BASE CLOSURE AND REALIGNMENT: FEDERAL CONTROL OVER THE NATIONAL GUARD

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INTRODUCTION

Major threats to United States' national security have emerged, evolved, and disappeared numerous times throughout its 229 years of existence. One of the highest priorities of the federal government is to ensure that the country and its citizens are protected from such threats by maintaining adequate and able military forces. Because different threats require different means of protection, our federal government, specifically the Department of Defense (DOD), must continually assess the functionality of each military branch and evaluate its ability to combat the present as well as future anticipated threats. As threats to national security change over time, military organizational structures and equipment become unnecessary, ineffective, or at least inefficient. The military must adapt to these changes. The United States' army consists of a relatively small regular army supported by a National Guard reserve. When the federal government determines that changes must occur to meet new threats, both of these forces are affected.

The Defense Base Closure and Realignment Commission is the agency responsible for investigating necessary changes to the individual military branches' respective structures and for developing a report of recommendations for the President to approve or disapprove.[1] On September 8, 2005, the Commission submitted its 2005 report to the President for signature. The Commission included in its report 182 closure and realignment recommendations.[2] A number of recommendations involved National Guard units and locations. The National Guard has a unique status, as it is under both federal and state control.[3] Governors from three states with National Guard units listed in the 2005 report brought suit challenging the Commission's and

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1. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901–11, 104 Stat. 1808, 1808–19 (portions codified at 10 U.S.C § 2687 note (2000)). *See* discussion *infra* at Part II. The Act and procedure for creating a report will be discussed in further detail later.

2. DEF. BASE CLOSURE & REALIGNMENT COMM'N, 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION REPORT iii (2005).

3. *See infra* note 7 and accompanying text.

Secretary of Defense Donald Rumsfeld's authority to recommend to the President that National Guard units and locations be realigned or closed without first gaining respective gubernatorial consent and approval from the affected state.[4]

This Comment argues that the historical relationship between states and the federal government regarding the National Guard, as evidenced through numerous legislative enactments, supports the proposition that gubernatorial consent is unnecessary in making decisions affecting the National Guard. Part I of this Comment gives a brief history of state and federal control over National Guard units. Part II describes the more recent congressional action regarding military installation closure and realignment. Part III delineates the arguments and court opinions involved in the three claims mentioned above. Part IV discusses the issues presented in these cases. Part V concludes by offering a brief insight into the ramifications of these decisions.

I. NATIONAL GUARD[5]

The U.S. Army is a complex system comprised of three major components: the active Army, the Army Reserve, and the National Guard.[6] Both the active Army and the Army Reserve are entities solely of the federal government and under whose authority they fall is never in question. The National Guard serves two separate purposes, one state and one federal,[7] and is therefore subject to each of these authorities. The history of the National Guard may be summarized as a continuous debate over the conceptual structure of military forces required to protect the national interests of the United States. On the one hand is the militiamen's patriotic desire to serve the national defense (as well as to financially survive). On the other is the desire to remain significantly independent of the federal government's regulation and vision of a reliable military force capable of fighting the country's wars and

4. Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *6 (E.D. Pa. Aug. 26, 2005); Blagojevich v. Rumsfeld, 385 F. Supp. 2d 768, 769 (C.D. Ill. 2005); Rell v. Rumsfeld, 389 F. Supp. 2d 395, 397 (D. Conn. 2005).

5. The following Part describes the history of the *Army* National Guard. It is necessary to note that the three actions brought by state governors discussed in this Comment involve *Air* National Guard units in their respective states. For the purposes of this Comment, this distinction is not a critical matter. I chose to give a background of the Army National Guard because it contains the relevant history to this Comment and also because I am a member of the active-duty Army. For the Air National Guard History Homepage, *see* Forging the Air National Guard, http://www.ang.af.mil/history/Forging.asp (last visited Oct. 11, 2006).

6. *See* JEFFREY A. JACOBS, THE FUTURE OF THE CITIZEN-SOLDIER FORCE: ISSUES AND ANSWERS, 1–13 (1994).

7. *See* The Army National Guard, http://www.arng.army.mil (last visited Mar. 9, 2006).

conflicts. The next section illustrates this embattled past by chronicling the law that has significantly affected the National Guard, starting with the U.S. Constitution.

A. The Constitutional Convention

Even prior to the drafting of the Constitution, the Articles of Confederation required the States to "always keep up a well regulated and disciplined militia."[8] However, the weakness of the Articles of Confederation was evident in Congress's inability to enforce its provisions.[9] This unenforceability, combined with numerous experiences of inadequate military forces during the Revolutionary War, created tremendous concern and debate as to the level of centralized authority necessary to meet national military needs.[10]

Behind the closed doors of the Constitutional Convention, the nation's founding fathers found themselves on one of two very distinct sides. The Federalists, who arose from a group of Revolutionary War veterans, desired a strong central government with authority to establish a significant standing army.[11] On the other side, Antifederalists favored a decentralized system with state control of a militia system.[12] The debate ended in a compromise between the two sides.[13] Clause 12 of the Armies Clause[14] grants Congress the authority to raise a standing army.[15] Regarding the militia, the Constitution provides Congress with the "authority to organize, arm, and discipline."[16] States retain the ability to appoint officers and train militia soldiers. Such authority,

8. JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 46 (Louis Morton ed., 1983).

9. *Id.*

10. JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA 1865–1920, 7 (1997).

11. *Id.* at 7–8.

12. *Id.* at 8.

13. By splitting the authority to create, maintain and call upon military forces between a number of provisions, the compromise embedded in the Constitution effectively prevented the "accumulation of overwhelming power in any person or agency." MAHON, *supra* note 8, at 49.

14. The Armies Clause consists of Article I, Section 8, Clauses 1, 11, 12, & 14 of the U.S. Constitution. *See* The Army National Guard, http://www.arng.army.mil (follow "History" hyperlink; then follow "Constitutional Charter of the Guard" hyperlink; then follow "Armies Clause" hyperlink) (last visited Mar. 9, 2006).

15. MAHON, *supra* note 8, at 49. Article I, Section 8, Clause 12 provides Congress with authority "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12.

16. MAHON, *supra* note 8, at 49. Congress shall have power "[t]o provide for organizing, arming, and disciplining, the Militia . . . ." U.S. CONST. art. I, § 8, cl. 16.

however, must be conducted within congressional guidelines.[17] Congress also has the power to call the militia into federal service when necessary and has exclusive control over the militia while it is in such service.[18] The Antifederalists found one fundamental flaw with the main body of the Constitution in that it did not guarantee the existence of the militia.[19] They therefore insisted on adding the Second Amendment which constitutionally protects the existence of the militia.[20]

B. The Militia Act, 1792

The Constitution went into effect in early 1789, and Congress quickly realized that additional legislation was necessary to guide the military system.[21] The militias engaged in a number of unsuccessful skirmishes against Native Americans and received the brunt of the criticism for these failures.[22] In 1790, Secretary of War Henry Knox submitted a plan, supported by President Washington, to Congress providing "for a national compulsory militia organized, trained, and equipped by the federal government."[23] The product of this proposal, the Militia Act of 1792, was Congress's first significant attempt at influencing state regulation of militias. The Militia Act stipulated that all eligible males owed themselves to military service of both the state and nation.[24] Congress also sought to create a military system in which units were "uniform" in structure and "interchangeable" when called to service.[25] To meet this end, the Militia Act included regulations on the tactical organization of state militias and on how militiamen must arm

17. MAHON, *supra* note 8, at 49. Article I, Section 8, Clause 16 of the U.S. Constitution also "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16.

