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U.S. Department of Justice

Office of Legal Counsel

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Re: Enclosed is OLC's memorandum opinion *Re: Authority under the Defense Base Closure and Realignment Act to Close or Realign National Guard Installations Without the Consent of State Governors*.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

August 10, 2005

MEMORANDUM FOR ANTHONY J. PRINCIPI
CHAIRMAN, DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Re: Authority under the Defense Base Closure and Realignment Act to Close or Realign National Guard Installations Without the Consent of State Governors

The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or "Act") establishes a process by which the federal Government is authorized to close and realign federal military installations in the United States. *See* Pub. L. No. 101-510, § 2901, 104 Stat. 1808, as amended, 10 U.S.C.A. § 2687 note (West Supp. 2005). You have asked the Attorney General whether the federal Government has authority under the Act to close or realign a National Guard installation without the consent of the governor of the State in which the installation is located, particularly given two earlier-enacted statutes that require gubernatorial consent before a National Guard "unit" may be "relocated or withdrawn," 10 U.S.C. § 18238 (2000), or "change[d]" as to its "branch, organization, or allotment," 32 U.S.C. § 104(c) (2000). *See* Letter for Alberto R. Gonzales, Attorney General, from Anthony J. Principi, Chairman, Defense Base Closure and Realignment Commission (May 23, 2005). The Attorney General has delegated to this Office responsibility for rendering legal opinions to the various federal agencies. *See* 22 Op. O.L.C. v (1998) (Foreword). We conclude that the federal Government has the requisite authority.

I.

A.

Congress adopted the Base Closure Act in order "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Act § 2901(b).[1] Congress acted against the backdrop of "repeated, unsuccessful, efforts to close military bases in a rational and timely manner." *Dalton v. Specter*, 511 U.S. 462, 479 (1994) (Souter, J., concurring in part and concurring in judgment). The initial Act authorized rounds of closure and realignment for 1991, 1993, and 1995; amendments in 2001 (and again in 2004) provided for another round in 2005. *See* National Defense Authorization Act for Fiscal Year 2002, §§ 3001-3008, 115 Stat. 1012, 1342-53 (2001); Pub. L. No. 108-375, Div. A, Title X, § 1084, Div. B, Title XXVIII, §§ 2831-2834, 118 Stat. 2064, 2132 (2004). While in force, the

[1] Citations of the Act are of the sections as they appear in the note to 10 U.S.C. § 2687.

enumerated four "military value criteria," *id.* § 2913(b), and four "other criteria," *id.* § 2913(c), on which the Secretary must rely, and has provided that these, along with the plan and inventory, shall be the "only criteria" on which he relies, *id.* § 2913(f). (In prior rounds, Congress left with the Secretary discretion to establish the selection criteria. *Id.* § 2903(b).)

The Commission must hold public hearings and prepare a report reviewing the Secretary's recommendations and setting out the Commission's own recommendations. *Id.* § 2903(d). Just as it has restricted the Secretary in preparing the original list, so also has Congress constrained the Commission's authority to alter the Secretary's list. The Commission may do so only if it "determines that the Secretary deviated substantially from the force-structure plan and final criteria." *Id.* § 2903(d)(2)(B). And the Commission must make additional findings and follow additional procedures if it proposes to close or realign an installation that the Secretary has not recommended for closure or realignment or to increase the extent of a realignment. *Id.* § 2903(d)(2)(C)-(D); § 2914(d)(3), (d)(5). The Commission must transmit its report and recommendations to the President no later than September 8, 2005. *Id.* § 2914(d).

Within two weeks of receiving the Commission's report, the President must issue his own report "containing his approval or disapproval of the Commission's recommendations." *Id.* § 2914(e)(1). The Act "does not at all limit the President's discretion in approving or disapproving the Commission's recommendations." *Dalton*, 511 U.S. at 476; *see also id.* at 470. But it does require his review to be "all-or-nothing," *see* Act § 2903(e); he must accept or reject "the entire package offered by the Commission," 511 U.S. at 470. If he disapproves, the Commission may prepare a revised list, which it must send to the President by October 20, 2005. Act § 2914(e)(2). Presidential rejection of that list ends the process; no bases may be closed or realigned. *Id.* § 2914(e)(3). If, however, the President approves either the original or revised recommendations, he sends the approved list, along with a certification of approval, to Congress. *Id.* § 2903(e)(2), (e)(4).

Each of the above steps is necessary for any closures or realignments to occur under the Act. If Congress does not enact a joint resolution disapproving the Commission's recommendations within 45 days after the transmittal from the President, the Secretary of Defense must implement the entire list. *Id.* § 2904. The Act goes on to specify in great detail the procedures for implementing these closures and realignments. *Id.* § 2905.

B.

The modern National Guard descends from efforts that Congress began in the early twentieth century both to revive the long-dormant "Militia" described in the Constitution and, spurred by World War I, to make it an effective complement to the regular Armed Forces. *See generally Perpich v. Dep't of Defense*, 496 U.S. 334, 340-46 (1999). Among its several provisions relating to the militia, the Constitution grants to Congress power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be

order any other component of the Armed Forces into active duty. *See* 10 U.S.C. § 12301 (2000 & West Supp. 2005). For as long as they remain in federal service, members of the National Guard are relieved of their status in the State Guard, *see* 32 U.S.C. § 325(a) (2000); *Perpich*, 496 U.S. at 345-46, and their units become exclusively components of the United States Armed Forces, *see* 10 U.S.C. §§ 10106, 10112 (2000).

II.

A.

Your letter to the Attorney General requests an answer to the question whether the federal Government, when following the procedures described in the Base Closure Act, has authority to recommend and carry out the closure or realignment of a National Guard installation without obtaining the consent of the governor of the State in which the installation is located.

As an initial matter, the authority and procedures of the Base Closure Act undoubtedly do extend to National Guard installations, just as they do to any other type of military installation under the jurisdiction of the Department of Defense. The Act is comprehensive in its coverage. In broadly defining "military installation," *see* Act § 2910(4) (quoted above), the Act makes no distinction between installations associated with the National Guard and those associated with any other component of the Armed Forces. Indeed, the Secretary's required inventory of military installations must include facilities in both the "active and reserve forces," *id.* § 2912(a)(1)(B), which plainly includes the National Guard, *see* 10 U.S.C. § 10101. We understand that all of the National Guard installations recommended by the Secretary for closure or realignment in the current round are located on land either owned or leased by the Department of Defense. Such installations are included within the definition of "military installation" and are thus presumptively subject to closure or realignment under the Act. Similarly, the Act's definition of "realignment," which "includes any action which both reduces and relocates functions and civilian personnel positions," Act § 2910(5), provides no basis for distinguishing the National Guard. Nothing in that definition suggests that such actions are not equally covered whether they involve active or reserve forces, the regular military or the National Guard. It is therefore not surprising that in previous rounds both the Secretary and the Commission made recommendations to close or realign National Guard installations, or that the Secretary has made such recommendations in the current round.

As your letter recognizes, however, two statutes might be read to restrict the federal Government's ability to carry out such closures and realignments. These are 10 U.S.C. § 18238 and 32 U.S.C. § 104(c). Considering each provision in turn, we conclude that neither affects the exercise of authority under the Base Closure Act.

to restate existing law, not to make new law. Consistently with the general plan of the United States Code, the pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties, or functions."); *Fairbank v. Schlesinger*, 533 F.2d 586, 600 (D.C. Cir. 1975) (observing that "the codification of the Armed Forces statutes in 1956, according to the provisions of the codification and the committee reports, did not intend to make any changes in the law"); *id.* at 595 & n.20 (discussing the codification).

Both text and history thus make clear that the gubernatorial consent requirement contained in section 18238 applies *only* where the federal Government is acting under the authority conferred by the Facilities Act, as now codified in chapter 1803 of title 10. The Commission is certainly not doing so here. It is instead acting under the authority of the Base Closure Act—its only source of authority or even existence—without any reliance on chapter 1803, just as the President and later the Secretary of Defense will act solely under the Act as the process continues. Moreover, the Commission is performing actions distinct from those for which chapter 1803 provides authority. The primary purpose of that chapter is to provide for "the acquisition" in various ways "of facilities necessary for the proper development, training, operation, and maintenance of the reserve components of the armed forces, including troop housing and messing facilities." 10 U.S.C. § 18231 (2000); *see also* H.R. Rep. No. 81-2174, at 1 (1950) (stating similar purpose of original Facilities Act). To that end, chapter 1803 authorizes the Secretary of Defense to acquire or build facilities with federal money, as well as to make contributions to the States. *See* 10 U.S.C. § 18233 (2000). Those contributions are to be used either to convert existing facilities for joint use by more than one reserve unit, *id.* § 18233(a)(2), or to acquire or convert new facilities "made necessary by the conversion, redesignation, or reorganization" of units of the National Guard of the United States by the Secretary of the relevant military department, *id.* § 18233(a)(3).

All of this federally funded construction for the benefit of the National Guard naturally could lead to the relocation of certain Guard units to new facilities. In these circumstances, section 18238 requires gubernatorial consent before a unit is "withdrawn" from its existing facility or "relocated" to a new one. The provision thus limits the ability of the Secretary of Defense to relocate National Guard units unilaterally *as an incident* of his powers under chapter 1803 to provide new facilities for the reserve components of the Armed Forces. In contrast, when the federal Government uses the Base Closure Act to close or realign military installations—and thereby to relocate National Guard units—its power in no way derives from chapter 1803.

The same analysis applies even if the closure or realignment of a National Guard facility pursuant to the Base Closure Act should ultimately require the federal Government to acquire land or construct facilities. That Act provides independent statutory authority for such development activity, by authorizing the Secretary of Defense to "take such actions as may be necessary to close or realign any military installation, including *the acquisition of such land, [or] the construction of replacement facilities* . . . as may be required to transfer functions from a

impliedly suspending operation of the latter to the extent of the overlap.[6] Interpreting section 104(c) not to apply to the Act avoids that result and harmonizes the two statutes in a way fully consistent with the underlying purposes of each, as required by well-established rules of statutory construction.

We begin with the text. The second sentence of section 104(c) refers back to the first sentence in two significant ways; these references suggest that the second sentence's admonition that "no change" may be made without gubernatorial approval is best read simply to constrain actions conducted under the first sentence's authorization of certain presidential "designat[ions]." For one, the beginning word, "However," is one that necessarily refers to and limits what comes before. For another, the words "branch" and "organization" appear in both sentences of section 104(c). In the first sentence they describe the scope of the President's power; in the second, they describe the scope of the limitation on that power. This parallel construction indicates that the second sentence was intended to apply when the President takes action under the first sentence, not when he acts pursuant to authority conferred on him by entirely separate and distinct authorizations.

This reading finds additional support in the statutory history. What is now section 104(c) is the combined product of the National Defense Act of 1916 and the amendments enacted in 1933. Section 60 of the National Defense Act allowed the President to associate National Guard units with particular branches of the regular Army and to arrange those units geographically so that, when combined, they would form complete tactical units. *See* 39 Stat. at 166. As originally enacted, this section granted no veto authority to the States. In 1933, however, Congress qualified this presidential power, such that section 60 read as follows:

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[6] At least some closures or realignments of National Guard installations under the Base Closure Act may be said to involve a "change in the branch, organization, or allotment of a unit located entirely within a State," in which case, if section 104(c) did apply, gubernatorial consent would be required. We understand that phrase to reach only actions that would either alter the affiliation of a particular National Guard "unit" with a particular segment of the regular Armed Forces or move a Guard "unit" out of a State where it had been entirely maintained. This interpretation follows from reading the two sentences of section 104(c) together. In the first sentence, "branch" refers to the part of the Army with which the Guard unit is associated, and "organization" refers to the part of the Air Force. When used in the very next sentence, those terms should be given the same meaning. *Cf. Brown v. Gardner*, 513 U.S. 115, 118 (1994) (observing that the "presumption that a given term is used to mean the same thing throughout a statute [is] . . . surely at its most vigorous when a term is repeated within a given sentence."). Similarly, "allotment" is best understood, in light of the first sentence, to refer to the President's "designat[ion] of units . . . to be maintained in each State." Regulations issued by the National Guard Bureau adopt this interpretation: "Allotment to a state comprises all units allocated to and accepted by the Governor of that state for organization under appropriate authorization documents." Departments of the Army and the Air Force, *Organization and Federal Recognition of Army National Guard Units*, NGR 10-1 § 2-2 (Nov. 22, 2002), *available at* http://www/ngbpdc.ngb.army.mil/pubfiles/10/101/pdf. Under this reading, section 104(c) would not restrict the transfer of a National Guard unit's federally owned equipment or armaments, so long as the "unit" itself remained in place and its branch or organization were not changed. Although the provision so construed is limited, we understand that certain closures or realignments proposed by the Secretary in the current round may involve relocating an entire National Guard unit out of a given State, which could amount to a change in "allotment."

and the context in which it used them. *See* Singer, 2A *Statutory Construction* § 47:09 at 239-40. All of these indicators point toward giving the proviso a narrow cast.

