

Running for Cover:

The BRAC Commission as a Model for Federal Spending Reform

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INTRODUCTION

Federal spending, debt, and deficits are at all-time highs,¹ and there is pressure on both political parties to cut spending.² President Obama recognized this when he said,

In these challenging times, when we are facing both rising deficits and a sinking economy, budget reform is not an option. It is a necessity. We cannot sustain a system that bleeds billions of taxpayer dollars on programs that have outlived their usefulness, or exist solely because of the power of a politician, lobbyist, or interest group. We simply cannot afford it.³

On several occasions he has pledged to conduct a line-by-line review of the federal budget, cutting wasteful and inefficient spending.⁴ The President, however, does not control the purse strings. Spending reform must happen in Congress, and this is easier said than done.⁵

As President Obama's words suggest, in many cases spending programs exist for political reasons. Almost every federal program has a constituency that lobbies hard to keep it alive, whether it is an efficient program or not. Members of Congress are beholden to these interests, so they champion the programs and horse-trade to ensure they remain funded.

At the same time, the cost of each federal spending program is spread so widely among all taxpayers that it is barely noticeable. The public and members of Congress worry about an out-of-control budget and agree that spending must

1. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2011, HISTORICAL TABLES 22, 134 (2010), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/hist.pdf>. For spending and deficits totals, see Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2015. *Id.* at 22. For debt totals, see Table 7.1—Federal Debt at the End of Year: 1940–2015. *Id.* at 134.

2. See Press Release, Rasmussen Reports, 83% Blame Deficit on Politicians' Unwillingness To Cut Spending (Feb. 4, 2010), available at http://www.rasmussenreports.com/public_content/business/general_business/february_2010/83_blame_deficit_on_politicians_unwillingness_to_cut_spending (summarizing a poll conducted in early Feb. 2010 finding that "Eighty-six percent (86%) of Americans are at least somewhat concerned about the size of the federal budget deficit, including 65% who are very concerned," and that "Eighty-one percent (81%) of voters also think the unwillingness of politicians' to cut government spending is a bigger problem than taxpayers' unwillingness to pay more in taxes.").

3. President-elect Barack Obama, Speech Announcing Appointment of Peter Orszag Director of the Office of Management and Budget (Nov. 25, 2008), available at http://change.gov/newsroom/entry/president_elect_barack_obama_announces_office_of_management_and_budget_dire.

4. *Id.* ("We will go through our federal budget—page by page, line by line—eliminating those programs we don't need, and insisting that those we do operate in a sensible cost-effective way."); The President's Weekly Address, 2009 DAILY COMP. PRES. DOC. 271 (Apr. 18, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900271/pdf/DCPD-200900271.pdf> ("It's a process we have already begun, scouring our budget line by line for programs that don't work so we can cut them to make room for ones that do."); Address Before a Joint Session of the Congress on the State of the Union Address, 2010 DAILY COMP. PRES. DOC. 55 (Jan. 27, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf> ("We will continue to go through the budget, line by line, page by page, to eliminate programs that we can't afford and don't work.").

5. See *infra* notes 115–128 and accompanying text.

be reined in, but there is no agreement on which particular programs to cut or reform. This is the classic public choice dynamic of concentrated benefits and dispersed costs.⁶

For example, Congress continues to approve billions of dollars in ethanol subsidies each year despite a wide consensus that these programs are inefficient, do little to improve “energy security,” and are likely bad for the environment.⁷ The reason is that while the cost of the subsidies is spread among all taxpayers, the benefits accrue to a small group that can more easily organize itself to lobby Congress. Given this dynamic, how can we ever hope to “go through our federal budget—page by page, line by line—eliminating those programs we don’t need,”⁸ as the President has promised?

Today’s situation is similar to what we experienced at the end of the Cold War. Record deficits cried out for spending cuts, and an indisputable glut of military bases was the obvious target.⁹ By definition each base was in a congressional district so that they each had a literal constituency and a designated champion in Congress. While the public at large could agree that a large reduction in bases was necessary, citizens could also agree that their hometown base should be exempt. And so it was that between 1977, when Congress began to take a more prominent role in base realignment, and 1988, when reforms were finally implemented, not one major base was closed.¹⁰

Through a combination of genius and good luck, in 1988 Congress created the Base Realignment and Closure (BRAC) Commission to address the impasse.¹¹ The Commission was composed of independent experts who were to select which bases should be closed or realigned based largely on military need.¹² Once made, their recommendations would become binding unless Congress passed a joint resolution of disapproval.¹³ In the first iteration of BRAC,

6. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 118–130 (Ann Arbor Paperbacks 2001) (1962). For a thorough application of public choice to the budget process, see DAVID M. PRIMO, *RULES AND RESTRAINT: GOVERNMENT SPENDING AND THE DESIGN OF INSTITUTIONS* (2007).

7. See Robert Bryce, *Corn Dog: The Ethanol Subsidy Is Worse Than You Can Imagine*, SLATE, Jul. 19, 2005, <http://www.slate.com/id/2122961>.

8. Obama, *supra* note 3.

9. See Lawrence J. Haas, *The Deficit Culture*, NAT’L J. 1460, 1462 (1988) (“Policies that didn’t have much support years ago, such as military base closing . . . are now supported for cost-cutting reasons”); see also Charles R. Morris, *Deficit Figuring Doesn’t Add Up*, N.Y. TIMES, Feb. 12, 1989 (Magazine), at 40 (“Without the deficit clamor, how could Congress sit still for \$1 billion worth of military base closings?”) (cited in Natalie Hanlon, *Military Base Closings A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 336 n.25 (1991)).

10. DEFENSE SECRETARY’S COMMISSION ON BASE REALIGNMENT AND CLOSURE, *BASE REALIGNMENTS AND CLOSURE: REPORT OF THE DEFENSE SECRETARY’S COMMISSION 9* (Dec. 1988) [hereinafter BRAC COMMISSION REPORT].

11. See Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 201–203, 102 Stat. 2623, 2627–28 (1988) (codified at 10 U.S.C. § 2687 note (1988)).

12. See *id.* §§ 203(a), 206. In establishing the BRAC Commission, Congress also adopted by incorporation the existing Commission Charter that laid out many of the criteria to be considered by the Commission in its decisions. See *id.* §§ 209(3)–(4).

13. *Id.* §§ 202(b), 208.

the Commission recommended eleven major bases to be closed or severely realigned.¹⁴

The BRAC scheme successfully broke the political impasse that prevented base closures. As a result, many today are proposing schemes based on the BRAC model to help cut inefficient and wasteful government spending.¹⁵ The key components of these new reform proposals are a congressional commission and expedited legislative procedures. These proposals, however, resemble BRAC only superficially.

The BRAC commissions of the late 80s and early 90s were successful because of their peculiar structure—not simply because they were independent commissions, and not simply because of their all-or-nothing approach to base closures. In this Article we first look at the history of BRAC and the roots of its success. We then contrast today's commission proposals to the successful BRAC process, and show how these proposals lack some of the key ingredients that made BRAC successful. Finally, we suggest how a new federal spending commission could be more closely modeled on BRAC.

I. BASE REALIGNMENT AND CLOSURE

A. *Historical Base Closures*

The number of military bases on American soil has fluctuated throughout history—more bases during wartime and during times of perceived threat, and fewer in times of peace and after conflict.¹⁶ Historically, the Secretary of Defense has decided which military bases should be opened, closed, or realigned.¹⁷ The decisions were regarded as military, not political.

After World War II, the tide began to turn. Soon after taking office, the Kennedy Administration sought to reduce the glut of military bases that had

14. See DAVID S. SORENSON, *MILITARY BASE CLOSURE: A REFERENCE HANDBOOK* 32 (2007). In total, the Commission recommended the closure of partial closure of ninety-one bases and the realignment of fifty-four more. See also Lilly J. Goren & P. Whitney Lackenbauer, *Closing Military Bases*, in *THE GOVERNMENT TAKETH AWAY: THE POLITICS OF PAIN IN THE UNITED STATES AND CANADA* 167, 173 (Leslie A. Pal & Kent Weaver eds., 2003).

15. See, e.g., Press Release, Sen. Sam Brownback, *Brownback Introduces CARFA Legislation* (Jun. 17, 2009), available at <http://brownback.senate.gov/public/press/record.cfm?id=314639&> (drawing a comparison between proposed CARFA spending commission legislation and the BRAC process); see also *Safeguarding the American Dream: Prospects for Our Economic Future and Proposals to Secure It: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. 3–4 (2009) (testimony of Sen. Judd Gregg) (drawing a comparison between proposed Gregg-Conrad spending task force legislation and the BRAC process).

16. See Brian T. Kehl, *The Pentagon vs. Congress: The Political Economy of Military Base Closures During BRAC 40* (July 23, 2003) (unpublished Ph.D. dissertation, George Mason University), available at <http://handle.dtic.mil/100.2/ADA416525>.

