

*The Honorable Lloyd Newton*  
*Commissioner*

**DEFENSE BASE CLOSURE AND  
REALIGNMENT COMMISSION**



**WASHINGTON, DC  
OSD, GAO, OBC HEARINGS**

**MONDAY JULY 18, 2005**

The issues raised are a concern to us as well and, as a result, our second panel this morning will deal exclusively with the Commission's questions regarding the Air National Guard recommendations. Before introducing

our witnesses allow me also to make this point. All interested parties to this issue should be aware that the Commission believes a solution is needed. To say that eliminating all of the Secretary's recommendations regarding the Air National Guard is a solution would be irresponsible. Therefore, we would urge our next panel of witnesses, and the Governors, and the TAGs, to work to a solution that serves the best interests of national security and the country. We look forward to seeing the results.

We will now hear from Lieutenant General Stephen Wood, Deputy Chief of Staff of the Air Force for Plans and Programs; Major General Gary Heckman, Assistant Deputy Chief of Staff of the Air Force for Plans and Programs; Major General Scott Mayes, the Commander of 1<sup>st</sup> Air Force and Commander of the Continental U.S. North American Aerospace Command Region, and Lieutenant General Daniel James, Director of the Air

National Guard. The Commission looks forward to hearing your views on this important subject.

Following the testimony of our first two panels, we will hear from the Government Accountability Office's Comptroller General, the Honorable David Walker who will offer testimony on the GAO's analysis of the Defense Department's BRAC selection process. This separate view and examination of the methodology used to arrive at the decisions embodied in the Secretary's realignment or closure proposals is an important step in the Commission's process.

And finally, at 1:30 today, we look forward to hearing from Commissioners of the Overseas Basing Commission, chaired by Mr. Al Cornella. As we continue to assess the BRAC proposal's ability to support military force structure, including the 70,000 military personnel anticipated to return to our shores, the afternoon's testimony should provide important insight and additional framework for our independent assessment.

At this time I would invite all our Department of

Defense witnesses for this hearing to please stand for the administration of the oath required by the Base Closure and Realignment statute. The oath will be administered by Dan Cowhig, the Commission's Designated Federal Officer.



# Meeting Agenda

1. Review Schedule July 17 to November 7, 2005
2. Status of Pay and Travel Claim Issues
3. Public Access to the Commission
4. Air National Guard Legal Issue and Status
5. Review of 1 July GAO Report Highlights
6. Adds Hearing Background Information
  - a. Review July 14 DoD Response to Chairman's July 1 Letter
  - b. Reasons for Consideration
  - c. Sample format for Presentation on Tuesday
7. Voting Procedure and Recusals
8. Wrap-up
  - a. Hearing Books - available now
  - b. Pick-up at Hotel on Monday - 7:30 am. Breakfast in Senate Dirksen
  - c. Dinner transportation



EXIT

Roger:

My staff and I have taken a quick look at the proposal. We have not gone into detail because, as you know, this plan has been overcome by events. In light of legal opinion by the Defense Base Closure and Realignment Commission General Counsel's office, the FTF Excursion Plan is clearly a non-starter and should be dropped immediately and in its entirety.

The Adjutants General need to inform the Air Force that we will not be a party to any attempt to misuse the BRAC process to disband Guard units, shift equipment and personnel or otherwise address issues that are outside BRAC. We are prepared to start from scratch to discuss these issues with the Air Force and NGB using the normal chain of command/communications with the clear understanding that certain actions will require the consent of our governors. The draft Excursion Plan might do a couple of things that ~~some might desire~~. You're right when you say that we have come a long way to get the Commission to consider making dramatic changes and that now is not the time to march off in different directions. But the approach taken by this plan moves in the wrong direction at the wrong time.

Pennsylvania absolutely **will not** agree to any plan or proposal that allows the Air Force to take out Air National Guard units as part of the BRAC process or otherwise without the consent of the Governor. None of the states should agree to any such concept. We are defending the important principles of federalism that are the foundation on which our National Guard is built. Any "compromise" that ignores the ~~Congressionally-mandated requirement~~ for gubernatorial approval is wrong for the Guard, not just in Pennsylvania but across America. My governor has not and will not approve deactivation of the 111th Fighter Wing, and I am very concerned that an AGAUS proposal appears to agree with this illegal and ill-advised action.