18. MAHON, *supra* note 8, at 49. Congress may call upon the militia in three circumstances: "[T]o execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. When called into such service, the Constitution provides that Congress shall have authority "for governing such Part of them as may be employed in the Service of the United States . . . ." U.S. CONST. art. I, § 8, cl. 16. The Constitution further grants the President, as Commander-in-Chief, authority over all armed forces while in the service of the United States. U.S. CONST. art. II, § 2, cl. 1.

19. COOPER, *supra* note 10, at 8.

20. *Id.* The Second Amendment of the Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

21. MAHON, *supra* note 8, at 50.

22. *Id.* at 50–51.

23. COOPER, *supra* note 10, at 9; *see also* WILLIAM H. RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 18 (1957).

24. MAHON, *supra* note 8, at 52.

25. *Id.*

themselves.[26] Congress also required states to appoint adjutant generals to oversee and maintain this uniformity.[27] State adjutant generals were responsible for reporting annually to their respective governors and to the President on the status of their militia units.[28]

The Militia Act would serve as the militia system's only guidance for 111 years.[29] Although it purported to create certainty and reliability that the nation would be able to defend itself in times of conflict, it failed to accomplish what President Washington and Secretary Knox had hoped. The Militia Act lacked provisions of enforceability. Congress also failed to finance the costs of implementing the expensive requirements the states now shouldered.[30]

C. The Dick Act, 1903

The lack of enforceability of the Militia Act "amounted to virtual abdication by the federal government of all authority over the state militias. As a consequence, the states acted upon the recommendations of Congress according to their own diverse needs."[31] However, through most of the first half of the 19th Century, even the states, showed little interest in and exercised minimal control over militias, rendering the units essentially "private fraternal associations."[32] Not until the 1840s, when some state governments began providing financial support to the militia units, was any state control evident.[33]

In the latter half of the 1800s, the militia system proved to be unreliable and unable to fulfill the nation's periodic need for a substantial military force. During the Civil War, President Lincoln's initial call upon state militias revealed units that were unprepared for battle and states that were unwilling to oblige the order.[34] In response, Congress enacted legislation requiring states to draft individuals to meet the quotas the federal government had requested.[35]

26. COOPER, *supra* note 10, at 9. The act provided that states must organize their militias into brigades and regiments and emphasized the necessity of infantry-type units. MAHON, *supra* note 8, at 52.

27. MAHON, *supra* note 8, at 52.

28. *Id.*

29. *Id.*

30. COOPER, *supra* note 10, at 9. The act failed to enforce the provisions requiring states to organize their respective militias in a uniform manner by including at the end of the provisions "if the same be convenient." MAHON, *supra* note 8, at 52.

31. MAHON, *supra* note 8, at 56.

32. COOPER, *supra* note 10, at 16.

33. *Id.* at 17–18.

34. MAHON, *supra* note 8, at 97–99.

35. *Id.* at 100. This was the first exercise of a federal draft; historically, this authority had been

In the years following the Civil War, militiamen overwhelmingly supported having an increased role in providing for the national defense.[36] In 1879, they formed the National Guard Association (NGA) with the purpose of promoting interests within the federal government.[37] During the Spanish-American War of 1898, supporters of a national reserve army viewed ineffective mobilization of many state militias as unacceptable and compromising of the national defense.[38]

The lack of preparedness, as well as increased support for the militia's reserve role of the national defense, led to the Dick Act in 1903. The road to reform initially began with a bill providing for a significant national reserve force. The bill lacked state control, however, and the NGA effectively lobbied against the proposal, which ultimately failed.[39] The more compromising Dick Act, which came after this first failed bill, first and foremost, repealed the Militia Act of 1792.[40] The Dick Act "started the volunteer militia—by this time known as the National Guard in most of the states—along the irreversible path toward federalization."[41] Under the Dick Act, federal involvement began only after the state governor requested aid and support.[42] Congress then attached requirements and standards for training and preparedness of the militia units.[43] The Dick Act also achieved the main goal of most militiamen and the NGA: to ensure that in times of conflict, the President must first call upon the National Guard before any other volunteer service.[44]

The Dick Act was amended in 1908 and among the amendment's significant provisions was the establishment of the Division of Militia Affairs (DMA) under the War Department.[45] The DMA, made up entirely of regular Army servicemembers, supervised arms and equipment distribution to the states, evaluated National Guard training,

left solely to the states. *Id.*

36. *Id.* at 87–88.

37. *Id.* at 84.

38. COOPER, *supra* note 10, 98–108.

39. MAHON, *supra* note 8, at 139. The bill actually passed the House of Representative, but failed in the Senate. *Id.*

40. COOPER, *supra* note 10, at 109.

41. MAHON, *supra* note 8, at 139. From 1881 to 1892 most states revised their military codes and substituted the term "National Guard" for "militia." The Army National Guard, http://www.arng.army.mil (follow "History" hyperlink; then follow "Constitutional Charter of the Guard" hyperlink; then follow "The States revise the military codes—1881 to 1892" hyperlink) (last visited March 12, 2006).

42. MAHON, *supra* note 8, at 139.

43. *Id.* at 140.

44. *Id.*

45. COOPER, *supra* note 10, at 112.

and represented the National Guard's interest at the federal level.[46] Under the amended Dick Act, the War Department could not force states to create specific units, but it could compel them to organize existing units to comply with federal organizational plans.[47] In 1913, the DMA issued the controversial Circular No. 8 requiring states to comply with the organizational tables or face denial of federal recognition and funding.[48] The ramifications of this publication were enormous, and compliance required significant alterations to National Guard units, including disbandment in some instances.[49] Although opposition to the Circular No. 8 was substantial, these dissenters ultimately failed to have an effect on the strict regulations of the War Department. The NGA, which had been an effective National Guard lobbyist for the Dick Act, failed to present the unified front of states and Guardsmen necessary for congressional action.

D. The National Defense Act

Congress, through the Dick Act, made substantial annual investments to state National Guards which led to significant improvement of units.[50] However, frustration with Circular No. 8, as well as a continued belief by many higher military officials that a national reserve was the only option to ensure national security, led to congressional action again in 1916.[51] The National Defense Act (NDA) of 1916[52] increased federal control of the National Guard tremendously. First, the NDA restricted state authority to appoint officers by requiring all such individuals to pass a federally developed fitness test.[53] Second, it gave authority to the President to assign regular officers and soldiers to National Guard units.[54] It also increased the annual required training time for National Guard to conduct in order to maintain federal recognition and funding.[55] States were not allowed to disband units without prior consent from the

46. *Id.* The chief of the DMA once stated that the purpose of the DMA was to create "a militia that may be counted upon in time of federal need as a strong and efficient service prepared for active service in the field." *Id.* at 113 (quoting a DMA report issued in 1910).

47. *Id.* at 116.

