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



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Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

August 10, 2005

BY FACSIMILE & POST

The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 S. Clark St., Suite 600
Arlington, VA 22202

Dear Mr. Principi:

The enclosed memorandum from the Office of Legal Counsel responds to your request to the Attorney General, dated May 23, 2005, for a legal opinion regarding the authority of the federal Government, when acting under the Defense Base Closure and Realignment of 1990, as amended, to close or realign Army and Air National Guard installations without obtaining the consent of the governors of the States in which the affected installations are located. As you will see, the Office concludes that the Government has such authority.

This memorandum is not a public document. Should the Commission wish it to be made public, please consult us before taking any action.

Please contact me if you have any further questions or concerns.

Regards,

A handwritten signature in black ink that reads "C. Kevin Marshall".

C. Kevin Marshall
Deputy Assistant Attorney General

Enclosure



U.S. Department of Justice

Office of Legal Counsel

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Washington, D.C. 20530

August 10, 2005

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

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

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

I.**A.**

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

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

Base Closure Act (which under current law expires on April 15, 2006) serves as “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 § 2909(a).² The Act’s scope is broad: It defines “installation” as a “base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.” *Id.* § 2910(4). And “[t]he term ‘realignment’ includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.” *Id.* § 2910(5).

In addition to reaching broadly, the Act also establishes an “elaborate selection process” for accomplishing its purpose, by assigning specific roles to several federal actors who are subjected to rigid statutory deadlines. *Dalton*, 511 U.S. at 464 (opinion of Court). The process for the 2005 round begins when the Secretary of Defense certifies to Congress that a need exists to close and realign military installations and that such closures and realignments would “result in annual net savings for each of the military departments.” Act § 2912(b)(1)(B). The process may proceed thereafter only if, no later than March 15, 2005, the President nominates for Senate consideration persons to constitute the Defense Base Closure and Realignment Commission. *Id.* § 2912(d). Although the Commission’s actions are expressly subject to the approval or disapproval of the President (as explained below) and the Act does not restrict the removal of commissioners, the Commission is “independent” of other federal departments, agencies, or commissions. *Id.* § 2902(a); see generally *Removal of Holdover Officials Serving on the Federal Housing Finance Board and the Railroad Retirement Board*, 21 Op. O.L.C. 135, 135, 138 n.5 (1997); see also Memorandum for Alberto R. Gonzales, Counsel to the President, from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Holdover and Removal of Members of Amtrak’s Reform Board* at 3-6 (Sept. 22, 2003) (Part II), available at www.usdoj.gov/olc/opinions.htm.

The next step after the nomination of commissioners is for the Secretary of Defense to develop a list of the military installations in the United States that he recommends for closure or realignment; he must submit that list to the Commission by May 16, 2005. Act § 2914(a). In preparing his list, the Secretary must “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.* § 2903(c)(3)(A). The Secretary’s recommendations must be based on his previously established and issued “force-structure plan” and a “comprehensive inventory of military installations.” *Id.* § 2912(a)(1). Congress also has

² The Act makes an exception for closures and realignments not covered by 10 U.S.C. § 2687. See Act § 2909(c)(2). Section 2687 applies to closures of military installations at which 300 or more civilians are employed and to realignments of such installations that involve a reduction by more than 1,000 (or 50 percent) of the civilian personnel. In other words, small closures and realignments are not subject to the Act’s exclusivity provision. This does not mean, however, that such closures and realignments *cannot* be carried out under the Act.

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

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

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

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

B.

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

employed in the Service of the United States," while "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16. Acting pursuant to this power, see *Perpich*, 496 U.S. at 342, Congress in 1903 passed the Dick Act, 32 Stat. 775, which provided among other things for an Organized Militia, known as the National Guard of the several States, that would be organized in the same way as the regular Army, trained by regular Army instructors, and equipped through federal funds. 496 U.S. at 342. For historical and constitutional reasons, it was thought that this force could not be used outside of the United States. See Memorandum for the Attorney General from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, et al., *Re: Whether the Second Amendment Secures an Individual Right* at 27 (Aug. 24, 2004) (Part II.C.2) ("*Second Amendment Opinion*"), available at www.usdoj.gov/olc/opinions.htm.

Partly to overcome this restriction, Congress in the National Defense Act of 1916, 39 Stat. 166, further federalized the National Guard pursuant to its power, among others, to "raise and support Armies." U.S. Const. art. I, § 8, cl. 12; see *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918). The National Defense Act "increased federal control and federal funding of the Guard," "authorized the President to draft members of the Guard into federal service," and provided that the Army should include both the regular Army and the National Guard while in federal service. *Perpich*, 496 U.S. at 343-44. The Court in the *Selective Draft Law Cases* and *Cox v. Wood*, 247 U.S. 3 (1918), upheld the draft provisions of the National Defense Act, concluding, among other things, that Congress's power to raise and support armies was "not qualified or restricted by the provisions of the militia clause," 247 U.S. at 6. The Court reaffirmed this interpretation in *Perpich*. See 496 U.S. at 349-50.

In 1933, Congress gave the National Guard much of its current shape by creating two overlapping organizations whose members have dual enlistment: the National Guard of the various States and the National Guard of the United States, the latter forming a permanent reserve corps of the federal Armed Forces. See Act of June 15, 1933, 48 Stat. 153; *Perpich*, 496 U.S. at 345; see also 10 U.S.C. § 101(c) (2000) (distinguishing between these two entities); *id.* § 10101 (defining the "reserve components of the armed forces" to include the Army and Air National Guard of the United States); see also *id.* §§ 10105, 10111 (2000) (similar). Today, the federal Government "provides virtually all of the funding, the materiel, and the leadership for the State Guard units," although Congress continues, arguably for constitutional reasons, to allow a State to provide and maintain at its own expense a defense force outside of this system. *Perpich*, 496 U.S. at 351-52; 32 U.S.C. § 109(c) (2000). The National Guard of the United States is thus at all times part of the Armed Forces of the United States. The requirement of dual enlistment set up in 1933 means that a member of the National Guard simultaneously performs two distinct roles: Armed Forces reservist and state militiaman. Under ordinary circumstances, National Guard units retain their status as state militia units, under the ultimate command of the governor of the State in which the unit is located. See 10 U.S.C. §§ 10107, 10113 (2000). Under certain conditions, however, the President can order those units into active federal service, just as he can

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

II.

A.

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

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

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

B.

Section 18238 provides in full as follows:

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

10 U.S.C. § 18238 (emphasis added). Section 18238 by its terms applies only to relocations or withdrawals "under this chapter." The applicable chapter of title 10 is chapter 1803, which comprises sections 18231 to 18239. The Base Closure Act, however, is not included in chapter 1803. Public Law 107-107, which authorizes the current round of closings and realignments, is a distinct legal authority, and the Act has been included as a note to 10 U.S.C. § 2687, which is part of chapter 159. By its terms, therefore, section 18238 does not apply to the Base Closure Act because the Act is not part of "this chapter" (*i.e.*, chapter 1803) and action under the Act therefore is not, and cannot be, action under chapter 1803. Thus, as the plain text of the provision makes clear, section 18238 has no bearing on the scope of authority exercised under the Act.

This reading of the current text is confirmed by the statutory history of section 18238. The provision was originally enacted as section 4(b) of the National Defense Facilities Act of 1950, 64 Stat. 829, 830. Section 4(b) applied only to situations in which the location of a National Guard unit was changed "pursuant to any authority *conferred by this Act.*" *Id.* (emphasis added).³ This limiting clause was modified to "under this chapter" in 1956 when the Facilities Act was first codified in title 10 as part of the codification of military law into titles 10 and 32. Act of Aug. 10, 1956, Pub. L. No. 84-1028, § 1, 70A Stat. 120, 123.⁴ As was generally the case in the 1956 codification, no change in meaning was intended. *Id.* at 640 ("In sections 1-48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections"); *see also Schacht v. United States*, 398 U.S. 58, 62 n.3 (1970) ("Although the 1956 revision and codification were not in general intended to make substantive changes, changes were made for the purpose of clarifying and updating language."); S. Rep. No. 84-2484, at 19 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4632, 4640 ("The object of the new titles has been

³ Section 4(b) required merely that the relevant governor be "consulted." 64 Stat. at 830. A subsequent amendment added the phrase "and shall have consented." Pub. L. No. 84-302, ch. 662, 69 Stat. 593 (1955). In 1958, the wording was changed to the current "without the consent" version, and the phrase "shall have been consulted" was omitted as surplusage. *See* Pub. L. No. 85-861, § 1(43), 72 Stat. 1437, 1457 (1958); 1958 U.S.C.C.A.N. 4634.

⁴ Section 4(b) then became 10 U.S.C. § 2238, part of chapter 133. In 1994, Congress redesignated chapter 133 as chapter 1803, and sections 2231-2239 as sections 18231-18239, with section 2238 becoming section 18238. *See* Pub. L. No. 103-337, § 1664(b), 108 Stat. 2663, 3010 (1994).

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

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

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

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

military installation being closed or realigned to another military installation.” Base Closure Act § 2905(a)(1)(A) (emphasis added). Here again, because the exercise of such authority would not depend on anything in chapter 1803, it would be unconstrained by section 18238.⁵

C.

Section 104(c) of title 32 provides in full as follows:

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

32 U.S.C. § 104(c). Related to this provision, section 104(a) authorizes each State to “fix the location of the units and headquarters of its National Guard,” and section 104(b) provides that, except as otherwise specifically provided in title 32, “the organization of” the Army National Guard and Air Force National Guard “and the composition of [their] units” shall be the same as those of their respective branches of the federal Armed Forces.

For two reasons, we conclude that section 104(c) does not constrain actions taken pursuant to the Base Closure Act. First, the text of that section strongly suggests that the second sentence simply qualifies any exercise of authority under the first, and thus that its gubernatorial consent requirement does not apply to the exercise of any separate authority—such as the Base Closure Act—even if that authority may allow similar or overlapping actions. Second, reading the “However” sentence more broadly would so fundamentally undermine the Base Closure Act’s detailed and comprehensive scheme that Congress could not have intended such a result. Indeed, the inconsistency between the integrated and exclusive procedures of the Base Closure Act and the requirement imposed by the second sentence of section 104(c) is sufficiently serious that, if the Act and section 104(c) did overlap, we would be compelled to read the former as

⁵ There is an additional reason for not reading section 18238 to apply to the Base Closure Act. The Facilities Act grants authority to “the Secretary of Defense.” See, e.g., 10 U.S.C. § 18233(a). It follows that section 18238’s limitation on that authority applies only to actions taken by the Secretary. Thus, the Facilities Act at least should not be read to apply to actions by the Commission or the President. And given that the final power to require closure or realignment under the Base Closure Act belongs to the President alone, see *Dalton*, 511 U.S. at 469-70, it would be anomalous to read section 18238 to apply to—and conflict with—the Secretary’s subsequent duty (discussed above) to implement *all* of the closures and realignments on the list approved by the President.

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

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

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

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

[T]he President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: *Provided*, that no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.

Act of June 15, 1933, § 6, 48 Stat. at 156. The language of this amendment demonstrates even more clearly that Congress did not intend the gubernatorial consent provision to be a free-standing requirement for all actions taken by the federal Government with respect to the National Guard. Instead, the use of a proviso form—linking the second clause to the preceding one both grammatically (by the colon followed by the word “Provided”) and syntactically (by the repetition of the words “branch” and “arm”)—indicates that Congress intended merely to qualify the authority it had previously conferred on the President in the 1916 Act.

This provision reached its current form in the 1956 codification, discussed above in connection with section 18238. *See* § 2, 70A Stat. at 598. As with the changes made to section 18238, those made to section 104(c) at that time were stylistic, and were not intended to alter the scope or meaning of the provision. *See supra* part II.B.

Thus, given both the language of the current text and the history of that text, the second sentence of section 104(c) is best read simply as a proviso of the first, *i.e.*, as a statement “restricting the operative effect of statutory language to less than what its scope of operation would be otherwise.” Norman J. Singer, *2A Statutes and Statutory Construction* § 47:08 at 235 (6th ed. 2000); *see Georgia R.R. and Banking Co. v. Smith*, 128 U.S. 174, 181 (1888) (the “general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular”). This textual reading is consistent with the general rule that a proviso should be construed narrowly, *see C.I.R. v. Clark*, 489 U.S. 726, 739 (1989), and “to refer only to the things covered by a preceding clause,” *Alaska v. United States*, 125 S. Ct. 2137, 2159 (2005).

It is true that courts do not always apply the general rule that a proviso is limited to the provision it qualifies. *See Singer*, *2A Statutory Construction* § 47:09 at 239; *Alaska*, 125 S. Ct. at 2159. But our analysis here rests only on the particular text at issue—focusing on the obvious connections between the two sentences of section 104(c), which the statutory history makes even more obvious, as well as on the absence of any language indicating that the proviso was intended to reach beyond the scope of the provision that it qualifies. In addition, the existence of a separate gubernatorial consent provision in section 18238 further suggests that section 104(c)’s proviso was not intended to be comprehensive. Our interpretation thus does not depend on invoking a presumption to clarify a text more naturally read in a different way, but instead relies on what Congress intended when it enacted section 104(c), as evidenced by the words that it used

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

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

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

The potential conflicts between a gubernatorial consent requirement and the Base Closure Act take several forms. First, where it applies and while it is in force, the Act is expressly designated as the “*exclusive* authority” for the closure or realignment of federal military installations in the United States. Act § 2909(a) (emphasis added). This exclusivity would be eviscerated if an entity not given any authority by the Act were nevertheless allowed to *deselect* particular installations from the list of proposed closures and realignments. The Act, in contrast to the roles carefully selected for the Secretary, Commission, President, and Congress, designates no role whatsoever for state governors in the selection process. It would be a serious incursion on the Act’s comprehensive procedural scheme to allow a different set of actors, unmentioned in the Act with regard to selection, and operating at an entirely different level of government, to play such a crucial and potentially disruptive role in determining which installations could be closed or realigned. Indeed, such a conclusion would allow state governors to exercise a power that the Act withholds from *all* of the federal actors on which it confers responsibility: the ability to block the closure or realignment of an *individual* installation for *any reason*. In addition, Congress knew how to confer a role on governors (and other non-federal entities) when it wanted them to have one: The Act expressly gives to state and local officials (including governors in some cases) the right to be consulted regarding and even veto certain federal actions, but these are actions implementing the list, *after* it has been approved. See Act § 2905(b)(2)(D) & (E), (3)(B) & (D), (5)(B) & (C)(i). In this context, the Act’s contrasting silence about the role of state governors in the process of selecting bases for closure and realignment must be considered conclusive. See, e.g., *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694, 700 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

Similarly, applying section 104(c) to the Act would unravel the exclusivity of the selection criteria that Congress has woven into the rules for both the Secretary and the Commission. Under section 2913(f), the “final selection criteria specified in [section 2913] shall be the *only criteria* to be used, along with the [Secretary’s] force-structure plan and infrastructure inventory” in determining the Secretary’s recommendations. (Emphasis added.) Furthermore, the Secretary in applying these criteria must “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.” Act § 2903(c)(3)(A) (emphases added). Although this provision is not free from ambiguity (the concluding “without regard” clause might be read as limiting the sense of “equally” rather than merely emphasizing one aspect of equal consideration), there is nevertheless tension between this mandate and the application of a unique immunity for National Guard installations. The Commission faces analogous restrictions, as it may depart from the Secretary’s recommendations only if, among other things, it determines that he “deviated substantially from the force-structure plan and final criteria.” *Id.* § 2903(d)(2)(B); see also *id.* § 2914(d) (imposing other constraints). Thus, the base closure framework is unambiguously designed not to allow either the Secretary or the

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

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

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

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

President might disregard a gubernatorial objection (notwithstanding section 104(c)) and approve the entire list. This action, however, would set up yet another conflict: Section 2904(a) of the Act requires the Secretary, in implementing the final list, to “close *all* military installations recommended for closure” and “realign *all* military installations recommended for realignment” (emphases added). In that scenario, the Secretary could not comply with section 104(c) without violating section 2904(a).

Although these specific conflicts are extremely significant, we also cannot overlook that reading section 104(c) to apply to actions under the Base Closure Act would thwart the broader goal of the Act: to replace an essentially ad hoc and politically unworkable process, *see Dalton*, 511 U.S. at 479, 481-82 (opinion of Souter, J.), with a comprehensive, unified, and rational one, “a fair process that will result in the timely closure and realignment of military installations inside the United States,” Act § 2901(b). With respect to National Guard installations at least, applying section 104(c) would revive the ills of the pre-Act process. Justice Souter’s observations in *Dalton* (on behalf of four Justices) about the incompatibility of the Base Closure Act with judicial review would thus apply with equal force to a gubernatorial veto:

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.

511 U.S. at 481-82 (emphasis added).

For these reasons, a gubernatorial consent requirement would do serious damage to—and thus be incompatible with—the carefully calibrated scheme set up by the Base Closure Act. Under applicable rules of statutory construction, this incompatibility confirms our interpretation that section 104(c)’s proviso qualifies only the power that section 104(c) itself grants.⁹ Here,

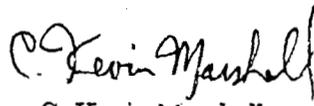
⁹ This interpretation does not render the proviso a nullity. The provision applies whenever the President acts pursuant to the authority granted him by the first sentence of section 104(c). Although the President’s decision to rearrange National Guard units under that authority (which he can do at any time) is not constrained by the Base Closure Act’s elaborate requirements, he is required in such circumstance to secure gubernatorial permission before altering the branch, organization, or allotment of a unit. Nor does our interpretation produce a result at odds with the proviso’s apparent purpose. When Congress in 1933 was in the process of adding to the predecessor of section 104(c) the requirement of gubernatorial consent, the House Committee on Military Affairs stated the reasons for the addition as follows: “[W]here a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service,” the State “should not arbitrarily be compelled to accept a change.” H.R. Rep. No. 73-141, at 6 (1933). The stated goal was to protect States against *arbitrary* changes. Although one might find the closures and realignment wrought by the elaborate process of the Base Closure Act imperfect, one could hardly

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

* * *

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

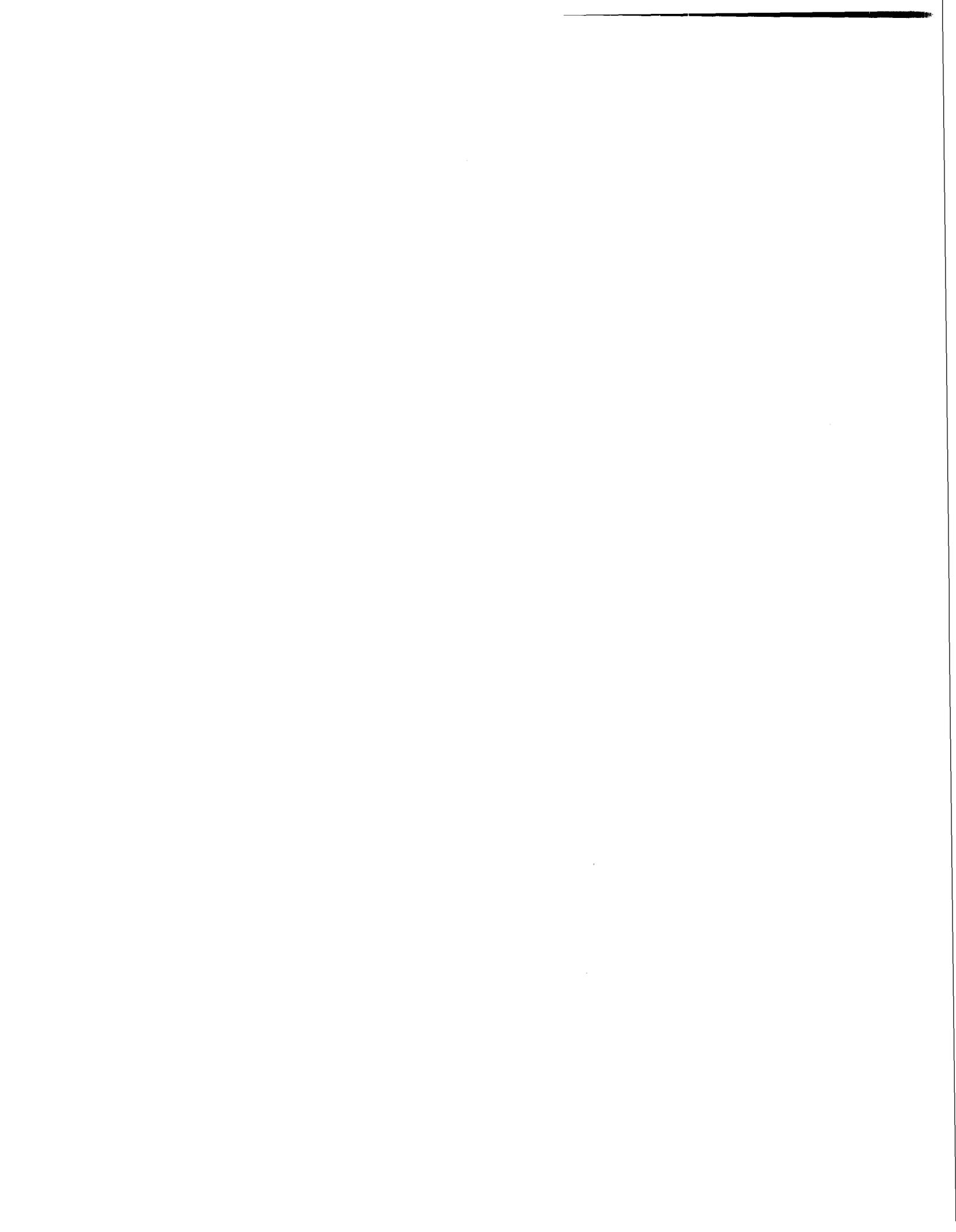
Please let us know if we can provide further assistance.



