

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN H. DALTON, SECRETARY OF THE NAVY, ET
AL., Petitioners v. ARLEN SPECTER, ET. AL.

CASE NO: No. 93-289

PLACE: Washington, D.C.

DATE: Wednesday, March 2, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN H. DALTON, SECRETARY OF :

4 THE NAVY, ET AL., :

5 Petitioners :

6 v. : No. 93-289

7 ARLEN SPECTER, ET. AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 2, 1994

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:02 a.m.

14 APPEARANCES:

15 GENERAL DREW S. DAYS, III, ESQ., Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of

17 the Petitioners.

18 ARLEN SPECTER, ESQ., Washington, D.C.; on behalf

19 of the Respondents.

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1 1 P R O C E E D I N G S C O N T E N T S

2 2 ORAL ARGUMENT OF

(10:02 a.m.) PAGE

3 3 GENERAL DREW S. DAYS, III, ESQ. We'll hear argument

4 4 now in On behalf of the Petitioners Arlen Specter. 3

5 5 ARLEN SPECTER, ESQ.

6 6 On behalf of the Respondents DREW S. DAYS, III 23

7 7 REBUTTAL ARGUMENT OF HALF OF THE PETITIONERS

8 8 GENERAL DREW S. DAYS, III, ESQ. of Justice, and may it

9 9 please On behalf of the Petitioners 47

10 10 On November 5th, 1990, the President signed into

11 11 law the Defense Base Closure Act at issue in this

12 12 litigation. The 1990 Act was the product of vigorous

13 13 efforts on the part of both the Congress and the President

14 14 to remove partisan and procedural obstacles that

15 15 historically had made it nearly impossible to achieve a

16 16 timely and orderly close of domestic military bases deemed

17 17 unnecessary to the national security.

18 18 The compromise arrived at by the legislative and

19 19 executive branches with respect to this particular issue

20 20 embodied several critical features. First, the President

21 21 was to be held personally responsible for the decision.

22 22 Secondly, there would be extensive congressional oversight

23 23 and involvement. Third, there would be an independent

24 24 commission established to make recommendations to the

25 25 President, and there would be a single indivisible package

1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 93-289, John H. Dalton v. Arlen Specter.

5 General Days.

6 ORAL ARGUMENT OF GENERAL DREW S. DAYS, III

7 ON BEHALF OF THE PETITIONERS

8 GENERAL DAYS: Mr. Chief Justice, and may it
9 please the Court:

10 On November 5th, 1990, the President signed into
11 law the Defense Base Closure Act at issue in this
12 litigation. The 1990 Act was the product of vigorous
13 efforts on the part of both the Congress and the President
14 to remove partisan and procedural obstacles that
15 historically had made it nearly impossible to achieve a
16 timely and orderly close of domestic military bases deemed
17 unnecessary to the national security.

18 The compromise arrived at by the legislative and
19 executive branches with respect to this particular issue
20 embodied several critical features. First, the President
21 was to be held personally responsible for the decision.
22 Secondly, there would be extensive congressional oversight
23 and involvement. Third, there would be an independent
24 commission established to make recommendations to the
25 President, and there would be a single indivisible package

1 made available to the President by the Commission.

2 The entire process would be one that would be
3 completed within a 6-month period. Central to this
4 process was that it would remove concern for what was
5 referred to as cherry-picking. That is a practice that
6 contributed to the criticism of the pre-1990 base closure
7 actions and impasses between the Congress and the
8 President, where on a base closing list one particular
9 base would be picked out and removed from that particular
10 determination.

11 Between April 15th and July 30th, 1991, as --
12 insofar as this lawsuit is concerned, every party had
13 completed what was required of that party under the 1990
14 Act. The Secretary of Defense had made his recommendation
15 for base closures and realignments, and the Commission had
16 held hearings on 82 closures or realignments. The
17 President had approved the entire list and transmitted it
18 to Congress, and Congress, having held hearings on that
19 particular list, had declined to enact a Joint Resolution
20 of Disapproval.

21 QUESTION: General Days, I would like to ask you
22 what your position is as to the role of the President in
23 this scheme? I guess the President has to either approve
24 the entire list or reject the entire list. The President
25 isn't authorized to pick and choose.

1 GENERAL DAYS: That's correct. That's central
2 to the scheme.

3 QUESTION: All right. Does the President have
4 any obligation to review the proceedings below for
5 irregularity?

6 GENERAL DAYS: He does not. There's nothing --

7 QUESTION: Could the President do that? Could
8 he decide that there were irregularities in the process
9 and therefore he wouldn't approve?

10 GENERAL DAYS: There is nothing in the statute
11 that would prevent that. In fact, the President can
12 reject the list that's submitted by the Commission and
13 send it back to the Commission for further deliberations
14 and a new list.

15 QUESTION: But in your view, not obligated to
16 review procedurally.

17 GENERAL DAYS: No, he is not obligated under the
18 terms of the statute.

19 QUESTION: Is the Commission subject to the
20 President's direction in any respect? Could he stop the
21 Commission from behaving improperly in developing its
22 recommendations if he wanted to?

23 GENERAL DAYS: There is nothing in the statute
24 that reflects that power on the part of the President. Of
25 course, the President appoints the Commission after

1 consultation with both sides of the aisle in the Congress,
2 but there is no direct supervision by the President of the
3 activities of the Commission.

4 The Congress, however, does have a very active
5 role to play in this process. There are at least 10
6 points in the process where Congress has a role to play,
7 starting with the appointment of the Commission itself,
8 and moving through the point where Congress has the
9 ability to enact a Joint Resolution of Disapproval. So
10 that one would presume that -- although it's not explicit
11 in the statute, that Congress could make its views known
12 during this entire process. And, indeed, I think the
13 facts were that Congress did make its views known from
14 time to time, leading up to this base closure decision.

15 QUESTION: General Days, the normal presumption
16 is that legislation and its operation will be subject to
17 judicial review. There's no express preclusion in this
18 legislation. Can you summarize for us your argument of
19 why the absence of judicial review is implicit in this
20 scheme?

21 GENERAL DAYS: Yes, Justice Ginsburg. You're
22 certainly right that the presumption exists in favor of
23 judicial review, but I don't think the Court has ever held
24 that that presumption and the use of the term "clear and
25 convincing evidence" was designed to impose an evidentiary

1 standard in the sense that we would be talking about if we
2 were talking about parties and the shifting of burdens.

3 But we think that even given that presumption of
4 review, it is weaker in a situation such as this where
5 military sensitivities are involved. When one is talking
6 about, we must remember, a decision by the Secretary of
7 Defense as to what are the military needs of the United
8 States over a 6-year period, and then trying to work out a
9 closure process that is consistent with that particular
10 determination, and it is a decision ultimately by the
11 President acting in, among other things, his capacity as
12 commander in chief.