I'm sure you've read the legal opinion issued by the BRAC Commission staff counsel. His views track those that I and other TAGs have been advocating for the last two months. BRAC is about installations, not units and equipment. It's wrong to try to use the Base Closure Act to make changes in how units are equipped or organized, and that's exactly what the FTF Excursion Plan tries to do. It's wrong to use the Base Closure Act to relocate, withdraw, disband or change the organization of ANG units, but that's what the Excursion Plan appears to sanction. It's wrong to use the BRAC process to transfer aircraft from the ANG of one state to another, but that's what the Excursion Plan appears to allow. Where is the requirement for consent of the governors built into this plan?

All the Adjutants General should take a unified stance against misuse of the BRAC process in the ways found wanting by the BRAC Commission's own lawyers. We must not make any compromise that subverts the authority of our states and our governors. It's time for the Air Force to simply withdraw all its BRAC recommendations for ANG units and start from scratch to undertake the kind of collaborative and cooperative process that should have been used in the first place. And, yes, that means they will have to meet with TAGs and ANG staff from each affected state.

v/r  
Jessica

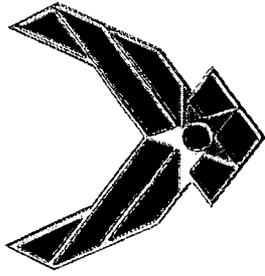
General Newton – Two More Questions

1. How viable will enclaves be over the next several years without a weapons system attached to them?
2. Are the Expeditionary Combat Support packages, as outlined in several ANG recommendations, actually funded?
3. What is the likelihood of the enclaves getting a future mission?

Frank  
From  
Jane

# Comparative Military Value Rankings Between Ellsworth AFB, Grand Forks AFB, & Minot AFB

Air Force Function	1 <sup>st</sup> in Rankings		2 <sup>nd</sup> in Rankings		3 <sup>rd</sup> in Rankings	
Bomber	Ellsworth	50.81	Minot	45.72	Grand Forks	38.48
Lift	Ellsworth	59.40	Minot	54.34	Grand Forks	50.53
Tanker	Ellsworth	83.73	Grand Forks	63.52	Minot	62.74
Fighter	Ellsworth	58.06	Minot	56.64	Grand Forks	55.88
SOF	Minot	45.12	Ellsworth	43.91	Grand Forks	43.75
C2ISR	Ellsworth	87.72	Minot	77.04	Grand Forks	76.33
UAV	Grand Forks	70.93	Ellsworth	69.73	Minot	67.53
Space	Ellsworth	84.12	Minot	83.93	Grand Forks	82.64



Candidate # USAF - 0018V3/ S200.3  
#USAF - 0117V2/ S420c3

	Ellsworth Air force Base	Grand Forks Air force Base
One-time Cost:	\$229 M	\$129 M
Payback period:	1yr / 2009	Immediate
NPV Savings:	\$1,853 M	\$2,656 M



# CRS Report for Congress

Received through the CRS Web

## **The Availability of Judicial Review Regarding Military Base Closures and Realignment**

**June 24, 2005**

Ryan J. Watson  
Law Clerk  
American Law Division

# 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.

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 Realignment

## Introduction<sup>1</sup>

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

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.<sup>4</sup> 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.<sup>5</sup> In particular, the report synthesizes key federal court decisions that address three

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<sup>1</sup> 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.

<sup>2</sup> 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).