48. *Id.*

49. *Id.*

50. MAHON, *supra* note 8, at 141.

51. *See id.* at 141–47.

52. National Defense Act of 1916, Pub. L. No. 64-85, 39 Stat. 166.

53. COOPER, *supra* note 10, at 154.

54. MAHON, *supra* note 8, at 148.

55. *Id.*

War Department.[56] As was past practice, federal recognition and funding was conditional on compliance with regulations. However, the stakes were even higher now.[57] Increased federal expenditure relieved states entirely from financial burdens involved with the National Guard except administrative and armory support costs.[58] Most significantly, the NDA required Guardsmen to take two separate oaths, one for state service and one for federal service, and also substituted the Militia Bureau, controlled by the Secretary of War, for the DMA.[59] The Militia Bureau, similar to the DMA, was headed by a regular army official. However, the Secretary of War had the ability to place Guardsmen on its staff temporarily.[60] The provisions of the National Defense Act concededly resulted in the "federal control of state organizations [now being] 'absolutely complete.'"[61]

Experiences shortly after the enactment of the NDA in World War I led to its amendment in 1920. The war resulted in disgruntled parties on both the federal or War Department side and the state or National Guard side. The National Guard's lack of preparedness and effectiveness led federal and regular army officials to push once again for a national reserve.[62] State representatives and the NGA objected to the near-immediate dismantling of National Guard unit integrity once called into federal service.[63] Debate in 1920 saw a return to glory for the NGA. The NGA successfully gained National Guard representation at the federal level with the change of the chief of the Militia Bureau to a National Guard officer.[64] The War Department was also required to establish a number of committees. Each of these committees had to be comprised of one-half National Guard Officers responsible for overseeing issues concerning the National Guard specifically.[65] Thus, the National Guard would finally have some influence in the War Department.

In 1933, the NGA again lobbied for the National Guard to have a greater role as the reserve force for national defense. The 1933

56. *Id.*

57. *Id.* at 149.

58. COOPER, *supra* note 10, at 155.

59. MAHON, *supra* note 8, at 148–49.

60. COOPER, *supra* note 10, at 154.

61. *Id.* at 155 (quoting a report submitted by the Militia Bureau in 1916). Indeed many scholars have contended that the NDA "can be described as a state triumph only in the sense that the Guard avoided being eliminated from military policy." *Id.*

62. MAHON, *supra* note 8, at 169.

63. *Id.* at 170.

64. *Id.* at 171.

65. *Id.*

amendment built on the NDA's original concept of dual loyalty by establishing the National Guard as comprised of two components: the National Guard of the United States and the National Guard of the states.[66] The former entity was now created under the Constitution's Armies Clause.[67] This establishment had the effect of giving the National Guard a federal identity with responsibilities as the nation's reserve component "governed by federal law and regulations."[68]

Since 1933, the National Guard has seen some changes in its relationship with the federal government. However the National Defense Act and its subsequent amendments establish the framework which still governs army structure today.[69]

II. BASE CLOSURE AND REALIGNMENT

The National Defense Act was the necessary result of the historical debate over the role of the National Guard. The ancient fear of a large standing army produced a federal government reliant on the citizen-soldier to provide the nation's defense. From this reliance, the tremendous interest that the federal government has in ensuring the preparedness of the National Guard is clear. Because the Department of Defense operates on a budget, the interest in maintaining effective, efficient forces is equally clear. Achievement of this end sometimes requires changes to unit structure. This section describes the legislative measures taken to facilitate these goals.

A. Initial Legislation

Congress first addressed base closure and realignment in its enactment of 10 U.S.C.S § 2687 in 1977. The statute, along with its substantial amendment in 1985, authorized the Secretary of Defense (Secretary) or the secretary of one of the military departments to close or realign a military installation as he or she deemed necessary, provided that he or she publicly announce to Congress that the affected installation was a candidate for such action, and submit a report to both Houses of Congress detailing justification for the decision.[70] The statute further stated that it did not apply to decisions affecting the closure or realignment of an installation if the President certified that the decision

66. *Id.* at 174–75.

67. COOPER, *supra* note 10, at 174.

68. *Id.*

69. *Id.*

70. 10 U.S.C.S. § 2687 (LexisNexis 2002) (as appearing after the 1985 amendment).

must be implemented because of "reasons of national security or a military emergency."[71] Finally, section (d)(1) of the statute defined a military installation as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department" which is located within the United States or its Territories.[72]

B. The First Commission on Base Realignment and Closure

In 1988, Congress significantly changed the process for military installation closure and realignment. Title II of Public Law (Pub. L.) 100-526 created a process by which the Secretary of Defense appointed members to the Commission on Base Realignment and Closure (Commission).[73] The statute also required the Secretary to submit a study to the Commission discussing possible changes to military installations located overseas that would lead to greater efficiency.[74] The Commission was responsible for creating a report listing its recommendations for closure and realignment of military installations in the United States.[75] The statute provided a number of important definitions. First, it defined a military installation as "a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Secretary of a military department."[76] A realignment "include[d] any action which both reduces and relocates functions and civilian personnel positions."[77] Finally, the United States included "the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States."[78] Upon completion of the report, the Commission submitted it to the Secretary as well as copies to each of the Houses of Congress. In addition to the report, the Commission also had to submit to Congress a statement certifying that, in concluding its recommendations, it had "[considered] all military installations inside

71. *Id.*

72. *Id.*

73. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, §§ 201–209, 102 Stat. 2623, 2627–34 (1988).

74. § 206(b)(1), 102 Stat. at 2631.

75. §§ 201–03, 102 Stat. at 2627–28. The Commission did not make recommendations pertaining to military installations located overseas, however, it used the Secretary of Defense's study in reaching its recommendations. § 206(b)(1), 102 Stat. at 2631.

76. § 209(6), 102 Stat. at 2634.

77. § 209(7), 102 Stat. at 2634.

78. § 209(9), 102 Stat. at 2634.

the United States."[79] After the report went to the Secretary and Congress, the Secretary was required to carry out its recommendations unless Congress agreed upon a joint resolution disapproving the recommendations of the Commission's report.[80]

Title II of Pub. L. 100-526 also provided the Secretary with guidance concerning implementation of the Commission's recommendations. Congress gave the Secretary broad discretion to take action as necessary to carry out a recommended closure or alignment and "to transfer functions from such military installation to another military installation."[81] Congress also delegated to the Secretary the authority to properly dispose of excess real property and facilities located at a military installation being closed or realigned.[82] Finally, the Secretary was required, in making such decisions, to "consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned."[83]

C. Defense Base Closure and Realignment Act of 1990

In 1990, Congress enacted the Defense Base Closure and Realignment Act ("the BRAC Act").[84] The purpose of the BRAC Act was "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States."[85] The BRAC Act provided for three separate rounds of military installation alterations occurring in 1991, 1993, 1995.[86] Congress carried over many of the provisions from Pub. L. 100-526 when it created the 1988 Commission and procedures, but the BRAC Act contained significant changes.[87] One major change was to the definition of "realignment."

79. § 203(b)(2), 102 Stat. at 2628.

80. § 202(b), 102 Stat. at 2627. The statute also provides guidelines for congressional consideration of the report as well as procedures for reaching a joint resolution should one be deemed necessary. § 208, 102 Stat. at 2632–34.