13 QUESTION: Well, might this be different,
14 General Days, if some sort of individual rights in the
15 traditional sense were involved, as they don't seem to be
16 here?

17 GENERAL DAYS: Certainly, Chief Justice
18 Rehnquist. The U.S. Reports reflect the fact that there
19 have been occasions where this Court has exercised
20 jurisdiction, or lower Federal courts have exercised
21 jurisdiction where there was an identifiable right, either
22 a common-law right or a constitutional right.

23 But I think one searches in vain in this case to
24 identify such a right. There is not a common-law right.
25 And, indeed, the Third Circuit rejected the notion that

1 there was a constitutional right presented by this case.
2 There was an assertion in the complaint of a due process
3 violation flowing out of some of the errors that the
4 plaintiffs identify, the respondents identify, but the
5 Third Circuit rejected that particular claim. And, as I
6 understand it, respondents now are pressing their
7 constitutional claim, their due process claim, before this
8 Court.

9 QUESTION: So you didn't put it this way, but
10 basically you're saying this is just a pact, a kind of a
11 modus vivendi between the two political branches.

12 GENERAL DAYS: That's correct, Justice Souter.
13 This was the result of a very long period in which the
14 Congress and the President, for a variety of reasons,
15 found themselves unable to agree upon how base closures
16 should be handled. In 1988 there was an act that pointed
17 in the same direction as this 1990 Act, but it was for 1
18 year.

19 This particular act incorporated many of those
20 features that the Congress and the President felt had
21 worked well, that had removed most of the avenues for
22 political maneuvering and obstruction, procedural
23 obstruction, which had really prevented the Government
24 from doing what I think everyone recognized needed to be
25 done, given the enormous costs that are incurred when an

1 obsolete base is kept open year after year, and also when
2 it's not needed for the protection of the United States.

3 So we see this very much as an understanding
4 between the President and the Congress as to how to do
5 this most effectively, and I mentioned --

6 QUESTION: That's a different response than the
7 one that you gave earlier, that judicial review is out of
8 the ballpark because of national -- because national
9 security is involved because these are military bases.
10 The answer that you're now giving to Justice Souter seems
11 to be that this was a determination between the two
12 branches, that this was a matter for them to determine,
13 perhaps --

14 GENERAL DAYS: Justice Ginsburg, I don't think
15 my responses are inconsistent. I just wanted to respond
16 to your point about the presumption, and I think the
17 presumption is weaker under these circumstances. But I
18 think the history and the structure and purpose of the Act
19 also suggests that judicial review was not viewed by the
20 Congress or anticipated by the Congress as an appropriate
21 way to deal with whatever problems might have arisen under
22 the Act.

23 QUESTION: Can you conceive of any procedural
24 irregularity so gross as to invalidate the Commission's
25 findings?

1 GENERAL DAYS: Justice Kennedy, one pauses when
2 posed a question like yours, but I think that given the
3 structure of the Act and given the history and purpose,
4 there would be no violation that would rise to the level
5 of judicial review or trigger judicial review. This is a
6 matter --

7 QUESTION: So if --

8 GENERAL DAYS: -- That would be dealt with by
9 the Congress.

10 QUESTION: -- If the Commission issued a report
11 in 1994, which it's not authorized to do.

12 GENERAL DAYS: That's correct.

13 QUESTION: And the President acted --
14 transmitted the list, that would be a -- and the Congress
15 refused to act to upset that determination, those bases
16 could be closed without interference from the courts?

17 GENERAL DAYS: That's correct, Justice Kennedy.
18 This is, after all, a piece of legislation that has a
19 sunset provision. It exists for only 5 or 6 years, and
20 after that point certainly Congress, in due course, could
21 revisit this issue. And as I indicated earlier, there are
22 points during the process where Congress can make its
23 interests and its concerns felt, and I don't think that
24 it's appropriate to presume that the Commission or the
25 President or the Secretary of Defense would be completely

1 unaffected by those expressions of concern.

2 QUESTION: Mr. Day, at what point in the process
3 would you say that Congress would have the best
4 opportunity to express its concern about procedural
5 shortcomings that are at issue in this case?

6 GENERAL DAYS: It could do so at the point where
7 it can vote out, enact a Joint Resolution of Disapproval.

8 QUESTION: That would be the point at which
9 you'd expect them to react, if at all?

10 GENERAL DAYS: That's correct. And in this
11 case --

12 QUESTION: Of course, Mr. --

13 GENERAL DAYS: Yes.

14 QUESTION: Senator Specter says they don't have
15 time to do that. His argument, as I understand it, is
16 that if that's what you're banking on, there won't be any
17 procedural review at all, because he says Congress
18 basically cannot act in the time that the statute would
19 allow it to act.

20 GENERAL DAYS: Justice Souter, I don't think
21 that's correct. As I indicated, Congress has the ability
22 to review what's going on in this process at many
23 different points, and in this case it was possible for the
24 Congress to hold hearings, to assign particular issues to
25 committees and subcommittees for resolution. And we're

1 not talking about something that arrives on the doorstep
2 of the Congress completely unannounced.

3 QUESTION: General Days, you could say that
4 about any arbitrary or capricious executive action. You
5 could always say if Congress doesn't like it, Congress
6 could have enacted a Joint Resolution of Disapproval,
7 which is the same as a piece of legislation. It has to
8 pass both houses, right?

9 GENERAL DAYS: That's correct.

10 QUESTION: And be signed by the President.

11 GENERAL DAYS: Yes.

12 QUESTION: So why is this any different from
13 any -- any other instance of executive arbitrariness?

14 Congress can overturn it by a law if it doesn't like it.

15 I don't find that a very persuasive -- it doesn't make me
16 feel better about the arbitrariness in this case.

17 GENERAL DAYS: Yes.

18 QUESTION: If there was any.

19 GENERAL DAYS: I understand that, Justice
20 Scalia. But this is a situation that I think is not
21 commonplace. It's not like a normal statutory scheme.
22 It's one where Congress, as I indicated, is intimately
23 involved from the beginning to the end. The President has
24 to consult with Members of Congress before even appointing
25 members of the Commission. The Secretary of Defense, as

1 part of the budgetary process, has to submit the force
2 structure plan, the criteria for closing.

3 QUESTION: Well, he doesn't really have to.
4 He's supposed to, but you've told us you can't imagine
5 any -- you know, any defect that would be bad enough to
6 allow review. All you say is he's supposed to do it.
7 Let's assume he doesn't do it.

8 GENERAL DAYS: Justice Scalia, I think this is a
9 risk that Congress felt it was prepared to take, given the
10 problems that the President and Congress had encountered
11 in the past in dealing with the whole base closure issue.
12 This particular problem of cherry-picking was one that had
13 brought the President and Congress to impasse in many
14 instances. And also there was this concern about the
15 extent to which political considerations entered into the
16 process; that some people got better treatment or some
17 bases got better treatment than others.

