-5331
JOHN H. DALTON, Secretary of the Navy, et al., Defendants.	

STIPULATION AND ORDER

By their undersigned counsel, plaintiffs and defendants hereby stipulate that plaintiffs' oppositions to defendants' partial motion to dismiss and motion for a partial stay of proceedings and that defendants' opposition to plaintiffs' motion for summary judgment shall be due on or before August 27, 1993. The parties further stipulate that any reply memoranda shall be due on or before September 10, 1993.

David J. Anderson
Vincent M. Garvey
Jeffrey S. Gutman
Attorneys for Defendants

Peter S. Greenberg
Nicole Reimann
Attorneys for Plaintiffs

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Dated: August 2, 1993

8/3/93

Document Separator

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1700 North Moore Street
Arlington, Virginia 22209

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Assistant Counsel

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CONTENTS: Force Structure Plan

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Chapter 2

Force Structure Plan

Background

Public Law 101-510 requires the Secretary of Defense to submit to the Congress and to the Commission a force structure plan for fiscal years 1994 through 1999. The Secretary submitted the plan to Congress and to the Commission on March 12, 1993.

The force structure plan which follows incorporates an assessment by the Secretary of the probable threats to the national security during the fiscal year 1994 through 1999 period, and takes into account the anticipated levels of funding for this period. The plan comprises three sections:

- The military threat assessment,
- The need for overseas basing, and
- The force structure, including the implementation plan.

The force structure plan is classified SECRET. What follows is the UNCLASSIFIED version of the plan.

Section I: Military Threat Assessment

The vital interests of the United States will be threatened by regional crises between historic antagonists, such as North and South Korea, India and Pakistan, and the Middle East/Persian Gulf states. Also, the collapse of political order as a result of ethnic enmities in areas such as Somalia and the former Yugoslavia will prompt international efforts to contain violence, halt the loss of life and the destruction of property, and re-establish civil society. The future world military situation will be characterized by regional actors with modern destructive weaponry, including chemical and biological weapons, modern ballistic missiles, and, in some cases, nuclear weapons. The acceleration of regional strife caused by frustrated ethnic and nationalistic aspirations will increase the pressure on the United States to contribute military forces to international peacekeeping/enforcement and humanitarian relief efforts.

The United States faces three types of conflict in the coming years: deliberate attacks on U.S. allies or vital interests; the escalation of regional conflicts that eventually threaten U.S. allies or vital interests; and conflicts that do not directly threaten vital interests, but whose costs in lives of innocents demand an international response in which the United States will play a leading role.

Across the Atlantic

The Balkans and parts of the former Soviet Union will be a source of major crises in the coming years, as political-ethnic-religious antagonism weaken fragile post-Cold War institutions. These countries may resort to arms to protect narrow political-ethnic interests or maximize their power vis-a-vis their rivals. The presence of vast stores of conventional weapons and ammunition greatly increases the potential for these local conflicts to spread. Meanwhile, European NATO allies will continue to grapple with shaping an evolving regional security framework capable of crisis management and conflict prevention, as well as responding to out-of-area contingencies. These countries will develop closer relations with the central East European countries of Poland, the Czech and Slovak Republics, and Hungary, but they will be reluctant to admit the republics of the former Soviet Union into a formal collective defense arrangement. Attempts by these former Soviet republics to transform into democratic states with market economies and stable national boundaries may prove too difficult or too costly and could result in a reassertion of authoritarianism, economic collapse, and civil war. Unsettled civil-military relations, unstable relations between Russia and Ukraine, and retention of significant numbers of nuclear weapons even after the implementation of START II, the continuation of other strategic programs, and relatively indiscriminate arms sales will remain troubling aspects of the Commonwealth of Independent States.

In the Middle East, competition for political influence and natural resources (i.e., water and oil), along with weak economies, Islamic fundamentalism, and demographic pressures will contribute to deteriorating living standards and encourage social unrest. The requirement for the United States to maintain a major role in Persian Gulf security arrangements will not diminish for the foreseeable future.