This textual reading of the scope of section 104(c)'s proviso finds additional support in the rule that seemingly inconsistent statutes should be construed, where their text permits, to avoid a conflict. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen 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."); *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000) ("[I]t is a well established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict."). This rule of statutory construction reinforces the need to construe the proviso narrowly, as a more expansive interpretation would create serious conflicts between section 104(c) and the Base Closure Act. The Act establishes comprehensive procedural and substantive criteria to be used for making base closure and realignment decisions. It imposes strict deadlines on various Executive Branch actors and on Congress; establishes and limits the criteria on which the Secretary may rely in preparing his list of recommendations; establishes and limits the criteria on which the Commission may rely in reviewing and revising the Secretary's list; and constrains the President and Congress to all-or-nothing decisions about the entire package of recommendations. These finely wrought procedures are designed to be—and can work correctly only if they are—wholly integrated as a single package, exclusive of and unimpeded by external procedural requirements like a gubernatorial veto. Accordingly, we must read section 104(c)'s proviso—consistent with its text and statutory history—as not applying to the exercise of authority under the Base Closure Act.[7] *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

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[7] If we were to read the second sentence of section 104(c) as reaching beyond the section in which it appears, we would be compelled to read the Base Closure Act as impliedly repealing (or, more accurately given the time-limited nature of the Act, temporarily suspending) the proviso to the extent that the proviso would interfere with and constrain the exercise of authority under the Act. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (describing the "well-settled" rule that "where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"); Singer, 1A *Statutory Construction* § 23:9 at 458 ("[I]t is only natural that subsequent enactments could declare an intent to repeal preexisting laws without mention or reference to such laws. A repeal may arise by necessary implication from the enactment of a subsequent act."). The general presumption against implied repeals is overcome where there is a clear conflict between provisions enacted at different times or a clear indication that, in enacting the later statute, Congress intended to supplant the earlier one. *See Department of Transp. v. Public Citizen*, 541 U.S. 752, 766-67 (2004); *Branch v. Smith*, 538 U.S. 254, 273 (2003); *see also In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991) (holding that the Trans-Alaska Pipeline Authorization Act impliedly repealed the earlier Limitation Act, because the former was "comprehensive" and its "scheme simply cannot work if the Limitation Act is allowed to operate concurrently"). For the reasons given in the text below, such would plainly be the case here. Congress intended the Base Closure Act to be an integrated, comprehensive, and exclusive statutory scheme, and a limited suspension of the previously enacted proviso in section 104(c) (which was last amended before the Base Closure Act was first enacted in 1990) would be "necessary to make [the Act] work." *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

Commission to make decisions about which installations to close or realign on any additional criteria not described in the Act itself—such as the wishes of state governors. A requirement that gubernatorial consent be obtained before particular installations may be recommended for closure or realignment cannot be squared with this crucial feature of the Act.

Section 2914(b), which Congress added for the 2005 round, confirms this interpretation by expressly allowing one narrow exception from the exclusivity of selection criteria, and giving even that exception a minimal scope. This section requires the Secretary, in developing his recommendations, to "consider any notice received from a local government in the vicinity of a military installation that the government would approve of the closure or realignment of the installation." *Id.* § 2914(b)(2)(A). Yet at the end of the day, "[n]otwithstanding" this requirement, the Secretary must base his recommendations only on "the force-structure plan, infrastructure inventory, and final selection criteria." *Id.* § 2914(b)(2)(B). The Act makes no comparable provision for state officials—or, indeed, for any officials who *disapprove* a possible closure or realignment. In light of this narrow accommodation of the view of local governments, the exclusion of any accommodation of the views of non-consenting governors is powerful evidence that Congress did not expect—and would not have wanted—a gubernatorial veto provision to impede any action proposed or carried out under the Base Closure Act. *Cf. United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned.").

The conflict between an expansively interpreted version of section 104(c) and the comprehensive scheme of the Base Closure Act becomes particularly acute in the context of the President's role under the Act. As previously noted, the Act imposes no constraints on the President's discretion to approve or disapprove the Commission's recommendations. If state governors had a veto power over actions under the Act, however, one of two absurd consequences would follow. On the one hand, the President could take into account a gubernatorial veto. The President's power under the Act, however, is all-or-nothing; he is barred from editing out a particular installation to whose closure or realignment a governor objects. Accordingly, his only option for giving effect to the gubernatorial veto would be to reject the entire list.[8] In such case, the governor would receive a veto power not simply over a particular National Guard installation—which, as explained above, is extraordinary enough in the context of the Act—but rather over the *entire set* of recommended closures and realignments. Such a power not only would exceed the scope of section 104(c) itself, but also would be clearly irreconcilable with a nationwide, federal base closure process that, as described above, provides no role for governors in selecting installations for closure or realignment. On the other hand, the

[8] Although the President could return the list to the Commission with objections based on the veto, that would not solve the problem. If the Commission simply deleted the vetoed recommendations, it would violate the exclusivity of selection criteria. If it did not, the President would face the original problem again when the Commission returned the list.

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because the power exercised in the base closure process by the Secretary, the Commission, and ultimately the President, including the power to relocate National Guard units, is in no way derived from or dependent on section 104(c), it follows that the proviso does not apply.[10]

* * *

For the foregoing reasons, we conclude that the federal Government, acting pursuant to the Base Closure Act, need not obtain permission from state governors before closing or realigning National Guard installations.

Please let us know if we can provide further assistance.

C. Kevin Marshall

C. Kevin Marshall
Deputy Assistant Attorney General

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consider them arbitrary. Indeed, the entire point of the Act is to *reduce* arbitrariness.

[10] Necessarily included within your request is the question whether the authority to close or realign National Guard installations under the Base Closure Act, unrestricted by a requirement of state consent, would violate the Constitution, or, at least, whether we should read sections 18238 and 104(c) broadly so as to avoid a possible constitutional violation. We see no basis for an affirmative answer. First, the most plausible source of any constitutional infirmity would be the second Militia Clause. But that clause authorizes *Congress* to provide for "organizing, arming, and disciplining" the militia, U.S. Const. art. I, § 8, cl. 16, which includes forming the militia into organized units, *Perpich*, 496 U.S. at 350. Indeed, "the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress," *id.* at 349; and concurrent state power in this area is clearly subordinate to that federal power. *See Second Amendment Opinion* at 38-40 (Part II.D.2). Second, the modern National Guard, intimately connected with the federal Armed Forces, rests to a large extent on Congress's distinct power to raise and support armies, which is not qualified by the Militia Clauses. *See supra* part I.B. Third, the Act applies only to federal installations, and thus finds further support in Congress's power to "dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. That power is not held at the mercy of the States. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539, 543 (1976). Finally, as already noted, the original version of what is now section 104(c), in force from 1916 to 1933, contained no requirement of gubernatorial consent; we have located no constitutional objections raised during that time. Rather, the proviso apparently was added in 1933 solely for policy reasons. *See* H.R. Rep. No. 73-141, at 6 (quoted above in note 9).

Office of General Counsel
Defense Base Closure and Realignment Commission

Discussion of the August 3, 2005 Wiley, Rein & Fielding Memorandum Regarding the Apparent Legal Authority of the Secretary of Defense to Recommend Changes to Air National Guard and National Guard Units and Installations Pursuant to the Defense Base Closure and Realignment Act of 1990, as Amended

Dan Cowhig
Deputy General Counsel

August 5, 2005

This memorandum discusses the August 3, 2005 Wiley, Rein & Fielding memorandum regarding "the apparent legal authority of the Secretary of Defense to recommend changes to Air National Guard and National Guard units and installations pursuant to the Defense Base Closure and Realignment Act of 1990, as amended." As noted in prior Office of General Counsel memoranda, this memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Defense Base Closure and Realignment Commission (Commission).

As the Commission stood up operations in April 2005, it was apparent that significant legal issues related to the Air National Guard loomed in the base closure and realignment recommendations that were to be released on May 16, 2005.[1] The Governor and Attorney General of the State of Illinois, who at that time were the most vocal of the critics of the anticipated Air National Guard recommendations, made several statements regarding their belief that the pending recommendations would violate both statutory and constitutional law.[2]

Consistent with the mandate for the Commission to conduct operations in an open, fair and impartial manner, the Commission has solicited the views from a broad variety of parties on these matters, including the Department of Justice.[3] Despite a

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[1] The Secretary of Defense released his recommendations on May 13, 2005, three days earlier than the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act), required. See DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS (May 13, 2005).

[2] The Illinois Attorney General warned that if the anticipated recommendations were not modified, a protracted legal battle would ensue upon the release of the recommendations.

[3] Letter from Chairman Principi to Attorney General Gonzales (May 23, 2005). Several Members of Congress made the Congressional Research Service (CRS) memoranda The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005), and Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005), available to the Commission on release. Some have made their views available to the Commission without request. See RESPONSE TO DEPT. OF

number of informal and formal requests, the Office of General Counsel of the Department of Defense (DoD OGC) refused to make their analysis of the matters available to the Commission.[4] The Commission Office of General Counsel (Commission OGC) prepared a discussion of legal and policy considerations related to certain base closure and realignment recommendations on July 14, 2005.[5] On July 18, 2005, the Commission asked Wiley, Rein & Fielding (WRF) to examine the legal issues presented by the Air National Guard recommendations as they relate to the authority delegated by Congress and the President to the Commission, supplying WRF with the July 14 Commission OGC memorandum as a point of departure.

The question addressed by WRF in crafting their memorandum was "the apparent legal authority of the Secretary of Defense to recommend changes to Air National Guard and National Guard units and installations pursuant to the Defense Base Closure and Realignment Act of 1990." While the question differs from the one posed in Chairman Principi's May 23, 2005 letter to the Attorney General, the WRF memorandum (Memorandum) is useful nonetheless as it may provide the Commission with insights into the kind of analysis the Department of Defense may have conducted in order to reach the conclusion that such authority does exist.

DEFENSE: BASE REALIGNMENT AND CLOSURE COMMISSION, Office of the Governor of Nevada (June 2, 2005), and Complaint, Blagojevich v. Rumsfeld et al., C.D. Ill. No. 05-3190 (July 21, 2005).

[4] See Letter from DoD OGC to Commission Chairman Principi (June 24, 2005) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005). The DoD OGC views would have been of great utility to the Commission. Knowledge of the DoD OGC analysis would have facilitated the ability of the Commission to harmonize the legal positions of the contending parties, enhancing the ease with which the Commission would fulfill the purpose of the Base Closure Act "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Base Closure Act, § 2901(b).

[5] Commission OGC, Memorandum, subject: Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations (July 14, 2005) (July 14 Commission OGC Memorandum).

Summary of the Wiley, Rein & Fielding Memorandum

The entirety of the reasoning contained in the Memorandum is based upon a chain of three syllogisms.[6] The three syllogisms are described below.

The First Syllogism:

Major Premise: The Base Closure Act provides the "authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation in the United States."[7]

Minor Premise: "The term 'military installations' applies to installations on which National Guard units are located."[8]

Conclusion: "Accordingly, installations on which National Guard units are located may be closed or realigned."[9]

In plain terms, this first syllogism asserts:

The Base Closure Act authorizes the closure or realignment of military installations;
Some military installations house units of the Air National Guard;
Therefore, the Base Closure Act authorizes the closure or realignment of all military installations that house units of the Air National Guard.

This syllogism provides a false conclusion.

[6] A syllogism is a common technique of reasoning often used in logic and oratory to move an argument from a specific example to a more general application. "Men are mortal; Greeks are men; therefore, Greeks are mortal" is a classic example of a syllogism, with an orderly statement of the major premise, the minor premise, and the conclusion. Syllogisms are sometimes linked in series to provide a more extensive argument. While syllogisms are useful, they also present a significant hazard because they can sometimes mask serious flaws in reasoning, making the irrational appear rational.
[7] Memorandum at 2.
[8] Memorandum at 9.
[9] Memorandum at 10.

The authority delegated to the Commission[10] under the Base Closure Act is limited by the definition of a "military installation." Under the Base Closure 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*, including any leased facility."[11] If the Department of Defense has jurisdiction over an installation, the Commission may act to close or realign that installation. Conversely, if the Department of Defense does not have jurisdiction over an installation, the Commission may not act to close or realign that installation. In some instances, Air National Guard units are housed on military installations under the jurisdiction of the Department of Defense, such as an Air Force Base. In many instances, however, Air National Guard units are housed at locations over which the Department of Defense has no jurisdiction, such as a state-owned municipal airport.

Where past base closure commissions have "closed" a military installation under the jurisdiction of the Department of Defense that housed a National Guard unit, the usual result has been that the state concerned has taken over the "closed" base, leaving the National Guard unit in place. Often, other Department of Defense activities are later moved onto the "closed" installation through agreements with the state authorities.[12]

The Second Syllogism:

Major Premise: "When a military installation is realigned ... units' and headquarters' ... missions and tasks ... will cease, be reorganized or be relocated."[13]

Minor Premise: The Base Closure Act provides the "authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation in the United States."[14]

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[10] Although this same limitation applies to the authority delegated to the Secretary of Defense, the role of this office is to advise the Commission, not the Secretary.

[11] Base Closure Act § 2910(4) (Emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(1).

[12] A 2003 Government Accountability Office report provides a number of useful insights into the effect of a base closure action on a National Guard unit housed on that base. GAO-03-723, MILITARY BASE CLOSURES: BETTER PLANNING NEEDED FOR FUTURE RESERVE ENCLAVES (June 27, 2003).

[13] Memorandum at 10-11

[14] Memorandum at 2, quoting Base Closure Act § 2909(a).

Conclusion: "Accordingly ... equipment may be relocated without apparent limitation, and the relocation of headquarters, units or missions between one military installation and another ... is permitted [under the Base Closure Act]."[15]

In plain terms, this second syllogism asserts:

Base Closure Act recommendations make mention of disbanding, relocating, reorganizing or changing the equipment of military units;
Base Closure Act recommendations are made under the authority of the Base Closure Act;
Therefore, the Base Closure Act authorizes disbandment, relocation, reorganization, or change to the equipment of military units.

This conclusion of this second syllogism is false.

The authority of the Secretary of Defense to disband, relocate, reorganize, or change the equipment of military units is derived from and limited by diverse statutory authority, including Title 10 and 32 of the United States Code, annual authorization and appropriation acts, and other session law, as well as the delegated authority of the President as Commander-in-Chief of the Armed Forces of the United States.

The authorities and restrictions of the Base Closure Act are harmonized with these other sources of authorities and restrictions by the Base Closure Act itself. The Act provides for specific, constrained exemptions and exclusions from the effect of precisely identified statutes.[16] The Base Closure Act does not contain any language that would permit its provisions to override statutes that are not listed.[17] There is no provision of the Base Closure Act that expands the authority of the Federal Government to disband, relocate, reorganize or change the equipment of National Guard units outside the scope of existing authorities.

[15] Memorandum at 12.
[16] For example, Base Closure Act § 2909(a) (Restrictions on other base closure authority) (Limiting application of 10 USC § 2687), § 2905 (Implementation) (Restricting the application of certain provisions of the National Environmental Policy Act of 1969).
[17] The Base Closure Act does not contain any language indicating that its provisions are to be given effect "notwithstanding any other provision of law." To the contrary, the presence of specified exemptions to identified statutes is a clear indication the Base Closure Act is not intended to override statutes that are not explicitly identified.