17. See Charlotte Twight, *Department of Defense Attempts to Close Military Bases: The Political Economy of Congressional Resistance*, in *ARMS, POLITICS, AND THE ECONOMY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 236, 262 (Robert Higgs ed., 1990); see also Natalie Hanlon, *Military Base Closings A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 334 (1991); Kehl, *supra* note 16, at 40–41.

accumulated during the War.¹⁸ In 1961, Secretary of Defense McNamara announced plans to reduce unneeded military infrastructure.¹⁹ This led to the closing of over 700 bases over the following three years.²⁰ The unprecedented realignment continued through the mid-sixties.²¹ Members of Congress were alarmed by the vast cuts, which affected their districts, but there was no formal way they could intervene.²² Of the 954 realignments announced between 1960 and 1969, only two were not completed by the Department of Defense.²³

What was once a military matter quickly became political. The pain of base closures was concentrated on discrete interest groups while the benefits were spread across all taxpayers. The groups in question were the literal constituencies of members of Congress, to which they were certainly beholden. Although military bases had been closed before without it becoming political, it was the unprecedented number of bases being slated for closure at once—each with its own representative—that motivated Congress to become involved.

After McNamara made his first announcement, the House Armed Services Committee held hearings at which affected members protested the closures in their districts.²⁴ Members also complained that the Department of Defense (DoD) kept them in the dark about which bases might be closed until the last possible moment—no doubt to avoid congressional interference.²⁵ As a result, in 1965 Congress passed a bill that required 120 days notice before DoD could close a base, and permitted such announcements only between January 1 and April 30 of each year.²⁶ Not beating around the bush, the conference report accompanying the bill explained that the purpose of these requirements was to allow the armed services committees “an opportunity to hear the matter of any particular base closure at a time when it is considering the military construction authorization bill and to write restrictive language in such legislation in the case it disapproved such a base closure.”²⁷

President Johnson vetoed this bill, citing concerns over separation of powers, and making the case that it would prevent the President from adequately carrying out his duty as Commander in Chief.²⁸ Congress returned with a less

18. See Annual Message to the Congress on the State of the Union, 1961 PUB. PAPERS 19, 24 (Jan. 30, 1961) (announcing that he had instructed the Secretary of Defense to investigate “the elimination of obsolete bases and installations”); see also Twight, *supra* note 17, at 241 (outlining the Kennedy Administration base closing efforts).

19. See Kehl, *supra* note 16, at 40–41; Twight, *supra* note 17, at 262; Hanlon, *supra* note 17, at 335 n.15.

20. Kehl, *supra* note 16, at 41.

21. See Hanlon, *supra* note 17, at 335 n.15 (noting that Defense Secretary McNamara announced the closing of thirty-three bases in 1963, ninety-five in 1964, and 149 in 1965).

22. See Kehl, *supra* note 16, at 41.

23. Twight, *supra* note 17, at 262.

24. See *id.* at 241 n.15; Kehl, *supra* note 16, at 41.

25. See Twight, *supra* note 17, at 256–57.

26. *Id.* at 242.

27. H.R. REP. NO. 89-713, pt. 14, at 19,421 (1965) (Conf. Rep.).

28. See Veto of Military Authorization Act, 1965 PUB. PAPERS 907, 907 (Aug. 21, 1965).

restrictive bill that only applied to bases with more than 250 military or civilian personnel, which covered only the largest installations.²⁹ Additionally, the new bill only prevented DoD from implementing a closure for thirty days after it submitted a justification to Congress.³⁰ Johnson signed this bill into law.

Although the new law protected the largest installations somewhat, base realignment continued apace with closures announced in 1965, 1967, 1969, and 1970.³¹ The end of the Vietnam War, however, saw a replay of the drama that followed World War II. In 1973, DoD announced a large realignment package that prompted strong congressional uproar, including the introduction of hearings and bills that would extend the existing notification requirements on DoD.³² In 1976, when DoD announced more base closures, Congress had had enough.³³ It passed a bill that required DoD to notify Congress when bases became “candidates” for closure, and required waiting periods for congressional consultation and for the preparation of environmental impacts statements.³⁴ The bill would have meant that closing a base would be at least a yearlong affair.³⁵ After an initial veto, President Ford signed a modified version that nevertheless would have the same effect.³⁶ In 1977, President Carter signed a bill that made the base closure restrictions permanent.³⁷

Between 1977 and the BRAC reforms of 1988, not a single major base was closed or realigned.³⁸ Congress had shut down base closures without being seen to act in an overtly parochial manner. Instead, by requiring that base closures comply with the National Environmental Policy Act, Congress was seen to be acting in the public interest.³⁹ The result of the new law, however, was that as soon as a base was being considered for closure, DoD had to alert Congress, which meant that its representative would spring into action, and the required environmental impact analysis provided the procedural leverage to fight a closure. As Rep. Richard Arme explained in 1988:

An environmental impact statement (EIS) can take as long as two years and cost over \$1 million to complete. Once completed, any congressman or well-organized citizens' group can take the military to court and insist that it be redone to consider some previously unnoticed aspect. After that, the second statement can be found wanting, and a third can be ordered. By this

29. See Twight, *supra* note 17, at n.19.

30. See *id.*

31. See *id.* at 243.

32. See *id.* at 243.

33. See *id.* at 243–244.

34. *Id.* at 244.

35. See *id.*

36. See *id.*

37. See *id.* at 245.

38. BRAC COMMISSION REPORT, *supra* note 10, at 9.

39. See Hanlon, *supra* note 17, at 335 (“While committee reports emphasized that ‘Congress should not “approve or disapprove” each base,’ in effect Congress gained the authority to review all decisions on the closing or realignment of military bases.”).

time, several years after the base closing was first announced (a move that by itself has already hurt the local economy), the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the closing order are all but insurmountable.⁴⁰

It became so easy for a competent legislator to stop a military base from closing that a representative could not afford to abstain from doing so.⁴¹ Every base community became an interest group keenly focused on protecting its rents. As one commentator explained, military bases can be seen as just another type of congressional pork barrel.⁴² Defense capital spending could direct billions of dollars into a district such that a base's payroll and spending could be more rewarding to communities and representatives than typical pork projects such as dams and bridges.⁴³ The public choice dynamic of concentrated benefits and dispersed costs was set in stone.

B. *The Base Realignment and Closure Commission*

As the Cold War came to a close, there was the promise of a "peace dividend" as defense spending wound down. The public choice dynamic surrounding military base closures and capital spending, however, threatened these gains. Any peace dividend would come at the expense of constituencies with the organization and the tools to resist change. So what made reform possible?

In a word: crisis. Massive growth in defense spending and entitlements had created an unprecedented deficit crisis by the mid-eighties.⁴⁴ In 1984, the Grace Commission—an independent panel chartered by President Reagan to investigate federal waste and inefficiency—reported that closing obsolete military bases could save up to \$2 billion annually.⁴⁵ It specifically cited congressional "interference" and "obstructionism" for the lack of closures.⁴⁶ By 1988, there was wide consensus that the glut of military bases was embarrassingly untenable.⁴⁷

40. Dick Armev, *Base Maneuvers: The Games Congress Plays with the Military Pork Barrel*, 43 POL'Y REV. 70, 72 (1988).

41. See Twight, *supra* note 17, at 262.

42. See Hanlon, *supra* note 17, at 333.

43. See *id.* at 333–34 & n.10.

44. See Editorial, *Unhappy Fiscal New Year!*, N.Y. TIMES, Oct. 1, 1985, at A30 (noting that tax cuts and defense and entitlement spending had caused unprecedented deficits that resulted in fiscal "disarray" and "confusion"); see also Kehl, *supra* note 16, at 46.

45. Exec. Order No. 12,369, 47 Fed. Reg. 28,899 (1982).

46. PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL: A REPORT TO THE PRESIDENT 13 (1984), available at http://digital.library.unt.edu/ark:/67531/metaocr9044/m1/1/high_res_d ("We found Congressional interference to be a major problem. For example, because Congress obstructs the closing of bases that the military wants to close, the three-year waste is \$367 million. In total, PPSS recommends three-year savings of \$3.1 billion by closing excess military bases, equivalent to the three-year income taxes of 466,000 median income families.").

47. See SORENSON, *supra* note 14, at 45; Kehl, *supra* note 16, at 45–46. See also Editorial, *To Mop Up Military Gravy*, N.Y. TIMES, Apr. 29, 1988, at A38 ("No waste in government is more obvious than keeping military bases open only to benefit a particular congressman's or senator's constituents.").

