

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

GOVERNOR M. JODI RELL, in her : CIVIL ACTION NO.  
official capacity as Governor of the : 3:05cv1363(AVC)  
State of Connecticut, CHRISTOPHER :  
J. DODD, in his official capacity as :  
United States Senator, JOSEPH I. :  
LIEBERMAN in his official capacity as :  
United States Senator, JOHN B. :  
LARSON, in his official capacity as :  
United States Representative, and :  
STATE OF CONNECTICUT, :  
*Plaintiffs,* :

v. :

DONALD RUMSFELD, :  
in his official capacity as :  
Secretary of Defense, :  
THE DEFENSE BASE CLOSURE :  
AND REALIGNMENT COMMISSION, :  
and ANTHONY J. PRINCIPI, in his :  
official capacity as Chairman of the :  
the Defense Base Closure and :  
Realignment and Commission, and :  
JAMES H. BILBRAY, PHILIP COYLE, :  
HAROLD W. GEHMAN, JR., :  
JAMES V. VINSON, JAMES T. HILL, :  
LLOYD W. NEWTON, SAMUEL K. :  
SKINNER, and SUE E. TURNER, :  
in their official capacities as members :  
of the Defense Base Closure and :  
Realignment Commission, :  
*Defendants.* : November 7, 2005

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. The Plaintiff State of Connecticut has a fundamental, long-standing duty to ensure the security of its citizens, including through the maintenance of a state militia.

The State's right to maintain and direct its own militia is deeply rooted in both the U.S. Constitution and its State Constitution. See U.S. Constitution Article I, Section 8, clauses 15 & 16 and Connecticut Constitution, Article Fourth, sec. 8.

2. The National Guard system is the successor to the original state militias. The National Guard and Air National Guard are dual federal and state organizations, with dual enlistments, whereby the National Guard military personnel swear allegiance to both the federal and state governments, and are simultaneously enlisted or commissioned with both the state and federal governments.

3. The plaintiff, M. Jodi Rell, Governor of the State of Connecticut, is the "captain general of the militia of the state, except when called into the service of the United States." See Connecticut Constitution, Article Fourth, sec. 8. As "commander-in-chief" of both the National Guard and Air National Guard in Connecticut, Governor Rell directs the National Guard and Air National Guard unless the Guard units are called into active federal military service. See Conn. Gen. Stat. § 27-14.

4. Plaintiff Christopher J. Dodd is a duly elected United States Senator for the State of Connecticut.

5. Plaintiff Joseph I. Lieberman is a duly elected United States Senator for the State of Connecticut.

6. Plaintiff John B. Larson is a duly elected United States Representative for the First Congressional District of Connecticut. The First Congressional District encompasses the town of Windsor Locks, Connecticut, in which the Bradley Air National Guard Station is located.

7. A unit of the Connecticut National Guard or Air National Guard may not be relocated or withdrawn without the consent of Governor Rell. See 10 U.S.C. § 18238.

8. No change in the branch, organization, or allotment of a National Guard or Air National Guard unit located entirely within a state may be made without the approval of its governor. See 32 U.S.C. § 104.

9. Defendant Secretary Donald Rumsfeld (the "Secretary" or "Secretary Rumsfeld") is the Secretary of Defense of the United States Department of Defense ("DOD"). Secretary Rumsfeld is sued in his official capacity.

10. The Base Closure and Realignment Act of 1990, 104 Stat. 1808, as amended, note following 10 U.S.C. § 2687 (the "BRAC Act"), sets forth the process by which military bases in the United States and its territories are identified for closure or realignment.

11. Pursuant to the BRAC Act, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of military bases in the United States to the defendant Defense Base Closure and Realignment Commission (the "BRAC Commission").

12. Defendant Anthony J. Principi is the Chairman of the BRAC Commission. Chairman Principi is sued in his official capacity.

13. Defendants James H. Bilbray, Philip Coyle, Harold W. Gehman, Jr., James V. Vinson, James T. Hill, Lloyd Newton, Samuel K. Skinner and Sue E. Turner are members of the BRAC Commission (collectively "the BRAC Commissioners"). The BRAC Commissioners are sued in their official capacities.

14. Secretary Rumsfeld is responsible for overseeing, directing and/or implementing the closure or realignment of military bases pursuant to the BRAC process.

