

DRAFT

17 June 1991

MEMORANDUM FOR DR. BILL MOORE

SUBJECT: Defense Base Closure and Realignment Act of 1990

Your question centers around the interpretation of section 2905(d)(2)(b) of the Base Closure Act and whether the Commission may change the Secretary list if it determines the Secretary deviated substantially from the force-structure plan and final criteria upon which the list was based. In particular, I believe you questioned whether the Commission has the authority under the law to change the Secretary list if it finds the Secretary deviated substantially from either the force-structure plan or the final criteria, or whether the Commission's authority to change the list could only be exercised if it determined the Secretary failed to comply with both the force-structure plan and the final criteria.

You described a two-part definition of substantial compliance now being used by the Commission, that is, a condition that permits the Commission to change the Secretary's list if it fails to meet either of the above mentioned statutory requirements. It is my opinion that using the two part definition now in practice is legally correct.

Although I can understand that one might interpret the law as requiring that there must be a failure of both the force-structure plan and the final criteria before the Commission may change the Secretary's list, I believe such an interpretation is overly strict and overlooks the intent of Congress.

Even though there is not a published legislative history of the Base Closure Act, nonetheless it is clear that Congress added the requirement for a force-structure plan because of concern with the January 29, 1990 list of bases proposed for closing. Congress was concerned with the list because apparently it proved to contain bases with combat units critical to the Gulf War. In particular Ft. McClullan was targeted - a base critical to training troops to deal with the chemical battlefield.

At any rate, Congress imposed the force-structure requirement in the Base Closure Act, something that was missing and thought to be a deficiency in 1988 Base Closure Commission's Authority.

It is clear from analyzing the entire Base Closure Act that Congress views the force-structure plan and the final criteria as separate and distinct requirements. The simple unartful use of the conjunction "and" should not therefore, be dispositive of this issue in view of the obvious intent of Congress.

The two requirements are treated separately in that the force-structure plan is a requirement in the budget justification for DoD's fiscal year 1992, 1994, and 1996 budget, while the final criteria is separately published in the Federal register (and

transmitted to the Congressional defense submitters) not later than 15 Feb of the year concerned. Congressman Les Aspin is on record: "Together, these two elements, the force structure plan and the criteria for closing, would form the rational center of the base closing process."

In conclusion, I believe your approach to use the two-part definition process as you described, is reasonable and correct. To interpret otherwise would defeat the purpose of the law.

John A. Ciucci

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6-19

- either criteria can be derived -
- both criteria should be met -
- he hasn't signed

- I pointed out the log history

As: I can't guarantee to my client that there is a valid cfa if we use the more liberal test. He agreed and said the commission will have to decide

~~But~~

DRAFT

CONFIDENTIAL MATTERS
ATTORNEY CLIENT PRIVILEGE

MEMORANDUM TO: Paul Hirsch, Director of Review and Analysis
FROM: Robert Moore, General Counsel

You have asked for guidance on what conditions must occur prior to the Commission making a change in the Secretary of Defense's list of closure and realignments.

The test that must be applied exists at PL 101-510 section 2903 (d)(2)(B). "In making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force structure plan and final criteria referred to in subsection (c)(1) in making recommendations."

In interpreting this provision of the statute, the language is ambiguous as to whether the Commission must find a substantial deviation from both "the force structure plan and the final criteria", or whether the Commission must find a substantial deviation from a finite set which includes "the force structure plan and the final criteria."

The legislative history at page 705 of the PL 101-510 Conference Report does nothing to clear up the ambiguity, it states:

"The test for the commission to apply to bases recommended by the Secretary for closure and realignment is whether the Secretary deviated substantially from the force structure plan and the final criteria when making the recommendations."

✓ The interpretation, which the Research and Analysis section proposes, provides that the Commission may change the Secretary's list if there exists a substantial deviation in the force structure plan or in the final criteria. This is a reasonable interpretation, but its use will not be without risk of legal challenge.