81. § 204(a)(1), 102 Stat. at 2628.

82. § 204(b), 102 Stat. at 2628–29. The Secretary of Defense was required to act in accordance with the Federal Property and Administrative Services Act of 1949 and the Surplus Property Act of 1944. § 204(b). The Secretary of Defense also had to comply with the provisions of the National Environmental Policy Act of 1969. Title II of Pub. L. 100-526 only specifically provides for claims to be brought under this Act. § 204(c), 102 Stat. at 2630.

83. § 204(b)(2)(D), 102 Stat. at 2629.

84. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901–11, 104 Stat. 1808, 1808–19 (portions codified at 10 U.S.C. § 2687 note (2000)).

85. § 2901(b), 104 Stat. at 1808.

86. § 2902(e), 104 Stat. at 1808.

87. None-too-important was a change in the Commission's name to the "Defense Base Closure

Under the BRAC Act, the term "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."[88] Another significant change was that the members of the Commission were to be appointed by the President, rather than the Secretary, with substantial consultation and consent from the Senate.[89] In conducting its investigations, the Commission was to make meetings, upon request, open to certain leaders of Congress.[90]

Even though the Secretary lost the responsibility of choosing the members of the Commission, Congress provided for substantial involvement of the Secretary in the procedures for making actual recommendations. First, the Secretary was responsible for creating a force-structure plan giving an assessment of the necessary overall military unit structure and strengths. Although this plan could not contain recommendations for the alteration of specific military installations, it was to be submitted to the Commission to use in consideration and creation of such recommendations.[91] Second, the Secretary was responsible for creating the criteria which the Commission would use to evaluate individual military installations and their potential for closure or realignment.[92] Finally, Congress gave the Secretary the option of submitting a report of recommendations for the Commission to consider and review.[93]

Congress's changes also altered the responsibilities of the Commission. In making its recommendations, the Commission could only alter the Secretary's recommendations if it found that he or she had "deviated substantially" from his force-structure and the final criteria.[94] The Commission was now required to submit its report to the President instead of the Secretary.[95] The President either approved the report as a whole, certified it, and forwarded it to Congress, or disapproved it in whole or in part and sent it back to the Commission for revision. In the

and Realignment Commission." § 2902(a), 104 Stat. at 1808. As you will see, these changes and additions created for a much more regulated, congressionally overseen, process.

88. § 2910, 104 Stat. at 1819.

89. § 2902(c), 104 Stat. at 1808.

90. § 2902(e), 104 Stat. at 1808.

91. § 2903(a), 104 Stat. at 1810.

92. § 2903(b), 104 Stat. at 1810–11.

93. § 2903(c), 104 Stat. at. 1811. The Secretary of Defense's recommendations had to comply with his force-structure plan and criteria. *Id*.

94. § 2903(d), 104 Stat. at 1811–12.

95. *Id.* The Commission still submitted copies to the Congress, but Congress's participation now came one step later. *Id.*

former case, the Commission would make revisions and resubmit it to the President. The President, upon approving the revised report, would certify and forward it to Congress. However, if the President did not approve the revisions, the process for military installation closure and realignment was terminated, with no alterations, for that year—it was an "all or nothing" provision.[96]

Congress incorporated many provisions from the 1988 statute into the BRAC. First, once Presidential approval and certification occurred, the Commission's report was considered final and the Secretary was required to carry out its recommendations unless Congress disapproved the report by joint resolution.[97] Second, most of the provisions guiding the Secretary's implementation of the Commission's recommendations carried over from the 1988 statute, including the federal property regulations[98] as well as the requirement that the Secretary consult with state governors and local government heads during the disposition of real property and facilities.[99]

D. The 2005 Commission

In 2001, Congress considerably amended the BRAC Act of 1990, altering the military installation closure and realignment process, as well as providing for the charter of the 2005 Commission should one be necessary.[100] The Secretary's responsibilities changed significantly for the 2005 process. In addition to creating a force-structure plan as before, the Secretary also had to create an infrastructure inventory, which included a "description of the infrastructure necessary to support . . . the force-structure plan [and] . . . [a] discussion of categories of excess infrastructure."[101] Based on the plan and the inventory, the Secretary had to submit a certification regarding the need, or lack of need, for an additional round of base closure and realignment.[102] The President, based on this certification, would appoint the 2005 Commission.[103]

Congress also gave the Secretary more specific guidance in creating criteria for military installation closure and realignment. First, the

96. § 2903(e), 104 Stat. at 1812.

97. § 2908, 104 Stat. at 1816–18.

98. *See supra* note 82; *see also* § 2905(b), 104 Stat. at 1814–15.

99. § 2905(b), 104 Stat. at 1814–15.

100. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, §§ 3001–08, 115 Stat. 1012, 1342–53 (2001).

101. § 3001, 115 Stat. at 1342.

102. § 3001, 115 Stat. at 1343.

103. § 3001, 115 Stat. at 1343–44.

Secretary was to provide opportunities for public comment on the criteria.[104] Next, the "military value" of an installation was to be the most important factor in determining the necessity of alteration.[105] In establishing criteria, the Secretary was also to consider the economic impact on local communities of alteration to neighboring military installations.[106] Rather than giving the Secretary the option of submitting a report of recommendations for military installation closures and realignments, the 2001 BRAC amendments made the report mandatory.[107]

Further, Congress made the Commission assume an increased role as a reviewing body for the Secretary's recommendations. In addition to its limited ability to alter the Secretary's recommendations, in order to add a closure recommendation to the list, seven of eight Commission members had to approve the recommendation and the Commission had to allow the Secretary an opportunity to respond.[108]

The need to modify the structure of U.S. military forces so as to remain prepared for current threats and contingencies is obviously a national priority. Through four rounds of closure and realignment, the federal government has developed an effective and careful process for meeting this need.

III. THE ISSUE: RECENT COURT DECISIONS

The following cases involve suits brought by state governors claiming that the Secretary's and Commission's recommendations affecting Air National Guard installations and units of their respective states violated 32 U.S.C § 104.[109] Paragraph (c) of that statute states

104. § 3002, 115 Stat. at 1344.

105. § 3002, 115 Stat. at 1344–45. Military value included: "(1) Preservation of training areas . . . . (2) Preservation of . . . staging areas for the use of the Armed Forces in homeland defense missions. (3) Preservation of . . . a diversity of climate and terrain areas . . . ." *Id.*

106. § 3002, 115 Stat. at 1345.

107. § 3003, 115 Stat. at 1346. In creating this report, the Secretary of Defense was required to take into consideration any recommendations by local governments consenting to the closure or realignment of a nearby military installation. *Id.* Additionally, the Secretary of Defense now had a third option of recommending an installation be put into "inactive status." *Id.*

108. § 3003, 115 Stat. at 1347.

109. *See* Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *6 (E.D. Pa. Aug. 26, 2005); Blagojevich v. Rumsfeld, 385 F. Supp. 2d 768, 769 (C.D. Ill. 2005); Rell v. Rumsfeld, 389 F. Supp. 2d 395, 397 (D. Conn. 2005). For the purpose of this Comment, only the 32 U.S.C § 104(c) argument is pertinent. The plaintiffs in all three cases also claimed the recommendations violated 10 U.S.C § 18238 which 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

> 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.*[110]

The Government did not contest in any of the cases that the Secretary of Defense and the Commission failed to seek or receive gubernatorial consent in developing the BRAC recommendations they submitted in their respective reports.