18 QUESTION: General Days, in this statute where
19 Congress may, if it disapproves, pass a joint resolution,
20 would that Joint Resolution of Disapproval have to be
21 signed by the President?

22 GENERAL DAYS: Yes, it would, it would have to
23 accord with the presentment clause of the Constitution.

24 QUESTION: Does that go for everything now? I
25 was just wondering about the Federal rules procedure, that

1 get laid on the table of Congress and then they become
2 effective. That wouldn't --

3 GENERAL DAYS: Justice Ginsburg, it's our
4 understanding, and it was the contemplation of Congress,
5 that this would go through the presentment process.

6 QUESTION: And that everything --

7 GENERAL DAYS: And the charter would dictate
8 that.

9 QUESTION: That everything -- that you could no
10 longer have anything, you think, even the Federal rules
11 procedure?

12 GENERAL DAYS: Well, I think that's a different
13 scheme, Justice Ginsburg, but in this particular case
14 we're talking about an enactment by the Congress, by the
15 entire Congress.

16 QUESTION: I didn't want to distract you.

17 GENERAL DAYS: Well, no, it's certainly an
18 interesting question.

19 QUESTION: General Days.

20 GENERAL DAYS: Yes.

21 QUESTION: Would you refresh my recollection on
22 something? What is the status of the bases right now?
23 Was the closing all been held up on all of them?

24 GENERAL DAYS: No, it has not. In fact, my
25 understanding is that the closing of the Philadelphia

1 shipyard is moving along. Right now the USS Kennedy is
2 being overhauled at the shipyard. But in, I guess, July
3 of '91 when this lawsuit was filed, there were 7,000
4 employees at the naval yard. There are now about 5,000,
5 and the cease mission date is August 30th or September
6 30th, 1995.

7 QUESTION: The court of appeals didn't stay --
8 didn't enter any kind of a --

9 GENERAL DAYS: No, there is no stay in this
10 particular case. And this, of course, points up a
11 difficult problem with judicial review in this case,
12 because all the bases either stand or fall together. The
13 1991 closure list included the naval shipyard. The 1993
14 closure process has been completed. The Commission has
15 been disbanded, and that particular list was dependent
16 upon the Philadelphia shipyards being closed and one would
17 presume that the '95 process would also take that into
18 consideration.

19 It's not merely a question of dropping or adding
20 one particular base. It's a -- it's the case that all of
21 the pieces to this puzzle have to fit together. And
22 one -- when one moves a piece out --

23 QUESTION: Well, they do -- for the activity,
24 the actions of the executive and the legislative branches,
25 they don't, for purposes of judicial review, do they?

1 GENERAL DAYS: No. The point I'm making --

2 QUESTION: Oh, you're not -- maybe I
3 misunderstood you. You're not arguing that unless the
4 Philadelphia closing goes forward in this case, the
5 closing of every other base on the list is held up too as
6 a result of judicial review?

7 GENERAL DAYS: No, I'm -- that is a problem
8 because if the Secretary --

9 QUESTION: That's not your argument, is it?

10 GENERAL DAYS: Well, my argument, Justice
11 Souter, is that when the Secretary of Defense determines
12 that certain bases need to be closed, the Commission makes
13 the recommendation and the President approves. The list
14 stands or falls in its entirety.

15 QUESTION: Oh, no, I understand that.

16 GENERAL DAYS: Yes.

17 QUESTION: But my only point was you're not
18 arguing that if this Court sustains judicial review and if
19 the -- an order is entered which will terminate the
20 closure proceedings for Philadelphia, that that's going to
21 affect the closure of every other base that was on the
22 same list with Philadelphia.

23 GENERAL DAYS: Not necessarily, but they are
24 interrelated. But I think that point is --

25 QUESTION: But there's no -- they're not subject

1 to any challenge. I mean nobody's brought a suit.

2 GENERAL DAYS: No one's brought a suit, but I
3 think what this lawsuit reflects is one of potentially 82
4 lawsuits. In other words, with 82 bases being either
5 closed or realigned, given the theory of the respondents
6 and the theory of the court of appeals, there could have
7 been 81 other lawsuits. Indeed, in Cohen v. Rice there
8 was an effort in the State of Maine to prevent the closure
9 of a base in that State.

10 QUESTION: Well, isn't it true also, General
11 Days, that the Commission, in debating the 1993 closings,
12 assumed that the Philadelphia yard was going to be closed,
13 and in -- perhaps relied on that in making its decisions
14 as to 1993 closings?

15 GENERAL DAYS: That's precisely correct, Chief
16 Justice Rehnquist.

17 QUESTION: But I must confess, I'm -- I must say
18 I'm confused. I was under the impression that you had a
19 package situation.

20 GENERAL DAYS: Yes.

21 QUESTION: And certainly the President has to
22 take it as a lump and the Congress has to. But you're
23 saying in the case of judicial review, if there is
24 judicial review it can be done on a base-by-base basis.

25 GENERAL DAYS: That's correct. That's what this

1 case is really all about. They're trying to prevent the
2 closure --

3 QUESTION: So that nobody accepted --

4 GENERAL DAYS: -- Of one of those pieces of the
5 puzzle in the entire puzzle, and the question would be the
6 impact of that particular determination in favor of the
7 respondents upon the entire list or, indeed, subsequent
8 list.

9 QUESTION: Well, I might have thought your
10 argument would have been that if we were to permit
11 judicial review, that one possibility is that the district
12 court would have to throw out the entire list in order to
13 be consistent with the statutory scheme.

14 GENERAL DAYS: Well, throw out the --

15 QUESTION: Or resort to a si prius doctrine and
16 just save the Philadelphia base.

17 GENERAL DAYS: Well, it might require a court to
18 throw out the '91 list, the '93 list, and direct the '95
19 Commission that it would have to carry out its
20 responsibilities without any dependence on the
21 Philadelphia Naval Shipyard being included in that closure
22 process.

23 QUESTION: Well, if we can retreat just a minute
24 from that parade of horrors, let's again assume that we
25 find that there is judicial review.

1 GENERAL DAYS: Yes.

2 QUESTION: That the APA review applies. What
3 should be the rule if the Commission violates its
4 statutory mandate to hold a public hearing, and we've made
5 this assumption? Can an aggrieved person immediately go
6 to seek judicial review and a judicial order to open the
7 hearings immediately after the Commission makes its
8 determination to close them?

9 GENERAL DAYS: I would think not, Justice
10 Kennedy. This is a situation where there is no immediate
11 impact on anyone. It's moving toward the ultimate
12 decision. But that would not be any direct impact --

13 QUESTION: Well, suppose you want to observe --
14 suppose you want to observe the public hearing?

15 GENERAL DAYS: Well, perhaps there would be a
16 right to go into court to claim that the agency was
17 withholding a right pursuant to the APA or pursuant to the
18 statute, that individuals would be entitled to, but it
19 certainly wouldn't be final agency action under the APA.

