

DCN: 12354

BASE CLOSURE AND REALIGNMENT COMMISSION
2521 SOUTH CLARK STREET, SUITE 600
ARLINGTON, VA 22202
PHONE: 703-699-2950
FAX: 703-699-2735



FACSIMILE TRANSMITTAL SHEET

TO: SCOTT STUCKEY

FROM: DAVID HAGUE, GENERAL COUNSEL

COMPANY: SASC

DATE: JULY 28, 2005

FAX NUMBER: 202.228.0037

TOTAL NO. OF PAGES INCLUDING COVER: 2

PHONE NUMBER: 202.224.3871

SENDER'S TELEPHONE NUMBER: 703.699.2950

RE: COPY OF LTR FROM CHAIRMAN, BRAC OF JUL. 27,
2005 TO SENATOR BYRD. FOR SENATOR WARNER.

SENDER'S FAX NUMBER:
703.901.7817

URGENT

FOR REVIEW

PLEASE COMMENT

PLEASE REPLY

PLEASE RECYCLE

NOTES/COMMENTS:

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FACSIMILE TRANSMITTAL SHEET

TO: PETER LEVINE

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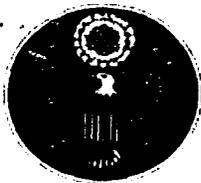
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PLEASE RECYCLE

NOTES/COMMENTS:



DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

2521 South Clark Street, Suite 600

Arlington, VA 22202

Telephone: 703-699-2950

July 27, 2005

The Honorable Robert C. Byrd
United States Senate
311 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Byrd:

I have learned of your intent to propose an amendment to S. 1042 expressing the sense of the Senate concurring with a "legal opinion issued by the Base Closure and Realignment Commission . . ." I want you to know that, as the memorandum mentioned in the amendment indicates, it is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission. Although now widely distributed, it is an internal memorandum prepared as a working paper, a starting point rather than an ending point for discussion.

The Commission continues its efforts to resolve the issues identified in the memorandum. We have asked the Department of Justice if the Federal government, through the BRAC process, has the authority to carry out the proposed closures and realignments of Air and Army National Guard installations in the absence of a consultative process with the governors of the respective states. We expect to receive an official opinion from the Department soon.

Please be assured that, whatever the response from the Department of Justice, we will be guided by a well-grounded understanding of the law and of our responsibility to fulfill the mandate that guides our actions, that is to be open and thorough in our deliberations and independent and resolute in our decisions.

Thank you for your active support of the BRAC process and of the work of our Commission.

Sincerely,

Anthony J. Principi
Chairman

*Original sent
with you at Byrd's
Ap. Court Ball
Tony*

Chairman: Anthony J. Principi

Commissioners: The Honorable James H. Bilbray, The Honorable Philip E. Coyle III, Admiral Harold W. Gehman Jr., USN (Ret), The Honorable Jim Hansen, General James T. Hill, USA (Ret), General Lloyd Newton, USAF (Ret), The Honorable Samuel K. Skinner, Brigadier General Sue Ellen Turner, USAF (Ret)

Executive Director: Charles Battaglia

AMENDMENT NO. _____ Calendar No. _____

Purpose: To express the sense of the Senate concurring with the legal opinion issued by the Base Closure and Re-alignment Commission regarding the existence of legal impediments to the closure or realignment of Air National Guard assets.

IN THE SENATE OF THE UNITED STATES—109th Cong., 1st Sess.

S. 1042

To authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. BYRD

Viz:

- 1 On page 371, between lines 8 and 9, insert the fol-
- 2 lowing:

1 **SEC. 2887. SENSE OF THE SENATE CONCURRING WITH THE**
2 **BASE CLOSURE AND REALIGNMENT COMMIS-**
3 **SION LEGAL OPINION ON EXISTENCE OF**
4 **LEGAL IMPEDIMENTS TO CLOSURE OR RE-**
5 **ALIGNMENT OF AIR NATIONAL GUARD AS-**
6 **SETS.**

7 It is the sense of the Senate that the Senate concurs
8 with the conclusion that legal impediments exist to the clo-
9 sure or realignment of Air National Guard assets, as stat-
10 ed in the memorandum entitled "Discussion of Legal and
11 Policy Considerations Related to Certain Base Closure
12 and Realignment Recommendations" issued on July 14,
13 2005, by the Office of General Counsel of the Base Clo-
14 sure and Realignment Commission.



DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
2521 SOUTH CLARK STREET, SUITE 600
ALEXANDRIA, VA 22202
TELEPHONE: 703-699-2950
FAX: 703-699-2975

23 MAY 2005

Chairman:
The Honorable Anthony J. Principi

Commissioners:
The Honorable James H. Gilroy
The Honorable Philip E. Coyne III
Admiral Harold W. Gehman, Jr., USN (Ret.)
The Honorable James V. Hansen
General James T. Hill, USA (Ret.)
General Lloyd W. Newton, USAF (Ret.)
The Honorable Samuel K. Skinner
Brigadier General Sue Ellen Turner, USAF (Ret.)