Additionally, no matter one's political perspective, there was sound reason to pursue savings through base closures.⁴⁸ Some might pursue savings to reduce the deficit, while others might seek to invest the peace dividend in other non-defense programs. Even hawks were amenable to reform because by 1988 the defense budget had been declining for three years.⁴⁹ Savings on obsolete bases could be redistributed to other defense priorities.⁵⁰

With mounting public pressure to cut spending and fix the budget crisis, military installations became an obvious target. As one scholar put it, "Everyone involved in the process realized that some form of base closures was eventually going to be necessary, but no one could figure out how to take enough of the politics out of the process to get effective legislation passed."⁵¹ It was at this point that Rep. Richard Arme y proposed a bill to delegate base-closing to a commission.

At the time, Arme y was in an especially serendipitous position that allowed him to make his proposal. He was new to Congress and in the minority party; he did not serve in any of the committees with jurisdiction over military bases; and certainly not least, he did not have a base in his own district.⁵² He also happened to be a former economics professor with a clear understanding of public choice.

Arme y's first proposal came in 1987 when he introduced an amendment to that year's defense authorization bill that would have created a commission to select bases for closure.⁵³ The Secretary of Defense would then have had the option to close any of the bases recommended by the Commission notwithstanding environmental regulations or other laws.⁵⁴ To everyone's surprise, the bill almost passed.⁵⁵

One of the major reasons why the first attempt failed was that Congress did not trust giving the Executive the power to choose which bases would be closed. Their fear was that the bases that would ultimately be closed would be in the districts of members who opposed the President on military or other matters.⁵⁶ And they had good reason to believe this might be the case.

President Johnson was reputed to have closed several Air Force bases in districts that voted against him in the presidential election.⁵⁷ Similarly, "[r]e-

48. See SORENSON, *supra* note 14, at 46.

49. See *id.* at 16, 18.

50. Additionally, economies of scale meant that the base glut had put pressure on readiness. See Kehl, *supra* note 16, at 46.

51. Kehl, *supra* note 16, at 46.

52. See Goren & Lackenbauer, *supra* note 14, at 172; Kehl, *supra* note 16, at 47.

53. See H.R. 1583, 100th Cong. (1987).

54. See *id.* § 11.

55. See Editorial, *Defense Cuts That Won't Hurt Defense*, N.Y. TIMES, Oct. 23, 1987, at A37 ("The Arme y plan came within a whisker of adoption earlier this year as an amendment to the military authorization bill. It had won by 15 votes when the time for voting expired, but the Democratic leadership froze the clock and then switched enough votes to kill it, 197 to 192.")

56. See Goren & Lackenbauer, *supra* note 14, at 169.

57. See Arme y, *supra* note 40, at 73; SORENSON, *supra* note 14, at 914-15.

ports hold that President Nixon closed a number of bases in Massachusetts in 1973, after that state became the only one to go against him in the 1972 election.”⁵⁸ In 1985 it was suggested that Defense Secretary Caspar Weinberger had threatened members of Congress with base closures if they did not vote for the President’s budget.⁵⁹

Armey’s second attempt the following year was successful. This time he had the support of over 100 co-sponsors and Secretary of Defense Frank Carlucci.⁶⁰ The measure that ultimately passed created a commission with twelve members appointed by the Secretary of Defense.⁶¹

Congress’s fear of ceding too much power to the executive was allayed by a series of clever maneuvers. First, Secretary of Defense Carlucci took the unusual step of naming members of the commission before it was ever vested with any statutory power.⁶² This assured Congress that the commission’s composition would be acceptable.⁶³ Second, the new proposal required the Secretary of Defense to accept all of the commission’s recommendations or none of them, thereby ensuring that he would not pick and choose bases based on political considerations.⁶⁴ Lastly, Congress reserved for itself a final check. If it did not like the Commission’s list of recommendations it could always reject them by passing a joint resolution of disapproval.⁶⁵

By the time the final bill was signed into law by President Reagan in October 1988, the base-closing panel that had been appointed by Carlucci had been studying the issue and holding hearings since May.⁶⁶ The now official BRAC Commission met its statutory December 31 deadline and submitted a report to Congress and the Pentagon that recommended closing or sharply realigning eleven major bases and eighty smaller installations.⁶⁷

As one would expect, a joint resolution of disapproval to reject the BRAC Commissions was introduced. It failed by a wide margin of 381 to 43, and the

58. SORENSON, *supra* note 14, at 30.

59. See Twight, *supra* note 17, at 255–56; Hanlon, *supra* note 17, at 334 n.13.

60. See SORENSON, *supra* note 14, at 32; Editorial, *Military Bases - In My Backyard*, N.Y. TIMES, June 20, 1988, at A18.

61. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 203(a), 102 Stat. 2623, 2627 (1988) (codified at 10 U.S.C. § 2687 note (1988)).

62. Cf. Frank Carlucci, Charter: Defense Secretary’s Commission on Base Realignment and Closure, May 3, 1988.

63. See John. H. Cushman, Jr., *An Impossible Dream May Soon Be Possible*, N.Y. TIMES, May 3, 1988, at A32 (“An example of the maneuvering that got the legislation this far involved the handling of appointments to the commission. At first, the idea was for Congress and the Administration each to name several members. But the Justice Department felt this posed constitutional problems, and Mr. Carlucci thought it would be wrong to be advised on military matters by a commission not named by him. Instead, Mr. Carlucci consulted extensively with lawmakers and let it be known whom he would name.”).

64. See Base Closure and Realignment Act § 202(a)(1).

65. See *id.* § 202(b).

66. See Editorial, *Remember the Base-Closings Bill*, N.Y. TIMES, Aug. 21, 1988, at A24 (“The commission is already at work, appointed by Defense Secretary Frank Carlucci on his own authority.”).

67. SORENSON, *supra* note 14, at 34.

Commission's recommendations were implemented.⁶⁸ A political feat once thought impossible had been accomplished.

C. *Why Did BRAC Succeed?*

To understand why BRAC succeeded in overcoming the public choice dynamic that until then had thwarted all attempts at base closing, we must first explore its institutional contours.

1. Membership

The first Commission was composed of twelve members appointed by the Secretary of Defense.⁶⁹ The understanding at the time, although the law did not require it, was that it would be a blue-ribbon panel of experts independent of both Congress and the Executive.⁷⁰ This fact is evident in the composition of the proto-BRAC appointed by Defense Secretary Carlucci before the legislation was passed, which included "former members of Congress, retired Pentagon officials, and military and environmental experts . . ."⁷¹ A celebrated aspect of Carlucci's commission was that he persuaded former Congressmen Jack Edwards (R-Ala.) and Abraham Ribicoff (D-Conn.), who were trusted by Congress, to co-chair the commission.⁷² Later BRAC Commissions vested in the President the power to appoint members of the Commissions subject to Senate confirmation.⁷³

2. Mission

While Congress has many times delegated policy tasks to commissions, one thing that made BRAC unique was that it was focused on an urgent and clear issue.⁷⁴ The Commission's brief was to consider all military installations inside

68. H.R. Roll Call Vote No. 32, 101st Cong. (1989) (H.R.J. Res. 165, 101st Cong. (1989)), <http://www.thomas.gov/cgi-bin/bdquery/z?d101:H.J.RES.165:>

69. Base Closure and Realignment Act § 203(a).

70. Armeý's failed original bill would have provided for Commission appointments by the President, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate. See H.R.1583, 100th Cong. § 5(a) (1987). It explicitly stated that except for those appointed by the President, sitting members of Congress could be named to the Commission. *Id.* In contrast, Armeý's second bill, which did pass, vested all appointments in the Secretary of Defense, and did not mention the possibility of sitting members of Congress serving on the Commission. Base Closure and Realignment Act § 203(a). Additionally, the bill required that not more than half of the Commission's professional staff could have worked for the Department of Defense in the previous year. *Id.* § 203(2)(c).

71. Hanlon *supra* note 17, at 337; John. H. Cushman Jr., *An Impossible Dream May Soon Be Possible*, N.Y. TIMES, May 3, 1988, at A32 ("The list includes former Representative Jack Edwards, an Alabama Republican; former Senator Abraham Ribicoff, a Connecticut Democrat; the industrialists Louis Cabot and Donald Craib Jr.; former Army Secretary Martin Hoffman and former Navy Secretary W. Graham Claytor Jr.; two retired generals, Donn Starry of the Army and Bryce Poe 2d of the Air Force, and Russell E. Train, a former chairman of the Council on Environmental Quality.").