The major threat of military aggression or subversion in the Persian Gulf region may well emanate from Iran. Iran will find its principal leverage in subversion and propaganda, and in threats and military posturing below the threshold that would precipitate U.S. intervention.

Iraq will continue to be a major concern for the region and the world. By the turn of the century, Iraq could pose a renewed regional threat depending on what sanctions remain in place and what success Iraq has in circumventing them. Iraq continues to constitute a residual threat to some Gulf states, particularly Kuwait. Its military capabilities to threaten other Gulf Arab states will grow. These states will nevertheless continue to depend largely on the U.S. deterrent to forestall a renewed Iraqi drive for regional dominance.

A prolonged stalemate in the Middle East peace process may lead to further violence and threats to U.S. allies and interests, perhaps accelerating the popularity of anti-Western and Islamic radical movements.

Across the Pacific

The security environment in most of Asia risks becoming unstable as nations reorient their defense policies to adapt to the end of the Cold War, the collapse of the Soviet empire, the breakup of the former Soviet Union, and the lessons of the Persian Gulf War. Political and economic pressures upon Communist or authoritarian regimes may lead to greater instability and violence. Virtually every nation will base its strategic calculations on the premise of a declining U.S. military presence. The lesser nations of Asia will become increasingly concerned about security in areas characterized by national rivalries.

Our most active regional security concern in Asia remains the military threat posed by North Korea to our treaty ally, the Republic of Korea. Our concerns are intensified by North Korea's efforts to develop weapons of mass destruction and delivery systems.

China's military modernization efforts of the last two decades will produce a smaller but more capable military with modern combat aircraft, including the Su-27/FLANKER. China will also have aerial refueling and airborne warning and control aircraft before the end of the decade. The Chinese Navy will have significantly improved air defense missile capabilities, antiship missiles, long-range cruise missiles (120 km range), and a new submarine-launched cruise missile. By the end of the decade China also will have improved its strategic nuclear forces.

Japan's major security concerns will focus primarily on the potential emergence of a reunified Korea armed with nuclear weapons, on the expanding Chinese naval threat, and on the possibility of a nationalistic Russia.

In South Asia, the principal threat to U.S. security will remain the potential of renewed conflict between India and Pakistan. While the conventional capabilities of both countries probably will be eroded by severe budget pressures, internal security obligations, and the loss of Superpower benefactors, India and Pakistan will still have nuclear-capable ballistic missiles.

The Rest of the World

This broad characterization covers regions not addressed above and is not intended to either diminish or denigrate the importance of U.S. interests, friends, and allies in areas beyond Europe and the Pacific.

In Latin America, democratic foundations remain unstable and the democratization process will remain vulnerable to a wide variety of influences and factors that could easily derail it. Virtually every country in the region will be victimized by drug-associated violence and crime. Over the next few years, the capabilities of almost all of the militaries in the region will remain static or decline despite planned or ongoing measures to upgrade or modernize existing inventories or restructure. A single exception may be Chile, which may see some force structure improvements through the mid-1990s.

In Africa, chronic instability, insurgency, and civil war will continue throughout the continent. Two major kinds of security issues will dominate U.S. relations with the region: noncombatant evacuation and conflict resolution. Operations most likely to draw the U.S. military into the continent include disaster relief, humanitarian assistance, international peacekeeping, and logistic support for allied military operations. Further, conflict resolution efforts will test the growing reputation of the United States for negotiation and mediation.

Direct threats to U.S. allies or vital interests that would require a significant military response in the near future are those posed by North Korea, Iran, and Iraq. More numerous, however, are those regional conflicts that would quickly escalate to threaten vital U.S. interests in Southeastern Europe, Asia, the Middle East, Africa, and Latin America. These conflicts would not require military responses on the order of DESERT STORM, but they would pose unique demands on the ability of U.S. Armed Forces to maintain stability and provide the environment for political solutions. Finally, there will be a large number of contingencies in which the sheer magnitude of human suffering and moral outrage demands a U.S. response, probably in concert with the United Nations. The current number of international crises is unlikely to diminish before the end of this decade, as many regions of the world continue to suffer the ravages of failed economic programs and nationalistic violence.

