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SUBJECT: **Base Realignment and Closure of National Guard Facilities: Application of 10 U.S.C. § 18238 and 32 U.S.C. § 104(c)**

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The Defense Base Closure and Realignment Act of 1990[1] has been amended to authorize a new round of base realignment and closure (BRAC) actions in 2005. Consistent with the law, the Department of Defense (DOD) has prepared a list of candidate military installations for closure or realignment actions. Among these installations are several Air National Guard and Army National Guard facilities. Two provisions of law, 10 U.S.C. § 18238 and 32 U.S.C. § 104(c), have been seen as impediments to BRAC actions at these facilities. The application of these provisions to the BRAC process is the subject of this memorandum.

BRAC Background

The Defense Base Closure and Realignment Act provides a finely wrought procedure for analyzing and carrying out BRAC actions and governs the current BRAC round. In general, the Secretary of Defense is required to prepare a force-structure plan and an inventory of existing military installations.[2] The Secretary is required to review this information and, based on statutorily prescribed selection criteria, create a list of sites recommended for realignment or closure.[3]

[1] Defense Base Closure & Realignment Act of 1990, Pub. L. No. 101-510, § 2905; *see also* Pub. L. No. 107-107, § 3006 (current version at 10 U.S.C. § 2687 note.) For ease of reference, all citations to the 1990 Act are to the relevant sections of the Act as it appears in note following 10 U.S.C. § 2687.

[2] Base Closure Act, §§ 2912; 2913; *see generally* Military Base Closures: Implementing the 2005 Round, CRS Rept. RL32216 (March 17, 2005).

[3] Base Closure Act, §§ 2903(c); 2914.

Next, the independent BRAC Commission must review the DOD list.[4] After following mandated procedures, the Commission can alter the recommendations of the Secretary if the Secretary's proposal deviates substantially from the force-structure plan and selection criteria.[5] The Commission must then transmit its recommendations, along with a report explaining any changes to the DOD choices, to the President for his review.[6]

The President may review the recommendations and then transmit to the Commission his report either accepting or rejecting, in whole or in part, the Commission's recommendations.[7] If the President disapproves the recommendations, the Commission must then submit a revised recommendation to the President for his consideration.[8]

If the President approves all of the recommended sites, he may transmit a copy of the list to Congress.[9] If the President does not send this list to Congress by November 7, 2005, the base closure process terminates.[10]

Finally, the process may be terminated by a joint resolution of disapproval passed within 45 days after the President transmits the list of recommendations.[11] As a matter of course, this congressional action would be subject to a presidential veto and the ordinary requirements for overriding a veto. If Congress does not act, the Secretary of Defense may then proceed to implement the recommendations.

National Guard Background

The National Guard is the modern incarnation of the militia referred to in the Constitution.[12] The Constitution provides for both a state and federal role in controlling the militia.[13] Congress is empowered to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States ...."[14] The Constitution also reserves to the

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[4] *Id.* §§ 2903(d); 2914(d).

[5] *Id.* §§ 2903(d)(2)(B); 2914(d)(3). Additional requirements are applicable if the Commission proposes to add or expand a closure or realignment.

[6] *Id.* §§ 2903(d)(2)(A), (d)(3); 2914(e).

[7] *Id.* §§ 2903(e)(1)-(3); 2914(e).

[8] *Id.* §§ 2903(e)(3); 2914(e)(1), (2).

[9] *Id.* §§ 2903(e)(4); 2914(e)(4).

[10] *Id.* § 2914(e)(3).

[11] *Id.* § 2904(b).

[12] *See* Lipscomb v. Federal Labor Relations Authority, 333 F.3d 611, 613 (5th Cir. 2003).

[13] Perpich v. Dep't of Defense, 496 U.S. 334, 350-52 (1990) (discussing the role of the federal and state governments in regulating the National Guard).

[14] U.S. Const. Art. 1, § 8, cl. 15, 16.

