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The Availability of Judicial Review Regarding Military Base Closures and Realignments

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The Availability of Judicial Review Regarding Military Base Closures and Realignments

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 Realignments

Introduction[1]

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

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[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).

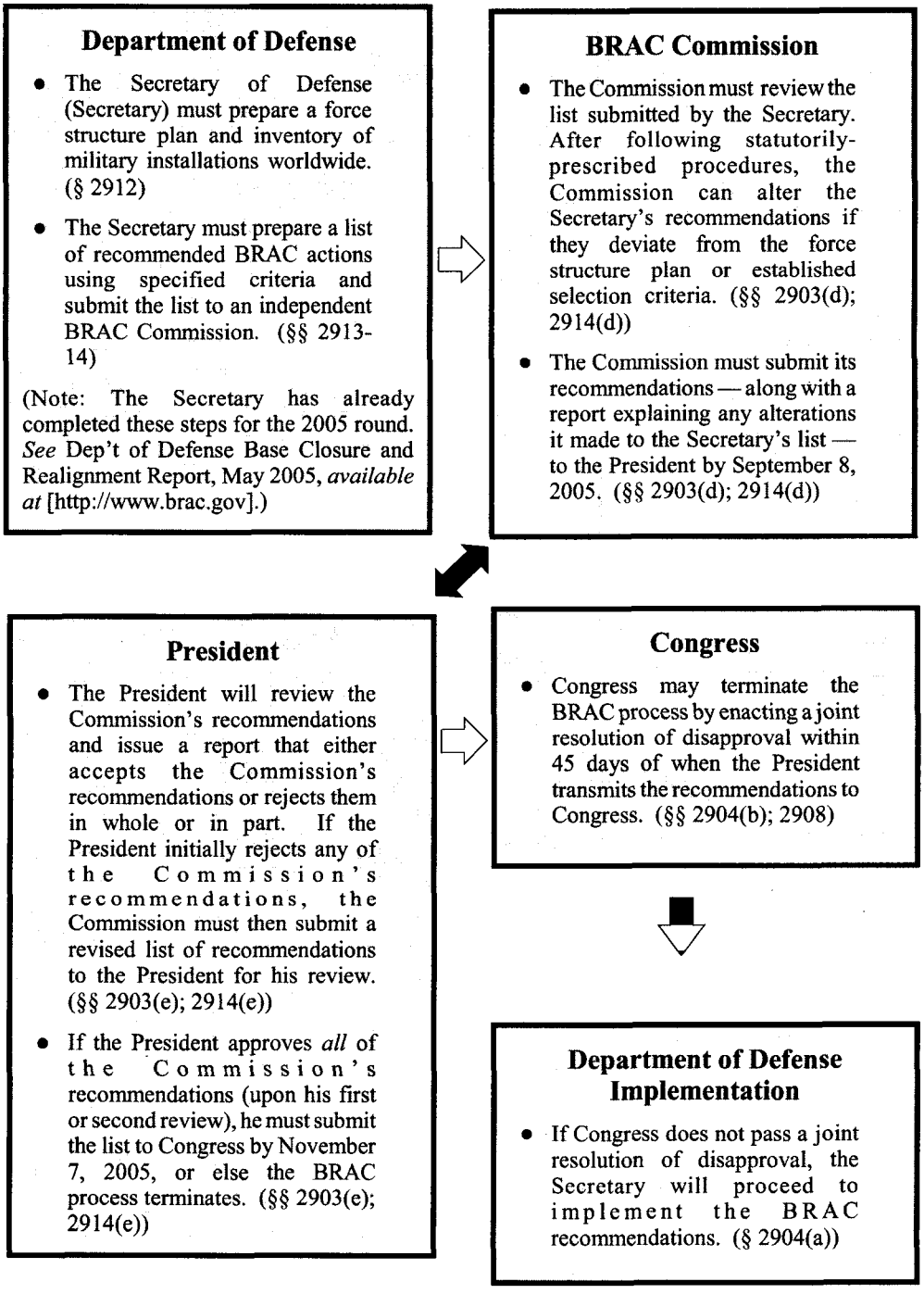
[3] P. L. 107-107, § 3001, 115 Stat. 1012 (2001).

[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 Process[6]



[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

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[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

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[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

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[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.

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[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

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[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

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[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.

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[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.