IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD G. RENDELL, ET AL.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DONALD H. RUMSFELD	:	**No. 05-CV-3563**

OPINION

Padova, J. **August 26, 2005**

Plaintiffs, Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, Arlen Specter, United States Senator for the Commonwealth of Pennsylvania, and Rick Santorum, United States Senator for the Commonwealth of Pennsylvania, all acting in their official capacities, have brought this action challenging the legality of a recommendation made by Donald H. Rumsfeld, the Secretary of Defense, in the Department of Defense Report to the Defense Base Closure and Realignment Commission (the "BRAC DoD Report"). In the BRAC DoD Report, the Secretary recommended that the 111th Fighter Wing of the Pennsylvania Air National Guard be deactivated. Plaintiffs claim that this recommendation violates federal law. Before the Court are Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, and Plaintiffs' Motion for Summary Judgment. A Hearing was held on the Motions on August 23, 2005.[1] For the reasons that follow, Defendant's Motion

[1]After argument on August 23, 2005, the Court gave the opportunity to the parties to file forthwith an application with the Court to stay this decision until after the Defense Base Closure and Realignment Commission vote on the Secretary's recommendation. No such application has been received by the Court

to Dismiss is denied, his alternative Motion for Summary Judgment is granted in part and denied in part, and Plaintiffs' Motion for Summary Judgment is granted in part and denied in part.

I. BACKGROUND

A. Factual and Procedural Background[2]

In the BRAC DoD Report, Secretary Rumsfeld recommended that the Naval Air Station Joint Reserve Base Willow Grove, Pennsylvania, be closed. (Def. Ex. B at DoN-21.) In connection with this closure, he recommended that "all Navy and Marine Corps squadrons, their aircraft and necessary personnel, equipment and support" be relocated to McGuire Air Force Base, Cookstown, New Jersey. (Id.) He further recommended that the Pennsylvania Air National Guard's 111th Fighter Wing, which is stationed at the Willow Grove Naval Air Station, be deactivated[3] and that half of

---

from either side.

[2]The record before the Court on the Motions consists of the Complaint, which has been verified by Governor Rendell, the parties' Statements of Undisputed Facts, and the exhibits submitted by the parties.

[3]The Secretary's recommendation does not define the term "deactivate." The term is defined by Webster's New Collegiate Dictionary as "to make inactive or ineffective." Webster's Ninth New Collegiate Dictionary at 326 (1990). *Amicus curiae* the National Guard Association of the United States ("NGAUS") explains that deactivation is "the ultimate change in a National Guard unit's branch, organization and allotment. It is removed from its branch of service; its organizational ties are irrevocably severed; and its allotment of personnel and equipment is reduced to zero. A unit which is deactivated is withdrawn from existence as a military entity." (NGAUS Mem. at 12.) Both Plaintiffs and the Defendant indicated similar understanding of "deactivate" at the

its assigned A-10 aircraft be relocated to different Air National Guard units in Idaho, Maryland and Michigan, while the remainder of the aircraft be retired. (Compl. ¶ 13, Rendell Aff., Def. Ex. B at DoN - 21.)

The 111th Fighter Wing is an operational flying National Guard unit located entirely within the Commonwealth of Pennsylvania with 1023 military positions. (Compl. ¶¶ 14-15, Rendell Aff.) Deactivation of the 111th Fighter Wing would deprive the Governor of nearly 1/4th the total strength of the Pennsylvania Air National Guard and would deprive the Governor and Commonwealth of a key unit with the current capability of addressing homeland security missions in Southeastern Pennsylvania. (Compl. ¶¶ 22-23, Rendell Aff.) Deactivation of the 111th Fighter Wing would be the ultimate change in the branch, organization or allotment of the unit. (NGAUS Mem. at 12.) In May 2005, and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC DoD Report to the Defense Base Closure and Realignment Commission (the "BRAC Commission"), "the overwhelming majority of the 111th Fighter Wing was not and currently is not in active federal service." (Compl. ¶ 25, Rendell Aff.)

August 23, 2005 Hearing. (Rendell, et al. v. Rumsfeld, Civ.A.No. 05-3563, 8/25/05 N.T. at 7-8, 40.) The Court, therefore, will define "deactivate" consistently with such understanding as well as the dictionary definition.

Neither Secretary Rumsfeld nor any authorized representative of the Department of Defense requested Governor Rendell's approval to change the branch, organization, or allotment of the 111th Fighter Wing, or requested Governor Rendell's consent to relocate or withdraw the 111th Fighter Wing during the 2005 BRAC process. (Compl. ¶¶ 26-29, Rendell Aff.) Governor Rendell sent a letter to Secretary Rumsfeld on May 26, 2005, officially advising the Secretary that he did not consent to the deactivation, relocation or withdrawal of the 111th Fighter Wing. (Compl. ¶ 31, Rendell Aff., Pls. Ex. B.) Deputy Assistant Secretary of the Air Force Gerald F. Pease, Jr. replied to the Governor's letter on July 11, 2005, but did not address the Secretary's failure to obtain the Governor's prior consent to the recommendation that the 111th Fighter Wing be deactivated. (Def. Ex. C.)

Plaintiffs claim that the Department of Defense's attempt, through its recommendation to the BRAC Commission, to deactivate the 111th Fighter Wing without first seeking Governor Rendell's permission violates two federal statutes, 10 U.S.C. § 18238[4] and 32

---

[4]10 U.S.C. § 18238 provides as follows:

> 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.

18 U.S.C. § 18238.

U.S.C. § 104(c).[5] Plaintiffs seek: (1) an Order declaring that Secretary Rumsfeld has violated 32 U.S.C. § 104 and 10 U.S.C. § 18238 by designating the 111th Fighter Wing for deactivation without first obtaining the approval of Governor Rendell; (2) an Order declaring that Secretary Rumsfeld does not have the power to deactivate or recommend deactivation of the 111th Fighter Wing without first obtaining Governor Rendell's approval; (3) an Order declaring that the portion of the BRAC DoD Report that recommends deactivation of the 111th Fighter Wing is null and void; and (4) such other and further relief as the Court deems appropriate. (Compl. Prayer for Relief.)

---

[5]32 U.S.C. § 104(c) provides that:

> 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 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.

32 U.S.C. § 104(c). The Complaint also alleges that the recommendation that the 111th Fighter Wing be deactivated violates the Militia Clause of the Constitution, art. 1, § 8, cl. 16. Plaintiffs, however, no longer take that position and state, in their Reply Memorandum, that "Plaintiffs do not assert that Defendant's actions violate the Militia Clause of the Constitution." (Pls. Reply at 1.) Consistent with this statement, we read the Plaintiffs' Prayer for Relief as no longer requesting a declaration that the Secretary's recommendation violates the Militia Clause of the Constitution.

On July 25, 2005, Plaintiffs filed a Motion to Expedite Consideration, requesting Court consideration of Summary Judgment Motions filed by the parties prior to September 8, 2005. That Motion was granted on August 2, 2005, and this Court set an expedited schedule for briefing and a hearing with respect to motions filed pursuant to Federal Rule of Civil Procedure 56 regarding the following two issues, which the Court preliminarily determined were ripe for consideration: whether the Secretary of Defense can legally recommend deactivating the 111th Fighter Wing without the prior consent of the Governor of Pennsylvania and whether the portion of the BRAC DoD Report that recommends deactivation of the 111th Fighter Wing is null and void because Governor Rendell did not consent to the deactivation.