A. Rendell v. Rumsfeld

A series of governmental decisions led to the case of *Rendell v. Rumsfeld*. The Secretary of Defense recommended the closure of Naval Air Station Joint Reserve Base Willow Grove, Pennsylvania.[111] Among the units affected was the 111th Fighter Wing (111th) of the Pennsylvania Air National Guard. The Secretary recommended that a number of the unit's aircraft be redistributed to other Air National Guard units outside of Pennsylvania and that the remainder be retired.[112] The Secretary also recommended that the unit be "deactivated."[113]

The Commission, after considering numerous petitions from state officials and applying the Final Selection Criteria, slightly altered the Secretary's recommendations.[114] The Commission agreed with the base closure and aircraft redistribution recommendations, but disagreed with the recommendation to deactivate the unit.[115] The Commission based the equipment reassignment "upon a resource-constrained determination by the Department of Defense that the aircraft concerned will better

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> 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 (2000). Only the court in *Rendell* found it necessary to address this latter argument. The court agreed with the Government's argument that the statute's language "under this chapter" meant that § 18238 only prohibited relocation and withdrawal of units done pursuant to Chapter 1803 of the Title 10 under which § 18238 falls. Because the BRAC Act appears in Chapter 159, § 18238 does not apply to BRAC recommendations. The court subsequently granted the Government summary judgment on this portion of the claim. *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *65–68.

110. 32 U.S.C. § 104(c) (2000) (emphasis added).

111. DEF. BASE CLOSURE & REALIGNMENT COMM'N, *supra* note 2, at 95.

112. *Id.*

113. *Id.* The term "deactivate" means "to make inactive or ineffective." *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *4 n.3 (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 326 (1990)).

114. DEF. BASE CLOSURE & REALIGNMENT COMM'N, *supra* note 2, at 96.

115. *Id.*

support national security requirements in other locations."[116] The Commission stated that the decision "to change the organization, composition and location of the [111th]" would be left to the State.[117]

Governor Edward Rendell and U.S. Congressional members from Pennsylvania, all acting in their official capacities, filed suit in the Eastern District of Pennsylvania arguing the Secretary's deactivation recommendation violated 10 U.S.C. § 104(c).[118] They sought orders declaring that the Secretary did not have the power to deactivate or recommend deactivation of the 111th without gubernatorial consent and declaring that the deactivation recommendation of the Secretary's report was null and void.[119] The Secretary and Commission argued that the Governor, acting in his official capacity, lacked standing to bring a claim.[120]

After giving a brief history of the National Guard, the court found that this was a rare case in which a government official had standing to bring a claim.[121] The court determined that, if the Governor was correct on the merits, he had suffered an "injury-in-fact" because the Secretary had submitted his recommendation to the Commission without first receiving gubernatorial consent.[122] The court found that 10 U.S.C. § 104(c) gave the Governor the "right to disapprove changes to the branch, organization or allotment of a unit of the National Guard located wholly within [Pennsylvania], and [that exercise of this right] would have been sufficient to prevent the deactivation recommendation from going to the BRAC Commission."[123] However, because the Secretary failed to request gubernatorial consent of his recommendation, the Governor's right to disapproval had "been completely nullified."[124]

116. *Id.* at 96–7.

117. *Id.* at 96.

118. *Rendell,* 2005 U.S. Dist. LEXIS 18098, at *5.

119. *Id*.

120. *Id.* at *22.

121. *Id.* at *26–30. In order to have standing, a plaintiff must show three elements:

> [First,] an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical[; second,] causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant[;] and [third,] "redressability—a likelihood that the requested relief will redress the alleged injury.

Id. at *24–25 (citations omitted) (internal quotation marks omitted).

122. *Id.* at *26–30. "Injury-in-fact" is first element a plaintiff must show to prove standing. *See supra* note 121.

123. *Rendell,* 2005 U.S. Dist. LEXIS 18098, at *30.

124. *Id.* at *31. Under presumably the same reasoning, the court also found that the Secretary's recommendation was the cause of the Governor's injury—the second element of standing a plaintiff must show. *Id.*; *see also supra* note 121. The district court also found the Governor's injury would "be

The court next turned to the issue of ripeness of the claim.[125] First, the court found that the adversity prong of ripeness was similar to the injury-in-fact element of standing and that the Governor had likewise satisfied it. Second, the court found the conclusiveness prong of ripeness satisfied because the declaratory order the Governor sought would "determine whether the [Secretary] can legally recommend deactivating the [111th] without Governor Rendell's prior approval."[126] Finally, the court found that the case satisfied the utility prong of ripeness because "the parties' plans of actions are likely to be affected by a declaratory judgment."[127] The Pennsylvania state constitution authorized Governor Rendell, as commander-in-chief of the Pennsylvania National Guard, to make numerous decisions affecting the equipment, location, and status of the State's National Guard units.[128] The 111th comprises a significant portion of Pennsylvania's National Guard force.[129] The court reasoned that "[a] declaratory judgment determining the legality of the Secretary's recommendation to deactivate the [111th] . . . clearly would affect the Governor's ability to carry out his powers as commander-in-chief . . . ."[130] The court therefore concluded that the case was ripe for decision.[131]

The court also addressed motions for summary judgment filed by both parties on the merits of the Governor's claims The court first agreed that the deactivation of a military unit constitutes a change in its "branch, organization, or allotment" pursuant to 10 U.S.C. § 104(c).[132] The parties' major dispute was over the scope of the second sentence of

redressed by the requested relief." *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *31.

On the second prong of causation, the Government made a separate argument that the Supreme Court ruled in *Dalton v. Specter*, 511 U.S. 462 (1994), that the Secretary's and Commission's recommendations did not constitute "final agency action" because they were only advisory reports and the President made the ultimate decision. *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *37–9. However, the *Rendell* court found the Supreme Court's holding inapplicable in this case because in *Dalton* the suit had been brought pursuant to the Administrative Procedure Act (APA) claiming that the Secretary and Commission had violated the procedures of the BRAC Act. *Id.* In other words, had Governor Rendell brought the suit pursuant to the APA, the Government could most likely succeed in arguing that the recommendations were not final.

125. Ripeness also requires the satisfaction of a three-part test. A plaintiff must show "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Id.* at *33 (quoting Pic-a-State Pa. v. Reno, 76 F.3d 1294, 1298 (3d Cir. 1996)).

126. *Id.* at *35.

127. *Id.* at *35.

128. *Id.* at *36.

129. *Id.*

130. *Id.*

131. *Id.* at *37.

