

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5
6 August Term, 2005

7
8 (Argued September 9, 2005 Decided September 9, 2005)

9
10 Docket No. 05-4682

11
12
13
14
15 EMERGENCY MOTION FOR STAY

16
17
18
19
20 M. Jodi Rell, Gov., State of CT,
21 Christopher J. Dodd, USA Senator, Joseph Lieberman, USA Senator,
22 John B. Larson, USA Representative, State of Connecticut,

23
24 Plaintiffs-Appellees,

25
26 v.

27
28 Donald H. Rumsfeld, Sec. of Defense, Defense Base Closure &
29 Realignment Comm., Anthony J. Principi, Chmm, Defense Base
30 Closure & Realignment Comm., James H. Bilbray, Mem, Defense Base
31 Closure & Realignment Comm., Philip Coyle, Mem, Defense Base
32 Closure & Realignment Comm., Harold W. Gehman, Jr., Mem, Defense
33 Base Closure & Realignment Comm., James V. Vinson, Mem, Defense
34 Base Closure & Realignment Comm., James T. Hill, Mem, Defense
35 Base Closure & Realignment Comm., Lloyd W. Newton, Mem, Defense
36 Base Closure & Realignment Comm., Samuel K. Skinner, Mem, Defense
37 Base Closure & Realignment Comm., Sue E. Turner, Mem, Defense
38 Base Closure & Realignment Comm.,

39
40
41 Defendants-Appellants.

42
43
44
45 Before:

46 CARDAMONE, McLAUGHLIN, and POOLER,
47 Circuit Judges.
48
49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Defendants Secretary of Defense Donald H. Rumsfeld and the Base Realignment and Closure (BRAC) Commission appeal from the grant of a preliminary injunction issued by the United States District Court for the District of Connecticut (Covello, J.) on September 7, 2005, in a declaratory judgment action instituted by plaintiffs the Governor of the State of Connecticut M. Jodi Rell and various public officials. The defendants request a stay of the preliminary injunction pending appeal.

Stay granted.

SCOTT R. McINTOSH, Washington, D.C. (Peter G. Keisler, Assistant Attorney General, Douglas N. Letter, Appellate Litigation Counsel, H. Thomas Byron, Appellate Staff, United States Department of Justice, Civil Division, Washington, D.C., of counsel), for Defendants-Appellants.

RICHARD BLUMENTHAL, Attorney General, Hartford, Connecticut (Perry Zinn-Rowthorn, Assistant Attorney General, Hartford, Connecticut, of counsel), for Plaintiffs-Appellees.

1 PER CURIAM:

2 Defendants Donald H. Rumsfeld, the Defense Base Closure and
3 Realignment Commission (Commission) and members of the Commission
4 bring before us an emergency motion to stay a preliminary
5 injunction issued on September 7, 2005 by the United States
6 District Court for the District of Connecticut (Covello, J.).

7 The preliminary injunction bars the Commission from
8 forwarding to the President of the United States its
9 recommendation to transfer A-10 aircraft assigned to the 103rd
10 Fighter Wing of the Connecticut Air National Guard to a unit or
11 station outside of the State of Connecticut. In granting the
12 preliminary injunction, the district court found that the
13 Commission's recommendation was "sufficiently final" for judicial
14 review.

15 We disagree with the district court's premise. The
16 Commission's recommendation is not a final agency action subject
17 to judicial review, see Dalton v. Specter, 511 U.S. 462, 469-70
18 (1994), and since no final action has yet taken place, the harm
19 alleged by plaintiffs has not occurred. Absent final action, the
20 declaratory judgment action instituted by various public
21 officials of the State of Connecticut likely should have been
22 dismissed for want of jurisdiction. Because irreparable harm may
23 result to the defendants if the Commission's report is not
24 transmitted to the President forthwith, see Defense Base Closure
25 and Realignment Act of 1990, 104 Stat. 1808, as amended, note
26 following 10 U.S.C. § 2687; New Motor Vehicle Bd. v. Orrin W. Fox

1 Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in Chambers), we
2 grant the motion to stay the preliminary injunction pending
3 appeal.

4 In holding that the Commission's recommendation does not
5 constitute final agency action that is reviewable, we note that
6 the State of Connecticut may have an opportunity to contest the
7 removal of the aircraft when indeed the action becomes final and
8 the aircraft are in danger of imminent seizure. At that stage,
9 the State may argue that the Commission acted in violation of 32
10 U.S.C. § 104(c) by not obtaining the Governor's consent prior to
11 issuing its recommendation or otherwise acted in excess of its
12 authority. See Pan Am. World Airways v. Civil Aeronautics Bd.,
13 380 F.2d 770, 775-76 (2d Cir. 1967), aff'd, World Airways v. Pan
14 Am. World Airways, 391 U.S. 461 (1968) (holding that the Civil
15 Aeronautics Board exceeded its authority by issuing certain
16 orders and allowing review despite that the President had already
17 approved the orders). As the United States conceded, it could
18 not then argue that the Governor should have brought this action
19 sooner. Review at this later stage ensures both that the
20 agency's decision is final and whatever statutory rights the
21 Governor possesses are preserved.