B. The National Guard

The Complaint springs from the principals of federalism reflected in the dual nature of the National Guard as comprising both units of state militias and a part of the federal armed forces, when those units are called into federal service. "The National Guard is the modern Militia reserved to the States by Art. I, s 8, cl. 15, 16, of the Constitution." Maryland ex rel. Levin v. United States, 381 U.S. 41, 46 (1965), vacated on other grounds, 382 U.S. 159 (1965). The Pennsylvania National Guard dates its founding to 1747 when Benjamin Franklin organized the Philadelphia Associators (now the 111th Infantry and 103rd Engineers units of

the Pennsylvania National Guard). See Historical highlights of the Pennsylvania National Guard, http://sites.state.pa.us/PA_Exec/Military_Affairs/PAO/pr/PAGuardHistory.html (last visited Aug. 24, 2005). Two hundred and fifty years ago, in 1755, the Pennsylvania Assembly passed the first Militia Act, which formally authorized a volunteer militia.[6] Id.

The modern National Guard dates back to 1903, when Congress, acting pursuant to the Militia Clause of the Constitution, passed the Dick Act. Perpich v. Dep't of Defense, 496 U.S. 334, 342 (1990). The Dick Act:

> divided the class of able-bodied male citizens between 18 and 45 years of age into an "organized militia" to be known as the National Guard of the several States, and the remainder of which was then described as the "reserve militia," and which later statutes have termed the "unorganized militia."

Id. In 1916, the National Defense Act federalized the National Guard, providing that the Army of the United States consists of "the Regular Army, the Volunteer Army . . . [and] the National

---

[6]The Pennsylvania Air National Guard, though considerably younger, also has deep roots. The history of the Pennsylvania Air National Guard reaches back to 1924, when the 103rd Observation Squadron was organized at Philadelphia Airport. See Historical highlights of the Pennsylvania National Guard, http://sites.state.pa.us/PA_Exec/Military_Affairs/PAO/pr/PAGuardHistory.html (last visited Aug. 24, 2005). The Pennsylvania Air National Guard was formally established in 1947. Id. The 111th Fighter Wing dates its own history back to January 1943, when the 391st Bombardment Group was organized. The History Of The 111th Fighter Wing, http://www.pawill.ang.af.mil/history.asp (last visited Aug. 24, 2005).

Guard while in the service of the United States . . . ." Id. at 343 n.15. The National Defense Act "required every guardsman to take a dual oath – to support the Nation as well as the States and to obey the President as well as the Governor – and authorized the President to draft members of the Guard into federal service." Id. at 343.

State control of National Guard units when not in federal service was of special importance to Congress when it considered the 1933 National Guard Bill, which amended the National Defense Act. Although the National Defense Act allowed members of the National Guard to be drafted into the Regular Army, the Act did not provide for continuity in structure of National Guard units when their members were drafted, leading to significant problems during, and immediately after, World War I:

> Because of the fact that the National Guard was administered under the militia clause of the Constitution, it had to be drafted for the World War notwithstanding the fact that every officer and man in the organization had volunteered for service. The units and organizations, some of them dating back to Revolutionary War period, were ruthlessly destroyed and the individuals were organized into new war strength organizations.

H.R. Rep. No. 73-141, at 2 (1933). In 1926, the membership of the National Guard passed a resolution asking Congress to amend the National Defense Act to ensure that the status of the federally recognized National Guard be preserved "so that its government when not in the service of the United States shall be left to the

respective States . . . .” Id. In 1927, the Secretary of War appointed a special War Department Committee to consider the proposed amendments to the National Defense Act. Id. The War Department Committee reached the following conclusion regarding the dual nature of the National Guard and the continuing vitality of state control of National Guard units which are not in federal service:

> It is possible and practicable in creating such reserve of the Army of the United States to so amend the National Defense Act as to provide and make it clear that the administration, officering, training, and control of the National Guard of the States, Territories, and District of Columbia shall remain unimpaired to the States, Territories, and District of Columbia, except during its active service as a part of the Army of the United States.

Id. To effectuate the conclusions of the War Department Committee, Congress passed the National Guard Bill of 1933, which amended the National Defense Act of 1916. The primary purpose of the National Guard Act was “to create the National Guard of the United States as a component of the Army of the United States, both in time of peace and in war, **reserving to the States their right to control the National Guard or the Organized Militia absolutely under the militia clause of the Constitution in time of peace**.” Id. at 5 (emphasis added).

Thus, “[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National

Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve of Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard Unit." Perpich, 496 U.S. at 345. The Supreme Court has explained that, through this dual enlistment, members of the National Guard both engage in federal service and fulfill the historical understanding of the function of the state militia. Id. at 348. Indeed, members of State National Guard units "must keep three hats in their closets – a civilian hat, a state militia hat, and an army hat – only one of which is worn at any particular time." Id.

The dual nature of the National Guard, particularly the importance of state control over National Guard units not in federal service, is reflected in the current laws governing the structure of the Armed Forces and the National Guard. The United States Air Force consists of "the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve . . . ." 10 U.S.C. § 8062(d)(1). Members of the National Guard serve in the state militia under the command of the governor of their state unless they are called into federal service. See Clark v. United States, 322 F.3d 1358, 1366 (Fed. Cir. 2003) ("[M]embers of the National Guard only serve the federal military when they are formally called into the military service of the United States. At

all other times, National Guard members serve solely as members of the State militia under the command of a state governor.”).

Laws pertaining to the National Guard are found in both Title 10, Armed Forces, and in Title 32, National Guard, of the United States Code. Recognizing the status of National Guard units as state organizations when not in the service of the United States, Congress codified laws pertaining to the National Guard while in state service in Title 32:

> Laws relating primarily to the Army National Guard of the United States or its Air Force counterpart, or to the Army National Guard while in the service of the United States or its Air Force counterpart, all of which are components of the Army or Air Force, were logically transferred to the new title 10, Armed Forces. Laws relating to the National Guard not in the service of the United States, **which as a State organization is no part of the Federal armed forces**, were allocated to the new title 32, National Guard. Unfortunately, the close connection between the Federal and State elements, and the fact that many of the topics are of direct concern to both the Federal Government and the several States and Territories, made it impossible to draw a logical dividing line in every instance. The result is a practical compromise.

S. Rep. No. 84-2484, at 23 (1956) (emphasis added). It is undisputed that, at all times relevant to this action, the 111th Fighter Wing has been, and is presently, under the command of Governor Rendell and the overwhelming majority of its members are not in active federal service. (Complaint ¶ 25, Rendell Aff.)

The National Guard is the only military force shared by the states and the federal government and ready to carry out missions for both state and federal purposes. (NGAUS Mem. at 5.) The mission of the 111th Fighter Wing demonstrates the dual nature of its existence as a National Guard unit:

> The 111th Fighter Wing Mission [is] to maintain highly trained, well-equipped, and motivated military forces in order to provide combat-ready OA10/A10 aircraft and support elements in response to wartime and peacetime tasking under state or federal authority and to do so with Loyalty, Honor, and Pride.

The 111th Fighter Wing Mission, http://www.pawill.ang.af.mil/mission.asp (last visited Aug. 24, 2005).