132. *Id.* at *51.

the statute's paragraph (c).[133] The Government argued that 10 U.S.C § 104(c) was a parallel construction and that the second sentence proviso limited the President's ability to form complete higher tactical units authorized in the first sentence.[134] However, the court agreed with Governor Rendell that the proviso was independent of the first sentence and was a "generalized gubernatorial consent requirement."[135] The court found that the statute's legislative history suggested that Congress intended the proviso "to protect and delineate the rights and responsibilities of two competing sovereigns, the state and federal governments."[136] The court concluded that an adoption of the Government's interpretation of the proviso would negate the tremendous authority the Governor is given over the National Guard by the State constitution.[137]

The Government alternatively contended that such an interpretation created a conflict between the 32 U.S.C. § 104(c) and the BRAC Act whereby the former is impliedly repealed.[138] The court, however, pointed out that the BRAC Act governed only the realignment and closure of military installations and did not include the deactivation of military units. Therefore, the two statutes were not in conflict.[139] The court consequently granted the Governor's motion for summary judgment and held that the Secretary's recommendation to deactivate the 111th violated 32 U.S.C. § 104(c).[140]

B. Blagojevich v. Rumsfeld

Secretary Rumsfeld also included in his report to the Commission proposals that would affect Capital Airport Air Guard Station, Illinois and the 183rd Fighter Wing (183rd) of the Illinois Air National Guard stationed there. The Secretary recommended that the installation be realigned and that the 183rd's F-16 aircraft be redistributed to an Indiana Air National Guard unit.[141] The Commission approved of this portion of the Secretary's recommendation.[142]

133. *Id.*
134. *Id.*
135. *Id*.
136. *Id.* at *56.
137. *Id.* at *57.
138. *Id.* at, *57–8.
139. *Id.* at *59–60.
140. *Id.* at *65.
141. DEF. BASE CLOSURE & REALIGNMENT COMM'N, *supra* note 2, at 128.
142. *Id.* at 129.

Governor Rod Blagojevich of Illinois, filed suit in the Central District of Illinois seeking an order to restrain the Commission and Secretary from presenting to the President their recommendations affecting the 183rd.[143] However, the court found that the Governor lacked standing to bring a claim because he had not suffered an injury-in-fact. The court found that the Secretary's and Commission's recommendations did not constitute "final actions."[144] The court therefore concluded, based on the limited advisory role that the Secretary's and Commission's recommendations play, that the recommendations caused no injury to the Governor.[145]

The court also briefly addressed the U.S. Supreme Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994) that the final decision of the President in approving the BRAC Report is non-reviewable and thus seemingly harsh toward the state governors.[146] The court, unmoved, stated that subsequent enactments may modify or eliminate any right of consent given to governors by federal statute 32 U.S.C. § 104(c); the provisions of the BRAC Act arguably do just this.[147]

C. Rell v. Rumsfeld

The third suit involved Secretary Rumsfeld's recommendation to realign Bradley International Airport Air Guard Station, Connecticut, and to retire and redistribute the aircraft assigned to the 103rd Fighter Wing of the Connecticut Air National Guard to other Air National Guard units outside the state of Connecticut.[148] The Commission approved of this portion of the Secretary's recommendation.[149]

Governor Jodi Rell of Connecticut, along with Congressional members from that State, filed suit in the District of Connecticut against Secretary Rumsfeld and the Commission seeking a preliminary injunction preventing the Commission from submitting its report to the President.[150] The court found that Governor Rell had met the burden for

143. Blagojevich v. Rumsfeld, 385 F. Supp. 2d 768, 769 (C.D. Ill. 2005).

144. *Id.* at 770 (citing Dalton v. Specter*,* 511 U.S. 462, 469 (1994)).

145. *Id.* at 771. The court also voiced its respectful disagreement with the *Rendell* decision and "its interpretation of the Supreme Court's opinion in *Dalton*." *Id*.

146. *Id.* at 771–72.

147. *Id.* at 772.

148. *See* DEF. BASE CLOSURE & REALIGNMENT COMM'N, *supra* note 2, at 121.

149. *Id.* at 122.

150. Rell v. Rumsfeld, 389 F. Supp. 2d 395, 397 (D. Conn. 2005). In order to grant a preliminary injunction, a plaintiff must show: "(1) irreparable harm and (2) . . . a likelihood of success on the merits of the underlying claim." *Id.* at 399 (citing Moore v. Consol. Edison Co.*,* 409 F.3d 506, 510 (2d Cir. 2005)).

granting the preliminary injunction[151] and, furthermore, found that the relocation of aircraft violated 32 U.S.C § 104(c) because "leav[ing] pilots and other military personnel trained to support a flying mission with nothing to do . . . [would] constitute a dramatic change in the organization and allotment of that unit."[152]

On appeal, the Second Circuit overturned the preliminary injunction, finding that the Commission's report did not constitute a final action and therefore Governor Rell had not yet suffered irreparable harm.[153] However, the Court did "note that the State of Connecticut may have an opportunity to contest the removal of the aircraft when indeed the action becomes final, and the aircraft are in danger of imminent seizure."[154]

The district court in *Rendell* determined that the Secretary's recommendation for deactivation of the 111th violated 10 U.S.C. § 104(c).[155] Similarly, the district court in *Rell* found that the relocation of the 103rd's aircraft constituted a violation of 10 U.S.C. § 104(c).[156] Although the Second Circuit Court of Appeals overruled the lower court in *Rell*, it did so only because it found the Secretary's and Commission's recommendations not to be final actions.[157] Furthermore, the appellate court suggested that the finality requirement may be satisfied and the Governor of Connecticut may have a claim once the President has approved the recommendations.[158] Finally, the district court in *Blagojevich*, similar to the appellate court in *Rell,* found that recommendations to relocate the 183rd's aircraft did not constitute a final agency action.[159] However, the *Blagojevich* court noted that the Governor was asserting rights created by federal statute and that the BRAC Act, perhaps harshly, could and did modify those rights.[160] Although the courts in these cases, perhaps properly, limited their opinions determining of standing and ripeness, the bases for conclusions to these inquiries raise substantial questions as to the understanding of state and federal control over National Guard units.

151. *Id.* at 399–401 (*see supra* note 150 for the necessary elements to grant preliminary injunction).

152. *Id.* at 401.

153. Rell v. Rumsfeld, 423 F.3d 164, 165 (2d. Cir. 2005).

154. *Id*. at 165–66.

155. Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *57 (E.D. Pa. Aug. 26, 2005).

156. Rell v. Rumsfeld, 389 F. Supp. 2d 395, 401 (D. Conn. 2005).

157. Rell v. Rumsfeld, 423 F.3d 164, 165 (2d. Cir. 2005).

158. *Id.* at 165–66.

159. Blagojevich v. Rumsfeld, 385 F. Supp. 2d 768, 771 (C.D. Ill. 2005).

160. *Id*.

IV. DISCUSSION

The courts in the preceding three cases disregarded the nature of the relationship between the National Guard and federal government that has developed since the United States gained independence over 200 years ago. The first portion of this Part addresses this lack of regard. The second portion deals with the courts' failure to properly interpret the limited scope of 10 U.S.C § 104(c). Finally, the last portion of this Part discusses how Congress, through a number of reforms and prior BRAC rounds, has developed procedures to ensure that National Guard and state interests are considered in the BRAC process.

A. Federal Control over the "Federal" National Guard

To start, the U.S. Constitution gives the federal government substantial control over the National Guard. Congress has the authority to organize, arm, and discipline the militia.[161] The state reserves the power to appoint officers and train the militia but only "according to the discipline prescribed by Congress."[162] The Constitution also provides that Congress may call the National Guard into service "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[163] These provisions empower Congress to make broad decisions affecting nearly every aspect of the National Guard.