20 QUESTION: Can I ask --

21 GENERAL DAYS: So it would be wrongly withheld
22 action under the APA by the agency.

23 QUESTION: General Days, I frankly don't see why
24 your case is any stronger than a case in which the same
25 scheme were set up but it did not say at the end that when

1 the President approves it, he sends it, transmits it to
2 the Hill, and the Hill has 45 days to overturn it.
3 Suppose it didn't say that? Suppose it just said the
4 President shall make the decision. He has to take it or
5 leave it when it's submitted to him, and his decision
6 shall not be effective for 45 days -- that's all it says,
7 shall not be effective for 45 days. In fact, that's the
8 same result, right? Congress can -- could only be able to
9 overturn it by joint resolution.

10 GENERAL DAYS: That's correct.

11 QUESTION: So what do you gain from the fact
12 that this is a scheme in which he formally had to place it
13 before Congress? I don't see how that makes your case for
14 nonreviewability any stronger.

15 GENERAL DAYS: Well, we think this case is
16 controlled by this Court's decision in Franklin v.
17 Massachusetts, that what we have here, apart from the fact
18 that the President wasn't named as a defendant, is
19 basically an effort to get courts to review presidential
20 action. This is a situation where the Secretary of
21 Defense and the Commission agencies make nonbinding
22 recommendations to the President and then the President
23 has the discretion to decide what he's going to do under
24 those circumstances. As the Third Circuit said, the
25 President can make his decision for any reason at all.

1 This is discretion that is not bound by the terms of the
2 statute.

3 Although the argument has been made by the
4 respondents that this is somehow different from Franklin,
5 we've never viewed Franklin as a decision about artful
6 pleading, but rather about the respect for the integrity
7 of the presidential process or presidential action. And
8 so we think given this Court's decision in Franklin v.
9 Massachusetts, this case falls very nicely into that
10 particular framework, and therefore it is important that
11 the President is involved. This is a situation where he
12 has more discretion than I think this Court recognized in
13 Franklin in making the decision. So if anything, this is
14 a stronger case for deference by the judiciary to
15 Presidential action.

16 QUESTION: I agree it's important that the
17 President is involved. I'm not sure it's at all important
18 that Congress is involved. That is to say that what the
19 President does is not simply issue a regulation, the bases
20 shall close, period, effective 45 days from now.

21 GENERAL DAYS: Yes.

22 QUESTION: I'm not sure there's any difference
23 between that and this scheme where it says not just 45
24 days from now, but within those 45 days I'm leaving it on
25 the floor of Congress.

1 GENERAL DAYS: Yes. Well, I think, Justice
2 Scalia, the involvement of Congress really goes to the
3 point that I was making earlier, that even if you disagree
4 with our argument and find that there was final action
5 under the APA and therefore reviewability, the Act itself
6 does not, we submit, contemplate judicial review. And one
7 of the reasons for that is the involvement of Congress,
8 the need for expedition, the fact that in this legislation
9 Congress recognized that the NEPA process was one that had
10 been used for a variety of reasons to delay the process,
11 and therefore NEPA was completely taken out of the
12 statute.

13 QUESTION: But why doesn't that cut the other
14 way, General Days, that they noticed that NEPA could slow
15 things down, so they made an exception for it, but they
16 didn't make an across-the-board exception?

17 GENERAL DAYS: Justice Ginsburg, I think that
18 the NEPA exception doesn't go so much to the question of
19 judicial review. In other words, I don't see it as an
20 argument that what Congress intended to do was take NEPA
21 out but allow other types of procedural challenges to be
22 reviewed by the courts, but rather as a determination that
23 NEPA imposes certain procedural requirements on agencies
24 that, apart from judicial review, can be used to slow
25 down, delay the process that Congress wanted to be handled

1 in an expeditious fashion. And it was really those
2 procedural concerns, not so much judicial review, that was
3 on the mind of Congress, we would submit.

4 QUESTION: Is it your position with respect to
5 the significance of the express provision for
6 congressional disapproval that it's sort of affirmative
7 evidence that Congress would engage in a review, and hence
8 affirmative evidence, one more bit of evidence for you
9 that that's where the review was to take place and not
10 somewhere else?

11 GENERAL DAYS: Yes, Justice Souter, I think
12 that, in sum, this case is really about an effort on the
13 part of the respondents to substitute judicial
14 cherry-picking for legislative and executive
15 cherry-picking, which was a major concern of both Congress
16 and the President when they enacted the 1990 legislation.

17 I'd like to reserve the balance of my time.

18 QUESTION: Very well, General Days.

19 Senator Specter, we'll hear from you.

20 ORAL ARGUMENT OF ARLEN SPECTER

21 ON BEHALF OF THE RESPONDENTS

22 SENATOR SPECTER: Mr. Chief Justice, and may it
23 please the Court:

24 Our contention that there is judicial review
25 turns on alternative legal theories, first under common

1 law principles and second under statutory review under the
2 Administrative Procedure Act. It is not determinative
3 under the decisions of this Court that there be individual
4 rights involved. The Panama Refining case, the American
5 Airlines v. the Civil Aeronautics Board, and going back to
6 Flying Fish, has established the solid principle that
7 where there is a violation of the doctrine of separation
8 of powers where the congressional requirements are not met
9 by the executive, then the action by the executive, the
10 Base Closing Commission, is null and void.

11 The principle of judicial review and the
12 importance is not one that has to be emphasized in this
13 Court --

14 QUESTION: Senator Specter, let me just, if I
15 may, interrupt you. When you say null and void, do you
16 mean that if there is a concern about the particular --
17 the Philadelphia base and procedural shortcomings as to
18 that one base, the remedy that the Court would grant would
19 be null and void of the entire package?

20 SENATOR SPECTER: No, Mr. Justice Stevens, it
21 would not be. There is no showing that the elimination of
22 the Philadelphia base would have any effect on any other
23 bases at all.

24 QUESTION: Well, then let me ask you, just to be
25 sure I understand the position, you do agree, do you not,

1 that if the President were -- found there were procedural
2 shortcomings as to Philadelphia and no other base, he
3 would not have the authority to say I will close
4 everything except the Philadelphia base?

5 SENATOR SPECTER: Justice Stevens, he could have
6 sent the list back and raised an issue, but it's a
7 practical impossibility in 10 days to take a look at 72
8 bases. In the 1991 and 1993 closures and realignments,
9 310 bases have been involved and only 3 cases have been
10 brought. But when you come to the question of remedy, I
11 want to emphasize this point, that it may be that
12 declaratory relief would be sufficient if the district
13 court says that there has been a violation of the Act and
14 that the failure to have a fair process --

15 QUESTION: No, but the point I want to be sure I
16 understand your position on, Senator, is that if I
17 understand you correctly, the Congress could not say
18 because of the procedural violations involving
19 Philadelphia, we will approve the entire package except
20 Philadelphia. They might say we're very unhappy about
21 that, but we think the interest in all the closures
22 outweighs it and we're going to approve the package.