✓ If our commission had the authority to issue a declaratory order, issue an adjudicative decision, or expressed authority to issue binding interpretations, then this interpretation would be controlling, Chevron USA Inc. v. NDRC 467 U.S. 837. Without such authority we can adopt the "or" interpretation by Commission vote, but will not be assured definitive acceptance by the courts.

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This interpretation, less restrictive than finding a substantial deviation in both the force structure plan and the final criteria, will however be afforded deference by the courts. Although the likelihood is slight, there is no guarantee that a contrary interpretation would not prevail, Sierra Club v. Clark 756 F.2d 686.

The sustaining of the Commission recommendations under judicial scrutiny is all of our concern. In order to lower the risk of challenge to our Commissioners actions, I recommend the following:

1. At the beginning of deliberations on the Secretary's list, the commission should adopt Research and Analysis's standard of review. This would allow for the finding of a substantial deviation from the set (force structure plan and the final criteria). This standard, which was presented to the commission on April 26, was never adopted.
2. If a change is made to the Secretary's recommendations, the Commissioners should state the substantial deviations from both the force structure plan and the final criteria. Obviously the more findings of substantial deviation in both categories the better.
3. The office of the General Counsel will aggressively defend the Commission against challenges should they arise.

cc: Mr. Chairman
Matt Behrmann

PAUL HIRSCHE

MEMORANDUM TO DIRECTOR, REVIEW & ANALYSIS
~~TO PAUL~~ FROM ROBERT MOORE GENERAL COUNSEL

condition
You have ~~been~~ asked for guidance on what
must occur prior to the Commission making
a change in the Secretary of Defense's list of
doctors and realignments.

The test that must be applied is that of
PL 101-510 § 2903 (d)(2)(B)

indent
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In interpreting this provision of the
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the ~~test~~ Commission must find a
substantial deviation from both "the
force structure plan and the final criteria", or
whether the Commission must find a
substantial deviation from ~~the set of both~~
which includes the.

a finite set ~~of~~ which includes "the
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yes.

The legislative history at page 705 of the PL ~~101-510~~ 101-510 Conference Report does nothing clear up the ambiguity by stating:

indent → "The test for the Commission to apply to bases recommended by the Secretary for closure and realignment is whether the Secretary deviated substantially from the force structure plan and the final criteria in making the recommendations."

The interpretation which the Research and Analysis section proposes which provides that the Commission may change the Secretary's list if it finds a substantial deviation in the force structure plan or the final criteria ~~is~~ ~~is~~ is a reasonable interpretation, but its use will not be without risk of legal challenge.

If ~~an~~ ^{an} Commission had the authority to issue a ~~legislative~~ ^{declaratory order} ~~order~~, issue an adjudicative decision, or expressed authority to issue binding interpretations, then ^{this interpretation} ~~the~~ ~~interpretation~~ would be controlling. ^{Chevron USA Inc v NLRB 407 U.S. 837} ~~has been since our Commission~~ ~~is not~~ ~~to~~ ~~be~~ ~~done~~ ~~without~~ such authority we can, by Commission vote, adopt the "or" ~~an~~ interpretation ~~and~~ but will not be assured of the courts acceptance of it.

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through the likelihood

have the benefit of deference by the courts. ~~There is no guarantee that a company interpretation will prevail.~~

~~Charter, see, Library of Congress v FARA, 699 F.2d 1233~~

~~Sveva Club v Clark 756 F.2d 686~~

~~It is this notion of deference which ~~is~~ lowers the risk of challenge at a later date~~

~~The~~

The sustaining of Commission ~~to~~ recommendations under judicial scrutiny is all of one concern. In order to lower the risk of challenge to our Commission actions this week, I received the following.

1. At the beginning of deliberations on the secretary's list adopt ~~the~~ ~~proposed~~ ~~standard~~ of review allowing for the funding of a substantial diversion from the set of ~~cost~~ ~~the~~ force structure plan ~~and~~ the Final Criteria. ~~Contrary to your June 10th memo,~~ ~~the no action took place on this issue on May 10,~~ ~~however it was~~ ~~discussed by~~ ~~the~~ the commission on April 26, but never adopted.