States "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress...."[15]

By federal statute, the Guard has also become a reserve component in the United States Armed Forces. Specifically, federally recognized Guard units are part of the Air National Guard of the United States or Army National Guard of the United States.[16]

Pursuant to federal law, all fifty states (as well as U.S. territories, Puerto Rico, and the District of Columbia) maintain units of the National Guard.[17] Under the laws of all of the states, the Governor acts as commander-in-chief, with state authority over the Guard remaining until Congress, consistent with the Constitution, exercises its authority in a manner to preempt the state regulatory role.[18]

Section 18238

10 U.S.C. § 18238 has been cited as a potential impediment to BRAC activities. That provision of law states:

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

Thus, the question is whether a state Governor (or the commanding general of the National Guard of D.C.) would have the authority to prevent a BRAC action to the extent that it would result in the relocation or withdrawal of a National Guard unit. It appears, however, that the applicability of 10 U.S.C. § 18238 would be somewhat more limited.

The provision itself references relocations or withdrawals made "under this chapter." The phrase "this chapter" is an apparent reference to Chapter 1803 of title 10, which governs facilities for Reserve components and includes 10 U.S.C. §§ 18231-18239. These authorities were originally enacted as the National Defense Facilities Act of 1950, and despite subsequent revision, remain substantially similar to their original form.[19] As described in 10 U.S.C. § 18231, the purpose of these provisions is to provide for "the acquisition, by purchase, lease, transfer, construction, expansion, rehabilitation, or conversion of facilities necessary for the proper development, training, operation, and maintenance of the reserve components of the armed forces ...."[20] Accordingly, these provisions authorize the Secretary of Defense to acquire facilities for use by Reserve components. Incidental to this authority is an authorization to transfer title to property acquired under § 18233(a)(1) to a state, so long

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[15] U.S. Const. Art. ,1 § 8, cl. 16.

[16] 10 U.S.C. §§ 261(a)(1), (5).

[17] 32 U.S.C. § 104 (a).

[18] *See, e.g.*, MINN. CONST. art. 5, § 3; N.C. CONST. art. XII, § 1; PA. CONST. art. IV, § 7; VA. CODE ANN. § 44-8; *see also* People ex rel. Leo v. Hill, 126 N.Y. 497, 504 (N.Y. 1891); Bianco v. Austin, 197 N.Y.S. 328, 330 (N.Y. App. Div. 1922).

[19] *See* Act of Sept. 11, 1950, c. 945, 64 Stat. 830.

[20] 10 U.S.C. § 18231(1); *see also* H.R. CONF. REP. NO. 3026, 81st Cong. (1950), *reprinted in* 1950 U.S.C.C.A.N. 3705.

as such transfer is incidental to the expansion, rehabilitation, or conversion of the property for joint use by two or more Reserve components.[21] Thus, it is certainly conceivable that acquisition of new facilities and, potentially, the transfer of properties could result in relocation of particular units of the National Guard.[22] Thus, in circumstances where transfer of units would occur in connection with the exercise of these authorities, 10 U.S.C. § 18238 would apply.

The law governing BRAC activities is codified at 10 U.S.C. § 2687 note. These authorities are contained in chapter 155 of Title 10 and are not related to the chapter of the code containing § 18238 nor to the law which originally contained § 18238. Thus, it would appear that the chapter 1803 provision limiting authority to relocate Army and Air National Guard units would, by its own terms, not serve as a limitation on actions taken pursuant to BRAC-related law.

It should be noted that the Defense Base Closure and Realignment Act does not specifically address 10 U.S.C. § 18238. If, however, a court were to determine that this provision was intended to apply to relocations resulting from the exercise of authorities outside of chapter 1803 of the United States Code, the enactment of the Defense Base Closure and Realignment Act could be interpreted as an implicit repeal of the § 18238 limitation. The arguments in this regard are discussed, infra pages 8-10, following the section analyzing the language contained in 32 U.S.C. § 104(c).