C. Kevin Marshall
Deputy Assistant Attorney General

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

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



**Office of General Counsel
Defense Base Closure and Realignment Commission**

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

**Dan Cowhig
Deputy General Counsel**

August 5, 2005

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

As the Commission stood up operations in April 2005, it was apparent that significant legal issues related to the Air National Guard loomed in the base closure and realignment recommendations that were to be released on May 16, 2005.¹ The Governor and Attorney General of the State of Illinois, who at that time were the most vocal of the critics of the anticipated Air National Guard recommendations, made several statements regarding their belief that the pending recommendations would violate both statutory and constitutional law.²

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

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

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

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

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number of informal and formal requests, the Office of General Counsel of the Department of Defense (DoD OGC) refused to make their analysis of the matters available to the Commission.⁴ The Commission Office of General Counsel (Commission OGC) prepared a discussion of legal and policy considerations related to certain base closure and realignment recommendations on July 14, 2005.⁵ On July 18, 2005, the Commission asked Wiley, Rein & Fielding (WRF) to examine the legal issues presented by the Air National Guard recommendations as they relate to the authority delegated by Congress and the President to the Commission, supplying WRF with the July 14 Commission OGC memorandum as a point of departure.

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

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

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

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

Summary of the Wiley, Rein & Fielding Memorandum

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

The First Syllogism:

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

Minor Premise: “The term ‘military installations’ applies to installations on which National Guard units are located.”⁸

Conclusion: “Accordingly, installations on which National Guard units are located may be closed or realigned.”⁹

In plain terms, this first syllogism asserts:

The Base Closure Act authorizes the closure or realignment of military installations;

Some military installations house units of the Air National Guard;

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

This syllogism provides a false conclusion.

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

⁷ Memorandum at 2.

⁸ Memorandum at 9.

⁹ Memorandum at 10.

The authority delegated to the Commission¹⁰ under the Base Closure Act is limited by the definition of a “military installation.” Under the Base Closure Act, “the term ‘military installation’ means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity *under the jurisdiction of the Department of Defense*, including any leased facility.”¹¹ If the Department of Defense has jurisdiction over an installation, the Commission may act to close or realign that installation. Conversely, if the Department of Defense does not have jurisdiction over an installation, the Commission may not act to close or realign that installation. In some instances, Air National Guard units are housed on military installations under the jurisdiction of the Department of Defense, such as an Air Force Base. In many instances, however, Air National Guard units are housed at locations over which the Department of Defense has no jurisdiction, such as a state-owned municipal airport.

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

The Second Syllogism:

Major Premise: “When a military installation is realigned ... units’ and headquarters’ ... missions and tasks ... will cease, be reorganized or be relocated.”¹³

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

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

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

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

¹³ Memorandum at 10-11

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

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

In plain terms, this second syllogism asserts:

Base Closure Act recommendations make mention of disbanding, relocating, reorganizing or changing the equipment of military units;

Base Closure Act recommendations are made under the authority of the Base Closure Act;

Therefore, the Base Closure Act authorizes disbandment, relocation, reorganization, or change to the equipment of military units.

This conclusion of this second syllogism is false.

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

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

¹⁵ Memorandum at 12.

¹⁶ For example, Base Closure Act § 2909(a) (Restrictions on other base closure authority) (Limiting application of 10 USC § 2687), § 2905 (Implementation) (Restricting the application of certain provisions of the National Environmental Policy Act of 1969).

¹⁷ The Base Closure Act does not contain any language indicating that its provisions are to be given effect "notwithstanding any other provision of law." To the contrary, the presence of specified exemptions to identified statutes is a clear indication the Base Closure Act is not intended to override statutes that are not explicitly identified.

The Third Syllogism:

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

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

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

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

The Base Closure Act authorizes the closure or realignment of military installations that house units of the Air National Guard;

The Base Closure Act authorizes disbandment, relocation, reorganization, or change to the equipment of military units;

Therefore, the Base Closure Act authorizes the disbandment, relocation, reorganization, or change to the equipment of units of the Air National Guard.

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

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

¹⁸ Memorandum at 10.

¹⁹ Memorandum at 12.

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

²¹ Memorandum at 8.

Sundry Points

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

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

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

²² Memorandum at 12.

²³ July 14 Commission OGC Memorandum at 15-17. Unfortunately, this leaves the Commission without a possible insight into the DoD OGC analysis on this point.

²⁴ Memorandum at 10.

²⁵ BASE REALIGNMENTS AND CLOSURES: REPORT OF THE DEFENSE SECRETARY’S COMMISSION (Dec 29, 1988) (1988 SECRETARY’S COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: REPORT TO THE PRESIDENT 1991 (July 1, 1991) (1991 COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: 1993 REPORT TO THE PRESIDENT (July 1, 1993) (1993 COMMISSION REPORT); DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION: 1995 REPORT TO THE PRESIDENT (July 1, 1995) (1995 COMMISSION REPORT). The Memorandum also fails to note the practice adopted by the Army in making its recommendations for the 2005 round, where every recommendation that impacts a unit of the Army National Guard is conditioned by the phrase “if the State decides to relocate those National Guard units.”

²⁶ Memorandum at 10, note 61, indicating that the “1995 BRAC Commission Report ... recommend[ed] closure of Ontario International Airport Air Guard Station in California, Roslyn Air Guard Station in New York, and Chicago O’Hare IAP Air Reserve Station in Illinois with relocation of the 126th Air Refueling Wing (ANG) to Scott AFR in Illinois and relocations of other ANG units to locations acceptable to the Secretary of the Air Force.”

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

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

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

²⁷ 1995 COMMISSION REPORT.

²⁸ See 1988 SECRETARY'S COMMISSION REPORT, 1991 COMMISSION REPORT, 1993 COMMISSION REPORT, and 1995 COMMISSION REPORT.

²⁹ 1995 COMMISSION REPORT at Ch. 1, p. 94-95

³⁰ 1995 COMMISSION REPORT at Ch. 1, p. 95.

³¹ Memorandum at 4.

³² While a statute was subsequently enacted to support the activities of the 1988 Secretary's Commission, that commission remained under the authority of the Secretary of Defense. Subsequent base closure commissions were placed outside the authority of the Secretary of Defense by the enactment of the Defense Base Closure and Realignment Act of 1990.

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

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

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

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

³³ 511 U.S. 462 (1994).

³⁴ Memorandum at 23 (quoting Dalton at 473).

³⁵ 511 U.S. at 473-74, citing Franklin v. Massachusetts, 505 U.S. 788 (1992).

³⁶ 511 U.S. at 474 (Emphasis added).

³⁷ 511 U.S. at 476 (Emphasis added).

³⁸ 511 U.S. at 476-77 (Emphasis added).

³⁹ 511 U.S. at 477-78. Justice Blackmun provided several examples of questions that he considered reviewable under the Dalton decision:

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

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

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

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

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

⁴⁰ 511 U.S. at 466.

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

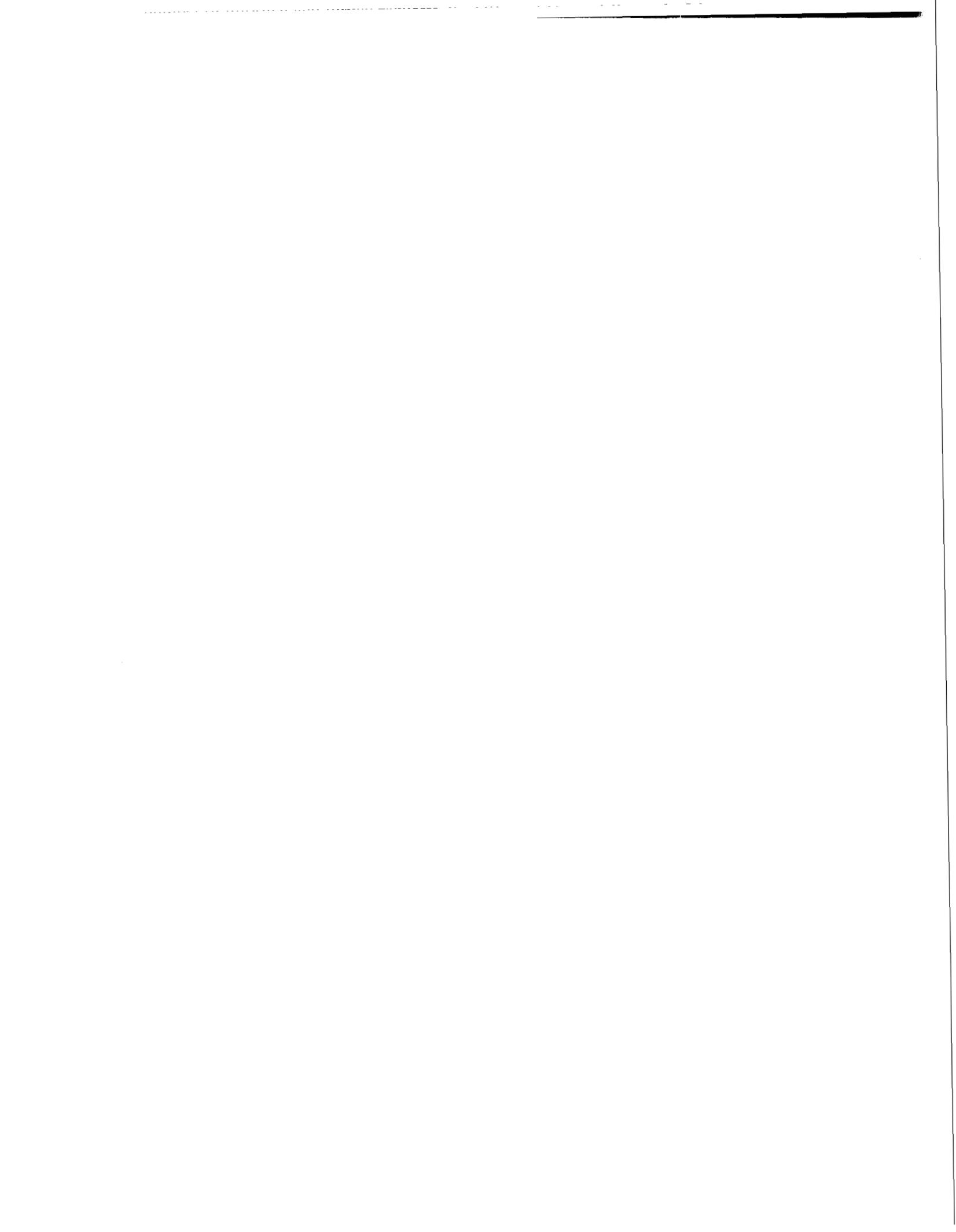
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not be reconciled with the Commission's role as an independent body charged with the responsibility of reviewing the recommendations of the Department of Defense for compliance with the requirements of the Base Closure Act.

Author: Dan Cowhig, Deputy General Counsel

Approved: David Hague, General Counsel

DJ 5/10/05
DH 8 Aug 2005





Wiley Rein & Fielding LLP

MEMORANDUM

ATTORNEY CLIENT PRIVILEGED - CONFIDENTIAL

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

FROM: Fred F. Fielding

DATE: August 3, 2005

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

I. Introduction.

The Defense Base Closure and Realignment Act ("BRAC statute") of 1990, as amended, governs the 2005 round of base realignment and closure decisions.¹ Pursuant to the BRAC statute, the Secretary of Defense ("Secretary") presented a force-structure plan and infrastructure inventory to Congress and the Defense Base Closure and Realignment Commission ("BRAC Commission") and published final selection criteria for use in making base closure and realignment recommendations.² Subsequently, the Secretary transmitted to Congress and the BRAC Commission a list of military installations that the Secretary recommends for closure or realignment based on the force-structure plan and the final selection criteria.³ The final selection criteria are "the only criteria to be used, along with the force-structure plan and infrastructure inventory" in making base closure and realignment recommendations in 2005.⁴

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

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

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

³ *Id.* § 2687 note (§ 2914(a)).

⁴ *Id.* § 2687 note (§ 2913(f)).

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

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

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

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

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

¹³ 10 U.S.C. § 2687.

¹⁴ MilCon Act § 612(a), (b).

¹⁵ *Id.*

¹⁶ *Id.* § 612(c).

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

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

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

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

Because the 1988 statute provided streamlined base closure and realignment authority on a “one-time basis,” the legal and political impediments to base closure returned upon its expiration at the end of 1988.²⁷ In early 1990, Secretary Cheney nonetheless issued a list of recommended closures and realignments, but the list met with Congressional opposition.²⁸

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

(Continued . . .)

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

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

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

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

²⁷ H. REP. NO. 100-735, pt. I.

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

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

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

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

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

⁴⁰ *Id.* §§ 2905, 2909.

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

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

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

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

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

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

⁵² 10 U.S.C. § 2687 note (§ 2910(4)).

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

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

⁵⁵ 10 U.S.C. § 2687 note (§ 2910(5)).

⁵⁶ GAO 2002 Report, at 5 n.6.

⁵⁷ Department of Defense Dictionary of Military and Associated Terms (“DOD Dictionary”), available at <http://www.dtic.mil/doctrine/jel/doddict/>.

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

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

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

The BRAC statutory scheme itself supports this view, as it provides that the Secretary may “take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design *as may be required to transfer functions from a military installation being closed or realigned to another military installation.*”⁶⁵ Consequently, with respect to both the realignment and closure of bases, the statute contemplates that functions – “assigned duties, responsibilities, missions, or tasks of an individual, office, or organization” – may be relocated from one military installation to another.⁶⁶ Hence, the BRAC statute authorizes the Secretary to recommend and take any action necessary to terminate operations or reduce and relocate National Guard equipment, headquarters, units, and/or missions at any “base, camp, post, station yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”⁶⁷ Because the BRAC statute applies in the first instance to military installations on which National Guard units are located, it necessarily also applies to National Guard units, missions, and equipment associated with those installations

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

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

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

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

⁶⁷ 10 U.S.C. § 2687 note (§ 2910(4)).

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

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

A. 10 U.S.C. § 18238.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. 10 U.S.C. § 2687.

Section 2909(a) of the BRAC statute, entitled “Restriction on Other Base Closure Authority,” flatly states that “during the period beginning on November 5, 1990, and ending on April 15, 2006, *this part shall be the exclusive authority* for selecting for closure or realignment, or for carrying out *any* closure or realignment of, a military installation inside the United States.”⁹¹ Section 2905(a)(1)(A) provides broad authority to the Secretary: “In closing or

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

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

⁸⁶ 32 U.S.C. § 104(c).

⁸⁷ See part III, *supra*.

⁸⁸ 32 U.S.C. § 104(c).

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

⁹⁰ See part III, *supra*.

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

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

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

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

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

¹⁰⁰ See part III, *supra*.

¹⁰¹ See Part III.B, *supra*.

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

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

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

Congress originally passed § 104(c) in 1916. Its last action on the statute was a technical amendment in 1988.¹¹⁰ Meanwhile, Congress enacted the BRAC statute in 1990 and authorized the current BRAC round in 2001 and 2004. These latest authorizations included significant amendments to the BRAC statute, including § 2914 ("Special Procedures for Making Recommendations for Realignments and Closures for 2005 Round"), which requires the Secretary to "consider any notice received from a local government . . . [that] would approve of the closure or realignment of the installation," but permits the Secretary to make the recommendations "[n]otwithstanding" this input "based on the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable to such recommendations."¹¹¹ These more recent, specific provisions in the BRAC statute trump those of earlier, more general statutes.¹¹²

Congress is presumed to have knowledge of prior statutes¹¹³ and precedents¹¹⁴ when it enacts legislation, and with this understanding in mind, it made the BRAC statute "the exclusive authority" for closing and realigning military facilities and functions. Earlier statutes that address the same topic have no force.

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

¹¹⁰ This analysis pertains equally to § 18238.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁶ *Id.* at 284 n.3.

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

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

VI. Conclusion.

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

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

¹³⁶ *Id.* at 474.

¹³⁷ *Id.* at 473.

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

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

¹⁴⁰ *Id.* at 332.

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





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August 3, 2005

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BY HAND DELIVERY

The Honorable Anthony J. Principi
Chairman, Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Alexandria, VA 22202

Dear Mr. Chairman:

Pursuant to your conversation with Mr. Fielding yesterday, enclosed is the Memorandum prepared at the Commission's request for your review and consideration.

When you send this Memorandum to OLC, your cover letter should include language stating that: "The enclosed Memorandum was prepared at the request of the Defense Base Closure and Realignment Commission and represents the Commission's legal opinion on the matters contained herein."

Please contact Mr. Fielding or me if you have any questions or concerns whatsoever.