The balance struck by Congress between the federal and state nature of the National Guard is reflected in the various statutes requiring the consent of the Governor to decisions which change the personnel and forces available for state duties and the way in which such consent is obtained. See e.g., 10 U.S.C. §§ 4301, 9301 (requiring gubernatorial consent for a member of Army or Air National Guard to be detailed to certain duties); 10 U.S.C. § 10146 (requiring gubernatorial consent for the transfer of a National Guard member to the Standby Reserve); 10 U.S.C. § 12105 (requiring gubernatorial consent to transfer an enlisted member of the National Guard to the Army or Air Force Reserve); 10 U.S.C. §§ 12213, 12214 (requiring gubernatorial consent to transfer an officer of the National Guard to the Army or Air Force Reserve); 10

U.S.C. § 12301 (requiring gubernatorial consent to order units or members of National Guard Units to active duty, but limiting the reasons for which the Governor may withhold such consent); 10 U.S.C. § 12644 (requiring gubernatorial consent to discharge a member of the National Guard who is not physically qualified); 32 U.S.C. § 115 (requiring gubernatorial consent for National Guard members to be ordered to perform funeral duty); and 32 U.S.C. § 325 (requiring gubernatorial consent for a National Guard officer on active duty to serve in command of a National Guard unit). This coordination and consent ordinarily is obtained through the National Guard Bureau of the Department of Defense working with the Adjutants General of the states. (NGAUS Mem. at 10.) The Pennsylvania Adjutant General exercises the authority delegated to her by the Governor pursuant to 51 Pa. Cons. Stat. Ann. § 902 and coordinates military affairs with the federal government. See 51 Pa. Cons. Stat. Ann. § 902(1). This coordination has included providing consent to recommendations made by the Department of the Army regarding Army National Guard installations in the BRAC process. See Transcript of 2005 BRAC Commission Hearings at 81 (Aug. 11, 2005) ("[W]e have learned that in the current recommendations, that the [Adjutants General] for 39 states signed off on the Army BRAC proposals."), http://www.brac.gov/docs/Un-certifiedTranscript_11AugPM.pdf. Indeed, the Pennsylvania Adjutant General was one of those thirty-nine Adjutants General who signed

off on Army recommendations concerning Army National Guard installations which were included in the 2005 BRAC DoD Report. (Rendell, et al. v. Rumsfeld, Civ.A.No. 05-3563, 8/23/05 N.T. at 55-56.)

C. The Defense Base Closure and Realignment Act

The Secretary's recommendation to deactivate the 111th Fighter Wing was made as part of his recommendation to close the Naval Air Station Joint Reserve Base Willow Grove, Pennsylvania in his report to the BRAC Commission pursuant to the Defense Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (West 1998, 2005 Supp.) (the "BRAC Act").[7] The BRAC Act initially provided for three rounds of base closures and realignments in 1991, 1993, and 1995. BRAC Act §§ 2902-2905. Congress later amended the statute to provide for an additional round of base closures and realignments in 2005. BRAC Act § 2912. Pursuant to Section 2912 of the Act, the Secretary was required to prepare "[a] force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the 20-year period beginning with fiscal year 2005 . . . ." Id. § 2912(a)(1)(A). Based on this force-structure plan,

[7]Plaintiffs do not challenge, in this action, the Secretary's recommendation for closure of the Naval Air Station Joint Reserve Base Willow Grove, Pennsylvania, where the 111th Fighter Wing is currently housed. They suggest that the 111th Fighter Wing could be moved to another Pennsylvania Air National Guard Base in Pennsylvania. (Pls. Resp. at 17.)

the Secretary was required to prepare an infrastructure inventory, identifying infrastructure necessary to support the force-structure plan and excess infrastructure. Id. § 2912(a)(2). The BRAC Act also provides criteria to be used by the Secretary to determine whether military installations should be closed or realigned. Id. § 2913. The Secretary was required to submit to the BRAC Commission a list of military installations within the United States that are recommended for closure or realignment no later than May 16, 2005.[8] Id. § 2914(a).

The Secretary submitted the BRAC DoD Report to the BRAC Commission on May 13, 2005. (Def. Separate Statement of Material Facts ¶ 1.) The BRAC Commission, in turn, must transmit its report, "containing its findings and conclusions based on a review and analysis of the Secretary's recommendations" to the President by September 8, 2005. BRAC Act § 2914(d)(1). The President has until September 23, 2005, to review the recommendations of the Secretary and the Commission and prepare a report containing his approval or disapproval of the Commission's recommendations. Id. § 2914(e)(1). If the President disapproves the Commission's

[8]The BRAC Act defines "military installation" as "a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility." BRAC Act § 2910(4). "Realignment" is defined by the BRAC Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." Id. § 2910(5).

recommendations, the Commission may prepare a revised list of recommendations and transmit those to the President by October 20, 2005. Id. § 2914(e)(2). If the President disapproves the revised recommendations, the 2005 BRAC process is terminated. Id. § 2914(e)(3). If the President approves either the original or revised recommendations, he must send the approved list and a certification of approval to Congress. Id. § 2903(e). If Congress does not enact a resolution disapproving the approved recommendations within 45 days after receiving the President's certification of approval, the Secretary must carry out all of the recommendations. Id. § 2904(a).

II. MOTION TO DISMISS

Defendant has moved to dismiss the Complaint in this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant argues that the Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and/or for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) on three grounds: (1) Plaintiffs lack standing to assert the claims alleged in the Complaint because they have not suffered injury in fact; (2) the claims asserted in the Complaint are not ripe for adjudication; and (3) judicial review of actions taken by the Secretary of Defense during the "BRAC process" is barred by the decision of the Supreme Court in Dalton v. Specter, 511 U.S. 462 (1994).

A. Legal Standard

The Complaint seeks the entry of a declaratory judgment. 28 U.S.C. § 2201 states that a federal court may, "[i]n a case of actual controversy within its jurisdiction . . . declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree . . . ." 28 U.S.C. § 2201(a).

"Article III, section 2 of the United States Constitution requires an actual 'controversy' for a federal court to have jurisdiction." Pic-a-State Pa., Inc. v. Reno, 76 F.3d 1294, 1298 (3d Cir. 1996) (citing U.S. Const. art. III, § 2). In a declaratory judgment action, the "case or controversy" requirement of Article III necessitates court determination of "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992).

Defendant states that his attack on the Court's subject matter jurisdiction pursuant to Rule 12(b)(1) is a facial attack, asserting that the Complaint itself demonstrates lack of jurisdiction. "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced

therein and attached thereto, in the light most favorable to the plaintiff." Gould Elecs. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (emphasis added) (citing PBGC v. White, 998 F.2d 1192, 1196 (3d Cir. 1993)). The standard for reviewing a motion to dismiss brought pursuant to Rule 12(b)(6) is the same. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985).

B. Standing

Defendant seeks dismissal of this action on the ground that Plaintiffs do not have standing.[9] The "irreducible constitutional minimum of standing" in federal court requires three elements. Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102 (1998) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). A plaintiff asserting standing to sue in federal court has the burden of establishing three requirements: (1) "an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or hypothetical[;]'" id. at 103 (quoting Whitmore v. Arkansas, 495 U.S. 149, 149, 155 (1990)); (2) "causation – a fairly traceable connection between the plaintiff's

[9]The Court's analysis of standing and ripeness are related and both derive from the "case or controversy" requirement of Article III. Armstrong, 961 F.2d at 411 n.13. The ripeness inquiry "is concerned with *when* an action may be brought, standing focuses on *who* may bring a ripe action." Id. (citing E. Chemerinsky, Federal Jurisdiction § 2.4, at 99 & n.1 (1989)) (emphasis in original).

injury and the complained-of conduct of the defendant[;]" id. (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); and (3) "redressability – a likelihood that the requested relief will redress the alleged injury." Id. (citing Simon, 426 U.S. at 45-46). These requirements are intended to ensure that "a plaintiff has the requisite 'personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions.'" Surrick v. Killion, Civ.A.No. 04-5668, 2005 WL 913332, at *4 (E.D. Pa. Apr. 18, 2005) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)).