Section 104(c)

Whether 32 U.S.C. § 104(c) places a limitation on the authority of DOD and the BRAC Commission to recommend or take BRAC-related actions at National Guard facilities hinges upon the answers to several questions. It is first necessary to determine the scope of the provision in order to ascertain whether Congress intended it to apply to actions precipitated by BRAC decisions. This inquiry into the language and legislative history of the provision itself is followed by a separate section analyzing whether Congress amended or repealed any applicable limitation on federal authority to close or realign National Guard facilities by enacting the Defense Base Closure and Realignment Act.

In general, 32 U.S.C. § 104 provides that each "State or Territory and Puerto Rico may fix the location of the units and headquarters of its National Guard." It also prescribes, pursuant to Congress' constitutional authority, the general organization of the Guard and the composition of Guard units. Relevant to the present inquiry, subsection (c) states:

> To secure a force the units of which when combined will form complete higher tactical units, the President may designate the units of the National Guard, by branch of the Army or organization of the Air Force, to be maintained in each State and Territory, Puerto

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[21] 10 U.S.C. § 18233(b), (a)(2).

[22] It would not appear that 10 U.S.C. § 18238 would limit its gubernatorial approval requirement to relocations or withdrawals that would result in transfer of Air National Guard and Army National Guard units to locations outside of a state. Indeed, the provision as originally enacted clearly indicated that approval would be required for unit movements "from any community or area ...." National Defense Facilities Act of 1950, c. 945, § 4, 64 Stat. 830 (1950). These words were subsequently deleted as surplusage. *See* Act of Aug. 10, 1956, c. 1041, 70A Stat. 123; House and Senate Reports to accompany H.R. 7049, *available at* 1956 U.S.C.C.A.N. 4613.

> Rico, and the District of Columbia. *However, no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor*.[23]

Under this provision, the President may designate the units of the Guard, by branch or organization, that will be maintained in each state, meaning that the President can choose the function particular units will serve and their level of command.[24] The provision also supplies a limitation on the exercise of federal authority by conditioning any changes in the branch or organization of a unit upon gubernatorial approval. Thus, redesignation of a unit's position in the command echelon or a change in its functions would appear to require gubernatorial consent. In addition, this limitation states that changes to the "allotment" of a unit are subject to gubernatorial approval. According to regulations issued by the National Guard Bureau of the Department of the Army and Air Force, allotment of a unit means its allocation to a particular state or group of states.[25]

It may be possible to interpret § 104(c) to apply to BRAC actions. Unlike 10 U.S.C. § 18238, § 104(c) does not contain a provision expressly limiting its application to changes that result from the use of a given set of authorities. It is therefore arguable that the second sentence of this provision is applicable to a change resulting from the exercise of any authority. Further, it is possible that Congress intended the limitation to apply generally to changes that might be authorized by both law existing at the time of the provision's enactment and laws enacted in the future. On the other hand, it could also be argued that the limitation is applicable only to the exercise of the authority granted to the President by § 104(c) itself, namely the authority to designate the units of the National Guard to be maintained throughout the states and other specified U.S. possessions or, perhaps more broadly, to the exercise of other authorities enacted contemporaneously with § 104(c).

Despite the lack of a clear expression that the gubernatorial approval language of § 104(c) is applicable only to the exercise of authorities contained elsewhere in § 104, there is support for implying such a limitation to the provision's application. Generally, courts will not read provisions or portions of a statutory provision in isolation. Thus, it is appropriate when interpreting a statute to examine the context of a given provision and to "give effect to the plainly expressed clauses which precede and follow [the provision at issue] ...."[26] It is arguable, in this instance, that the second sentence of § 104(c) is impliedly tied to and meant to modify the first sentence of that subsection. As such, it serves as a traditional proviso, or a statement "restricting the operative effect of statutory language to less than what its scope of operation would be otherwise."[27] Provisos are typically interpreted according to the same principles applied to any other type of statutory provision, except that where there is ambiguity concerning "the extent of the application of the proviso

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[23] 32 U.S.C. § 104(c) (emphasis added).