The Third Syllogism:

Major Premise (the conclusion of the first syllogism): "Installations on which National Guard units are located may be closed or realigned."[18]

Minor Premise (the conclusion of the second syllogism): "Equipment may be relocated without apparent limitation, and the relocation of headquarters, units or missions between one military installation and another ... is permitted."[19]

Conclusion: "Hence, the BRAC statute authorizes the Secretary to recommend and take any action necessary to terminate operations or reduce and relocate National Guard equipment, headquarters, units and/or missions."[20]

This third syllogism is constructed from the conclusions of the first and second syllogisms. In plain terms, it asserts:

The Base Closure Act authorizes the closure or realignment of military installations that house units of the Air National Guard;
The Base Closure Act authorizes disbandment, relocation, reorganization, or change to the equipment of military units;
Therefore, the Base Closure Act authorizes the disbandment, relocation, reorganization, or change to the equipment of units of the Air National Guard.

Derived as it is from the false conclusions of the first and second syllogisms, this third syllogism and its conclusion are also false.

The false conclusion of this third syllogism is the conclusion of the Memorandum, that the Base Closure Act "authorizes relocation or change to National Guard equipment, headquarters, units and/or missions."[21] The Commission should not rely upon the reasoning of the Memorandum.

[18] Memorandum at 10.
[19] Memorandum at 12.
[20] Memorandum at 11. The Memorandum also states this conclusion in somewhat cleaner language as "because the BRAC statute applies in the first instance to military installations on which National Guard units are located, it necessarily also applies to National Guard units, missions, and equipment associated with those installations."
[21] Memorandum at 8.

Sundry Points

Although they do not impact the conclusion of the Memorandum, there are a number of sundry points that merit comment.

The Memorandum concludes that the Base Closure Act "appears to provide no authority for the retirement of equipment, as opposed to the transfer or relocation of equipment."[22] This is consistent with the conclusion on that same point in the July 14 Commission Office of General Counsel memorandum.[23]

While the Memorandum correctly notes "past BRAC rounds have recommended the closure or realignment of installations relating to the National Guard,"[24] it mischaracterizes those actions by failing to note that every recommendation made by prior commissions that directed the movement of a unit of the Air National Guard was made with the consent of the governor concerned.[25] Often the recommendations were made at the request of the governor concerned. The Memorandum also indicates that the 1995 Defense Base Closure and Realignment Commission (1995 Commission) directed the relocation of a laundry list of Air Guard units "to locations acceptable to the Secretary of the Air Force."[26] A reader might conclude from that summarization that the 1995 Commission placed the relocation of a long list of Air Guard units entirely at the

[22] Memorandum at 12.
[23] July 14 Commission OGC Memorandum at 15-17. Unfortunately, this leaves the Commission without a possible insight into the DoD OGC analysis on this point.
[24] Memorandum at 10.
[25] BASE REALIGNMENTS AND CLOSURES: REPORT OF THE DEFENSE SECRETARY'S COMMISSION (Dec 29, 1988) (1988 SECRETARY'S COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: REPORT TO THE PRESIDENT 1991 (July 1, 1991) (1991 COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: 1993 REPORT TO THE PRESIDENT (July 1, 1993) (1993 COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: 1995 REPORT TO THE PRESIDENT (July 1, 1995) (1995 COMMISSION REPORT). The Memorandum also fails to note the practice adopted by the Army in making its recommendations for the 2005 round, where every recommendation that impacts a unit of the Army National Guard is conditioned by the phrase "if the State decides to relocate those National Guard units."
[26] Memorandum at 10, note 61, indicating that the "1995 BRAC Commission Report ... recommend[ed] closure of Ontario International Airport Air Guard Station in California, Roslyn Air Guard Station in New York, and Chicago O'Hare IAP Air Reserve Station in Illinois with relocation of the 126th Air Refueling Wing (ANG) to Scott AFR in Illinois and relocations of other ANG units to locations acceptable to the Secretary of the Air Force."

discretion of the Secretary of the Air Force, without any limitation whatsoever. In fact, the recommendations mentioned in the list contained in the Memorandum originated with the states concerned, and were thus made with the consent of the governors concerned.[27] With the exception of the last installation mentioned in the list, O'Hare International Airport, each recommendation proposed that the unit would move to the precise location within the state that was requested by the state.[28]

In the case of O'Hare International Airport, the City of Chicago sought the property that housed the 126th Air Refueling Wing of the Illinois Air Guard and a number of other support units at the airport. The city and state requested the 1995 Commission authorize the movement of the state's Air Guard units to other locations. The Air Force concurred with the relocation of the 126th Air Refueling Wing to Scott Air Force Base, Illinois, and "the remaining Air National Guard units to other locations within the state," so long as those locations were "acceptable to the Secretary of the Air Force."[29] The 1995 Commission crafted a recommendation based on the request of the State of Illinois that directed those movements so long as the City of Chicago paid all costs associated with the relocations. If those conditions were not met, the 1995 Commission provided, "the units [would] remain at O'Hare International Airport."[30]

In the body of a historical discussion, the Memorandum recounts that the 1988 Base Realignment and Closure Commission (1988 BRAC Commission) was "an executive-branch commission,"[31] established by the authority of the Secretary of Defense.[32] It is important to note that this is not true of the 2005 Base Closure and Realignment Commission, which was established by the amended Defense Base Closure and Realignment Act of 1990, a statute. Because Congress, through the Base Closure Act, delegated some degree of legislative authority to the 2005 Commission, the Commission resides outside the Executive Branch.

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[27] 1995 COMMISSION REPORT.
[28] See 1988 SECRETARY'S COMMISSION REPORT, 1991 COMMISSION REPORT, 1993 COMMISSION REPORT, and 1995 COMMISSION REPORT.
[29] 1995 COMMISSION REPORT at Ch. 1, p. 94-95
[30] 1995 COMMISSION REPORT at Ch. 1, p. 95.
[31] Memorandum at 4.
[32] While a statute was subsequently enacted to support the activities of the 1998 Secretary's Commission, that commission remained under the authority of the Secretary of Defense. Subsequent base closure commissions were placed outside the authority of the Secretary of Defense by the enactment of the Defense Base Closure and Realignment Act of 1990.

The Memorandum misstates the issue and holding of Dalton v. Specter.[33] According to the Memorandum, the Court found in Dalton that "stated plainly, 'claims simply alleging the President has exceeded his statutory authority are not constitutional claims, subject to judicial review.'"[34] This quote, however, is drawn from dicta, not from the holding of the Court. The entire sentence reads "the decisions cited above," referring to an extensive discussion of the application of a broad variety of cases to the assertion that the President's approval of a recommendation purportedly tainted by a procedural violation by the Commission constituted a violation of the Constitutional separation of powers doctrine, "establish that claims simply alleging the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in Franklin."[35]

In the words of the Supreme Court, "the claim raised" in Dalton was "a statutory one: The President is said to have violated the terms of the 1990 Act by accepting *procedurally flawed* recommendations."[36] In other words, in Dalton, the plaintiff claimed that the Commission's actions were procedurally flawed, not that the Commission had exceeded its authority or violated the Constitution.

Deciding this issue, the Supreme Court held that "*how* the President chooses to exercise *the discretion Congress has granted him* is not a matter for our review."[37] Summing its decision, the Court rephrased this holding slightly, as a finding that "where a statute, such as the 1990 Act, commits decision-making to the discretion of the President, judicial review of the President's decision is not available."[38]

This distinction is critical to the Commission's action on elements of recommendations that fall outside the scope of the Base Closure Act, as discussed in the July 14 Commission Office of General Counsel memorandum that was provided to the Office of Legal Counsel, because the holding in Dalton presupposes that the action was within the scope of the statutory delegation of authority. Justice Blackmun's concurring opinion underscored this distinction, pointing out that Dalton "does not foreclose judicial review of a claim" that the President acted "in contravention of his statutory authority."[39]

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[33] 511 U.S. 462 (1994).
[34] Memorandum at 23 (quoting Dalton at 473).
[35] 511 U.S. at 473-74, citing Franklin v. Massachusetts, 505 U.S. 788 (1992).
[36] 511 U.S. at 474 (Emphasis added).
[37] 511 U.S. at 476 (Emphasis added).
[38] 511 U.S. at 476-77 (Emphasis added).
[39] 511 U.S. at 477-78. Justice Blackmun provided several examples of questions that he considered reviewable under the Dalton decision:

Nor, plainly, does Dalton foreclose a claim that the Commission acted beyond its authority, or in violation of the Constitution.

It is essential for the Commission to recognize that the recommendations at issue in Dalton did not themselves present constitutional questions. In Dalton, the plaintiff asserted that the recommendations regarding a purely Federal facility, the Philadelphia Naval Shipyard, were procedurally tainted.[40] Several leaps of logic were required to allege a matter of constitutional significance. The Air Force and Navy recommendations impacting the Air National Guard, however, are replete with issues that are clearly grounded in the Constitution, including the separation of powers between the Legislative and Executive and the division of power between the state and Federal governments.

Finally, the Memorandum asserts that the Commission must ignore and endorse any aspect of the Department of Defense recommendations that might violate the law, positing that the "Commission may only make changes to recommendations that substantially deviate from the Force-Structure Plan and final criteria."[41] In effect, the Memorandum would assert that commissioners are devoid of any authority to correct plain error, could be compelled to act in violation of law, and are entirely reliant upon the Department of Defense to determine the scope of their authority. Such an assertion can

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

511 U.S. at 477-78 (Emphasis added).

[40] 511 U.S. at 466.

[41] Memorandum at 20. This assertion presupposes that unless a statute making a delegation of authority contains a specific proviso to the effect that the entity to which the authority in question has been delegated is authorized to ensure that it does not exceed its delegated authority, it must exceed its delegated authority.

not be reconciled with the Commission's role as an independent body charged with the responsibility of reviewing the recommendations of the Department of Defense for compliance with the requirements of the Base Closure Act.

Author: Dan Cowhig, Deputy General Counsel 5 Aug 05
Approved: David Hague, General Counsel 8 Aug 2005

DCN: 12010

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
2521 South Clark Street, Suite 600
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August 5, 2005

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Dear Attorney General Gonzales:

A memorandum of law prepared at my request by the law firm of Wiley, Rein & Fielding, LLP is enclosed. The memorandum is not a product of deliberations by Base Closure and Realignment (BRAC) Commission members and accordingly does not necessarily represent their views or those of the Commission. We remain uncertain as to the state of the law and thus continue in our need for the assistance requested in my letter to you of May 23, 2005.

Your legal opinion regarding the authority of the Secretary of Defense and BRAC Commission to effect the changes contemplated by the Secretary's recommended closures and realignments of National Guard and Air National Guard installations will help to guide us in formulating our recommendations to the President. With our final deliberations scheduled for August 24-27 and our report due to the President on September 8, time is of the essence.

We have remained in contact with the Office of Legal Counsel with respect to this matter and will continue to provide assistance as requested. A paper prepared by my legal staff discussing the enclosed memorandum may be forthcoming early next week.

Sincerely,

Anthony J. Principi
Chairman

Enclosure:
Memo of law dtd August 3, 2005

Chairman: Anthony J. Principi
Commissioners: The Honorable James H. Bilbray, The Honorable Philip E. Coyle III, Admiral Harold W. Gehman Jr., USN (Ret),The Honorable Jim Hansen, General James T. Hill, USA (Ret), General Lloyd Newton, USAF (Ret), The Honorable Samuel K. Skinner, Brigadier General Sue Ellen Turner, USAF (Ret)
Executive Director: Charles Battaglia

Wiley Rein & Fielding LLP

MEMORANDUM

ATTORNEY CLIENT PRIVILEGED - CONFIDENTIAL

TO: The Honorable Anthony J. Principi
Chairman, Defense Base Closure and Realignment Commission

FROM: Fred F. Fielding

DATE: August 3, 2005

RE: Apparent Legal Authority of the Secretary of Defense to Recommend Changes to Air National Guard and National Guard Units and Installations Pursuant to the Defense Base Closure and Realignment Act of 1990, as Amended

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I. Introduction.

The Defense Base Closure and Realignment Act ("BRAC statute") of 1990, as amended, governs the 2005 round of base realignment and closure decisions.[1] Pursuant to the BRAC statute, the Secretary of Defense ("Secretary") presented a force-structure plan and infrastructure inventory to Congress and the Defense Base Closure and Realignment Commission ("BRAC Commission") and published final selection criteria for use in making base closure and realignment recommendations.[2] Subsequently, the Secretary transmitted to Congress and the BRAC Commission a list of military installations that the Secretary recommends for closure or realignment based on the force-structure plan and the final selection criteria.[3] The final selection criteria are "the only criteria to be used, along with the force-structure plan and infrastructure inventory" in making base closure and realignment recommendations in 2005.[4]

Among the actions recommended by the Secretary are: (1) the closure of certain installations on which Army National Guard or Air National Guard ("National Guard") units are

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[1] Defense Base Closure & Realignment Act of 1990, as amended, Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808 (codified at 10 U.S.C. § 2687 note (§§ 2901-14)).

[2] 10 U.S.C. § 2687 note (§§ 2912(a), 2913).

[3] *Id.* § 2687 note (§ 2914(a)).

[4] *Id.* § 2687 note (§ 2913(f)).

located and the associated relocation or change to equipment, headquarters, units, and/or missions; and (2) the realignment of certain installations on which National Guard units are located and the associated relocation or change to equipment, headquarters, units, and/or missions.[5] Pursuant to your instruction, we enclose herewith our analysis of issues related to these recommendations.

II. Presentation of Issues.

The question is whether the Secretary may recommend the above actions involving military installations on which National Guard units exist without obtaining gubernatorial consent in each state in which such units are located. This question presents at least three subsidiary questions. First, do the proposed actions impacting National Guard equipment, headquarters, units, and/or missions fall within the parameters of the BRAC statute? Second, do the proposed actions impacting National Guard equipment, headquarters, units, and/or missions implicate other statutory schemes and, if so, does the BRAC statute override these schemes? Third, even if the proposed actions implicate other statutory schemes, may the BRAC Commission change recommendations based on this legal presumption and, relatedly, could a cause of action lie against the Secretary or the BRAC Commission for making or failing to reject such recommended actions?