Defendant argues that Governor Rendell lacks standing because he has not suffered a concrete or imminent injury. The Complaint alleges that the Secretary of Defense recommended deactivation of the 111th Fighter Wing without the Governor's consent in violation of 10 U.S.C. § 18238 and 32 U.S.C. § 104(c). Under the BRAC Act, once the Secretary has made his recommendation, no future opportunity exists for the Governor to consent to or disapprove deactivation. Consequently, if the Governor is correct on the merits of his claim, he has suffered the injury of losing his statutory right to approve, or disapprove, the change in the branch, organization, or allotment of the 111th Fighter Wing, before the decision to deactivate is finalized.

We have identified no authority which directly addresses the gubernatorial standing/injury issues presented here. The injury alleged by Governor Rendell is, however, similar to the legislative injury found to support standing in Coleman v. Miller, 307 U.S. 433 (1939). In Coleman, twenty Kansas State Senators voted for a resolution in favor of ratifying a constitutional amendment regarding child labor and twenty voted against the resolution. Id. at 435-36. The Kansas Lieutenant Governor, who presided over the Kansas Senate, cast the deciding vote in favor of ratification. Id. at 436. The Kansas House later voted in favor of the resolution. Id. Twenty-one members of the Kansas Senate and three members of its House of Representatives then filed a writ of mandamus in the Supreme Court of Kansas, seeking to force the Secretary of the Senate to erase the endorsement on the resolution stating that it had been approved by the Kansas Senate and to prevent the Kansas Secretary of State from delivering the resolution to the Governor. Id. The plaintiffs claimed that the Lieutenant Governor did not have the power to cast the deciding vote. Id. The Kansas Supreme Court found that the legislators had standing to bring suit, but ruled against them on the merits. Id. at 437. The United States Supreme Court granted certiorari and affirmed. Id. at 437, 455. The Supreme Court held that the legislators had standing because "if the legislators (who were suing as a bloc) were correct on the merits, then their votes not

to ratify the amendment were deprived of all validity . . . ." Raines v. Byrd, 521 U.S. 811, 823 (1997) (citing Coleman, 307 U.S. at 438). The Supreme Court explained:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.

Coleman, 307 U.S. at 438. The Governor's injury is similar to that suffered by the Kansas legislators, because, if he is correct on the merits of his claim, his statutory right to prior approval of deactivation of the 111th Fighter Wing has been "held for naught" and he has a "plain, direct and adequate interest in maintaining" his right to prior approval. Id.

Defendant contends that the Supreme Court's more recent decision in Raines v. Byrd, 521 U.S. 811 (1997), forecloses standing based upon a derogation of a governmental official's political powers. In Raines, six Members of Congress brought suit challenging the constitutionality of the Line Item Veto Act (the "Act"). Id. at 814. The plaintiffs argued that they had suffered a direct and concrete injury conferring standing to challenge the Act because the Act "alter[s] the legal and practical effect" of their votes on bills which contain "separately vetoable items . . . divests them of their constitutional role in the repeal of

legislation, and . . . alter[s] the constitutional balance of powers between the Legislative and Executive Branches . . . ." Id. at 816. The Supreme Court held that these six individual members of Congress did not have a sufficiently "personal stake" and had not suffered a "sufficiently concrete injury to have established Article III Standing." Id. at 829. The Supreme Court's holding was based on the fact that the plaintiffs had "alleged no injury to themselves as individuals . . ., the institutional injury they allege is wholly abstract and widely dispersed . . ., and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." Id. The Supreme Court distinguished Coleman on the ground that, in Raines, unlike Coleman, the plaintiffs did not allege that their votes were nullified; in fact, their votes were given full effect and they lost. Id. at 824. The Supreme Court noted that its holding in Coleman stands "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Id. at 823.

In this case, assuming that the Governor is correct about the merits of his claim, he had the statutory right to disapprove changes to the branch, organization or allotment of a unit of the National Guard located wholly within the Commonwealth, and his

disapproval would have been sufficient to prevent the deactivation recommendation from going to the BRAC Commission. His right to prior approval or disapproval has, however, been completely nullified by the Secretary's recommendation. We find that the injury suffered by the Governor is the type of concrete and particularized injury contemplated by Coleman. We further find that this injury is, in fact, traceable to the Secretary's recommendation to deactivate the 111th Fighter Wing and that this injury may be redressed by the requested relief, i.e., an order declaring that Secretary Rumsfeld has violated federal law by designating the 111th Fighter Wing for deactivation without first obtaining the approval of Governor Rendell and an order declaring that the portion of the BRAC DoD Report that recommends deactivation of the 111th Fighter Wing is null and void. (Compl. Prayer for Relief.) Accordingly, we find that Governor Rendell has standing to assert the claims alleged in the Complaint.[10]

---

[10]The Defendant also contends that Senators Specter and Santorum should be dismissed as Plaintiffs for lack of standing because they did not suffer a particularized injury as a result of the Secretary's recommendation. As we have determined that Governor Rendell has standing to bring the claims asserted in the Complaint, we need not address whether the Senators independently have standing. See Specter v. Garrett, 971 F.2d 936, 942 (3d Cir. 1992), rev'd on other grounds, Dalton v. Specter, 511 U.S. 462 (1994) ("Because the position of each of the plaintiffs is the same and because we conclude that the Shipyard employees and their union have standing, we need not address the standing of the remaining plaintiffs.") (citing City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 485 (D.C. Cir. 1990)).

C. Ripeness

Defendant argues that the Complaint must be dismissed because the claims asserted in the Complaint are not ripe. The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 341 (3d Cir. 2001) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)). The Supreme Court has determined that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotation and additional citations omitted). In deciding whether a claim is ripe, the Court considers "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Id. at 300-01 (quoting Abbott Labs., 387 U.S. at 149). Because declaratory judgment actions are typically brought "before a completed injury has occurred," the United States Court of Appeals for the Third Circuit has "refined" the analysis developed in Abbott Labs. and utilizes a three part test, focusing on "(1) the adversity of the parties' interests, (2) the

conclusiveness of the judgment, and (3) the utility of the judgment." Pic-a-State, 76 F.3d at 1298 (citing Freehold Cogeneration Assocs. v. Bd. Reg. Comm'rs, 44 F.3d 1178, 1188 (3d Cir. 1995); Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990)).

The adversity inquiry focuses on "[w]hether the claim involves uncertain and contingent events, or presents a real and substantial threat of harm." NE Hub Partners, 239 F.3d at 342 n.9 (citing Presbytery of N.J. v. Florio, 40 F.3d 1454, 1466 (3d Cir. 1994)). The adversity prong "is substantially similar to the 'injury-in-fact' prong of constitutional standing: 'in measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'" Surrick, 2005 WL 913332, at *6 (quoting Joint Stock Soc'y v. UDV North America, Inc., 266 F.3d 164, 174 (3d Cir. 2001)). We have found that the Complaint alleges that Governor Rendell suffered an injury in fact with respect to the derogation of his statutory power to consent to or to disapprove changes to the branch, organization or allotment of a unit of the National Guard located wholly within the Commonwealth. We find, accordingly, that the adversity prong is satisfied in this case.