[24] *See* GlobalSecurity.org, Military Lineage Terms, *available at* [http://www.globalsecurity.org/military/agency/army/lineage-terms.htm].

[25] DEPARTMENTS OF THE ARMY AND THE AIR FORCE, NATIONAL GUARD BUREAU, *Organization and Federal Recognition of Army National Guard Units*, NGR 10-1 § 2-2 (Oct. 2002).

[26] Western Union Tel. Co. v. Nester, 309 U.S. 582, 589 (1940).

[27] 2A, Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 47:08 at 235 (6th ed. 2000).

on the scope of another provision's operation, the proviso is strictly construed."[28] In addition, some judicial precedent indicates that a proviso's effect is limited to the section of a statute to which it is attached.[29] If this approach to statutory construction were adopted, it would appear likely that application of the limiting provision of § 104(c) would not be extended to changes to the branch, organization, or allotment of a unit resulting from BRAC actions. However, modern jurisprudence appears to adopt the position that provisos are to be interpreted in accordance with legislative intent and that "the form and location of the proviso may be some indication of the legislative intent," but will not be controlling.[30]

An examination of the legislative history of § 104(c) may shed some light upon the intent behind the current limitation contained within the provision. The provision originates from language contained in the National Defense Act of 1916.[31] That law altered the status of the then existing state militias by constituting them as the National Guard of the United States.[32] The law provided federal compensation for Guard members and governed the basic organization, equipping, and training of the National Guard. It also authorized "federalization" of the Guard by units, rather than through the drafting of individual soldiers.[33] Section 60 of that act was comparable to the current law. It stated:

> Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in the time of peace to such general exceptions as may be authorized by the Secretary of War. *And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units*.[34]

Thus, in its original incarnation, this provision contained no limitation on the President's authority to designate which units of the Guard were to be maintained in which location. Subsequent to its enactment, the National Defense Act was amended several times. Section 6 of the National Defense Act Amendments of 1933[35] struck out the original language. The new provision retained much of the original substance, but included a limitation on presidential authority comparable to the current law. The provision stated:

> [T] he President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units: *Provided*, That

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[28] *Id*. at 236.

[29] United States v. Babbit, 66 U.S. 55 (1862); United States v. Maryland Cas. Co., 49 F.2d 556 (7th Cir. 1931); Wirtz v. Phillips, 251 F. Supp. 789 (W.D. Pa. 1965).

[30] 2A, Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 47:09 at 240 (6th ed. 2000).

[31] National Defense Act, ch. 134, 39 Stat. 166 (1916).

[32] *See* New Jersey Air Nat'l Guard v. Federal Labor Relations Authority, 677 F.2d 276, 278 (3d Cir. 1982).

[33] *See* 10 U.S.C. § 12301; Holdiness v. Stroud, 808 F.2d 417, 420-21 (5th Cir. 1987).

[34] National Defense Act, ch. 134, § 60, 39 Stat. 197 (emphasis added).

[35] National Defense Act Amendments, ch. 87, Pub. L. No. 73-64, 48 Stat. 153 (1933).

> no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned.[36]

A subsequent revision to the law changed the form of this above-quoted proviso, inserting it into a separate sentence. However, this change apparently was stylistic in nature and was not intended to have any legal consequences.[37] Thus, at the time the gubernatorial approval requirement was enacted, it would likely have been interpreted to have applied only to the section to which it was attached, in accordance with the jurisprudence of the time.[38] Thus, it is arguable that the limitation contained within § 104(c) is not applicable to any changes in the branch, organization, or allotment of a unit that result from BRAC actions.