III. The Secretary's Proposed Actions Fall Within the Parameters of the BRAC Statute.

A. The Purpose of the BRAC Statute Is to Provide an Expedited and Politically Neutral Base Closure Process.

A review of the evolution of the current BRAC process from prior statutory mechanisms for closing or realigning military installations is instructive for two reasons. First, it illustrates that the codified BRAC process was intended to be a comprehensive review of the United States military base structure without regard to partisan interests or local intervention. Second, and relatedly, it supports the plain language of the BRAC statute, which currently provides that BRAC is 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."[6]

1. The Pre-BRAC Statute Base Closure and Realignment Process.

In the early 1960s, President Kennedy directed Secretary McNamara to implement an extensive base closure and realignment program aimed at reducing the sizeable base structure developed during World War II and the Korean conflict.[7] With minimal consultation with

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[5] It is not our opinion, based on the limited information we have to date, that the members of a State's Guard, outside of their federal reserve capacity, assigned to a headquarters or unit, may themselves be relocated or moved outside the State pursuant to a BRAC recommendation.

[6] 10 U.S.C. § 2687 note (§ 2909(a)).

[7] Defense Base Closure and Realignment Commission: Report to the President, 1995 ("1995 BRAC Commission Report"), ch. 4, at 4-1; Report of the Defense Secretary's Commission, 1988 ("1988 Secretary's Commission Report"), ch. 1, at 8.

Congress or the military services, Secretary McNamara closed or realigned hundreds of bases.[8] In 1965, suspicious that politics had played a role in the selection of bases for closure or realignment, members of Congress responded by enacting legislation that established reporting requirements for base closures.[9] President Johnson promptly vetoed the legislation, setting off a decade-long struggle between the branches over base closures.[10]

In 1977, Congress succeeded in curtailing the Secretary's ability to close or realign military bases.[11] Tucked into the fiscal year 1978 military construction bill signed by President Carter was a provision requiring the Secretary to undertake extensive notification, reporting, environmental, and layover requirements prior to closing or realigning a military installation.[12] The provision subsequently was codified at § 2687 of title 10, U.S. Code.[13]

As enacted, § 2687 barred the Secretary from closing or realigning an installation at which at least 500 civilian personnel were authorized to be employed, or realigning an installation if the realignment involved a reduction of more than 1,000 (or 50 percent of) personnel authorized to be employed, unless the Secretary took certain steps.[14] Specifically, the Secretary was to notify Congressional armed services committees of the proposed closure or realignment, comply with environmental law, submit his final decision to the committees accompanied by a detailed justification evaluating its possible consequences, and wait 60 days before implementing the decision.[15] However, the statute removed § 2687's procedural hurdles for closures or realignments above the numeric thresholds that the President certified as necessary for reasons of national security or a military emergency.[16] Section 2687 later was amended to lower the number of authorized civilian personnel from 500 to 300, require committee notification as part of the Secretary's annual authorization request, and extend the waiting period to the longer of 30 legislative days or 60 calendar days.[17]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Military Construction Authorization Act ("MilCon Act"), Pub. L. No. 95-82, tit. VI, § 612, 91 Stat. 358 (1977); *see also* S. REP. NO. 95-125 (1977); H. REP. NO. 95-494 (1977) (Conf. Rep.).

[13] 10 U.S.C. § 2687.

[14] MilCon Act § 612(a), (b).

[15] *Id.*

[16] *Id.* § 612(c).

[17] 10 U.S.C. § 2687; Department of Defense Authorization Act, Pub. L. No. 99-145, tit. XII, § 1202(a), 99 Stat. 716 (1985).

Following the enactment of § 2687, virtually no closures took place over the next decade.[18] In 1988, faced with a declining Department of Defense ("DOD") budget, Secretary Carlucci worked with Congress to develop a two-part base closure approach, under which the Secretary would establish an executive-branch commission ("Secretary's Commission") to review the military base structure, and Congress would draft legislation to implement the Secretary's Commission's recommendations.[19] The objective of this approach was to streamline base closure and realignment procedures by removing existing bureaucratic and legislative roadblocks.[20]

Accordingly, the Secretary established a 12-member commission charged with determining the best process for identifying bases for closure or realignment, reviewing the military base structure, and reporting its recommendations to the Secretary by December 1988.[21] For its part, Congress enacted a BRAC statute ("1988 statute") that attempted to address the key impediments to DOD's ability to close or realign unneeded military installations.[22] At the outset, the 1988 statute was structured to address the "very political problem" of asking members of Congress to put aside parochial concerns and evaluate base closure recommendations objectively.[23] By codifying the Secretary's Commission and its mission, the 1988 statute

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[18] 1988 Secretary's Commission Report, ch. 1, at 9 (noting that "[s]ince passage of [§ 2687] over a decade ago, there has not been a single major base closure [as a]ll attempts at closing major installations have met with failure, and even proposed movements of small military units have been frustrated"); 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz) (asserting that "for more than a decade Congress has kept the military from closing any unneeded bases").

[19] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Armed Services Committee Ranking Member Warner) (describing how President Reagan and Secretary Carlucci "seized the initiative and approached the senior members of both the House and Senate Armed Services Committees [and together] devised this legislation").

[20] *Id.* (statement of Armed Services Committee Chairman Nunn) (explaining that "[t]he key to making the military installation structure more efficient and effective is to remove the current bureaucratic and legislative roadblocks to closing or realigning bases"); H. REP. NO. 100-735, pt. 1 (1988) (reporting that "[t]he purpose of [the bill] would be to streamline procedures on a one-time basis to expedite the realignment and closure of unneeded military installations").

[21] 1988 Charter: Defense Secretary's Commission on Base Realignment and Closure, The Pentagon (May 3, 1988).

[22] Defense Authorization Amendments & Base Closure & Realignment Act, Pub. L. No. 100-526, tit. II, §§ 201-09, 102 Stat. 2623 (1988) (codified at 10 U.S.C. § 2687 note (§§ 201-09)).

[23] 134 CONG. REC. S16882-01 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner) (also acknowledging that "[n]o Senators or Congressmen want to see jobs lost in their States or districts"); *see also id.* S15554-04 (daily ed. Oct. 12, 1988) (statement of Chairman Nunn) (noting that "[w]e also understand the reality and the sensitivity in the communities of America that are so dependent in some cases on these bases at least in the short run and we know that that reflects itself here in the Congress"); *id.* S15554-04 (statement of Ranking Member Warner) (recognizing "the apprehension of the Members of Congress [who may] say 'We are closing bases and we may close out my career in the Congress of the United States'"); *id.* S15554-04 (statement of Sen. Boschwitz) (indicating that although members "agree in principle that some military bases should be closed . . . this general consensus breaks down when it comes to specifics, when Members put up obstacles . . . to stop base closings in their home States"); *id.* H10033-01 (daily ed. Oct. 12, 1988) (statement of Rep. Dickinson) (emphasizing that "[h]istorically, we have been unable to [put in place a base-closing vehicle], at least for 12 years, because of political

"remove[d] Congress from micromanaging each and every proposal to close a military base."[24] At the same time, the 1988 statute also waived certain key statutes – including § 2687 – that the Secretary had identified as impediments to base closures.[25]

The 1988 statute produced immediate effects. In December 1988, the Secretary's Commission recommended closing or realigning 145 bases, and in May 1989, after the Congressional review period expired without a resolution of disapproval, the recommendations went into effect.[26]

2. The Post-BRAC Statute Base Closure and Realignment Process.

Because the 1988 statute provided streamlined base closure and realignment authority on a "one-time basis," the legal and political impediments to base closure returned upon its expiration at the end of 1988.[27] In early 1990, Secretary Cheney nonetheless issued a list of recommended closures and realignments, but the list met with Congressional opposition.[28]

Congress recognized that further reductions in installations were necessary, however, and in late 1990 enacted the BRAC statute as "the right way to close bases."[29] The BRAC statute

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(Continued . . .)
considerations or whatever"); *id.* H10033-01 (daily ed. Oct. 12, 1988) (statement of Rep. Armey) (indicating that "[t]his [legislation] has been a difficult fight [and i]n the beginning, few thought that Congress would accept a bill that strikes so directly at pork barrel spending").

[24] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz).

[25] H. REP. NO. 100-735, pt. I (reporting that the Secretary "stated that [DOD] is unable to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of current law"); H. REP. NO. 100-735, pt. II (1988) (indicating that "[t]he Department contends . . . that a 1977 law (codified at 10 U.S.C. section 2687) created impediments to closure of unneeded facilities"); 134 CONG. REC. S16882 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner) (noting that the Secretary "requested that Congress enact legislation to remove the various impediments in law that prevent timely closure of military bases").

[26] 1995 BRAC Commission Report, ch. 4, at 4-2.

[27] H. REP. NO. 100-735, pt. I.

[28] 1995 BRAC Commission Report, ch. 4, at 4-3; *see, e.g.*, 136 CONG. REC. H7429-03 (daily ed. Sept. 12, 1990) (statement of Rep. Fazio) (arguing that "[t]here is very strong evidence to indicate that Secretary Cheney's base closing announcements are politically motivated"); *id.* H7429-03 (statement of Rep. Brown) (explaining that "the long list of base closures and realignments proposed by Secretary of Defense Cheney in January 1990 is not, in my opinion, either fair or forward-looking"); *id.* H7429-03 (statement of Rep. Schroeder) (urging Congress to "reject[] the back of the envelope, partisan base closure efforts used by Secretary Cheney so far").

[29] H. REP. NO. 101-665 (1990) (stating that "[t]he last two years have provided examples of both the right way and the wrong way to close bases[: t]he establishment of the Defense Secretary's Commission on Base Realignment and Closure in 1988 is an example of the right way to close bases . . . [while] Secretary Cheney's announcement of candidates for base closure on January 29, 1990, was an example of the wrong way to close bases").

built upon and made various improvements to the 1988 statute.[30] First, the BRAC statute authorized a bipartisan commission, with members to be appointed by the President and confirmed by the Senate.[31] Second, the BRAC statute established a multi-step process, subject to strict time limits, for making closure and realignment recommendations in 1991, 1993, and 1995, respectively.[32] It directed the Secretary to submit a force-structure plan to Congress, develop and publish criteria for selecting installations for closure or realignment, and formulate a list of recommendations based upon the force-structure plan and final selection criteria.[33] Upon receipt of DOD's recommendations, and with the assistance of the Government Accountability Office ("GAO"), the BRAC Commission was to conduct public hearings and review the recommendations to determine whether the Secretary had "deviated substantially" from the force-structure plan and final selection criteria.[34] The BRAC Commission then was to report to the President with its own recommendations, accompanied by explanations and justifications.[35] If the President approved the BRAC Commission's recommendations, he was to transmit them to Congress; if not, he was to return them to the BRAC Commission for revision and resubmittal.[36] Barring a joint resolution of disapproval by Congress, the recommended closures and realignments were to be carried out by the Secretary within a six-year period.[37]

The BRAC statute provided the Secretary with special authorities to implement closure and realignment recommendations.[38] Under the law, the Secretary could "take such actions as may be necessary" to close or realign an installation, manage and dispose of property, carry out environmental restoration and mitigation, and provide assistance to affected communities and employees.[39] In addition, the BRAC statute specified that it was to serve as "the exclusive authority" for base closures and realignments, with the exception of closures and realignments (1) that were implemented under the 1988 statute, or (2) to which § 2687 is not applicable,

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[30] S. REP. NO. 101-384 (1990) (describing the BRAC statute's adoption of the 1988 procedures with certain improvements).

[31] Pub. L. No. 101-510, § 2902.

[32] *Id.* § 2903.

[33] *Id.* § 2903(a)-(c).

[34] *Id.* § 2903(d).

[35] *Id.*

[36] *Id.* § 2903(e). If the President did not transmit an approved list of recommendations, the process was to be terminated. *Id.*

[37] *Id.* §§ 2904, 2908.

[38] *Id.* §§ 2905, 2909.

[39] *Id.* § 2905(a)-(b).

including those carried out for reasons of national security or military emergency.[40] To expedite the process even further, the BRAC statute also waived § 2687, along with certain property, environmental, and appropriations statutes, so that § 2687 could not impede the Secretary's ability to close or realign installations.[41]

Pursuant to the BRAC statute, three rounds of closures and realignments took place in 1991, 1993, and 1995, resulting in the closure or realignment of hundreds of installations.[42]

It was not until 2001 that Congress again turned its attention to the need to reduce excess military infrastructure.[43] After extensive debate, Congress approved legislation ("2001 amendments") amending the BRAC statute to authorize a 2005 round.[44] The 2001 amendments modified the BRAC statute to require the Secretary to submit, in addition to the force-structure plan, a comprehensive infrastructure inventory of every type of military installation for active

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[40] *Id.* §§ 2905, 2909.

[41] *Id.* § 2905(c)-(d). The 1990 waiver thus constituted a more comprehensive repeal of § 2687 than the 1988 version, which had merely authorized closures and realignments without regard to the "procedures set forth in" § 2687. Pub. L. No. 100-526, § 205(2); *see also* S. REP. NO. 101-384 (explaining that DOD should "reap the benefit of certain waivers [applied in 1988 to] permit a more rapid closure of installations[and] realization of the attendant savings[, and] expedite the disposal of the property and the development of local economic revitalization plans").

[42] DEP'T OF DEFENSE, REPORT REQUIRED BY SECTION 2912 OF THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT OF 1990 ("Section 2912 Report"), app. C (2004). The process established by the BRAC statute withstood constitutional challenges under the non-delegation or separation of powers doctrines. *See Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 404-05 (D.C. Cir. 1990).

[43] The House of Representatives was more resistant than the Senate to authorizing an additional round. *E.g.*, 147 CONG. REC. H10069-01 (daily ed. Dec. 13, 2001) (statement of Rep. Baldacci) (noting that "this House has continually stood up and voted against any additional base closure commissions"). In 2001, the Senate approved defense authorization legislation providing comprehensive authority for a new BRAC round after narrowly defeating an amendment to strike that authority. 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001); *see also* S. REP. NO. 107-62 (2001) (minority views of Sen. Bunning). By contrast, the House legislation provided only for limited authority relating to lease-back of base closure property. *Compare, e.g.*, S. 1416 *and* S. 1238 (providing comprehensive authority for a new BRAC round) *with* H.R. 2586 (providing only for limited authority for lease back of base closure property). Ultimately, the House acquiesced to the Senate proposal, modified to delay the next round from 2003 to 2005. H. REP. NO. 107-333 (2001) (Conf. Rep.); 147 CONG. REC. H10069-01 (statement of Armed Services Committee Chairman Stump) (explaining that "[o]ver the strong reservation of many House Members, including myself, we have agreed to authorize a round of base closures, but not until 2005"); *id.* H10069-01 (statement of Rep. Pomeroy) (stating that "I believe that . . . the Armed Services Committee correctly decided not to authorize additional base closures in the House bill [and] am disappointed that they were forced under the threat of a presidential veto to accept a provision authorizing a new round in 2005").