15. On or about May 13, 2005, Secretary Rumsfeld transmitted the DOD Base Closure and Realignment Report ("DOD Report") to the BRAC Commission.

16. The DOD Report contains the DOD's recommendations to realign or close military installations within the United States and its territories.

17. The DOD Report recommends the realignment of the Connecticut 103<sup>rd</sup> Fighter Wing located at Bradley Air National Guard Station in Windsor Locks, Connecticut. In particular, the Secretary has recommended that "[t]he A-10s assigned to the 103d Fighter Wing will be distributed to the 104th Fighter Wing, Barnes Municipal Airport Air Guard Station, MA (nine aircraft) and retirement (six aircraft)," and realigning the flying unit into the Massachusetts Air Guard. See DOD Report, Sec. 3 (Air Force) at 14.

18. Pursuant to the BRAC Act, the BRAC Commission and the BRAC Commissioners are responsible for reviewing and either approving, disapproving or modifying the Secretary's base closure and realignment recommendations, compiling a final set of recommendations into a report ("the BRAC Commission Final Report"), and transmitting that report to the President of the United States. By operation of law, the Commission terminates on April 15, 2006.

19. On August 26, 2005, the BRAC Commission adopted and approved in all important respects the DOD's recommendation to realign the 103<sup>rd</sup> Fighter Wing,

including the recommendation to remove all of the aircraft from the 103<sup>rd</sup> Fighter Wing.

In particular, the BRAC Commission Final Report provides in relevant part as follows:

Realign Bradley International Airport Air Guard Station, CT. Distribute the 15 A-10 aircraft assigned to the 103d Fighter Wing (ANG) at Bradley Field, Connecticut ... to meet the Primary Aircraft Authorizations (PAA) requirements established by the Base Closure and Realignment recommendations of the Secretary of Defense, as amended by the Defense Base Closure and Realignment Commission.

See BRAC Commission Final Report at 122.

20. The BRAC Commission and DOD's recommendation to realign the 103<sup>rd</sup> Fighter Wing was incorporated into the BRAC Commission's Final Report.

21. On September 7, 2005, this Court entered a preliminary injunction prohibiting the BRAC Commission and its members from transmitting to the President of the United States a final recommendation to realign the 103<sup>rd</sup> Fighter Wing.

22. On September 8, 2005, the BRAC Commission transmitted its final report to the President with a letter concerning this Court's injunction, which stated in relevant part as follows:

As a result of the order issued by Judge Covello, you should consider the portion of Recommendation 85, titled "Bradley International Airport Air Guard Station, Connecticut, Barnes Air Guard Station, Massachusetts, Selfridge Air National Guard Base, Michigan, Shaw Air Force Base, South Carolina, and Martin State Air Guard Station, Maryland," that recommends the realignment of the Connecticut 103d Fighter Wing withdrawn from the Commission's report. If the court's injunction is later vacated, reversed, stayed, or otherwise withdrawn, it is the intent of the Commission that the entirety of the recommendation be a part of the Commission's Report, delivered to you this day.

See Letter of Anthony J. Principi to President Bush (September 8, 2005).

23. By ruling dated September 9, 2005, the Court of Appeals stayed the preliminary injunction, but noted as follows:

In holding that the Commission's recommendation does not constitute agency action that is reviewable, we 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. At that stage, the State may argue that the Commission acted in violation of 32 U.S.C. § 104(c) by not obtaining the Governor's consent prior to issuing its recommendation or otherwise acted in excess of its authority. As the United States conceded, it could not then argue that the Governor should have been brought this action sooner. Review at this later stage ensures both that the agency's decision is final and whatever statutory rights the Governor possesses are preserved.

*Rell v. Rumsfeld*, No. 05-4682, Ruling on Emergency Motion For Stay, September 9, 2005, at 3 (*per curiam*) (internal citations omitted).

24. Pursuant to the BRAC Act, the President of the United States must approve or disapprove the BRAC Commission's recommendations in their entirety. He may not reject any individual recommendation, including the recommendation to realign the 103<sup>rd</sup> Fighter Wing. The deadline for the President's transmission to the Congress of the 2005 BRAC recommendations was September 23, 2005.

25. On September 15, 2005, the President approved the BRAC Commission's recommendations in their entirety and forwarded those recommendations to the United States Congress.