23 SENATOR SPECTER: The Congress could not say the
24 Philadelphia base is excluded. And the Congress faced
25 this issue directly, Justice Stevens, as set forth at page

1 44 of our brief where the Congress passed a Sense of the
2 Congress Resolution saying that their rejection of the
3 resolution of disapproval did not say anything about
4 compliance with the Act.

5 It is another way of saying what Senator Dixon,
6 the chairman of the subcommittee, said at the time of the
7 hearing on the resolution of disapproval, that he could
8 not take up the question of whether the congressional
9 mandates were followed, and under the decisions of this
10 Court that is a particularly and peculiarly judicial
11 function.

12 QUESTION: Senator, if Congress --

13 QUESTION: But, let me just finish -- let me
14 just finish the one thing, and that'll be -- I'll leave
15 you alone. But you do agree, then, that neither Congress
16 nor the President could take separate action on a
17 base-by-base basis, but the courts could?

18 SENATOR SPECTER: Correct, Justice Stevens.

19 QUESTION: Okay.

20 SENATOR SPECTER: It is a particularly,
21 peculiarly judicial function, and when you say that there
22 may be an interference with all the other bases, that's a
23 question for the court on a remedy.

24 QUESTION: Senator, I don't agree with that.
25 Congress can do anything by a joint resolution. If

1 Congress passes a joint resolution, which to be effective
2 has to be signed by the President, it has passed a new
3 statute which would supersede this whole statute anyway.
4 Congress -- I agree with you that the President couldn't
5 single out the Philadelphia base, but Congress could by
6 joint resolution.

7 SENATOR SPECTER: Justice Scalia, Congress, as
8 the lawmaker, may do that.

9 QUESTION: Anything at all.

10 SENATOR SPECTER: But within the confines of the
11 Base Closure Act, that was not contemplated. And the --

12 QUESTION: It wasn't contemplated, but the Base
13 Closure Act calls for a joint resolution and Congress can
14 do anything it wants by a joint resolution so long as it's
15 constitutional?

16 SENATOR SPECTER: Well, not the joint
17 resolution, Justice Scalia, which is called for by the
18 Act. The joint resolution which is called for by the Act,
19 the Joint Resolution of Disapproval, calls for rejecting
20 the whole thing or leaving the whole thing in place. But
21 where you have a question as to whether the congressional
22 standards were followed, Senator Dixon at the hearing
23 said -- it's in the record -- we can't take this up;
24 that's a matter for the courts.

25 And then there was a congressional determination

1 that the rejection of the resolution of disapproval did
2 not bear on whether the provisions of the Act were
3 complied with because the Congress could not do that.
4 It --

5 QUESTION: Well, I think the procedures that
6 Congress would go through for a joint resolution under
7 this Act might be quite different and a good deal speedier
8 than introducing a brand new piece of legislation and
9 having it go through committee.

10 SENATOR SPECTER: Chief Justice Rehnquist,
11 that's precisely the point, that the resolution of
12 disapproval contemplated under the Act said all or
13 nothing. There could be another resolution introduced, or
14 a bill introduced to deal with the Philadelphia Navy Yard,
15 but that's a total impracticality because Congress passed
16 this Act saying that this is the sole way that you deal
17 with base closures.

18 But when Congress passed the Act -- and this is
19 the fundamental of the case -- there were specific
20 provisions set out. There had to be a structure force
21 plan. There had to be criteria. There had to be full
22 disclosure to the General Accounting Office, the arm of
23 Congress.

24 QUESTION: Senator --

25 SENATOR SPECTER: And this was added in the 1990

1 Act because there was so much concern that the Defense
2 Department would act in an unfair way.

3 QUESTION: If the President concluded that some
4 of these conditions that you have just described had not
5 been followed by the Commission, did he have the duty to
6 reject the list?

7 SENATOR SPECTER: No, Justice Kennedy, he did
8 not, because he's looking at the total picture. And we
9 offered to prove at trial --

10 QUESTION: So if you were his legal counsel and
11 these defects had been disclosed to him during the short
12 period of time in which he could either reject or approve
13 the list, you would have said that he had the legal right
14 to submit the list to the Congress, to go ahead with it?

15 SENATOR SPECTER: I would have advised him to
16 send the whole list back, but where there's a defect as to
17 one base that's up to the courts, because there is a
18 showing that this is not a garden-variety matter of
19 procedural error, as asserted by the Government.

20 QUESTION: But he -- but would you further
21 advise him that he did, in his discretion, have the
22 authority to transmit the list to the Congress?

23 SENATOR SPECTER: I would advise him that he had
24 very little discretion. He could take it all or he could
25 leave it all, but on this record he ought to submit the

1 whole list to the Congress because he's dealing with 72
2 bases.

3 QUESTION: Not what he ought to do -- that he
4 ought to submit the whole list to the Congress?

5 SENATOR SPECTER: That that's what he should do.
6 That would be my advice to him, because I would say to
7 him, Mr. President, you cannot have a determination as to
8 the failure of the Navy to supply the information to the
9 GAO. You can't call in two admirals who sent reports that
10 the yard should be kept open which were fraudulently
11 concealed from the GAO and the Congress, you can't call in
12 the admiral and have him testify that he was instructed by
13 the Navy, which is an obstruction of justice not to
14 testify before --

15 QUESTION: Well, then you're saying he acted
16 within his discretion.

17 SENATOR SPECTER: I'm saying that he acted
18 within his authority. I would disagree, respectfully,
19 about discretion, because I think he had virtually none,
20 but I am saying that he is not equipped to make that kind
21 of a determination, which is judicial.

22 QUESTION: But, Senator Specter, he did -- did
23 he have an obligation under the statute to review whether
24 procedures were properly employed by the Commission?

25 SENATOR SPECTER: Justice O'Connor, he did not

1 have any such obligation, which is the same answer that
2 General Days gave you.

3 QUESTION: So you agree with that. And the
4 President did have two options. He could send it on with
5 his approval to the Congress, or he could reject it and
6 send it back to the Commission.

7 SENATOR SPECTER: Correct. He could send it
8 back to the Commission once or he could reject it totally,
9 or he could just let it sit and not act on it, and there
10 would be no base closings. But when he has a 72 and a
11 total of 310 in 2 years, he cannot engage in the
12 fact-finding to see if these allegations are true. And
13 for the purpose of a motion to dismiss, they are all
14 accepted as true, and we have already had the hearing
15 before the district court.