Best regards,

Margaret A. Ryan

MR/lf

cc: Fred Fielding



Wiley Rein & Fielding LLP

MEMORANDUM

ATTORNEY CLIENT PRIVILEGED - CONFIDENTIAL

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

FROM: Fred F. Fielding

DATE: August 3, 2005

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

I. Introduction.

The Defense Base Closure and Realignment Act ("BRAC statute") of 1990, as amended, governs the 2005 round of base realignment and closure decisions.¹ Pursuant to the BRAC statute, the Secretary of Defense ("Secretary") presented a force-structure plan and infrastructure inventory to Congress and the Defense Base Closure and Realignment Commission ("BRAC Commission") and published final selection criteria for use in making base closure and realignment recommendations.² Subsequently, the Secretary transmitted to Congress and the BRAC Commission a list of military installations that the Secretary recommends for closure or realignment based on the force-structure plan and the final selection criteria.³ The final selection criteria are "the only criteria to be used, along with the force-structure plan and infrastructure inventory" in making base closure and realignment recommendations in 2005.⁴

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

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

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

³ *Id.* § 2687 note (§ 2914(a)).

⁴ *Id.* § 2687 note (§ 2913(f)).

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

II. Presentation of Issues.

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

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

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

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

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

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

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

⁶ 10 U.S.C. § 2687 note (§ 2909(a)).

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

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

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

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

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

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

¹³ 10 U.S.C. § 2687.

¹⁴ MilCon Act § 612(a), (b).

¹⁵ *Id.*

¹⁶ *Id.* § 612(c).

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

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

Accordingly, the Secretary established a 12-member commission charged with determining the best process for identifying bases for closure or realignment, reviewing the military base structure, and reporting its recommendations to the Secretary by December 1988.²¹ For its part, Congress enacted a BRAC statute (“1988 statute”) that attempted to address the key impediments to DOD’s ability to close or realign unneeded military installations.²² At the outset, the 1988 statute was structured to address the “very political problem” of asking members of Congress to put aside parochial concerns and evaluate base closure recommendations objectively.²³ By codifying the Secretary’s Commission and its mission, the 1988 statute

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

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

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

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

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

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

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

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

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

Because the 1988 statute provided streamlined base closure and realignment authority on a “one-time basis,” the legal and political impediments to base closure returned upon its expiration at the end of 1988.²⁷ In early 1990, Secretary Cheney nonetheless issued a list of recommended closures and realignments, but the list met with Congressional opposition.²⁸

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

(Continued . . .)

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

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

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

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

²⁷ H. REP. NO. 100-735, pt. I.

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

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

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

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

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

³¹ Pub. L. No. 101-510, § 2902.

³² *Id.* § 2903.

³³ *Id.* § 2903(a)-(c).

³⁴ *Id.* § 2903(d).

³⁵ *Id.*

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

³⁷ *Id.* §§ 2904, 2908.

³⁸ *Id.* §§ 2905, 2909.

³⁹ *Id.* § 2905(a)-(b).

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

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

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

⁴⁰ *Id.* §§ 2905, 2909.

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

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

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

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

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

In 2004, when preparations for the 2005 round were well underway, Congress debated proposals to delay the 2005 round for two years, until 2007.⁴⁹ Ultimately, however, Congress “put the good of the Department of Defense over parochial interests and protected the upcoming BRAC round” by rejecting the proposals.⁵⁰ Instead, Congress approved legislation (“2004 amendments”) making certain modifications to the BRAC statute.⁵¹

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

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

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

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

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

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

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

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

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

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

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

⁵² 10 U.S.C. § 2687 note (§ 2910(4)).

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

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

⁵⁵ 10 U.S.C. § 2687 note (§ 2910(5)).

⁵⁶ GAO 2002 Report, at 5 n.6.

⁵⁷ Department of Defense Dictionary of Military and Associated Terms (“DOD Dictionary”), available at <http://www.dtic.mil/doctrine/jel/doddict/>.

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

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

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

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

(Continued . . .)

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

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

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

⁶² Section 2912 Report, at 25-35.

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

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

The BRAC statutory scheme itself supports this view, as it provides that the Secretary may “take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design *as may be required to transfer functions from a military installation being closed or realigned to another military installation.*”⁶⁵ Consequently, with respect to both the realignment and closure of bases, the statute contemplates that functions – “assigned duties, responsibilities, missions, or tasks of an individual, office, or organization” – may be relocated from one military installation to another.⁶⁶ Hence, the BRAC statute authorizes the Secretary to recommend and take any action necessary to terminate operations or reduce and relocate National Guard equipment, headquarters, units, and/or missions at any “base, camp, post, station yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”⁶⁷ Because the BRAC statute applies in the first instance to military installations on which National Guard units are located, it necessarily also applies to National Guard units, missions, and equipment associated with those installations

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

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

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

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

⁶⁷ 10 U.S.C. § 2687 note (§ 2910(4)).

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

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

function, component, weapon, or weapons system at another location; (ii) is uniquely military in character, and is likely to have no civilian use[;] (iii) is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary and the redevelopment authority); (iv) is stored at the installation for purposes of distribution (including spare parts or stock items); or (v) meets known requirements of another Federal department.”⁷⁰ Accordingly, there is no statutory basis for limiting the Secretary’s authority solely to transfers of real estate: equipment may be relocated without apparent limitation, and the relocation of headquarters, units, or missions between one military installation and another in conjunction with a closure or realignment is permitted. However, the BRAC statute itself appears to provide no authority for the retirement of equipment, as opposed to transfer or relocation of equipment, whether such retirement is otherwise permissible. Again, common sense supports the statutory language: given the coordinated, comprehensive, and non-partisan review of military installations that the BRAC process represents, it seems highly dubious that the closure and realignment of military installations was intended to take place without concomitant changes to, and relocation of, equipment, headquarters, units, and/or missions.⁷¹

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

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

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

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

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

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

A. 10 U.S.C. § 18238.

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

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

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

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

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

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

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

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

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

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

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

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

B. 32 U.S.C. § 104(c).

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

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

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

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

(Continued . . .)

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

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

⁸⁰ 32 U.S.C. 104(c) (emphasis added).

⁸¹ H.R. REP. NO. 73-141 (1933).

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

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

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

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

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

C. 10 U.S.C. § 2687.

Section 2909(a) of the BRAC statute, entitled “Restriction on Other Base Closure Authority,” Italy states that during the period beginning on November 5, 1990, and ending on April 15, 2006, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of a military installation inside the United States. Section 2905(a)(1)(A) provides broad authority to the Secretary: “In closing or |

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

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

⁸⁶ 32 U.S.C. § 104(c).

⁸⁷ See part III, *supra*.

⁸⁸ 32 U.S.C. § 104(c).

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

⁹⁰ See part III, *supra*.

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

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

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

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

⁹² *Id.* (§ 2905(d)).

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

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

⁹⁵ *Id.* (§ 2905(d)).

⁹⁶ *See* 10 U.S.C. § 2687(c).

⁹⁷ *Id.* § 2687 note (§ 2905(d)(2)).

⁹⁸ *Id.* § 2687(a).

⁹⁹ *Id.* § 2687 note (§ 2909).

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

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

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

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

¹⁰⁰ See part III, *supra*.

¹⁰¹ See Part III.B, *supra*.

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

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

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

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

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

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

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

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

¹⁰⁴ H. REP. NO. 100-735, pt. I.

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

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

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

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

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

Congress originally passed § 104(c) in 1916. Its last action on the statute was a technical amendment in 1988.¹¹⁰ Meanwhile, Congress enacted the BRAC statute in 1990 and authorized the current BRAC round in 2001 and 2004. These latest authorizations included significant amendments to the BRAC statute, including § 2914 (“Special Procedures for Making Recommendations for Realignment and Closures for 2005 Round”), which requires the Secretary to “consider any notice received from a local government . . . [that] would approve of the closure or realignment of the installation,” but permits the Secretary to make the recommendations “[n]otwithstanding” this input “based on the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable to such recommendations.”¹¹¹ These more recent, specific provisions in the BRAC statute trump those of earlier, more general statutes.¹¹²

Congress is presumed to have knowledge of prior statutes¹¹³ and precedents¹¹⁴ when it enacts legislation, and with this understanding in mind, it made the BRAC statute “the exclusive authority” for closing and realigning military facilities and functions. Earlier statutes that address the same topic have no force.

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

¹¹⁰ This analysis pertains equally to § 18238.

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

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

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

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

V. Challenges to the 2005 BRAC Closures and Realignments.

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

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

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

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

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

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

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

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

¹¹⁶ *Id.* (§ 2903(d)(2)(E)).

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

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

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

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

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

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

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

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

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

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

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

¹²⁶ *Id.* at 284 n.3.

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

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

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

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

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

¹²⁷ *Sandoval*, 532 U.S. at 289.

¹²⁸ *Gonzaga Univ.*, 536 U.S. at 283.

¹²⁹ 511 U.S. 462 (1994).

¹³⁰ 5 U.S.C. 701 *et seq.*

¹³¹ *Dalton*, 511 U.S. at 469.

¹³² *Id.* at 469-70.

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

¹³⁴ *Id.* at 474.

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

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

VI. Conclusion.

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

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

¹³⁶ *Id.* at 474.

¹³⁷ *Id.* at 473.

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

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

¹⁴⁰ *Id.* at 332.

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

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

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Issue and Holding of Dalton v. Specter

**Dan Cowhig
Deputy General Counsel**

July 18, 2005

This memorandum describes the decision of the Supreme Court in Dalton v. Specter¹, a critical case involving a challenge to the actions of a prior Defense Base Closure and Realignment Commission (Commission). The issue and holding in Dalton has been mischaracterized in several summaries made available to the Commission.² This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

In the words of the Court, “the claim raised” in Dalton was “a statutory one: The President is said to have violated the terms of the 1990 Act by accepting *procedurally flawed* recommendations.”³ In other words, in Dalton, the plaintiff claimed that the Commission’s actions were procedurally flawed, not that the Commission had exceeded its authority.

Deciding this issue, the Supreme Court held that “*how* the President chooses to exercise *the discretion Congress has granted him* is not a matter for our review.”⁴ Summing its decision, the Court rephrased this holding slightly, as a finding that “where a statute, such as the 1990 Act, commits decision-making to the discretion of the President, judicial review of the President’s decision is not available.”⁵

¹ 511 U.S. 462 (1994).

² For example, there is a significant error in the Congressional Research Service Report for Congress: The Availability of Judicial Review Regarding Military Base Closures and Realignments (Availability of Judicial Review). In that report, the author asserts that

A claim that the President *exceeded his statutory authority* under the Base Closure Act has been held to be judicially unreviewable, because the Base Closure Act gives the President broad discretion in approving or disapproving BRAC recommendations.

This is an incorrect description of the issue and holding of the case. As described in this paper, the Dalton decision did not examine the question of whether the President “exceeded his statutory authority,” but rather whether his decision was based on “procedurally flawed” actions by the Commission. Availability of Judicial Review, CRS Order Code RL32963, Summary page (June 24, 2005).

³ 511 U.S. at 474 (Emphasis added).

⁴ 511 U.S. at 476 (Emphasis added).

⁵ 511 U.S. at 476-77 (Emphasis added).

Office of General Counsel
Defense Base Closure and Realignment Commission
Issue and Holding of Dalton v. Specter

This distinction is critical to the Commission's action on elements of recommendations that fall outside the scope of the Base Closure Statute, as discussed in the July 12, 2005 Office of General Counsel memorandum, because such a holding presupposes that the action was within the scope of the statutory delegation of authority. Justice Blackmun's concurring opinion underscored this distinction, pointing out that Dalton "does not foreclose judicial review of a claim" that the President acted "in contravention of his statutory authority."⁶

Author: Dan Cowhig, Deputy General Counsel

Approved: David Hague, General Counsel

[Handwritten signatures and dates]
18 July 05
18 Jul 05

2 Enclosures

1. Dalton v. Specter, 511 U.S. 462 (1994).
2. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005).

⁶ 511 U.S. at 477-78. Justice Blackmun provided several examples of questions that he considered reviewable under the Dalton decision:

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

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

LEXSEE 511 U.S. 462

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

No. 93-289

SUPREME COURT OF THE UNITED STATES

511 U.S. 462; 114 S. Ct. 1719; 128 L. Ed. 2d 497; 1994 U.S. LEXIS 3778; 62
U.S.L.W. 4340; 94 Cal. Daily Op. Service 3643; 94 Daily Journal DAR 6846; 8 Fla. L.
Weekly Fed. S 157

March 2, 1994, Argued
May 23, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT.

DISPOSITION: 995 F.2d 404, reversed.

LexisNexis(R) Headnotes

SYLLABUS: Respondents filed this action under the Administrative Procedure Act (APA) and the Defense Base Closure and Realignment Act of 1990 (1990 Act), seeking to enjoin the Secretary of Defense (Secretary) from carrying out the President's decision, pursuant to the 1990 Act, to close the Philadelphia Naval Shipyard. The District Court dismissed the complaint on the alternative grounds that the 1990 Act itself precluded judicial review and that the political question doctrine foreclosed judicial intervention. In affirming in part and reversing in part, the Court of Appeals held that judicial review of the closure decision was available to ensure that the Secretary and the Defense Base Closure and Realignment Commission (Commission), as participants in the selection process, had complied with the procedural mandates specified by Congress. The court also ruled that this Court's recent decision in *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767, did not affect the reviewability of respondents' procedural claims because adjudging the President's actions for compliance with the 1990 Act was a form of constitutional review sanctioned by *Franklin*.

Held: Judicial review is not available for respondents' claims. Pp. 468-477.

(a) A straightforward application of *Franklin* demonstrates that respondents' claims are not reviewable under the APA. The actions of the Secretary and the Commission are not reviewable "final agency actions" within the meaning of the APA, since their reports recommending base closings carry no direct consequences. See 505 U.S. at 798. Rather, the action that "will directly affect" bases, *id.*, at 797, is taken by the President when he submits his certificate of approval of the recommendations to Congress. That the President cannot pick and choose among bases, and must accept or reject the Commission's closure package in its entirety, is immaterial; it is nonetheless the President, not the Commission, who takes the final action that affects the military installations. See *id.*, at 799. The President's own actions, in turn, are not reviewable under the APA because he is not an "agency" under that Act. See *id.*, at 801. Pp. 468-471.

(b) The Court of Appeals erred in ruling that the President's base closure decisions are reviewable for constitutionality. Every action by the President, or by another elected official, in excess of his statutory authority is not *ipso facto* in violation of the Constitution, as the Court of Appeals seemed to believe. On the contrary, this Court's decisions have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, e. g., *Larson v. Domestic and*

511 U.S. 462, *; 114 S. Ct. 1719, **;
128 L. Ed. 2d 497, ***; 1994 U.S. LEXIS 3778

Foreign Commerce Corp., 337 U.S. 682, 691, n. 11, 93 L. Ed. 1628, 69 S. Ct. 1457; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 587, 96 L. Ed. 1153, 72 S. Ct. 863, distinguished. Such decisions demonstrate that the claim at issue here -- that the President violated the 1990 Act's terms by accepting flawed recommendations -- is not a "constitutional" claim subject to judicial review under the exception recognized in *Franklin*, but is simply a statutory claim. The 1990 Act does not limit the President's discretion in approving or disapproving the Commission's recommendations, require him to determine whether the Secretary or Commission committed procedural violations in making recommendations, prohibit him from approving recommendations that are procedurally flawed, or, indeed, prevent him from approving or disapproving recommendations for whatever reason he sees fit. Where, as here, a statute commits decisionmaking to the President's discretion, judicial review of his decision is not available. See, e. g., *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113-114. Pp. 471-476, 92 L. Ed. 568, 68 S. Ct. 431.

(c) Contrary to respondents' contention, failure to allow judicial review here does not result in the virtual repudiation of *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60, and nearly two centuries of constitutional adjudication. The judicial power conferred by Article III is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute. Pp. 476-477.

COUNSEL: Solicitor General Days argued the cause for petitioners. With him on the briefs were Assistant Attorney General Hunger, Deputy Solicitor General Kneeder, John F. Manning, and Douglas N. Letter.

Senator Arlen Specter, pro se, argued the cause for respondents. With him on the brief were Bruce W. Kauffman, Mark J. Levin, Camille Spinello Andrews, and Thomas E. Groshens. *

* Robert J. Cynkar, John B. Rhinelander, Alexander W. Joel, Bernard Petrie, and Steven T. Walther filed a brief for Business Executives for National Security as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of New York by G. Oliver Koppell, Attorney General, Jerry Boone, Solicitor General, Peter H. Schiff, Deputy Solicitor General, and Alan S. Kaufman, Edward M. Scher, and Howard L. Zwickel, Assistant

Attorneys General; and for Public Citizen by Patti A. Goldman, Alan B. Morrison, and Paul R. Q. Wolfson.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, Part II of which was unanimous, and in the remainder of which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, post, p. 477. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, post, p. 478.

OPINIONBY: REHNQUIST

OPINION:

[*464] [***504] [**1722] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A] Respondents sought to enjoin the Secretary of Defense (Secretary) from carrying out a decision by the President to close the Philadelphia Naval Shipyard. n1 This decision was made pursuant to the Defense Base Closure and Realignment Act of 1990 (1990 Act or Act), 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (1988 ed., Supp. IV). The Court of Appeals held that judicial review of the decision was available to ensure that various participants in the selection process had complied with procedural mandates specified by Congress. We hold that such review is not available.

n1 Respondents are shipyard employees and their unions; Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the city of Philadelphia. Petitioners are the Secretary of Defense; the Secretary of the Navy; and the Defense Base Closure and Realignment Commission and its members.

The decision to close the shipyard was the end result of an elaborate selection process prescribed by the 1990 Act. Designed "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States," § 2901(b), n2 the Act provides for three [*465] successive rounds of base closings -- in 1991, 1993, and 1995, § 2903(c)(1). For each round, the Secretary must prepare closure and realignment recommendations, based on selection

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criteria he establishes after notice and an opportunity for public comment. § § 2903(b) and (c).

n2 For ease of reference, all citations to the 1990 Act are to the relevant sections of the Act as it appears in note following 10 U.S.C. § 2687 (1988 ed., Supp. IV).

The Secretary submits his recommendations to Congress and to the Defense Base Closure and Realignment Commission (Commission), an independent body whose eight members are appointed by the President, with the advice and consent of the Senate. § § 2903(c)(1); 2902(a) and (c)(1)(A). The Commission must then hold public hearings and prepare a report, containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures and realignments. § § 2903(d)(1) and (2). Within roughly three months of receiving the Secretary's recommendations, the Commission has to submit its report to the President. § 2903(d)(2)(A).

Within two weeks of receiving the Commission's report, the President must decide whether to approve or disapprove, in their entirety, the Commission's recommendations. § § 2903(e)(1)-(3). If the President disapproves, [***505] the Commission has roughly one month to prepare a new report and submit it to the President. § 2903(e)(3). If the President again disapproves, no bases may be closed that year under the Act. § 2903(e)(5). If the President approves the initial or revised recommendations, the President must submit the recommendations, along with his certification of approval, to Congress. § § 2903(e)(2) and (e)(4). Congress may, within 45 days of receiving the President's certification (or by the date Congress adjourns for the session, whichever is earlier), enact a joint resolution of disapproval. § § 2904(b); 2908. If such a resolution is passed, the Secretary may not carry out any closures pursuant to the Act; if such a resolution is not passed, the Secretary must close all military installations recommended for closure by the Commission. § § 2904(a) and (b)(1).