26. Upon receipt of the BRAC recommendations from the President, Congress's legislative authority under the BRAC Act is limited to disapproving the entire slate of closures and realignments. Congress may not reject any individual recommendation, including the recommendation to realign the 103<sup>rd</sup> Fighter Wing. If

Congress does not affirmatively act to disapprove the recommendations in their entirety within 45 legislative days of their transmittal from the President, they become law. Thereafter, Secretary Rumsfeld is responsible for implementing all final closure and realignment decisions.

27. Congress's 45 legislative days to disapprove the base closure and realignment recommendations have expired without any successful action by Congress to disapprove the recommendations.

28. Consequently, the recommendation to realign the 103<sup>rd</sup> Fighter Wing is now law and is subject to implementation by Secretary Rumsfeld.

29. The 103<sup>rd</sup> Fighter Wing is an operational flying National Guard Unit located entirely within the State of Connecticut and is not currently activated to federal service. Initially formed in 1917, the 103<sup>rd</sup> Fighter Wing, also known as the "Flying Yankees," is made up the 103<sup>rd</sup> Operations Group, 103<sup>rd</sup> Support Group, 103<sup>rd</sup> Logistics Group and the 103<sup>rd</sup> Medical Squadron. Within each group are squadrons and flights that come together to make up the more than 800 men and women of the 103<sup>rd</sup> Fighter Wing.

30. Transferring and/or retiring all of the 103<sup>rd</sup> Fighter Wing's aircraft would eliminate Connecticut's *only* Air National Guard fighter squadron. Transfer of these aircraft out of Connecticut would deprive the Governor of vital homeland security assets, and degrade her ability to defend the security of Connecticut's citizenry and to respond to natural disasters and other civil emergencies, and leave Connecticut without a single Air National Guard aircraft assigned within its borders or under the Governor's command.

31. The realignment of the 103<sup>rd</sup> Fighter Wing would leave Connecticut as one of only two states without a single Air National Guard aircraft assigned within its borders. As a consequence, Connecticut would be dependent on neighboring states and/or the federal government for fixed-wing airborne resources, which might not be available in a timely fashion, if at all.

32. The proposed elimination of Connecticut's only Air National Guard Fighter Wing would have, and already has had, an immediate negative effect on enlistment, reenlistment and retention of personnel in the Air National Guard in Connecticut.

33. For example, Connecticut's Air National Guard A-10 pilots will be unable to maintain their flight certifications without aircraft on which to train and log necessary flight time, causing some or all of those pilots to resign or transfer their commissions to other states' Air National Guard flight wings.

34. Transfer of Connecticut's only Air National Guard aircraft will also result in the loss of valuable personnel, expertise and aircraft maintenance and support equipment that are presently available to be deployed in a wide range of homeland security and disaster response missions, including land-based missions.

35. The 103<sup>rd</sup> Fighter Wing is one of the world's premier A-10 flying units. Its members have demonstrated their excellence during missions over Bosnia and Iraq, including in Operation Iraqi Freedom, Operation Southern Watch and Operation Deny Flight.

36. The 103<sup>rd</sup> Fighter Wing is not activated to federal service. Thus, the 103<sup>rd</sup> Fighter Wing is under the command of the Governor of Connecticut. Responding to

state or community emergencies is co-equal, and in no way subordinate, to the 103<sup>rd</sup> Fighter wing's federal responsibilities.

37. The proposed realignment of the 103<sup>rd</sup> Fighter Wing is a change in the branch, organization or allotment of the unit.

38. The proposed realignment of the 103<sup>rd</sup> Fighter Wing is a relocation or withdrawal of a unit of the Air National Guard.

39. In recommending the realignment of the 103<sup>rd</sup> Fighter Wing, the BRAC Commission contravened the law and the legal advice of its own counsel. By memorandum dated July 14, 2005, legal counsel to the BRAC Commission correctly recognized that the BRAC Act did not authorize the DOD or its Secretary to change the organization of or withdraw or disband a National Guard unit unless the DOD obtained the consent of the governor where the unit was located. In particular, the BRAC Commission's staff's legal analysis, which was approved by its General Counsel, concluded that

[w]here 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.

*See Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations*, July 14, 2005 at 15.