72. See Kehl, *supra* note 16, at 48.

73. See, e.g., Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2902(c), 104 Stat. 1485, 1808 (1990).

74. See Hanlon, *supra* note 17, at 344 (making a comparison to the pay raise commission).

the United States,⁷⁵ and to submit a report with its recommendations for bases to be closed or realigned to the Secretary of Defense and to the House and Senate Armed Services Committees.⁷⁶ After that, the Commission would disband.⁷⁷

The Base Realignment and Closure and Act adopted by incorporation⁷⁸ the Commission's original charter.⁷⁹ That Charter spelled out specific criteria the Commission had to consider in its analysis and allowed it to develop additional criteria of its own.⁸⁰ While these were mostly military in nature, they also included economic and environmental considerations.⁸¹ A clear mission (identify bases to be cut) along with guiding criteria (military need) positioned the commission to make empirically defensible choices.⁸²

The Commission had a straightforward mission because military bases could be analyzed as discrete units. While the Commission had to keep in mind the effects of its actions on overall military capability, it nevertheless could proceed on a base-by-base analysis to determine the relative effectiveness of each one. Additionally, the BRAC structure changed the burden of proof. Under the previous regime, in place since the 1976 Act, the burden of proof was on those who wished to close a military base. Now as BRAC examined each base, the burden was on those who sought to keep a particular base open.⁸³

3. Silent Approval

It is often thought that the key feature of BRAC is an expedited legislative process that requires Congress to vote "up or down" on the whole set of Commission recommendations.⁸⁴ This is only partly the case. The unique process at work in BRAC is one of "silent approval" in which "the commis-

75. See Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 203(b)(2)(B), 102 Stat. 2623, 2628 (1988).

76. See *id.* § 203(b)(1).

77. See *id.* § 202(c).

78. See *id.* § 201(1).

79. See Frank Carlucci, Charter: Defense Secretary's Commission on Base Realignment and Closure, § 2(A), May 3, 1988.

80. See *id.*; see also Hanlon, *supra* note 17, at 337 n.28 (explaining that "[t]he Charter expressly provided nine criteria for the Commission to consider in making its recommendations: (1) current operational readiness; (2) availability and condition of land and facilities at both existing and potential receiving locations; (3) force requirements at receiving locations; (4) cost and manpower implications; (5) extent and timing of potential cost savings; (6) economic impact on the base area community; (7) community support at the receiving locations; (8) environmental impact; and (9) the implementation process involved.").

81. See *id.*

82. The Defense Base Closure and Realignment Act of 1990, which governed later BRAC rounds, specified a clear list of criteria in the legislation. See Pub. L. No. 101-510, § 2903(b), 104 Stat. 1485, 1810-11 (1990); see also SORENSON, *supra* note 14, at 36 (summarizing the various criteria).

83. See Twight, *supra* note 17, at 264-67.

84. See, e.g., Eric Schmitt, *Pentagon Seeks to Shut Dozens of Bases Across Nation*, N.Y. TIMES, May 14, 2005, at A1 (implying that the BRAC Commission's recommendations must be approved by Congress before they become operative).

sion's recommendations become law unless both houses of Congress pass and the President signs a resolution rejecting the package proposal."⁸⁵ This is a subtle-sounding, but profoundly important difference. While an expedited legislative process was necessary for BRAC's success, it was not sufficient without the silent approval mechanism.

Under the BRAC Act, once the Commission made its recommendations, the Secretary of Defense was *required* to begin closing the designated bases.⁸⁶ No further vote in Congress was necessary. Only if a joint resolution disapproving *all* of the Commission's recommendations were passed, and signed by the President, could the bases be spared.⁸⁷ This is a high bar indeed.

The "up or down" expedited legislative procedure often associated with BRAC applies to this joint resolution.⁸⁸ The Act prohibited amendments to the resolution and limited the time it could spend in committee as well as the amount of debate to which it could be subjected.⁸⁹ Because it is a practical certainty that at least one affected representative will introduce such a resolution, Congress will have to vote on whether to keep or reject the set of Commission recommendations. Only in this way can we say that BRAC creates an all-or-nothing, "up-or-down" vote on a list of base closures.

4. Political Cover

Finally, and perhaps most importantly, the structure of BRAC gives members of Congress political cover to act against their parochial interest. Members can vote for the popular budget-cutting measure, and then deflect blame to the Commission if a base in their district is ultimately selected for closure.⁹⁰ They may even earn credit from their constituencies if they are seen as doing everything in their power to avoid the closure.⁹¹ As Senator Phil Gramm, one of BRAC's originators, explained during a committee hearing at the time,

The beauty of this proposal is that, if you have a military base in your district . . . under this proposal, I have 60 days. So, I come up here and say, "God have mercy. Don't close this base in Texas. We can get attacked from the South. The Russians are going to go after our leadership and you know they are going to attack Texas. We need this base." Then I can go out and lie down in the street and the bulldozers are coming and I have a trusty aid there

85. Hanlon, *supra* note 17, at 331–32.

86. *See* Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 201–202, 102 Stat. 2623, 2627 (1988). As a check to assure Congress that the Secretary of Defense was not acting politically, he had to close all recommended bases, not just some. *See* Twight, *supra* note 17, at 249.

87. *See* Base Closure and Realignment Act § 208.

88. *See id.*

89. *See id.* §§ 208(b)–(d).

90. *See* Hanlon, *supra* note 17, at 364; Twight, *supra* note 17, at 267; Kehl, *supra* note 16, at 50; Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 LEGIS. STUD. Q. 393, 394–95 (1995).

91. *See* Hanlon, *supra* note 17, at 364.

just as it gets there to drag me out of the way. All the people . . . will say ‘You know, Phil Gramm got whipped, but it was like the Alamo. He was with us until the last second.’⁹²

This is possible because members of Congress are never required to vote to *kill* any particular base; they only ever vote on the abstract and consensus notion of cutting spending by eliminating obviously inefficient bases.⁹³ A “veil of ignorance” provides members cover to vote for the measure, whether they have a base in their district or not.⁹⁴ Once the closure list is published—and an affected representative no doubt introduces a resolution of disapproval—members are then simply asked to vote to *save* a handful of bases. Affected members are given an opportunity to be seen by their constituencies as champions, while all other members only need to take no action. In this way the majority position is able to triumph at the expense of organized special interests, thus overcoming traditional public choice bias.⁹⁵

One example of this dynamic at work took place during the 1991 round of BRAC base closures. Senator Arlen Specter of Pennsylvania voted for the creation of a new BRAC Commission, which was part of the 1991 defense authorization bill.⁹⁶ When the final closure list included the Philadelphia Naval Ship Yard, he mounted a legal campaign against the Commission.⁹⁷ The case ultimately made it to the Supreme Court and Specter argued it before the Justices himself.⁹⁸ The Court rejected Specter’s challenge.⁹⁹ Nevertheless, Specter was praised at home for his effort.¹⁰⁰

92. *Base Closures: Hearing Before the Subcomm. on Military Construction of the S. Comm. on Armed Services*, 99th Cong. 17 (1985) (statement of Sen. Phil Gramm, Member, S. Comm. on Armed Services); see also Twight, *supra* note 17 (citing Senator Graham’s statement in the *Base Closure* hearing).

93. See Mayer, *supra* note 90, at 394.

94. Goren & Lackenbauer, *supra* note 14, at 172; see also Twight, *supra* note 17, at 265. It should be noted that the “veil of ignorance” shrouds the public, not members of Congress necessarily. See Goren & Lackenbauer, *supra* note 14, at 172. It should also be noted that the measure was not unopposed. Those with likely closures in their districts fought the bill. See Kehl, *supra* note 16, at 47 n.32.

95. See Goren & Lackenbauer, *supra* note 14, at 172 (“A more plausible interpretation of the legislator’s behavior is that they were amendable to a procedure that (1) allowed them to express a personal preference for governmental economy and efficiency and (2) enable them to cast a politically popular vote in favor of that preference, for which they could claim credit from constituents while simultaneously (3) protecting them from the wrath of an intense minority of their constituents when base-closing decisions were made and (4) allowing them to protest loudly against individual base closures affecting their constituents, while ensuring that their protests would not be effective.”).

96. S.Roll Call Vote No. 320, 101st Cong. (1990) (Conference Report, H.R. 4739), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=101&session=2&vote=00320.

97. See Goren & Lackenbauer, *supra* note 14, at 176.

98. See *Dalton v. Specter*, 511 U.S. 462 (1994); see also Linda Greenhouse, *High Court Hears a Senator Argue For Right to Sue on a Base Closing*, N.Y. TIMES, Mar. 3, 1994, at A16.

99. See *id.*

100. See, e.g., Jodi Enda, *Specter Carries the Torch for Navy Yard*, PHILADELPHIA INQUIRER, Feb. 25, 1994, at A3 (comparing Sen. Specter’s Supreme Court performance to an Olympic athlete’s comeback).

D. A Caveat

The success of BRAC comes with one major caveat. While the BRAC process worked well the first time it was employed, subsequent rounds of base closures, while still effective, were arguably subject to political influence. The initial BRAC Commission ratified all DoD's recommended base closures without adding or subtracting from the list.¹⁰¹ All later commissions removed and added bases to the proposed DoD closure list. In his dissertation on the topic, Brian T. Kehl demonstrates that political considerations partly influenced these changes. For example, about the 1993 round of base closures, he writes:

Evidence that logrolling and special interests had influence over the process became evident when internal Pentagon recommendations were leaked to the *New York Times* about a week before the commission was to get the official recommendations. Congressmen whose bases were on the list lobbied hard over the next week for their removal.