The conclusiveness inquiry focuses on "whether a declaratory judgment definitively would decide the parties' rights" and the

extent to which further factual development of the case would facilitate decision, so as to avoid issuing advisory opinions, or whether the question presented is predominantly legal." NE Hub Partners, 239 F.3d at 344 (citations omitted). In determining conclusiveness, the Court examines whether the issues before it are "purely legal (as against factual)" and "[w]hether further factual development would be useful." Id. at 342 n.9 (citation omitted). In this case, the parties agree on the material facts underlying the issue before the Court. No party disputes that the 111th Fighter Wing is a unit of the Pennsylvania Air National Guard; that it is presently under state control; that the Secretary recommended deactivation of the 111th Fighter Wing in his Report to the BRAC Commission; and that he did not seek or obtain Governor Rendell's prior approval to do so. The claims asserted in the Complaint present solely legal issues, obviating the need for future factual development. A declaratory judgment would conclusively determine whether the Secretary of Defense can legally recommend deactivating the 111th Fighter Wing without Governor Rendell's prior approval. We find, accordingly, that the conclusiveness prong is satisfied in this case.

The utility inquiry focuses on the "[h]ardship to the parties of withholding decision" and "[w]hether the claim involves uncertain and contingent events." Id. (citation omitted). In determining utility, the Court examines "whether the parties' plans

of actions are likely to be affected by a declaratory judgment . . . ." Id. at 344 (citation omitted). Governor Rendell is the commander-in-chief of the Pennsylvania National Guard, including 111th Fighter Wing. 51 Pa. Cons. Stat. Ann. § 501. As commander-in-chief, the Governor has the power to accept allotments of military personnel and equipment from the Department of Defense for the Pennsylvania National Guard; carry out training of the Pennsylvania National Guard; establish the location of any assigned, authorized units of the Pennsylvania National Guard; organize or reorganize any organization or unit of the Pennsylvania National Guard; and place the Pennsylvania National Guard on active duty during an emergency in this Commonwealth. 51 Pa. Cons. Stat. Ann. §§ 502-505, 508. A declaratory judgment determining the legality of the Secretary's recommendation to deactivate the 111th Fighter Wing – a unit that constitutes 1/4 of the personnel of the Pennsylvania Air National Guard – clearly would effect the Governor's ability to carry out his powers as commander-in-chief, particularly his ability to call members of the 111th Fighter Wing to active duty in the case of an emergency in this Commonwealth. We find, therefore, that the utility prong is satisfied in this case.

For the foregoing reasons, we conclude that the ripeness inquiry has been satisfied in this case and that this case is ripe for determination.

D. Application of *Dalton v. Specter*

Defendant contends that Dalton v. Specter precludes judicial review because this case involves a challenge to a recommendation submitted by the Secretary during the BRAC process. In Dalton, the Supreme Court rejected a suit brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, which alleged that the Secretaries of the Navy and Defense and the BRAC Commission "violated the substantive and procedural requirements of the 1990 Act in recommending closure of the Philadelphia Naval Shipyard." Dalton, 511 U.S. at 466. The APA allows a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review. 5 U.S.C. § 702.[11] "The APA provides for review only of '*final* agency action.'" Dalton, 511 U.S. at 469 (quoting 5 U.S.C. § 704) (emphasis in Dalton). In Dalton, the Supreme Court found that the reports

[11]Plaintiffs do not assert that this Court's jurisdiction over their claims arises under the APA. Plaintiffs contend that, because this action arises under 10 U.S.C. § 18238 and 32 U.S.C. § 104, this Court has jurisdiction over their claims pursuant to 28 U.S.C. § 1331. Although Plaintiffs have not brought this action pursuant to the APA, the waiver of sovereign immunity contained in 5 U.S.C. § 702 is not limited to claims brought pursuant to the APA and, therefore, applies to this action. See Simmat v. United States Bureau of Prisons, 413 F.3d 1225, 1233 (10th Cir. 2005) (noting that the waiver of sovereign immunity contained in 5 U.S.C. § 702 "is not limited to suits under the Administrative Procedures Act") (citing Chamber of Commerce v. Reich, 74 F.3d 1322, 1329 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.")).

submitted by the Secretary and the BRAC Commission were not final, and therefore, not subject to judicial review under the APA because these reports:

> "carr[y] no direct consequences" for base closings. The action that "will directly affect" the military bases is taken by the President, when he submits his certification of approval to Congress. Accordingly, the Secretary's and Commission's reports serve "more like a tentative recommendation than a final and binding determination." The reports are, "like the ruling of a subordinate official, not final and therefore not subject to review." The actions of the President, in turn, are not reviewable under the APA because, as we concluded in Franklin, the President is not an "agency."

Dalton, 511 U.S. at 469-70 (quoting Franklin v. Massachusetts, 505 U.S. 788, 798, 800-01 (1992)). The central issue with respect to finality under the APA is "'whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" Id. at 470 (quoting Franklin, 505 U.S. at 797). The decision in Dalton rested on the fact that, under the APA, "'[t]he President, and not the [Commission], takes the final action that affects' the military installations . . . ." Id. at 470 (quoting Franklin, 505 U.S. at 799). Consequently, the Supreme Court held that "decisions made pursuant to the 1990 Act are not reviewable under the APA." Id. at 470-71. The Supreme Court also determined, in part II of Dalton, that the President's decisionmaking with respect to BRAC recommendations is unreviewable outside of the APA because "[w]here

a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."[12] Id. at 477; see also 5 U.S.C. § 701(a) (stating that the APA does not apply where "agency action is committed to agency discretion by law").

Defendant argues that Dalton requires dismissal of the instant lawsuit for three reasons: (1) the Secretary's recommendation that the 111th Fighter Wing be deactivated is not a final agency decision and, therefore, is not subject to review; (2) the Secretary's recommendation may not be challenged because the BRAC Act commits decisionmaking to the discretion of the Secretary; and (3) judicial review of decisions made under the BRAC Act are precluded by the text, structure and purpose of the Act itself.

1. Final agency action

The APA limits review under that statute to final agency actions. 5 U.S.C. § 704. This action, however, has not been brought pursuant to the APA and, therefore, the APA's limitation with respect to final agency actions does not apply to this case.

Even assuming the final agency action requirement applies here, we find that the Secretary's recommendation is sufficiently final to be subject to judicial review at this time. An agency

[12]Defendant argues, and Plaintiffs essentially concede, that once the BRAC Commission's recommendation is sent to the President, it will become unreviewable pursuant to part II of Dalton.

order is final, for purposes of judicial review, "when it 'imposes an obligation, denies a right, or fixes some legal relationship as the consummation of the administrative process.'" City of Fremont v. Fed. Energy Regulatory Comm'n, 336 F.3d 910, 914 (9th Cir. 2003) (examining whether an agency action was final for purposes of review under the Federal Power Act) (quoting Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 239 (D.C. Cir. 1985)). "An order may be final though it is not the very last step in the administrative process, but it is not final if it remains tentative, provisional, or contingent, subject to recall, revision, or reconsideration by the issuing agency." Mountain States Tel. & Tel. Co. v. F.C.C., 939 F.2d 1021, 1027 (D.C. Cir. 1991) (internal quotation and footnotes omitted). In Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407 (1942), the Supreme Court determined that "the ultimate test of reviewability" of an agency action "is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow . . . ." Id. at 425. Consequently, "to be reviewable, an order must have an impact upon rights and be of such a nature as will cause irreparable injury if not challenged." Amerada Petroleum Corp. v. Fed. Power Comm'n, 285 F.2d 737, 739 (10th Cir. 1960).