40. The recommendations by the BRAC Commission and Secretary Rumsfeld to transfer and/or retire aircraft currently assigned to the Bradley Air Guard Unit are also

unlawful in that they call for action beyond the Commission's authority as delineated by the BRAC Act. The BRAC Commission's legal staff concluded that:

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 mix are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

*See Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations, July 14, 2005 at 10.*

41. At no time during the 2005 BRAC process did Secretary Rumsfeld, the BRAC Commission, or any other person or entity request or obtain the approval of Governor Rell or her authorized representative to change the branch, organization or allotment of the 103<sup>rd</sup> Fighter Wing, or any portion thereof.

42. At no time during the 2005 BRAC process did Secretary Rumsfeld, the BRAC Commission, or any other person or entity request or obtain the approval of Governor Rell or her authorized representative to relocate or withdraw the 103<sup>rd</sup> Fighter Wing or any portion thereof.

43. At no time during the 2005 BRAC process did Secretary Rumsfeld, the BRAC Commission, or any other person or entity request or obtain the approval of Governor Rell or her authorized representative to deactivate the 103<sup>rd</sup> Fighter Wing or any portion thereof.

44. In her letter of June 14, 2005, Governor Rell informed the Secretary that she does not consent to the realignment, relocation, withdrawal, deactivation or change in the branch, organization or allotment of the 103<sup>rd</sup> Fighter Wing.

45. Nothing in the BRAC Act or elsewhere prevents consultation with Governors in connection with the BRAC Process. The current BRAC process has been underway for at least two years, and it would have been entirely feasible to confer with the Governor either directly or through her Adjutant General concerning any realignment of the 103<sup>rd</sup> Fighter Wing.

46. Defendants' conduct is an unprecedented departure from the law and the historic respect and consultation afforded to the States in implementing changes to the branch, organization or allotment of National Guard units.

47. There exists a well-established and effective process – known as the conversion process – by which the federal government consults and collaborates with state officials to update and transform Army and Air National Guard units.

48. The conversion process is founded upon and respects the co-equal and cooperative relationship between the states and the federal government in equipping and maintaining National Guard units, and is premised on participation by and consent of the states to changes in National Guard Units.

49. The conversion process is the traditional and appropriate process to alter a state Air National Guard unit's allotment of aircraft.

50. In stark contrast to the Air Force BRAC process at issue in this lawsuit, the Department of the Army did not seek to realign Army National Guard units through the

2005 BRAC process without the consent of the affected Governors. Rather, the Army and the states' Adjutants General collaborated in an open and cooperative conversion process. The end product of this collaboration was uncontested Army National Guard realignment recommendations that both respected the authority of the Governors and accommodated the military needs of the states and the federal government.

51. Plaintiffs do not challenge any discretionary acts of the defendants in applying the BRAC Act or any other grant of authority. Nor do plaintiffs assert any violations of the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, or any procedural violations of the BRAC Act. Rather, plaintiffs challenge conduct that is ultra vires, void ab initio, unlawful, wholly unauthorized by the BRAC Act or any other source of authority, and in contravention of clear and explicit statutory proscriptions.

### **JURISDICTION**

52. This is a lawsuit for declaratory and injunctive relief based upon 10 U.S.C. § 18238 and 32 U.S.C. § 104.

53. Pursuant to 28 U.S.C. §§ 1331, 1346, 2201, and 2202, this Court has jurisdiction over the parties and claims in this lawsuit.

54. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

### **IRREPARABLE HARM**

55. Absent injunctive relief, the harm as alleged herein would be severe and irreparable. In addition to nullifying the Governor's right to disapprove changes to the organization or allotment of Connecticut's Air National Guard, the Secretary's and

BRAC Commission's recommendation would deprive the Governor of vital homeland security assets, degrade her ability to defend the security of Connecticut's citizenry and to respond to natural disasters and other civil emergencies, and leave Connecticut without a single Air National Guard aircraft assigned within its borders or under the Governor's command. The elimination of Connecticut's only Air National Guard Fighter Wing would immediately and negatively affect enlistments and reenlistments in Connecticut's Air National Guard.

**FIRST CAUSE OF ACTION**  
[Declaratory and Injunctive Relief]

56. The allegations in Paragraphs 1-55 are alleged and incorporated herein by reference.

57. Pursuant to 32 U.S.C. § 104, no change in the branch, organization or allotment of a National Guard Unit located entirely within a State may be made without the approval of that State's Governor.

