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August 19, 1993

Memorandum to Chairman Courter and Matt Behrmann

From: Sheila Cheston, General Counsel

Re: Litigation Update

1. AFGE v. Cheney. In December of 1992, a federal district court in Alabama issued a "final" order in this case enjoining DoD from carrying out a proposal it then had to consolidate tactical missile maintenance work at Letterkenny without first complying with the competitive bidding requirements of section 351(a) of the Authorization Act. The Commission was not a party to the case and, as the court made explicitly clear, it did not in any way involve the issue of BRAC closures or realignments. Nonetheless, we just received a copy of a petition by which the former plaintiffs in this case (which has been over for almost a year) are asking the court (1) to add the Commission as a defendant (on the theory that the Commission is "by law" an "agent" of DoD); and (2) to modify its order to apply to the Commission and, I assume, to override the Commission's '93 recommendation (if and when it becomes law). DOJ wrote the plaintiffs a letter, pointing out the stupidity of their petition and suggesting they withdraw it voluntarily.¹ They have declined to do so and the court has set a briefing schedule. Plaintiffs will file a brief in support of their petition by August 27. Our opposition is due by September 3; plaintiffs will then have one week in which to file a reply. DOJ has promised a draft opposition by August 31. Copies of the petition and DOJ's letter are enclosed.

The real underlying issue -- whether the Commission had the authority to recommend the consolidation of tactical missile maintenance work at Letterkenny (the answer to which should be yes) -- is also being debated at DoD. As I understand it, lawyers at OSD, DOJ and Army JAG agree that the Commission had the authority to make the recommendation; while an Army Deputy GC is taking the unfortunate position that DoD and the Commission need express permission from Congress before recommending a closure or

¹ The letter is largely correct, and based on information we supplied some time ago in a different context. Unfortunately, however (and uncharacteristically), DOJ did not give us an opportunity to review the letter before it went out, or even tell us that they were preparing or had prepared it. Indeed, we only know of the letter because Ed Brown obtained a copy from the Army yesterday (10 days after it was sent). I have asked DOJ to make sure that in the future we are provided an opportunity to review all such correspondence and filings.

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realignment that is in any way inconsistent with prior congressional legislation (s.a. section 351(a)).

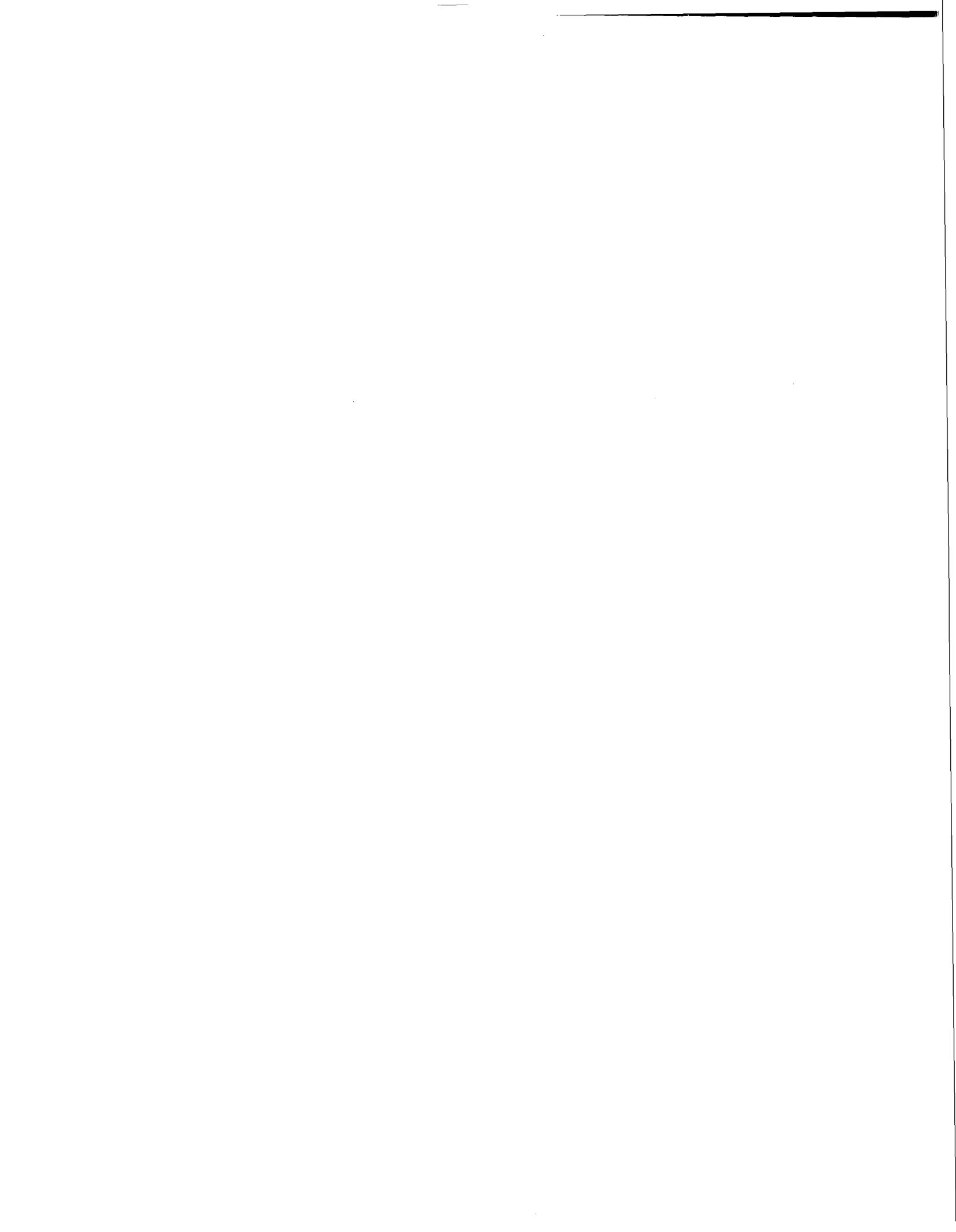
2. Charles E. Smith Management, Inc. v. Aspin (amended complaint filed July 1993; action to enjoin implementation of recommendation to realign naval systems commands at Crystal City, alleging the commands occupy general purpose space leased from GSA and, therefore, are not "military installations" within the meaning of the Base Closure Act). DOJ is preparing a motion to dismiss which we will file in lieu of an answer. The motion will seek dismissal of the complaint against the Commission on various grounds, including the following: (1) plaintiffs lack standing; (2) claims not subject to judicial review; (3) relief seek not available from the Commission (as distinct from DoD); (4) claims premature; (5) commands are military installations. We hope to receive a draft motion next week.