16 QUESTION: Senator Specter, may I -- you've been
17 very clear, I think, on two points. You said there is to
18 be no cherry-picking by the President under this measure,
19 and no cherry-picking by Congress, but there is by the
20 courts.

21 And my question to you is this; suppose
22 Congress, concerned about this picking-off problem, wanted
23 to say and the courts too cannot zero in on the
24 Philadelphia base, on the Rice base, on any base, could
25 that -- could Congress have done that, would it have been

1 constitutional, or is your argument fundamentally that the
2 courts must always be able to engage in the cherry-picking
3 business in this kind of a legislative setup?

4 SENATOR SPECTER: Justice Ginsburg, not
5 cherry-picking, but the courts must always be able to
6 review the congressional delegation of authority to see if
7 it is followed by the executive. That's the fundamental
8 rule of Panama Refining.

9 QUESTION: But let me withdraw the word
10 cherry-picking, because I don't want to make anything in
11 the pejorative sense. You have been very clear that it's
12 an all or nothing deal for the legislature, as it is for
13 the executive, but you say it's never an all or nothing
14 deal for the courts, and it is never because this
15 legislation didn't preclude that, or even if Congress had
16 said, and, courts, you too have no business looking at
17 bases one by one? Suppose Congress had said that, would
18 that have been unconstitutional in your view?

19 SENATOR SPECTER: It would not be
20 unconstitutional to say the courts could not make
21 individual selections, but that is not the case. We are
22 not engaged in cherry-picking, as General Days has said,
23 by the court. The court is asked to send the matter back
24 to the Commission. The court does not have the competency
25 to decide whether the base should be kept open or not.

1 The court has the unique competency to decide
2 whether the mandates of the statute have been followed on
3 full disclosure to the GAO and on a hearing. That is what
4 courts do. But it would go back to the Base Closing
5 Commission, and they may win on the merits.

6 But that is a very critical distinction here,
7 Justice Ginsburg, and may it please the entire Court, we
8 are not asking that the yard be kept open. We are asking
9 that we have a fair day in court. We are asking, in light
10 of the fundamental purpose of the courts under Marbury v.
11 Madison on judicial review, that the clear precedents of
12 this court be followed under American Airlines --

13 QUESTION: But, Senator, may I interrupt you?
14 It seems to me that what you're saying is the most the
15 court can do is to declare that with respect to this one
16 base there was a procedural irregularity, maybe a very
17 serious one, then send it back somehow into the executive
18 process and say you figure out what to do. And yet the
19 essence of the executive process was that it would proceed
20 on a given timetable on an all, take it or leave it,
21 basis. And I don't see how that relief is consistent with
22 the scheme of the statute.

23 SENATOR SPECTER: Justice Souter, it is
24 consistent because the Base Closing Commission will be
25 sitting again in 1995.

1 QUESTION: With an entirely different package in
2 front of it.

3 SENATOR SPECTER: Not really --

4 QUESTION: In effect, you're saying the court
5 can say add a new item to this year's package, change the
6 next --

7 SENATOR SPECTER: No, I'm saying the court has
8 the authority under decisions and under the Administrative
9 Procedure Act to say to the Commission where you flout the
10 direction of Congress and make the law a nullity, because
11 Congress said that you have to turn over the information
12 to the congressional arm, the Comptroller General, the
13 General Accounting office, and where you have to have
14 hearings and you don't do that, do it right. And if you
15 do --

16 QUESTION: Well, do it right, but the time for
17 doing it right is passed. And your remedy, in effect, as
18 I understand it, involves a court ordering the Commission
19 to consider a different mix from the mix that the
20 Commission otherwise would derive?

21 SENATOR SPECTER: Justice Souter, there is ample
22 time for the Commission to act in 1995, because it still
23 is in existence. The Navy yard is not scheduled to be
24 closed until 1996.

25 QUESTION: Well, it may have time, but I don't

1 think that goes to my question. But let me ask you a
2 different question, which I thought you might get close to
3 in answering Justice Ginsburg's.

4 Assuming that the court finds that with respect
5 to the Philadelphia shipyard there was a significant
6 procedural irregularity. We've got judicial review,
7 that's the conclusion -- whatever relief the court gives,
8 whether it were -- and you're not asking for it -- you
9 tell me if it were to order the closure to -- process to
10 be halted, or whether it's some kind of a remand procedure
11 which you've described, why doesn't the scheme of the Act
12 require the court to take the package all or nothing, so
13 that if there's something wrong with Philadelphia, there's
14 something wrong infecting the entire political mix which
15 it was the object of the statute to require both Congress
16 and the President to act on as a package?

17 SENATOR SPECTER: Because --

18 QUESTION: So if Philadelphia's tainted, why
19 don't we say that the relief is going to affect all of the
20 others?

21 SENATOR SPECTER: Because the court ought to act
22 on the most restricted basis possible, as the --

23 QUESTION: Well, the Act -- the court also ought
24 to act consistent with the intent of Congress, and the
25 intent of Congress to regard a package as a package is

1 pretty clear, isn't it?

2 SENATOR SPECTER: Not with respect to judicial
3 action. It is clear with respect to presidential action
4 or congressional action, but not at all as to judicial
5 action.

6 Justice Souter, when you postulate these
7 concerns and these problems on remedy, I grant you that
8 there are some concerns which we have to address, and I
9 think we have -- can do it consistent with plaintiff's
10 position. But the other side of it is that you're saying
11 to the Navy if you let this go through, you can conceal
12 reports. Congress says full disclosure goes to the
13 General Accounting Office.

14 QUESTION: No. The other side of it is
15 basically that the -- that this is essentially a political
16 pact between two branches of the Government and the
17 Congress can decide what to do about it if there is a
18 procedural irregularity. That's the alternative.

19 SENATOR SPECTER: The two branches of Congress,
20 Justice Souter, may not make a political pact in
21 derogation of the Constitution. This Court in Franklin
22 reaffirmed Panama Refining, which said when Congress tried
23 to give general legislative authority to the President
24 without appropriate standards it was unconstitutional.

25 QUESTION: But, Senator --

1 SENATOR SPECTER: The Congress and the President
2 may not make a pact which is unconstitutional. That's why
3 we have Marbury v. Madison and this Court.

4 QUESTION: But, Senator, that's what confuses me
5 about the answer to the question I asked you earlier. The
6 President has an obligation to obey the law and the
7 Constitution, and yet you postulated that the President,
8 with full knowledge of a procedural irregularity, could
9 submit this list to the Congress. I should have thought
10 if your case is one in which you are vindicating the rule
11 of law, the President had absolute obligation under the
12 hypothesis we put to refuse to transmit a list that was
13 improperly composed.