However, there are indications that Congress perhaps intended a broader application of the proviso. In explaining the reasoning behind this addition to the law, the House Committee on Military Affairs stated that "where a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service, [] such State should not arbitrarily be compelled to accept a change in such allotment, and this amendment grants to the State concerned the right to approve *any* such change which may be desired by the Federal Government."[39] Resorting to more modern principles of statutory interpretation, congressional intent, as stated, is controlling as to the scope of a proviso's application. Thus, this report language gives some weight to the argument that § 104(c) applies to any exercise of authority that results in the types of changes it references regardless of whether the changes are precipitated by the exercise of § 104(c) authorities.

It is also arguable, however, that the report language indicates only that Congress, in referring to "any such change which may be desired by the Federal Government," considered the President's authority under section 104(c) or more broadly, under the National Defense Act as it existed in 1933, to be the only source of authority for the changes it wished to subject to the limitation. In addition, while by no means dispositive, the report language does indicate that the gubernatorial approval requirement is meant to prohibit *arbitrary* changes to Guard allotment; it is certainly arguable that the BRAC process, which Congress devised to be premised on methodical analysis and review, would not produce the sort of arbitrary changes the proviso, even broadly interpreted, is targeted to prevent. In addition,

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[36] *Id.* § 6.

[37] It should be noted that this provision along with all of Title 32 of the United States Code was revised and enacted into positive law, by Public Law 84-1028. Prior to this, Title 32 of the Code served as prima facie evidence of the law it restated; thus, reference to the original Statutes at Large was needed to obtain a truly reliable statement of the law. During the revision and enactment of Title 32, the structure of section 104(c) was modified. The 1956 revision, among other things, removed the phrase "Provided, That" and placed the gubernatorial approval requirement in a separate sentence, beginning with the word "However." As explained in the legislative history for this revision, "the pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties, or functions." S. REP. NO. 84-2484 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4640. Where other changes to Title 32, including § 104, were intended to have legal consequences, an explanation of the change was included in the revision notes following the provision in the revised Code. No explanation of the change mentioned here appears. Thus, it would seem appropriate to conclude that no alteration to the substance of the law was intended by this revision.

[38] *See supra* note 29 and accompanying text.

[39] H.R. REP. NO. 73-141at 6 (1933) (emphasis added).

it is notable that, despite the modern reliance on congressional intent and not formalism alone, courts will still look to the structure of a provision as relevant to deciphering congressional intent.[40] That the proviso was attached to the authority granted the President in the first sentence of § 104(c) could thus remain influential in determining whether the gubernatorial approval requirement applies to authorities outside of that provision.

In sum, unlike 10 U.S.C. § 18238, § 104(c) is more ambiguous in the scope of its application. Canons of statutory construction in favor at the time of the provision's enactment presumed the limitation of a proviso's application to the section to which it is attached. However, there is some indication in the legislative history that the proviso was intended to apply to any of the referenced types of changes, regardless of the source of their authorization. Thus, it remains necessary to examine the possible changes to this provision rendered by the Defense Base Closure and Realignment Act.

The Impact of Base Closure and Realignment Act

If it were determined that the provisions described above do apply broadly to the exercise of any authorities that might result in the type of changes or relocations proscribed by §§ 104(c) and 18238, it may still be arguable that the Defense Base Closure and Realignment Act supersedes these earlier provisions. Several principles of statutory interpretation inform the analysis of how these laws relate to one another.

It is clear that Congress can specify in legislation if earlier enacted statutes are to remain applicable or be modified in some particular way.[41] The Base Closure Act does not directly address either of the provisions at issue here. Likewise, it does not appear to expressly authorize closure or realignment action despite any other existing law. In fact, the Base Closure Act does contain a waiver provision exempting BRAC actions from the operation of certain laws. That provision, however, references only limitations contained in appropriations acts and 10 U.S.C. §§ 2662 and 2687.[42] Thus, unless an implied modification of §§ 104(c) and 18238 can be found in the Base Closure Act, these two provisions could limit the authority to close or realign facilities, assuming, as described above, that a court determined they applied to BRAC actions in the first place.