58. The Plaintiffs request a Declaratory Judgment declaring that Secretary Rumsfeld may not realign the 103<sup>rd</sup> Fighter Wing without first obtaining the consent of the Governor of Connecticut.

59. The Plaintiffs request a Declaratory Judgment declaring that the portions of the DOD Report to the BRAC Commission and the BRAC Commission Final Report that recommend realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National

Guard, as approved and adopted by the President and the Congress, are unlawful and null and void; and

60. The Plaintiffs request that the Court enjoin the Defendant Rumsfeld from mandating, overseeing, implementing or directing the realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard in the manner proposed in the DOD and BRAC Commission Reports.

**SECOND CAUSE OF ACTION**  
[Declaratory and Injunctive Relief]

61. The allegations in Paragraphs 1-55 are alleged and incorporated herein by reference.

62. Pursuant to 10 U.S.C. § 18238, a unit of the National Guard or Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard unit is located.

63. The Plaintiffs request a Declaratory Judgment declaring that Secretary Rumsfeld may not realign the 103<sup>rd</sup> Fighter Wing without first obtaining the consent of the Governor of Connecticut;

64. The Plaintiffs request a Declaratory Judgment declaring that the portions of the DOD Report to the BRAC Commission and the BRAC Commission Final Report that recommend realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard, as approved and adopted by the President and the Congress, are unlawful and null and void; and

65. The Plaintiffs request that the Court enjoin the Defendant Rumsfeld from mandating, overseeing, implementing or directing the realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard in the manner proposed in the DOD and BRAC Commission Reports.

**THIRD CAUSE OF ACTION**  
[Declaratory and Injunctive Relief]

66. The allegations in Paragraphs 1-55 are alleged and incorporated herein by reference.

67. The Secretary and the BRAC Commission have recommended that the aircraft assigned to the 103rd Fighter Wing of the Bradley Air National Guard be transferred or retired.

68. The BRAC Act does not grant the BRAC Commission the authority to change how a unit is equipped or organized.

69. Any recommendation by the BRAC Commission to transfer aircraft from one unit to another or to retire aircraft unlawfully exceeds its authority as granted and delineated by the BRAC Act.

70. The Plaintiffs request a Declaratory Judgment declaring that any recommendation by the BRAC Commission to transfer or retire aircraft assigned to the 103rd Fighter Wing of the Bradley, as approved and adopted by the President and the Congress, is unlawful and null and void.

71. The Plaintiffs request that the Court enjoin the defendants from recommending, mandating, directing, implementing, or controlling the transfer or

retirement of the aircraft assigned to the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard in the manner proposed in the DOD and BRAC Commission Reports.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully request that this Court:

(1) Issue an order declaring that the realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard as proposed by Secretary Rumsfeld and the BRAC Commission, and as approved and adopted by the President and the Congress, without the consent of the Governor of the State of Connecticut is prohibited by federal law;

(2) Issue an order declaring that portions of the DOD and BRAC Commission Final Reports, as approved by the President and the Congress, that recommend realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard are null and void;

(3) Enjoin Defendant Rumsfeld and any other officer or employee of DOD from mandating, implementing, overseeing or directing the realignment of the 103<sup>rd</sup> Fighter Wing of the Bradley Air National Guard in the manner proposed in the DOD and BRAC Commission Final Reports, as approved and adopted by the President and the Congress.

(4) Award to the Plaintiffs, pursuant to 28 U.S.C. § 2412 and any other applicable statute, the costs, fees, and other expenses incurred in prosecuting this lawsuit; and

(5) Order such other and further relief as this Court may deem appropriate.

PLAINTIFFS,  
M. JODI RELL, GOVERNOR OF  
CONNECTICUT, CHRISTOPHER J.  
DODD, JOSEPH I. LIEBERMAN, JOHN B.  
LARSON, and  
THE STATE OF CONNECTICUT

BY:



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**CERTIFICATION**

I hereby certify that a copy of the foregoing was mailed, faxed and electronic mailed, in accordance with Rule 5(b) of the Federal Rules of Civil Procedure on this 7th day of November, 2005 to:

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