

BRAC Commission

FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

SEP 12 2005

Received

ROD BLAGOJEVICH, Governor of the)
 State of Illinois,)
)
 Plaintiff,)
)
 -vs-)
)
 DONALD RUMSFELD, Secretary of Defense)
 of the United States; ANTHONY J. PRINCIPI,)
 Chairman of the Defense Base Closure and)
 Realignment Commission; JAMES H.)
 BILBRAY; PHILLIP E. COYLE; HAROLD W.)
 GEHMAN, JR.; JAMES V. HANSEN; JAMES)
 T. HILL; LLOYD W. NEWTON; SAMUEL K.)
 SKINNER; and SUE ELLEN TURNER,)
 members of the Defense Base Closure and)
 Realignment Commission,)
)
 Defendants.)

No. 05-3190

MEMORANDUM IN SUPPORT OF COURT'S JURISDICTION

COMES NOW, plaintiff, ROD BLAGOJEVICH, Governor of the State of Illinois, by his attorney, Lisa Madigan, Attorney General of the State of Illinois, and for his Memorandum in Support of Court's Jurisdiction, states as follows:

The Court has raised concern over whether it has jurisdiction to consider the pending claim in light of Dalton v. Spector, 511 U.S. 462 (1994).

As an initial matter, there are facts which completely distinguish Dalton from the present case. The subject of the Dalton decision was a naval shipyard, not a militia unit of the state.¹ Further, the parties bringing the Dalton claim specifically sought to invoke the

¹To the best of plaintiff's knowledge, there is no Pennsylvania state navy.

APA to bring a suit under or pursuant to BRAC. Lastly, the suit was brought after the President had exercised his discretion over the non-militia naval yard under BRAC.

As and for their initial argument, plaintiff adopts and incorporates herein by reference pages 28-37 of the Pennsylvania court's findings² of why Dalton does not apply to the case sub judice as and for their additional argument on this point as if said arguments were set forth fully herein.

Additionally or in the alternative, in Dalton, no party challenged whether the President had the statutory authority to make the decision; or whether BRAC or the Secretary had the authority to make the recommendation. Of note, Dalton cited to the decision in Larson. In Larson, the Supreme Court found that a suit against a government official in his official capacity does not constitute a suit against the sovereign if (1) the officer's powers are limited by statute and his actions were ultra vires, or (2) the officer was acting unconstitutionally or pursuant to an unconstitutional grant of power from the sovereign. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 1461 (1949). The Dalton court assumed, as it was not an issue and not otherwise challenged in that decision, that the BRAC statute provided both the secretary, BRAC, and the President with the statutory authority to close the naval shipyard solely upon their authority. The parties attempted to challenge whether the President had properly exercised his discretionary authority. The Dalton court was not addressing a statute which prohibited the Secretary, the Commission or the President from taking the act (i.e., that the actions are ultra vires or without authority).

²Attached to the plaintiff's amended complaint.

Present in this case, unlike in Dalton, is the State of Illinois' national guard unit. The Governor is not asking this Court to review whether the Secretary, or BRAC, or the President have complied with the BRAC statute. Instead, the Governor asserts that pursuant to federal law, as contained in the plain language of 32 U.S.C. 104 (c), neither the Secretary, BRAC, nor the President have discretion to change the branch, organization or allotment of a military unit located entirely within the State of Illinois without the approval of the Governor. Thus, by operation of federal law, neither the Secretary, BRAC, nor the President have authority, discretionary or otherwise, to change a branch, organization, or allotment of a unit located entirely within a state without the Governor's approval. Thus, all actions taken which attempt to control or change the branch, organization or allotment of the state air guard, which is located entirely within the state, without first obtaining the approval of the Governor, are ultra vires and performed unlawfully.³ Because federal statute prohibits changing a guard unit without the Governor's consent, neither the Secretary, nor BRAC, nor the President have discretionary authority to engage in conduct that is prohibited by law. The Court always has jurisdiction to review and prohibit an ultra vires act.

Of significance, when Congress passed the BRAC Act, it explicitly provided that certain other statutes were repealed or superseded. See BRAC Act, Section 2905(b). However, no language in the text of the BRAC Act expresses an intention to supersede or repeal Section 32 U.S.C. 104(c), which provides that there is no authority to affect the

³The BRAC Act does not state that it has repealed Section 104(c) or that it gives either the President, BRAC, or the Secretary discretion to change the allotment of a guard base without consent.