The history of the National Guard evidences a give-and-take relationship between the federal and state governments during times of peace. The provisions of the Constitution concerning the military proved insufficient to guide the military system from the outset.[164] Congress, in the Militia Act, provided for a military system consisting of militia units uniform in structure to facilitate interchangeability while in federal service.[165] The Militia Act further directed states to appoint adjutant generals to oversee the implementation of these guidelines.[166] Although the Militia Act served as the militia system's only guidelines for over a century, it lacked any enforcement provisions and proved tremendously ineffective.[167] In the latter part of the 1800's, militiamen formed the NGA to promote their objective of an increased role in the

161. U.S. CONST. art I, § 8, cl. 16.

162. *Id.*

163. U.S. CONST. art. I, § 8, cl. 15.

164. MAHON, *supra* note 8, at 50.

165. COOPER, *supra* note 10, at 9; MAHON, *supra* note 8, at 52.

166. MAHON, *supra* note 8, at 52.

167. *Id.*

nation's national defense.[168] The NGA's first success was Congress's enactment of the Dick Act in 1903. The Dick Act ensured that the President must call the National Guard first in time of conflict.[169] The Dick Act contained provisions for the states to receive federal financial aid and equipment, but only upon request by state governors.[170] Once requested, Congress would attach requirements and standards for training and preparation of militia units to the federal funding.[171] The 1908 amendment to the Dick Act created the DMA in the War Department.[172] The DMA was composed of regular army officials and served as the National Guard's representative in the federal government.[173] The Dick Act further provided that the federal government could force existing National Guard units to comply with organizational plans.[174]

Congress's enactment in 1916 of the NDA made enormous progress towards federalization of the National Guard. The NDA provided states with federally dictated individual tests and unit training requirements.[175] The federal government increased funding and left only administrative and armory support costs to the states.[176] Most significantly, the NDA required Guardsmen to take two separate oaths, one for state service and one for federal service.[177] Finally, in 1933 Congress amended the NDA and created the military system that, for the most part, is in effect today.[178] Most notably, the amendment established the National Guard as two entities: the National Guard of the United States and the National Guard of the states.[179] The former was established under the Armies Clause of the Constitution.[180] This created further federal control of the National Guard. The Armies Clause empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."[181]

168. COOPER, *supra* note 10, at 84.
169. MAHON, *supra* note 8, at 140.
170. *Id.* at 139.
171. *Id.* at 140.
172. COOPER, *supra* note 10, at 112.
173. *Id.*
174. *Id.* at 116.
175. *Id.* at 154.
176. *Id.* at 155.
177. MAHON, *supra* note 8, at 148–49.
178. COOPER, *supra* note 10, at 174.
179. MAHON, *supra* note 8, at 174–75.
180. COOPER, *supra* note 10, at 174.
181. U.S. CONST. art I, § 8, cl. 14.

The legislation enacted by Congress throughout American history displays the federal government's belief that it should have substantial control over the National Guard to ensure readiness in time of conflict. States have always acquiesced to federal control because of the need for funding and equipment to maintain their respective National Guard systems, as well as Guardsmen's continuous goal of gaining the role as the nation's reserve military force.

B. Application of 32 U.S.C. § 104(c) to the BRAC Process

In *Rendell*, the Government argued that the second sentence proviso of 10 U.S.C § 104(c) should be interpreted narrowly as a limitation only on the President's authority provided in the first sentence.[182] Under this view, the statute authorizes the President to make unit designations in an effort to complete higher tactical units, but limits this authority by requiring gubernatorial consent before changing the "branch, organization, or allotment of a unit located [completely] within a [s]tate."[183] The district court disregarded the Government's supportive evidence that the words "branch" and "organization" appear in both sentences.[184] There is additional textual support for a parallel construction of the two sentences in that the proviso begins with the word "however," suggesting that the second sentence proviso is a limitation on the preceding text.[185] Together with the repetition of the words "branch" and "organization," the conjunction lends strong support to the Government's limited interpretation of the proviso.[186]

The history of 10 U.S.C. § 104(c) also supports interpreting the word "however" in the proviso as strictly a limitation on the preceding text. As the district court in *Rendell* pointed out, the statutory text originally appeared in section 60 of the NDA of 1916 with one critical difference: it did not contain the second sentence proviso.[187] Congress did not add

182. . Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *51 (E.D. Pa. Aug. 26, 2005).

183. *Id.*

184. *Id.* at *52–53.

185. Authority Under the Defense Base Closure and Realignment Act to Close or Realign National Guard Installations Without the Consent of State Governors, 29 Op. Off. Legal Counsel 1, 9, 2005 OLC LEXIS 3 (Dep't of Justice Aug. 10, 2005), *available at* http://www.usdoj.gov/olc/2005/050810_brac_opinion.pdf [hereinafter *DOJ Opinion*].

186. *Id.*

187. *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *53. Section 60 of the NDA of 1916 provided "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." National Defense Act of 1916, Pub. L. No. 64-85, § 60, 39 Stat. 166, 197.

the proviso until it amended the NDA in 1933.[188] The court in *Rendell* determined that the addition of the proviso, along with the legislative history discussing its addition, supported a much broader protection of state rights, and hence increased restriction on the federal government to more than just a limitation on the President when forming higher tactical units.[189] In reaching this determination, however, the court disregarded the relevant issues leading up to the NDA's amendment in 1933. The NDA of 1916 empowered the President to draft individual Guardsmen into federal service with no regard to militia unit integrity.[190] When Guardsmen were called to federal service at the start of WWI, they experienced an unforeseen shock. The War Department reorganized National Guard units to create a new divisional organization.[191] The new organization eliminated unit designations and state affiliations.[192] National Guard officers lost command of their units and were thrown in positions of responsibility for which they had no training.[193] Overall, the experiences of Guardsmen in WWI left them with a sense of betrayal.[194] National Guard supporters "deplored the way . . . Guard units had been broken up during the Great War."[195]

In the years after WWI, a central objective of the NGA was to require the War Department to call units, not individuals into federal service.[196] Although the NGA succeeded in attaining most of its objectives in the 1920 amendment to the NDA, it did not achieve protection of integrity for Guard units when called into federal service.[197] It did ,however, succeed soon after. The 1933 amendment to the NDA federally recognized the National Guard units as forming the reserve component

188. *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *53. Congress amended the relevant portion of section 60 in 1933 to read:

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

National Guard Act of 1933, Pub. L. No. 73-64, § 6, 48 Stat. 153, 156.

189. *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *53–57.

190. MAHON, *supra* note 8, at 148.

191. COOPER, *supra* note 10, at 168.

192. *Id.*

193. *Id.* at 169.

194. *Id.*

195. MAHON, *supra* note 8, at 170.

196. *Id.* at 171.

197. *Id.*

of the regular army.[198] The amendment "made it unnecessary ever again to bring the Guard into federal service by dissolving its units and drafting their members as individuals."[199] This brief history shows that a main objective of the 1933 amendment was to protect National Guard units' integrity when the President calls them into federal service. This evidence supports the more narrow interpretation of § 104(c)'s second sentence proviso.

