

Sarkar, Rumu, CIV, WSO-BRAC

From: Bayert, Nicole, Ms, DoD OGC
Sent: Tuesday, September 06, 2005 7:18 AM
To: 'Andrew.Tannenbaum@usdoj.gov'; Jimenez, Frank, Mr, DoD OGC; Aly, Stewart, Mr, DoD OGC; Easton, Robert, Mr, DoD OGC; Clark Paul Lt Col AFLSA/JACL; Carr John Maj AFLSA/JACL; Soybel Laurence Col AF/JACL; Rogers Steven SES SAF/GCN; Heady Douglas GS-15 SAF/GCN; Hoard David E GS-15 SAF/GCN; Van Ness, James, Mr, DoD OGC; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: State's Reply Brief

A few points:

1. Reliance on Rendell is misplaced since Rendell dealt with a deactivation, which is not at issue here.
2. The Army did not solicit the approval or otherwise provide an opportunity for any state actor to review its recommendations prior to issuance. Commissioner Coyle was dead wrong in this respect. What the Army did, at the outset of its BRAC process, was ask the TAGs for suggestions on how to consolidate scattered guard locations in geographic regions. The Army then took that information under advisement as it conducted its analysis. It was a one-way communication. The "sign-off" to which Commissioner Coyle refers was the sign-off the Army required on the suggestions - the Army wanted to ensure that the State supported these suggestions so it required their transmission under signature. The Army did not consult or in any way share the products of its analysis with any state actor, so there was not opportunity for a state actor to approve the Army's recommendations.
3. The movement of aircraft is the movement of the flying function. Also, I could argue that a restriction on changing end-strength refers only to military personnel and as such does not limit the transfer of civilian personnel positions.

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.

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

From: Andrew.Tannenbaum@usdoj.gov [mailto:Andrew.Tannenbaum@usdoj.gov]
Sent: Tuesday, September 06, 2005 7:02 AM
To: jimenezf@dodgc.osd.mil; alys@dodgc.osd.mil; eastonr@dodgc.osd.mil; Paul.Clark@pentagon.af.mil; John.Carr@pentagon.af.mil; Laurence.Soybel@pentagon.af.mil; Steven.Rogers@pentagon.af.mil; Douglas.Heady@pentagon.af.mil; David.Hoard@pentagon.af.mil; vannessj@dodgc.osd.mil; David.Hague@wso.whs.mil; rumu.sarkar@wso.whs.mil; bayertn@dodgc.osd.mil
Subject: FW: State's Reply Brief
Importance: High

Please let me know if you have any thoughts on this for today's potential hearing in the Missouri case.

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

From: Paul.Wilson@ago.mo.gov [mailto:Paul.Wilson@ago.mo.gov]
Sent: Tuesday, September 06, 2005 12:25 AM
To: Tannenbaum, Andrew (CIV)
Cc: Daniel.Hall@ago.mo.gov

DCN: 12054

Subject: State's Reply Brief

This is a copy of what we faxed to the Court tonight. We will be e-filing it tomorrow morning. The cover letter that accompanied the fax to the Court will be e-mailed to you by separate cover.

Sarkar, Rumu, CIV, WSO-BRAC

From: H.Thomas.Byron@usdoj.gov
Sent: Friday, September 02, 2005 1:16 PM
To: bayern@dodgc.osd.mil; eastonr@dodgc.osd.mil
Cc: rumu.sarkar@wso.whs.mil
Subject: FW: BRAC -- NJ Pleadings

Importance: High

Attachments: NJ BRAC -- Corzine TRO.pdf; NJ BRAC -- Corzine Certification attached to TRO Order.pdf; NJ BRAC -- Corzine Compl.pdf; NJ BRAC -- Corzine Draft Final Order & Perm. Injunct.pdf; NJ BRAC -- Corzine Exhibits attached to TRO Order.pdf; NJ BRAC -- Corzine Mem. in Support of TRO.pdf



NJ BRAC -- Corzine
TRO.pdf (32... Certificati... Compl.pdf (... Draft Final... Exhibits at... Mem. in Sup...

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

From: Haas, Alexander (CIV)
Sent: Friday, September 02, 2005 1:12 PM
To: Tannenbaum, Andrew (CIV); Nichols, Carl (CIV); Katsas, Gregory (CIV); Kopp, Robert (CIV); Letter, Douglas (CIV); Byron, H. Thomas (CIV); Hunt, Jody (CIV); Garvey, Vincent (CIV); Lepore, Matthew (CIV); Meron, Daniel (CIV); McIntosh, Scott (CIV); Stewart, Malcolm L; Hungar, Thomas G; Smith, Jeffrey (CIV)
Subject: BRAC -- NJ Pleadings
Importance: High

These documents were just filed.

Alexander K. Haas
Trial Attorney
United States Department of Justice
Federal Programs Branch
20 Massachusetts Ave., N.W. 7328
Washington, D.C. 20530
(202) 307-3937 (tel)
(202) 616-8470 (fax)
Alexander.Haas@usdoj.gov

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

From: Tannenbaum, Andrew (CIV)
Sent: Friday, September 02, 2005 12:55 PM
To: Nichols, Carl (CIV); Katsas, Gregory (CIV); Kopp, Robert (CIV); Letter, Douglas (CIV); Byron, H. Thomas (CIV); Hunt, Jody (CIV); Garvey, Vincent (CIV); Lepore, Matthew (CIV); Meron, Daniel (CIV); McIntosh, Scott (CIV); Stewart, Malcolm L; Hungar, Thomas G; Haas, Alexander (CIV); Smith, Jeffrey (CIV)
Subject: BRAC -- TN and IL hearings
Importance: High

The hearing in TN went well. Judge Echols was very up to speed on all of the issues and seemed inclined toward our positions. He did not make an oral ruling, but said he will issue a written opinion soon. Although the State only moved for a TRO, it stated that it would essentially act as a PI. The hearing lasted approximately two hours and included a full discussion of all of the arguments (including testimony from a General of the Air Nat'l Guard and a brief cross-examination which went well), so it seems likely that the decision will preclude the necessity for further briefing or argument on a PI.

IL, which was covered by Rodger Heaton of the U.S. Att'ys Office (with Carl listening in by phone), also seemed to go well. The judge questioned whether the court had

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jurisdiction, and seemed focused on Dalton. The court ordered any briefs to be filed by 3:30pm today, and stated that a TRO decision will issue by noon on Tuesday. If she grants the TRO, there will be a PI hearing on Wednesday at 10 am. If she denies the PI, the hearing will be canceled.

Sarkar, Rumu, CIV, WSO-BRAC

From: Alexander.Haas@usdoj.gov
Sent: Friday, September 02, 2005 1:20 PM
To: Andrew.Tannenbaum@usdoj.gov; jimenezf@dodgc.osd.mil; alys@dodgc.osd.mil; eastonr@dodgc.osd.mil; Paul.Clark@pentagon.af.mil; John.Carr@pentagon.af.mil; Laurence.Soybel@pentagon.af.mil; Steven.Rogers@pentagon.af.mil; Douglas.Heady@pentagon.af.mil; David.Hoard@pentagon.af.mil; vannessj@dodgc.osd.mil; David.Hague@wso.whs.mil; bayertn@dodgc.osd.mil; rumu.sarkar@wso.whs.mil
Cc: Jeffrey.Smith5@usdoj.gov; Matthew.Lepore@usdoj.gov
Subject: BRAC -- NJ Pleadings

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NJ BRAC -- Corzine Correspondence
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These were just filed.

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 Trial Attorney
 United States Department of Justice
 Federal Programs Branch
 20 Massachusetts Ave., N.W. 7328
 Washington, D.C. 20530
 (202) 307-3937 (tel)
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From: Tannenbaum, Andrew (CIV)
Sent: Friday, September 02, 2005 12:56 PM
To: 'bayertn@dodgc.osd.mil'; 'jimenezf@dodgc.osd.mil'; 'alys@dodgc.osd.mil'; 'eastonr@dodgc.osd.mil'; 'Paul.Clark@pentagon.af.mil'; 'John.Carr@pentagon.af.mil'; 'Laurence.Soybel@pentagon.af.mil'; 'Steven.Rogers@pentagon.af.mil'; 'Douglas.Heady@pentagon.af.mil'; 'David.Hoard@pentagon.af.mil'; 'vannessj@dodgc.osd.mil'; 'rumu.sarkar@wso.whs.mil'; 'David.Hague@wso.whs.mil'
Cc: Haas, Alexander (CIV); Smith, Jeffrey (CIV); Lepore, Matthew (CIV)
Subject: FW: BRAC -- TN and IL hearings
Importance: High

The hearing in TN went well. Judge Echols was very up to speed on all of the issues and seemed inclined toward our positions. He did not make an oral ruling, but said he will issue a written opinion soon. Although the State only moved for a TRO, it stated that it would essentially act as a PI. The hearing lasted approximately two hours and included a full discussion of all of the arguments (including testimony from a General of the Air Nat'l Guard and a brief cross-examination which went well), so it seems likely that the decision will preclude the necessity for further briefing or argument on a PI.

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Sarkar, Rumu, CIV, WSO-BRAC

From: Heady Douglas GS-15 SAF/GCN
Sent: Tuesday, September 06, 2005 9:13 AM
To: Bayert, Nicole, Ms, DoD OGC; Andrew.Tannenbaum@usdoj.gov; Jimenez, Frank, Mr, DoD OGC; Aly, Stewart, Mr, DoD OGC; Easton, Robert, Mr, DoD OGC; Clark Paul Lt Col AFLSA/JACL; Carr John Maj AFLSA/JACL; Soybel Laurence Col AF/JACL; Rogers Steven SES SAF/GCN; Hoard David E GS-15 SAF/GCN; Van Ness, James, Mr, DoD OGC; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Cc: Carl.Nichols@usdoj.gov; Jody.Hunt@usdoj.gov; Vincent.Garvey@usdoj.gov; Matthew.Lepore@usdoj.gov; Jeffrey.Smith5@usdoj.gov; Alexander.Haas@usdoj.gov
Subject: RE: State's Reply Brief

Andrew,

Regarding Nicole's comment about timing, even if the court were to agree that the plaintiffs' are right that a realignment must both relocate a function and civilian personnel positions, it's important to be aware that the statute doesn't say "all" positions, or even how many. The Commission still could, if it chose to do so in the face of such a holding, revise its recommendations to provide for the movement of some civilian positions with airplanes, assuming that it isn't constrained by an overly broad PI that presumes the plaintiffs' version of the facts (i.e. no positions relocate).