[*466] In April 1991, the Secretary recommended the closure or realignment of a number of military installations, including the [**1723] Philadelphia Naval Shipyard. After holding public hearings in Washington, D. C., and Philadelphia, the Commission recommended closure or realignment of 82 bases. The Commission did not concur in all of the Secretary's recommendations, but it agreed that the Philadelphia Naval Shipyard should be closed. In July 1991, President Bush approved the Commission's recommendations, and the House of

Representatives rejected a proposed joint resolution of disapproval by a vote of 364 to 60.

Two days before the President submitted his certification of approval to Congress, respondents filed this action under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and the 1990 Act. Their complaint contained three counts, two of which remain at issue. n3 Count I alleged that the Secretaries of Navy and Defense violated substantive and procedural requirements of the 1990 Act in recommending closure of the Philadelphia Naval Shipyard. Count II made similar allegations regarding the Commission's recommendations to the President, asserting specifically that, *inter alia*, the Commission used improper criteria, failed to place certain information in the record until after the close of public hearings, and held closed meetings with the Navy.

n3 Respondents' third count alleged that petitioners had violated the due process rights of respondent shipyard employees and respondent unions. In its initial decision, the United States Court of Appeals for the Third Circuit held that the shipyard employees and unions had no protectible property interest in the shipyard's continued operation and thus had failed to state a claim under the Due Process Clause. *Specter v. Garrett*, 971 F.2d 936, 955-956 (1992). Respondents did not seek further review of that ruling, and it is not at issue here.

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint in its entirety, on the alternative grounds that the 1990 Act itself precluded [*467] judicial review and that the political question doctrine foreclosed judicial intervention. *Specter v. Garrett*, 777 F. Supp. 1226 (1991). A divided panel of the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. *Specter v. Garrett*, 971 F.2d 936 (1992) (*Specter I*). The Court of Appeals first acknowledged that the actions challenged by respondents were not typical of the "agency actions" reviewed under the APA, because the 1990 Act contemplates joint decisionmaking among the Secretary, Commission, President, and Congress. *Id.*, at 944-945. The Court of Appeals then reasoned [***506] that because respondents sought to enjoin the implementation of the President's decision, respondents (who had not named the President as a defendant) were asking the Court of Appeals "to review a presidential decision." *Id.*, at 945. The Court of Appeals decided that there could be judicial review of the President's decision because the "actions of the President

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have never been considered immune from judicial review solely because they were taken by the President." *Ibid.* It held that certain procedural claims, such as respondents' claim that the Secretary failed to transmit to the Commission all of the information he used in making his recommendations, and their claim that the Commission did not hold public hearings as required by the Act, were thus reviewable. *Id.*, at 952-953. The dissenting judge took the view that the 1990 Act precluded judicial review of all statutory claims, procedural and substantive. *Id.*, at 956-961.

Shortly after the Court of Appeals issued its opinion, we decided *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992), in which we addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act requires the Secretary of Commerce to submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled pursuant to [*468] a statutory formula. We concluded both that the Secretary's report was not "final agency action" reviewable under the APA, and that the APA does not apply to the President. *Id.*, at 796-801. After we rendered our decision in *Franklin*, petitioners sought our review in this case. Because of [**1724] the similarities between *Franklin* and this case, we granted the petition for certiorari, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of *Franklin*. *O'Keefe v. Specter*, 506 U.S. 969, 121 L. Ed. 2d 364, 113 S. Ct. 455 (1992).

On remand, the same divided panel of the Court of Appeals adhered to its earlier decision, and held that *Franklin* did not affect the reviewability of respondents' procedural claims. *Specter v. Garrett*, 995 F.2d 404 (1993) (*Specter II*). Although apparently recognizing that APA review was unavailable, the Court of Appeals felt that adjudging the President's actions for compliance with the 1990 Act was a "form of constitutional review," and that *Franklin* sanctioned such review. 995 F.2d at 408-409. Petitioners again sought our review, and we granted certiorari. 510 U.S. 930 (1993). We now reverse.

I

[**LEdHR1B] [1B] [**LEdHR2A] [2A] We begin our analysis on common ground with the Court of Appeals. In *Specter II*, that court acknowledged, at least tacitly, that respondents' claims are not reviewable under the APA. 995 F.2d at 406. A straightforward application of *Franklin* to this case demonstrates why this is so. *Franklin* involved a suit against the President, the Secretary of Commerce, and various public officials, challenging the manner in which seats in the House of

Representatives had been apportioned among the States. 505 U.S. at 790. The plaintiffs challenged the method used by the Secretary of Commerce in preparing her census report, particularly [***507] the manner in which she counted federal employees working overseas. The plaintiffs raised claims under both the APA and the Constitution. In reviewing the former, we [*469] first sought to determine whether the Secretary's action, in submitting a census report to the President, was "final" for purposes of APA review. (The APA provides for judicial review only of "final agency action." 5 U.S.C. § 704 (emphasis added).) Because the President reviewed (and could revise) the Secretary's report, made the apportionment calculations, and submitted the final apportionment report to Congress, we held that the Secretary's report was "not final and therefore not subject to review." 505 U.S. at 798.

We next held that the President's actions were not reviewable under the APA, because the President is not an "agency" within the meaning of the APA. *Id.*, at 801 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"). We thus concluded that the reapportionment determination was not reviewable under the standards of the APA. *Ibid.* In reaching our conclusion, we noted that the "President's actions may still be reviewed for constitutionality." *Ibid.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935)).

In this case, respondents brought suit under the APA, alleging that the Secretary and the Commission did not follow the procedural mandates of the 1990 Act. But here, as in *Franklin*, the prerequisite to review under the APA -- "final agency action" -- is lacking. The reports submitted by the Secretary and the Commission, like the report of the Secretary of Commerce in *Franklin*, "carry no direct consequences" for base closings. 505 U.S. at 798. The action that "will directly affect" the military bases, *id.*, at 797, is taken by the President, when he submits his certification of approval to Congress. Accordingly, the Secretary's and Commission's reports serve "more like a tentative recommendation than a final and binding determination." *Id.*, at 798. The reports are, "like the ruling of a subordinate [*470] official, not final and therefore not subject to review." *Ibid.* (internal quotation marks and citation omitted). The actions of the President, in turn, are not reviewable under the APA because, as we concluded in *Franklin*, [**1725] the President is not an "agency." See *id.*, at 800-801.

Respondents contend that the 1990 Act differs significantly from the Census Act at issue in *Franklin*, and that our decision in *Franklin* therefore does not

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control the question whether the Commission's actions here are final. Respondents appear to argue that the President, under the 1990 Act, has little authority regarding the closure of bases. See Brief for Respondents 29 (pointing out that the 1990 Act does not allow "the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety"). Consequently, respondents continue, the Commission's report must be regarded [***508] as final. This argument ignores the *ratio decidendi* of *Franklin*. See 505 U.S. at 800-801.

[***LEdHR2B] [2B] [***LEdHR3] [3]First, respondents underestimate the President's authority under the Act, and the importance of his role in the base closure process. Without the President's approval, no bases are closed under the Act, see § 2903(e)(5); the Act, in turn, does not by its terms circumscribe the President's discretion to approve or disapprove the Commission's report. Cf. *id.*, at 799. Second, and more fundamentally, respondents' argument ignores "the core question" for determining finality: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.*, at 797. That the President cannot pick and choose among bases, and must accept or reject the entire package offered by the Commission, is immaterial. What is crucial is the fact that "the President, not the [Commission], takes the final action that affects" the military installations. *Id.*, at 799. Accordingly, we hold that the decisions made pursuant to the 1990 Act are not reviewable [*471] under the APA. Accord, *Cohen v. Rice*, 992 F.2d 376 (CA1 1993).

Although respondents apparently sought review exclusively under the APA, n4 the Court of Appeals nevertheless sought to determine whether non-APA review, based on either common law or constitutional principles, was available. It focused, moreover, on whether the President's actions under the 1990 Act were reviewable, even though respondents did not name the President as a defendant. The Court of Appeals reasoned that because respondents sought to enjoin the implementation of the President's decision, the legality of that decision would determine whether an injunction should issue. See *Specter II*, 995 F.2d at 407; *Specter I*, 971 F.2d at 936. In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

n4 See *Specter v. Garrett*, 995 F.2d 404, 412 (1993) (Alito, J., dissenting); see also *Specter v. Garrett*, 777 F. Supp. 1226, 1227 (ED Pa. 1991) (respondents "have asserted that their right to

judicial review . . . arises under the Administrative Procedure Act").

II

[***LEdHR1C] [1C] [***LEdHR4A] [4A]Seizing upon our statement in *Franklin* that Presidential decisions are reviewable for constitutionality, the Court of Appeals asserted that "there is a constitutional aspect to the exercise of judicial review in this case -- an aspect grounded in the separation of powers doctrine." *Specter II*, *supra*, 995 F.2d at 408. It reasoned, relying primarily on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952), that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. Thus, judicial review must be available to determine whether the President has statutory authority "for whatever action" he takes. 995 F.2d at 409. In terms of this case, the Court of Appeals concluded that the President's statutory authority to close and realign bases would be lacking if the Secretary and Commission violated the procedural [*472] requirements of the Act in formulating their recommendations. *Ibid.*

[***509] [**1726] Accepting for purposes of decision here the propriety of examining the President's actions, we nonetheless believe that the Court of Appeals' analysis is flawed. Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, e. g., *Wheeldin v. Wheeler*, 373 U.S. 647, 650-652, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963) (distinguishing between "rights which may arise under the Fourth Amendment" and "a cause of action for abuse of the [statutory] subpoena power by a federal officer"); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition," and those "merely said to be in excess of the authority delegated . . . by the Congress").

In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949), for example, we held that sovereign immunity would not shield an executive officer from suit if the officer acted either "unconstitutionally or beyond his statutory powers." (Emphasis added.) If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, as the Court of Appeals seemed to believe, there would have been little need in *Larson* for our specifying unconstitutional and *ultra vires* conduct as

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separate categories. See also *Dugan v. Rank*, 372 U.S. 609, 621-622, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963); *Harmon v. Brucker*, 355 U.S. 579, 581, 2 L. Ed. 2d 503, 78 S. Ct. 433 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' *non-constitutional claim* that respondent [Secretary of the Army] acted in excess of powers granted him by Congress" (emphasis added)).

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[***LEdHR1D] [1D] [***LEdHR4B] [4B]Our decision in *Youngstown, supra*, does not suggest a different conclusion. In *Youngstown*, the Government disclaimed any statutory authority for the President's seizure of steel mills. See 343 U.S. at 585 ("We do not understand the Government to rely on statutory authorization for this seizure"). The only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces. *Id.*, at 587. Because no statutory authority was claimed, the case necessarily turned on whether the Constitution authorized the President's actions. *Youngstown* thus involved the conceded *absence* of any statutory authority, not a claim that the President acted in excess of such authority. The case cannot be read for the proposition that an action taken by the President in excess of his statutory authority necessarily violates the Constitution. n5

[***LEdHR1E] [1E]

n5 *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935), the other case (along with *Youngstown*) cited in *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992), as an example of when we have reviewed the constitutionality of the President's actions, likewise did not involve a claim that the President acted in excess of his statutory authority. *Panama Refining* involved the National Industrial Recovery Act, which delegated to the President the authority to ban interstate transportation of oil produced in violation of state production and marketing limits. See 293 U.S. at 406. We struck down an Executive Order promulgated under that Act not because the President had acted beyond his statutory authority, but rather because the Act unconstitutionally delegated Congress' authority to the President. See *id.*, at 430. As the Court pointed out, we were "not dealing with action which, appropriately belonging to the executive

province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power." *Id.*, at 432 (footnote omitted). Respondents have not alleged that the 1990 Act in itself amounts to an unconstitutional delegation of authority to the President.

[***LEdHR4C] [4C]The decisions cited above establish that claims simply alleging [***510] that the President has exceeded his statutory authority are not "constitutional" claims, subject to judicial review [*474] under the exception recognized in [**1727] *Franklin*. n6 As this case demonstrates, if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* would be broadened beyond recognition. The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration.

[***LEdHR4D] [4D]

n6 As one commentator has observed, in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no "constitutional question whatever" is raised. J. Choper, *Judicial Review and the National Political Process* 316 (1980). Rather, "the cases concern only issues of statutory interpretation." *Ibid.*

[***LEdHR1F] [1F] [***LEdHR5A] [5A]So the claim raised here is a statutory one: The President is said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations. The exception identified in *Franklin* for review of constitutional claims thus does not apply in this case. We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. See *Dames & Moore v. Regan*, 453 U.S. 654, 667, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981). But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

[***LEdHR5B] [5B] [***LEdHR6] [6]As we stated in *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184, 63 L. Ed. 910, 39 S. Ct. 507 (1919), where a claim

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"concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

[*475] In a case analogous to the present one, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 92 L. Ed. 568, 68 S. Ct. 431 (1948), an airline denied a certificate from the Civil Aeronautics Board to establish an international air route sought judicial review of the denial. Although the Civil Aeronautics Act, 49 U.S.C. § 646 (1946 ed.), generally allowed for judicial review of the Board's decisions, and did not explicitly exclude judicial review of decisions involving international routes of domestic airlines, we nonetheless held that review was unavailable. 333 U.S. at 114.

[***511]

[***LEdHR5C] [5C]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 ("Orders 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"). We then concluded that the President's decision to approve or disapprove the orders was not reviewable, because "the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." See *id.*, at 114. We fully recognized that the consequence of our decision was to foreclose judicial review:

"The dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination . . . and after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of *unreviewable Presidential discretion.*" *Id.*, at 113 (emphasis added).

Although the President's discretion in *Waterman S. S. Corp.* derived from the Constitution, we do not believe the result should be any different when the President's discretion derives from a valid statute. See *Dakota Central Telephone [*476] Co.*, *supra*, 250 U.S. at 184; *United States v. George S. Bush & Co.*, 310 U.S. 371, 380, 84 L. Ed. 1259, 60 S. Ct. 944 (1940).

[***LEdHR7] [7]The 1990 Act does not at all limit the President's discretion in approving or disapproving the Commission's recommendations. See § 2903(e); see also *Specter II*, 995 F.2d at 413 (Alito, J., dissenting). The Third Circuit seemed to believe that the President's authority to close bases depended on the Secretary's and Commission's compliance with statutory procedures. This view of the statute, however, incorrectly conflates the duties of the Secretary and Commission with the authority of the President. The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in § 2903(e) requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does § 2903(e) prohibit the President from approving recommendations that are procedurally flawed. Indeed, nothing in § 2903(e) prevents the President from approving or disapproving the recommendations for whatever reason he sees fit. See § 2903(e); *Specter II*, 995 F.2d at 413 (Alito, J., dissenting).

[***LEdHR5D] [5D]How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. See *Waterman S. S. Corp.*, *supra*; *Dakota Central Telephone Co.*, *supra*, at 184. As we stated in *George S. Bush & Co.*, *supra*, at 380, "no question of law is raised when the exercise of [the President's] discretion is challenged."

III

[***LEdHR1G] [1G]In sum, we hold that the actions of the Secretary and the Commission [***512] cannot be reviewed under the APA because they are not "final agency actions." The actions of the President cannot be reviewed under the APA because the President is not an "agency" under that Act. The claim that the President exceeded his authority under the 1990 Act is not a constitutional [*477] claim, but a statutory one. Where 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.

[***LEdHR8] [8]Respondents tell us that failure to allow judicial review here would virtually repudiate *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed.

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60 (1803), and nearly two centuries of constitutional adjudication. But our conclusion that judicial review is not available for respondents' claim follows from our interpretation of an Act of Congress, by which we and all federal courts are bound. The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute.

The judgment of the Court of Appeals is

Reversed.

CONCURBY: BLACKMUN (In Part); SOUTER (In Part)

CONCUR:

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I did not join the majority opinion in *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992), and would not extend that unfortunate holding to the facts of this case. I nevertheless agree that the Defense Base Closure and Realignment Act of 1990 "preclud[es] judicial review of a base-closing decision," *post*, at 484, and accordingly join JUSTICE SOUTER's opinion.

I write separately to underscore what I understand to be the limited reach of today's decision. The majority and concurring opinions conclude that the President acts within his unreviewable discretion in accepting or rejecting a recommended base-closing list, and that an aggrieved party may not enjoin closure of a duly selected base as a result of alleged error in the decisionmaking process. This conclusion, however, does not foreclose judicial review of a claim, for example, that the President added a base to the Defense [*478] Base Closure and Realignment Commission's [**1729] (Commission's) list in contravention of his statutory authority. Nor does either opinion suggest that judicial review would be unavailable for a timely claim seeking direct relief from a procedural violation, such as a suit claiming that a scheduled meeting of the Commission should be public, see § 2903(d), note following 10 U.S.C. § 2687 (1988 ed., Supp. IV), or that the Secretary of Defense should publish the proposed selection criteria and provide an opportunity for public comment, §§ 2903(b) and (c). Such a suit could be timely brought and adjudicated without interfering with Congress' intent to preclude judicial "cherry picking" or frustrating the statute's expedited decisionmaking schedule. See *post*, at 481. I also do not understand the majority's *Franklin* analysis to

foreclose such a suit, since a decision to close the Commission's hearing, for example, would "directly affect" the rights of interested parties independent of any ultimate Presidential [***513] review. See *ante*, at 470; cf. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 80 L. Ed. 2d 480, 104 S. Ct. 1936 (1984).

With the understanding that neither a challenge to ultra vires exercise of the President's statutory authority nor a timely procedural challenge is precluded, I join JUSTICE SOUTER's concurrence and Part II of the opinion of the Court.

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

I join Part II of the Court's opinion because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Base Closure and Realignment Act of 1990 (Act), and because respondents pleaded no constitutional claim against the President, indeed, no claim against the President at all. As the Court explains, the Act grants the President unfettered discretion to accept the Commission's base-closing report or to reject it, for a good reason, a bad reason, or no reason. See *ante*, at 476.

[*479] It is not necessary to reach the question the Court answers in Part I, whether the Defense Base Closure and Realignment Commission's (Commission's) report is final agency action, because the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded. There is, to be sure, a "strong presumption that Congress did not mean to prohibit all judicial review." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986) (internal quotation marks and citation omitted). But although no one feature of the Act, taken alone, is enough to overcome that strong presumption, I believe that the combination present in this unusual legislative scheme suffices.

In adopting the Act, Congress was intimately familiar with repeated, unsuccessful, efforts to close military bases in a rational and timely manner. See generally Defense Base Closure and Realignment Commission, Report to the President 1991. n1 That history of frustration is reflected in the Act's text and intricate structure, which plainly express congressional intent that action on a base-closing package be quick and final, or no action be taken at all.

n1 See also H. R. Conf. Rep. No. 101-923, p. 705 (1990) (Earlier base closures had "taken a

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128 L. Ed. 2d 497, ***; 1994 U.S. LEXIS 3778

considerable period of time and involved numerous opportunities for challenges in court"); *id.*, at 707 (Act "would considerably enhance the ability of the Department of Defense . . . promptly [to] implement proposals for base closures and realignment"); H. R. Rep. No. 101-665, p. 384 (1990) ("Expedited procedures . . . are essential to make the base closure process work").