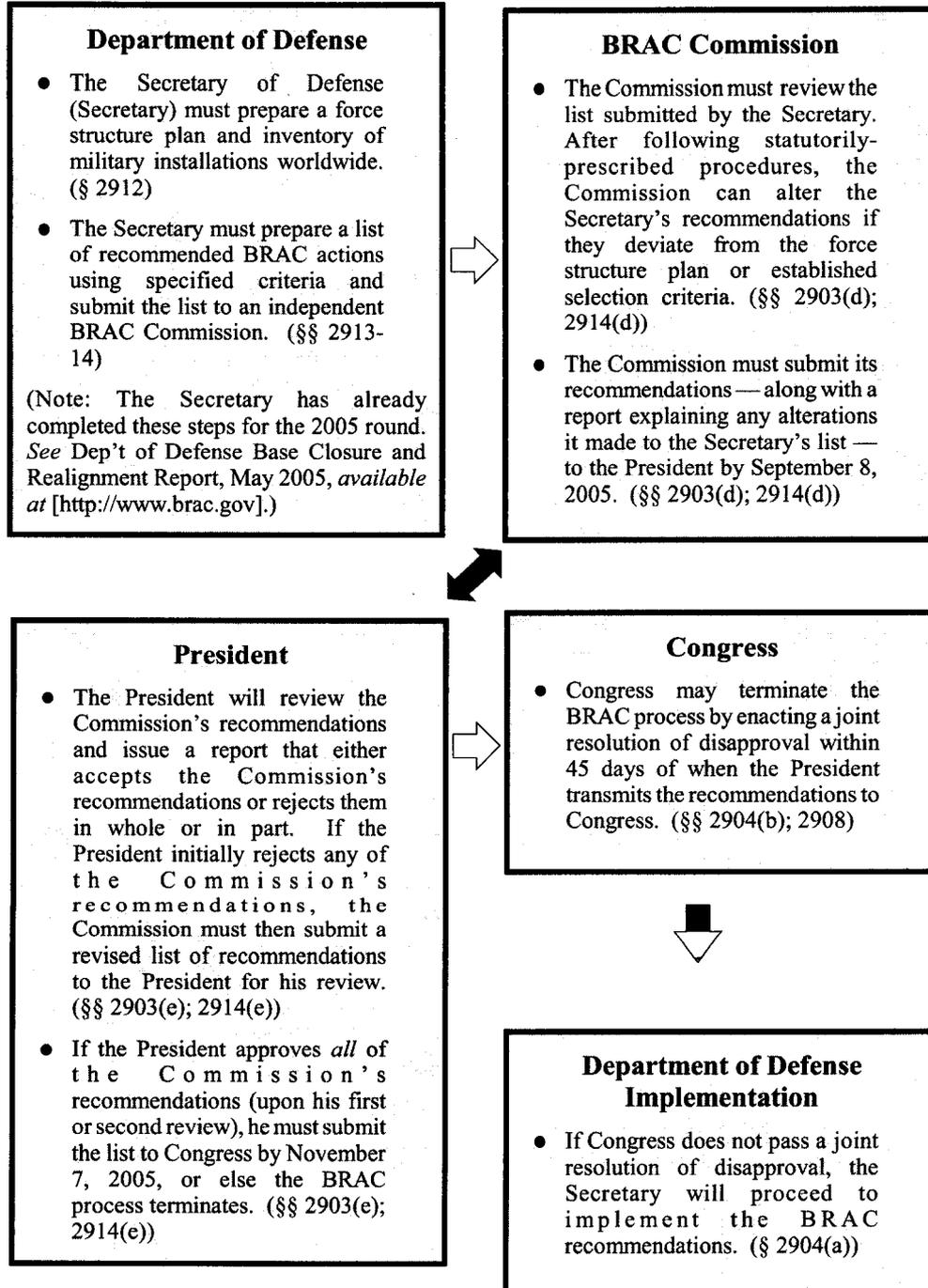
<sup>3</sup> P. L. 107-107, § 3001, 115 Stat. 1012 (2001).

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

<sup>5</sup> 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 Process<sup>6</sup>**



<sup>6</sup> 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,”<sup>7</sup> 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.”<sup>8</sup>

### 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.<sup>9</sup> Specifically, plaintiffs alleged that the Secretary’s report and the Commission’s report were subject to judicial review under the APA.<sup>10</sup>

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].”<sup>11</sup> 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.’”<sup>12</sup> 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.<sup>13</sup> Thus, the Court held that they were unreviewable under the APA.<sup>14</sup>

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.<sup>15</sup> 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

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<sup>7</sup> 5 U.S.C. § 704 (2000).

<sup>8</sup> *Id.* § 701(a).

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

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

<sup>11</sup> *Dalton*, 511 U.S. at 469.

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

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

<sup>14</sup> *Dalton*, 511 U.S. at 470-71.

<sup>15</sup> *See id.*

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

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.<sup>17</sup>

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).<sup>18</sup> Therefore, the lack of finality in BRAC actions taken by the Secretary or the Commission bars judicial review of such actions under the APA.<sup>19</sup>

## 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.<sup>20</sup> The foundation for this argument is that under the APA, judicial review is not available if statutes preclude judicial review.<sup>21</sup>

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).<sup>22</sup> Souter’s opinion concluded that Congress intended for BRAC actions to be “quick and final, or [for] no action [to] be taken at all.”<sup>23</sup>

Souter cited a variety of evidence to support the contention that Congress generally intended to preclude judicial review under the Base Closure Act:<sup>24</sup>

- 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

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<sup>16</sup> *Cohen*, 992 F.2d at 381-82.

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

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

<sup>19</sup> *Dalton*, 511 U.S. at 468-71.

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

<sup>21</sup> *See* 5 U.S.C. § 701(a)(1).

<sup>22</sup> *Id.* at 479, 483 (Souter, J., concurring in judgment).