Congress's intent concerning the authority of the BRAC Act is unambiguous in light of the language used to describe its scope: these provisions "shall be the exclusive authority for selecting for closure or realignment . . . a military installation inside the United States."[200] Congress enacted the BRAC Act "against the backdrop of 'repeated, unsuccessful, efforts to close military bases in a rational and timely manner.'"[201] The Government in *Rendell* argued that § 104(c) and the BRAC Act present an irreconcilable conflict and therefore the former is repealed.[202] The court, however, found that the BRAC Act could not be interpreted as including deactivation of a unit and therefore no such conflict existed.[203] This finding is concededly correct. However, the *Blagojevich* and *Rell* cases cannot yield a similar finding. In both of these cases, the recommendations were for only realignment of the respective units.[204] If certain closures and realignments constitute changes in unit branch, organization or allotment, then an irreconcilable conflict exists between the BRAC Act and § 104(c). However, in circumstances in *Blagojevich* and *Rell*, unlike in *Rendell,* no interpretation of the BRAC Act alleviates this conflict. The broad scope that the *Rendell* court assigns to § 104(c) effectively kills the statute.[205] However, applying the *Rendell* court's own strict standard for determining whether an irreconcilable conflict is present,[206] one

198. *Id.* at 174.

199. *Id.*

200. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2909(a), 104 Stat. 1808, 1818 (portions codified at 10 U.S.C § 2687 note (2000)).

201. *DOJ Opinion*, *supra* note 185, at 1; *see also* § 2901(b), 104 Stat. at 1808.

202. Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *57–58 (E.D. Pa. Aug. 26, 2005).

203. *Id.* at *59–60. However, as discussed previously, the 1933 amendment to the NDA created distinct National Guards under separate federal and state control. There may be a colorable argument that the Secretary possesses authority to deactivate a National Guard unit in respect to its federal role.

204. Blagojevich v. Rumsfeld, 385 F. Supp. 2d 768, 769 (C.D. Ill. 2005); Rell v. Rumsfeld, 389 F. Supp. 2d 395, 397 (D. Conn. 2005).

205. *DOJ Opinion*, *supra* note 185, at 11–12 n.7.

206. The court states that "[a]n irreconcilable conflict between two statutes requires 'a positive repugnancy between them or that they cannot mutually coexist.'" *Rendell*, 2005 U.S. Dist. LEXIS 18098, at *58–59.

interpretation of § 104(c) avoids any conflict. Interpreting the second sentence proviso of § 104(c) as applying only to the sentence preceding it eliminates conflict. This interpretation bolsters the Government's argument that § 104(c) is limited in scope and inapplicable to the Secretary's BRAC recommendations.

National Guard units are protected from presidential decisions that would change their branch, organization, or allotment without first receiving gubernatorial consent. However, this protection is limited to circumstances in which the President is designating such units to form complete higher tactical units. The text and history of 10 U.S.C. § 104(c) support this interpretation of the statute. Furthermore, a broader interpretation of the statute as limiting the Secretary's ability to make recommendations of closure and realignment would create an irreconcilable conflict between the BRAC Act and § 104(c), in which case the latter would be impliedly repealed. For these reasons, the Government's more narrow interpretation of § 104(c) is correct. The *Rendell* court's interpretation of § 104(c) would no doubt afford states broad protection from federal alteration to their National Guard units. Although this interpretation is incorrect, the current BRAC process affords a substantial amount of protection while balancing national security needs.

C. The BRAC Process

The federal government and military has now completed four BRAC rounds under the BRAC Act. Through each of these rounds, Congress has refined the responsibilities of each entity involved. The result is a process that is fairly administered across the military that considers states' interests while fulfilling the obligation to provide for the national defense. The BRAC process is administered without any bias toward National Guard units. The Act defines the term "military installation" without any reference to regular army or National Guard.[207] Congress has given strict guidance as to the criteria by which the Secretary is to make a list of recommendations.[208] In fact, Congress provided that the Secretary, in establishing selection criteria, must take local interests into consideration.[209] The Secretary must give opportunity for public comment and must consider economic, environmental and community

207. *See* Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2910, 104 Stat. 1808, 1819 (portions codified at 10 U.S.C § 2687 note (2000)).

208. *See supra* note 104 to 106 and accompanying text.

209. *See supra* note 106 and accompanying text.

infrastructure implications in reaching recommendations.[210] The remaining elements the Secretary must consider are non-discriminatory military interests.[211]

Congress has also provided the Commission with guidelines for reviewing the Secretary's recommendations. Should the Commission find "substantial deviation" from the selection criteria or force structure plan by the Secretary, the Commission is authorized to amend the violating recommendation.[212] The procedure for the President's review is also structured to prevent unfair detriment to the National Guard.[213] This procedure dictates an all-or-nothing Executive decision on the Commission's report.[214] Similarly, if the President approves the report, Congress can prevent it only by joint resolution.[215] These procedural limitations on both the Executive and Legislative branches ensure that the process fair to both the states and the National Guard.

The federal government conducts the BRAC process through an intricate statutory framework. This framework includes actions by many different entities. Although each of these entities has tremendous responsibilities and authority, each responsibility overlaps with those of another entity. Furthermore, the process allows state and local involvement and maintains these concerns as part of the criteria in recommendation development. These aspects ensure that the state and National Guard interests are adequately protected.

The history of relations between the states and the federal government over the status and control of the National Guard has steadily led to increased federal control of such military forces. One objective that National Guardsmen have strived for, and successfully achieved, is the protection of their unit integrity. This is the purpose of 10 U.S.C. § 104(c). The BRAC Act, through its detailed provisions, has created a process that both achieves the needs of national defense and fairly involves the National Guard in the military forces. These elements lend tremendous support to the proposition that the federal government can alter National Guard units without gubernatorial consent.

210. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3002, 115 Stat. 1012, 1344 (2001).

211. *Id.*

212. § 3003, 115 Stat. at 1345–47.

213. *See* § 2903(e), 104 Stat. at 1812.

214. Rendell v. Rumsfeld, No. 05-CV-3563, 2005 U.S. Dist. LEXIS 18098, at *46 (E.D. Pa. Aug 26, 2005) (citing Justice Souter's opinion in *Dalton v. Specter,* 511 U.S. 462 (1994)); *see* § 2903(e), 104 Stat. at 1812.

215. § 2908, 104 Stat. at 1816–18.

V. CONCLUSION

National security requires a prepared and effective military force. Threats to this national security are continuously changing, making it necessary to possess a military force that is also capable of change. The United States has settled on a military system made up of a relatively small regular army that depends on a National Guard force as its reserve. The federal government must have the capability of altering that reserve to ensure its preparedness for present and future threats. The district court and court of appeals decisions in the preceding cases do not facilitate this necessity. They are contrary to the relationship between the states and the federal government regarding the National Guard that has developed since the birth of this nation. To accept these decisions would compromise this country's defense and set it on very unstable ground.

Other courts would do themselves well not to rely on decisions addressed above. The history of the National Guard displays how states have surrendered much of their authority over Guardsmen in order to obtain the federal funds necessary for their units' survival. As long as the National Guard continues to play such a critical role in the national defense, the federal government will be able to determine its organizational structure.