At the heart of the distinctive statutory regime, Congress placed a series of tight and rigid deadlines on administrative review and Presidential action, embodied in provisions for three biennial rounds of base closings, in 1991, 1993, and 1995 (the "base-closing years"), § § 2903(b) and (c), note following *10 U.S.C. § 2687* (1988 ed., Supp. IV), with unbending deadlines prescribed for each round. The Secretary is obliged to forward base-closing recommendations to the Commission, [*480] no later, respectively, than April 15, 1991, March 15, 1993, and March 15, 1995. [**1730] § 2903(c). The Comptroller General must submit a report to Congress [***514] and the Commission evaluating the Secretary's recommendations by April 15 of each base-closing year. § 2903(d)(5). The Commission must then transmit a report to the President setting out its own recommendations by July 1 of each of those years. § 2903(d)(2). And in each such year, the President must, no later than July 15, either approve or disapprove the Commission's recommendations. § 2903(e)(1). If the President disapproves the Commission's report, the Commission must send the President a revised list of recommended base closings, no later than August 15. § 2903(e)(3). In that event, the President will have until September 1 to approve the Commission's revised report; if the President fails to approve the report by that date, then no bases will be closed that year. § 2903(e)(5). If, however, the President approves a Commission report within either of the times allowed, the report becomes effective unless Congress disapproves the President's decision by joint resolution (passed according to provisions for expedited and circumscribed internal procedures) within 45 days. § § 2904(b)(1)(A), 2908. n2

n2 To enable Congress to perform this prompt review, the Act requires the Secretary, the Comptroller General, and the Commission to provide Congress with information prior to the completion of Executive Branch review. See § § 2903(a)(1), (b)(2), (c)(1), and (d)(3).

The Act requires that a decision about a base-closing package, once made, be implemented promptly. Once

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

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

The point that judicial review was probably not intended emerges again upon considering the linchpin of this unusual statutory scheme, which is its all-or-nothing feature. The President and Congress must accept or reject the biennial base-closing recommendations as a single package. See § § 2903(e)(2), (e)(3), (e)(4) (as to the President); § § 2908(a)(2) and (d)(2) (as to Congress). Neither the President nor Congress may add a base to the list or "cherry pick" one from it. This mandate for prompt acceptance or rejection of the entire package of base closings can only represent a considered allocation of authority between the Executive and Legislative Branches to enable each to reach [***515] important, but politically difficult, objectives. Indeed, the wisdom and ultimate political acceptability of a decision to close any one base depends on the other closure decisions joined with it in a given package, and the decisions made in the second and third rounds just as surely depend (or will depend) on the particular content of the package or packages of closings that will have preceded them. If judicial review could eliminate one base from a package, the political resolution embodied in that package would be destroyed; if such review could eliminate [*482] 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, [**1731] if not impossible. The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled,

go far to persuade me that Congress did not mean the courts to have any such power through judicial review.

When combined with these strict timetables for decision, the temporary nature of the Commission, the requirement for prompt implementation, and the all-or-nothing base-closing requirement at the core of the Act, two secondary features of the legislation tend to reinforce my conclusion that judicial review was not intended. First, the Act provides nonjudicial opportunities to assess any procedural (or other) irregularities. The Commission and the Comptroller General review the Secretary's recommendations, see § § 2903(d)(5), 2903(d)(3), and each can determine whether the Secretary has provided adequate information for reviewing the soundness of his recommendations. n3 The President may, of course, also take procedural irregularities into account in deciding whether to seek new recommendations from the Commission, or in deciding not to approve the Commission's recommendations altogether. And, ultimately, Congress may decide during its 45-day review period whether procedural failings call the Presidentially approved recommendations so far into question as to justify their substantive rejection. n4

n3 Petitioners represent, indeed, that as to the round in question, the Comptroller General reported to Congress on procedural irregularities (as well as substantive differences of opinion) and requested additional information from the Secretary (which was provided). See Reply Brief for Petitioners 16, n. 12.

n4 In approving the base closings for 1991, Congress was apparently well aware of claims of procedural shortcomings, but nonetheless chose not to disapprove the list. See Department of Defense Appropriations Act, 1992, Pub. L. 102-172, § 8131, 105 Stat. 1208.

[*483] Second, the Act does make express provision for judicial review, but only of objections under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, as amended, 42 U.S.C. § 4321 *et seq.*, to implementation plans for a base closing, and only after the process of selecting a package of bases for closure is complete. Because NEPA review during the base-closing decision process had stymied or delayed earlier efforts, n5 the Act, unlike prior legislation addressed to base closing, provides that NEPA has no application at all until after the President has submitted his decision to Congress and the process of selecting bases for closure has been completed. See § 2905(c)(1). NEPA then applies only to claims arising out of actual

disposal or relocation of base property, [***516] not to the prior decision to choose one base or another for closing. § 2905(c)(2). The Act by its terms allows for "judicial review, with respect to any requirement of [NEPA]" made applicable to the Act by § 2905(c)(2), but requires the action to be initiated within 60 days of the Defense Department's act or omission as to the closing of a base. § 2905(c)(3). This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.

n5 See, e. g., H. R. Conf. Rep. No. 100-1071, p. 23 (1988).

In sum, the text, structure, and purpose of the Act clearly manifest congressional intent to confine the base-closing selection process within a narrow time frame before inevitable political opposition to an individual base closing could become overwhelming, to ensure that the decisions be implemented promptly, and to limit acceptance or rejection to a package of base closings as a whole, for the sake of political feasibility. While no one aspect of the Act, standing alone, [*484] 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 [**1732] of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact. I conclude accordingly that the Act forecloses such judicial review.

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

REFERENCES: Return To Full Text Opinion

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ALR Index, Administrative Law; Armed Forces; Finality
and Conclusiveness; President of the United States

Annotation References:

What constitutes agency "action," "order,"
"decision," "final order," "final decision," or the like,
within meaning of federal statutes authorizing judicial
review of administrative action-- *Supreme Court cases.*
47 L Ed 2d 843.

Unconstitutional conduct by state or federal officer
as affecting governmental immunity from suit in federal
court-- *Supreme Court cases.* 12 L Ed 2d 1110.

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The Availability of Judicial Review Regarding Military Base Closures and Realignment

June 24, 2005

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The Availability of Judicial Review Regarding Military Base Closures and Realignment

Summary

The 2005 round of military base realignments and closures (BRAC) is now underway. The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), as amended, establishes mandatory procedures to be followed throughout the BRAC process and identifies criteria to be used in formulating BRAC recommendations. However, judicial review is unlikely to be available to remedy alleged failures to comply with the Base Closure Act's provisions. A synopsis of the relevant law regarding the availability of judicial review in this context is included below:

- The actions of the Secretary of Defense (Secretary) and the independent BRAC Commission (Commission) are not considered to be "final agency action," and thus cannot be judicially reviewed pursuant to the Administrative Procedure Act (APA).
- Even if a court determined that the actions of the Secretary and the Commission were "final agency action," the court would likely consider the case to fall under one of two APA exceptions to judicial review: (1) when statutes preclude judicial review or (2) when agency action is committed to agency discretion by law.
- The President's actions cannot be judicially reviewed under the APA, because the President is not an "agency" covered by the statute.
- A claim that the President exceeded his statutory authority under the Base Closure Act has been held to be judicially unreviewable, because the Base Closure Act gives the President broad discretion in approving or disapproving BRAC recommendations.

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Thus, courts would likely allow the BRAC process to proceed even if the Department of Defense, the Commission, or the President did not comply with the Base Closure Act's requirements.

This report was prepared by Ryan J. Watson, Law Clerk, under the general supervision of Aaron M. Flynn, Legislative Attorney. It will be updated as case developments warrant.

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The Availability of Judicial Review Regarding Military Base Closures and Realignmentments

Introduction¹

The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), as amended, generally governs the military base realignment and closure (BRAC) process.² After three previous BRAC rounds, Congress authorized a fourth round for 2005, which is now underway.³

The BRAC process involves a complex statutory scheme, under which numerous governmental entities play a role in recommending bases to be closed or realigned. A brief summary of the major steps in the process is illustrated in Figure 1 on the following page. In addition to establishing the basic framework for the BRAC process, the Base Closure Act sets forth a variety of selection criteria and mandatory procedures, such as the requirements that certain information be disclosed and that certain meetings be made open to the public

This report analyzes whether judicial review is available when plaintiffs allege that the Department of Defense (DOD), the independent BRAC Commission (Commission), or the President has either (1) failed to comply with procedural requirements of the Base Closure Act or (2) failed to properly apply specified selection criteria in making BRAC determinations. Congress could employ numerous strategies to attempt to “enforce” the Base Closure Act.⁴ However, this report focuses on the effect a failure to comply would have if Members of Congress or other parties sued based on an alleged failure to comply with the Act’s provisions.⁵ In particular, the report synthesizes key federal court decisions that address three

¹ This report was prepared by Ryan J. Watson, Law Clerk, under the general supervision of Aaron M. Flynn, Legislative Attorney. It will be updated as case developments warrant.

² Defense Base Closure & Realignment Act of 1990, P. L. 101-510; *see also* P. L. 107-107. For ease of reference, all citations to the Base Closure Act refer to the relevant sections of the Base Closure Act as it appears in the note following 10 U.S.C. § 2687 (Supp. 2003).

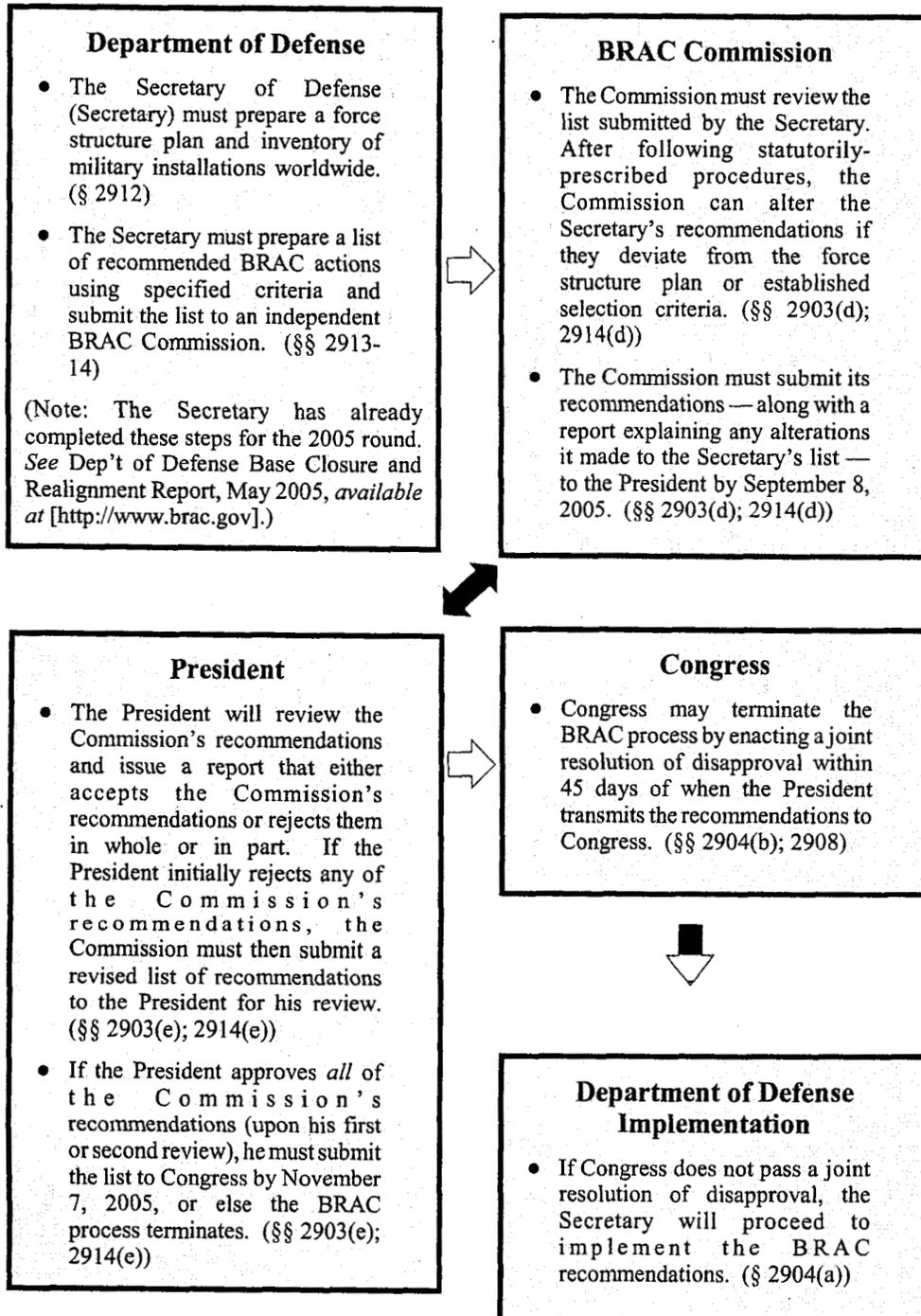
³ P. L. 107-107, § 3001, 115 Stat. 1012 (2001).

⁴ For example, Congress could use its subpoena power to obtain undisclosed information or use the appropriations process to affect BRAC actions.

⁵ This report does not analyze standing. In its most basic form, Article III standing requires a showing that plaintiffs suffered “injury in fact” that was caused by the challenged action, and that such injury would likely be redressed by a favorable judicial determination. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing of Members of Congress to sue raises other questions as well. *See Raines v. Byrd*, 521 U.S. 811 (1997).

potential bases for judicial review of BRAC-related actions: the Administrative Procedure Act (APA), the Base Closure Act, and the U.S. Constitution.

Figure 1: The BRAC Process⁶



⁶ All citations in Figure 1 are to the Base Closure Act, unless otherwise noted.

Administrative Procedure Act Claims

The Administrative Procedure Act (APA) provides for judicial review of “final agency action,”⁷ unless either of two exceptions applies: (1) when a statute precludes judicial review or (2) when “agency action is committed to agency discretion by law.”⁸

Determining the Finality of Agency Action

In *Dalton v. Specter*, Members of Congress and other plaintiffs sought to enjoin the Secretary of Defense (Secretary) from closing a military installation during a previous BRAC round because of alleged substantive and procedural violations of the Base Closure Act.⁹ Specifically, plaintiffs alleged that the Secretary’s report and the Commission’s report were subject to judicial review under the APA.¹⁰

In *Dalton*, the Supreme Court held that the issuances of the Secretary’s report and the Commission’s report were not judicially reviewable actions under the APA because they were not “final agency action[s].”¹¹ The Court explained that “[t]he core question’ for determining finality [of agency action under the APA is] ‘whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.’”¹² Because the Base Closure Act established a process under which the President takes the final action that affects military installations (see Figure 1 on the previous page), the actions of the Secretary and the Commission did not directly affect the parties.¹³ Thus, the Court held that they were unreviewable under the APA.¹⁴

The *Dalton* decision affirmed the analysis in *Cohen v. Rice*, in which the First Circuit stated that the President’s statutory right to affect the BRAC process meant that previous steps of the BRAC process were not final.¹⁵ As the *Cohen* court explained:

Under the 1990 Act, the President is not required to submit the Commission’s report to Congress. In addition, the 1990 Act gives the President the power to order the Commission to revise its report, and, in the final analysis, the President

⁷ 5 U.S.C. § 704 (2000).

⁸ *Id.* § 701(a).

⁹ *Dalton v. Specter*, 511 U.S. 462, 464, 466 (1994).

¹⁰ *Id.* at 466; *see also* 5 U.S.C. § 701 *et seq.* (2000).

¹¹ *Dalton*, 511 U.S. at 469.

¹² *Id.* at 470 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992)).

¹³ *Id.* at 469-70; *accord Cohen v. Rice*, 992 F.2d 376, 381-82 (1st Cir. 1993).

¹⁴ *Dalton*, 511 U.S. at 470-71.

¹⁵ *See id.*

has the power to terminate a base closure cycle altogether via a second rejection of a Commission report.¹⁶

In addition, a subsequent Supreme Court decision described the BRAC reports as “purely advisory” and subject to the “absolute discretion” of the President, thus making them non-final agency action for APA purposes.¹⁷

Importantly, the *Dalton* Court applied its analysis of finality under the APA to both substantive claims (applying improper selection criteria) and procedural claims (e.g., failing to make certain information public).¹⁸ Therefore, the lack of finality in BRAC actions taken by the Secretary or the Commission bars judicial review of such actions under the APA.¹⁹

Statutory Preclusion of Judicial Review

Four Justices concurred in the *Dalton* Court’s judgment that judicial review was not available under the APA, but argued in a separate concurring opinion that the Court should not have decided the issue of whether the agency actions were final.²⁰ The foundation for this argument is that under the APA, judicial review is not available if statutes preclude judicial review.²¹

Justice Souter — writing for these four Justices — argued that “the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission’s or the Secretary’s compliance with it is precluded” (except for certain environmental objections to base closure implementation plans).²² Souter’s opinion concluded that Congress intended for BRAC actions to be “quick and final, or [for] no action [to] be taken at all.”²³

Souter cited a variety of evidence to support the contention that Congress generally intended to preclude judicial review under the Base Closure Act.²⁴

- statutorily-mandated strict time deadlines for making and implementing BRAC decisions
- “the all-or-nothing base-closing requirement at the core of the Act”
- congressional frustration resulting from previous attempts to close military bases

¹⁶ *Cohen*, 992 F.2d at 381-82.

¹⁷ *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citing *Dalton*, 511 U.S. at 478).

¹⁸ *See Dalton*, 511 U.S. at 466, 468-71; *accord Cohen*, 992 F.2d at 381-82.

¹⁹ *Dalton*, 511 U.S. at 468-71.

²⁰ *See id.* at 478-84 (Souter, J., concurring in judgment).

²¹ *See* 5 U.S.C. § 701(a)(1).

²² *Id.* at 479, 483 (Souter, J., concurring in judgment).

²³ *Id.* at 479 (Souter, J., concurring in judgment).

²⁴ *Id.* at 479, 482-83 (Souter, J., concurring in judgment).

- “nonjudicial opportunities to assess any procedural (or other) irregularities,” (i.e., the opportunities for the Commission and the Comptroller General to review the Secretary’s recommendations, the President’s opportunity to consider procedural flaws, and Congress’s opportunity to disapprove the recommendations)
- “the temporary nature of the Commission”
- the fact that the Act expressly provides for judicial review regarding objections to base closure implementation plans under the National Environmental Policy Act of 1969 (NEPA) that are brought “within a narrow time frame,” but the Act does not explicitly provide for any other judicial review

Importantly, whether the Supreme Court applies the rationale of the *Dalton* majority or Justice Souter’s *Dalton* concurrence, the Court would likely decide *not* to review the BRAC actions of the Secretary or the Commission under the APA in the 2005 round.

Agency Actions Committed to Agency Discretion by Law

Under the APA, judicial review of agency action is not available if “agency action is committed to agency discretion by law.”²⁵ Even if the actions of the Secretary or the Commission were held to be final agency action (which would be unlikely, given the *Dalton* decision), courts might consider those agency actions to be committed to agency discretion by law — thus making them judicially unreviewable.²⁶ Because there is a “strong presumption that Congress intends judicial review of administrative action,” “clear and convincing evidence” of contrary congressional intent must exist in order for this exception to judicial review to apply.²⁷

The issue of whether actions of the Secretary or the Commission under the Base Closure Act are committed to agency discretion by law has not been adjudicated by the Supreme Court. Instead, several Supreme Court cases have addressed this issue in non-BRAC contexts and one D.C. Circuit case addressed the applicability of the exception to the Base Closure Act. These cases are analyzed in the following paragraphs.

