

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROD BLAGOJEVICH, Governor of the)
State of Illinois,)

Plaintiff,)

-vs-)

No. 05-3190

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

Defendants.)

AMENDED COMPLAINT

Plaintiff, ROD BLAGOJEVICH, Governor of the State of Illinois, by his attorney, Lisa Madigan, Attorney General of the State of Illinois, and for his amended complaint against defendants, DONALD RUMSFELD, Secretary of Defense of the United States; ANTHONY J. PRINCIPI, Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V. HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, members of the Defense Base Closure and Realignment Commission, states as follows:

1. This Court has jurisdiction over this action which alleges a violation of federal law pursuant to 28 U.S.C. §1331 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Venue is proper in the Central District of Illinois by virtue of the fact that the Abraham Lincoln Capital Airport where the 183rd Fighter Wing, a portion of the Illinois Air National Guard, is based is in the Central District of Illinois and by virtue of the fact that the official residence of the Governor of the State of Illinois is in the Central District of Illinois.

3. Plaintiff, Rod Blagojevich, is the Governor of the State of Illinois.

4. Pursuant to the Constitution and laws of the State of Illinois, plaintiff is the Commander in Chief of the military forces of the State of Illinois, except for those persons who are actively in the service of the United States. Illinois Constitution of 1970 art. XII, §4.

5. Defendant Donald Rumsfeld is the Secretary of Defense of the United States.

6. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission.

7. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission.

8. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission.

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and

realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The Air National Guard base at the Abraham Lincoln Capital Airport is used for the administering and training of the reserve components of the armed forces.

12. Defendant Rumsfeld has recommended to the Base Closure and Reassignment Commission that the 183rd Fighter Wing be realigned.

13. The 183rd Fighter Wing of the Illinois Air National Guard is presently located at the Abraham Lincoln Capital Airport in Springfield, Illinois.

14. A "wing" is defined by Air Force Instruction 38-101 as a level of command with approximately 1,000-5,000 persons which has a distinct mission with a significant scope and is responsible for monitoring the installation or has several squadrons in more than one dependent group. AFI 38-101 §2.2.6.

15. The 183rd Fighter Wing is composed of Headquarters Staff, the 183rd Operations Group, the 183rd Maintenance Group, the 183rd Medical Group, and the 183rd Mission Support Group.

16. The 183rd Operations Group includes the 170th Fighter Squadron.

17. A "group" is a level of command consisting of approximately 500-2,000 persons usually comprising two or more subordinate units. AFI 38-101 §2.2.7.

18. The Groups which make up the 183rd Fighter Wing are composed of various squadrons and flights.

19. A "squadron" is the "basic unit of the Air Force." AFI-38-101 §2.2.8.

20. A "numbered/named flight" is the lowest level unit in the Air Force. AFI 38-101 §2.2.9.1.

21. The wing, groups, squadrons, and flights at the Abraham Lincoln Capital Airport are "units" as the term is defined by AFI 38-101.

22. The proposed realignment would result in the withdrawal or relocation of the fifteen F16 fighter planes currently assigned to the 183rd Fighter Wing and the relocation or removal of the positions of 185 full time and 452 part time personnel.

23. Plaintiff has information and believes that the proposed realignment will result in the withdrawal or relocation of various units of the Illinois Air National Guard, including the 170th Fighter Squadron, the 183rd Operational Support Flight, and large portions of the 183rd Maintenance Group.

24. The result of the withdrawal or relocation of these units is that the 183rd Fighter Wing will cease to exist, because the units remaining will be insufficient to meet the definition of a "wing."

25. The Illinois National Guard constitutes a portion of the reserve component of the armed forces of the United States.

26. Defendant Rumsfeld has recommended that units of the Illinois Air National Guard be relocated or withdrawn, although he has neither requested, nor received the approval of plaintiff.

27. Pursuant to 10 U.S.C. §18238, "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.”

28. Plaintiff has not consented to withdrawal or relocation of units of the Illinois Air National Guard.

29. Plaintiff has informed defendants that he did not consent to withdrawal or relocation of Air National Guard units and stated that:

The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.

See Exhibits A, B.

30. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

31. Pursuant to 32 U.S.C. §104(c) “no change in the branch, organization, or allocation of a unit located entirely within a state may be made without the approval of its Governor.”

32. The units of the 183rd Fighter Wing are presently located entirely within the State of Illinois and not currently activated to federal service.

33. Federal law prohibits defendant Rumsfeld from taking action to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois.

34. Pursuant to 10 U.S.C. §18235(b)(1) the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities’ use for administering and training the reserve components of

the armed forces.

35. The realignment of the 183rd Fighter Wing as proposed by defendant Rumsfeld would interfere with the use of the Abraham Lincoln Capital Airport for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

36. By virtue of defendant Rumsfeld's proposal to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois an actual controversy exists between the parties.