[44] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, div. B, tit. XXX, §§ 3001-08, 115 Stat. 112 (codified at 10 U.S.C. § 2687 note (§§ 2904(a), 2905(b), 2906A, 2912-14)); H. REP. NO. 107-333 (Conf. Rep.); *e.g.*, 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Armed Services Committee Chairman Levin) (stating that "[i]t seems to me, at a minimum, we ought to be willing now to set aside our own back-home concerns and do what is essential in order to have the efficient use of resources [especially] when we are asking our troops to go into combat"); *id.* S10027-07 (daily ed. Oct. 2, 2001) (statement of Sen. McCain) (arguing that "[w]e cannot, in this national emergency, let our parochial concerns override the needs of the military").

and reserve forces, and, based on these documents, certify whether a need existed for further closures and realignments.[45] The 2001 amendments also set forth specific selection criteria for the Secretary to use in making recommendations.[46] Moreover, while the 2001 amendments directed the Secretary to *consider* "any notice received from a local government in the vicinity of a military installation that the government would approve of the closure or realignment of the installation," they instructed him to make recommendations for closure or realignment based on "the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable[.]"[47] Finally, the 2001 amendments made other changes relating to the commission structure and disposal of property.[48]

In 2004, when preparations for the 2005 round were well underway, Congress debated proposals to delay the 2005 round for two years, until 2007.[49] Ultimately, however, Congress "put the good of the Department of Defense over parochial interests and protected the upcoming BRAC round" by rejecting the proposals.[50] Instead, Congress approved legislation ("2004 amendments") making certain modifications to the BRAC statute.[51]

B. The BRAC Statute Authorizes the Closure and Realignment of Military Installations On Which National Guard Units Are Located As Well As the Associated Relocation, Change or Retirement of National Guard Missions, Units, and Equipment.

A review of the text, history, and application of the BRAC statute confirms that its scope includes installations relating to the National Guard, and that it authorizes not only the closure and realignment of such installations but the associated relocation or change to National Guard equipment, headquarters, units, and/or missions.

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[45] Pub. L. No. 107-107, § 3001 (amending 10 U.S.C. § 2687 note to add § 2912). The 2001 amendments directed GAO to evaluate the Secretary's force-structure plan, infrastructure inventory, and need for closure or realignment. *Id.*

[46] *Id.* § 3002 (amending 10 U.S.C. § 2687 note to add § 2913).

[47] *Id.* § 3003 (amending 10 U.S.C. § 2687 note to add § 2914(b)(2)).

[48] *Id.* §§ 3003-07 (amending 10 U.S.C. § 2687 note to add §§ 2914, 2906A and amend §§ 2902, 2904-05, 2908-10).

[49] 150 CONG. REC. S5569-01, S5767-01 (daily eds. May 18-19, 2004) (debating the Lott et al. amendment to delay the 2005 round for domestic installations until 2007); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (debating the Kennedy-Snyder amendment to delete legislative language delaying the 2005 round until 2007).

[50] 150 CONG. REC. S10945-01 (daily ed. Oct. 9, 2004) (statement of Sen. McCain) (noting that the Senate defeated the Lott amendment "aimed at crippling the upcoming BRAC round").

[51] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, div. B, tit. XXVIII, subtit. C, §§ 2831-34, 118 Stat. 1811 (codified at 10 U.S.C. § 2687 note (§§ 2912-14)).

The BRAC statute defines "military installation" 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."[52] While the BRAC statute does not define "closure," DOD defines the term in pertinent part to mean that "[a]ll missions of the installation have ceased or have been relocated; personnel positions (military civilian and contractor) have either been eliminated or relocated."[53] In a closure, all missions carried out at a military installation either cease or relocate.[54] The BRAC statute defines "realignment" as "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."[55] In a realignment, a military installation remains open but loses and sometimes gains functions.[56] Although the BRAC statute does not define "function," DOD's definition of the term includes "the appropriate or assigned duties, responsibilities, missions, or tasks of an individual, office, or organization."[57]

At the outset, the history and application of the BRAC statute confirm that the term "military installations" applies to installations on which National Guard units are located. The history of the BRAC statutory process makes clear that the executive branch and Congress regarded the BRAC process as comprehensive, covering "every" military installation.[58] Nowhere in the legislative history is there mention of any exemption for installations involving the National Guard.[59] To the contrary, the legislative history indicates that Congress specifically

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[52] 10 U.S.C. § 2687 note (§ 2910(4)).

[53] BRAC 2005 Definitions, available at http://www.defenselink.mil/brac/docs/definitions012004.pdf.

[54] U.S. General Accounting Office, Report No. GAO 02-433 ("GAO 2002 Report"), *Military Base Closures: Progress in Completing Actions from Prior Realignments and Closures*, Apr. 2002, at 5 n.6.

[55] 10 U.S.C. § 2687 note (§ 2910(5)).

[56] GAO 2002 Report, at 5 n.6.

[57] Department of Defense Dictionary of Military and Associated Terms ("DOD Dictionary"), available at http://www.dtic.mil/doctrine/jel/doddict/.

[58] Letter from the Chairman, Joint Chiefs of Staff, to the Chairman, Senate Armed Services Committee, May 18, 2004 (concluding that "BRAC has proven to be the only comprehensive, fair, and effective process for accomplishing this imperative"); H. REP. NO. 100-735, pt. II (noting that the new procedure set up by the 1988 statute would direct the Secretary to "*all* military installations in the United States") (emphasis added); H. REP. NO. 107-333 (Conf. Rep.) (expressing the conferees' view that the Secretary must "review *every* type of installation") (emphasis added); *see also* 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Sen. Dorgan) (noting that the BRAC commissions "say[] to *every* military installation in the country, by the way, we are going to look at you for potential closure" and that "*every* military installation is at risk of closure") (emphasis added); *id.* S9763-07 (statement of Sen. Lott) (asserting that "*every* base, every community, every State is going to be affected by" the 2005 round) (emphasis added). *Cf.* H. REP. NO. 101-665 (stating that "[t]he committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it" by carving out exceptions thereto).

[59] *See, e.g.*, S. REP. NO. 101-384; S. REP. NO. 107-62; S. REP. NO. 108-260 (2004); H. REP. NO. 100-735, pts. 1-IV; H. REP. NO. 101-665; H. REP. NO. 107-94 (2001); H. REP. NO. 108-491 (2004); H. REP. NO. 100-1071 (1988).

understood that "National Guard facilities will . . . be included in this process."[60] Toward that end, past BRAC rounds have recommended the closure or realignment of installations relating to the National Guard,[61] and the Secretary's infrastructure inventory submitted for the 2005 BRAC round lists thousands of National Guard installations.[62] Accordingly, installations on which National Guard units are located may be closed or realigned.[63]

Moreover, with regard to such installations, the terms of the BRAC statute authorize the associated relocation, change, or merger of National Guard missions, units, and equipment. Implicit in the statute's definition of realignment as "any action which both reduces and relocates functions and civilian personnel positions" is the common sense notion that when a military installation is *realigned* pursuant to a national plan, something other than the property or

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(Continued . . .)
(Conf. Rep.); H. REP. NO. 101-923 (1990) (Conf. Rep.); H. REP. NO. 107-333 (Conf. Rep.); H. REP. NO. 108-767 (2004) (Conf. Rep.); 134 CONG. REC. S15554-04, S16882-01, H10033-01 (daily eds. Oct. 12, 19, 26, 1988); 136 CONG. REC. E3511-02, H7297-05 (daily eds. Sept. 11, Oct. 26, 1990); 147 CONG. REC. S9565-01, S9763-07, S10027-07, S13118-01, H10069-01 (daily eds. Sept. 21, 25, Oct. 2, Dec. 13, 2001); 150 CONG. REC. S5515-01, S5569-01, S5767-01, S7277-01, S10945-01, H3260-02, H3406-02, H3445-01, (daily eds. May 17-19, 20, June 17, Oct. 9, 2004).

[60] 147 CONG. REC. S5569-01 (daily ed. May 18, 2004) (statement of Sen. Lott) (warning that senators should "[k]eep this in mind[; t]he next BRAC round will include National Guard"); *see also* 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Sen. Lott) (arguing that the U.S. should not say to the National Guard and others being called up that "[b]y the way, we are going to look at closing your base"); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (statement of Rep. Ortiz) (arguing that "[w]e have now begun to rely so much on the National Guard and Reserve . . . [that it is] time to step back and look at what is happening" and delay the 2005 round); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (statement of Rep. Kolbe) (noting that he supported a 2005 BRAC round even though "the 162nd Fighter Wing of the Arizona Air National Guard which is the largest air guard unit in the United States" was in his district).

[61] *See, e.g.*, 1988 Secretary's Commission Report (recommending closure of Pease Air Force Base in New Hampshire and directing that the 132nd Air Refueling Squadron (ANG) be relocated should local authorities decide against operating the facility as an airport); Defense Base Closure and Realignment Commission: Report to the President, 1991 ("1991 BRAC Commission Report") (recommending closure of Rickenbacker Air Guard Base ("Rickenbacker") in Ohio and transfer of the 160th Air Refueling Group (ANG) to Wright-Patterson AFB in Ohio); Defense Base Closure and Realignment Commission: Report to the President, 1993 ("1993 BRAC Commission Report") (recommending that the 1991 recommendation regarding Rickenbacker be modified to move the 160th Air Refueling Group (ANG) and the 121st Air Refueling Wing (ANG) to a cantonment area at Rickenbacker); 1995 BRAC Commission Report (recommending closure of Ontario International Airport Air Guard Station in California, Roslyn Air Guard Station in New York, and Chicago O'Hare IAP Air Reserve Station in Illinois with relocation of the 126th Air Refueling Wing (ANG) to Scott AFR in Illinois and relocations of other ANG units to locations acceptable to the secretary of the Air Force).

[62] Section 2912 Report, at 25-35.

[63] A series of related provisions enacted as part of the same legislation as the 1990 statute reinforce the notion that Congress intended to utilize the National Guard as part of a complete and efficient military force. Pub. L. No. 101-510, § 1431(a). Specifically, Congress indicated that DOD "should shift a greater share of force structure and budgetary resources to the reserve components of the Armed Forces." *Id.* § 1431(a)(4). Congress also found that "[t]he reserve components of the Armed Forces are an essential element of the national security establishment of the United States" and that national and world events "require the United States to increase use of the reserve components of the Armed Forces." *Id.* § 1431(a)(1)-(2).

installation itself is at issue. Units and headquarters have duties, responsibilities, missions and tasks, and it is those that will cease, be reorganized or be relocated to support the force-structure plan, in accordance with the final selection criteria. Supporting this understanding is the sole judicial interpretation of "realignment," which specifies that the Secretary may take "any action which . . . involves the positioning of one group of functions *or* personnel relative to another group."[64]

The BRAC statutory scheme itself supports this view, as it provides that the Secretary may "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*."[65] Consequently, with respect to both the realignment and closure of bases, the statute contemplates that functions – "assigned duties, responsibilities, missions, or tasks of an individual, office, or organization" – may be relocated from one military installation to another.[66] Hence, the BRAC statute authorizes the Secretary to recommend and take any action necessary to terminate operations or reduce and relocate National Guard equipment, headquarters, units, and/or missions at 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."[67] Because the BRAC statute applies in the first instance to military installations on which National Guard units are located, it necessarily also applies to National Guard units, missions, and equipment associated with those installations

Finally, the BRAC statute covers both real and personal property.[68] The statute authorizes the Secretary to transfer real property from a closed or realigned installation to another military department.[69] The statute also empowers the Secretary to move any personal property located at such an installation if the property: "(i) is required for the operation of a unit,

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[64] *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir. 1993) (contrasting realignment, or the transfer or regrouping of functions and personnel, with the mere elimination of a particular function or RIF at an Army depot in New York) (emphasis added).

[65] 10 U.S.C. § 2687 note (§ 2905(a)) (emphasis added).

[66] DOD Dictionary, available at http://www.dtic.mil/doctrine/jel/doddict/.

[67] 10 U.S.C. § 2687 note (§ 2910(4)).

[68] *Id.* (§ 2905(b)) (granting the Secretary authority over "real property, facilities, and personal property located at a closed or realigned military installation"). "Real property" consists of "lands, buildings, structures, utilities systems, improvements, and appurtenances thereto. Includes equipment attached to and made part of buildings and structures (such as heating systems) but not movable equipment (such as plant equipment)." DOD Dictionary, available at http://www.dtic.mil/doctrine/jel/doddict/. "Personal property" includes "[p]roperty of any kind or any interest therein, except real property, records of the Federal Government, and naval vessels of the following categories: surface combatants, support ships, and submarines." *Id.*

[69] 10 U.S.C. § 2687 note (§ 2905(b)(2)(C)).

function, component, weapon, or weapons system at another location; (ii) is uniquely military in character, and is likely to have no civilian use[;] (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) meets known requirements of another Federal department."[70] Accordingly, there is no statutory basis for limiting the Secretary's authority solely to transfers of real estate: equipment may be relocated without apparent limitation, and the relocation of headquarters, units, or missions between one military installation and another in conjunction with a closure or realignment is permitted. However, the BRAC statute itself appears to provide no authority for the retirement of equipment, as opposed to transfer or relocation of equipment, whether such retirement is otherwise permissible. Again, common sense supports the statutory language: given the coordinated, comprehensive, and non-partisan review of military installations that the BRAC process represents, it seems highly dubious that the closure and realignment of military installations was intended to take place without concomitant changes to, and relocation of, equipment, headquarters, units, and/or missions.[71]

IV. The BRAC Statute Is the Exclusive Authority for Closure and Realignment of Military Installations.

Notwithstanding the breadth of the BRAC statute, it has been argued that two statutes would prohibit the closure or realignment of military installations to the extent that the closure or realignment implicates relocation or retirement of National Guard equipment, units, or missions: 10 U.S.C. § 18238 and 32 U.S.C. § 104(c). In determining whether those statutes qualify the authority under the BRAC statute, the most sustainable conclusion is that neither statute limits the ability of the Secretary or the BRAC Commission to recommend the closure or realignment of military installations, even where the closure or realignment implicates associated relocation or changes to National Guard equipment, headquarters, units, and/or missions.