In *Heckler v. Chaney*, the Supreme Court explained that the exception for agency action being committed to agency discretion applies if “a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”²⁸ The Court continued, saying that “if no *judicially manageable standards* are

²⁵ 5 U.S.C. § 701(a)(2).

²⁶ See *Nat’l Fed’n of Fed. Employees v. United States*, 905 F.2d 400, 405-06 (D.C. Cir. 1990).

²⁷ *Franklin*, 505 U.S. at 816 (Stevens, J., concurring in judgment) (internal citations and quotation marks omitted); see also 5 U.S.C. § 701(a)(2).

²⁸ *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion,' [as provided for in 5 U.S.C. § 706]."²⁹

In *National Federation*, the D.C. Circuit found that the criteria DOD and the Commission use for making BRAC determinations do not provide judicially manageable standards, as required by the *Heckler* test.³⁰ The D.C. Circuit articulated the rationale for its finding:

[T]he subject matter of those criteria is not 'judicially manageable' [because] judicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy.³¹

Based on this finding, the *National Federation* court held that application of the selection criteria to military installations during the BRAC process is agency action committed to agency discretion by law, thus making it judicially unreviewable under the APA.³²

More recently, the Supreme Court observed that this exception has generally applied in three categories of cases:

- (1) cases involving national security;
- (2) cases where plaintiffs sought judicial review of an agency's refusal to pursue enforcement actions; and
- (3) cases where plaintiffs sought review of "an agency's refusal to grant reconsideration of an action because of material error."³³

Although the Base Closure Act may not fit squarely within any of those three categories, the Supreme Court might adopt the D.C. Circuit's construction of the exception from *National Federation* were it to construe the exception in the context of BRAC.

²⁹ *Id.* (emphasis added). The Supreme Court has also stated that the exception in 5 U.S.C. § 701(a)(2) applies when there is no law available for the court to apply. See *Webster v. Doe*, 486 U.S. 592, 599 (1988). However, in the BRAC context, the Base Closure Act provides the relevant law. Thus, the critical question is whether that law contains a "meaningful standard," as required by *Heckler*. See *Heckler*, 470 U.S. at 830.

³⁰ *Nat'l Fed'n*, 905 F.2d at 405; see *Heckler*, 470 U.S. at 830. The criteria used during the BRAC round at issue in *National Federation* were substantially similar to those being used in the 2005 BRAC round. Compare Base Closure Act § 2913 with *Nat'l Fed'n*, 905 F.2d at 402.

³¹ *Nat'l Fed'n*, 905 F.2d at 405-06.

³² *Id.*

³³ See *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993).

Review of Presidential Action Under the APA

In *Dalton*, the Supreme Court held that the President's approval of the Secretary's BRAC recommendations was not judicially reviewable under the APA, because the President is not an agency.³⁴ Although the APA's definition of an "agency" does not explicitly include or exclude the President,³⁵ the Court had previously held that the President is not subject to the APA, due to separation of powers principles.³⁶

Base Closure Act Claims

The *Dalton* Court distinguished between two types of potential claims: (1) claims that the President exceeded his statutory authority and (2) claims challenging the constitutionality of the President's actions.³⁷ The Court stated that not every case of *ultra vires* conduct by an executive official was *ipso facto* unconstitutional.³⁸

In *Dalton*, the lower court had held that the President would be acting in excess of his statutory authority under the Base Closure Act if the Secretary or the Commission had failed to comply with statutorily-required procedures during previous stages of the BRAC process.³⁹ On appeal, the Supreme Court characterized this claim as a statutory claim — not as a constitutional claim.⁴⁰

The Court assumed *arguendo* that some statutory claims against the President could be judicially reviewable apart from the APA.⁴¹ However, it stated that statutory claims are not judicially reviewable apart from the APA "when the statute in question commits the decision to the discretion of the President."⁴² According to

³⁴ *Dalton*, 511 U.S. at 470; *accord Franklin*, 505 U.S. at 801.

³⁵ See 5 U.S.C. § 701(b)(1) (emphasis added): "[A]gency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include — (A) the Congress; (B) the courts of the United States; (c) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by [certain statutes]."

³⁶ See *Franklin*, 505 U.S. at 800-01.

³⁷ *Dalton*, 511 U.S. at 472-75.

³⁸ *Id.* at 472-74.

³⁹ *Dalton*, 511 U.S. at 466, 474.

⁴⁰ *Id.* at 474-75. See the following section of this report for an analysis of potential constitutional claims.

⁴¹ *Id.* at 474.

⁴² *Id.*

the Court, the Base Closure Act did not limit the President's discretion in any way.⁴³ Thus, the President's authority to approve the BRAC recommendations was "not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the [Base Closure] Act."⁴⁴ Therefore, the issue of how the President chose to exercise his discretion under the Base Closure Act was held to be judicially unreviewable.⁴⁵

Justice Blackmun, concurring in part and concurring in the judgment, attempted to narrowly define the scope of the *Dalton* decision.⁴⁶ He considered the decision to be one that would allow judicial review of a claim (1) if the President acted in contravention of his statutory authority (e.g., adding a base to the Commission's BRAC recommendations list) or (2) if a plaintiff brought "a timely claim seeking direct relief from a procedural violation" (e.g., a claim that a Commission meeting should be public or that the Secretary should publish proposed selection criteria and allow for public comment).⁴⁷

However, Justice Blackmun's argument that plaintiffs could seek relief from a procedural violation of the Base Closure Act appears to directly conflict with Chief Justice Rehnquist's opinion on behalf of the *Dalton* majority, which stated:

The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the [Base Closure] Act. Nothing in § 2903(e) requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does § 2903(e) prohibit the President from approving recommendations that are procedurally flawed.⁴⁸

Constitutional Claims

As mentioned in the preceding section of this report, the *Dalton* Court explained that claims that the President acted in *excess* of his statutory authority differ from claims that the President unconstitutionally acted in the *absence* of statutory authority.⁴⁹ Specifically, the Court distinguished the issues in *Dalton* from those in *Youngstown Sheet & Tube Co. v. Sawyer*, a landmark case on presidential powers.⁵⁰ The Court said that *Youngstown* "involved the conceded *absence* of any statutory

⁴³ *Id.* at 476-77; see Base Closure Act § 2903(e).

⁴⁴ *Dalton*, 511 U.S. at 476.

⁴⁵ *Id.*

⁴⁶ *Id.* at 477-78 (Blackmun, J., concurring in judgment).

⁴⁷ *Id.* (Blackmun, J., concurring in judgment).

⁴⁸ *Id.* at 476-77.

⁴⁹ *Id.* at 472-75.

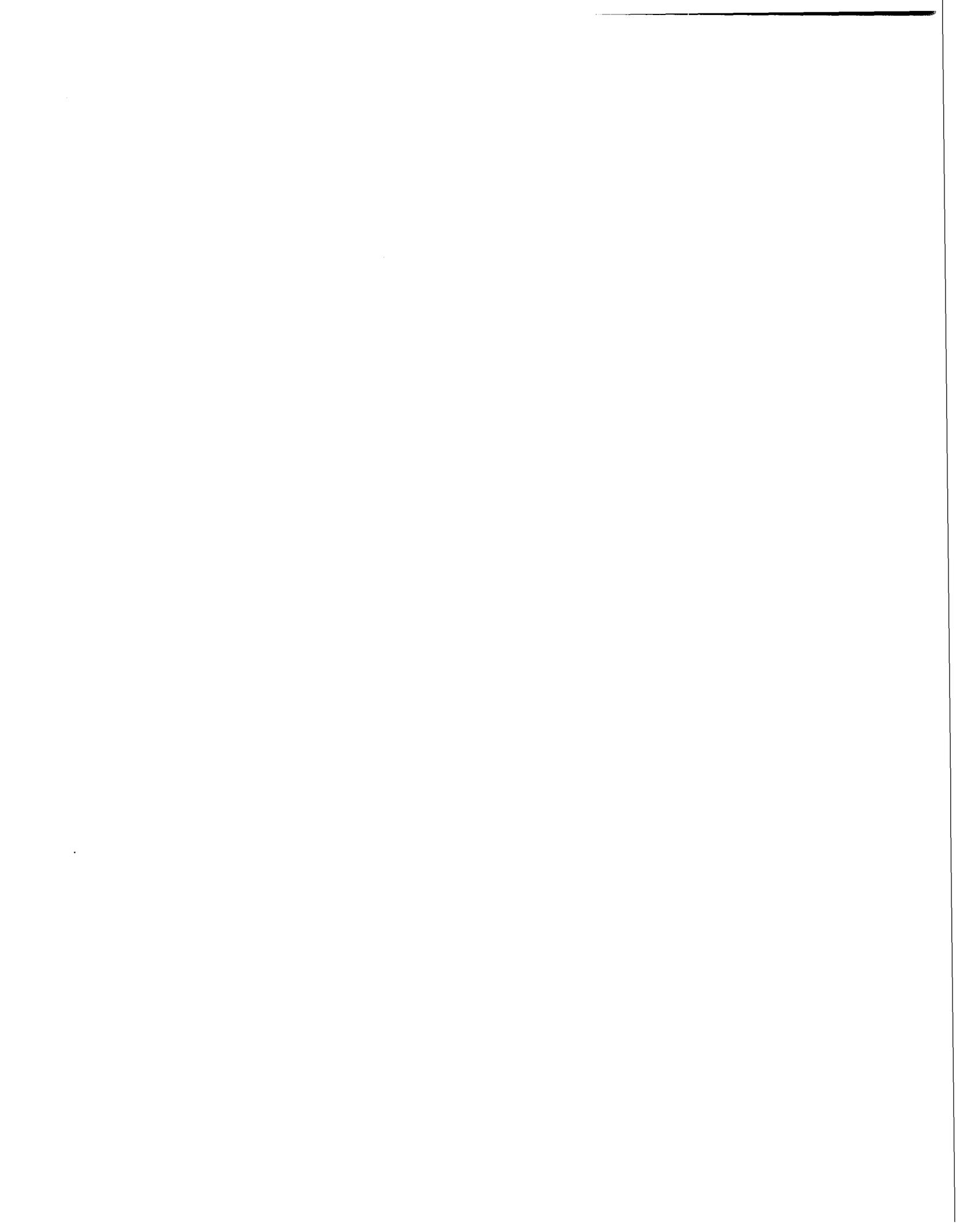
⁵⁰ *Id.* at 473; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

authority, not a claim that the President acted in excess of such authority.”⁵¹ Because the Base Closure Act provides statutory authority to the President, the *Dalton* Court did not find it necessary to examine the constitutional powers of the President (e.g., the President’s powers as Commander-in-Chief).

A litigant could also challenge the constitutionality of the Base Closure Act itself. For example, in *National Federation*, plaintiffs unsuccessfully argued that the 1988 Base Closure Act violated the non-delegation doctrine and the separation of powers doctrine.⁵² However, the Base Closure Act has not yet been held unconstitutional by any federal appellate courts.

⁵¹ *Id.* (citing *Youngstown*, 343 U.S. 579). Indeed, Justice Jackson’s *Youngstown* concurrence also attempted to articulate several categories of presidential action: “1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum 2. When the President acts in absence of either a congressional grant or denial of authority [and] 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Using Justice Jackson’s framework, the *Dalton* case would fall within the first category, because the Base Closure Act granted the President discretion in approving or disapproving the BRAC recommendations. *See Dalton*, 511 U.S. at 472-75.

⁵² *Nat’l Fed’n*, 905 F.2d at 404-05.



**Office of General Counsel
Defense Base Closure and Realignment Commission**

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

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

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

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

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

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

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

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART I OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

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

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

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

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

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

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

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

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

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

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

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

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

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

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

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

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

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

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

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

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

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

²³ Emphasis added.

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

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

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

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

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

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

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

³¹ Department of the Navy

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

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

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

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

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

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

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

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

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

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

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

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

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

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

In AF 33, the Air Force recommends:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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



June 24, 2005

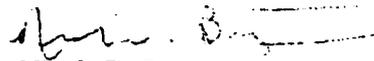
The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Chairman Principi:

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

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

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


Nicole D. Bayert
Associate General Counsel
Environment & Installations



ENCLOSURE 1

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

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

From: Cowhig, Dan, CIV, WSO-BRAC

Sent: Friday, June 10, 2005 5:09 PM

To: RSS dd - WSO BRAC Clearinghouse

Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL

Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

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

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

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

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

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

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer



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



July 5, 2005

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

Dear Mr. Cowhig:

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

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

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

Sincerely,

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



ENCLOSURE 2

Cowhig, Dan, CIV, WSO-BRAC

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

Clearinghouse -

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

V/R

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

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

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

Thank you for your cooperation and timeliness in this matter.

OSD BRAC Clearinghouse

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

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

Clearinghouse -

Please respond to the following:

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

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

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

Clearinghouse -

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

V/R

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

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

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

OSD BRAC Clearinghouse

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

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

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

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

Clearinghouse -

Please respond to the following:

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

16 June 2005

Inquiry Response

Re: BI-0068

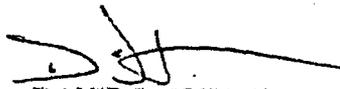
Requester: OSD Clearinghouse

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

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

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

Approved



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



Willow Grove -
Rendell ltr.pdf...

ENCLOSURE 3

30 June 2005

Inquiry Response

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

Requester: BRAC Commission

Question:

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

Answer:

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

Approved



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

ENCLOSURE 4

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

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

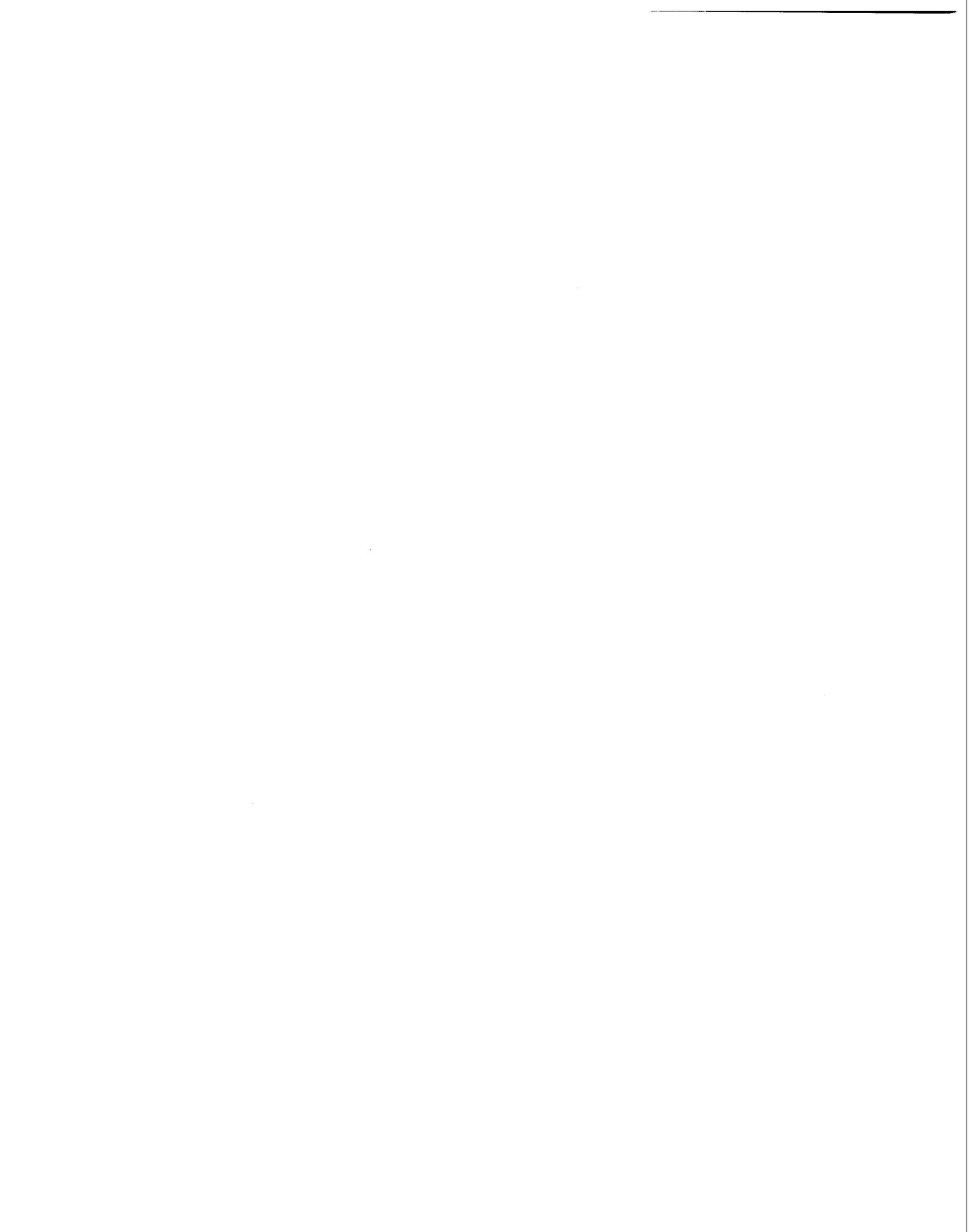
**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B	187 FW, Dannelly Fld, AL	FY92	91000504	
			94000265	
			94000260	
			94000262	
			90000529	
			92000369	
			92000373	
			92000372	
			94000261	
			94000264	
			94000263	11
C-38A	201 ALF SQ, Andrews AFB, MD		94001569	
			94001570	2
C-130J	175 WGH WG, Baltimore, MD		97001351	
			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
	146 ALF WG, Channel Islands, CA		1001461	
			1001462	
			2001463	
			2001464	4
	143 ALF WG, Quonset State, RI		2001434	
			99001431	
			99001432	
			99001433	4
EC-130J	193 SOP WG, Harrisburg, PA		1934	
			95008154	
			97001931	
			98001932	
			99001933	4
TOTAL AIRCRAFT:				45

*note: Historian shows 14,
programmatically shows 11*

*note: Historian shows 8,
programmatically shows 9*

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



Defense Base Closure and Realignment Commission White Paper

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

July 11, 2005

The purpose of this white paper is to provide a discussion of legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not discuss limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),¹ such as the final selection criteria,² but will focus rather on other less obvious constraints on Commission action.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,³ as an illustration. The text of AF 33 follows:

¹ Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523, 1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

² Base Closure Act § 2913.

³ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper

Defense Base Closure and Realignment Commission White Paper
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁴) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁵) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁶

are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁴ Air Force Reserve

⁵ Air National Guard

⁶ The justification, payback, and other segments of AF 33 read:

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

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of Volume I [of the Department of Defense Base Closure and Realignment Report].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Defense Base Closure and Realignment Commission White Paper
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

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

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁷ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today.

⁷ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Defense Base Closure and Realignment Commission White Paper
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

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

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

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

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.⁸

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.⁹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute.

⁸ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater impediments from statutory directions on the basing of specific airframes today than the Navy did in the early 1990s.

⁹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense “complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments” might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

Defense Base Closure and Realignment Commission White Paper
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹⁰

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In other instances, it might be more appropriate to strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft as he sees fit.¹¹

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

¹¹ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

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

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit’s aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it may be more appropriate for the Commission to amend the recommendation to read “Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing’s aircraft as directed by the Secretary of the Air Force.” Such an amendment would have the benefit of preserving the Air Force’s flexibility to react to future needs and missions. Such an amendment would be appropriate under the Base Closure Act because the language directing the “distribution” of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized, below.