Because the Base Closure Act does not expressly exempt the actions it governs from compliance with the gubernatorial approval provisions found elsewhere in the Code, additional rules of statutory interpretation become useful. First, it is generally accepted that a statute enacted later in time can trump an earlier duly enacted law even absent an express statement to that effect.[43] The Base Closure Act was originally enacted in 1990 and remains largely in effect today. Further, it has been amended multiple times, most recently in 2001 authorizing the current 2005 round of BRAC actions and in 2004, altering certain authorities granted to the Secretary of Defense.[44] The relevant provisions contained in 10 U.S.C. §

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[40] *See supra* note 30 and accompanying text.

[41] *See, e.g.*, United States v. Fausto, 484 U.S. 439, 453 (1988).

[42] Base Closure Act, § 2905(d).

[43] *See, e.g.*, Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

[44] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat 1811 (October 28, 2004); National Defense Authorization Act for Fiscal Year 2002,

(continued...)

18238 and 32 U.S.C. § 104(c) were both originally enacted well before the Base Closure Act in 1958 and 1933, respectively. Each has been amended subsequently as well. The most recent revision to §104(c) occurred in 1988, and was only a technical amendment. Section 18238 was most recently amended in 1994, after enactment of the Base Closure Act. This revision simply renumbered the provision and made technical corrections throughout the chapter containing §18238. Given these facts, different analysis applies to each provision.

Section 104(c) clearly predates the enactment of the Base Closure Act. Thus, it is possible that the Base Closure Act repealed any limitation otherwise imposed by the provision by providing the "exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States."[45] However, before a court will find that a later statute implies repeal of an older one, it must generally determine that the two provisions are in irreconcilable conflict.[46] The extent of any conflict in this instance is subject to debate. Certainly, the limitation in § 104(c) could prevent BRAC actions from occurring as intended by DOD, the BRAC Commission, and the President, and could be deemed inconsistent with the overall regime created by the Base Closure Act.

On the other hand, § 104(c) addresses a specific set of changes that cannot occur to National Guard units without gubernatorial approval. Thus, there is at least some range of BRAC action (e.g. a realignment of equipment or activities that does not result in the movement of units) that could occur absent gubernatorial consent. In addition, the consent requirement could be characterized as a limitation on actions that are the consequences of a realignment or closure, such as unit re-allotment, and not a limitation on the closure or realignment authority itself, thus making harmonization possible. Still, such an interpretation may parse statutory language too finely to be sustainable; indeed, the Base Closure Act authorizes the Secretary of Defense to "take such actions as may be necessary to close or realign any military installation, including the ... the performance of such activities ... as may be required to transfer functions from a military installation being closed or realigned to another military installation...."[47] Accordingly, it appears that § 104(c), if applied to the BRAC process, could frustrate an authorized BRAC action; further, harmonization of the provision with the Base Closure Act, while perhaps possible, may stretch the statutory language.

The issue of whether § 18238 supersedes the Base Closure Act, or vice versa, is somewhat more complicated. As stated above, § 18238 was first enacted in 1950 and revised multiple times subsequently, including a technical amendment in 1994, after enactment of the Base Closure Act. Further, the Base Closure Act has also been amended following the last revision of § 18238, in 2001 and 2004. Given that none of the amendments mentioned address the relationship between the BRAC process and § 18238 and given the presumption against implied repeal, it may not be sensible to ascribe priority to the provision that has most recently undergone minor and unrelated amendments. Indeed, statutory silence is rarely a

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[44] (...continued)
Pub. L. No. 107-107, 115 Stat. 1012 (December 28, 2001).

[45] Base Closure Act, § 2909(a).

[46] *See* United States v. Estate of Romani, 523 U.S. 517, 530-533 (1998) (holding that a later, specific statute trumps an earlier, more general statute).