Illinois National Air Guard's allotment of planes without permission. In fact, this very silence in BRAC on the issue of National Guard units indicates conclusively that Congress did not intend the BRAC Act to repeal Section 104(c), and thus did not intend for it to give discretion to either the Secretary, the BRAC Commission, or the President to change a National Guard base without consent or permission of the Governor. See, *Jama v. Immigration & 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 imply, 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").

Therefore, the Court's jurisdiction exists to review the ultra vires actions of BRAC and the Secretary which are in violation of federal law. *Dalton* does not provide that as a matter of law the President has discretionary authority to change the allotment of a National Guard base, a holding which would require the Court to first declare 32 U.S.C. 104(c) unconstitutional or otherwise non-existent, that decision is not applicable to the case before the Court.

This matter raises a simple question. Congress, by act of federal law, prohibits changing a state National Guard unit without consent. The BRAC Act does not rescind or repeal that federal law. The BRAC Act does not give to the President the discretion to change a guard base's allotment of planes, nor does it give such discretion to the Secretary or the BRAC Commission without consent of the Governor. Since the Governor has not given his consent, the Commission recommendation is ultra vires under federal law, and can be restrained.

Plaintiff would also direct the Court's attention to Bennett v. Spear, 520 U.S. 154, 117 S. Ct. 1154 (1997). In Bennett, the court addressed the issue of whether a non-final biological opinion and accompanying incidental take statement constituted final action for APA purposes. The plaintiff here is not seeking to invoke or apply the APA, but tenders to the court that the discussions as to why the court was going to review the non-final decision as further persuasive authority consistent with discussions and finding from the Pennsylvania court's order.

Specifically, the court found that the biological opinion and accompanying incidental take statement alter the legal regime by creating the authority under which the bureau is authorized to take the endangered species. The court noted that the ability to act was dependent upon the biological opinion and accompanying incidental take statement, and since the bureau could not act without such opinion and statement, the opinion and statement altered the legal regime and were reviewable. This argument was not raised in Dalton.

Here, the President cannot act until he receives the recommendations from BRAC. The recommendations from BRAC alter the legal regime of the Governor by purportedly attempting to transfer to the President the ability to close a National Guard base where there has been no consent from the Governor in violation of the law. Since the recommendation serves as a triggering event to invoke what, if any, authority the President has over the state militia. The unlawful recommendation is reviewable and can be restrained. The President cannot act under BRAC if no recommendation is submitted. Similar to Spear, it is the submission of that recommendation triggering the ability to act which creates an incident which changes the legal regime between the parties. At this

stage, the plaintiff does not dispute BRAC's application and the President's discretion in regards to non-state militia units, which is only what Dalton was addressing. The question here is whether the Secretary and the BRAC Commission may violate federal law and engage in conduct that is ultra vires. The answer is no and the Court has jurisdiction to review whether they are acting outside of their authority. Under federal law, BRAC has no authority to ever submit to the President a recommendation to change the allotment of a state guard unit without the Governor's permission. Such act of submitting the recommendation without the Governor's permission is itself ultra vires in violation of federal law. The Court has the jurisdiction to consider and review BRAC's authority and to prohibit them from engaging in unlawful conduct.

WHEREFORE, plaintiff prays that this Court find that it has jurisdiction to consider this matter; and that it grant plaintiff's motion for a temporary restraining order.

Respectfully submitted,

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of Illinois,
Plaintiff,

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State of Illinois,
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BY: /s/Matthew D. Bilinsky

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Certificate of Service

I hereby certify that on September 2, 2005, I presented the foregoing Memorandum in Support of Court's Jurisdiction to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that on September 2, 2005, I have mailed by United States Postal Service, the document to the following non-registered participant:

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Other Documents3:05-cv-03190-JES-BGC Blagojevich v. Rumsfeld, et al**U.S. District Court****Central District of Illinois**

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The following transaction was received from Bilinsky, Matthew entered on 9/2/2005 at 2:25 PM CDT and filed on 9/2/2005

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