

SUPREME COURT OF THE UNITED STATES

No. 93-289

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,
PETITIONERS v. ARLEN SPECTER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT
[May 23, 1994]

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

I join Part II of the Court's opinion because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Base Closure and Realignment Act of 1990 (Act), and because respondents pleaded no constitutional claim against the President, indeed, no claim against the President at all. As the Court explains, the Act grants the President unfettered discretion to accept the Commission's base-closing report or to reject it, for a good reason, a bad reason, or no reason. See *ante*, at 14.

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

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In adopting the Act, Congress was intimately familiar with repeated, unsuccessful, efforts to close military bases in a rational and timely manner. See generally, Defense Base Closure and Realignment Commission, Report to the President 1991.¹ That history of frustration is reflected in the Act's text and intricate structure, which plainly express congressional intent that action on a base-closing package be quick and final, or no action be taken at all.

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

¹See also, H. R. Conf. Rep. No. 101-923, p. 705 (1990) (Earlier base closures had “take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court”); *id.*, at 707 (Act “would considerably enhance the ability of the Department of Defense . . . promptly [to] implement proposals for base closures and realignment”); H. R. Rep. No. 101-665, p. 384 (1990) (“Expedited procedures . . . are essential to make the base closure process work”).

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or disapprove the Commission's recommendations. §2903(e)(1). If the President disapproves the Commission's report, the Commission must send the President a revised list of recommended base closings, no later than August 15. §2903(e)(3). In that event, the President will have until September 1 to approve the Commission's revised report; if the President fails to approve the report by that date, then no bases will be closed that year. §2903(e)(5). If, however, the President approves a Commission report within either of the times allowed, the report becomes effective unless Congress disapproves the President's decision by joint resolution (passed according to provisions for expedited and circumscribed internal procedures) within 45 days. §§2904(b)(1)(A), 2908.²

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

It is unlikely that Congress would have insisted on such a timetable for decision and implementation if the base-closing package would be subject to litigation during the periods allowed, in which case steps toward closing would either have to be delayed in deference to the litigation, or the litigation might

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

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be rendered moot by completion of the closing process. That unlikelihood is underscored by the provision for disbanding the Commission at the end of each base-closing decision round, and for terminating it automatically at the end of 1995, whether or not any bases have been selected to be closed. If Congress intended judicial review of individual base-closing decisions, it would be odd indeed to disband biennially, and at the end of three rounds to terminate, the only entity authorized to provide further review and recommendations.

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

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package would be rendered the more difficult, if not impossible. The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled, go far to persuade me that Congress did not mean the courts to have any such power through judicial review.

When combined with these strict timetables for decision, the temporary nature of the Commission, the requirement for prompt implementation, and the all-or-nothing base-closing requirement at the core of the Act, two secondary features of the legislation tend to reinforce my conclusion that judicial review was not intended. First, the Act provides nonjudicial opportunities to assess any procedural (or other) irregularities. The Commission and the Comptroller General review the Secretary's recommendations, see §§2903(d)(5), 2903(d)(3), and each can determine whether the Secretary has provided adequate information for reviewing the soundness of his recommendations.³ The President may, of course, also take procedural irregularities into account in deciding whether to seek new recommendations from the Commission, or in deciding not to approve the Commission's recommendations altogether. And, ultimately, Congress may decide during its 45-day review period whether procedural failings call the presidentially approved recommendations so far into question as to justify their substantive rejection.⁴

³Petitioners represent, indeed, that as to the round in question, the Comptroller General reported to Congress on procedural irregularities (as well as substantive differences of opinion) and requested additional information from the Secretary (which was provided). See Reply Brief for Petitioners 16, n. 12.

⁴In approving the base closings for 1991, Congress was apparently well aware of claims of procedural shortcomings, but nonetheless chose not to disapprove the list. See Department of Defense Appropriations Act,

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Second, the Act does make express provision for judicial review, but only of objections under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, as amended, 42 U. S. C. §4321 *et seq.*, to implementation plans for a base closing, and only after the process of selecting a package of bases for closure is complete. Because NEPA review during the base-closing decision process had stymied or delayed earlier efforts,⁵ the Act, unlike prior legislation addressed to base closing, provides that NEPA has no application at all until after the President has submitted his decision to Congress and the process of selecting bases for closure has been completed. See §2905(c)(1). NEPA then applies only to claims arising out of actual disposal or relocation of base property, not to the prior decision to choose one base or another for closing. §2905(c)(2). The Act by its terms allows for “judicial review, with respect to any requirement of [NEPA]” made applicable to the Act by §2905(c)(2), but requires the action to be initiated within 60 days of the Defense Department's act or omission as to the closing of a base. §2905(c)(3). This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.

In sum, the text, structure, and purpose of the Act clearly manifest congressional intent to confine the base-closing selection process within a narrow time frame before inevitable political opposition to an individual base closing could become overwhelming, to ensure that the decisions be implemented

1992, Pub. L. 102-172, §8131, 105 Stat. 1208.

⁵See, *e.g.*, H. R. Conf. Rep. No. 100-1071, p. 23 (1988).

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promptly, and to limit acceptance or rejection to a package of base closings as a whole, for the sake of political feasibility. While no one aspect of the Act, standing alone, would suffice to overcome the strong presumption in favor of judicial review, this structure (combined with the Act's provision for Executive and congressional review, and its requirement of time-constrained judicial review of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact. I conclude accordingly that the Act forecloses such judicial review.

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