Although the Secretary's recommendation is not the final action that will be taken with respect to deactivation of the 111th Fighter Wing in the BRAC process, it is the last act taken by the Secretary and is not "subject to recall, revision, or reconsideration by the issuing agency." Mountain States, 939 F.2d at 1027. Moreover, as stated above, the Complaint alleges that the Secretary's recommendation has resulted in an irreparable injury to the Governor, namely, nullification of the Governor's statutory right to consent to changes in the branch, organization, or allotment of a unit of the National Guard located wholly in the Commonwealth. The BRAC Act clearly forecloses the Secretary from reconsidering his recommendation once it has been included in the BRAC DoD Report and sent to the BRAC Commission. It is also apparent that, if the Governor is correct on the law, the Secretary's recommendation would cause irreparable injury if not challenged now because the nature of the BRAC process is such that review is not possible after the BRAC Commission submits its report to the President. Accordingly, viewing the facts alleged in the Complaint in the light most favorable to the Governor, we find that the agency action challenged in this case is sufficiently final to be subject to judicial review.

2. Discretion of the Secretary

The APA itself states that it does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. §

701(a). Defendant relies on Nat'l Fed. of Fed. Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990), which interpreted an earlier base closing statute. The Nat'l Fed. court determined that the earlier statute committed agency action to the discretion of the Secretary because:

> judicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy. Such decisions are better left to those more expert in issues of defense. Thus we find NFFE's APA claim nonjusticiable.

Id. at 405-06 (citing Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969) (*en banc*)).

This case, however, has not been brought pursuant to the APA and does not require the Court to second-guess the Secretary's assessment of the force-structure plans or excess infrastructure. This action only requires the Court to determine whether the Secretary's recommendation that the 111th Fighter Wing be deactivated violated federal laws. We find, therefore, that the Secretary's recommendation is reviewable in this case even though the BRAC Act gives the Secretary discretion with respect to his base closing recommendations.

3. Text, structure and purpose of the BRAC Act

Finally, Defendant argues that this action must be dismissed because the structure, objectives, and legislative history of the BRAC Act preclude judicial review. See Block v. Cmty Nutrition Inst., 467 U.S. 340, 345 (1984) (recognizing that the APA does not apply to statutes that preclude judicial review and noting that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved") (citations omitted). Defendant relies on Justice Souter's concurring opinion in Dalton, in which he determined that "the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded." Dalton, 511 U.S. at 479 (Souter, J., concurring). Justice Souter looked at the "congressional intent that action on a base-closing package be quick and final, or no action taken at all" and the text of the act itself, in which "Congress placed a series of tight and rigid deadlines on administrative review and Presidential action . . . ." Id. He stated that "[i]t is unlikely that Congress would have insisted on such a timetable for decision and implementation if the base-closing package would be subject to litigation during the periods allowed, in which case steps toward closing would either

have to be delayed in deference to the litigation, or the litigation might be rendered moot by completion of the closing process." Id. at 481. Justice Souter also considered the limited choices available to the President and Congress under the Act: "[T]he point that judicial review was probably not intended emerges again upon considering the linchpin of this unusual statutory scheme, which is its all-or-nothing feature. The President and Congress must accept or reject the biennial base-closing recommendations as a single package." Id. Justice Souter also considered the provision of non-judicial opportunities for review, i.e., the Commission's review of the Secretary's recommendation, the President's review of the Commission's recommendation, and Congress's review of the President's decision. Id. at 482. In addition, Justice Souter noted that the BRAC Act expressly provides for judicial review of closure decisions under the National Environmental Policy Act of 1969 ("NEPA"), but only after the BRAC process has been completed. Id. at 483. Justice Souter concluded that:

> the text, structure, and purpose of the Act clearly manifest congressional intent to confine the base-closing selection process within a narrow time frame before inevitable political opposition to an individual base closing could become overwhelming, to ensure that the decisions be implemented promptly, and to limit acceptance or rejection to a package of base closings as a whole, for the sake of political feasibility. While no one aspect of the Act, standing alone, would suffice to overcome the strong presumption in

> favor of judicial review, this structure (combined with the Act's provision for Executive and congressional review, and its requirement of time-constrained judicial review of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact. I conclude accordingly that the Act forecloses such judicial review.

Id. at 483-84.

Plaintiffs do not challenge the Secretary's compliance with the BRAC Act, therefore, Justice Souter's determination that judicial review of the Secretary's compliance with the Act is precluded is not applicable in this case. Although Justice Souter's admonition against judicial review interfering with the purpose of the Act and the narrow time frames required by the Act concerns the Court, this case does not constitute judicial review of a base closing decision and has been expedited so as to prevent interference with the narrow time frames for decisionmaking under the Act. The Secretary's recommendation to close the Willow Grove Naval Air Station has not been challenged in this lawsuit. What has been challenged is the legality of his further recommendation that the 111th Fighter Wing be deactivated. The parties have pointed to nothing in the express language, structure, objectives, or legislative history of the laws pursuant to which this case has been brought that prohibits judicial review. Accordingly, we find that the structure, objectives, and legislative history of the BRAC

Act do not prohibit judicial review of the legality of the Secretary's recommendation to deactivate the 111th Fighter Wing.

Considering the allegations of the Complaint and the documents referred to therein in the light most favorable to Plaintiffs, we find that the Complaint does not, on its face, demonstrate a lack of subject matter jurisdiction and that it states a claim on behalf of Governor Rendell on which relief may be granted. Defendant's Motion to Dismiss is, therefore, denied.

III. CROSS MOTIONS FOR SUMMARY JUDGMENT

Both Plaintiffs and Defendant have filed Motions for Summary Judgment on the merits of Plaintiffs' claims brought pursuant to 32 U.S.C. § 104(c) and 10 U.S.C. § 18238.

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id. "Where, as here, cross-motions for summary judgment have been presented, we must consider each party's motion

individually. Each side bears the burden of establishing a lack of genuine issues of material fact." Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

B. Plaintiffs' Title 32 Claim

In Count I, Plaintiffs claim that the Secretary's recommendation that the 111th Fighter Wing be deactivated violates the plain language of 32 U.S.C. § 104(c). In considering a question of statutory interpretation, the court "begin[s] with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Section 104(c) states as follows:

> 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 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.

32 U.S.C. § 104(c) (emphasis added). As previously noted, the deactivation of the 111th Fighter Wing would be the ultimate change in the branch, organization, or allotment of that unit.

The parties' dispute turns on the scope of the second sentence of Section 104(c) ("the proviso"). Defendant argues that the gubernatorial consent proviso applies only to actions taken under

the first sentence, namely the President's designation of units combined to form higher tactical units. Plaintiffs, on the other hand, contend that the proviso stands alone, and imposes a more generalized gubernatorial consent requirement.