Before the list was submitted to the BRAC commission, three California bases were removed—McClellan AFB in Sacramento, Long Beach Naval Shipyard, and the Presidio of Monterey. The special interests of California and its Congressional delegation were undoubtedly successful at bringing pressure to bear on the Pentagon.¹⁰²

Additionally, no member of the relevant defense committees has ever had a base closed in their districts. In 1991, DoD recommended 30 major bases for closure.¹⁰³ The BRAC Commission removed four from this list, three of which were represented on the Senate Armed Services Committees.¹⁰⁴ In 1993, “[o]f the nine bases removed from the list, only one was not represented on the Senate Armed Services Committee or the Senate Defense Appropriations Committee.”¹⁰⁵ The same story repeated itself in the 1995 round.¹⁰⁶

Kehl suggests that a process of political “learning” took place with each subsequent BRAC round.¹⁰⁷ While the first round represented a unique process at the time, special interests were more familiar with the system in later rounds. Additionally, the first round of cuts was made up of “low-hanging fruit”—the most egregious examples of surplus bases on which most could agree.¹⁰⁸

The first round was also very quick, with less than three months between the

101. Kehl, *supra* note 16, at 53.

102. *Id.* at 57–58.

103. *Id.* at 55.

104. *See id.*

105. *Id.* at 58.

106. *See id.* at 60 (“The commission added three bases to the list and deleted five of the recommendations of the Pentagon. All the deleted bases had representation on Senate Defense Committees—four on the Senate Armed Services Committee and one on the Senate Defense Appropriations Committee.”).

107. *Id.* at 49, 65–66.

108. *Id.* at 53.

Commission's formation and the deadline for its recommendation.¹⁰⁹ "[T]he short time frame did not allow special interests and rent-seekers an opportunity to pressure legislatures and commissioners."¹¹⁰ Subsequent rounds took substantially longer, giving interests time to organize.¹¹¹ For example, during the 2005 round, Texas Governor Rick Perry created a "BRAC Response Strike Force" composed of state and local officials charged with lobbying the Commission.¹¹² Other states and localities have hired retired military officials and former BRAC commissioners to make their case before the Commission.¹¹³

The lesson seems to be that a BRAC-style process will be most successful in its first iteration. Those who would seek to thwart cuts are least prepared the first time, especially if the process takes place rapidly. It is also the case that by definition the easiest choices will be available during a first round.

II. A FEDERAL SPENDING COMMISSION

Today, like in the late 1980's, the country faces record deficits and out of control spending. Both parties agree on the need for budget reform.¹¹⁴ As we have seen, the President has pledged a line-by-line review of the budget in order to cut inefficient, wasteful, and unnecessary programs. Unfortunately, despite consensus on the crisis and what needs to be done, the same dynamic that thwarted base closures for so long applies to federal programs as well.

Federal spending programs, like military bases, each have their own congressional sponsors and organized constituencies that work to ensure the wellbeing of those programs. As Senator George Voinovich explained at a hearing considering spending reform legislation,

The biggest problem we must overcome in this effort is that almost every program in the Federal Government, no matter how effective or spendthrift, has its own core of supporters It would be wishful thinking, at best, to believe we can restructure or shut down large numbers of programs across

109. The BRAC Act was signed into law on Oct. 24, 1988. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 100 CIS Legis. Hist. P.L. 526 (1988) (legislative history). The BRAC Commission's report deadline was Dec. 31, 1988. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 203(b)(1), 102 Stat. 2623, 2628 (1988).

110. Kehl, *supra* note 16, at 53.

111. *See id.* at 56, 66.

112. *See* Beaulier et al., *The Impact of Political Factors on Military Base Closures 2* (Working Paper), available at http://www.scottbeaulier.com/111708_BRAC_Paper_1_.doc.

113. *See id.* (noting that Illinois spent \$3 million for BRAC-related direct lobbying in 2005.).

114. *See* David Leonhardt, *Bipartisan Agreement: Raise Taxes, Cut Spending*, N.Y. TIMES ECONOMICS BLOG (Apr. 28, 2010, 1:40 PM), <http://economix.blogs.nytimes.com/2010/04/28/bipartisan-agreement-raise-taxes-cut-spending> (noting a recent survey by the Peter G. Peterson Foundation of high-ranking officials from the past eight administrations in which they all agreed that cutting spending must be part of any deficit reduction solution); Lori Montgomery, *Senate Rejects Plan to Create Commission on the Deficit*, WASH. POST, Jan. 27, 2010, at A8 (noting that members of both parties are concerned by deficits and wish to make budget reform a top priority).

multiple Federal agencies without provoking a firestorm of opposition. Nevertheless, that task must be undertaken if we are to have any hope of providing taxpayers the most effective and efficient government possible.¹¹⁵

In his frank account of his tenure as OMB Director, David A. Stockman explains how Congress—most notably Republican members protecting their pet programs—gutted President Ronald Reagan’s waste-cutting first budget.¹¹⁶ Stockman recounts that while he was preparing the budget and briefing member of Congress, Sen. Jesse Helms (R-N.C.) approached him to give him encouragement for his budget cutting, but warned him not to “let them OMB bureaucrats down there confuse you.”¹¹⁷ Helms told Stockman, “The tobacco program doesn’t cost the taxpayers one red cent. And it never will as long as I’m chairman of the Agriculture Committee.”¹¹⁸

Once the budget had been released, Sen. Jack Schmitt (R-N.M.) was apoplectic because NASA’s budget had been cut nine percent, and a “moon complex” program had been cancelled.¹¹⁹ Schmitt was a self-professed deficit hawk, but he had also been an astronaut that had walked on the moon.¹²⁰ He placed considerable pressure on Stockman to reverse his decision.

Sen. Strom Thurmond (R-S.C.) might take the cake for parochialism, however. He accosted Stockman to explain that while he very much supported budget-cutting, outmoded Rural Electric Administration co-ops should be spared.¹²¹ “Now we’re all behind the President’s program, yuh heah?” he said. “But you take good care of those REAs. Them’s some real *fine* people.”¹²²

The pattern of general support for spending control, but resistance to individual budget cuts continues to this day. In his first budget, President George W. Bush pursued a similar strategy to President Reagan, proposing tax cuts, spending cuts, and increased defense spending. The result was also similar, with tax cuts proving much more palatable than spending cuts and large deficits the ultimate consequence. Predictably, members of Congress, spurred by special interests, resisted the proposed program cuts.¹²³

115. *Trimming the Fat: Examining Duplicative and Outdated Federal Programs and Functions: Hearings Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Governmental Affairs*, 108th Cong. 1-2 (2004) (statement of Sen. George Voinoich, Member, S. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia).

116. See generally DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: WHY THE REAGAN REVOLUTION FAILED* (1st ed. Harpers & Row 1986).

117. *Id.* at 120.

118. *Id.*

119. *Id.* at 150.

120. See *id.*

121. See *id.* at 152.

122. *Id.*

123. See Robert Pear, *Opposition Builds to Spending Cuts in Bush’s Budget*, N.Y. TIMES, Apr. 9, 2001, at A1; Richard W. Stevenson, *Bush Faces Fight on Plan to Limit or Cut Programs*, N.Y. TIMES, Mar. 12, 2001, at A1.

President Obama's first budget included proposed cuts of \$17 billion from 121 government programs—a modest figure.¹²⁴ However, members of Congress from Obama's own party balked at the idea.¹²⁵ The *Washington Post* reported that Senator Dianne Feinstein vowed to fight for a \$400 million program that reimburses states for jailing illegal immigrants.¹²⁶ Rep. Mike Ross, “said he would oppose ‘any cuts’ in agriculture subsidies because ‘farmers and farm families depend on this federal assistance.’”¹²⁷ And Rep. Maurice D. Hinchey “vowed to force the White House to accept delivery of a new presidential helicopter Obama says he doesn’t need and doesn’t want. The helicopter program, which cost \$835 million this year, supports 800 jobs in Hinchey’s district.”¹²⁸

A commission approach modeled after BRAC could help here. It could serve to overcome the public choice dynamic by giving politicians the political cover needed to cut their special interest constituencies’ well-guarded programs. Unfortunately, the proposals we have seen to date resemble BRAC only superficially. They do not take into account the factors that made BRAC successful.