This

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MEMORANDUM TO: Paul Hirsch Director of Review and Analysis
FROM: Robert Moore General Counsel

You have asked for guidance on what conditions must occur prior to the Commission making a change in the Secretary of Defense's list of closure and realignments.

The Test that must be applied exist at PL 101-510 section 2903 (d) (2) (B).

"In making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the ~~power~~^{force} structure plan and final criteria referred to in subsection (c) (1) in making recommendations."

In interpreting this provision of the statute, the language is ambiguous as to whether the Commission must find a substantial deviation from both "the force structure plan and the final criteria", or whether the Commission must find a substantial deviation from a finite set which includes "the force structure plan and the final criteria."

The legislative history at page 705 of the PL 101-510 Conference Report does nothing to clear up the ambiguity by stating:

"The test for the commission to apply to bases recommended by the Secretary for closure and realignment is whether the Secretary deviated substantially from the force structure plan and the final criteria when making the recommendations."

The interpretation ^{which} within the Research and Development section proposes ~~only~~ provides that the Commission may change the Secretary's list if it finds a substantial deviation in the force structure plan or the final criteria, ^{is} a reasonable interpretation, but its use will not be without risk of legal challenge.

If our commission had the authority to issue a declaratory order, issue an ~~adjunctive~~^{adjudicatory} decision, or expressed authority to issue binding interpretations, then this interpretation would be controlling. Chevron USA Inc. v. NDRC 467 U.S. 837 ^{would be controlling.} Without such authority we can adopt the "or" interpretation by Commission vote, but will not be assured of the courts acceptance of it as definitive.

This interpretation ^{is} less restrictive than ^{is} finds a substantial deviation in both the force structure plan and the final criteria, will however have the benefit of ~~defense~~^{deference} by the courts. Although the likelihood is slight, there is no guarantee

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This interpretation , less restrictive than finds a substantial deviation in both the force structure plan and the final criteria, will however have the benefit of defense by the courts. Although the likelihood is slight, there is not guarantee

that a contrary interpretation would not prevail.

The _____ of Commission recommendations under Judicial scrutiny is all of our concern. In order to lower the risk of challenge to our Commissioners actions this week, I recommend the following.

1. At the beginning of deliberations on the Secretary's list adopt the proposed standard of review allowing for the _____ of a substantial deviation from the set of the force structure plan and the Final criteria. This standard was presented to the commission on April 26, but never adopted.
2. If a change is made in the Secretary's list the Commissioners should stat the substantial deviation whether they find it in both the force structure plan and the final criteria where they exist. Obviously the more changes with substantial deviation in both the plan and criteria the better.
3. The office of the Legal Council will of course aggressively defend the Commission against challenges should they arise.

cc Mr. Chairman
Matt Behrmann

if adopted by the Commission
final criteria, will ~~never~~ have the benefit of deference by the courts. Although the likelihood is slight, there is no guarantee that a contrary interpretation would not prevail. *Sierwo Clubs v. Club* ✓

756 R.2d 686

The sustaining of the Commission recommendations under judicial scrutiny is all of our concern. In order to lower the risk of challenge to our Commissioners actions, I recommend the following:

1. At the beginning of deliberations on the Secretary's list, the commission should adopt Research and Analysis's standard of review. This would allow for the finding of a substantial deviation from the set ~~of~~ ^{the} (force structure plan and the Final criteria). This standard was presented to the commission on April 26, but ^{was} never adopted. ✓ ✓ ✓ ✓

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3. The office of the ^{General} ~~Legal~~ Council will ~~of course~~ aggressively defend the Commission against challenges, should they arise. ✓

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Matt Behrmann

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CONFIDENTIAL MATTERS
ATTORNEY CLIENT PRIVILEGE

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