37. On or about July 14, 2005, Dan Cowhig, Deputy General Counsel for the Defense Base Closure and Realignment Commission, advised the Commission that units of the Air National Guard could not be withdrawn or disbanded without the consent of the governors of the states in which those units are located. See Exhibit C.

38. On August 26, 2005, the United States District Court for the Central District of Pennsylvania held that 32 U.S.C. §104(c) prohibits defendant Rumsfeld from making a change in the branch, organization, or allocation of unit of the Air National Guard without the consent of the governor. See Exhibit D.

39. Notwithstanding the facts alleged in paragraphs 35 and 36, the members of the Base Closure and Realignment Commission voted to adopt defendant Rumsfeld's recommendations for the realignment of the 183rd Fighter Wing.

40. Plaintiff will suffer irreparable harm, if injunctive relief is not granted.

41. The State of Illinois will suffer irreparable harm, if injunctive relief is not granted, in that the State's ability to respond to homeland security threats, civil emergencies, and natural disasters will be diminished.

42. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

- A. Enter a declaratory judgment declaring the realignment of the 183rd Fighter Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Illinois is prohibited by federal law, null, and void; and
- B. Enjoin the Defense Base Closure and Realignment Commission from transmitting to the President its recommendation for the realignment of the 183rd Fighter Wing or taking any other action to effect the realignment of the 183rd Fighter Wing unless and until the Governor of the State of Illinois consents; and
- C. Enjoin Defendant Rumsfeld from taking any action to realign 183rd Fighter Wing unless and until the Governor of the State of Illinois consents; and
- D. Granting such other relief as is warranted in the circumstances.

ROD BLAGOJEVICH, Governor of the State of
Illinois,

Plaintiff,

LISA MADIGAN, Attorney General,
State of Illinois,

Attorney for Plaintiff,

BY: /s/Terence J. Corrigan

Terence J. Corrigan, #6191237

Assistant Attorney General

500 South Second Street

Springfield, IL 62706

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OFFICE OF THE GOVERNOR

Rod R. Blagojevich
JRTC, 100 WEST RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

July 11, 2005

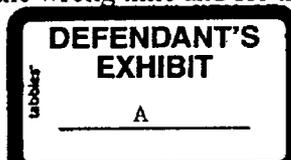
The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
The Pentagon
Room 3E800
Washington D.C. 20301

Dear Secretary Rumsfeld:

According to the recent BRAC recommendations issued by the Department of Defense, the fighter mission of 183rd Fighter Wing at Abraham Lincoln Capitol Airport in Springfield, Illinois would be realigned to another state. If this recommendation is upheld by the Defense Base Closure and Realignment Commission, the 183rd Fighter Wing will no longer have a flying mission.

The Department of Defense did not coordinate this recommendation with either my office or the Illinois Adjutant General. This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and completely disregards my role as Commander-in-Chief of the Illinois National Guard. Further, pursuant to 10 U.S.C. §18238 and 32 U.S.C. §104(c), my consent is necessary for the actions contemplated by the Department of Defense with regard to the 183rd Fighter Wing.

Chairman Principi recently wrote you expressing his concern about the impact realigning Air National Guard facilities would have on homeland and national security. The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.



By this letter I wish to formally notify you that I do not consent to the proposed realignment of the 183rd Fighter Wing. Accordingly, pursuant to the above reference statutory citations, the actions proposed by your Department cannot proceed.

Sincerely,

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(1)(1)(f)

Rod Blagojevich
Governor of Illinois



OFFICE OF THE GOVERNOR

Rod R. Blagojevich
JRTC, 100 WEST RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

July 11, 2005

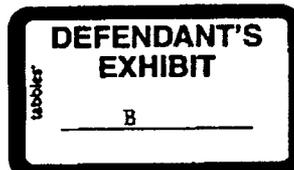
Anthony J. Principi
Chairman of the Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600
Arlington, Virginia 22202

Dear Chairman Principi:

As you are aware, Secretary of Defense Donald Rumsfeld has recommended that the fighter mission of 183rd Fighter Wing at Abraham Lincoln Capitol Airport in Springfield, Illinois be realigned to another state. If this recommendation is upheld by the Defense Base Closure and Realignment Commission, the 183rd Fighter Wing will no longer have a flying mission.

The Department of Defense did not coordinate this recommendation with either my office or the Illinois Adjutant General. This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and disregards my role as Commander-in-Chief of the Illinois National Guard. Further, pursuant to 10 U.S.C. §18238 and 32 U.S.C. §104(c), my consent is necessary for the actions contemplated by Secretary of Defense Rumsfeld with regard to the 183rd Fighter Wing.