3. Specter v. Garrett. SG's Office hopes to file cert. petition this Friday, August 20.

4. Greenwood v. O'Keefe (action challenging 1991 decision to realign the Naval Air Development Center, Warminster, PA; previously stayed pending 3rd Circuit decision in Specter). In July, we filed motions (1) to dismiss plaintiffs' substantive and lab commission claims and (2) to stay plaintiffs' procedural claims pending Supreme court review of our cert petition in Specter. The plaintiffs cross-moved for summary judgment. Opposition briefs are due at the end of August, and reply briefs in early September.

5. I gather (via Austin) that DoD is also considering whether, in its view, the Commission had the authority to dictate the aircraft (F-16) that the reserve units at Homestead and Bergstrom will fly.

cc: Tom Houston
Ben Borden
Team Leaders



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, EASTERN DIVISION

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 1945, PATRICIA S.)
WHITE AND DARRELL D. DEMPSEY,)

Plaintiffs,)

vs.)

CASE NO. CV-92-PT-2453-F

RICHARD CHENEY IN HIS OFFICIAL)
CAPACITY AS SECRETARY OF DEFENSE)
and MICHAEL P. W. STONE IN HIS)
OFFICIAL CAPACITY AS SECRETARY)
OF THE ARMY)

Defendants.)

PETITION TO DESIGNATE THE DEFENSE
BASE CLOSURE AND REALIGNMENT COMMISSION
AS A PARTY DEFENDANT AND FOR OTHER RELIEF

COME NOW, the Plaintiffs, and petition this Honorable Court to designate the Defense Base Closure and Realignment Commission ("BRAC") as party defendant in the above styled action and as grounds therefore states as follows:

1. By law BRAC is an agent of the Secretary of Defense, Secretary of the Army and Department of Defense.
2. By proceeding with the realignment of missile maintenance work from the Anniston Army Depot ("ANAD"), to Letterkenny Army Depot ("LEAD"), BRAC is attempting to evade a final order of this Court issued on or about December 21, 1992, which was not appealed by any party defendant to the above styled action, and the requirements of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993 ("Authorization Act"). (See BRAC Report for 1993 attached as Exhibit "A" hereto.)

3. Said final order (attached as Exhibit "B" hereto) states in pertinent part as follows:

The proposed consolidation of the tactical missile maintenance work under the direction of the defendants insofar as it relates to a transfer of any such mission from Anniston Army Depot... is subject to all the provisions of § 351(a) of the National Defense Authorization Act for Fiscal Year 1993...

The defendants and their agents and employees are enjoined from transferring any portion of the tactical missile maintenance work or facilities, and jobs and equipment related thereto, located at Anniston Army Depot, to Letterkenny Army Depot or any other depot, base or facility for the purpose of consolidating said tactical missile maintenance work of the Department of the Army, unless and until competitive procedures as provided for in said § 351(a) are implemented and selection made and action taken accordingly. (emphasis added).

4. Any realignment of missile maintenance work from ANAD to LEAD without implementation of competitive bidding procedures, as proposed in the BRAC-1993 Report, would violate this Court's order and § 351(a) of the Authorization Act.

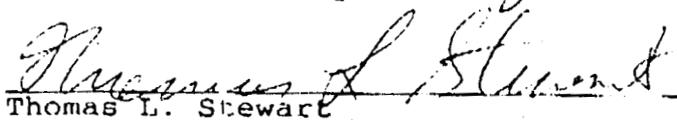
5. The Department of Defense had stopped said realignment from ANAD to LEAD pursuant to the Court's order.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request this Court to enter an order designating BRAC as a party defendant in the above referenced action, to reissue its order enjoining the defendants, including BRAC, from proceeding with the realignment from ANAD to LEAD without the implementation of competitive bidding procedures as required by § 351(a) of the Authorization Act, to expedite any ruling on this petition, and to tax costs of this

proceeding against said defendants.

Respectfully submitted,


Charlie D. Waldrep


Thomas L. Stewart


Graham L. Sisson, Jr.


Donald E. Blankenship

Attorneys for Plaintiff, American
Federation of Government Employees

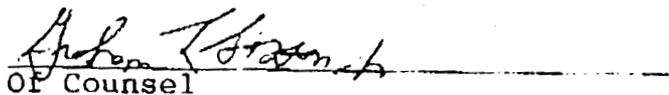
OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon the following, by placing same in the United States Mail, properly addressed and postage prepaid, this the 21 day of July, 1993.

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