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[70] *Id.* (§ 2905)b)(3)(E)). Even where such disposition involves personal property – such as planes or equipment – issued by the United States to the National Guard unit of a particular State pursuant to a Congressional earmark requiring that property to be located in that state, the BRAC statute's grant of authority contains no restrictions on disposition of planes or other equipment. *See generally id.* (§§ 2901-2914). In any event, "[a]ll military property issued by the United States to the National Guard remains the property of the United States." 32 U.S.C. § 710(a).

[71] A 1995 General Accounting Office report confirms this reading of the BRAC process, noting that:

> [t]he term base closure often conjures up the image of a larger facility being closed than may actually be the case. Military installations are rather diversified and can include a base, camp, post, station, yard, center, home-port, or leased facility. Further, more than one mission or function may be housed on a given installation[. Thus] an individual [BRAC] recommendation may actually affect a variety of activities and functions without fully closing an installation. Full closures, to the extent they occur, may involve relatively small facilities, rather than the stereotypically large military base.

U.S. General Accounting Office, Report No. GAO/NSIAD-95-133 ("GAO 1995 Report"), *Military Bases: Analysis of DOD's 1995 Process and Recommendations for Closure and Realignment*, Apr. 1995, at 19-20.

A. 10 U.S.C. § 18238.

Originally enacted as part of the National Defense Facilities Act of 1950 ("NDFA"), § 18238 of title 10, U.S. Code, provides that:

> [a] unit of the Army National Guard of the United States or the Air National Guard of the United States *may not be relocated or withdrawn under this chapter* without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia.[72]

Enactment of the NDFA was spurred by Congressional concern about the lack of facilities in the post-World War II era for the greatly expanded National Guard.[73] Congress therefore authorized the Secretary to acquire and equip facilities as necessary to support reserve components, including the National Guard.[74] Because reserve units had encountered difficulties sustaining their units in communities with insufficient manpower, Congress directed the Secretary to determine whether the number of units located in an area exceeded the area's manpower.[75] Toward that end, Congress granted the Secretary "final authority" to disband or remove a unit from an area, but directed him to consult with the governor about a National Guard unit before making a final decision.[76] In 1958, during a routine recodification of title 10, the consultation requirement transformed into the "consent" requirement now found in the current version of the statute.[77]

Although the objectives of the NDFA and BRAC are disparate, § 18238 appears to require gubernatorial consent before a unit of the National Guard may be relocated or withdrawn. Notably, however, § 18238 governs only those relocations or withdrawals "under this chapter," a phrase that consistently has been interpreted as relating to the provisions of the chapter in which the limitation or definition exists.[78] The chapter under which § 18238 falls – chapter 1803 –

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[72] 10 U.S.C. § 18238 (emphasis added).

[73] H.R. REP. NO. 81-2174 (1950); S. REP. NO. 81-1785 (1950).

[74] National Defense Facilities Act, Pub. L. No. 81-783, §§ 2-8 (1950); S. REP. NO. 81-1785. Since its enactment, § 18238 has been amended on four occasions to remove surplusage and redesignate sections. Act of Aug. 10, 1956 (70A Stat. 123); Pub. L. No. 85-861 (1958); Pub. L. No. 97-214 (1982); Pub. L. No. 103-377 (1994).

[75] Pub. L. No. 81-783, § 4(a)(1); S. REP. NO. 81-1785.

[76] S. REP. NO. 81-1785; Pub. L. No. 81-783, § 4(b). As enacted, § 18238 required simply that "the governor . . . shall have been consulted with regard to such withdrawal or change of location." *Id.*; *see* S. Hrg. on S. 960 (1949) (discussing whether the consultation requirement should be converted to a consent requirement or deleted altogether).

[77] Pub. L. No. 85-861, §; S. REP. NO. 85-2095 (1958). Neither the legislation nor its legislative history provide an explanation for this transformation. *Id.*

[78] *Portland Golf Club v. C.I.R.*, 497 U.S. 154, 164-65 (1990) (holding that the phrase "allowed by this chapter" cannot be rendered superfluous); *Green v. Brantley*, 981 F.2d 514, 518-19 (11th Cir. 1993) (holding that a Federal Aviation Administration repeal of a pilot certificate constituted action "under this chapter" within the meaning of a

addresses "Facilities for Reserve Components," and neither cross-references nor mentions BRAC, which is contained in chapter 159. Consequently, we conclude that the relocation or withdrawal of National Guard units associated with a closure or realignment pursuant to the BRAC statute does not require gubernatorial consent under § 18238.[79]

B. 32 U.S.C. § 104(c).

Section 104 of title 32, U.S. Code, sets forth the location, organization, and command of National Guard units. Subsection (c) states that

> [t]o secure a force the units of which when combined will form complete higher tactical units, the President may designate the units of the National Guard, by branch of the Army or organization of the Air Force, to be maintained in each State and Territory, Puerto Rico, and the District of Columbia. However, *no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.*[80]

As originally incorporated in the National Defense Act of 1916 ("NDA"), § 104(c) focused solely on the President's power to designate National Guard units, and did not include the prohibition barring changes in the branch, organization, or allotment of certain units absent gubernatorial approval.[81]

In 1933, Congress amended the NDA to authorize the President to order the National Guard into federal service upon a Congressional declaration of emergency, rather than via draft.[82] Congress also undertook certain unrelated modifications to the NDA, among them the addition of a proviso to § 104 requiring a governor's approval prior to a "change in the allotment, branch, or arm" of certain National Guard units.[83] In explaining the reasoning for this addition,

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statute providing exclusive jurisdiction over review of orders issued under Chapter 20 of Federal Aviation Act); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2718 (2005) (Scalia, J. dissenting) (acknowledging that the Federal Communications Commission could not use its Title I powers to impose common-carrier-like requirements, since the statute provided that a "'telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services' (emphasis added), and 'this chapter' includes Titles I and II." (emphasis in original)).

[79] Although we conclude that neither § 18238 nor § 104(c) *requires* gubernatorial consent before a National Guard unit or base may be realigned or closed, nothing prevents the Secretary or his representative from consulting with state governors and reaching mutually-satisfactory agreements, so long as the Secretary's *recommendations* are based on the statutory criteria. The discretion to decide whether to consult with the governors, however, *lies with the Secretary.*

[80] 32 U.S.C. 104(c) (emphasis added).

[81] H.R. REP. NO. 73-141 (1933).

[82] *Id.*; S. REP. NO. 73-135 (1933); Pub. L. No. 73-64, § 18 (1933).

[83] Pub. L. No. 73-64, § 6; H.R. REP. NO. 73-141. In 1956, during the revision of title 32 and without explanation, the proviso was rewritten as a separate sentence. Pub. L. No. 84-1028 (1956); S. REP. NO. 84-2484 (1956).

the House Committee on Military Affairs stated that "that where a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service, [the] State should not *arbitrarily* be compelled to accept a change in such allotment[.]"[84]

Although the statute does not define "branch, organization or allotment," these terms likely refer to the mission, structure, or location of a National Guard unit.[85] On its face, § 104(c) requires gubernatorial consent before a "change in the branch, organization, or allotment of a [National Guard] unit located entirely within a State may be made."[86] At the same time, a wide range of recommended changes to the mission, structure, or location of a National Guard unit on a military installation falls under BRAC authority, as the BRAC statute authorizes relocation or change to National Guard equipment, headquarters, units, and/or missions corollary to the closure or realignment of military installations.[87] Some of those proposed changes also alter the branch, organization, or allotment of a National Guard unit as provided in 32 U.S.C. § 104(c).

Consequently, one may argue that a conflict appears to exist between § 104(c), which requires gubernatorial approval prior to a change in the "branch, organization, or allotment of a [National Guard] unit located entirely within a State,"[88] and the BRAC statute, which neither contains nor contemplates gubernatorial approval.[89] An analysis of the text, purpose, and legislative history of the BRAC statute indicates that the National Guard is not exempt from its exclusive and plenary authority. Therefore, to the extent that there is a conflict, BRAC controls.[90]

C. 10 U.S.C. § 2687.

Section 2909(a) of the BRAC statute, entitled "Restriction on Other Base Closure Authority," flatly states that "during the period beginning on November 5, 1990, and ending on April 15, 2006, *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."[91] Section 2905(a)(1)(A) provides broad authority to the Secretary: "In closing or

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[84] H.R. REP. NO. 73-141 (emphasis added).

[85] Notably, none of these terms lends itself to a definition that includes "equipment," "personal property," or planes; § 104 does not appear to require gubernatorial approval for changes to same, whether under the BRAC statute or otherwise.

[86] 32 U.S.C. § 104(c).

[87] *See* part III, *supra*.

[88] 32 U.S.C. § 104(c).

[89] 10 U.S.C. § 2687 note (§§ 2901-2914). The BRAC statute contains no state or local approval requirements whatsoever. *See generally id.*

[90] *See* part III, *supra*.

[91] *Id.* (§ 2909(a)) (emphasis added).

realigning *any* military installation under this part, the Secretary may take such actions as may be necessary to close or realign[.]" Nothing in the BRAC statute or the 2001 and 2004 amendments pertaining to the 2005 Round appears to limit application of the BRAC process to closures or realignments of a certain size and impact. Indeed, the statute explicitly provides that the Secretary may close or realign military installations "without regard to section[] 2687."[92] Therefore, the threshold requirements contained in § 2687(a) cannot be used to impede closures and realignments made under BRAC authority.[93]

Congress made clear in the BRAC statute that the BRAC process is not required for actions taken for reasons of national security and military emergency.[94] Because of the BRAC statute's waiver of "sections" of § 2687,[95] the Secretary no longer has to certify such justifications to Congress and BRAC is not a restriction on that other base closure authority.[96] The waiver provision, which states that the Secretary "may close or realign military installations under this part without regard to . . . sections" of § 2687,[97] seems designed to ensure that neither the laborious notification and layover procedures under § 2687(b) and (d), nor the size thresholds outlined in § 2687(a), preclude the Secretary from utilizing the BRAC process to close or realign installations. What is less clear is whether the exceptions to BRAC's exclusivity under § 2909 for "closures and realignments to which section 2687 of title 10, United States Code [this section], is not applicable" means that the BRAC process is only *mandatory* for those closures that affect an installation where at least 300 civilian personnel are authorized to be employed or realignments that involve reductions by more than 1,000, or 50%, of authorized civilian personnel.[98]

Reading the BRAC statute's waiver provision in conjunction with the "exclusivity" provision,[99] one possible rendering is that the BRAC process is the sole mechanism for closing and realigning military installations regardless of the size of the impact, and that the exception in § 2909(c)(2) is designed solely to ensure that the waiver provision does not unintentionally

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[92] *Id.* (§ 2905(d)).

[93] To the extent that § 2687 applies, however, § 2687(a) contains strong language indicating that closures may only proceed according to BRAC and its related statutes: "Notwithstanding any other provision of law . . . ." Hence, any action which: (a) closes an installation at which at least 300 civilian personnel are authorized to be employed, or (b) realigns an installation that meets the § 2687(a) threshold via the transfer of functions and personnel, including those of the National Guard, proceeds irrespective of other provisions of law, such as 32 U.S.C. § 104(c).

[94] 10 U.S.C. § 2687 note (§ 2909(c)(2)).

[95] *Id.* (§ 2905(d)).

[96] *See* 10 U.S.C. § 2687(c).

[97] *Id.* § 2687 note (§ 2905(d)(2)).

[98] *Id.* § 2687(a).

[99] *Id.* § 2687 note (§ 2909).

preclude the President from carrying out closures and realignments for national security and military emergency reasons outside the BRAC process. This reading makes the most sense, given the broad definition of military installation, the absence of any referent to numeric thresholds under "this part," and the comprehensive nature of the BRAC statute and process.[100]

Another possible reading, however, is that the waiver provision merely ensures that the Secretary is not precluded from making closures and realignments by any subsection of § 2687 and that the exception to exclusivity in § 2909(c)(2) for closures and realignments "to which section 2687 . . . is not applicable" leaves discretion not only for national security purposes, but for recommending closures and realignments that would not have required compliance with the prior statutory scheme under § 2687(a).

The view that the BRAC statute is less exclusive for actions that affect less than the numerical thresholds of civilian personnel contained in § 2687(a) appears to be erroneous for two reasons. First, the BRAC statute supplants § 2687. Second, such a view reads the exception to exclusivity clause in § 2909(c)(2) so as to utilize § 2687(a) as a *restriction* of the Secretary's authority to close or realign installations under BRAC, along with related relocations of, and changes to equipment, headquarters, units and/or missions, instead of a *preservation* of the Secretary's authority for recommending closures and realignments that would not have required compliance with the prior statutory scheme, such as national security movements.[101] The BRAC statute specifically waived any encumbrances from "sections 2662 and 2687 of title 10" in the Secretary's execution of closures and realignments.[102]

Resolution of the above conflict does not impact the analysis with respect to § 18238. Nor does it extend the limitations contained in § 104(c) to recommendations for closure or realignment that transfer military property. However, if it were determined that BRAC is not the exclusive mechanism for closure or realignment of military installations below the numeric thresholds contained in § 2687(a), in those instances where other mechanisms for closure or realignment exist, there is no apparent authority for utilizing a discretionary statute to evade other legal limitations.[103]

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[100] *See* part III, *supra*.

[101] *See* Part III.B, *supra*.

[102] 10 U.S.C. § 2687 note (§ 2905(d)(2)).

[103] This would not hold true if the BRAC statute implicitly repealed these other provisions. While federal courts make an effort to harmonize potentially conflicting statutes, the Supreme Court has recognized repeals by implication "if there is an irreconcilable conflict between the two provisions or if the later Act was clearly intended to 'cove[r] the whole subject of the earlier one.'" *Branch v. Smith*, 538 U.S. 254, 256-57 (2003) (Stevens, J., concurring) (internal citation omitted). The comprehensive nature of the BRAC statutory scheme, combined with the legislative history indicating express intent to limit the influence of local politics and include National Guard functions, equipment, and units in the 2005 round, lend strong support to the notion that Congress intended to occupy the field of closures and realignments with this legislation.