In your recent letter to Secretary Rumsfeld, in addition to asking whether we were consulted about this recommendation, you expressed concern about the impact realigning Air National Guard facilities would have on homeland and national security. The Springfield Air National Guard Base is a highly strategic location for homeland security missions for both Illinois and the entire Midwest. Illinois is also home to 11 nuclear power plants that provide 50 percent of our power generation. Further, Illinois has 28 locks and dams on the Illinois, Mississippi and Ohio rivers. If these



recommendations are adopted, these vital assets and many others will be at greater risk without the F-16s in Springfield. On top of all that, this move will cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons.

By this letter, I wish to formally notify the Commission that I do not consent to the proposed realignment of the 183rd Fighter Wing. Accordingly, pursuant to the statutory citations referenced above, the actions proposed by Secretary Rumsfeld cannot proceed. I expressed similar sentiments to your fellow commissioners on June 20, 2005, at the BRAC Regional Hearings in St. Louis via both oral and written testimony.

Thank you for your time and consideration.

Sincerely,

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)

Rod Blagojevich
Governor of Illinois

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

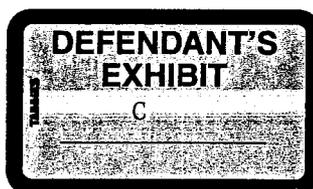
**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,



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obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

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This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

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- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to “distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station,” Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the “Air National Guard” or “Army National Guard,” these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

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Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

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at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

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**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes “any military installation at which at least 300 civilian personnel are authorized to be employed,”¹⁴ or realigns a military installation resulting in “a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed” at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to “close Niagara Falls Air Reserve Station” because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to “closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.” Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

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numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

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In order to protect the Base Closure Act process, where a recommendation to close or realign and installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign and installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

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aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act “is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States.”²⁶ Under the Base Closure Act, “the term ‘military installation’ means 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.”²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, “the term ‘realignment’ includes 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.*”²⁸ A “realignment,” under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, “*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*” by closing “Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH,” distributing “the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft).” Emphasis added.

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**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to “distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station,” Maine. Under the recommendation, “no Air Force aircraft remain at Niagara.” The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS; the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing’s KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing’s fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

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Johnstown, PA, the Navy proposes to “close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard).” In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission “realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing’s F-16s (15 aircraft) retire. The wing’s expeditionary combat support elements remain in place.” As justification, the Air Force indicates “the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill.*”³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, “each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard.”³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, “may designate the units of the National Guard ... to be maintained in each State and Territory” in order “to secure a force the units of which when combined will form complete higher tactical units ... 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.”³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (“The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.”) (June 16, 2005) (Enclosure 3).

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recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ 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."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

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members have received compensation from the United States as members of the National Guard may not be disbanded.”⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission’s recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that “in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.”⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

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also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

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Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

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types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

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Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

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The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

- (1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.
- (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.
- (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.
- (4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

- (1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.
- (2) The economic impact on existing communities in the vicinity of military installations.
- (3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

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the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DJC 14 Jul 05*
Approved: David Hague, General Counsel

DH 14 Jul 05

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

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

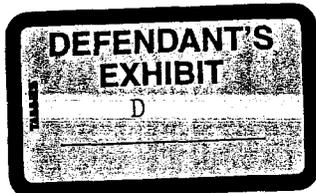
OPINION

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

¹After 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 Background²

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 deactivated³ and that half of

from either side.

²The 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.

³The 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. § 18238⁴ and 32

⁴10 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.)

⁵32 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

⁶The 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,

⁷Plaintiffs 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

⁸The 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

⁹The 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

¹⁰The 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

¹¹Plaintiffs 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

¹²Defendant 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 or 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.

Certificate of Service

I hereby certify that on September 1, 2005, I presented the foregoing Plaintiff's Amended Complaint to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

rodger.heaton@usdoj.gov
andrew.tannenbaum@usdoj.gov

and I hereby certify that on September 1, 2005, I have mailed by United States Postal Service, the document to the following non-registered participant:

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Secretary of Defense
U.S. Department of Defense
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/s/Terence J. Corrigan
Terence J. Corrigan
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

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

No. 05-3190

MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff, ROD BLAGOJEVICH, Governor of the State of Illinois, by his attorney, Lisa Madigan, Attorney General of the State of Illinois, and moves this honorable Court to enter a temporary restraining order restraining the Defense Base Closure and Realignment Commission from transmitting its recommendation to realign the 183rd Fighter Wing to the President of the United States until a hearing can be held on plaintiff's motion for a preliminary injunction. Plaintiff further requests that a hearing on plaintiff's motion for a preliminary injunction be set on or before September 8, 2005.

In support thereof, it is stated:

1. Defendants Donald Rumsfeld and the members of the Defense Base Closure and Realignment Commission have recommended that the 183rd Fighter Wing, a portion

of the Illinois Air National Guard, be realigned.