P.S. Factually, most of the full time positions at a Guard installation are civilian positions. The civilians are required to have a military position in the unit, too, so that if the unit is federally activated, they can deploy with it. But day-to-day, most of the full time positions are civilian.

P.P.S. Plaintiffs' reference to the Commissions' recommendations as a "statute" is an echo of sloppy language used by a lot of people at DoD. Here, people say that the "recommendations have become law." That's wrong, too. As you point out, the recommendations are not passed by each House and signed by the President. What *is* correct is that after the process has run its course, the Secretary of Defense is required by law to close and realign the installations recommended by the Commission. BRAC Act, 2904(a)(1) and (2).

Doug

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From: Bayert, Nicole, Ms, DoD OGC
Sent: Tuesday, September 06, 2005 9:01 AM
To: 'Andrew.Tannenbaum@usdoj.gov'; Jimenez, Frank, Mr, DoD OGC; Aly, Stewart, Mr, DoD OGC; Easton, Robert, Mr, DoD OGC; Clark Paul Lt Col AFLSA/JACL; Carr John Maj AFLSA/JACL; Soybel Laurence Col AF/JACL; Rogers Steven SES SAF/GCN; Heady Douglas GS-15 SAF/GCN; Hoard David E GS-15 SAF/GCN; Van Ness, James, Mr, DoD OGC; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC; Bayert, Nicole, Ms, DoD OGC
Cc: Carl.Nichols@usdoj.gov; Jody.Hunt@usdoj.gov; Vincent.Garvey@usdoj.gov; Matthew.Lepore@usdoj.gov; Jeffrey.Smith5@usdoj.gov; Alexander.Haas@usdoj.gov
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First I would return to Dalton - they are arguing non compliance with the BRAC statute. While Rendell may have found that a challenge under a separate statute is justiciable - it in know way held that a challenge to conduct under the BRAC statute was justiciable. What could be a clearer challenge to conduct under the BRAC statute than to argue the recommendation is not a realignment as defined in the statute.

Next, it is non-sensible to argue that the BRAC statute limits out authority to realign a function to only those circumstances when civilian personnel perform that function. You have to keep in mind the source of the realignment definition - 10 USC 2687 - a statute whose purpose is to limit otherwise discretionary authority. Congress wanted to limit movement of civilian personnel so it defined realignment relative to civilian personnel.

DCN:12054
While that definition was included wholesale in BRAC when it was enacted, it has never been argued by DoD or past Commissions that BRAC was limited to realignments that moved civilian personnel. I am sure prior BRAC reports are replete with examples where the movement was of military personnel (although please don't ask me to find them now!)

Also, timing. It is hard to argue about what the Commission has done when the Commission has not done it yet. They could still make changes.

FYI - the legislative history on justicial review is attached.

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

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Sent: Tuesday, September 06, 2005 8:21 AM
To: jimenezf@dodgc.osd.mil; alys@dodgc.osd.mil; eastonr@dodgc.osd.mil;
Paul.Clark@pentagon.af.mil; John.Carr@pentagon.af.mil; Laurence.Soybel@pentagon.af.mil;
Steven.Rogers@pentagon.af.mil; Douglas.Heady@pentagon.af.mil; David.Hoard@pentagon.af.mil;
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bayertn@dodgc.osd.mil
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Matthew.Lepore@usdoj.gov; Jeffrey.Smith5@usdoj.gov; Alexander.Haas@usdoj.gov
Subject: RE: State's Reply Brief

Thanks very much Nicole. As to your last point, is it enough to say that there is no restriction on moving civilian personnel? Plaintiff's point is that the statute defines realignment as any action "which both reduces and relocates funcations and civilian personnel positions," so both must occur for it to be a realignment. Any good ideas on how to respond to that?

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1. Reliance on Rendell is misplaced since Rendell dealt with a deactivation, which is not at issue here.
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To: Tannenbaum, Andrew (CIV)
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Subject: State's Reply Brief

This is a copy of what we faxed to the Court tonight. We will be e-filing it tomorrow morning. The cover letter that accompanied the fax to the Court will be e-mailed to you by separate cover.

FAX TRANSMITTAL COVER SHEET

Date: **September 2, 2005**

Please deliver the following pages to:

Name: **Rumu Sarkar, Esq.**
703-699-2735

From: **Eugene M. LaVergne, Esq.**

Total Pages (including this page) **91**

DCN: 12054

Garrubbo, Capece, D'Arcangelo, Milman & Smith, P.C.
Attorneys at Law
53 Cardinal Drive
Westfield, New Jersey 07080
Telephone: (908) 233-5575
Telefax: (908) 223-4894
By: Frank Capece, Esq. (#FC4482)

Law Office
EUGENE M. LaVERGNE
Attorney at Law
601 Grand Avenue - Suite 307
Asbury Park, New Jersey 07712
Telephone: (732) 897-9700
Telephone: (732) 897-9711
BY: Eugene M. LaVergne, Esq. (#EL3331)

September 2, 2004

Via Fax Only to (703) 699-2735:

Rumu Sarkar, Esq.
Associate General Counsel
2005 Defense Base Closure and Realignment Commission
Arlington, VA 22202
Telephone: (703) 699-2950

RE: United States Senator Jon Corzine, *et als.* v. 2005 Defense Base Closure and Realignment Commission, *et als.*

Dear Ms. Sarkar:

This letter shall serve to confirm our telephone conversation of today's date at 8:45 a.m. regarding the above matter and that I have advised you of the fact that at @11:00 a.m. this morning the legal team for the plaintiffs intends to file a Verified Complaint in Federal District Court for the District of New Jersey, Trenton Vicinage, and seek "Temporary Restraints" restraining the Commission from sending the Final Commission BRAC Report to the President before the statutory deadline of September 8, 2005. I advised we are bringing this application as a procedural matter because our various attorneys working on the matter have researched the issue and have concluded that plaintiffs likely must attempt to seek such relief irrespective of the outcome to preserve our right to be "timely" heard on the merits of plaintiffs' claims. As discussed, you have given me your cellular telephone number and I will cause to be faxed to you copies of:

- Plaintiffs' Verified Complaint;
- Order to Show Cause With "Temporary Restraints";
- Certification with Exhibits ("Exhibit B" redacted from fax version);
- Plaintiffs' Brief; and
- Proposed Final Order.

Thank you very much.

Very truly yours,

Eugene M. LaVergne, Esq.

EML:ms
enclosures
cc: Service List

DCN: 12054

Garrubbo, Capece, D'Arcangelo, Milman & Smith, P.C.
Attorneys at Law
53 Cardinal Drive
Westfield, New Jersey 07080
Telephone: (908) 233-5575
Telefax: (908) 223-4894
By: Frank Capece, Esq. (#FC4482)

Law Office
EUGENE M. LaVERGNE
Attorney at Law
601 Grand Avenue - Suite 307
Asbury Park, New Jersey 07712
Telephone: (732) 897-9700
Telephone: (732) 897-9711
BY: Eugene M. LaVergne, Esq. (#EL3331)

Attorneys for plaintiffs United States Senator Jon S. Corzine, individually and in his capacity as a duly elected member of the United States Senate from the State of New Jersey, et als.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON VICINAGE

-----X
:
UNITED STATES SENATOR :
:
JON S. CORZINE, individually and :
:
in his capacity as a duly elected :
:
member of the United States Senate :
:
from the State of New Jersey, :
:
UNITED STATES SENATOR FRANK :
:
R. LAUTENBERG, individually and :
:
in his capacity as a duly elected :
:
member of the United States Senate :
:
from the State of New Jersey; :
:
CONGRESSMAN RUSH HOLT, :
:
individually and in his capacity as a :
:
duly elected member of the United :
:
States House of Representatives :
:
from the 12th Congressional District :
:
of the State of New Jersey; :
:
CONGRESSMAN FRANK PALLONE, :
:
individually and in his capacity as a :

Civil Action No. _____

VERIFIED COMPLAINT

DCN: 12054

duly elected member of the United States House of Representatives from the 6th Congressional District of the State of New Jersey; CONGRESSMAN CHRISTOPHER SMITH, individually and in his capacity as a duly elected member of the United States House of Representatives of from the 4th Congressional District of the State of New Jersey; GERALD TARANTOLO, individually and in his capacity as Mayor of the Borough of Eatontown, New Jersey; MARIA GATTA, individually and in her capacity as Mayor of the Borough of Oceanport, New Jersey; SUZANNE CASTLEMAN, individually and in her capacity as Mayor of the Borough of Little Silver, New Jersey; CHARLES WOWKANECH, individually and in his capacity as President, New Jersey State AFL-CIO; JOHN R. POITRAS, individually and in his capacity as President of the American Federation of Government Employees - Local 1904; KATHLEEN BACKER, individually; SARGENT FIRST CLASS LOUIS ORROVO, individually; SHEILAH KELLY, individually; ROBERT GIORDANO, individually and as a Member of the Patriot's Alliance, Inc.; S. THOMAS GAGLIANO, ESQ., individually and in his capacity as Co-Chair of the Patriot's Alliance, Inc.; and Frank C. Muzzi, individually and in his capacity as Co-Chair of the Patriot's Alliance,

Plaintiffs,

v.