"Though it may be customary to use a proviso to refer only to things covered by a preceding clause, it is also possible to use a proviso to state a general, independent rule." Alaska v. United States, --- U.S. ---, 125 S. Ct. 2137, 2159 (2005). As always, the Court's responsibility is to interpret the statutory language according to the general intent of the legislature. See 1A Norman J. Singer, Sutherland Statutes and Statutory Construction § 47:9 (2005). Thus, "a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used." Alaska, 125 S. Ct. at 2159 (quoting McDonald v. United States, 279 U.S. 12, 21 (1929)).

Defendant urges that parallel construction of the two sentences requires the Court to read the proviso as only limiting presidential designations of higher tactical units. Specifically, Defendant points to the fact that the words "branch" and "organization" appear in both sentences. In fact, however, the statute does not employ a parallel construction. The first sentence refers to "units of the National Guard, . . . branch of the Army or organization of the Air Force." 32 U.S.C. § 104(c).

The second sentence, by contrast, only refers to units of the National Guard: "No change in the branch, organization or allotment of a unit . . . . " Id. Consequently, the internal construction of the two sentences of this subsection does not support the proposition that the proviso is to be read narrowly.

Moreover, in this case, the legislative history indicates that Congress intended the proviso to apply generally to all actions that fall within its meaning. The proviso did not appear in the first version of this statute, Section 60 of the National Defense Act of 1916, which provided that the "organization of the National Guard . . . shall be the same as that which is . . . prescribed for the Regular Army" and that "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." 39 Stat. 166, 197 (1916). The proviso was added to Section 60 by the 1933 National Guard Bill. The House Committee on Military Affairs explained that the proviso was added in recognition of state interests:

> Section 6. This section adds a proviso to the present section 60, National Defense Act, which proviso states: "That 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." It is the belief of your committee that where a State has gone to considerable expense and trouble in organizing and housing a unit of a branch

> of the service, that such State should not arbitrarily be compelled to accept a change in the allotment, and this amendment grants to the State concerned the right to approve any such change which may be desired by the Federal Government.

H.R. Rep. No. 73-141, at 6. "In Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication in casting their votes." Exxon Mobil Corp. v. Allapattah Servs., Inc., --- U.S. ---, 125 S. Ct. 2611, 2630 (2005).

This explanation in the House Report does not appear to be an after-thought or out of place; rather, the provision is wholly consistent with the 1933 National Guard Bill's overall purpose. Under the 1916 National Defense Act, individual members of the National Guard were drafted into the Army during World War I. Perpich v. Dep't of Defense, 496 U.S. 334, 345 (1990). "The draft terminated the members' status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army." Id. This situation nearly destroyed the Guard as an effective organization, and following the War, the membership of the National Guard asked Congress to amend the 1916 National Defense Act to ensure that the state national guard was preserved. Appointed by the Secretary of War to consider this proposed amendment, a special War Department Committee concluded that the amendments "make . . . clear" that

state "control" of the state national guard was not obstructed by federal service:

> It is possible and practicable in creating such reserve of the Army of the United States to so amend the National Defense Act as to provide and make it clear that the administration, officering, training, and control of the National Guard of the States, Territories, and District of Columbia shall remain unimpaired to the States, Territories, and District of Columbia, except during its active service as a part of the Army of the United States.

H.R. Rep. No. 73-141, at 2. Consistent with this apparent desire to protect states' rights, Congress enacted the National Guard Bill of 1933 as a means of "reserving to the States their right to control the National Guard or the Organized Militia absolutely under the militia clause of the Constitution in time of peace." Id. at 5.

Federalism concerns thus animate the proviso at issue here. Governor Rendell, as state commander-in-chief, does not share his authority over the state National Guard with any federal entity. See Pa. Const. art IV, § 7 ("The Governor shall be commander in chief of the military forces of the Commonwealth, except when they shall be called into actual service of the United States."). The clear intent of Section 104(c) is to protect and delineate the rights and responsibilities of two competing sovereigns, the state and federal governments. Accepting Defendant's argument would require this Court to ignore the authority of Governor Rendell to

command the state militia. Indeed, as commander-in-chief, Governor Rendell enjoys the power to accept allotments of military personnel and equipment from the Department of Defense for the Pennsylvania National Guard; carry out training of the Pennsylvania National Guard; establish the location of any assigned, authorized units of the Pennsylvania National Guard; organize or reorganize any organization or unit of the Pennsylvania National Guard; place the Pennsylvania National Guard on active duty during an emergency in this Commonwealth; and appoint commissioned officers and warrant officers of the Pennsylvania National Guard. 51 Pa. Cons. Stat. Ann. §§ 502-505, 508, 2301, 2302. Given Congress's concerns about federalism as reflected in the dual nature of the National Guard, we find that the proviso was intended by Congress to be read broadly, and therefore, that it applies generally to require gubernatorial consent to changes in the branch, organization, or allotment of a National Guard unit located entirely within a State. 32 U.S.C. § 104(c). Accordingly, we find, as a matter of law, that the Secretary's recommendation that the 111th Fighter Wing be deactivated without Governor Rendell's prior consent violated Section 104(c).

Defendant argues that, if Section 104(c) is read to apply to the Secretary's recommendation in this case, it conflicts with the BRAC Act and is, therefore, impliedly repealed by it.

> The cardinal rule is that repeals by implication are not favored. Where there are

> two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503 (1936). An irreconcilable conflict between two statutes requires "a positive repugnancy between them or that they cannot mutually coexist." Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976). In Radzanower, the Supreme Court explained that "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, 'when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'" Id. (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). The guiding principle governing repeal by implication is that "'[r]epeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the

minimum extent necessary.'" Id. (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).

The Court initially must determine whether Section 104(c) and the BRAC Act are capable of coexistence. See Posadas, 296 U.S. at 503. The BRAC Act governs the process whereby military bases and other installations are closed or realigned. It does not, on its face, govern the deactivation or dissolution of units of the National Guard. No provision of the BRAC Act directly, or indirectly, governs the manner in which a unit of the National Guard should be deactivated or recommended for deactivation. However, the BRAC Act does directly address outplacement of "civilian employees employed by the Department of Defense at military installations being closed or realigned . . . ." See BRAC Act § 2905(a)(1)(D); see also BRAC Act § 2910(5) (defining "realignment" to include "any action which . . . reduces and relocates . . . civilian personnel positions . . ."). Furthermore, no provision in the BRAC Act specifically prevents the Secretary from seeking a Governor's approval prior to recommending that a unit of the National Guard be deactivated.

Defendant argues, however, that the BRAC Act implicitly gives the Secretary the power to recommend deactivation of a National Guard unit in order to carry out his power to close the installation in which such unit is based. Defendant urges the Court to defer to the definition of "closure" developed by the

Department of Defense. The following definition appears on the Department of Defense's BRAC 2005 website:

> **Closure**. All missions of the installation have ceased or have been relocated. All personnel positions (military, civilian and contractor) have either been eliminated or relocated, except for personnel required for caretaking, conducting any ongoing environmental cleanup, and disposal of the base, or personnel remaining in authorized enclaves.