2. The proposed realignment will result in the deactivation or withdrawal of units of the Illinois Air National Guard.

3. The Defense Base Closure and Realignment Commission is scheduled to transmit its recommendations to the President on or before September 8, 2005.

4. Plaintiff has not consented to realignment of the 183rd Fighter Wing.

5. Federal law does not authorize defendants to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois.

6. Plaintiff has a reasonable likelihood of success on the merits. *See Rendell v. Rumsfeld*, Slip. Op. 05-3563 (E.D. Pa. 08/26/05).

7. Plaintiff will be irreparably harmed if the 183rd Fighter Wing is realigned without the consent of the Governor.

8. No adequate remedy exists at law.

9. A temporary restraining order will not harm the public interest.

10. A balancing of interests weighs in favor of granting the injunction.

11. Defendant will not be harmed if a temporary restraining order is granted, because the Commission is not required to transmit its recommendation to the President of the United States until September 8, 2005.

WHEREFORE, plaintiff respectfully requests that this honorable Court enter a temporary restraining order restraining the Defense Base Closure and Realignment Commission from transmitting its recommendation to realign the 183rd Fighter Wing to the President of the United States until September 8, 2005 or until a hearing can be held on plaintiff's motion for a preliminary injunction. Plaintiff further requests that a hearing on

plaintiff's motion for a preliminary injunction be set on or before September 8, 2005.

ROD BLAGOJEVICH, Governor of the State of
Illinois,

Plaintiff,

LISA MADIGAN, Attorney General,
State of Illinois,

Attorney for Plaintiff,

BY: /s/Terence J. Corrigan

Terence J. Corrigan, #6191237

Assistant Attorney General

500 South Second Street

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Telephone: 217/782-5819

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STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

Blagojevich v. Rumsfeld, et al.
USDC-CD Ill. 05-3190

AFFIDAVIT

Affiant Col. Robert J. Murphy (Ret.), having first been duly sworn upon oath, do hereby depose and state:

1. Affiant was Commander of the 183rd Fighter Wing from October 1998 through March, 2004.
2. Affiant is familiar with Air Force Instruction 38-101 which describes the objectives and principles of Air Force organization.
3. Affiant is familiar with the units which make up the 183rd Fighter Wing.
4. The 183rd Fighter Wing of the Illinois Air National Guard is presently located at the Abraham Lincoln Capital Airport in Springfield, Illinois.
5. A "wing" is defined by Air Force Instruction 38-101 as a level of command with approximately 1,000-5,000 persons which has a distinct mission with a significant scope and is responsible for monitoring the installation or has several squadrons in more than one dependent group. AFI 38-101 §2.2.6.
6. The 183rd Fighter Wing is composed of Headquarters Staff, the 183rd Operations Group, the 183rd Maintenance Group, the 183rd Medical Group, and the 183rd Mission Support Group.
7. The 183rd Operations Group includes the 170th Fighter Squadron.
8. A "group" is a level of command consisting of approximately 500-2,000 persons usually comprising two or more subordinate units. AFI 38-101 §2.2.7.
9. The Groups which make up the 183rd Fighter Wing are composed of various squadrons and flights.

10. A "squadron" is the "basic unit of the Air Force." AFI-38-101 §2.2.8.
11. A "numbered/named flight" is the lowest level unit in the Air Force. AFI 38-101 §2.2.9.1.
12. The wing, groups, squadrons, and flights at the Abraham Lincoln Capital Airport are "units" as the term is defined by AFI 38-101.
13. The proposed realignment would result in the withdrawal or relocation of the fifteen F16 fighter planes currently assigned to the 183rd Fighter Wing and the relocation or removal of the positions of 185 full time and 452 part time personnel.
14. The proposed realignment will result in the withdrawal or relocation of various units of the Illinois Air National Guard, including the 170th Fighter Squadron, the 183rd Operational Support Flight, and large portions of the 183rd Maintenance Group.
15. The result of the withdrawal or relocation of these units is that the 183rd Fighter Wing will cease to exist, because the units remaining will be insufficient to meet the definition of a "wing."
16. Affiant has read the foregoing paragraphs, is competent to testify, and if, called, would so testify.

FURTHER AFFIANT SAYETH NOT

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)

Robert J. Murphy 

Subscribed and sworn to before me

this 31st day of August, 2005.

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)



IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROD BLAGOJEVICH, Governor of the)
State of Illinois,)

Plaintiff,)

-vs-)

No. 05-3190

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

Defendants.)