CHRISTOPHER J. CHRISTIE
UNITED STATES ATTORNEY
SUSAN J. STEELE
ASSISTANT UNITED STATES ATTORNEY
ASSISTANT CIVIL CHIEF
UNITED STATES ATTORNEY'S OFFICE
970 BROAD STREET, ROOM 701
NEWARK, NEW JERSEY 07102
(973) 645-2920
SJS 7042

PETER D. KEISLER
ASSISTANT ATTORNEY GENERAL
CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
VINCENT M. GARVEY
DEPUTY BRANCH DIRECTOR
ANDREW H. TANNENBAUM
MATTHEW LEPORE
JEFFREY M. SMITH
ALEXANDER K. HAAS
TRIAL ATTORNEYS
FEDERAL PROGRAMS BRANCH
20 MASSACHUSETTS AVE., NW
WASHINGTON, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES SENATOR JON S.)
CORZINE, et al.)

Plaintiffs,)

v.)

No. 05-4294 (MLC)

2005 DEFENSE BASE CLOSURE AND)
REALIGNMENT COMMISSION, et al.,)

Defendants.)

_____)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION AND EXPEDITED SUMMARY TRIAL**

INTRODUCTION

Plaintiffs seek a preliminary injunction against the members of the Defense Base Closure and Realignment Commission (the "Commission") preventing them from transmitting their final report to the President, pursuant to the Defense Base Closure and Realignment Commission Act (the "Act" or "BRAC Act"), see 10 U.S.C. § 2687 note, prior to September 8, 2005. Brief of Plaintiffs in Support of Application for T.R.O., Expedited Rule 65(a)(2) Summary Trial and Declaratory and Permanent Injunctive Relief ("Pl. Mem."). Plaintiffs also seek an expedited summary trial to be completed before September 8, at which they will seek permanent declaratory and injunctive relief against Defendants relating to proposals regarding Fort Monmouth. (Id.) Because Plaintiffs have demonstrated no irreparable harm associated with the issuance of the Commission's report, and because Plaintiffs have no likelihood of success on the merits, their requests must be denied.

All of Plaintiffs' assertions of harm, in addition to being speculative, relate to distant alleged harms resulting from the actual implementation of the Commission's recommendations. But allegations of far distant injuries are insufficient bases for the extraordinary remedy of a preliminary injunction. Moreover, Plaintiffs can suffer no irreparable harm solely from the delivery of the Commission's report to the President on September 8, because the report consists only of recommendations which the President, and then Congress, has the opportunity to reject. The Supreme Court, in fact, has already squarely decided that such recommendations made during the BRAC process are not subject to judicial review precisely because they are only

recommendations and thus can have no direct consequences. See Dalton v. Specter, 511 U.S. 462 (1994). Indeed, Plaintiffs' claims are precisely the type of claims explicitly foreclosed by Dalton.

While Plaintiffs have demonstrated no irreparable injury requiring a preliminary injunction or expedited summary trial, any relief prohibiting the Commission from including its recommendations related to Fort Monmouth in its report would disrupt the carefully tailored statutory scheme. The Act requires the transmission of the report to the President by September 8, 2005, Act at § 2914(d), but it contains no mechanism for additional submissions after that date unless the President rejects the report in its entirety. Thus, it is simply unclear at this time exactly how any such recommendation will be reinstated. An injunction that disrupts this schedule would cause real and imminent harm to the Government, and public—harm which far outweighs the allegations of speculative and future harms alleged by Plaintiffs.

Moreover, Plaintiffs have no likelihood of success on the merits because this case is nonjusticiable. Plaintiffs challenge the recommendations of the Secretary and Commission, but such a challenge is precluded by the Supreme Court's decision in Dalton. Plaintiffs' claims also suffer from fundamental Article III ripeness flaws. Any of the ultimate harms alleged by Plaintiffs to stem from the Commission's recommendations simply cannot occur until the Commission's recommendations are implemented, a process which is at least months away. Similarly, Plaintiffs lack standing because they have not suffered, and cannot suffer, any concrete and particularized injury solely from the recommendations of the Secretary or Commission. Assuming the Commission issues its report on September 8, 2005 containing recommendations regarding Fort Monmouth, the President still has the power to reject the report, and Congress has

the power to pass legislation to reject it as well.

For all of these reasons, the Court should not reach the merits of Plaintiffs' claims. In any event, and as demonstrated below, all of Plaintiffs' claims fail as a matter of law and thus Plaintiffs have no chance of success.

BACKGROUND

1. The Defense Base Closure and Realignment Act

Against a history of "repeated, unsuccessful, efforts to close military bases in a rational and timely manner," Dalton, 511 U.S. at 479 (Souter, J., concurring in part and concurring in judgment), Congress adopted the Act "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States," Act at § 2901(b). The Act initially provided for base closures and realignments in 1991, 1993, and 1995, and in 2001 it was amended to provide for the current 2005 round. See Pub. L. No. 107-107, §§ 3001-3008, 115 Stat. 1012, 1342-53. Until its expiration on April 15, 2006, the Act is "the *exclusive authority* for selecting for closure and realignment, or for carrying out any closure or realignment of, a military installation inside the United States." Act at § 2909(a) (emphasis added).

Through a detailed process, the Act assigns specific roles and strict deadlines to several federal actors. The 2005 BRAC process began when the Secretary of Defense certified to Congress a need to close and realign military installations, and that such action would "result in annual net savings for each of the military departments." Act at § 2912(b)(1)(B). After this certification, the President had until March 15, 2005 to nominate for Senate consideration individuals to serve on the independent BRAC Commission (which he timely did). Id. at § 2912(d). Had the President failed to nominate commissioners by this date, the 2005 BRAC

process would have terminated. Id. at § 2912(d)(2).

Next, the Secretary had until May 16, 2005 to submit to the Commission a list of U.S. military installations that he recommends for closure or realignment.¹ Id. at § 2914(a). In compiling the list, the Secretary was required to “consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.” Id. at § 2903(c)(3)(A). The Act imposes significant limitations on the facts that the Secretary may look to in proposing base closures and realignments. First, the Secretary had to use a previously established “force-structure plan” and a “comprehensive inventory of military installations” as the bases for his selections. Id. at § 2912(a)(1). In addition, the Act specifies four “military value criteria,” id. at § 2913(b), and four “other criteria,” id. at § 2913(c), for the Secretary to use in making his recommendations; these criteria, along with the force-structure plan and inventory, provide the “only criteria” on which he was permitted to rely, id. at § 2913(f).

After receiving the Secretary’s recommendations, the Commission held public hearings and now must prepare a report reviewing the Secretary’s recommendations and making its own recommendations. Id. at § 2903(d). The Commission may revise the Secretary’s recommendations where it finds “that the Secretary deviated substantially from the force-structure plan and final criteria.” Id. at § 2903(d)(2)(B). If the Commission seeks to close or realign an installation that the Secretary has not recommended for closure or realignment, or if it seeks to increase the extent of a realignment, additional procedures apply. See id. at §§ 2903(d)(2)(C)-(D); 2914(d)(3), (d)(5). The Commission’s report must be provided to the

¹ The Secretary submitted his list on May 13, 2005.

President by September 8, 2005. Id. at § 2914(d).

Not later than September 23, 2005, the President must either approve or disapprove of the Commission's recommendations in their entirety. Id. at § 2914(e)(1). If he rejects the recommendations, the Commission may revise its list and resubmit it to the President by October 20, 2005. Id. at § 2914(e)(2). Presidential rejection of the revised list terminates the BRAC process. Id. § 2914(e)(3). If, however, the President approves either the original or revised list, he must send the approved list and a certification of approval to Congress. Id. at § 2903(e)(2), (e)(4).

Finally, if Congress does not enact a joint resolution disapproving the Presidentially-approved Commission's recommendations within 45 legislative days after receiving the President's certification (or adjournment sine die for the session), the Secretary must close and realign each installation so recommended. Id. at § 2904. It is only at this point – after the Secretary's review and recommendations, the Commission's review and recommendations, the President's review and acceptance (if any), and the failure of Congress to pass legislation rejecting the recommendations – that any military installations actually may be closed or realigned.²

2. The Recommendations at Issue

On May 13, 2005, the Secretary recommended to the Commission the closure of Fort Monmouth, New Jersey. (See Ex. A). The Commission subsequently voted to adopt this recommendation, and added the following paragraph:

² The Act specifies in great detail the procedures for implementing any closures or realignments that are required after the BRAC process is completed. Id. at § 2905.

The Secretary of Defense shall submit a report to the Congressional Committees of Jurisdiction, that movement of organizations, functions, or activities from Fort Monmouth to Aberdeen Proving Ground will be accomplished without disruption of their support to the Global War on Terrorism or other critical contingency operations, and that safeguards exist to ensure that necessary redundant capabilities are put in place to mitigate potential degradation of such support, and to ensure maximum retention of critical workforce.

(See Ex. B (footnotes omitted).)³ Thus, the Commission's recommendation would require the closure of Fort Monmouth.⁴ In addition, the Commission's recommendation would require the Secretary to ensure that during the movement of functions from Fort Monmouth to Aberdeen, certain national security requirements are met and to document this in a report that is to be provided to Congressional Committees. Plaintiffs ask the Court to enjoin the Commission from including this recommendation in its September 8, 2005 report to the President.

ARGUMENT

1. Standard of Review

"A preliminary injunction is an extraordinary remedy" and a "plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." Nutrasweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 153 (3d Cir. 1999). To prevail and obtain the extraordinary remedy of preliminary relief, the plaintiff bears the burden of demonstrating:

³ This document includes the language that will appear in substantially the same form in the Commission's final report related to Fort Monmouth, but because that report is not yet final, it is subject to further technical amendment.