Section II: Justification for Overseas Basing

As we reduce forward-presence forces globally, we nevertheless will continue to emphasize the fundamental roles of forward-presence forces essential to deterring aggression, fostering alliance relationships, bolstering regional stability, and protecting U.S. interests abroad. Forward-presence activities such as forward basing, rotational and periodic deployments, exercises and port visits, military-to-military contacts, security assistance, combatting terrorism, combatting narcotrafficking, and protecting American citizens in crisis areas will remain central to our stability and U.S. influence will be promoted through emerging forward-presence operations. These include roles for the military in the war on drugs and in providing humanitarian assistance.

Over the past 45 years, the day-to-day presence of U.S. forces in regions vital to U.S. national interest has been key to averting crises and preventing war. Our forces throughout the world show our commitment, lend credibility to our alliances, enhance regional stability, and provide crisis-response capability while promoting U.S. influence and access. Although the numbers of U.S. forces stationed overseas will be reduced, the credibility of our capability and intent to respond to crisis will continue to depend on judicious forward presence. Forward presence is also vital to the maintenance of the system of collective defense by which the United States works with its friends and allies to protect our security interests, while reducing the burdens of defense spending and unnecessary arms competition.

Atlantic Forces

U.S. interests in the Atlantic Regions, including Europe, the Mediterranean, the Middle East, Africa and Southwest Asia, require continuing commitment. There will be forces, forward stationed and rotational, with the capability for rapid reinforcement from within the Atlantic region and from the United States and the means to support deployment of larger forces when needed.

The end of the Cold War has significantly reduced the requirement to station U.S. forces in Europe. Yet, the security of the United States remains linked to that of Europe, and our continued support of the Atlantic Alliance is crucial. Our stake in long-term European security and stability, as well as enduring economic, cultural, and geopolitical interests require a continued commitment of U.S. military strength.

Our forward presence forces in Europe must be sized, designed, and postured to preserve an active and influential role in the Atlantic Alliance and in the future security framework on the continent. The remaining force of 1 Army Corps with 2 divisions and 3(+) Air Force Fighter Wing Equivalents (FWE) is a direct response to the

uncertainty and instability that remains in this region. In addition, maritime forces committed to Europe will be one Carrier Battle Group (CVBG) and one Amphibious Ready Group (ARG/MEU(SOC)). These forward-deployed forces provide an explicit commitment to the security and stability of Europe, and pre-positioned equipment provides an infrastructure for CONUS-based forces should the need arise in Europe or elsewhere.

The U.S. response to the Iraqi invasion of Kuwait was built on the foundation of previous U.S. presence in the region. Air, ground, and maritime deployments, coupled with pre-position, combined exercises, security assistance, and infrastructure, as well as European and regional enroute strategic airlift infrastructure, enhanced the crisis-response force buildup. Future presence in Southwest Asia will be defined by ongoing bilateral negotiations with the governments of the Gulf Cooperative Council. Our commitment will be reinforced by pre-positioned equipment, access agreements, bilateral planning, periodic deployments and exercises, visits by senior officials and security assistance.

Pacific Forces

U.S. interests in the Pacific, including Southeast Asia and the Indian Ocean, require a continuing commitment. Because the forces of potential adversaries in the Pacific are different than the Atlantic, and due to the maritime character of the area, U.S. military forces in this vast region of major importance differ from those in the Atlantic arena. As Asia continues its economic and political development, U.S. forward presence will continue to serve as a stabilizing influence and a restraint to potential regional aggression and rearmament.