Defense Base Closure and Realignment Commission White Paper
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

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

The authority of the Base Closure Act is required only where the Department closes “any military installation at which at least 300 civilian personnel are authorized to be employed,”¹² or realigns a military installation resulting in “a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed” at that installation.¹³ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁴

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

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁵ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small numbers of aircraft, often without moving the associated personnel.¹⁶ Several of the Air

¹² 10 USC § 2687(a)(2).

¹³ 10 USC § 2687(a)(3).

¹⁴ By definition, the Base Closure Act does not apply to “closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.” Base Closure Act § 2909(c)(2).

¹⁵ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion below regarding the retirement of aircraft whose retirement has been barred by statute.

¹⁶ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

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Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁷

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,¹⁸ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.¹⁹

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

¹⁷ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

¹⁸ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, and; the retirement of aircraft whose retirement has been barred by statute, below.

¹⁹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, below.

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installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²⁰

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

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

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

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

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²¹ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²² the transfer or retirement of specific aircraft without movement of the associated personnel,²³ or the movement of headquarters without the associated units.

²⁰ See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, to effect changes in how a unit is equipped or organized, to relocate, withdraw, disband or change the organization of an Air National Guard unit, to retire aircraft whose retirement has been barred by statute, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, below.

²¹ Emphasis added.

²² See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²³ See notes 16 and 17 above.

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The purpose of the Base Closure Act “is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States.”²⁴ Under the Base Closure Act, “the term ‘military installation’ means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”²⁵ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, “the term ‘realignment’ includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*”²⁶ A “realignment,” under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁷ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

²⁴ Base Closure Act § 2901(b) (emphasis added).

²⁵ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁶ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁷ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, “*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*” by closing “Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH,” distributing “the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft).” Emphasis added.

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

In AF 33, the Air Force proposes to “distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station,” Maine. Under the recommendation, “no Air Force aircraft remain at Niagara.” The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.²⁸

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

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

Similarly, in AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission “realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing’s F-16s (15 aircraft) retire. The wing’s expeditionary combat support elements remain in place.” As justification, the Air Force indicates “the reduction in F-16 force structure and the need to align common versions of

²⁸ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

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the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill.*²⁹

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

By statute, “each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard.”³⁰ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, “may designate the units of the National Guard ... to be maintained in each State and Territory” in order “to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.”³¹ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³²

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Base Realignment and Closure Commission. It could be argued that since the recommendations of the Defense Base Closure and Realignment Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³³ It could also be argued that since the Commission would merely recommend, but

²⁹ Emphasis added.

³⁰ 32 USC § 104(a).

³¹ 32 USC § 104(c).

³² Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (“The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.”) (June 16, 2005) (Enclosure 1).

³³ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that “laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency.”

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does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁴ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects “a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁵ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia.”³⁶ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,³⁷ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that “unless the President consents ... an organization of the National Guard whose members have received compensation from the United States as members of the National Guard may not be disbanded.”³⁸ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting

³⁴ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁵ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁶ 10 USC § 18238.

³⁷ 10 USC § 2687.

³⁸ 32 USC § 104(f)(1).

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aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."³⁹ This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴⁰ they also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴¹ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization an Air National Guard unit, the Commission may not

³⁹ 32 USC § 102.

⁴⁰ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

⁴¹ See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 42, below.

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approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴²

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

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard “retire its eight KC-135E aircraft.” As discussed above, the Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

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

⁴² Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

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

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

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The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴³ Under the Ronald W. Reagan NDAA for FY 2005, “the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005.”⁴⁴ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁵

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also become statute. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁶ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain types of aircraft are deleted from the Commission’s recommendations in order to avoid a potential conflict of laws.

⁴³ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁴ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁵ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 (“The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006”) and § 135 (“The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.”) (May 17, 2005).

⁴⁶ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

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

In AF 33, the Air Force recommends:

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

This recommendation would effectively transfer the entire complement of aircraft
from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the
Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations
include similar language directing the transfer of aircraft from the Air Guard of one state
or territory to that of another.⁴⁷

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

Further, Congress alone is granted the authority by the Constitution to equip the
Armed Forces of the United States. Congress did not delegate this power to the
Commission through the language of the Base Closure Act. Where Congress has
authorized the purchase of certain aircraft with the express purpose of equipping the Air
Guard of a particular state or territory,⁴⁸ the Commission may not approve any
recommendation action that would contravene the intent of Congress.

⁴⁷ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the
109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of
the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the
movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville,
Kentucky.

⁴⁸ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division,
subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005)
(Enclosure 2).

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Conclusion and Recommendation

Each of the areas of concern discussed above

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

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁴⁹

⁴⁹ The final selection criteria are:

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

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

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

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

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The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with the force-structure plan and the final selection criteria, or whether a substantial deviation from the force-structure plan or the criteria exists.

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

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

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

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

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

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

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

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

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

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

Base Closure Act, § 2913.

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

Written: Dan Cowhig, Deputy General Counsel
Reviewed: David Hague, General Counsel
Approved: Anthony J. Principi, Chairman

2 Enclosures

1. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
2. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

30 June 2005

Inquiry Response

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

Requester: BRAC Commission

Question:

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

Answer:

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

Approved



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

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

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

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

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

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H	153 AW, Cheyenne, WY	FY94-95	92001531	8
			92001532	
			92001533	
			92001534	
			92001535	
			92001536	
			92001537	
			92001538	
	167 AW, EWWRA Shepherd, WV	FY94-95	94006701	12
			94006702	
			94006703	
			94006704	
			94006705	
			94006706	
94006707				
94006708				
C-26A	124WG, Boise ID	FY90	95006709	11
			95006710	
			95006711	
			95006712	
			147FW Ellington AFB TX	
			144FW, Fresno CA	
			186ARW, Meridian MS (KEY FIELD)	
			182AW, Peoria, IL	
			111FW, Willow Grove NAS PA	
			122FW, Ft Wayne, IN	
			192FW, Richmond VA (BYRD FLD)	
			131FW, St Louis, MO (LAMBERT)	
			142FW, Portland OR	
			121ARW, Rickenbacker OH	
HH-60G	176ARW, Kulis ANGB, AK	FY90	92026466	6
			92026467	
			92026469	
			92026470	
			92026471	
			92026472	
	106 RSQ WG, Suffolk, NY	FY90	88026108	6
			88026111	
			88026112	
			88026113	
			88026114	
			92026468	
	129 RSQ WG, Moffett Fld, CA	FY90	88026106	6
			88026107	
88026115				
88026118				
88026119				
88026120				

note: C-26As are no longer
in the ANG inventory

note: Historian shows 4:
programmatically shows 6

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B	187 FW, Dannelly Fld, AL	FY92	91000504	
			94000265	
			94000260	
			94000262	
			90000529	
			92000369	
			92000373	
			92000372	
			94000261	
			94000264	
			94000263	11
C-38A	201 ALF SQ, Andrews AFB, MD		94001569	
			94001570	2
C-130J	175 WGH WG, Baltimore, MD		97001351	
			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
	146 ALF WG, Channel Islands, CA		1001461	
			1001462	
			2001463	
			2001464	4
	143 ALF WG, Quonset State, RI		2001434	
			99001431	
			99001432	
			99001433	4
EC-130J	193 SOP WG, Harrisburg, PA		1934	
			96008154	
			97001931	
			98001932	
			99001933	4
TOTAL AIRCRAFT:				45

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

16 June 2005

Inquiry Response

Re: BI-0068

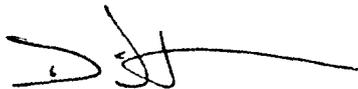
Requester: OSD Clearinghouse

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

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

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

Approved



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



Willow Grove -
Rendell ltr.pdf...



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

May 26, 2005

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

Dear Secretary Rumsfeld:

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

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

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

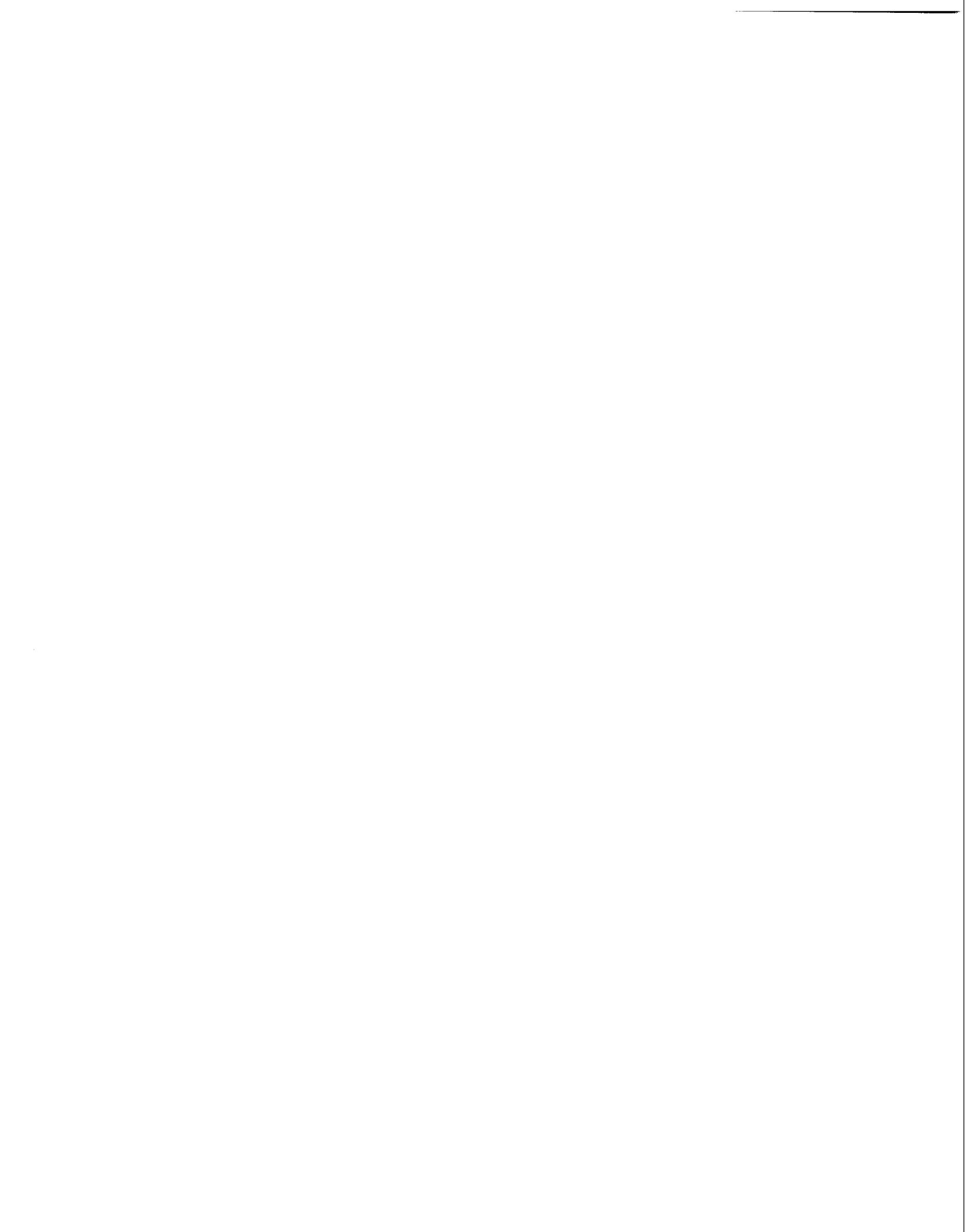
The recommended deactivation of the 111th Fighter Wing appears to be the result of a seriously flawed process that has completely overlooked the important role of the states with regard to their Air National Guard units.

Sincerely,

A handwritten signature in black ink that reads "Edward G. Rendell".

Edward G. Rendell
Governor

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





Memorandum

July 6, 2005

SUBJECT: Base Realignment and Closure of National Guard Facilities:
Application of 10 U.S.C. § 18238 and 32 U.S.C. § 104(c)

FROM: Aaron M. Flynn
Legislative Attorney
American Law Division

The Defense Base Closure and Realignment Act of 1990¹ has been amended to authorize a new round of base realignment and closure (BRAC) actions in 2005. Consistent with the law, the Department of Defense (DOD) has prepared a list of candidate military installations for closure or realignment actions. Among these installations are several Air National Guard and Army National Guard facilities. Two provisions of law, 10 U.S.C. § 18238 and 32 U.S.C. § 104(c), have been seen as impediments to BRAC actions at these facilities. The application of these provisions to the BRAC process is the subject of this memorandum.

BRAC Background

The Defense Base Closure and Realignment Act provides a finely wrought procedure for analyzing and carrying out BRAC actions and governs the current BRAC round. In general, the Secretary of Defense is required to prepare a force-structure plan and an inventory of existing military installations.² The Secretary is required to review this information and, based on statutorily prescribed selection criteria, create a list of sites recommended for realignment or closure.³

¹ Defense Base Closure & Realignment Act of 1990, Pub. L. No. 101-510, § 2905; *see also* Pub. L. No. 107-107, § 3006 (current version at 10 U.S.C. § 2687 note.) For ease of reference, all citations to the 1990 Act are to the relevant sections of the Act as it appears in note following 10 U.S.C. § 2687.

² Base Closure Act, §§ 2912; 2913; *see generally* Military Base Closures: Implementing the 2005 Round, CRS Rept. RL32216 (March 17, 2005).

³ Base Closure Act, §§ 2903(c); 2914.

Next, the independent BRAC Commission must review the DOD list.⁴ After following mandated procedures, the Commission can alter the recommendations of the Secretary if the Secretary's proposal deviates substantially from the force-structure plan and selection criteria.⁵ The Commission must then transmit its recommendations, along with a report explaining any changes to the DOD choices, to the President for his review.⁶

The President may review the recommendations and then transmit to the Commission his report either accepting or rejecting, in whole or in part, the Commission's recommendations.⁷ If the President disapproves the recommendations, the Commission must then submit a revised recommendation to the President for his consideration.⁸

If the President approves all of the recommended sites, he may transmit a copy of the list to Congress.⁹ If the President does not send this list to Congress by November 7, 2005, the base closure process terminates.¹⁰

Finally, the process may be terminated by a joint resolution of disapproval passed within 45 days after the President transmits the list of recommendations.¹¹ As a matter of course, this congressional action would be subject to a presidential veto and the ordinary requirements for overriding a veto. If Congress does not act, the Secretary of Defense may then proceed to implement the recommendations.

National Guard Background

The National Guard is the modern incarnation of the militia referred to in the Constitution.¹² The Constitution provides for both a state and federal role in controlling the militia.¹³ Congress is empowered to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States"¹⁴ The Constitution also reserves to the

⁴ *Id.* §§ 2903(d); 2914(d).

⁵ *Id.* §§ 2903(d)(2)(B); 2914(d)(3). Additional requirements are applicable if the Commission proposes to add or expand a closure or realignment.

⁶ *Id.* §§ 2903(d)(2)(A), (d)(3); 2914(e).

⁷ *Id.* §§ 2903(e)(1)-(3); 2914(e).

⁸ *Id.* §§ 2903(e)(3); 2914(e)(1), (2).

⁹ *Id.* §§ 2903(e)(4); 2914(e)(4).

¹⁰ *Id.* § 2914(e)(3).

¹¹ *Id.* § 2904(b).

¹² *See* *Lipscomb v. Federal Labor Relations Authority*, 333 F.3d 611, 613 (5th Cir. 2003).

¹³ *Perpich v. Dep't of Defense*, 496 U.S. 334, 350-52 (1990) (discussing the role of the federal and state governments in regulating the National Guard).

¹⁴ U.S. Const. Art. 1, § 8, cl. 15, 16.

States "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress...."¹⁵

By federal statute, the Guard has also become a reserve component in the United States Armed Forces. Specifically, federally recognized Guard units are part of the Air National Guard of the United States or Army National Guard of the United States.¹⁶

Pursuant to federal law, all fifty states (as well as U.S. territories, Puerto Rico, and the District of Columbia) maintain units of the National Guard.¹⁷ Under the laws of all of the states, the Governor acts as commander-in-chief, with state authority over the Guard remaining until Congress, consistent with the Constitution, exercises its authority in a manner to preempt the state regulatory role.¹⁸

Section 18238

10 U.S.C. § 18238 has been cited as a potential impediment to BRAC activities. That provision of law states:

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

Thus, the question is whether a state Governor (or the commanding general of the National Guard of D.C.) would have the authority to prevent a BRAC action to the extent that it would result in the relocation or withdrawal of a National Guard unit. It appears, however, that the applicability of 10 U.S.C. § 18238 would be somewhat more limited.

The provision itself references relocations or withdrawals made "under this chapter." The phrase "this chapter" is an apparent reference to Chapter 1803 of title 10, which governs facilities for Reserve components and includes 10 U.S.C. §§ 18231-18239. These authorities were originally enacted as the National Defense Facilities Act of 1950, and despite subsequent revision, remain substantially similar to their original form.¹⁹ As described in 10 U.S.C. § 18231, the purpose of these provisions is to provide for "the acquisition, by purchase, lease, transfer, construction, expansion, rehabilitation, or conversion of facilities necessary for the proper development, training, operation, and maintenance of the reserve components of the armed forces"²⁰ Accordingly, these provisions authorize the Secretary of Defense to acquire facilities for use by Reserve components. Incidental to this authority is an authorization to transfer title to property acquired under § 18233(a)(1) to a state, so long

¹⁵ U.S. Const. Art. ,1 § 8, cl. 16.

¹⁶ 10 U.S.C. §§ 261(a)(1), (5).

¹⁷ 32 U.S.C. § 104 (a).

¹⁸ See, e.g., MINN. CONST. art. 5, § 3; N.C. CONST. art. XII, § 1; PA. CONST. art. IV, § 7; VA. CODE ANN. § 44-8; see also *People ex rel. Leo v. Hill*, 126 N.Y. 497, 504 (N.Y. 1891); *Bianco v. Austin*, 197 N.Y.S. 328, 330 (N.Y. App. Div. 1922).

¹⁹ See Act of Sept. 11, 1950, c. 945, 64 Stat. 830.

²⁰ 10 U.S.C. § 18231(1); see also H.R. CONF. REP. NO. 3026, 81st Cong. (1950), reprinted in 1950 U.S.C.C.A.N. 3705.

as such transfer is incidental to the expansion, rehabilitation, or conversion of the property for joint use by two or more Reserve components.²¹ Thus, it is certainly conceivable that acquisition of new facilities and, potentially, the transfer of properties could result in relocation of particular units of the National Guard.²² Thus, in circumstances where transfer of units would occur in connection with the exercise of these authorities, 10 U.S.C. § 18238 would apply.

The law governing BRAC activities is codified at 10 U.S.C. § 2687 note. These authorities are contained in chapter 155 of Title 10 and are not related to the chapter of the code containing § 18238 nor to the law which originally contained § 18238. Thus, it would appear that the chapter 1803 provision limiting authority to relocate Army and Air National Guard units would, by its own terms, not serve as a limitation on actions taken pursuant to BRAC-related law.

It should be noted that the Defense Base Closure and Realignment Act does not specifically address 10 U.S.C. § 18238. If, however, a court were to determine that this provision was intended to apply to relocations resulting from the exercise of authorities outside of chapter 1803 of the United States Code, the enactment of the Defense Base Closure and Realignment Act could be interpreted as an implicit repeal of the § 18238 limitation. The arguments in this regard are discussed, *infra* pages 8-10, following the section analyzing the language contained in 32 U.S.C. § 104(c).