⁴ This is not, as Plaintiffs' allege a "conditional closure," as the recommendation, if adopted, would make the closure of Fort Monmouth mandatory.

(1) the likelihood of the plaintiff's success on the merits; (2) denial of preliminary relief will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. Id. A plaintiff's failure to show any one of these elements is grounds for denial of its application. Id.

These heavy burdens are heightened where a plaintiff asks the court to grant an injunction that would interfere with a carefully crafted statutory scheme adopted and implemented in the public interest. See Beal v. Stern, 184 F.3d 117, 123 (2d Cir. 1999). Under these circumstances, a plaintiff must prove a "clear" likelihood of success on the merits, id., and "it is particularly appropriate for the court to weigh the possible harm to other interested parties" apart from the plaintiff, and to consider whether the proposed injunction will "result in unnecessary damage to other parties ... perhaps as irreparable and more grave than the harm that might ensue from denial of the injunction." Punnet v. Carter, 621 F.2d 578, 587-88 (3rd Cir. 1980). Plaintiffs cannot even satisfy the ordinary standards for a preliminary injunction, let alone the heightened standards required before the Court should enjoin a portion of the BRAC process and cause serious harm to the Government and the public interest.

Plaintiffs' application for an expedited trial faces a similarly heavy burden. While Federal Rule 65(2)(a) permits the consolidation of a preliminary injunction trial with a trial on the merits, this provision is obviously inapplicable where there is no basis for a preliminary injunction. Moreover, even where a preliminary injunction is warranted, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." Anderson v. Davila, 125 F.3d 148, 157 (3d Cir. 1997) (quoting Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1980)). Moreover, any trial, let alone an expedited one, is

inappropriate here. As demonstrated below, Plaintiffs' claims are not justiciable, and Plaintiffs have not shown how any factual development would be relevant.⁵

2. The Only Harm Related To Plaintiffs' Request Will Be Inflicted Upon The Federal Government

A. Plaintiffs' assertions of irreparable harm

Plaintiffs' brief is notably silent on the issue of harm to Plaintiffs, let alone immediate irreparable harm. State of New Jersey Amicus contends that the *closure* of Fort Monmouth would create "a substantial likelihood" that the State would have to govern the area now covered by the base and would impact the area's economy. Brief on Behalf of Petitioners/Amicus Curiae Acting Governor Richard J. Codey and the State of New Jersey ("Amicus Mem."), at 6.) The State concedes, however, that "the decision being challenged—the BRAC Commission requiring the Secretary of Defense [to submit a report]—hardly is action which will be completed any time in the immediate future." (*Id.* at 17 n.4.)

The State is correct that *any implementation of the Commission's recommendations is months, if not years, away from occurring*. No implementation of the Commission's recommendations as to Fort Monmouth may occur until the President transmits the report to Congress (by September 23) and 45 legislative days pass without Congressional action.⁶ It is

⁵ Plaintiffs' vague and overbroad request for expedited discovery is similarly unwarranted. *See* Plaintiffs' Propose Order at 2-3 (seeking "copies of any and all information . . . used by the Commission in making its recommendations . . ." (elipses in original)). Plaintiffs have demonstrated no need for any such information, let alone all information used by the Commission in making its hundreds of recommendations. Similarly, to the extent that Plaintiffs seek preliminary or permanent injunctive relief that would prevent the entire Commission report from being transmitted to the President, such a request is obviously grossly overly broad.

⁶ As at least five of the Plaintiffs are members of Congress, they have the opportunity to be participants in the BRAC process.

only then (and, practically speaking, an additional time period beyond that point for the Department to begin implementation) that the Secretary may even begin the process of preparing a report to the President pursuant to the Commission's recommendations. Only after the completion of this report, could the process of closing Fort Monmouth begin. A preliminary injunction should not issue now to prevent alleged harms associated with events that cannot under any circumstances transpire until such a distant time in the future; there is ample time to decide this case on the merits under an ordinary schedule before implementation begins. See Nutrasweet, 176 F.3d at 153; see also 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 431 (1973) (footnote omitted) (“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.”); Women's Emergency Network v. Bush, 191 F. Supp.2d 1356, 1362 (S.D. Fla. 2002) (an injury “at least five months from realization” was not sufficiently imminent to warrant preliminary injunction).

Plaintiffs also contend that there is “an indication” that their claims need to be adjudicated expeditiously “so as not to frustrate the BARC [*sic*] Acts [*sic*] expedited decision making schedule.” (Pl. Mem. at 3.) Plaintiffs then state: “What this means is unknown.” (*Id.*) While the meaning of Plaintiffs' assertion is “unknown” to Defendants as well, the September 8, 2005 date has no consequence for the vitality (or lack thereof) of Plaintiffs' claims. As discussed at length below, the BRAC Commission's recommendations are *never* subject to judicial review, precisely because they are only recommendations, and this is equally true before and after September 8th. Additionally, the President's actions within the BRAC process also are never reviewable under Dalton and Franklin v. Massachusetts, 505 U.S. 788 (1992). See Dalton, 511

U.S. at 476-77 (“we hold that . . . [w]here a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President’s decision is not available”). And for that very reason, Plaintiffs have not named the President as a party to this litigation. But such a litigation decision, based on the governing law, does not suffice to create an irreparable harm, especially where the effect would be to allow review of Commission recommendations that are otherwise non-reviewable at this stage.⁷

Plaintiffs simply have presented no immediate irreparable harm that would justify a preliminary injunction or an expedited merits trial.

B. Harm to the Government and public

While Plaintiffs have demonstrated no irreparable injury requiring a preliminary injunction, the Government faces real and imminent harm should this Court enjoin the Commission from including its recommendations related to Fort Monmouth in its report. The Act requires the transmission of the report to the President by September 8, 2005. Act at § 2914(d). And there are no provisions that discuss additional Commission submissions after this transmission, see Act, generally, unless the President rejects *the entire list* and sends it back to the Commission for revision, id. at § 2914(e)(2). The extremely limited statutory timeline,

⁷ The Supreme Court squarely held in Dalton that the Commission’s recommendations under the BRAC are not “final agency actions” reviewable under the APA, and that the President’s decision to approve a Commission recommendation is not subject to statutory challenge. 511 U.S. at 476-77. The Court in Dalton had no occasion, however, to address the question whether subsequent actions taken by the Defense Department to implement the President’s decision under the BRAC would properly be subject to APA challenge. Cf. Franklin, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment) (“Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.”). Thus, denial of Plaintiffs’ current request for injunctive relief would not necessarily foreclose the possibility that Plaintiffs could ultimately obtain judicial review of their contention that the closure of Fort Monmouth is unlawful.

which cannot be altered, is an essential part of the statutory scheme that Congress has crafted to serve the public interest. Any injunction that threatens to interfere with or derail that scheme would cause serious harm to the government – and to the public interest, as the BRAC Act is designed to save taxpayer dollars and strengthen the military. Such harm far outweighs the allegations of speculative and future harms alleged by Plaintiffs. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”).

3. Plaintiffs Have No Likelihood Of Success On The Merits

Plaintiffs’ claims suffer from fatal justifiability flaws, and Plaintiffs fail to state any claim for relief.

A. *Dalton v. Specter* precludes review of the Commission’s recommendations

Dalton – exactly like here – involved a challenge to the reports and recommendations submitted by the Secretary and Commission during the BRAC process. 511 U.S. at 469. Relying on its decision in Franklin v. Massachusetts, 505 U.S. 788 (1992), the Supreme Court found that those reports “‘carr[y] no direct consequences’ for base closings.” Dalton, 511 U.S. at 469 (quoting Franklin, 505 U.S. at 798). Rather, “the Secretary’s and Commission’s reports serve ‘more like a tentative recommendation than a final and binding determination.’ The reports are, ‘like the ruling of a subordinate official, not final and therefore *not subject to review*.’” Id. at 469-70 (emphasis added) (internal citations omitted; quoting Franklin, 505 U.S. at 798); see also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 110-11 (1948) (“administrative orders are not reviewable unless and until they impose an obligation, deny a

right or fix some legal relationship as a consummation of the administrative process”). Under this clear holding, judicial review of the Commission’s vote to include a recommendation related to Fort Monmouth in its report to the President is precluded.

The Act at issue in Dalton was amended by Pub. L. No. 107-107, §§ 3001-3008, 115 Stat. 1012, 1342-53 (2001), and Pub. L. No. 108-375, 118 Stat. 2064, 2132 (2004) to authorize the 2005 round of military base closings and realignments at issue here, but those amendments did not change the Act in any way relevant to the analysis in Dalton. Indeed, given that Dalton was decided seven years before Congress amended the Act, courts must presume that Congress was aware of the settled caselaw and, by declining to add a judicial review provision, adopted the Supreme Court’s conclusion that there is no judicial review of intermediate steps in the BRAC process. See Keene Corp. v. United States, 508 U.S. 200, 212 (1993).

Because the challenge in Dalton was brought under the Administrative Procedure Act (“APA”), Plaintiffs have not sued under the APA and presumably will assert that the APA’s requirement of “final agency action” is inapplicable. But Plaintiffs cannot circumvent the fundamental principles announced in Dalton through creative pleading. Indeed, by failing to bring this case under the APA, Plaintiffs have identified no substantive cause of action under which this case may proceed.⁸ Moreover, the concept of “final agency action” existed long

⁸ The BRAC Act—the only substantive basis for Plaintiffs’ claims—does not provide any private right of action, express or implied, and Plaintiffs do not argue otherwise. Nor does the Declaratory Judgment Act (“DJA”) alone create a substantive cause of action. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-672 (1950). Indeed, if a plaintiff could assert a cause of action solely under the DJA, then the comprehensive requirements for challenging agency action that Congress prescribed in the APA would be rendered meaningless. The APA, for example, allows judicial review of only specific kinds of agency action, and only if such action is final and determines legal rights or obligations. See, e.g., Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2378 (2004); Bennett v. Spear, 520 U.S. 154, 178 (1997).

before Dalton was decided and the APA was enacted. Whether or not the APA is invoked, only challenges to agency action that is final are subject to review.