A. Recent Proposals

Members of Congress and the President have recently proposed budget reform efforts modeled on BRAC. In this section, we will look at some of these proposals and show how they lack many of the key elements that made BRAC successful. Specifically, we will look at the Bipartisan Task Force for Responsible Fiscal Action Act of 2009, better known as the Conrad-Gregg bill; the Commission on Congressional Budgetary Accountability and Review of Federal Agencies Act, often referred to as the CARFA Act; and Executive Order 13,531 establishing a National Commission on Fiscal Responsibility and Reform.

1. Conrad-Gregg

Senators Kent Conrad (D-N.D.) and Judd Gregg (R-N.H.), respectively the chairman and ranking member of the Senate Budget Committee, have introduced their “Bipartisan Task Force” proposal in the Senate the past two Congresses.¹²⁹ The proposal received much attention in early 2009 when it was offered as an amendment to the perennial bill to increase the federal debt ceiling.¹³⁰ While President Obama had endorsed the bill,¹³¹ it fell seven votes

124. Lori Montgomery & Amy Goldstein, *Democrats Assail Obama's Hit List, Lawmakers Vow to Protect Pet Programs*, WASH. POST, May 8, 2009, at A1.

125. *See id.*; *see also* Paul M. Krawzak & David Clarke, *Obama Details \$3.7 Trillion Budget*, CQ WEEKLY, May 11, 2009, at 1094.

126. *See* Montgomery & Goldstein, *supra* note 124.

127. *Id.*

128. *Id.*

129. Bipartisan Task Force for Responsible Fiscal Action Act of 2007, S. 2063, 110th Cong. (2007); Bipartisan Task Force for Responsible Fiscal Action Act of 2009, S. 2853, 111th Cong. (2009).

130. *See* Kent Conrad & Judd Gregg, *A Fiscal Battle on Two Fronts*, WASH. POST, Jan. 5, 2009, at A11.

short of the sixty it needed to pass.¹³² This prompted the President to create his own budget commission by executive order.¹³³

Senator Gregg has stated that the proposal was inspired and informed by the BRAC process.¹³⁴ The Conrad-Gregg bill would have created an eighteen-member commission charged with studying the government's fiscal imbalance and recommending ways to ameliorate it.¹³⁵ While superficially similar to BRAC, the Conrad-Gregg proposal is very different.

First, the Conrad-Gregg Task Force would be composed of eight sitting senators, eight sitting representatives, the Treasury Secretary, and one other executive branch official appointed by the President.¹³⁶ This is in stark contrast to the BRAC Commissions, which have been composed of experts independent of both Congress and the White House, and with no political careers to protect.

Second, while BRAC Commissions were tasked with a clear mission (select bases to close or realign) and guided by clear criteria (military need), the Conrad-Gregg commission's brief would be to "review the fiscal imbalance of the Federal Government"¹³⁷ and propose legislative language to address these factors.¹³⁸ This is a decidedly broader and more amorphous mandate with no guiding criteria to limit the commission's possible courses of action. In the case of BRAC, Congress was agreed on a desired outcome: closing surplus military bases based on military need. By creating a BRAC Commission, Congress was not delegating any policymaking power. It was instead simply attempting to overcome the political problems that made choosing specific bases to close virtually impossible. The Conrad-Gregg proposal, in contrast, creates what amounts to a miniature Congress imbued with blue-sky authority to develop policies to reconcile the fiscal-imbalance.¹³⁹ Next, while the Conrad-Gregg bill

131. See Jackie Calmes, *Obama Endorses Bill to Create Panel on Deficit*, N.Y. TIMES, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/us/politics/24debt.html>; Michael A. Fletcher, *President Obama Endorses Bipartisan Deficit-reduction Panel*, WASH. POST, Jan. 24, 2010, at A4.

132. J. Taylor Rushing, *Senate rejects deficit reduction commission*, THE HILL, Jan. 26, 2010, available at <http://thehill.com/homenews/senate/78069-senate-rejects-fiscal-deficit-reduction-commission>.

133. See Remarks on Signing an Executive Order Establishing the National Commission on Fiscal Responsibility and Reform and an Exchange With Reporters, 2010 DAILY COMP. PRES. DOC. 113 (Feb. 18, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000103/pdf/DCPD-201000103.pdf>.

134. *Safeguarding the American Dream: Prospects for Our Economic Future and Proposals to Secure It: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. 3 (2009) (statement of Sen. Judd Gregg) (drawing a comparison between proposed Conrad-Gregg spending task force legislation and the BRAC process); see also *The Bipartisan Task Force for Responsible Fiscal Action Act of 2007: Hearing Before the S. Comm. on the Budget*, 110th Cong. 30 (2007) (statement of Sen. Judd Gregg) (stating that a "fast-tracking" approach like the BRAC is the best way to overcome political gridlock).

135. Bipartisan Task Force for Responsible Fiscal Action Act of 2009, S. 2853, 111th Cong. § 316(b)(4) (2009) [hereinafter Conrad-Gregg Bill].

136. *Id.*

137. *Id.* § 2(b)(2)(A).

138. See *id.* §§ 2(b)(2)(C)–(D).

139. While sections 2(D)(i)–(iii) provide some guidance to the Task Force, they are not bound to consider any criteria and are free to make any recommendations they see fit.

includes an expedited legislative process, it is not a silent approval process as we see in BRAC. Under Conrad-Gregg, once the commission develops its recommendations, it transmits them to Congress as legislation.¹⁴⁰ This legislation must be reported out of committee within seven days of introduction,¹⁴¹ after which the bill receives fast track consideration, which includes a limit on debate and a prohibition on amendments and filibuster.¹⁴² This is similar to the fast track provisions available to a joint resolution of disapproval to overturn a BRAC Commission's recommendations.¹⁴³ We must therefore remember that it is not the fast-track provision that contributes to BRAC's success; it is the silent approval process.

Under the BRAC approach, Congress votes to approve the general policy of closing surplus bases. The BRAC Commission then chooses which bases to close, and its recommendations are operative unless Congress takes action—through an expedited process—to undo them. We saw in Part I.C why this matters, but chief among the reasons is that members of Congress are able to avoid voting to close any particular base. Instead they vote first to cut bases in the abstract, and then they vote to *not save* a few clearly surplus bases.

The Conrad-Gregg bill does the opposite. It charges a commission with developing legislation to fix the federal fiscal imbalance, and then requires members of Congress to affirmatively vote to enact that legislation without amendment. Members would have to state their approval on the record for every budget cut and tax increase in the legislation. This disregards the lesson of BRAC, which is that to overcome the special interest pressure that members of Congress feel, you must allow them to vote to cut spending in the abstract, and then simply abstain from repealing a commission's recommendations.

It is silent approval—the fact that a commission's recommendations are immediately active without further action—that provides members of Congress with the political cover they need. If a member's literal or special interest constituencies are affected by a commission's recommendations, the member can express shock at the commission's decisions, can point out that she did not and would not have voted as the commission did, and can act to be seen as working to overturn what is already a done deal. The Conrad-Gregg bill not only eschews this device, it requires that the Task Force bill be passed by a three-fifths vote in each house.¹⁴⁴

140. See Conrad-Gregg Bill, *supra* note 135, § 2(b)(2)(D).

141. See *id.* § 2(e)(1)(C). The bill must be reported out with favorable, unfavorable, or neutral recommendation within seven days. If not, it is discharged. *Id.*

142. See *id.* §§ 2(e)(2)(A), (e)(2)(B).

143. See Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 202(b), 208, 102 Stat. 2623, 2627, 2632–34 (1988).

144. See Conrad-Gregg Bill, *supra* note 135, §§ 2(e)(2)(A)(vi), §2(e)(2)(B)(iv). Because the Conrad-Gregg bill is delegating great deliberative authority to a “bipartisan task force” and then limiting amendment and debate on the task force's bill, a supermajority requirement is probably appropriate. However, if the purpose of a bill creating a commission or task force is to allow members of Congress to approve a policy that is popular in the abstract (such as base or budget cutting), but politically

Conrad-Gregg looks like BRAC, and this has led some to assume that it would work the same way.¹⁴⁵ They are, however, very different. BRAC did only one thing: cut military bases. Congress had agreed to cut bases; it only delegated the task of choosing which ones. That solved a political problem. The Conrad-Gregg “task force,” in contrast, could not only cut programs and budgets, it could raise taxes and slash benefits as well. This is very different from simply implementing a policy on which there is agreement.

A budget commission truly modeled on BRAC would similarly do only one thing: cut federal programs. Congress can agree that the budget must be cut and delegate the task of choosing which programs should be terminated or consolidated to an expert commission. The purpose there would similarly be to solve a political problem, not to abdicate responsibility for policymaking.

2. National Commission on Fiscal Responsibility and Reform

The National Commission on Fiscal Responsibility and Reform was created by Executive Order 13,531.¹⁴⁶ It is patterned on the Conrad-Gregg bill and President Obama signed the order shortly after that bill failed.¹⁴⁷ Many of the critiques that apply to the Conrad-Gregg bill apply to it as well.

