

July 26, 2005

MEMORANDUM FOR CHAIRMAN AND COMMISSIONERS  
DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

From: GENERAL COUNSEL

Subj: WEIGHING EVIDENCE IN PREPARATION FOR FINAL DELIBERATIONS OF  
THE 2005 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

This memorandum provides guidance on weighing the various types of evidence that are available to the 2005 Defense Base Closure and Realignment Commission (Commission). It suggests an approach that is consistent with past practice but does not purport to be binding instructions to the Commissioners.

The importance Congress attaches to the free flow of information is revealed by the application in the BRAC statute of the Military Whistleblowers Act with respect to communications with the Commission. The act prohibits any person from restricting a member of the armed forces from communicating with the Commission. An additional consideration with regard to communications with members in the armed forces is that they are required under the Uniform Code of Military Justice to be truthful when making official statements in the line of duty, which includes communications with the Commission.

In light of the upcoming final deliberations to be undertaken by the Commissioners in making recommendations to the President, a review of the types of evidence available to the Commission, and the weight they should be accorded are discussed below. The following categories of evidentiary submissions (both testimonial and documentary) will be considered:

- A) certified data submitted by the Department of Defense (DoD),
- B) sworn testimony and documentary submissions at hearings before the Commission,
- C) communications from federal, state, and municipal officials,
- D) communications from the general public, both individuals and organizations, and
- E) personal knowledge and observations.

**CATEGORY A: CERTIFIED DATA PROVIDED BY THE DOD**

Section 2903(c)(5)(A) of the Defense Base Closure and Realignment Act of 1990, as amended, (BRAC statute), provides that each person:

when submitting information to the Secretary of Defense or the [BRAC] Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that persons knowledge and belief. [Certify means to confirm formally as true or accurate; an oath serves that purpose with testimony.]

Persons include: (i) the Secretaries of the military departments; (ii) the heads of the defense agencies; and (iii) each person who is in a position whose duties include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations. . . ." (See Section 2903(c)(5)(B)) of the BRAC statute.)

Accordingly, DoD personnel have provided certified data to the Secretary of Defense in support of making recommendations for closures and realignments. Based on this certified data, the Secretary has made his final recommendations to the Commission. Moreover, pursuant to Section 2912(b) of the BRAC statute, the Secretary has also certified that there is a need for the closure and realignment of military installations, and has additionally certified that such closures and realignments will result in annual net savings for each of the military departments beginning no later than fiscal year 2011.

DoD personnel (in the categories described above), when responding to questions submitted by Commission personnel to the DoD clearinghouse, have a duty to provide the Commission with certified data. All data received from the clearinghouse is thus considered to be certified.

#### CATEGORY B: SWORN TESTIMONY AND DOCUMENTARY SUBMISSIONS AT HEARINGS BEFORE THE BRAC COMMISSION

Section 2903 (d)(1) of the BRAC statute provides that after receiving the Secretary's recommendations for closures and realignments of military installations, the Commission shall hold public hearings. Further, this statutory provision directs that "[a]ll testimony before the Commission at a public hearing . . . shall be presented under oath."

The oath administered to witnesses testifying before the Commission states as follows:

Do you swear or affirm that the testimony you are about to give, and any evidence that you may provide, are complete and accurate to the best of your knowledge and belief, so help you God?

This language parallels the certification requirement set forth in Section 2903 of the BRAC statute. Moreover, the oath covers not only the sworn testimony of the witnesses appearing before the Commission but also the documentary evidence (e.g., PowerPoint presentations, hand-outs, memoranda) that is submitted to the Commission by a witness during the course of a hearing.

In weighing the credibility of the witnesses, each Commissioner must individually determine for him or herself the believability of each witness. In evaluating this matter, each Commissioner must consider the witness's sincerity, truthfulness, persuasiveness, knowledgeableness on the subject-matter presented, and whether the witness is supported or contradicted by other evidence. The possibility of bias in terms of how the witness may be impacted by the decision-making of the Commission may also (but not necessarily) factor into the process of according the appropriate weight to such a witness's testimony and any documentary evidence he/she may provide. In making this determination, it is important to remain as objective and impartial as

possible, realizing that each Commissioner is also moved by his or her own life and professional experiences, biases, and judgments.

CATEGORY C: COMMUNICATIONS FROM FEDERAL STATE, AND MUNICIPAL OFFICIALS

The Commission has been in frequent contact with numerous elected and appointed federal, state, and municipal officials. Where such officials have been corresponding or otherwise communicating in person or by telephone without formally testifying before the Commission, such communications should also be given appropriate weight. Commissioners have come into contact with many such officials during the course of hearings, base site visits, meetings, receptions, and other events.

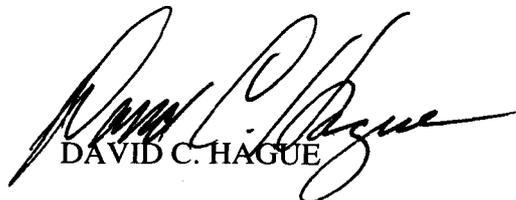
Since the nature of these communications are not sworn to or otherwise certified as truthful and accurate, less weight needs be accorded to them. Nevertheless, there may be circumstances in which a particular Commissioner may feel that a certain unsworn, non-certified communication is particularly influential or persuasive. This is again a matter of weighing the credibility and believability of such a person, and the context of that communication which necessarily includes the nature of the Commissioner's relationship with that person.

CATEGORY D: COMMUNICATIONS FROM THE GENERAL PUBLIC

The Commission has received thousands of pieces of correspondence from individuals, civic and community organizations, veterans groups, schools, and numerous other organizations. These communications are not sworn or certified. However, the same caveat mentioned above applies here where an individual Commissioner may feel that a certain public submission has great persuasive value. This is a judgment call, and each Commissioner has been vested with the public trust and authority to make such a determination.

CATEGORY E: PERSONAL KNOWLEDGE AND OBSERVATIONS

Commissioners and staff members are chosen for their experience and expertise and are expected to use their knowledge and special insights in evaluating information received from all sources. They acquire important information first-hand through site visits, which provide opportunities to speak with a wide variety of people and see the condition of infrastructure, extent of encroachment, and other conditions and circumstances relevant to proposed BRAC actions. They also properly receive relevant and material information from the popular press, television, and other news sources. The significance and value of such information are once again determinations to be made by individual Commissioners.

  
DAVID C. HAGUE