The Supreme Court's decision in Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) is directly on point. As here, the plaintiffs in Waterman sought review (not under the APA) of a recommendation made by an administrative agency (the Civil Aeronautics Board) to the President, who was the final decision-maker. 333 U.S. at 105-06. Finding that the challenged recommendation "grants no privilege and denies no right," but rather was, at most, merely a "step, which if erroneous will mature into a prejudicial result," the Supreme Court held that judicial review was not available.⁹ Id. at 112. "[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Id. at 112-13 (citing Rochester Telephone Corp. v. United States, 307 U.S. 125, 130 (1939) ("order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action"); United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 310 (1927) (challenged action "was merely preparation for possible action in some proceeding which may be instituted in the future"); United States v. Illinois Central R. Co., 244 U.S. 82, 89 (1917) (challenged action was "mere incident in the proceeding" having "no characteristic of an order, affirmative or negative")). "To revise or review an administrative decision, which has

The APA also provides only for limited review of agency action pursuant to a standard deferential to the agency. See, e.g., 5 U.S.C. § 706(2)(A) (agency action should not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

⁹ The Court reached this decision even though, unlike the instant case, an applicable statute subjected decisions by the Board to judicial review. Id. at 106.

only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form – advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President’s exclusive, ultimate control.”

Waterman, 333 U.S. at 113.

Waterman is based on both prudential considerations and fundamental constitutional principles and applies directly to Plaintiffs’ suit – irrespective of their failure to plead an APA claim. Indeed, not only is Waterman consistent with the principles of nonreviewability in Dalton, but the Court’s reasoning in Waterman applies equally to Article III’s standing and ripeness requirements (which are discussed below). On their own, the Commission’s BRAC recommendations (like those of the Civil Aeronautics Board) carry no direct consequences for base closings or realignments (and, consequently, Fort Monmouth). They are merely a step along the way. As such:

The legal incongruity of interposing judicial review between the action by the [Commission] and that by the President are as great as the practical disadvantages. The latter arise chiefly from the inevitable delay and obstruction in the midst of the administrative proceedings. The former arises from the fact that until the President acts there is no final administrative determination to review.

Id. at 112. To accede to Plaintiffs’ request for judicial review at this time thus not only would represent a needless and burdensome intrusion into the BRAC process, but even more fundamentally, it would exceed the bounds of the “Judicial Power” and the Court’s authority under Article III. And the APA, or lack thereof, is simply not crucial to this equation.

This longstanding principle – that “final agency action” is ingrained in Article III and thus does not depend on the type of claim made – also can be seen in the Supreme Court’s discussion

in Rochester Telephone of cases involving actions that may affect a complainant only upon “some further action.” 307 U.S. at 129. The Court wrote:

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article 3 of the Constitution, U.S.C.A., by what is implied from the grant of ‘judicial power’ to determine ‘Cases’ and ‘Controversies,’ Art. 3, Sec. 2, U.S. Constitution. Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loathe to authorize review of interim steps in a proceeding.

Id. at 131 (internal and external citations omitted). It is thus the Constitution, not the APA, that provides the foundation for the nonreviewability of non-final agency action. The APA merely codifies this principle; it does not monopolize it.

Nor does the holding in Part I of Dalton somehow limit this fundamental principle to APA cases. The Supreme Court’s holding discussed “final agency action” within the context of an APA case because it was addressing an APA case. 511 U.S. at 469-70. But the Court’s reasoning undoubtedly applies beyond this limited context. Indeed, in Part II of its decision the Supreme Court relied on Waterman (“a case analogous to the present one”) and specifically referenced its decision in that case to deny review of the Civil Aeronautics Board’s action. It wrote:

In reasoning pertinent to this case, we first held that the Board’s certification was not reviewable because it was not final until approved by the President. See id., at 112-114, 68 S.Ct., at 437 (“[O]rders of the Board as to certificates for

overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval”).

Dalton, 511 U.S. at 475. It does not matter that this discussion occurred in Part II of its decision because the Court clearly was referring with approval to its prior decision regarding judicial review of the Board’s action (not the President’s), and the reviewability of those types of interim actions was the focus of Part I.¹⁰

Article III of the Constitution precludes a federal court from reviewing non-final agency actions. Dalton and a host of cases before it confirms this, and Plaintiffs cannot sidestep this basic premise through clever pleading.¹¹

¹⁰ But even Part I of Dalton supports the premise that judicial review of non-final agency action is precluded in non-APA cases. This is best evidenced by the Court’s heavy reliance on its prior decision in Franklin v. Massachusetts, 505 U.S. 788 (1992), in which the Court cited Waterman for the principle that non-final agency action is “not subject to review.” Franklin, 505 U.S. at 798 (citing Waterman, 333 U.S. at 109; United States v. George S. Bush & Co., 310 U.S. 371, 379 (1940)).

¹¹ In Part II of Dalton, the Supreme Court also concluded, albeit regarding the President’s decision-making in the BRAC process, that any non-APA claims challenging the President’s authority under the Act are not constitutional claims but rather are statutory. 511 U.S. at 477. And “[w]here a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President’s decision is not available.” 511 U.S. at 477. This reasoning should apply with equal force to Plaintiffs’ alleged non-APA challenges to the preliminary recommendations of the Commission. Those challenges are not subject to judicial review because the Act commits decisionmaking to the discretion of the Commission. Indeed, the D.C. Circuit found this to be the case as to the Secretary while analyzing an earlier version of the statutory scheme related to base closings. See National Federation of Fed. Employees v. United States, 905 F.2d 400, 405-06 (D.C. Cir. 1990) (“even if appellants had standing to challenge the Secretary’s decisions, their claim is nonjusticiable because the Secretary’s decisions were ‘committed to agency discretion by law’”). This is so even though the Act sets forth criteria to be considered by the actors in the process; “the rub is that the subject matter of those criteria is not ‘judicially manageable.’” Id. at 405; see also Cohen v. Rice, 992 F.2d 376, 382 (1st Cir. 1993) (finding both procedural and substantive challenges to the BRAC Commission’s recommendations to be nonreviewable).

B. The statutory scheme, objectives and history of BRAC demonstrate a Congressional intent to preclude judicial review of the Commission's recommendations

Judicial review of decisions made under the Act also is precluded because “the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved,” Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984), all manifest a clear intent not to have judges reviewing the decision to recommend the closure or realignment of individual military installations. Justice Souter’s concurrence in Dalton, joined by three other Justices, persuasively demonstrates why no judicial review – whether under the APA or not – is permitted under the Act.¹² After a careful review of the “text, structure, and purpose of the Act,” Justice Souter concluded that “judicial review of the Commission’s or the Secretary’s compliance with it is precluded.” 511 U.S. at 479. He highlighted several reasons supporting this conclusion, the first being the “tight and rigid deadlines on administrative review and Presidential action” throughout the Act. Id. Regarding these deadlines, he wrote:

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

¹² No Justice disagreed with Justice Souter’s analysis. Rather, the State Amicus’ contention that Justice Blackmun’s brief concurring opinion contradicts Justice Souter’s opinion is belied by the fact that Justice Blackmun joined Justice Souter’s opinion. See 511 U.S. at 478. Rather Justice Blackmun opined that judicial review might be available for “a procedural violation, such as a suit claiming that a scheduled meeting of the Commission should be public or that the Secretary of Defense should publish the proposed selection criteria and provide an opportunity for public comment.” Id. He did not suggest that there was ever judicial review over the *substance* of a recommendation from the Secretary or the Commission.

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

Id. at 481.¹³

Next, Justice Souter stressed “the linchpin of this unusual statutory scheme . . . its all-or-nothing feature.” Id. That the President and Congress must promptly accept or reject the entire package of base closing recommendations – and may not ““cherry pick”” – “can only represent a considered allocation of authority between the Executive and Legislative Branches to enable each to reach important, but politically difficult, objectives.” Id. He continued:

If judicial review could eliminate one base from a package, the political resolution embodied in that package would be destroyed; if such review could eliminate an entire package, or leave its validity in doubt when a succeeding one had to be devised, the political resolution necessary to agree on the succeeding package would be rendered the more difficult, if not impossible. *The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled, go far to persuade me that Congress did not mean the courts to have any such power through judicial review.*

¹³ The initial Third Circuit panel opinion in Specter v. Garrett, 971 F.2d 936 (3rd Cir. 1992), the judgment of which was vacated by the Supreme Court and remanded for consideration in light of Franklin, see O’Keefe v. Specter, 506 U.S. 969 (1992), lends clear support to Justice Souter’s conclusions on this issue. See 971 F.2d at 946 (“With a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention.”). Dalton ultimately overruled the Third Circuit after it reconsidered its opinion.

Id. at 481-82 (emphasis added).

Finally, Justice Souter noted “two secondary features” of the Act that support the conclusion that judicial review of BRAC decision-making is barred. First, “the Act provides nonjudicial opportunities” for review: the Commission and the Comptroller General review the Secretary’s recommendations; the President reviews the Commission’s report; and Congress reviews the President’s decision. Id. at 482. And second, the Act contains one express provision for judicial review for claims brought under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq., challenging implementation of a base closing under certain circumstances. 511 U.S. at 483. “This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.” Id.

Accordingly, Justice Souter found that, “[w]hile no one aspect of the Act, standing alone, would suffice to overcome the strong presumption in favor of judicial review, this structure (combined with the Act’s provision for Executive and congressional review, and its requirement of time-constrained judicial review of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact.” Id. at 483-84. This detailed analysis applies equally whether or not the challenge to actions taken under BRAC is made through the APA. After all, any form of judicial review where a court could require an individual installation to be removed from the list would be equally destructive of the Act’s intricate structure and

would be equally inconsistent with congressional intent. Accordingly, Plaintiffs' claims are barred because judicial review is precluded by the Act itself.