Like the Conrad-Gregg “task force” the Commission is composed of eighteen members, however they need not all be sitting officials.¹⁴⁸ Six of the members must be senators and six representatives, but the remaining six, which are appointed by the President, can be private citizens.¹⁴⁹ Although this can be seen as a step in the right direction, the fact remains that two-thirds of the Commission will have political careers to protect.

The Commission’s mission is also broad and amorphous. It is charged with “identifying policies to improve the fiscal situation in the medium term and to achieve fiscal sustainability over the long run.”¹⁵⁰ There are no limiting criteria short of a mandate to propose recommendations to balance the budget by 2015.¹⁵¹ In this respect, like the Conrad-Gregg “task force,” the Commission is

difficult in particular cases because of special interest pressure, a supermajority requirement is counterproductive. Not only is it numerically more difficult to reach approval, but it increases the number of targets for special interest pressure.

145. George Will, *Congress’s Error of Commission*, WASH. POST, Jan. 17, 2010, at A23.

146. Exec. Order No. 13,531, 75 Fed. Reg. 7927 (2010).

147. See Remarks on Signing an Executive Order Establishing the National Commission on Fiscal Responsibility and Reform and an Exchange With Reporters, 2010 DAILY COMP. PRES. DOC. 113, at (Feb. 18, 2010) (“This commission is patterned on a bill that I supported for a binding commission that was proposed by Democratic Senator Kent Conrad and Republican Senator Judd Gregg. Their proposal failed recently in the Senate. But I hope congressional leaders in both parties can step away from the partisan bickering and join this effort to serve the national interest.”), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000103/pdf/DCPD-201000103.pdf>.

148. Exec. Order No. 13,531 § 2, 75 Fed. Reg. at 7927.

149. See *id.*

150. *Id.* § 4. More specifically, the Order requires the Commission to “propose recommendations designed to balance the budget, excluding interest payments on the debt, by 2015.” *Id.*

151. See *id.*

a deliberative body meant to develop policy.

Finally, because the Commission is a creature of the executive, there is no guarantee that Congress will consider its proposals. In fact, Senator Gregg has said that a commission approach by executive order would be “toothless.”¹⁵² The Commission will merely publish a final report with its recommendations.¹⁵³ While these may find their way into legislation, there is no automatic mechanism for this to happen, and there is certainly no silent approval process.

3. Commission on Congressional Budgetary Accountability and Review of Federal Agencies

Senator Sam Brownback (R-KS) has introduced some variant of a bill to establish a Commission on Congressional Budgetary Accountability and Review of Federal Agencies (CARFA) in the last five congresses.¹⁵⁴ The most recent bill includes an explicit budget accountability component.¹⁵⁵ Brownback has stated that CARFA is meant to be similar to BRAC.¹⁵⁶ Although different in some key respects, CARFA is closer to the BRAC model than the other proposals we have reviewed.

The commission created by CARFA would be composed of seven members.¹⁵⁷ Unlike the Conrad-Gregg proposal and the National Commission on Fiscal Responsibility and Reform, there is no requirement that any of these members be sitting members of Congress or other officeholders.¹⁵⁸ Although the bill does not prohibit sitting officials from being appointed to the Commission, statements by Senator Brownback suggest that it is meant to be an independent panel.¹⁵⁹

Like BRAC, the CARFA commission would have a clear and limited purpose: to recommend the elimination or realignment of federal programs that are

152. Press Release, Sen. Judd Gregg, A Fiscal Action Commission by Executive Order Will Be Toothless: Commission Would Lack Force of Law, So Recommendations Will Likely Go Nowhere (Jan. 20, 2009), *available at* <http://budget.senate.gov/republican/pressarchive/2010-01-20FiscalAction-Com.pdf>. Sen. Gregg said, “The creation of a fiscal action commission by executive order would be like a car without an engine,” and added that “Numerous commissions have been created by executive order over the years, and their common thread is that none have produced any legislative results.” *Id.*

153. *See* Exec. Order No. 13,531 § 5, 75 Fed. Reg. at 7927.

154. S. 1282, 111th Cong. (2009); S. 1935, 110th Cong. (2007); S. 1155, 109th Cong. (2005); S. 1668, 108th Cong. (2003); S. 2488, 107th Cong. (2002). Before the most recent version, the bills lacked a budget component and would have established a Commission on the Accountability and Review of Federal Agencies (CARFA). As a result, this proposal is still referred to as the CARFA bill even though its initials are now “CBARFA.”

155. A bill to establish a Commission on Congressional Budgetary Accountability and Review of Federal Agencies, S. 1282, 111th Cong. (2009) (commonly abbreviated as CARFA).

156. Press Release, Sen. Sam Brownback, Brownback Introduces CARFA Legislation (Jun. 17, 2009), *available at* <http://brownback.senate.gov/public/press/record.cfm?id=314639>.

157. CARFA § 2(b).

158. *See id.*

159. *See* Press Release, Sen. Sam Brownback, Brownback Introduces CARFA Legislation (Jun. 17, 2009), *available at* <http://brownback.senate.gov/public/press/record.cfm?id=314639> (suggesting that the CARFA Commission should operate like the BRAC Commissions).

inefficient, duplicative, or wasteful.¹⁶⁰ This specificity stands in contrast to the amorphous instructions of the Conrad-Gregg bill (to address the federal government's "fiscal imbalance")¹⁶¹ or Executive Order 13,531 (to "identify[] policies to improve the fiscal situation").¹⁶² This same specificity means that CARFA is addressing a political problem, and not simply delegating policymaking to an ad-hoc mini-Congress.

The BRAC process allowed Congress to agree to close military bases in principle and then delegate choosing the particular bases to a group of independent citizens who were not bound to any constituency. CARFA similarly allows Congress to agree to cut federal spending in the abstract, and then delegate the choice of which programs to cut to a panel that is not beholden to any lobbies with a special interest in those programs. This would give members of Congress the political cover that we have seen is necessary to overcome the public choice problem.

CARFA's limited purpose is further refined by a clear set of criteria that would guide the commission in choosing federal programs to cut or combine.¹⁶³ This parallels the first BRAC Act, which adopted clear criteria that informed Commission's decisions.¹⁶⁴ In the case of BRAC, these were largely focused on military need.¹⁶⁵ The criteria set out by CARFA explain in detail what would qualify a program as inefficient, duplicative, or wasteful, and therefore subject to elimination or reform.¹⁶⁶ Additionally, in making its assessments, the commission is mandated to consider the achievement of performance goals under the Government Performance and Results Act of 1993 (GPRA).¹⁶⁷

GPRA is legislation that grew from the Reinventing Government movement of the mid-90s¹⁶⁸ and requires federal agencies to establish clear and measurable outcome-based goals for its programs.¹⁶⁹ It also requires agencies to measure their performance and issue program evaluations that assess whether they are meeting their stated goals.¹⁷⁰ The hope for this exercise in performance measurement and reporting was not only that program managers would use the information to achieve better results, but also that Congress would take performance assessments into account as they authorized and appropriated budgets.¹⁷¹

160. CARFA § 3(b)(3).

161. Conrad-Gregg Bill, *supra* note 135, § 3(b)(3).

162. Exec. Order No. 13,531 § 4, 75 Fed. Reg. at 7927.

163. CARFA § 2(b)(3).

164. *See supra* notes 78–80 and accompanying text. Subsequent BRAC rounds also incorporated clear selection criteria. *See supra* note 82.

165. *See id.*

166. CARFA § 3(b)(3).

167. CARFA § 3(a)(2)(b).

168. For a primer to the Government Performance and Results Act and the concepts that undergird it, see Jerry Ellig & Jerry Brito, *Toward a More Perfect Union: Regulatory Analysis and Performance Management*, 8 FLA. BUS. L.R. 1 (2009).

169. *See* Government Performance and Results Act of 1993 § 3, 5 U.S.C. § 306(a)(1), (b).

170. *See id.* § 4, 31 U.S.C. §1116.

171. *See* Ellig & Brito, *supra* note 168, at 18.

Unfortunately, Congress has largely ignored the GPRA reports that agencies dutifully transmit to it each year.¹⁷²

Several case studies have shown that Congress has little interest in allowing program performance reports influence its funding decisions.¹⁷³ An independent commission charged with identifying inefficient, duplicative, and wasteful federal programs, however, would be able to make use of this data. CARFA goes one step further and requires that the commission consider performance assessments.¹⁷⁴ By using the performance data that has been produced under GPRA for over 10 years, the commission would be well positioned to make empirically defensible recommendations.