D. BRAC's Statutory Scheme Envisions Limited Involvement by State or Local Government In Recommendations to Close or Realign Military Installations.

There are additional reasons for interpreting the BRAC process as the exclusive mechanism for closure or realignment of bases, with no requirement for gubernatorial consent even with respect to recommendations for military installations below the numeric threshold contained in § 2687(a).

Congress created the BRAC process to reduce parochial political obstacles to realignment and closure. Prior to enactment of the BRAC statute, the Secretary noted that "the Department of Defense is unable to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of law."[104] Senator Warner similarly related that the Secretary "requested that Congress enact legislation to remove the various impediments in law that prevent timely closure of military bases."[105] Senator Boschwitz also characterized an earlier version of the BRAC statute as an effort to "remove[] Congress from micromanaging each and every proposal to close a military base."[106] Subsequent to the BRAC statute's passage, Congress has rejected attempts to overturn the BRAC Commission's recommendations for closure and realignment and has rejected allowing "parochial concerns [to] override the needs of the military."[107] Thus, in passing the BRAC statute, Congress sought to eliminate the interference of localized interests in the efficient operation and realignment of the national military structure.

Accordingly, the BRAC statute requires gubernatorial *consultation* only for the limited purposes of disposing of "surplus real property or facilit[ies]," and considering the availability of public access roads, *subsequent* to any BRAC closure or realignment.[108] BRAC itself thus eliminates the need to consult governors in matters realigning National Guard installations and affected personnel, equipment, and functions, except for these residual matters.

E. The BRAC Statute Is the More Recent and Comprehensive Statute.

Moreover, to say an existing legal restriction like § 104(c) controls whenever it conflicts with a legitimate exercise of BRAC authority reverses the well-settled principle of statutory

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[104] H. REP. NO. 100-735, pt. I.

[105] 134 CONG. REC. S16882-01 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner).

[106] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz).

[107] 147 CONG. REC. S10027-07 (daily ed. Oct. 2, 2001) (statement of Sen. McCain).

[108] 10 U.S.C. § 2687 (§ 2905(b)(2)(D)-(E)). The Secretary must also inventory and identify any leftover "personal property" six months *after* any Presidential approval of a closure and realignment, and then consult with the local redevelopment authority, local government, or designated state agency to discuss the use of such property in the redevelopment plan of the vacated or condensed installation. *Id.* § 2905(b). *See supra* note 68.

construction: "To the extent there is a conflict, the *most recently passed* statute or rule prevails."[109]

Congress originally passed § 104(c) in 1916. Its last action on the statute was a technical amendment in 1988.[110] Meanwhile, Congress enacted the BRAC statute in 1990 and authorized the current BRAC round in 2001 and 2004. These latest authorizations included significant amendments to the BRAC statute, including § 2914 ("Special Procedures for Making Recommendations for Realignments and Closures for 2005 Round"), which requires the Secretary to "consider any notice received from a local government . . . [that] would approve of the closure or realignment of the installation," but permits the Secretary to make the recommendations "[n]otwithstanding" this input "based on the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable to such recommendations."[111] These more recent, specific provisions in the BRAC statute trump those of earlier, more general statutes.[112]

Congress is presumed to have knowledge of prior statutes[113] and precedents[114] when it enacts legislation, and with this understanding in mind, it made the BRAC statute "the exclusive authority" for closing and realigning military facilities and functions. Earlier statutes that address the same topic have no force.

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[109] *Farmer v. McDaniel*, 98 F.3d 1548, 1556 (9th Cir. 1996) (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)) (emphasis added); *Internat'kl Union, United Auto., Aerospace & Agric. Implement Workers, Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248-1249 (6th Cir. 1996). The Supreme Court has similarly commented in the context of conflicting statutes and treaties that "'when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

[110] This analysis pertains equally to § 18238.

[111] 10 U.S.C. 2687 note (§ 2914). The Secretary is also required to explain its decision to accept or reject the local government input in its recommendation. *Id.* (§ 2914(b)(2)(C)).

[112] *United States v. Estate of Romani*, 523 U.S. 517, 530-33 (1998) (holding that a later, specific statute trumps an earlier, more general statute).

[113] *E.g., Reno v. Koray*, 515 U.S. 50, 56 (1995) ("'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms.") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407-408 (1991))).

[114] *E.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979) ("In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.").

V. Challenges to the 2005 BRAC Closures and Realignments.

A. The BRAC Commission May Only Make Changes to Recommendations That Substantially Deviate From the Force-Structure Plan and Final Criteria.

The Secretary's discretion in making recommendations is delimited by statute to compliance with the selection criteria, force-structure plan, and infrastructure inventory for the Armed Forces and military installations worldwide. Similarly, the BRAC Commission plays an integral but defined role in reviewing the Secretary's recommendations. In making its own recommendations to the President, the BRAC Commission is only granted statutory authority to make changes to the Secretary's recommendations "if the Commission determines that the Secretary deviated substantially from the force-structure plan" based on the Secretary's assessments of national security and anticipated funding, and "final criteria" outlined in § 2913.[115]

For example, in making its recommendations, the BRAC Commission *may not* take into account for any purpose any advance conversion planning undertaken by an affected community with respect to the anticipated closure or realignment of a military installation.[116] The final selection criteria specified in § 2913 "shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory . . . in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005."[117] Hence, even if the BRAC Commission believed that other law conflicts with the Secretary's recommendations under exclusive BRAC authority, the statute does not appear to either require or permit the BRAC Commission to delist recommendations on this basis.

B. There Is No Judicial Review Available for Challenges to BRAC.

Even if § 18238 or § 104(c) required gubernatorial consent or approval for BRAC's realignment of military installations that impact National Guard functions, there appears to be no cause of action or judicial review available for the failure to obtain such consent or approval.

1. The Statutes Do Not Provide a Right of Action.

As the Supreme Court has established, "private rights of action to enforce federal law must be created by Congress."[118] However, nothing in the text of the BRAC statute, § 18238, or

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[115] 10 U.S.C. § 2687 note (§§ 2903(d)(2)(B), 2913).

[116] *Id.* (§ 2903(d)(2)(E)).

[117] *Id.* (§ 2913(f)). Although Congress added the infrastructure inventory to §§ 2912 and 2913(f) in later amendments, it did not add it to the Commission's directives in § 2903(d)(2)(B). *Id.* (§§ 2903(d)(2)(B), 2912(a)(1), 2913(f)).

[118] *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

§ 104(c) explicitly provides for a right of action.[119] Without a potential cause of action, a party cannot file even a declaratory judgment suit. As the Declaratory Judgment Act is "procedural only,"[120] a party must refer to an actual cause of action to gain jurisdiction under the statute.[121]

Moreover, it is unlikely that a court would find an implied right of action in the BRAC statute, § 18238, or § 104(c). In analyzing whether a statute creates a private right of action, the Supreme Court recently confirmed that, where an explicit cause of action is absent, a party bears a heavy burden to establish that Congress nonetheless intended to authorize remedies for private litigants.[122] Neither § 18238 nor § 104(c) provides any indication that Congress intended to create a private right of action. Like the statutes in *Sandoval* and *Gonzaga University*, both statutes are devoid of the "rights-creating language" apparent in statutes such as Title VI and Title IX.[123] The language of § 18238 states that "no change . . . may be made without the approval of its governor" while the language of § 104(c) states that "[a] unit . . . may not be relocated or withdrawn . . . without the consent of the governor of the State[.]" This language is entirely different from that which the Supreme Court has stated was sufficient to create a private right of action, even under the pre-*Sandoval* standard.[124] Additionally, no party has asserted that the BRAC statute confers any rights on any individuals. And even if a statute is phrased in explicit rights-creating terms, "a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'"[125] Therefore, is it unlikely that a court would impute Congressional intent to create a private right of action under the statutes at issue.[126]

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[119] *Haw. Motor Sports Ctr. v. Babbitt*, 125 F. Supp. 2d 1041, 1046 (D. Haw. 2000) (holding that the BRAC statute did not expressly or impliedly create a private right of action).

[120] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

[121] Thus, although the Declaratory Judgment Act expands the courts' remedial powers, it is not an independent basis of jurisdiction. *Id.*; *Hawaii Motor Sports Ctr*, 125 F. Supp. 2d at 1045-46.

[122] *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2002) ("Just last Term it was noted that we abandoned the view of *Borak* decades ago, and have repeatedly declined to revert to the understanding of private causes of action that held sway 40 years ago.") (internal quotation marks omitted) (citing *Sandoval*, 532 U.S. at 287). For illustrations of the expansive approach to implied private rights of action that has since been abandoned see *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[123] 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a). *See Sandoval*, 532 U.S. at 288 (internal quotations omitted); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002).

[124] *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (holding that § 5 of the Voting Rights Act, which provided that "no person shall be denied the right to vote for failure to comply with this section," entitled appellants to seek a declaratory judgment that a new state enactment was covered by the Act in light of the explicit rights language and the clear purpose of the Act).

[125] *Gonzaga Univ.*, 536 U.S. at 284 (citing *Sandoval*, 532 U.S. at 286) (emphasis in original).

[126] *Id.* at 284 n.3.

Even if analyzed under the pre-*Sandoval* factor test, the statutes at issue focus upon actions taken by the United States and do not "protect" any individual's interests. The statutes limit the ability of the United States to relocate or withdraw units absent gubernatorial consent. The language of the text of the statutes does not indicate that Congress passed them to protect governors. These statutes focus on the entity regulated – the United States. Thus, there is "no implication of an intent to confer rights on a particular class of persons."[127]

In any event, it is irrelevant whether Congress intended governors to benefit from the statutes. The essential inquiry is whether Congress unambiguously conferred a right and not whether vague "benefits" or "interests" are enforceable.[128] Just as the Court in *Gonzaga University* summarily dismissed the plaintiff's argument that Congress intended him to benefit from the statute, such an argument would likely be dismissed here because there is no explicit "rights-creating" language in the statutes at issue.

2. The Supreme Court Has Held That Parties May Not Bring Suit to Challenge BRAC Pursuant to the APA.

The Supreme Court's holding in *Dalton v. Specter*[129] precludes any challenge to BRAC under the Administrative Procedure Act (APA).[130] In *Dalton*, the Court held that the actions of the Secretary and BRAC Commission could not be reviewed under the APA because they are not "final agency actions."[131] Actions taken by the Secretary and BRAC Commission have "no direct consequences" for base closings until the President makes the final decision. Until that time, BRAC's recommendations are tentative and the equivalent of the ruling by a subordinate official.[132]

Moreover, the President's final decision is not subject to review under the APA because the President is not an "agency."[133] Any claim that the President exceeded the terms of the BRAC statute or failed to honor § 104(c) or § 18238 is not a constitutional claim, but a statutory one.[134] Indeed, the Supreme Court in *Dalton* noted that it has "distinguished between claims of

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[127] *Sandoval*, 532 U.S. at 289.

[128] *Gonzaga Univ.*, 536 U.S. at 283.

[129] 511 U.S. 462 (1994).

[130] 5 U.S.C. 701 *et seq.*

[131] *Dalton*, 511 U.S. at 469.

[132] *Id.* at 469-70.

[133] *Id.* at 470 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)).

[134] *Id.* at 474.

constitutional violations and claims that an official has acted in excess of his statutory authority," suggesting that *Bivens* actions would be foreclosed as well.[135] As such, the President's decision is not subject to review where the statute "commits the decision to the discretion of the President."[136] Stated plainly, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review."[137] Because the BRAC statute "does not at all limit the President's discretion" in deciding to adopt BRAC's recommendations, the Court cannot review "[h]ow the President chooses to exercise the discretion Congress has granted him[.]"[138]

Only one court has found, in the face of *Dalton*, judicial power to review executive action. In *Role Models America, Inc. v. White*,[139] a panel of the D.C. Circuit found judicial review available for the failure to adhere to notice requirements once the Defense Department published a rule of decision and obligated itself to convey closed military base property to a state-created development corporation. The panel attempted to distinguish itself from the Supreme Court by characterizing *Dalton* as applying only to matters "that have found a lack of final agency action."[140] The *Dalton* Court, however, made clear in a discussion of an analogous circumstance that it could not review even a President's *final* decision with respect to the recommendations: "the President's decision to approve or disapprove the orders [is] not reviewable, because 'the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.'"[141] Thus, *Dalton* controls any APA challenge to the BRAC process. Any attempt to bring suit in this context under the APA should fail.

VI. Conclusion.

The Secretary may recommend the closure and realignment of installations on which National Guard units are located, as well as the relocation of or changes to equipment,

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[135] *Id.* at 472 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-97 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition" and those "merely said to be in excess of the authority delegated . . . by the Congress"); *Wheeldin v. Wheeler*, 373 U.S. 647, 650-52 (1963) (distinguishing between "rights which may arise under the Fourth Amendment" and "a cause of action for abuse of the [statutory] subpoena power by a federal officer").

[136] *Id.* at 474.

[137] *Id.* at 473.

[138] *Id.* at 476; *accord Cohen v. Rice*, 992 F.2d 376, 381 (1st Cir. 1993) (holding that BRAC commission recommendation for closure of Air Force base was not "final agency action").

[139] *Role Models Am., Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir 2003).

[140] *Id.* at 332.

[141] *Dalton*, 511 U.S. at 475 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948)).

headquarters, units, and/or missions associated with those closures and realignments, without seeking or obtaining the consent of the governors of the states in which the changes would take place. The closures and realignments discussed in this memorandum fall within BRAC's text and purpose to establish an efficient and apolitical method of determining how best to allocate the nation's military resources. To the extent any recommendation might implicate § 18238 or § 104(c), the more recent and comprehensive BRAC statute appears to control. Finally, as neither the BRAC statute nor § 18238 or § 104(c) provide for a cause of action, and as the Supreme Court has already rejected BRAC challenges brought pursuant to the APA, a declaratory judgment action or an APA suit to challenge either the BRAC's recommendations or the President's decision regarding those recommendations should fail.

Office of General Counsel
Defense Base Closure and Realignment Commission

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

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Deputy General Counsel

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),[2] such as the final selection criteria,[3] but rather will focus on other less

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[1] Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

[2] Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

obvious constraints on Commission action.[4] This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,[5] as an illustration. The text of AF 33 follows:

> Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR[6]) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG[7]) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.[8]

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

[3] Base Closure Act § 2913.