Forward presence forces will be principally maritime, with half of the projected carrier and amphibious force oriented toward this area including one CVBG, ARG, and Marine Expeditionary Force forward-based in this region. The improving military capability of South Korea has enabled our Army forces to be trimmed to less than a division. One Air Force FWE in South Korea and 1(+) FWE in Japan are to be forward-based in this region. In addition, presence in both Alaska and Hawaii will be maintained.

Elsewhere in the World

In the less-predictable yet increasingly important other regions of the globe, the United States seeks to preserve its access to foreign markets and resources, mediate the traumas of economic and social strife, deter regional aggressors, and promote the regional stability necessary for progress and prosperity. From Latin America to sub-

Saharan Africa to the far-flung islands of the world's oceans, American military men and women contribute daily to the unsung tasks of nation-building, security assistance, and quiet diplomacy that protect and extend our political goodwill and access to foreign markets. Such access becomes increasingly critical in an era of reduced forward presence, when forces deploying from the United States are more than ever dependent on enroute and host-nation support to ensure timely response to distant crises. In the future, maintaining forward presence through combined planning and exercises, pre-positioning and service agreements, and combined warfighting doctrine and interoperability could spell the difference between success or failure in defending vital regional interests.

Contingency Forces

The U.S strategy for the come-as-you-are arena of spontaneous, often unpredictable crises requires fully trained, highly ready forces that are rapidly deliverable and initially self-sufficient. Therefore, such forces must be drawn primarily from the active force structure and tailored into highly effective joint task forces that capitalize on the unique capabilities of each Service and the special operations forces. In this regard, the CINC must have the opportunity to select from a broad spectrum of capabilities such as: airborne, air assault, light infantry, and rapidly deliverable heavy forces from the Army; the entire range of fighter, fighter-bomber, and long range conventional bomber forces provided by the Air Force; carrier-based naval air power, the striking capability of surface combatants, and the covert capabilities of attack submarines from the Navy; the amphibious combat power of the Marine Corps, particularly when access ashore is contested, which includes on-station MEU(SOC) and Maritime Pre-positioning Ships; and the unique capabilities of the special operations forces. Additionally, certain reserve units must be maintained at high readiness to assist and augment responding active units. Reserve forces perform much of the lift and other vital missions from the outset of any contingency operation. In regions where no U.S. forward presence exists, these contingency forces are the tip of the spear, first into action, and followed as required by heavier forces and long-term sustainment.

	FY 92	FY 95	FY 97
ARMY DIVISIONS			
Active	14	12	12
Reserve(Cadre)	10(0)	6(2)	6(2)
MARINE CORPS DIVISIONS			
Active	3	3	3
Reserve	1	1	1
AIRCRAFT CARRIERS	13	12	12
TRAINING CARRIER	1	1	1
CARRIER AIR WINGS			
Active	12	11	11
Reserve	2	2	2
BATTLE FORCE SHIPS	466	427	425
AIR FORCE FIGHTERS			
Active	1,248	1,098	1,098
Reserve	816	810	810
AIR FORCE BOMBERS	242	176	184

DoD Personnel
(End Strength in thousands)

	FY 92	FY 95	FY 97
ACTIVE DUTY			
Army	610	538	522
Navy	542	490	489
Marine Corps	185	170	159
Air Force	470	409	400
TOTAL	1,807	1,607	1,570
RESERVES	1,114	911	907
CIVILIANS	1,006	904	884

< CONFIRMATION REPORT >

07-27-1993(TUE) 09:36

[TRANSMIT]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
6401	7-27	09:29	912026168202	9	0°06'53"	NORMAL	OK
				9	0°06'53"		

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Suite 1425
1700 North Moore Street
Arlington, Virginia 22209

FAX COVER SHEET

DATE: 9/8/93

TO: Jeff Gutman

FAX #: 202-616-8202

FROM: S Cheston

NUMBER OF PAGES (including cover): 21

CONTENTS: Comments.

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