<sup>23</sup> *Id.* at 479 (Souter, J., concurring in judgment).

<sup>24</sup> *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.”<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.”<sup>28</sup> The Court continued, saying that “if no *judicially manageable standards* are

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<sup>25</sup> 5 U.S.C. § 701(a)(2).

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

<sup>27</sup> *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).

<sup>28</sup> *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].”<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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.”<sup>33</sup>

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.

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<sup>29</sup> *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.

<sup>30</sup> *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.

<sup>31</sup> *Nat’l Fed’n*, 905 F.2d at 405-06.

<sup>32</sup> *Id.*

<sup>33</sup> 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.<sup>34</sup> Although the APA’s definition of an “agency” does not explicitly include or exclude the President,<sup>35</sup> the Court had previously held that the President is not subject to the APA, due to separation of powers principles.<sup>36</sup>

## 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.<sup>37</sup> The Court stated that not every case of *ultra vires* conduct by an executive official was *ipso facto* unconstitutional.<sup>38</sup>

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.<sup>39</sup> On appeal, the Supreme Court characterized this claim as a statutory claim — not as a constitutional claim.<sup>40</sup>

The Court assumed *arguendo* that some statutory claims against the President could be judicially reviewable apart from the APA.<sup>41</sup> 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.”<sup>42</sup> According to

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<sup>34</sup> *Dalton*, 511 U.S. at 470; *accord Franklin*, 505 U.S. at 801.

<sup>35</sup> 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].”

<sup>36</sup> See *Franklin*, 505 U.S. at 800-01.

<sup>37</sup> *Dalton*, 511 U.S. at 472-75.

<sup>38</sup> *Id.* at 472-74.

<sup>39</sup> *Dalton*, 511 U.S. at 466, 474.

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

<sup>41</sup> *Id.* at 474.

<sup>42</sup> *Id.*

the Court, the Base Closure Act did not limit the President's discretion in any way.<sup>43</sup> 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."<sup>44</sup> Therefore, the issue of how the President chose to exercise his discretion under the Base Closure Act was held to be judicially unreviewable.<sup>45</sup>

Justice Blackmun, concurring in part and concurring in the judgment, attempted to narrowly define the scope of the *Dalton* decision.<sup>46</sup> 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).<sup>47</sup>

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.<sup>48</sup>

## 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.<sup>49</sup> Specifically, the Court distinguished the issues in *Dalton* from those in *Youngstown Sheet & Tube Co. v. Sawyer*, a landmark case on presidential powers.<sup>50</sup> The Court said that *Youngstown* "involved the conceded *absence* of *any* statutory

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

<sup>44</sup> *Dalton*, 511 U.S. at 476.

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.* (Blackmun, J., concurring in judgment).

<sup>48</sup> *Id.* at 476-77.

<sup>49</sup> *Id.* at 472-75.

<sup>50</sup> *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.”<sup>51</sup> 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.<sup>52</sup> However, the Base Closure Act has not yet been held unconstitutional by any federal appellate courts.

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<sup>51</sup> *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.

<sup>52</sup> *Nat’l Fed’n*, 905 F.2d at 404-05.



## USMC

- **MCRD San Diego**
  - Consolidate with MCRD Parris Island
    - Provide efficiencies while maintaining throughput
    - Allows for surge
    - Would not require difficult to achieve level loading
    - No clear reason for having to have two.
  
- **NAS Oceana**
  - Move to Moody AFB
    - Eliminates severe encroachment
    - Not a money saver - ~\$750M for Navy move alone
    - 10,000 personnel
  
- **Broadway Complex, San Diego**
  - Close Broadway Complex
    - Consolidate onto existing Navy facilities in San Diego
      - 32<sup>nd</sup> Street primary
    - Prime real estate for re-development/sale
  
- **NAS Brunswick**
  - Close rather than realign
    - Immediate payback
    - Allows community reutilization
    - Reduces excess capacity
    - Can Det MMA at other facilities
    - Allows full range of options for consideration
  
- **NAS/JRB Willow Grove**
  - Navy only piece appears to make sense
  - However, ANG piece uncoordinated with States
  - AFRES Airlift Wing not included in analysis
  - Why close one of three JRB'S?
  
- **Naval Postgraduate School**
  - Realign like OSD functions if it remains OSD mission
    - AFIT/NPS for graduate education
    - DLI for language training
    - Common BOS
      - Monterey municipalities have 10 USC authority to provide BOS
      - DLI achieved 44% savings using local government services
    - Creates Defense wide advanced education complex, i.e., University
      - "College of Sciences"