So far, CARFA is very similar to BRAC. Unfortunately, it diverges in one critical respect. Like the Conrad-Gregg bill, it requires the commission to write legislation implementing its recommendations.¹⁷⁵ It then provides an expedited legislative process for that bill, with limited time in committee, limited debate, and no amendments allowed.¹⁷⁶ Only if the legislation is approved by both houses and signed by the President are the commission's recommendations binding. Like Conrad-Gregg, CARFA lacks the type of silent approval process that contributed greatly to BRAC's success.

For the same reasons explained in Part I.C, this greatly undercuts a commission's ability to give members of Congress the political cover they need to cut the programs favored by the special interests to which they are beholden. The trick, as we have seen, is to allow members to vote for cutting spending in principle without ever having to cast a vote to cut any particular program.

B. An Alternative Proposal

BRAC taught us that it is possible to overcome a political situation in which parochial or special interests prevent the attainment of a greater collective good. Its success seems to have been dependent on a very specific recipe, the key ingredient of which is a "silent approval" process. Silent approval of choices made by a commission with delegated authority means that Congress can agree to the uncontroversial collective good while at the same time securing political cover.

To apply that lesson to out of control federal spending, we must follow this recipe as closely as possible. CARFA, which is after all modeled on BRAC, gets us partway to this goal. To improve it, two key changes are necessary.

First, a silent approval mechanism must replace the affirmative up-or-down vote on legislation now in the CARFA bill. One option would be to mimic

172. See Jerry Ellig, *Ten Years of Results from the Results Act 22* (Mercatus Center Working Paper No. 10-21, 2010), available at <http://mercatus.org/publication/ten-years-results-results-act>.

173. *Id.*

174. A bill to establish a Commission on Congressional Budgetary Accountability and Review of Federal Agencies, S. 1282 § 3(a)(2)(B), 111th Cong. (2009) (commonly abbreviated as CARFA).

175. See *id.* § 3(b)(1)(B)(ii).

176. *Id.* § 6.

BRAC closely and only allow an up-or-down vote on a resolution *disapproving* the commission's package of recommendations in its entirety. Of course, such a resolution must also enjoy an expedited legislative process that protects it from amendment and filibuster. If a resolution was not approved within 45 days of the commission's reporting, the recommendations would become operative automatically.

The second necessary modification of CARFA is related to its scope. As we have seen, BRAC was successful in part because the decisions delegated to the Commission were very narrow; its choices were almost binary. A military base could be closed, realigned, or left alone. While CARFA can be praised for encompassing a similarly limited purpose (to recommend the elimination or realignment of federal programs), the scope of what is covered under the rubric of "federal programs" may be problematic.

A military base tends to have a fence around it, which means it can serve as a discrete unit of analysis. The contours of what constitutes a federal program are more difficult to ascertain. The current version of the CARFA bill defines programs as "any activity or function of an agency."¹⁷⁷ This encompasses the entire federal budget, including entitlements like Social Security and Medicare, as well as entire bureaucracies such as the Pentagon.

This is problematic for two reasons. First, while Congress may be willing to cede some authority to an independent commission in exchange for political cover, that bargain would probably not extend to include entitlements. Entitlements are politically sacrosanct for many reasons. For one thing, they are very popular with the electorate.¹⁷⁸ Professor David Primo recounts that a 1995 survey of Americans found 79 percent approval for a federal balanced-budget amendment.¹⁷⁹ "However, when the question was reframed to note that a balanced budget may require 'cuts in Social Security,' only 36 percent were in favor of the rule change."¹⁸⁰

Additionally, the largest and best-organized special interest groups work to protect entitlements. The American Association of Retired Persons, politically focused on Social Security and Medicare, boasts 40 million members¹⁸¹ and a budget of over \$1 billion.¹⁸² Although a BRAC-like approach will always preserve Congress's power to reject the commission's recommendations, it seems unlikely that Congress would delegate the task of entitlement reform to

177. *Id.* § 1(4).

178. See Press Release, Harris Interactive, Medicare, Crime-fighting, Social Security, Defense—the Most Popular Federal Government Services (Jan. 14, 2010), available at <http://news.harrisinteractive.com/profiles/investor/ResLibraryView.asp?BzID=1963&ResLibraryID=35446&Category=1777> (noting that 86% of respondents support the Social Security system, with 53% supporting "a great deal").

179. See Primo, *supra* note 6, at 157–64.

180. See *id.*

181. *About AARP*, AARP, http://www.aarp.org/aarp/About_AARP (last visited Nov. 11, 2010).

182. See AARP, SUMMARY OF 2008 AARP CONSOLIDATED FINANCIAL STATEMENTS (2009), available at http://assets.aarp.org/www.aarp.org/_TopicAreas/annual_reports/assets/AARPfinancialsummary.pdf.

such an automated process.¹⁸³

Second, entitlement reform is not amenable to the binary-like decision-making inherent in a BRAC-type commission. A program as massive as Social Security—or even its component parts—cannot simply be closed or realigned. Fixing entitlements will be a politically fraught matter of tweaking different factors: contributions, benefits, eligibility age, etc. To the extent a CARFA commission is given authority over entitlements, its mission will begin to look more like the amorphous mandates of the other proposals to reconcile the budget.

It is, therefore, interesting to note that previous versions of the CARFA bill applied only to non-defense discretionary spending.¹⁸⁴ It would be wise to return these limitations to a new bill. Doing so would limit commission review to only 17 percent of the budget.¹⁸⁵ Although we may wish we had a silver bullet that could resolve the government's fiscal imbalance in one shot, a spending review commission is not that bullet. Instead, a spending commission should be modeled as closely as possible to BRAC in order to try to replicate its success. This means limiting the commission's purpose to simple budget cutting (not rebalancing); limiting the scope of its review to a manageable and politically feasible set (discretionary spending); and defining its units of review as narrowly as possible (clear definitions of what constitutes a program).

Finally, there is one way that Congress should consider expanding the scope of a spending commission. That would be by including tax expenditures in a commission's brief. As Prof. Len Burman explains, tax expenditures can be considered spending programs masked as tax cuts.¹⁸⁶ For example, there is little difference between a \$5,000 refundable tax credit to pay for health insurance and a \$5,000 voucher from the Department of Health and Human Services.¹⁸⁷ Like spending programs, tax expenditures benefit special interests that jealously guard them. A commission approach that allows review while preserving political cover might be welcome.

As with spending programs, however, Congress must be careful how it defines what qualifies as a tax expenditure subject to commission review. As Prof. Donald Marron explains:

183. It is more likely that Congress would create a Commission process without a silent approval process. The Commission would then serve to reduce the costs of negotiating a political compromise, and make non-binding recommendations to Congress.

184. For example, the version of CARFA bill introduced in the 108th Congress excludes from consideration "(i) the Department of Defense or its subdivisions; or (ii) any agency that solely administers entitlement programs." Commission on the Accountability and Review of Federal Agencies Act, S. 1668 § 3(a)(B), 108th Cong. (2003).

185. See CONGRESSIONAL BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2010 TO 2020* 48, Table 3.1 (Jan. 2010).

186. See John Maggs, *On Freezing Tax Expenditures*, NATIONAL JOURNAL (Feb. 8, 2010), <http://insiderinterviews.nationaljournal.com/2010/02/on-freezing-tax-expenditures.php>.

187. See *id.*

One could, of course, just use whatever definitions the Treasury and the Joint Committee on Taxation use. But analysts do not agree on which provisions are really spending programs in disguise.

Some cases are easy. Tax credits for using ethanol-blended motor fuels are clearly spending programs run through the tax code. But then there are items like the 15% tax rate on capital gains and dividends. That rate is scored as a tax expenditure in the current system because 15% is lower than the rates on ordinary income. It wouldn't be viewed as a tax expenditure, however, by analysts who believe that a consumption tax, rather than an income tax, should be the lodestar for judging tax policies. My point is not to take sides on that issue, but just to point out that there is sincere debate about which items labeled as tax expenditures should be viewed as hidden spending programs and which as good tax policy.¹⁸⁸

How Congress might define federal spending programs and tax expenditures is beyond the scope of this Article. However, it would be wise to keep these definitions sufficiently broad to make the commission review exercise worthwhile, but narrow enough to approximate the discrete analyses that BRAC commissions could conduct on military bases.

CONCLUSION

The success of BRAC shows how to overcome public choice dynamics at a time of crisis. These lessons apply today, but they must be understood correctly. While creating a small commission or task force to tackle a problem has many advantages, it is just one aspect of what made BRAC succeed. A spending commission modeled on BRAC should be focused, independent, composed of disinterested citizens given clear criteria for their decisions, and be structured in a way that allows its recommendations to be operative unless Congress rejects them. This prescription is the only way that a spending commission has a chance to actually result in spending cuts.

188. Donald Marron, *The Problem with Tax Expenditures*, NATIONAL JOURNAL (Feb. 8, 2010, 11:23 AM), <http://economy.nationaljournal.com/2010/02/a-few-questions-on-freezing-ta.php#1410541>.