Executive Director:
Charles Sotraglio

The Honorable Alberto R. Gonzales
 Attorney General of the United States
 U.S. Department of Justice
 950 Pennsylvania Ave., N.W.
 Washington, D.C. 20530-0001

Dear Attorney General Gonzales:

As Chairman of the Base Closure and Realignment Commission I request your opinion regarding the legal authority of the Secretary of Defense to effect changes to National Guard and Air National Guard units and installations. The Commission is severely constrained in formulating its recommendations to the President as to which military installations should be closed or realigned without a clear understanding of the Secretary's authority.

Title 10, United State Code, Section 18238 and Title 32, United States Code, Section 104 (c) require permission of the governors of the states in which National Guard and Air National Guard units and installations are located before they may be "changed" or "relocated or withdrawn." I am not aware of any authority that clearly indicates contrariwise.

I ask for your opinion on this issue: does the Federal government, acting through the Defense Base Closure and Realignment Act of 1990, as amended, possess the authority to carry out the proposed realignments and closures of Army National Guard and Air National Guard installations in the absence of a consultative process with the governors of the various states? If not, what measures would be necessary to satisfy the consultation requirement?

We need to know whether the National Guard and Air National Guard units and installations that the Secretary has recommended be closed or realigned will, if the Commission concurs with those recommendations, be closed or realigned within the statutory time limits. Will the litigation being contemplated by various state attorneys

general, or other intervening legal proceedings, delay the process or abort it completely?

In order that we might fulfill our duty under the Defense Base Closure and Realignment Act of 1990, as amended, we must test the recommendations of the Secretary of Defense against the selection criteria and force-structure plan that he used in developing his list of military installations to be closed or realigned. Upon determining that the Secretary deviated substantially from the selection criteria and force-structure plan we can remove installations from his list. After making the same determination and meeting other statutory requirements we can add installations to his list. We are also authorized to make other changes to the list, such as privatization-in-place, as alternatives to actions proposed by the Secretary.

While all installations must be evaluated independently, many decisions that the Commission must make are interrelated. The process is involved and complex. Timely action is critical for the expected military value on which the closure or realignment is based to be realized. The legal opinion I have requested of you will provide the Commission the reasonable certainty needed to make informed decisions regarding not only the National Guard and Air National Guard installations being considered for closure or realignment, but also the many other installations affected by those decisions.



Anthony J. Principi
Chairman



Wiley Rein & Fielding LLP

MEMORANDUM

TO: Hon. Anthony J. Principi
FROM: Fred F. Fielding
DATE: July 25, 2005
RE: Talking Points for OLC Discussion

As per our discussion this morning, below are proposed talking points for your conversation with the Office of Legal Counsel at the Justice Department.

1) As you know, we have asked OLC for an opinion on the issue of whether recent DOD BRAC recommendations that would impact national guard installations require prior approval from affected governors.

a) I just wanted to confirm that the specific issues you are looking at are:

i) the interaction of the BRAC statute with the two “governor approval” statutes [10 USC 18238; 32 USC 104(c)];

ii) whether it is feasible to execute the proposed National Guard and Air National Guard closures and realignments within the statutory time limits in light of intervening litigation brought by various state attorneys general.

b) Can you give me a sense of when OLC expects to issue the opinion?

2) Is there any additional information that we can provide you at this point? For example, we have uncovered some helpful resources on:

a) prior BRAC actions affecting National Guard installations, and

b) the legislative history for both the BRAC statute and the “governor approval” statutes.

I would be glad to have our lawyers send them over to you.

talkings pls from
OCC

represent your concerns
and

Amy Punathun

Mr Fielding believes
the contract we have
had with him and
his attorneys since
our telephone call
yesterday obviates the
need for querying
OCC/OES!

David

1-6-701
legal opinion

OK to Buy

to CoS

copy to Senator

[H. Wainwright +
L. Levin]

email

not internal legal
memo -

[waiting for legal OES]

Chairman -

Letter for your signature.

Also included - Your letter
to the AG and the proposed
amendment.

Senators Biken, Rockefeller,
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and Shumer have joined in
proposing the amendment.

Mr Fielding no longer wants
the questions asked of OES.
David

7/27

Chairman —

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Mr. Fielding no longer wants
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David

7/27

Mr Fielding believes
the contact we have
had with him and
his attorneys since
our telephone call
yesterday obviates the
need for querying
O.C./O.B.S.

Rand

8/11

Resume -

pls review -

views for this?

Amel

We need to include
a reference or 2
to establish authority
for this.

Brad
2909

Legal opinion

via to Byrd

to CofS

copy to Senator
[H. Warner +
L. Levin]

email

not internal legal
memo -

[writing for legal 105]

talking pts from
OCE

represent your courses
and

Amy Punathan