[47] Base Closure Act, § 2905(a)(1)(A).

reliable indication of congressional intent, and as the Supreme Court has stated, "it would be surprising, indeed," for Congress to effect a "radical" change in the law "*sub silentio*" via "technical and conforming amendments."[48] In fact, it is arguable that each amendment to § 18238 and the Base Closure Act, in not addressing the provisions' relation to one another, affirmed the relationship established at the time of the Base Closure Act's enactment.[49] If this is the case, analysis of the relationship between the two laws would be similar to the analysis of the Base Closure Act's relationship with § 104(c). Therefore, it is arguable that because § 18238 deals with relocation of units and not with closure or realignment of facilities, the two provisions could be effectively harmonized so as not to require implied repeal of the earlier provision.[50] On the other hand, it would seem more likely that the Base Closure Act is incompatible with the limitation contained in § 18238 and that the limitation must fall aside.

It might also be plausible to argue that the subsequent amendments to the provisions at issue should also be taken into account. Arguably, after enacting the Base Closure Act, Congress was aware that it might supersede § 18238. Along these lines, had Congress intended a different result, it would have indicated its contrary intent in amending § 18238 in 1994. Similarly, the subsequent amendments to the Base Closure Act could be seen as implicitly affirming that § 18238 was not to limit BRAC actions. On the other hand, if the burden of clarifying the relationship between the laws at issue does fall upon the last section to be amended, even if only a minor or technical change is made, then § 18238 should remain applicable as a limitation on BRAC activities, as the Base Closure Act remains silent on the relationship of these laws even after the 2005 amendments. Finally, it should be noted again that despite the foregoing discussion, § 18238, even more so than § 104(c), seems to clearly indicate via the text of the provision, that its application is limited and does not extend to the BRAC process.

Conclusion

There would appear to be federal authority to require the closure or realignment of National Guard facilities under the Constitution of the United States. Several provisions of federal law, however, make it somewhat less clear if Congress has authorized the exercise of such authority by enacting the Defense Base Closure and Realignment Act and by authorizing a succession of BRAC rounds. The language of 10 U.S.C. § 18238 appears to indicate that the limitation it imposes upon the relocation or withdrawal of National Guard units is confined to a specified subset of authorities that does not include the Base Closure Act. 32 U.S.C. § 104(c) is less clear in this regard. Its limitation on changes to the branch, organization, or allotment of a unit, as originally enacted, served as a proviso attached to a

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[48] Director of Revenue of Mo. v. CoBank, ACB, 531 U.S. 316, 323 (2001).

[49] *See* Johns-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed.Cir.1988) (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978)) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-82 (1982); Clean Harbors Envtl. Servs., Inc. v. Herman, 146 F.3d 12, 19-20 (1st Cir. 1998). It should be noted that these cases dealt with congressional silence in the face of clear judicial or administrative interpretation, and that there does not appear to have been a similar interpretation of the provisions at issue here during the period in which Congress took action.

[50] *See, e.g.*, Watt v. Alaska, 451 U.S. 259, 267 (1981); Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001).

specific authority still contained within § 104(c). The provision has been revised, apparently without intending legal consequences, in such a manner as to perhaps indicate broader application. It is also arguable that even in its original form, the provision was intended to apply regardless of the source of authority for effectuating the types of changes the provision references. Even taking into account the legislative history behind § 104(c), the exact scope of its application is unclear, although cogent arguments against applying the provision to the BRAC process exist.

If a court were to determine that application of the provisions at issue was not limited to the authorities to which they appear at least structurally attached, general principles of statutory construction would tend to favor avoiding implied repeal by the later enacted or amended provision in favor of harmonization of potential conflicts, where possible. In such circumstances where the limiting provisions better fit the specifics of a situation, it may be appropriate to apply the limitation to the BRAC process. Despite this, it remains possible to argue that the intention behind BRAC is to provide for comprehensive closure and realignment authority and that application of §§ 18238 and 104(c) would frustrate the purpose of the Base Closure Act.