C. There is no ripe controversy

“A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580-81 (1985) (additional citation and internal quotation marks omitted)); see also Presbytery of New Jersey v. Florio, 40 F.3d 1454, 1462 (3d Cir. 1994) (ripeness doctrine prevents courts from “‘entangling themselves in abstract disagreements’”) (quoting Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967)). Ripeness is closely related to both standing, see generally Presbytery of New Jersey, 40 F.3d at 1462 (3d Cir. 1994) (“The concepts of standing and ripeness are related. Each is a component of the Constitution’s limitation of the judicial power to real cases and controversies.”), and the principles of Dalton nonreviewability, see Franklin, 505 U.S. at 797 (“The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.”), discussed above.

The simple issue is whether the Commission’s vote to issue a recommendation regarding Fort Monmouth alone has consequences for Plaintiffs, or whether the recommendation rests upon contingencies in the future that may alter or even prevent the recommended action from occurring. Here, the latter scenario is true. It may be possible today to engage in a debate about whether the Commission exceeded its power under the BRAC Act (although as described below, it has not). But Article III requires far more than mere debate. The ripeness requirement is “designed to ‘prevent the courts, through avoidance of premature adjudication, from entangling

themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” National Park Hospitality Ass’n v. Department of Interior, 538 U.S. 803, 807-88 (2003) (quoting Abbott Labs, 387 U.S. at 148-49). The Commission’s vote on Fort Monmouth will only be a recommendation, subject to possible rejection. Plaintiffs’ challenge to that vote are thus not ripe for review. See Specter v. Garrett, 971 F.2d 936, 946 (3rd Cir. 1992) (“One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President’s decision are merely preliminary in nature.”) (citation omitted) (judgment vacated for consideration in light of Supreme Court’s decision in Franklin).

D. Plaintiffs lack standing

For the same reasons that this case does not present a ripe controversy, Plaintiffs lack Article III standing. To establish Article III standing, a plaintiff must have suffered an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal marks and citations omitted); Warth v. Seldin, 422 U.S. 490, 499 (1975) (“A federal court’s jurisdiction . . . can be invoked only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action.’”). Also “there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant. . . .’” Id. (brackets and first ellipses in original) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Finally, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be

'redressed by a favorable decision.'" Lujan, 426 U.S. at 560-61 (quoting Simon, 426 U.S. at 38, 43). Plaintiffs' claims fail to satisfy these requirements.

i. Plaintiffs fail to allege any concrete, particularized and actual injury

Plaintiffs allege injuries that are tied solely to the actual closure of Fort Monmouth, as opposed injuries associated with the transmittal of the BRAC Commission report to the President on September 8, 2005. See Compl. ¶ 3(a)-(p) (each paragraph stating that alleged injuries will occur "as a result of the closure of Fort Monmouth"). Any implementation of the Commission's recommendations regarding Fort Monmouth is at least months away. Moreover, the closure itself is contingent on actions of both the President and Congress, each of which can prevent the recommendations from occurring. Thus, not only are Plaintiffs' alleged injuries not imminent, they are not even certain. See Garrett, 971 F.2d at 946 ("One can rarely if ever be injured by a base closing prior to a decision having been made to close that base.") (judgment vacated for consideration in light of Supreme Court's decision in Franklin). For instance, the mayoral plaintiffs have alleged only that they (and their constituents) will be subject to base closing procedures at some unknown time in the future. Compl. ¶ 3(f)-(h). Likewise, the individuals suing because they or their relatives receive unspecified services from Fort Monmouth, id. at ¶ 3(k)-(m), set forth no particularized injury with respect to the transmittal of the BRAC report. Even the union plaintiffs have no particularized injury with respect to the transmission of the BRAC report to the President. Because the Commission's recommendation to close Fort Monmouth cannot alone inflict any statutory injury upon any of the plaintiffs, all lack standing to

challenge the recommendation contained in the Final BRAC report.¹⁴

ii. The Congressional plaintiffs lack standing

The five Congressional plaintiffs – who sue in their official capacities as U.S. Senators and Representatives – have additional standing hurdles. Preliminarily, the Congressional plaintiffs allege no injuries at all associated with the Commission's recommendation regarding Fort Monmouth, and they apparently stand to suffer no injury that is in any way different from every citizen of New Jersey. Indeed, the Congressional plaintiffs assert an injury based solely upon on being “placed in the position of having to approve or disapprove a closure and realignment list . . .” see Compl. ¶ 3(a)-(e), and being reinserted into the process by way of receipt of a report from the Secretary of Defense, which requires no further legislative action. Because they fail to assert any particularized injury and for the additional reasons discussed below regarding congressional standing, these plaintiffs should be dismissed.

The Supreme Court's decision in Raines v. Byrd, 521 U.S. 811 (1997), is the defining case on the issue of legislative standing. In Raines, the Supreme Court held that, to establish standing, individual Members of Congress suing in their legislative capacity must assert an injury that is “personal, particularized, concrete, and otherwise judicially cognizable.” 521 U.S. at 820. A mere “diminution of [their] legislative power” is insufficient. Id. at 821. Here, the Congressmen allege no injury that is “personal, particularized, [and] concrete” enough to satisfy the stringent requirements of Raines. The Congressional plaintiffs claim injury from the very

¹⁴ Moreover to the extent that any injury exists, it would plainly be a “generalized grievance” that much, if not all, of the local population incurs and that cannot form the basis of jurisdiction in a federal court. Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 217-28 (1974) (holding that “generalized grievances” shared by substantially the whole population do not normally warrant the exercise of jurisdiction); see also Warth, 422 U.S. at 499.

statutory duty they have under the BRAC statute, but that is not cognizable under Raines. The Congressional plaintiffs still may play a role in the BRAC process after the President either accepts or rejects the Commission's recommendations when, within a 45 legislative day window, they are freely permitted to seek BRAC-related legislation and cast their votes as they see fit on any legislation that is proposed. And the receipt of the report from the Secretary of Defense in no way alters the congressional plaintiffs powers because Congress need not take any action in response to the report, or even read it. But their legislative duties with regard to any BRAC legislature in no way injure the Congressional plaintiffs.

E. Plaintiffs' challenges to the Secretary's recommendations are moot

Moreover, Plaintiffs' challenges to the Secretary's recommendations regarding Fort Monmouth are moot. The Secretary's recommendation regarding Fort Monmouth was revised by the Commission and once the Commission has dealt with the Secretary's recommendations, the Secretary's recommendations no longer have any legal force. Because the Secretary's recommendation is no longer in effect, any challenge to that recommendation is moot.

F. The Commission has not violated the BRAC Act

Plaintiffs' claims that the Commission violated the Act are based on essentially three contentions, all of which are flawed. First, Plaintiffs contend that the Commission violated the Act by considering the Secretary's recommendation that Fort Monmouth be closed. (Pl. Mem. at 18.) However, assuming *arguendo* that the Secretary's recommendation regarding Fort Monmouth was flawed, the Commission acted in accordance with its statutory mandate when it reconsidered and altered the recommendation. The Commission is authorized to "make changes in any of the recommendations made by the Secretary if the Commission determines that the

Secretary deviated substantially” from the statutory criteria, Act, at § 2903(d), and this is precisely what the Commission did.¹⁵

Second, Plaintiffs contend that the Commission acted unlawfully by requiring the Secretary to implement “safeguards to avoid degradation of current programs and disruption to the Global War on Terror.” (Pl. Mem. at 18.) Plaintiffs offer no support for this contention, and with good reason, given that the protection of national security is a core goal of the BRAC process. Obviously, ensuring that degradation of defense programs and disruption of the War on Terror are avoided is one of the roles of the BRAC process. Moreover, the only safeguards that the Commission’s recommendation would require are safeguards directly relating to the closure of a base, making them relevant and appropriate to the goals of the BRAC process. Finally, given that it is the Secretary, and not Plaintiffs, that are tasked with implementing these national security protections, Plaintiffs are not injured by this requirement and thus lack standing to challenge it.¹⁶

Third, Plaintiffs contend that by “directing the Secretary of Defense to submit a report to the appropriate congressional oversight committee [*sic*]” the Commission has “re-inserted Congress back into the base closure process in a way that was neither authorized nor contemplated by the BRAC Act.” (*Id.*) The BRAC Act does not remove Congress from the base

¹⁵ There is no merit to Plaintiffs’ contention that there is a difference between the “substantial deviation” from the criteria stated in the statute and the “wholesale deviation” posited by Plaintiffs (Compl. ¶ 21.) If the Commission finds “substantial deviation,” it is empowered to “make changes;” there is no provision that requires the Commission to then look for “wholesale deviation” and then relinquish its recommendation powers.

¹⁶ If these safeguards were eliminated, it would not alter the recommendation that Fort Monmouth be closed.

closure process (see Amicus Mem. at 9 (contending that the Act sought “a tightening of Congressional oversight”), and even if it did, any alleged re-insertion of Congress back into the process could not itself cause any injury to Plaintiffs—particularly, of course, to those Plaintiffs who are actually members of Congress. In any event, the Commission’s recommendation will not result in any additional work for Congress. The only requirement that concerns Congress is that the Secretary submit a report to the appropriate committees. Members of Congress are not required to take any action, let alone approve or respond to the report, or even to read it. Indeed, the BRAC recommendation does not purport to require Congress to take any act not currently contemplated by or set forth in the BRAC Act. Rather, the submission of the report to Congress is merely an acknowledgment of Congress’ constitutional role in overseeing the execution of the law.

CONCLUSION

For all of these reasons, this Court should deny Plaintiffs’ requests for a preliminary injunction and an expedited summary trial.