14 SENATOR SPECTER: Justice Kennedy --

15 QUESTION: I just don't see how you can answer
16 the way you did consistently with your whole theory of the
17 case.

18 SENATOR SPECTER: Well, I think it is consistent
19 for this reason. The President has a list with 72 bases
20 and he has an allegation that there is a failure to comply
21 with the statute on one list, and he knows there's a
22 judicial system and he knows that in the conference report
23 the Congress said that there shall not be judicial review
24 under a number of items, selection criteria, force review.
25 But the Congress did not say no judicial review on the

1 issue of a hearing and full disclosure, and the President
2 knows that in Abbot's Laboratories and in Bowen v.
3 Michigan Doctors, that this Court --

4 QUESTION: No, but, Senator, those were cases
5 that go to the question of whether the statute authorized
6 judicial review, and as I understand your position, even
7 if the statute said, notwithstanding procedural
8 violations, the courts may not review anything, you're
9 saying that statute would be unconstitutional?

10 SENATOR SPECTER: I'm saying it would be
11 unconstitutional if it precludes judicial review, if it
12 violates separation of powers, and that is Panama
13 Refining.

14 QUESTION: See, Abbot Laboratories and those
15 cases just are questions of whether the statute authorized
16 judicial review.

17 SENATOR SPECTER: Well, I'm on to the second
18 branch. I'm trying to cover my argument as to the
19 alternative theory.

20 QUESTION: Senator Specter, in all the cases
21 that you've given as examples, those were examples where
22 the executive should not have acted. That's the theory of
23 it. But you said something that -- in response to Justice
24 Kennedy's question that really concerned me, because it
25 was always my understanding that the Constitution is the

1 highest law for every official in the land, and Congress
2 has an obligation not to approve anything that it believes
3 is inconsistent with the Constitution. The President has
4 an obligation not to go forward with any measure that the
5 President believes is unconstitutional.

6 It isn't a question that while these officers --
7 the Constitution is in the trust of the Court alone, these
8 officers don't have to worry about that because the
9 Constitution is the Court's concern. I'm sure that you
10 really didn't mean to say that, but that's what came
11 across to me in your answer to Justice Kennedy's question.

12 SENATOR SPECTER: Justice Ginsburg, the question
13 of review of what the Commission did is not one the
14 President can undertake. He cannot undertake it because
15 he is not qualified to do it, and he only has 10 days and
16 he has 72 bases. The question of review as to whether
17 there is compliance with the Constitution is one which
18 this Court has acted on. And while it is true that the
19 Congress has the responsibility to uphold the
20 Constitution, and so does the President, we are not
21 equipped, as Senator Dixon said, on the resolution of
22 disapproval to take up these questions.

23 The President was asked to review this matter
24 and he said I can't get involved in that. And we made an
25 offer to prove that. And under --

1 QUESTION: The President doesn't have to use the
2 same criteria that the Commission used. He could
3 disapprove it for any reason, couldn't he? I mean it's a
4 brand new judgment when it gets to him.

5 SENATOR SPECTER: Justice Scalia.

6 QUESTION: He could just say, I like
7 Philadelphia and I'm not going to close the Philadelphia
8 Navy Yard, no matter what. He could say that if he wants.

9 SENATOR SPECTER: Not realistically, Justice
10 Scalia, because the consequence of that would be to reject
11 the entire list.

12 QUESTION: Well --

13 SENATOR SPECTER: You see, the Court --

14 QUESTION: But he could do that if he wants,
15 can't he?

16 SENATOR SPECTER: Yes. Well, yes.

17 QUESTION: Not realistically, but legally, I
18 mean.

19 SENATOR SPECTER: But that's a price he's not
20 prepared to pay. There was an arrangement here for the
21 Congress and the President to distance themselves from
22 this political hot potato, and they arrived at an
23 arrangement where to have a fair process, a word which was
24 not mentioned by General Days, not mentioned in his brief,
25 and it's the introductory purpose of the Act, a fair

1 process. And how do you get a fair process with a
2 political hot potato like this one where the President
3 doesn't want to have to do something politically unpopular
4 and the Congress doesn't want to have to do --

5 QUESTION: Well, we don't read laws that way. I
6 mean, the fact is that the President had an independent
7 judgment, that whatever the Commission came up with did
8 not govern, and even the criteria it used did not govern.
9 It was entirely the President's call to approve this, and
10 if he didn't want to, to say I don't like it. I don't
11 care how you did it. Maybe you did it right, maybe you
12 did it wrong, I don't like it.

13 SENATOR SPECTER: Justice Scalia, he did not
14 know that when he issued approval. The Commission handed
15 him a list on June 30th of 1991 and he made an approval on
16 July 10th --

17 QUESTION: Well, Senator, as I understand
18 your --

19 SENATOR SPECTER: -- 10 days later.

20 QUESTION: -- Response to Justice Ginsburg, even
21 if he knew the statute had not been followed and
22 therefore, under your theory, the Constitution had been
23 violated, he would properly have said I've got to approve
24 this package. I think that's what you've said to us.

25 SENATOR SPECTER: I believe that the practical

1 reality -- and I gave you a candid answer to that
2 question -- is that the President cannot reject 72 bases
3 because someone is saying to him that the mandate hasn't
4 been followed as to the Philadelphia Navy Yard. Because
5 he's not equipped to do that. That's a judicial function.
6 The President is not equipped to do that.

7 QUESTION: Well, but you're saying even he were
8 equipped and he had unimpeachable evidence of what you
9 consider to be a plain constitutional violation, you're
10 saying, well, he doesn't have to follow the Constitution,
11 that's for the courts --

12 SENATOR SPECTER: No, he has to follow the
13 Constitution. But when Justice Kennedy asked me the
14 question about what the President should do, there is a
15 legal duty and there is a realistic process which he can
16 follow, and he would say the same thing that Senator Dixon
17 said, and that is to leave it to the courts.

18 We have an administrative process in our
19 country.

20 QUESTION: Well, he can't knowingly prosecute
21 somebody that he believes is absolutely innocent, can he?
22 Those are for the courts.

23 SENATOR SPECTER: Well --

24 QUESTION: Surely that can't be your position,
25 Senator.

1 SENATOR SPECTER: Well, that is not my position,
2 that a prosecutor or a President should prosecute someone
3 who is innocent, but that's about what we have here when
4 you have a yard closed and you have a congressional
5 mandate ignored and you have fraudulent concealment of
6 evidence, and you have obstruction of justice.

7 It's a lot like what this Court said in Franklin
8 where there's a robbery of the representation rights of
9 the people and you have a process which is not followed
10 and you have a lot of theoretical considerations as to
11 what the President can or can't do, but realistically he
12 cannot act on allegations, the court can't act on
13 allegations, the court can only act on proof.

14 But if you don't give us a day in court, if you
15 don't permit us to come in and show these matters, the
16 President wouldn't give us an opportunity to do that, the
17 Congress wouldn't hear it -- I asked Senator Dixon
18 specifically, but he reserved it. He said our rejection
19 of the resolution of disapproval does not foreclose you
20 from the courts. We're not passing on the procedural
21 requirements.