AFFIDAVIT OF DAVID D. STREICKER

1. I am over the age of eighteen years old and fully capable to testify to the matters contained herein.
2. I am currently the Deputy General Counsel for the Illinois Department of Commerce and Economic Opportunity. As part of my regular job duties I advise both Governor Blagojevich and the Director of the Illinois Department of Commerce and Economic Opportunity on military base retention issues. I have been in this position since February of 2004.
3. Exhibits A and B to the complaint filed by Governor Blagojevich in the above captioned matter are true and accurate copies of the letters sent by Governor Blagojevich to Secretary Rumsfeld and Chairman Principi on July 11, 2005.
4. Copies of Exhibits A and B are retained by me in the ordinary course of business as advisor on base retention issues.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2005 by:

Signature redacted pursuant to
USDC-CDIL Adm.Proc. Rule II(I)(1)(f)

Certificate of Service

I hereby certify that on September 1, 2005, I presented the foregoing Motion for a Temporary Restraining Order to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

rodger.heaton@usdoj.gov
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Springfield, IL 62701

/s/Terence J. Corrigan
Terence J. Corrigan
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROD BLAGOJEVICH, Governor of the)	
State of Illinois,)	
)	
Plaintiff,)	
)	
-vs-)	No. 05-3190
)	
DONALD RUMSFELD, Secretary of Defense)	
of the United States; ANTHONY J. PRINCIPI,)	
Chairman of the Defense Base Closure and)	
Realignment Commission; JAMES H.)	
BILBRAY; PHILLIP E. COYLE; HAROLD W.)	
GEHMAN, JR.; JAMES V. HANSEN;)	
JAMES T. HILL; LLOYD W. NEWTON;)	
SAMUEL K. SKINNER; and SUE ELLEN)	
TURNER, members of the Defense Base)	
Closure and Realignment Commission,)	
)	
Defendants.)	

MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff, ROD BLAGOJEVICH, Governor of the State of Illinois, by his attorney, Lisa Madigan, Attorney General of the State of Illinois, and moves this honorable Court to enter a preliminary injunction enjoining the Defense Base Closure and Realignment Commission from transmitting its recommendation to realign the 183rd Fighter Wing to the President of the United States until a final decision can be made on the merits of plaintiff's claims.

In support thereof, it is stated:

1. Defendants Donald Rumsfeld and the members of the Defense Base Closure and Realignment Commission have recommended that the 183rd Fighter Wing, a portion of the Illinois Air National Guard, be realigned.
2. The proposed realignment will result in the deactivation or withdrawal of units of the Illinois Air National Guard.
3. The Defense Base Closure and Realignment Commission is scheduled to

transmit its recommendations to the President on or before September 8, 2005.

4. Plaintiff has not consented to realignment of the 183rd Fighter Wing.

5. Federal law does not authorize defendants to realign the 183rd Fighter Wing without the consent of the Governor of the State of Illinois.

6. Plaintiff has a reasonable likelihood of success on the merits. *See Rendell v. Rumsfeld*, Slip. Op. 05-3563 (E.D. Pa. 08/26/05).

7. Plaintiff will be irreparably harmed if the 183rd Fighter Wing is realigned without the consent of the Governor.

8. No adequate remedy exists at law.

9. A preliminary injunction will not harm the public interest.

10. A balancing of interests weighs in favor of granting the injunction.

WHEREFORE, plaintiff respectfully requests that this honorable Court enter an order enjoining the Defense Base Closure and Realignment Commission from transmitting its recommendation to realign the 183rd Fighter Wing to the President of the United States until a final decision can be made on the merits of plaintiff's claims.

ROD BLAGOJEVICH, Governor of the State
of Illinois,
Plaintiff,

LISA MADIGAN, Attorney General,
State of Illinois,
Attorney for Plaintiff,

BY: /s/Terence J. Corrigan
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Certificate of Service

I hereby certify that on September 1, 2005, I presented the foregoing Motion for a Preliminary Injunction to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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/s/Terence J. Corrigan
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IN THE UNITED STATES DISTRICT COURT
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-vs-)

No. 05-3190

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SAMUEL K. SKINNER; and SUE ELLEN)
TURNER, members of the Defense Base)
Closure and Realignment Commission,)
)
Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF
MOTIONS FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

INTRODUCTION

The National Guard of a state serves a dual state/federal mission. Congress has recognized the dual nature of the state guard by enacting two separate statutes which prohibit realignment of state guard units without the consent of the governor. In enacting the Defense Base Closure and Realignment Act, Congress did not abrogate these limitations on the power of the executive branch to close or realign national guard bases.