Dated: September 5, 2005

Respectfully submitted,

CHRISTOPHER J. CHRISTIE
United States Attorney

PETER D. KEISLER
Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

VINCENT M. GARVEY
Deputy Branch Director

/s/ Jeffrey M. Smith
ANDREW H. TANNENBAUM

MATTHEW LEPORE
JEFFREY M. SMITH (JS 0295)
ALEXANDER K. HAAS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 514-5751; Fax: (202) 616-8202
Jeffrey.Smith5@usdoj.gov

/s/ Susan J. Steele
SUSAN J. STEELE (SJS 7042)
ASSISTANT U.S. ATTORNEY
CHIEF, CIVIL DIVISION

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2005, the foregoing was served by e-mail to the following counsel of record:

Frank Capece, Esq.
Garrubbo, Capece, D'Arcangel,
Milman & Smith, P.C.
53 Cardinal Drive Westfield, NJ 07080
(908) 223-4894 (fax)
fgc@grrlawyers.com

Eugene M. LaVergne, Esq.
601 Grand Ave – Suite 307
Asbury Park, NJ 07712
(732) 897-9711 (fax)
EMLESQ@aol.com

Attorneys for Plaintiffs

Kenneth J. Sheehan
Assistant Attorney General
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101
Kenneth.Sheehan@law.dol.lps.state.nj.us

Attorney for Amicus Curiae

/s/ Alexander K. Haas

ALEXANDER K. HAAS

Trial Attorney

United States Department of Justice

Civil Division, Federal Programs Branch

P.O. Box 883

Washington, D.C. 20044

Tel: (202) 307-3937; Fax: (202) 616-8202

Alexander.Haas@usdoj.gov

Attorney for Defendants

A

Economic Impact on Communities: This recommendation will not result in any job reductions (direct or indirect) over the 2006-2011 period in the Fayetteville, NC and Fort Walton Beach-Crestview-Destin, FL, metropolitan statistical areas. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of Volume I.

Community Infrastructure Assessment: A review of community attributes revealed no significant issues regarding the ability of the local community's infrastructure to support missions, forces, and personnel. Of the ten attributes evaluated (Child Care, Cost of Living, Education, Employment, Housing, Medical Health, Population Center, Safety, Transportation, and Utilities) two levels of support declined (Cost of Living, Education) when moving activities from Fort Bragg to Eglin AFB. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: This recommendation may result in operational restrictions to protect cultural or archeological resources at Eglin AFB and Fort Bragg. Tribal consultations may also be required at both locations. Operations are currently restricted by electromagnetic radiation and/or emissions and additional operations/training may result in operational restrictions at Eglin AFB. Further analysis may be necessary to determine the extent of new noise impacts at Eglin and Bragg. Additional waste production at Eglin may necessitate modifications of hazardous waste program. Increased water demand at Fort Bragg may lead to further controls and restrictions and water infrastructure may need upgrades due to incoming population. Additional operations at Eglin may impact wetlands, resulting in operational restrictions. An evaluation of operational restrictions for jurisdictional wetlands will likely have to be conducted at Fort Bragg. Added operations may impact threatened and endangered species at Fort Bragg and result in further operational and training restrictions. This recommendation has no impact on air quality; dredging; land use constraints or sensitive resource areas; or marine mammals, resources, or sanctuaries. This recommendation will require spending approximately \$1.0M for environmental compliance costs. These costs were included in the payback calculation. This recommendation does not otherwise impact the costs of environmental restoration, waste management, and environmental compliance activities. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation has been reviewed. There are no known environmental impediments to implementation of this recommendation.

Fort Monmouth, NJ

Recommendation: Close Fort Monmouth, NJ. Relocate the US Army Military Academy Preparatory School to West Point, NY. Relocate the Joint Network Management System Program Office to Fort Meade, MD. Relocate the Budget/Funding, Contracting, Cataloging, Requisition Processing, Customer Services, Item Management, Stock Control, Weapon System Secondary Item Support, Requirements Determination, Integrated Materiel Management Technical Support Inventory Control Point functions for Consumable Items to Defense Supply Center Columbus, OH, and reestablish them as Defense Logistics Agency Inventory Control Point functions; relocate the procurement management and related support functions for Depot

Level Reparables to Aberdeen Proving Ground, MD, and designate them as Inventory Control Point functions, detachment of Defense Supply Center Columbus, OH, and relocate the remaining integrated materiel management, user, and related support functions to Aberdeen Proving Ground, MD. Relocate Information Systems, Sensors, Electronic Warfare, and Electronics Research and Development & Acquisition (RDA) to Aberdeen Proving Ground, MD. Relocate the elements of the Program Executive Office for Enterprise Information Systems and consolidate into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.

Realign Fort Belvoir, VA by relocating and consolidating Sensors, Electronics, and Electronic Warfare Research, Development and Acquisition activities to Aberdeen Proving Ground, MD, and by relocating and consolidating Information Systems Research and Development and Acquisition (except for the Program Executive Office, Enterprise Information Systems) to Aberdeen Proving Ground, MD.

Realign Army Research Institute, Fort Knox, KY, by relocating Human Systems Research to Aberdeen Proving Ground, MD.

Realign Redstone Arsenal, AL, by relocating and consolidating Information Systems Development and Acquisition to Aberdeen Proving Ground, MD.

Realign the PM Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS) facility at 2511 Jefferson Davis Hwy, Arlington, VA, a leased installation, by relocating and consolidating into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.

Justification: The closure of Fort Monmouth allows the Army to pursue several transformational and BRAC objectives. These include: Consolidating training to enhance coordination, doctrine development, training effectiveness and improve operational and functional efficiencies, and consolidating RDA and T&E functions on fewer installations. Retain DoD installations with the most flexible capability to accept new missions. Consolidate or co-locate common business functions with other agencies to provide better level of services at a reduced cost.

The recommendation relocates the US Army Military Academy Preparatory School to West Point, NY and increases training to enhance coordination, doctrine development, training effectiveness and improve operational and functional efficiencies.

The recommendation establishes a Land C4ISR Lifecycle Management Command (LCMC) to focus technical activity and accelerate transition. This recommendation addresses the transformational objective of Network Centric Warfare. The solution of the significant challenges of realizing the potential of Network Centric Warfare for land combat forces requires integrated research in C4ISR technologies (engineered networks of sensors, communications, information processing), and individual and networked human behavior. The recommendation increases efficiency through consolidation. Research, Development and Acquisition (RDA), Test and Evaluation (T&E) of Army Land C4ISR technologies and systems is currently split

among three major sites – Fort Monmouth, NJ, Fort Dix, NJ, Adelphi, MD and Fort Belvoir, VA and several smaller sites, including Redstone Arsenal and Fort Knox. Consolidation of RDA at fewer sites achieves efficiency and synergy at a lower cost than would be required for multiple sites. This action preserves the Army's "commodity" business model by near collocation of Research, Development, Acquisition, and Logistics functions. Further, combining RDA and T&E requires test ranges – which cannot be created at Fort Monmouth.

The closure of Fort Monmouth and relocation of functions which enhance the Army's military value, is consistent with the Army's Force Structure Plan, and maintains adequate surge capabilities. Fort Monmouth is an acquisition and research installation with little capacity to be utilized for other purposes. Military value is enhanced by relocating the research functions to under-utilized and better equipped facilities; by relocating the administrative functions to multi-purpose installations with higher military and administrative value; and by co-locating education activities with the schools they support. Utilizing existing space and facilities at the gaining installations, maintains both support to the Army Force Structure Plan, and capabilities for meeting surge requirements.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$822.3M. The net of all costs and savings to the Department of Defense during the implementation period is a cost of \$395.6M. Annual recurring savings to the Department after implementation are \$143.7M with a payback expected in 6 years. The net present value of the costs and savings to the Department over 20 years is a savings of \$1,025.8M.

This recommendation affects non-DoD Federal agencies. These include, the U.S. Post Office, the Department of Justice and the General Services Administration. In the absence of access to credible cost and savings information for those agencies or knowledge regarding whether those agencies will remain on the installation, the Department assumed that the non-DoD Federal Agencies will be required to assume new base operating responsibilities on the affected installation. The Department further assumed that because of these new base operating responsibilities, the affect of the recommendations on the non-DoD agencies would be an increase in cost. As required by Section 2913 (d) of the BRAC statute, the Department has taken the effect on the cost of these agencies into account when making this recommendation.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 9,737 jobs (5,272 direct and 4,465 indirect jobs) over the 2006 – 2011 periods in the Edison, NJ Metropolitan Division, which is 0.8 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 20 jobs (11 direct and 9 indirect jobs) over the 2006 – 2011 periods in the Elizabethtown, KY Metropolitan Division, which is 0.03 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,218 jobs (694 direct and 524 indirect jobs) over the 2006 – 2011 periods in the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division, which is 0.04 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 63 jobs (37 direct and 26 indirect jobs) over the 2006 – 2011 periods in the Huntsville, AL Metropolitan Division, which is 0.03 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 9,834 jobs (5,042 direct and 4,792 indirect jobs) over the 2006 – 2011 periods in the Baltimore-Towson, MD Metropolitan Division, which is 0.6 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 422 jobs (264 direct and 158 indirect jobs) over the 2006 – 2011 periods in the Poughkeepsie-Newburgh-Middletown, NY Metropolitan Division, which is 0.1 percent of economic area employment.

Assuming no economic recovery, this recommendation could result in a maximum potential increase of 89 jobs (49 direct and 40 indirect jobs) over the 2006 – 2011 periods in the Columbus, OH Metropolitan Division, which is 0.01 percent of economic area employment.

The aggregate economic impact of all recommended actions on these economic regions of influence was considered and is at Appendix B of Volume I.