United States Dep't of Defense, 2005 BRAC Definitions (2005), http://www.defenselink.mil/brac/definitions_brac2005.html. In Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), the Supreme Court set out a two step inquiry to be used in deciding whether an agency's construction of a statute should be given effect by the Court:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

In this case, we find that Congress's intent regarding the BRAC Act's meaning of closure and realignment is clear from the text of the Act. The BRAC Act expressly covers the elimination of civilian personnel positions. See BRAC Act § 2905(a)(1)((D); see

also BRAC Act § 2910(5). At the same time, the BRAC Act does not state that it covers the elimination of military personnel positions. Congress's failure to include military personnel positions within the definition of realignment indicates its intent to exclude the deactivation of military units from the BRAC process. See United States v. Vasquez, 271 F.3d 93, 111 (3d Cir. 2001) (Becker, C.J., concurring) (quoting United States v. McQuilken, 78 F.3d 105, 108 (3d Cir. 1996) ("It is a canon of statutory construction that the inclusion of certain provisions implies the exclusion of others.")). Consequently, the Court need not defer to the Secretary's definition of "closure." Accordingly, we find no explicit conflict between the Act's explicit purpose of providing for the closure and realignment of military installations and Section 104(c)'s consent provision.

The Court's next inquiry is whether the BRAC Act covers the whole subject of Section 104(c) and is clearly intended as a substitute for it. See Posadas, 296 U.S. at 503. The BRAC Act was "designed 'to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.'" Dalton, 511 U.S. at 464 (quoting BRAC Act § 2901(b)). The subject of Section 104(c) is the designation and change in branch, structure and allotment of units of the National Guard. The BRAC Act does not cover the whole subject of Section 104(c) and is not clearly intended as a substitute for it.

Even if it were, the Court cannot find that the BRAC Act impliedly repealed Section 104(c) unless Congress's intent to repeal Section 104(c) is "clear and manifest." Posadas, 296 U.S. at 503. Congress explicitly provided that certain other statutes were repealed or superceded by the BRAC Act in the text of the Act. See BRAC Act § 2905(b) (delegating authority granted to the Administrator of General Services in 40 U.S.C. § 521, *et seq.;* 40 U.S.C. § 541, *et seq.*; 49 U.S.C. §§ 47151-47153; and 16 U.S.C. § 667(b) to the Secretary of Defense). However, no language in the text of the BRAC Act expresses an intention to supercede or repeal Section 104(c). The BRAC Act's silence regarding changes in the branch, organization or allotment of National Guard units located entirely within a state indicates conclusively that Congress did not intend the BRAC Act to repeal Section 104(c). See Jama v. Immigration and Customs Enforcement, --- U.S. ---, 125 S. Ct. 694, 700 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

The only way to give effect to both statutes is to find that the Secretary was required, by Section 104(c), to obtain the approval of Governor Rendell prior to recommending the deactivation of the 111th Fighter Wing and that his failure to do so violated

Section 104(c). Accordingly, we find that there are no genuine issues of material fact with respect to Plaintiffs' claim, in Count I of the Complaint, that the Secretary's recommendation violated 32 U.S.C. § 104(c) and Plaintiffs, therefore, are entitled to judgment as a matter of law on that claim.

C. Plaintiffs' Title 10 Claim

In Count II, Plaintiffs claim that the Secretary's recommendation that the 111th Fighter Wing be deactivated violates 10 U.S.C. § 18238. As a threshold matter, it is not clear that 10 U.S.C. § 18238 applies to the relocation or withdrawal of a state National Guard unit that is not in federal service and that is, at the time of the relocation of withdrawal, under the control of the state. Assuming, *arguendo*, that Section 18238 applies to the 111th Fighter Wing, the Court will consider the parties' respective positions regarding the merits of Count II.

Defendant argues that he is entitled to judgment as a matter of law because the plain language of Section 18238 cannot apply to a recommendation made pursuant to the BRAC Act. Again, the Court's analysis starts with the language of the statute itself. Consumer Prod. Safety Comm'n, 447 U.S. at 108. Section 18238 states as follows:

> 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.

10 U.S.C. § 18238 (emphasis added). Defendant's position rests on the meaning of the phrase "under this chapter." Section 18238 appears in Chapter 1803, Facilities for Reserve Components, of Title 10 of the United States Code. The BRAC Act, however, appears in Chapter 159, Real Property, Related Personal Property, and Lease of Non-Excess Property. Thus, the question before the Court is whether the gubernatorial consent required under Section 18238 applies outside of Chapter 1803 to actions taken pursuant to Chapter 159.

Plaintiffs argue that Chapter 1803's "Facilities for Reserve Components" simply applies Chapter 159's "Real Property, Related Personal Property, and Lease of Non-Excess Property" to the specific circumstances of "Reserve Components." Essentially, Plaintiffs contend that "under this chapter" means both Chapter 1803 and Chapter 159 because both statutes relate to "the real property and facilities of the Defense Department." This analysis must be rejected, however, as Chapter 159 covers far more than just "Real Property." Chapter 159 also covers the minimum drinking age on military installations, the sales prices of goods sold in commissary facilities, and base closures and realignments – none of which are addressed in Chapter 1803. See 10 U.S.C. §§ 2683, 2685, 2687.

We conclude that the plain meaning of the phrase "under this chapter" limits Section 18238 to actions taken under Chapter 1803. "'*Under* this chapter' plainly includes actions that the chapter authorizes . . . . Just as plainly, 'under this chapter' excludes actions that . . . necessarily fall outside of the scope of the chapter, not under it." City of Burbank v. United States, 273 F.3d 1370, 1379 (Fed. Cir. 2001) (emphasis in original) (citing The Oxford English Dictionary 950 (2d ed. 1989) ("noting that 'under' denotes authorization, and defining it as '[in] accordance with (some regulative power or principle).'"). Interpreting "under this chapter" to include other related chapters would render the phrase superfluous, an impermissible construction. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)). Accordingly, we find that the gubernatorial consent requirement of Section 18238 applies only to actions taken pursuant to Chapter 1803 of Title 10. As there are no genuine issues of material fact with respect to Plaintiffs' claim, in Count II of the Complaint, that the Secretary's recommendation violated 10 U.S.C. § 18238, Defendants are, consequently, entitled to judgment as a matter of law on that claim.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is denied. Defendant's alternative Motion for Summary Judgment is denied as to Count I of the Complaint and granted as to Count II. Plaintiffs' Motion for Summary Judgment is granted as to Count I of the Complaint and denied as to Count II of the Complaint. Judgment is entered, as a matter of law, in favor of Plaintiff on Count I of the Complaint and in favor of Defendant on Count II of the Complaint. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD G. RENDELL, ET AL.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DONALD H. RUMSFELD	:	**No. 05-CV-3563**

O R D E R

AND NOW, this 26th day of August, 2005, upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 15), Plaintiffs' Motion for Summary Judgment (Docket No. 16), the papers filed in connection therewith, the National Guard Association of the United States Memorandum of Law as *Amicus Curiae* (Docket No. 27), and the Hearing held in open Court on August 23, 2005, **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion to Dismiss is **DENIED**;
2. Defendant's Motion for Summary Judgment is **GRANTED** as to Count II of the Complaint and **JUDGMENT** is hereby entered in favor of Defendant and against Plaintiffs on Count II of the Complaint;
3. Plaintiffs' Motion for Summary Judgment is **GRANTED** as to Count I of the Complaint and **DECLARATORY JUDGMENT** is hereby **ENTERED** in favor of Plaintiffs and against Defendant as follows:
    a. Secretary Rumsfeld, by designating the 111th Fighter Wing of the Pennsylvania Air National Guard

without first obtaining the approval of Governor Rendell, has violated 32 U.S.C. § 104(c).

b. The portion of the BRAC DoD Report that recommends deactivation of the 111th Fighter Wing of the Pennsylvania Air National Guard is null and void.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.