Section 104(c)

Whether 32 U.S.C. § 104(c) places a limitation on the authority of DOD and the BRAC Commission to recommend or take BRAC-related actions at National Guard facilities hinges upon the answers to several questions. It is first necessary to determine the scope of the provision in order to ascertain whether Congress intended it to apply to actions precipitated by BRAC decisions. This inquiry into the language and legislative history of the provision itself is followed by a separate section analyzing whether Congress amended or repealed any applicable limitation on federal authority to close or realign National Guard facilities by enacting the Defense Base Closure and Realignment Act.

In general, 32 U.S.C. § 104 provides that each "State or Territory and Puerto Rico may fix the location of the units and headquarters of its National Guard." It also prescribes, pursuant to Congress' constitutional authority, the general organization of the Guard and the composition of Guard units. Relevant to the present inquiry, subsection (c) states:

To secure a force the units of which when combined will form complete higher tactical units, the President may designate the units of the National Guard, by branch of the Army or organization of the Air Force, to be maintained in each State and Territory, Puerto

²¹ 10 U.S.C. § 18233(b), (a)(2).

²² It would not appear that 10 U.S.C. § 18238 would limit its gubernatorial approval requirement to relocations or withdrawals that would result in transfer of Air National Guard and Army National Guard units to locations outside of a state. Indeed, the provision as originally enacted clearly indicated that approval would be required for unit movements "from any community or area" National Defense Facilities Act of 1950, c. 945, § 4, 64 Stat. 830 (1950). These words were subsequently deleted as surplusage. See Act of Aug. 10, 1956, c. 1041, 70A Stat. 123; House and Senate Reports to accompany H.R. 7049, available at 1956 U.S.C.C.A.N. 4613.

Rico, and the District of Columbia. *However, no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.*²³

Under this provision, the President may designate the units of the Guard, by branch or organization, that will be maintained in each state, meaning that the President can choose the function particular units will serve and their level of command.²⁴ The provision also supplies a limitation on the exercise of federal authority by conditioning any changes in the branch or organization of a unit upon gubernatorial approval. Thus, redesignation of a unit's position in the command echelon or a change in its functions would appear to require gubernatorial consent. In addition, this limitation states that changes to the "allotment" of a unit are subject to gubernatorial approval. According to regulations issued by the National Guard Bureau of the Department of the Army and Air Force, allotment of a unit means its allocation to a particular state or group of states.²⁵

It may be possible to interpret § 104(c) to apply to BRAC actions. Unlike 10 U.S.C. § 18238, § 104(c) does not contain a provision expressly limiting its application to changes that result from the use of a given set of authorities. It is therefore arguable that the second sentence of this provision is applicable to a change resulting from the exercise of any authority. Further, it is possible that Congress intended the limitation to apply generally to changes that might be authorized by both law existing at the time of the provision's enactment and laws enacted in the future. On the other hand, it could also be argued that the limitation is applicable only to the exercise of the authority granted to the President by § 104(c) itself, namely the authority to designate the units of the National Guard to be maintained throughout the states and other specified U.S. possessions or, perhaps more broadly, to the exercise of other authorities enacted contemporaneously with § 104(c).

Despite the lack of a clear expression that the gubernatorial approval language of § 104(c) is applicable only to the exercise of authorities contained elsewhere in § 104, there is support for implying such a limitation to the provision's application. Generally, courts will not read provisions or portions of a statutory provision in isolation. Thus, it is appropriate when interpreting a statute to examine the context of a given provision and to "give effect to the plainly expressed clauses which precede and follow [the provision at issue]"²⁶ It is arguable, in this instance, that the second sentence of § 104(c) is impliedly tied to and meant to modify the first sentence of that subsection. As such, it serves as a traditional proviso, or a statement "restricting the operative effect of statutory language to less than what its scope of operation would be otherwise."²⁷ Provisos are typically interpreted according to the same principles applied to any other type of statutory provision, except that where there is ambiguity concerning "the extent of the application of the proviso

²³ 32 U.S.C. § 104(c) (emphasis added).

²⁴ See GlobalSecurity.org, Military Lineage Terms, available at [<http://www.globalsecurity.org/military/agency/army/lineage-terms.htm>].

²⁵ DEPARTMENTS OF THE ARMY AND THE AIR FORCE, NATIONAL GUARD BUREAU, *Organization and Federal Recognition of Army National Guard Units*, NGR 10-1 § 2-2 (Oct. 2002).

²⁶ *Western Union Tel. Co. v. Nester*, 309 U.S. 582, 589 (1940).

²⁷ 2A, Norman J. Singer, *STATUTES AND STATUTORY CONSTRUCTION*, § 47:08 at 235 (6th ed. 2000).

on the scope of another provision's operation, the proviso is strictly construed."²⁸ In addition, some judicial precedent indicates that a proviso's effect is limited to the section of a statute to which it is attached.²⁹ If this approach to statutory construction were adopted, it would appear likely that application of the limiting provision of § 104(c) would not be extended to changes to the branch, organization, or allotment of a unit resulting from BRAC actions. However, modern jurisprudence appears to adopt the position that provisos are to be interpreted in accordance with legislative intent and that "the form and location of the proviso may be some indication of the legislative intent," but will not be controlling.³⁰

An examination of the legislative history of § 104(c) may shed some light upon the intent behind the current limitation contained within the provision. The provision originates from language contained in the National Defense Act of 1916.³¹ That law altered the status of the then existing state militias by constituting them as the National Guard of the United States.³² The law provided federal compensation for Guard members and governed the basic organization, equipping, and training of the National Guard. It also authorized "federalization" of the Guard by units, rather than through the drafting of individual soldiers.³³ Section 60 of that act was comparable to the current law. It stated:

Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in the time of peace to such general exceptions as may be authorized by the Secretary of War. *And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units.*³⁴

Thus, in its original incarnation, this provision contained no limitation on the President's authority to designate which units of the Guard were to be maintained in which location. Subsequent to its enactment, the National Defense Act was amended several times. Section 6 of the National Defense Act Amendments of 1933³⁵ struck out the original language. The new provision retained much of the original substance, but included a limitation on presidential authority comparable to the current law. The provision stated:

[T]he President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: *Provided, That*

²⁸ *Id.* at 236.

²⁹ *United States v. Babbit*, 66 U.S. 55 (1862); *United States v. Maryland Cas. Co.*, 49 F.2d 556 (7th Cir. 1931); *Wirtz v. Phillips*, 251 F. Supp. 789 (W.D. Pa. 1965).

³⁰ 2A, Norman J. Singer, *STATUTES AND STATUTORY CONSTRUCTION*, § 47:09 at 240 (6th ed. 2000).

³¹ National Defense Act, ch. 134, 39 Stat. 166 (1916).

³² *See New Jersey Air Nat'l Guard v. Federal Labor Relations Authority*, 677 F.2d 276, 278 (3d Cir. 1982).

³³ *See 10 U.S.C. § 12301; Holdiness v. Stroud*, 808 F.2d 417, 420-21 (5th Cir. 1987).

³⁴ National Defense Act, ch. 134, § 60, 39 Stat. 197 (emphasis added).

³⁵ National Defense Act Amendments, ch. 87, Pub. L. No. 73-64, 48 Stat. 153 (1933).

no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.³⁶

A subsequent revision to the law changed the form of this above-quoted proviso, inserting it into a separate sentence. However, this change apparently was stylistic in nature and was not intended to have any legal consequences.³⁷ Thus, at the time the gubernatorial approval requirement was enacted, it would likely have been interpreted to have applied only to the section to which it was attached, in accordance with the jurisprudence of the time.³⁸ Thus, it is arguable that the limitation contained within § 104(c) is not applicable to any changes in the branch, organization, or allotment of a unit that result from BRAC actions.

However, there are indications that Congress perhaps intended a broader application of the proviso. In explaining the reasoning behind this addition to the law, the House Committee on Military Affairs stated that “where a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service, [] such State should not arbitrarily be compelled to accept a change in such allotment, and this amendment grants to the State concerned the right to approve *any* such change which may be desired by the Federal Government.”³⁹ Resorting to more modern principles of statutory interpretation, congressional intent, as stated, is controlling as to the scope of a proviso’s application. Thus, this report language gives some weight to the argument that § 104(c) applies to any exercise of authority that results in the types of changes it references regardless of whether the changes are precipitated by the exercise of § 104(c) authorities.

It is also arguable, however, that the report language indicates only that Congress, in referring to “any such change which may be desired by the Federal Government,” considered the President’s authority under section 104(c) or more broadly, under the National Defense Act as it existed in 1933, to be the only source of authority for the changes it wished to subject to the limitation. In addition, while by no means dispositive, the report language does indicate that the gubernatorial approval requirement is meant to prohibit *arbitrary* changes to Guard allotment; it is certainly arguable that the BRAC process, which Congress devised to be premised on methodical analysis and review, would not produce the sort of arbitrary changes the proviso, even broadly interpreted, is targeted to prevent. In addition,

³⁶ *Id.* § 6.

³⁷ It should be noted that this provision along with all of Title 32 of the United States Code was revised and enacted into positive law, by Public Law 84-1028. Prior to this, Title 32 of the Code served as *prima facie* evidence of the law it restated; thus, reference to the original Statutes at Large was needed to obtain a truly reliable statement of the law. During the revision and enactment of Title 32, the structure of section 104(c) was modified. The 1956 revision, among other things, removed the phrase “Provided, That” and placed the gubernatorial approval requirement in a separate sentence, beginning with the word “However.” As explained in the legislative history for this revision, “the pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties, or functions.” S. REP. NO. 84-2484 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4640. Where other changes to Title 32, including § 104, were intended to have legal consequences, an explanation of the change was included in the revision notes following the provision in the revised Code. No explanation of the change mentioned here appears. Thus, it would seem appropriate to conclude that no alteration to the substance of the law was intended by this revision.

³⁸ See *supra* note 29 and accompanying text.

³⁹ H.R. REP. NO. 73-141 at 6 (1933) (emphasis added).

it is notable that, despite the modern reliance on congressional intent and not formalism alone, courts will still look to the structure of a provision as relevant to deciphering congressional intent.⁴⁰ That the proviso was attached to the authority granted the President in the first sentence of § 104(c) could thus remain influential in determining whether the gubernatorial approval requirement applies to authorities outside of that provision.

In sum, unlike 10 U.S.C. § 18238, § 104(c) is more ambiguous in the scope of its application. Canons of statutory construction in favor at the time of the provision's enactment presumed the limitation of a proviso's application to the section to which it is attached. However, there is some indication in the legislative history that the proviso was intended to apply to any of the referenced types of changes, regardless of the source of their authorization. Thus, it remains necessary to examine the possible changes to this provision rendered by the Defense Base Closure and Realignment Act.

The Impact of Base Closure and Realignment Act

If it were determined that the provisions described above do apply broadly to the exercise of any authorities that might result in the type of changes or relocations proscribed by §§ 104(c) and 18238, it may still be arguable that the Defense Base Closure and Realignment Act supersedes these earlier provisions. Several principles of statutory interpretation inform the analysis of how these laws relate to one another.

It is clear that Congress can specify in legislation if earlier enacted statutes are to remain applicable or be modified in some particular way.⁴¹ The Base Closure Act does not directly address either of the provisions at issue here. Likewise, it does not appear to expressly authorize closure or realignment action despite any other existing law. In fact, the Base Closure Act does contain a waiver provision exempting BRAC actions from the operation of certain laws. That provision, however, references only limitations contained in appropriations acts and 10 U.S.C. §§ 2662 and 2687.⁴² Thus, unless an implied modification of §§ 104(c) and 18238 can be found in the Base Closure Act, these two provisions could limit the authority to close or realign facilities, assuming, as described above, that a court determined they applied to BRAC actions in the first place.

Because the Base Closure Act does not expressly exempt the actions it governs from compliance with the gubernatorial approval provisions found elsewhere in the Code, additional rules of statutory interpretation become useful. First, it is generally accepted that a statute enacted later in time can trump an earlier duly enacted law even absent an express statement to that effect.⁴³ The Base Closure Act was originally enacted in 1990 and remains largely in effect today. Further, it has been amended multiple times, most recently in 2001 authorizing the current 2005 round of BRAC actions and in 2004, altering certain authorities granted to the Secretary of Defense.⁴⁴ The relevant provisions contained in 10 U.S.C. §

⁴⁰ See *supra* note 30 and accompanying text.

⁴¹ See, e.g., *United States v. Fausto*, 484 U.S. 439, 453 (1988).

⁴² Base Closure Act, § 2905(d).

⁴³ See, e.g., *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

⁴⁴ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat 1811 (October 28, 2004); National Defense Authorization Act for Fiscal Year 2002, (continued...)

18238 and 32 U.S.C. § 104(c) were both originally enacted well before the Base Closure Act in 1958 and 1933, respectively. Each has been amended subsequently as well. The most recent revision to §104(c) occurred in 1988, and was only a technical amendment. Section 18238 was most recently amended in 1994, after enactment of the Base Closure Act. This revision simply renumbered the provision and made technical corrections throughout the chapter containing §18238. Given these facts, different analysis applies to each provision.

Section 104(c) clearly predates the enactment of the Base Closure Act. Thus, it is possible that the Base Closure Act repealed any limitation otherwise imposed by the provision by providing the “exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.”⁴⁵ However, before a court will find that a later statute implies repeal of an older one, it must generally determine that the two provisions are in irreconcilable conflict.⁴⁶ The extent of any conflict in this instance is subject to debate. Certainly, the limitation in § 104(c) could prevent BRAC actions from occurring as intended by DOD, the BRAC Commission, and the President, and could be deemed inconsistent with the overall regime created by the Base Closure Act.

On the other hand, § 104(c) addresses a specific set of changes that cannot occur to National Guard units without gubernatorial approval. Thus, there is at least some range of BRAC action (e.g. a realignment of equipment or activities that does not result in the movement of units) that could occur absent gubernatorial consent. In addition, the consent requirement could be characterized as a limitation on actions that are the consequences of a realignment or closure, such as unit re-allotment, and not a limitation on the closure or realignment authority itself, thus making harmonization possible. Still, such an interpretation may parse statutory language too finely to be sustainable; indeed, the Base Closure Act authorizes the Secretary of Defense to “take such actions as may be necessary to close or realign any military installation, including the ... the performance of such activities ... as may be required to transfer functions from a military installation being closed or realigned to another military installation....”⁴⁷ Accordingly, it appears that § 104(c), if applied to the BRAC process, could frustrate an authorized BRAC action; further, harmonization of the provision with the Base Closure Act, while perhaps possible, may stretch the statutory language.

The issue of whether § 18238 supersedes the Base Closure Act, or vice versa, is somewhat more complicated. As stated above, § 18238 was first enacted in 1950 and revised multiple times subsequently, including a technical amendment in 1994, after enactment of the Base Closure Act. Further, the Base Closure Act has also been amended following the last revision of § 18238, in 2001 and 2004. Given that none of the amendments mentioned address the relationship between the BRAC process and § 18238 and given the presumption against implied repeal, it may not be sensible to ascribe priority to the provision that has most recently undergone minor and unrelated amendments. Indeed, statutory silence is rarely a

⁴⁴ (...continued)

Pub. L. No. 107-107, 115 Stat. 1012 (December 28, 2001).

⁴⁵ Base Closure Act, § 2909(a).

⁴⁶ See *United States v. Estate of Romani*, 523 U.S. 517, 530-533 (1998) (holding that a later, specific statute trumps an earlier, more general statute).

⁴⁷ Base Closure Act, § 2905(a)(1)(A).

reliable indication of congressional intent, and as the Supreme Court has stated, “it would be surprising, indeed,” for Congress to effect a “radical” change in the law “*sub silentio*” via “technical and conforming amendments.”⁴⁸ In fact, it is arguable that each amendment to § 18238 and the Base Closure Act, in not addressing the provisions’ relation to one another, affirmed the relationship established at the time of the Base Closure Act’s enactment.⁴⁹ If this is the case, analysis of the relationship between the two laws would be similar to the analysis of the Base Closure Act’s relationship with § 104(c). Therefore, it is arguable that because § 18238 deals with relocation of units and not with closure or realignment of facilities, the two provisions could be effectively harmonized so as not to require implied repeal of the earlier provision.⁵⁰ On the other hand, it would seem more likely that the Base Closure Act is incompatible with the limitation contained in § 18238 and that the limitation must fall aside.

It might also be plausible to argue that the subsequent amendments to the provisions at issue should also be taken into account. Arguably, after enacting the Base Closure Act, Congress was aware that it might supersede § 18238. Along these lines, had Congress intended a different result, it would have indicated its contrary intent in amending § 18238 in 1994. Similarly, the subsequent amendments to the Base Closure Act could be seen as implicitly affirming that § 18238 was not to limit BRAC actions. On the other hand, if the burden of clarifying the relationship between the laws at issue does fall upon the last section to be amended, even if only a minor or technical change is made, then § 18238 should remain applicable as a limitation on BRAC activities, as the Base Closure Act remains silent on the relationship of these laws even after the 2005 amendments. Finally, it should be noted again that despite the foregoing discussion, § 18238, even more so than § 104(c), seems to clearly indicate via the text of the provision, that its application is limited and does not extend to the BRAC process.

Conclusion

There would appear to be federal authority to require the closure or realignment of National Guard facilities under the Constitution of the United States. Several provisions of federal law, however, make it somewhat less clear if Congress has authorized the exercise of such authority by enacting the Defense Base Closure and Realignment Act and by authorizing a succession of BRAC rounds. The language of 10 U.S.C. § 18238 appears to indicate that the limitation it imposes upon the relocation or withdrawal of National Guard units is confined to a specified subset of authorities that does not include the Base Closure Act. 32 U.S.C. § 104(c) is less clear in this regard. Its limitation on changes to the branch, organization, or allotment of a unit, as originally enacted, served as a proviso attached to a

⁴⁸ *Director of Revenue of Mo. v. CoBank, ACB*, 531 U.S. 316, 323 (2001).

⁴⁹ *See Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19-20 (1st Cir. 1998). It should be noted that these cases dealt with congressional silence in the face of clear judicial or administrative interpretation, and that there does not appear to have been a similar interpretation of the provisions at issue here during the period in which Congress took action.

⁵⁰ *See, e.g., Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

specific authority still contained within § 104(c). The provision has been revised, apparently without intending legal consequences, in such a manner as to perhaps indicate broader application. It is also arguable that even in its original form, the provision was intended to apply regardless of the source of authority for effectuating the types of changes the provision references. Even taking into account the legislative history behind § 104(c), the exact scope of its application is unclear, although cogent arguments against applying the provision to the BRAC process exist.

If a court were to determine that application of the provisions at issue was not limited to the authorities to which they appear at least structurally attached, general principles of statutory construction would tend to favor avoiding implied repeal by the later enacted or amended provision in favor of harmonization of potential conflicts, where possible. In such circumstances where the limiting provisions better fit the specifics of a situation, it may be appropriate to apply the limitation to the BRAC process. Despite this, it remains possible to argue that the intention behind BRAC is to provide for comprehensive closure and realignment authority and that application of §§ 18238 and 104(c) would frustrate the purpose of the Base Closure Act.