[4] Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

[5] DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

[6] Air Force Reserve

[7] Air National Guard

[8] The justification, payback, and other segments of AF 33 read:

> **Justification:** This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

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capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.
Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is $65.2M. The net of all costs and savings to the Department during the implementation period is a savings of $5.3M. Annual recurring savings after implementation are $20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of $199.4M.
Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].
Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.
Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include $0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard[9] unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

[9] These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.[10]

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.[11]

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.[12]

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

[10] Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

[11] Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "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" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

[12] Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.[13]

[13] For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

> Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

The Use of the Base Closure Act to Effect Changes that do not Require the Authority of the Act

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"[14] or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.[15] The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.[16]

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

> Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA ....
>
> Also at Niagara, distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station, ME.
>
> ... retire ... eight KC-135E aircraft ....

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,[17] or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

[14] 10 USC § 2687(a)(2).
[15] 10 USC § 2687(a)(3).
[16] By definition, the Base Closure Act does not apply to "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." Base Closure Act § 2909(c)(2).
[17] Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

numbers of aircraft, often without moving the associated personnel.[18] Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.[19]

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,[20] the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.[21]

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[18] For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

[19] For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

[20] See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

[21] Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

In order to protect the Base Closure Act process, where a recommendation to close or realign and installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign and installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.[22]

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

> Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA ....
>
> Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft ....

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"[23] Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,[24] the transfer or retirement of specific

[22] See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

[23] Emphasis added.

[24] See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

aircraft without movement of the associated personnel,[25] or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."[26] Under the Base Closure 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, including any leased facility."[27] The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "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*."[28] A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix[29] are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

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effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

[25] See notes 18 and 19 above.

[26] Base Closure Act § 2901(b) (emphasis added).

[27] Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

[28] Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

[29] For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the Organization of an Air National Guard Unit

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.[30]

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

> Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN[31] 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

[30] If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.
[31] Department of the Navy

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."[32]

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."[33] This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."[34] The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.[35]

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

[32] Emphasis added.
[33] 32 USC § 104(a).
[34] 32 USC § 104(c).
[35] Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.[36] It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.[37] Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter[38] without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."[39] It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,[40] which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

[36] Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."
[37] It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act , so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.
[38] Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq*.
[39] 10 USC § 18238.
[40] 10 USC § 2687.

members have received compensation from the United States as members of the National Guard may not be disbanded."[41] While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act , the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."[42] This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,[43] they

[41] 32 USC § 104(f)(1).
[42] 32 USC § 102.
[43] See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.[44] Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.[45]

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

[44] See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

[45] Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

> Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.[46] Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."[47] It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.[48]

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.[49] Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

[46] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).
[47] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).
[48] See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).
[49] See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

> Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.[50]

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

[50] See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Guard of a particular state or territory,[51] the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.[52]

[51] Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

[52] The final selection criteria are:

> (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

---

(b) Military value criteria. The military value criteria are as follows:

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

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

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

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

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

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

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

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

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

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel DC 14 Jul 05
Approved: David Hague, General Counsel DH 14 Jul 05

4 Enclosures
1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

June 24, 2005

The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Chairman Principi:

The Department of Defense is pleased to respond to Commission inquiries concerning the 2005 Base Realignment and Closure (BRAC) recommendations. The Deputy General Counsel of the Commission, Mr. Dan Cowhig, by e-mail dated June 10, 2005, requested detailed legal analyses regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. Mr. Cowhig also requested a description of any consultation or coordination that may have occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units. Information regarding Air Force consultation with Governors and Adjutants General is being provided under separate cover; you may expect to receive that information in the next few days.

The remaining four questions requested a series of legal opinions addressing the Department's authority to make and implement the recommendations forwarded to the Commission concerning Air National Guard units and equipment. We recently received word from the Department of Justice that on May 23, 2005, you requested similar legal advice from the Attorney General. In keeping with its common practice, the Office of Legal Counsel (OLC) has asked us to provide our views concerning these issues, and we will do so soon. As a consequence, we believe it would be premature and inappropriate for the Department to provide its views on these issues to the Commission in advance of OLC's opinion for the Commission.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions concerning this response, please feel free to contact me at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Nicole D. Bayert
Associate General Counsel
Environment & Installations

ENCLOSURE 1

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attachments: BRAC Subpoena.pdf

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).

BRAC
ıbpoena.pdf (136 KI

OSD BRAC Clearinghouse

-----Original Message-----
From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----
From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 10, 2005 5:09 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer

2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil <mailto:dan.cowhig@wso.whs.mil>
www.brac.gov

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

July 5, 2005

Mr. Dan Cowhig
Deputy General Counsel
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Mr. Cowhig:

This letter responds to your e-mail to the BRAC Clearinghouse, dated June 24, 2005. You asked for the legal advice the Department of Defense received regarding the authority of the Department to make and implement certain recommendations affecting the Air National Guard. You also requested copies of any pertinent documents.

Those involved in developing BRAC recommendations for the Secretary's consideration were advised by counsel regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. The substance of this advice is protected from disclosure by the attorney-client privilege.

If you have any questions concerning this response, please contact Mrs. Nicole D. Bayert, Associate General Counsel for Environment & Installations, at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Sincerely,

Frank R. Jimenez
Acting Deputy General Counsel
(Legal Counsel)

ENCLOSURE 2

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Tuesday, July 05, 2005 12:29 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email
Attachments: Response to Commission request for legal advice on guard signed.pdf

Attached is the response to your query OSD BRAC Clearinghouse # 0418, in PDF format.

OSD BRAC Clearinghouse

-----Original Message-----
From: Rice, Ginger, Mrs, OSD-ATL
Sent: Tuesday, July 05, 2005 12:16 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Yellin, Alex, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Alford, Ralph, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Harvey, Marian, CTR, OSD-ATL
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Attached is the response to Clearinghouse tasker 418 or 419 - please process appropriately.

Ginger B Rice
OSD BRAC Office
(703) 690-6101
-----Original Message-----
From: Bayert, Nicole, Ms, DoD OGC
Sent: Tuesday, July 05, 2005 11:54 AM
To: Rice, Ginger, Mrs, OSD-ATL
Cc: Potochney, Peter, Mr, OSD-ATL; Yellin, Alex, CTR, OSD-ATL
Subject: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Please ensure attached gets to clearinghouse for appropriate action - including provision to Congress w/in 48 hours. Thanks.

Nicole D. Bayert
Department of Defense
Associate General Counsel
(Environment & Installations)
703-693-4842; fax 693-4507

CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.

Cowhig, Dan, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Tuesday, July 05, 2005 11:05 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: RE: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Clearinghouse -

Request update on status of RFI. No response to date.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 5:11 PM
To: Alford, Ralph, CTR, OSD-ATL; Yellin, Alex, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL
Cc: Cowhig, Dan, CIV, WSO-BRAC
Subject: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Please provide a response to the inquiry below and return to OSD BRAC Clearinghouse NLT noon on Wednesday 29 June 2005, with the designated signature authority, in PDF format.

Thank you for your cooperation and timeliness in this matter.

OSD BRAC Clearinghouse

-----Original Message-----
From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 24, 2005 4:47 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

What legal advice did the Department of Defense receive on the questions given below during the formulation of the base closure and realignment recommendations? Please provide copies of any pertinent documents.

> The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard.

Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

If they exist, legal opinions on these matters fall within the ambit of "all information used by the Secretary to prepare the recommendations."

Please expedite your response to this request.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).

<< File: BRAC Subpoena.pdf >>

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
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dan.cowhig@wso.whs.mil
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From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----
From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 10, 2005 5:09 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or

would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

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Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil <mailto:dan.cowhig@wso.whs.mil>
www.brac.gov

16 June 2005

Inquiry Response

Re: BI-0068

Requester: OSD Clearinghouse

Question: Identify whether or not the respective Governor consents to each proposed realignment or closure impacting an Air Guard installation.

Answer: The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states. There are no letters from any Governor, addressed to the Air Force, withholding consent to realignment or closure of Air National Guard installations in their respective states. However, there is one letter, (attached) from Pennsylvania Governor Rendell to Secretary Rumsfeld, non-consenting to the Navy closure impacting the 111th Fighter Wing, Pennsylvania Air National Guard (ANG), at Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions, feel free to contact me.

Approved

DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division

Willow Grove - Rendell ltr.pdf...

ENCLOSURE 3

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

May 26, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

The Department of Defense recommendations for the 2005 Base Realignment and Closure (BRAC) process included a recommendation to deactivate the 111th Fighter Wing, Pennsylvania Air National Guard, Willow Grove Air Reserve Station.

I am writing to advise you officially that, as Governor of the Commonwealth of Pennsylvania, I do not consent to the deactivation, relocation, or withdrawal of the 111th Fighter Wing.

The recommended deactivation of the 111th Fighter Wing has not been coordinated with me, my Adjutant General, or members of her staff. No one in authority in the Pennsylvania Air National Guard was consulted or even briefed about this recommended action before it was announced publicly.

The recommended deactivation of the 111th Fighter Wing appears to be the result of a seriously flawed process that has completely overlooked the important role of the states with regard to their Air National Guard units.

Sincerely,

Edward G. Rendell

Edward G. Rendell
Governor

Cc: The Honorable Anthony J. Principi
The Honorable Arlen Specter
The Honorable Rick Santorum
The Honorable Allyson Schwartz
The Honorable Michael Fitzpatrick

30 June 2005

Inquiry Response

Re: BI-0099 - ANG aircraft acquired through congressional add

Requester: BRAC Commission

Question:

Request the following information with respect to Air National Guard aircraft that were purchased over the past 20 years with congressional add money. Specifically, we need the type aircraft, tail number, location, date received by gaining unit, source of funding (FY, appropriation, etc). Please forward this information NLT than 31 Jun 05 as it supports a commission event.

Answer:

The requested information is provided in the attachment (4 pages). This information was provided by the National Guard Bureau.

Approved

DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division

ENCLOSURE 4

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
F-16 Blk 52	169 FW, McEntire ANGB, SC	1995	92003902	
		1995	92003903	
		1995	92003905	
		1995	92003909	
		1995	92003911	
		1995	92003914	
		1995	92003916	
		1995	92003917	
		1995	92003922	
		1995	93000531	
		1995	93000533	
		1995	93000535	
		1995	93000537	
		1995	93000539	
		1995	93000543	
		1995	93000549	16
C-17A: 8 aircraft,	172 AW, Jackson, MS	18-Dec-03	2001112	
		12-Jan-04	3003113	
		30-Jan-04	3003114	
		17-Feb-04	3003115	
		9-Mar-04	3003116	
		31-Mar-04	3003117	
		18-Apr-04	3003118	
		12-May-04	3003119	8
C-21A *note. Historian shows 4 acquired, however only 2 currently in inventory*	200 ALF SQ, Peterson , CO	Dec 86 to Aug 87	86000374	
			86000377	2

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H	118 TAW, Nashville, TN	FY90	89001051	
note: Historian shows 14 to Nashville, but programatically can only account for 12				
			89001052	
			89001053	
			89001054	
			89001181	
			89001182	
			89001183	
			89001184	
			89001185	
			89001186	
			89001187	
			89001188	12
	123 AW, Louisville, KY	FY92	91001231	
			91001232	
			91001233	
			91001234	
			91001235	
			91001236	
			91001237	
			91001238	
			91001239	
			91001651	
			91001652	
			91001653	12
	145 AW, Charolette NC	FY94-95	92001451	
			92001452	
			92001453	
			92001454	
			93001455	
			93001456	
			93001457	
			93001458	
			93001459	
			93001561	
			93001562	
			93001563	12

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H	153 AW, Cheyenne, WY	FY94-95	92001531	
			92001532	
			92001533	
			92001534	
			92001535	
			92001536	
			92001537	
			92001538	8
	167 AW, EWVRA Shepherd, WV	FY94-95	94006701	
			94006702	
			94006703	
			94006704	
			94006705	
			94006706	
			94006707	
			94006708	
			95006709	
			95006710	
			95006711	
			95006712	12
C-26A	124WG, Boise ID	FY90		
note: C-26As are no longer in the ANG inventory				
	147FW Ellington AFB TX	FY90		
	144FW, Fresno CA	FY90		
	186ARW, Meridian MS (KEY FIELD)	FY90		
	182AW, Peoria, IL	FY90		
	111FW, Willow Grove NAS PA	FY90		
	122FW, Ft Wayne, IN	FY90		
	192FW, Richmond VA (BYRD FLD)	FY90		
	131FW, St Louis, MO (LAMBERT)	FY90		
	142FW, Portland OR	FY90		
	121ARW, Rickenbacker OH	FY90		11
HH-60G	176ARW, Kulis ANGB, AK	FY90	92026466	
note: Historian shows 4: programmatically shows 6				
			92026467	
			92026469	
			92026470	
			92026471	
			92026472	6
	106 RSQ WG, Suffolk, NY	FY90	88026108	
			88026111	
			88026112	
			88026113	
			88026114	
			92026468	6
	129 RSQ WG, Moffett Fld, CA	FY90	88026106	
			88026107	
			88026115	
			88026118	
			88026119	
			88026120	6

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B	187 FW, Dannelly Fld, AL	FY92	91000504	
note: Historian shows 14, programmatically shows 11				
			94000265	
	147FW, Ellington, TX		94000260	
	141 ARW, Fairchild, WA		94000262	
	144 FW, Fresno, CA		90000529	
	125 FW, Jacksonville, FL		92000369	
	186 ARW, Meridian, MS		92000373	
	150 FW, Kirtland, NM		92000372	
	109 ALF WG, Schenectady, NY		94000261	
	115 FW, Truax, WI		94000264	
	162 FW, Tucson, AZ		94000263	11
C-38A	201 ALF SQ, Andrews AFB, MD		94001569	
			94001570	2
C-130J	175 WGH WG, Baltimore, MD		97001351	
note: Historian shows 8, programmatically shows 9				
			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
	146 ALF WG, Channel Islands, CA		1001461	
			1001462	
			2001463	
			2001464	4
	143 ALF WG, Quonset State, RI		2001434	
			99001431	
			99001432	
			99001433	4
EC-130J	193 SOP WG, Harrisburg, PA		1934	
			96008154	
			97001931	
			98001932	
			99001933	4
TOTAL AIRCRAFT:				145

Note: C-12J: - acquired 6 from 87 to 88, (no longer in inventory)