22 QUESTION: Senator Specter, I think your
23 reliance on Panama Refining may be rather strained. In
24 that case the law -- on page 4, that the Court says if the
25 citizens is to be punished for the crime of violating a

1 legislative order or an executive order, the due process
2 requires it shall appear that the order is within the
3 authority of the officer. That's where the -- you're
4 going after the citizen to punish him. Here you don't
5 have any question of that sort of an individual right, so
6 I think the claim that Panama Refining supports judicial
7 review here is very difficult to make out.

8 SENATOR SPECTER: Chief Justice Rehnquist, I
9 respectfully disagree with you categorically. The
10 decision in Panama Refining was on the basis of the entire
11 statutory scheme, not just on the basis of how it affected
12 an individual. And this Court said, at page 432 of 293
13 U.S. Reports that where there is delegation which exceeds
14 congressional authority, Congress cannot give lawmaking
15 power to the President. There have to be standards
16 established, and if --

17 QUESTION: But that's on the very same page that
18 the language I just read to you is. It's in the context
19 of the Government proceeding against an individual and the
20 individual says the order you're charging me with
21 violating wasn't authorized.

22 SENATOR SPECTER: Mr. Chief Justice, the
23 statute -- the case invalidates the delegation on much
24 broader grounds. It invalidates the delegation on all of
25 the presidential authority to impact on the transportation

1 of petroleum products, far beyond that individual case.

2 QUESTION: At the instance of someone who was
3 sought to be prosecuted for transporting the hot oil,
4 wasn't --

5 SENATOR SPECTER: Justice Scalia, that is one
6 aspect, but it was much broader. The actions was -- the
7 statute was invalidated on much broader grounds.

8 QUESTION: Sure, but you still got to find
9 somebody who has had a right violated. I mean, there are
10 a lot of -- a lot of violations of separation of powers, a
11 lot of things that can be done wrong which we judges have
12 no power to reach unless somebody has been harmed in
13 right.

14 SENATOR SPECTER: Justice Scalia --

15 QUESTION: And I don't see where that is here.

16 SENATOR SPECTER: -- The right violated and the
17 standing to bring this suit has not been challenged by the
18 Government. And under the standards which you articulated
19 in your opinion in Franklin, we have met that standard of
20 showing that a right has been violated. And I would urge
21 the Court --

22 QUESTION: Well, but, Senator, it is true that
23 it's a statutory right that they would say is violated. I
24 don't think they agree with your submission that the
25 violation of statutory procedures always also violates the

1 Constitution, which I think is part of your submission.

2 SENATOR SPECTER: It rises to the level of a
3 violation of separation of powers when the executive
4 branch disregards the standards. In Panama there were no
5 standards set, and in the American Airlines case where
6 Judge Burger, later Chief Justice, picked up the issue
7 about invalid authority, invalid administrative authority,
8 handing an order to a President which was invalid; the
9 President had a nullity before him.

10 So that the cases under the common law
11 decisions -- and Flying Fish is another one -- going back
12 to 1804, a consistent line to say that where the authority
13 is not exercised by the executive, and in this case the
14 Base Closing Commission in conformity with the standards,
15 which it certainly was not, that there is a violation of
16 separation of powers.

17 I've not had an opportunity to deal to any
18 extent with the Administrative Procedures Act, which was
19 the gravamen of the review here under Franklin. And I
20 would urge this Court not to expand the doctrine of
21 Franklin. This case is fundamentally different from
22 Franklin because in Franklin the President had the
23 authority to revise the Census data, had supervisory
24 authority to modify it and amended it, which the President
25 cannot do here. And that was a 5 to 4 decision.

1 And to permit administrative agencies in our
2 society to operate without judicial review on the
3 distinction of what is final administrative agency action,
4 where here the Base Commission decision had a direct
5 impact on the parties involved and was final. And I would
6 offer you a syllogism, that where the veto power of the
7 Congress does not defeat finality of administrative
8 action, and the Government concedes that because the
9 Congress is excluded from the Administrative Procedure
10 Act, but the congressional veto does not take us out from
11 under the APA, not should the virtually identical --

12 QUESTION: Thank you, Senator Specter.

13 SENATOR SPECTER: -- Congressional authority.

14 QUESTION: Your time has expired.

15 General Days, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF GENERAL DREW S. DAYS, III

17 ON BEHALF OF THE PETITIONERS

18 GENERAL DAYS: Mr. Chief Justice and the Court,
19 Senator Specter refers to a fair process, but I think it's
20 important to emphasize that what Congress had in mind was
21 a fair process that would result in a timely closure of
22 bases, so it's the relationship between fairness and
23 timeliness.

24 And I think the fairness in the Act comes from
25 several sources. One, it's fair to Congress because it

1 involves Congress in an intimate way. The President is on
2 the line, which means that he's not a person who can hide
3 behind the decisions that are made. There's an
4 independent commission, as I said earlier. But there's
5 also a concern for communities. The Act itself has a
6 provision that deals with the problems of transition once
7 decisions are made with respect to closing.

8 Getting back to the question of whether the
9 statute authorizes judicial review, we think the
10 fast-track procedure indicates an absence of judicial
11 review expectations. The 45 days given to Congress, the 2
12 hour debate, there is an opportunity for any Member of the
13 Congress to bring to a vote a Joint Resolution of
14 Disapproval. But we think that what the statute reflects
15 is the decision to give to the President and the Congress
16 the ability to weigh the seriousness of alleged procedural
17 violations against the need to proceed with the entire
18 package.

19 Mr. Specter refers to the sense of Congress
20 resolution. I won't get into that, but we refer to it on
21 page 17 of our reply brief. And I think that resolution
22 ultimately reflects the approval by the Congress of the
23 recommendations made by the Base Closing Commission in
24 this case.

25 On the question of unconstitutionality, as I

1 understand unconstitutionality under these circumstances,
2 it would have to mean that Congress could not authorize
3 the President to do what the President did in this case,
4 which was to approve the package, even though that was
5 consistent with the statute.

6 For the foregoing reasons, we ask this Court to
7 reverse the decision of the court of appeals, thereby
8 permitting the base closure process that the President and
9 the Congress agreed upon in the 1990 Act to go forward.

10 We think to do otherwise would disrupt the careful balance
11 struck between the political branches. It would intrude
12 on Congress' statutory oversight role and it would make
13 expedition and finality impossible to achieve in an area
14 of national security and military policy uniquely within
15 the competence of Congress and the President.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, General
18 Days.

19 The case is submitted.

20 (Whereupon, at 11:01 a.m., the case in the
21 above-entitled matter was submitted.)
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL., Petitioners v. ARLEN SPECTER, ET. AL.
No. 93-289

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)

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