Notwithstanding these limitations, defendant Rumsfeld recommended realignment of the 183rd Fighter Wing, a part of the Illinois Air National Guard, without the consent, and contrary to the directives of the Governor of the State of Illinois. The effect of this

realignment will be to withdraw various units of the Illinois Air National Guard that will no longer be available to protect the vital interests of the State of Illinois. Legal counsel for the Base Closure and Realignment Commission advised the members of the Commission that consent of the state's governor was needed for such action. Furthermore, the United States District Court for the Eastern District of Pennsylvania held that such realignment would be illegal without the consent of the governor. *Rendell v. Rumsfeld*, Slip. Op. 05-3563 (08/26/05). After being advised by their own legal counsel and the order of the United States District Court that their actions were illegal, the Commission voted to adopt the recommendations of defendant Rumsfeld for the realignment of the 183rd Fighter Wing.

The issues in this case involve important issues regarding principles of federalism and the rights of a governor as Commander in Chief of a state National guard.

II. STATUTORY ENACTMENTS

32 U.S.C. §104(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 Rico, the Canal Zone, and the District of Columbia. However, no change in the branch, organization, or allotment of a unit located entirely with a State may be made without the approval of its governor.

10 U.S.C. §18238 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.

Congress enacted the Defense Base Closure and Realignment Act of 1990, as

amended, and provided that it shall be the exclusive authority of the Secretary of Defense to close or realign military bases during the period covered by the Act. 10 U.S.C. 2687.¹ While Sections 2905(c) and 2905(e)(6) of the Defense Base Closure and Realignment Act expressly supercede such other enactments as the National Environmental Policy Act of 1969 and the National Defense Policy Authorization Act of 1973, nothing in the Act purports to abrogate either section 32 U.S.C. §104(c) or 10 U.S.C. §18238.

NATURE OF THE NATIONAL GUARD

In its order finding that consent of a governor is needed for realignment of a unit of the Air National Guard, the United States District Court for the Eastern District of Pennsylvania traced the history of the National Guard and its statutory or constitutional bases:

“The National Guard is the modern Militia reserved to the States by Art. I, s8, 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 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 Guard while in the service of the United States. . . .” *Id.* at 343 n. 15. The National Defense Act “required

¹This limitation is found in the cited section and in section 2909 of the Act. The text of the Act is not codified and appears in the note following 10 U.S.C. §2687.

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 [by the court]).

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.” *Perpick*, 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 - 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) (“Members 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).

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 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 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.

Rendell, Slip. Op. At 6-13.

III. STANDARD FOR A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION

A party seeking a preliminary injunction must demonstrate that it has no adequate remedy at law and will suffer irreparable harm if the preliminary relief is denied. *East Saint Louis Laborers' Local 100 v. Bellon Wrecking and Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005). The movant also must show a reasonable likelihood of success on the merits and that the injunction will not harm the public interest. *Joelner v. Village of Washington Park*,

IL, 378 F.3d 613, 619 (7th Cir. 2004). If the movant can meet its threshold burden, then the inquiry becomes a sliding scale analysis where these factors are weighed against one another. *Id.* The standards are the same for a temporary restraining order. *Caterpillar, Inc. V. Walt Disney Co.*, 287 F.Supp.2d 913, 916 (C.D. Ill. 2003). Preliminary injunctive relief serves the purpose of preserving the status quo until the merits of a case may be resolved. *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001); See also *American Can Company v. Mansukhani*, 742 F.2d 314, 323 (7th Cir. 1984) (“[E]x parte temporary restraining orders should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm”).

“Initially, the court only needs to determine that the plaintiff has some likelihood of success on the merits.” *Ty, Inc. V. Jones Group*, 237 F.3d 891, 896 (7th Cir. 2001). “However, at the balancing stage, the court must determine how great the moving party’s likelihood of success on the merits is in order to properly balance the potential protected harms.” *Id.* “The greater the likelihood of success on the merits, the less irreparable harm is necessary for an injunction to issue.” *Caterpillar*, 287 F.Supp.2d at 916.

“An injury is irreparable for purposes of granting preliminary injunctive relief only if it cannot be remedied through a monetary award after trial.” *East St. Louis Laborers’*, 414 F.3d at 703.

IV. LIKELIHOOD OF SUCCESS

Defendants’ actions will deprive plaintiff of his right under 32 U.S.C. § 104(c) and 10 U.S.C. § 18238 to disapprove the realignment of the 183rd Fighter Wing. Governor Blagojevich has a strong chance of success on the merits of his complaint seeking to

enjoin defendants' efforts to usurp his rights under federal law. The only case on point squarely holds that federal law prohibits realignment of the 183rd Fighter Wing without the consent of the governor. *Rendell v. Rumsfeld*, Slip. Op. 05-3563.

As in the instant case, *Rendell* concerned attempts by defendant Rumsfeld to deactivate a unit of the Air National Guard without the consent of the governor.² The plaintiffs, the Governor of the Commonwealth of Pennsylvania and both of its United States Senators, alleged, "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 BRAC process. *Rendell* at 4. The plaintiffs claimed, *inter alia*, that the proposed deactivation of the 111th Fighter Wing without gubernatorial consent violated 32 U.S.C. §104(C), which prohibits changes in the branch, allocation, or allotment of a unit located entirely within a state without the approval of the governor. *Id.* at 4-5.