Community Infrastructure Assessment: A review of community attributes revealed no significant issues regarding the ability of the infrastructure of communities to support forces, missions, and personnel. When moving from Fort Monmouth to Aberdeen, MD, the following local area capabilities improve: Cost of Living and Medical Health. The following attributes decline: Safety and Transportation. When moving from Fort Monmouth to West Point, the following local area capabilities improve: Education and Employment. The following attribute declines: Housing. When moving from Fort Monmouth to Fort Belvoir, the following local area capabilities improve: Employment and Medical Health. The following attributes decline: Education and Safety. When moving from Fort Monmouth to Fort Meade, the following local area capabilities improve: Cost of Living and Medical Health. The following attributes decline: Education and Safety. When moving from Fort Monmouth to Columbus, OH, the following local area capabilities improved: Cost of living, Employment, and Medical Health. The following attribute declines: Safety. When moving from Fort Belvoir to Aberdeen, MD, the following local area capabilities improve: Cost of living and Education. The following attributes decline: Employment, Safety and Transportation. When moving from Fort Knox to Aberdeen, MD, the following local area capabilities improve: Housing, Employment, and Medical Health. The following attributes decline: Cost of Living, Safety, and Transportation. When moving from Redstone Arsenal to Aberdeen, MD, the following local area capabilities improve: Child Care, Housing, and Medical Health. The following attributes decline: Employment, Safety, Population Center, and Transportation. When moving from Arlington, VA, to Aberdeen, MD, the following attributes decline: Population Center, and Transportation.

Environmental Impact: Closure of Fort Monmouth will necessitate consultations with the State Historic Preservation Office to ensure that sites are continued to be protected. Fort Monmouth's

previous mission-related activities will result in land use constraints/sensitive resource area impacts. An Air Conformity Analysis and a New Source Review and permitting effort is required at Aberdeen, West Point, and Fort Belvoir. The extent of the cultural resources on Aberdeen, West Point, and Fort Belvoir are uncertain. Potential impacts may occur as result of increased times delays and negotiated restrictions. Additional operations at Aberdeen, West Point, and Fort Belvoir may further impact threatened/endangered species leading to additional restrictions on training or operations. Significant mitigation measures to limit releases may be required to reduce impacts to water quality and achieve US EPA water quality standards. Due to the increase in personnel there would be a minimal impact on waste production and water consumption at Defense Supply Center Columbus (DSCC), OH. This recommendation has no impact on dredging; land use constraints or sensitive resource areas; marine mammals, resources, or sanctuaries; noise; or wetlands. This recommendation will require spending approximately \$2.95M for environmental compliance activities. These costs were included in the payback calculation. Fort Monmouth reports \$2.9M in environmental restoration costs. Because the Department has a legal obligation to perform environmental restoration regardless of whether an installation is closed, realigned, or remains open, these costs were not included in the payback calculation. This recommendation does not impact the costs of environmental restoration, waste management, and environmental compliance activities. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation has been reviewed. There are no known environmental impediments to implementation of this recommendation.

Fort Hood, TX

Recommendation: Realign Fort Hood, TX, by relocating a Brigade Combat Team (BCT) and Unit of Employment (UEX) Headquarters to Fort Carson, CO.

Justification: This recommendation ensures Army BCTs and support units are located at installations capable of training modular formations, both mounted and dismounted, at home station with sufficient land and facilities to test, simulate, or fire all organic weapon systems. This recommendation enhances the military value of the installations and the home station training and readiness of the units at the installations by relocating units to installations that can best support the training and maneuver requirements associated with the Army's transformation.

This recommendation relocates to Fort Carson, CO, a Heavy BCT that will be temporarily stationed at Fort Hood in FY06, and a Unit of Employment Headquarters. The Army is temporarily stationing this BCT to Fort Hood in FY06 due to operational necessity and to support current operational deployments in support of the Global War on Terrorism (GWOT). However, based on the BRAC analysis, Fort Hood does not have sufficient facilities and available maneuver training acreage and ranges to support six permanent heavy BCTs and numerous other operational units stationed there. Fort Carson has sufficient capacity to support these units. The Army previously obtained approval from the Secretary of Defense to temporarily station a third BCT at Fort Carson in FY05. Due to Fort Carson's capacity, the BRAC analysis indicates that the Army should permanently station this third BCT at Fort Carson.

B

A Bill to Make Recommendations to the President
Under the Defense Base Closure and Realignment Act of 1990
Chapter I. Department of the Army Recommendations

4. Fort Bragg, North Carolina (Army 10).⁴

- a. **Realign Fort Bragg, NC**, by relocating the 7th Special Forces Group (SFG) to Eglin AFB, FL, and by activating the 4th Brigade Combat Team (BCT), 82^d Airborne Division and relocating European-based forces to Fort Bragg, NC.

5. Fort Monmouth, New Jersey (Army 11).

- a. **Close Fort Monmouth, NJ.** Relocate the US Army Military Academy Preparatory School to West Point, NY. Relocate the Joint Network Management System Program Office to Fort Meade, MD. Relocate the Budget/Funding, Contracting, Cataloging, Requisition Processing, Customer Services, Item Management, Stock Control, Weapon System Secondary Item Support, Requirements Determination, Integrated Materiel Management Technical Support Inventory Control Point functions for Consumable Items to Defense Supply Center Columbus, OH, and reestablish them as Defense Logistics Agency Inventory Control Point functions; relocate the procurement management and related support functions for Depot Level Repairables to Aberdeen Proving Ground, MD, and designate them as Inventory Control Point functions, detachment of Defense Supply Center Columbus, OH, and relocate the remaining integrated materiel management, user, and related support functions to Aberdeen Proving Ground, MD. Relocate Information Systems, Sensors, Electronic Warfare, and Electronics Research and Development & Acquisition (RDA) to Aberdeen Proving Ground, MD. Relocate the elements of the Program Executive Office for Enterprise Information Systems and consolidate into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.
- b. **Realign Fort Belvoir, VA** by relocating and consolidating Sensors, Electronics, and Electronic Warfare Research, Development and Acquisition activities to Aberdeen Proving Ground, MD except the Night Vision and Electronic Sensors Directorate (the Night Vision Lab) and the Project Manager Night Vision/Reconnaissance, Surveillance and Target Acquisition (PM NV/RSTA), and by relocating and consolidating Information Systems Research and Development and Acquisition (except for the Program Executive Office, Enterprise Information Systems) to Aberdeen Proving Ground, MD.⁵

⁴ By Motion G-4-1, the Commission found the recommendation of the Secretary of Defense consistent with the Final Selection Criteria and Force Structure Plan.

⁵ By Motion 5-3A, the Commission struck the entire text of the former paragraph "b", which read "**Realign Fort Belvoir, VA** by relocating and consolidating Sensors, Electronics, and Electronic Warfare Research, Development and Acquisition activities to Aberdeen Proving Ground, MD, and by relocating and consolidating Information Systems Research and Development and Acquisition (except for the Program Executive Office, Enterprise Information Systems) to Aberdeen Proving Ground, MD."

By Motion 5-4C, the Commission inserted a new paragraph "b", as reflected above.

A Bill to Make Recommendations to the President
Under the Defense Base Closure and Realignment Act of 1990
Chapter I. Department of the Army Recommendations

- c. **Realign Army Research Institute, Fort Knox, KY**, by relocating Human Systems Research to Aberdeen Proving Ground, MD.
- d. **Realign Redstone Arsenal, AL**, by relocating and consolidating Information Systems Development and Acquisition to Aberdeen Proving Ground, MD.
- e. **Realign the PM Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS) facility at 2511 Jefferson Davis Hwy, Arlington, VA**, a leased installation, by relocating and consolidating into the Program Executive Office, Enterprise Information Systems at Fort Belvoir, VA.
- f. The Secretary of Defense shall submit a report to the⁶ Congressional Committees of Jurisdiction, that movement of organizations, functions, or activities from Fort Monmouth to Aberdeen Proving Ground will be accomplished without disruption of their support to the Global War on Terrorism or other critical contingency operations, and that safeguards exist to ensure that necessary redundant capabilities are put in place to mitigate potential degradation of such support, and to ensure maximum retention of critical workforce.⁷

6. Fort Hood, Texas (Army 15).⁸

- a. **Realign Fort Hood, TX**, by relocating a Brigade Combat Team (BCT) and Unit of Employment (UEX) Headquarters to Fort Carson, CO.

7. Red River Army Depot, Texas (Army 16).

- a. **Realign Red River Army Depot, TX.**⁹ Relocate the storage and demilitarization functions of the Munitions Center to McAlester Army Ammunition Plant, OK. Relocate the munitions maintenance functions of the Munitions Center to McAlester Army Ammunition Plant, OK,

⁶ A verbal motion by Commissioner Skinner, with the concurrence of Commissioner Coyle, deleted the language "certify to the President, and provide copies of such certification to" and inserted in its place "shall submit a report to the".

⁷ By Motion 5-4D, the Commission appended a new paragraph "F", as reflected above.

⁸ By Motion G-4-1, the Commission found the recommendation of the Secretary of Defense consistent with the Final Selection Criteria and Force Structure Plan.

⁹ By Motion 7-4A, the Commission struck the language "Close Red River Army Depot, TX. Relocate the depot maintenance of Armament and Structural Components, Combat Vehicles, Depot Fleet/Field Support, Engines and Transmissions, Fabrication and Manufacturing, Fire Control Systems and Components, and Other to Anniston Army Depot, AL. Relocate the depot maintenance of Powertrain Components, and Starters/Generators to Marine Corps Logistics Base Albany, GA. Relocate the depot maintenance of Construction Equipment to Anniston Army Depot, AL, and Marine Corps Logistics Base Albany, GA. Relocate the depot maintenance of Tactical Vehicles to Tobyhanna Army Depot, PA and Letterkenny Depot, PA." and replaced it with the language "**Realign Red River Army Depot, TX.**", and struck the language "Relocate the storage and distribution functions and associated inventories of the Defense Distribution Depot to the Defense Distribution Depot, Oklahoma City, OK."