Both plaintiffs and defendant in *Rendell* filed motions for summary judgment. *Id.* at 1. After thoroughly analyzing the history of the National Guard and the legislative history of §104(c) and other provisions relating to the National Guard, the court concluded:

Given Congress's concerns about federalism as reflected in the dual nature of the National Guard, we find that the provisio [in 104(c)] 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.

²Although called "realignment" various units of the 183rd Fighter Wing will be deactivated or withdrawn. Since the remaining units will be insufficient to meet the definition of a "wing," the 183rd Fighter Wing will cease to exist. See Murphy affidavit. Thus, the 183rd Fighter Wing will be deactivated.

§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).

Id. at 43.

This holding collaterally estops defendant Rumsfeld from contesting that gubernatorial approval is needed for realignment of an Air Guard base which results in the deactivation or withdrawal of units of the Air National Guard.³ While the members of the Defense Base Closure and Realignment Commission were not parties to the *Rendell* action, the decision effectively binds them as well, because Rumsfeld is the person who must actually close or realign a base in accordance with the results of the Defense Base Closure and Realignment Commission process. A decision that the law does not allow Rumsfeld to close a particular base will, therefore, bind the Commission.

Even if not binding, the *Rendell* decision presents a thorough analysis of the exact issue presented here and is persuasive authority which should lead the court to conclude that plaintiff has more than a reasonable chance of success on the merits. The United States District Court for the District of Connecticut has found that sufficient likelihood of success exists to grant an *ex parte* temporary restraining order. See *Rell v. Rumsfeld*, 05-1363 (D.Conn. 08/30/05)(attached).

V. COLLATERAL ESTOPPEL

Collateral estoppel operates to prevent a party from relitigating an issue that party has already litigated and lost. *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 392 (7th Cir. 1986). The policy underlying the doctrine is that "one fair opportunity to litigate

³See discussion of collateral estoppel, *infra*.

an issue is enough.” *Id.*

Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits, based on a different cause of action, involving a party to the prior litigation. *Crowder v. Lash*, 687 F.2d 996, 1009 (7th Cir. 1982). In *Crowder*, the Seventh Circuit, *citing* to the Supreme Court decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) held that defendants were precluded from re-litigating issues decided against them in a prior proceeding with a different plaintiff where the defendants had a full and fair opportunity to litigate their claims in the prior proceeding. The Seventh Circuit went on to explain that to determine when a party may be precluded from re-litigating an issue decided adversely to it in an earlier proceeding, a court must examine:

1. Whether the issue on which collateral estoppel is asserted is identical to that determined in the prior action;
2. Whether the controlling facts or legal principles have changed significantly since the prior judgment; and
3. Whether any special circumstances exist which would render preclusion inappropriate or unfair.

Crowder, 687 F.2d at 1010.

The Seventh Circuit in *Gilldorn* further identified at what point in time a decision is considered “final” for purposes of giving it a preclusive effect. The Seventh Circuit noted that finality for collateral estoppel is not the same as that required to appeal. *Gilldorn*, 804 F.2d at 393, *citing Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). The court in *Gilldorn* also noted that a final judgment in the case as a whole is not necessary for purposes of collateral estoppel; a

motion to dismiss decision can be given preclusive effect as long as the issue is finally decided. *Id.* The court held that the ultimate question is whether the “prior adjudication is determined to be sufficiently firm to be accorded conclusive effect.” *Id.* Citing *Miller*, the court concluded that a decision is final for collateral estoppel purposes when the parties were fully heard, the court supported its decision with a reasoned opinion, and the decision was appealable or had been appealed. *Id.*

In *Rendell*, the court in Pennsylvania fully heard the parties on issues related to whether 32 U.S.C. §104(c) required Rumsfeld to obtain gubernatorial consent before making a recommendation that would deactivate a local guard unit; Attached hereto is the Court’s 52 page order reflecting the court’s determinations and clearly establishing that the decision was supported by a thorough reasoned opinion. The decision by the Pennsylvania court interpreting 32 U.S.C. §104(c) was a grant of summary judgment against Rumsfeld which is now appealable.

The issue presented in *Rendell* regarding the need for Rumsfeld to obtain gubernatorial consent is identical to that in this action. No facts or legal principles have changed significantly since the Pennsylvania court entered its judgment on August 26, 2005; and no special circumstances exist which would render preclusion inappropriate or unfair. Rumsfeld has had a fair opportunity to litigate this issue and his loss precludes him from re-litigating the issues in subsequent actions.

The defendant, Donald Rumsfeld, is estopped from disputing or attempting to litigate the issues actually and necessarily decided against him in the United States District Court

for the Eastern District of Pennsylvania, *Rendell v. Rumsfeld*, Slip. 05-3563, including:⁴

- a) That Congress intended 32 U.S.C. §104(c) to apply generally to all actions which attempt to change the branch, organization, or allotment of a unit located entirely within a state without consent of the governor;
- b) That §104(c) has not been repealed by the BRAC Act and that it does not conflict with the BRAC Act;
- c) That as a matter of law the secretary's recommendation to change the branch, organization, or allotment of a unit without prior consent of the governor, violates §104(c);
- d) That §104(c) requires the secretary to obtain the approval of the governor prior to recommending a change in the branch, organization or allotment of the unit and that his failure to do so violates §104(c); and
- e) That as a matter of law the secretary's recommendation submitted without the governor's consent violates §104(c).

Thus, defendant Rumsfeld is collaterally estopped from disputing that plaintiff is correct on the central issue in this case.

VI. IRREPARABLE INJURY⁵

The harm which will be suffered by the governor and the State of Illinois is irreparable, because it cannot be remedied through a later award of damages. Plaintiff

⁴Attached to Plaintiff's First Amended Complaint and incorporated herein by reference is the Court's Order adjudicating those issues as to Rumsfeld.

⁵In *Rendell*, Pennsylvania argued that review of a decision to close a military base is not possible after the Commission transmits its recommendation to the President. To support this argument, Pennsylvania relied on its interpretation of *Dalton v. Spocor*, 511 U.S. 462 (1994). Plaintiff here is not asserting the same interpretation of *Dalton* because *Dalton* concerned only whether BRAC decisions were reviewable under the Administrative Procedures Act. However, because the issue has not been authoritatively decided, the possibility that Pennsylvania is correct adds to the urgency of this matter.

would lose a valuable right to control the disposition of units of the Illinois Air National Guard. This right is conferred by the Constitution of the State of Illinois and 32 U.S.C. §104(c). This statute confers the right to approve or disapprove any recommended changes in the makeup of the Air Guard. Furthermore, the State of Illinois will suffer irreparable harm to its own interests. Defendants have recommended that units of the Illinois Air National Guard be disbanded or withdrawn. The Air National Guard is a valuable resource for the defense of the State of Illinois. The State of Illinois will be irreparably harmed in its ability to repond to homeland security threats, civil emergencies, and natural disasters. The proposed realignment of the 183rd Fighter Wing would serve to generally impair the ability of the State to recruit and secure reenlistment of citizens to serve in its Air National Guard. No action at law can afford relief from the injury which will be suffered by plaintiff and the State of Illinois.

VII. PUBLIC INTEREST

The public interest will not be harmed by an order granting the relief sought by plaintiff. The Seventh Circuit in reviewing preliminary injunction decisions has stressed that the public interest always lies in favor of a decision to stop illegal government action. See *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (“[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute). The decisions of other courts are in accord with this principle. See *G & V Lounge v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994)(“[I]t is always in the public interest to prevent a violation of a party’s constitutional rights.”); *Connecticut Distributing Co. V. Reno*, 154 F.3d 281 (6th Cir. 1998)(“[T]he crucial

inquiry [in deciding whether the public interest will be harmed] often is, and will be in this case, whether the statute will be held unconstitutional. . . . [T]he public interest lies in the correct application of First Amendment principles”); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001)(“[T]he public interest is better served by following Supreme Court precedent and protecting the core First Amendment right of political expression”); *Newsom v. Albemarle County School Board*, 354 F.3d 249, 261 (4th Cir. 2003)(“[Defendant] is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional.”)

Nothing in these decisions suggests that the result is likely to be any different when statutory, rather than constitutional, rights are at issue. Defendants have no interest in proceeding with an unlawful course of conduct. Furthermore, protection of public rights is the very reason plaintiff has refused to consent to realignment of the 183rd Fighter Wing. See complaint, Exhibits A and B.

VIII. BALANCING OF FACTORS

The weighing of the various factors at issue tips the scales strongly in favor of granting an injunction. Much of the necessary balancing of interests has already been done by Congress, which affirmatively took action to protect the interests of the governors of the several states to act as Commanders in Chief of their general units and either approve or disapprove recommended dispositions of their guard units. Plaintiff has a strong likelihood of success on the merits and defendants have no interest in pursuing an illegal cause of action.

Accordingly, this Court should grant the relief sought in plaintiff's motions for a temporary restraining order and for a preliminary injunction.

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Certificate of Service

I hereby certify that on September 1, 2005, I presented the foregoing Motion for a Temporary Restraining Order to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that on September 1, 2005, I have mailed by United States Postal Service, the document to the following non-registered participant:

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