



DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

2521 SOUTH CLARK STREET
 ARLINGTON, VA 22202
 TELEPHONE: (703) 699-2950

Chairman: The Honorable Anthony J. Principi
Commissioners: The Honorable James H. Bilbray • The Honorable Philip E. Coyle III • Admirable 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 Battaglia

May 25, 2005

Chairman:
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 The Honorable Samuel K. Skinner
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Executive Director:
 Charles Battaglia

The Honorable John W. Warner
 United States Senate
 225 Russell Building
 Washington, D.C. 20510

Dear Senator Warner:

The ethics review mandated by statute and regulation of the members of the Defense Base Closure and Realignment (BRAC) Commission has been completed. Appropriate ethics waivers have been made in consultation with the Office of Government Ethics and the Department of Defense's Office of the General Counsel. Except as noted below, all Commission members are able to participate fully in the BRAC process.

During an open hearing on May 19, 2005, four members recused themselves from participation in matters relating to installations in their home states and to installations in other states that are affected by closures and realignments of installations in their home states. Their actions were taken in the interest of avoiding the appearance of loss of impartiality and insuring the integrity of the BRAC process.

Commissioners Coyle and Gehman recused themselves because of their participation in BRAC-related activity in California and Virginia respectively. Commissioner Bilbray and Hansen recused themselves because of their long-time representation in the Congress and other public offices of Nevada and Utah respectively. As a result of their recusals, the commissioners cannot deliberate or vote on matters relating to installations in their home states and to installations in other states that are affected by closures and realignments of installations in their home states.

The commissioners' financial statements were first reviewed incident to their confirmation by the Department of Defense General Counsel. I thoroughly reviewed them again after receiving the list of recommended closures and realignments from the Secretary of Defense. I focused primarily on (1) real estate holdings in locations that may be affected by potential BRAC-related realignments or closures; (2) holdings in environmental remediation companies

that may have long-term contractual relationships with potential BRAC locations; (3) financial holdings and interests in companies with active contracts on military installations that were listed by the Secretary of Defense for possible realignments and/or closures that may give rise to a financial conflict of interest; and (4) personal and business relationships that may cause an actual or apparent loss of impartiality. I will conduct a similar review with regard to installations not on the Secretary's list that the Commission might consider, and ~~advise~~ ^{inform} you accordingly.

The Commissioners who recused themselves from certain matters will not participate in the deliberation or voting regarding those matters. Even so, it is not expected that the Commission will ever lack the quorum necessary to conduct its business, including the possible addition of installations to the Secretary's list, which requires seven votes.

A rigorous ethics review and training program of all Commission staff members has also been completed. Continued vigilance and self-reporting will ensure that if any additional conflicts of interest arise with the Commissioners or staff members they will be quickly identified and appropriate remedial action will be taken.

You may be assured that the public integrity requirements of the Commission have been fully met.

Sincerely,

David C. Hague
General Counsel



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May 23, 2005

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Dear Senator Warner:

I wish to advise you concerning the status of the Commissioners of the Base Closure and Realignment (BRAC) Commission on ethics-related matters. As you are aware, the BRAC Commission is controlled by the Ethics in Government Act of 1978, 5 U.S.C. app. § 101 et seq., requiring that certain financial disclosures be made in order to ensure the public integrity of the BRAC Commission process. All Commissioners, including Chairman Anthony J. Principi, have filed financial disclosure forms which I have now had an opportunity to review. The reports were screened for four basic items: (1) real estate holdings in locations that may be affected by potential BRAC-related realignments or closures; (2) holdings in environmental remediation companies that may have long-term contractual relationships with potential BRAC locations; (3) all financial holdings and interests in companies with active contracts on military installations that were listed by the Secretary of Defense for possible realignments and/or closures that may give rise to a financial conflict of interest; and (4) personal and business relationships that may cause an actual or apparent loss of impartiality.

revised with emphasis on four potential conflict areas:

were thoroughly

This review has been completed at this point, and all appropriate ethics waivers have been made in consultation with the Office of Government Ethics and the Department of Defense's Office of the General Counsel. In this context, however, I wish to bring certain recusals made on the record at a May 19, 2005 open hearing by four of the nine BRAC Commissioners to your attention. Commissioner James H. Bilbray has recused himself of all official BRAC matters relating to Nevada. Commissioner Phillip Coyle has recused himself from California matters or other states affected by realignments or closures that may take place in California. Commissioner Harold W. Gehman, Jr. has recused himself from matters concerning Virginia as well as from other states that may be affected by Virginia-based realignments and closures. Finally, Commissioner James V. Hansen has recused himself from Utah-related matters.

I have duly taken these recusals into account, and believe that the recusal of these Commissioners will not affect or impede the important work of the Commission. The Commissioners who recused themselves from certain matters will not vote or take part substantially or personally in such matters, but a quorum of five of the remaining Commissioners may proceed with the decision-making process. Further, with regard to the potential additions of military installations to the BRAC list, there should be at least seven Commissions remaining to decide upon such additions, if they become an issue.

Additionally, I have instituted an ethics review and training program of all Commission staff members along with the on-site contractors being used by the BRAC Commission, and this process is now completed as well. Therefore, in light of the above, you may be assured that the public integrity requirements of the Commission have been fully met.

Please do not hesitate to contact me if you have any questions concerning this. I may be reached at (703) 699-2952.

DAVID C. HAGUE
General Counsel

JOHN WARNER, VIRGINIA, CHAIRMAN

JOHN MCCAIN, ARIZONA
JAMES M. INHOFE, OKLAHOMA
PAT ROBERTS, KANSAS
JEFF SESSIONS, ALABAMA
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ELIZABETH DOLE, NORTH CAROLINA
JOHN CORNYN, TEXAS
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JUDITH A. ANSLEY, STAFF DIRECTOR
RICHARD D. DEBOBES, DEMOCRATIC STAFF DIRECTOR

United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

March 7, 2005

MEMORANDUM FOR SENATORS WARNER AND LEVIN

FROM: Scott Stucky and Peter Levine

SUBJECT: Conflict of interest issues concerning the Defense Base Closure and Realignment Commission

The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note), as amended by Title XXX of the National Defense Authorization Act for Fiscal Year 2002 (P.L. 107-107, December 28, 2001), authorizes a single round of base closure in 2005. The administrative instrument for the closure decisions, as in the 1991, 1993, and 1995 rounds of base closure, is the Defense Base Closure and Realignment Commission (the Commission.) The procedures set out in the statute raise unique conflict of interest issues. This memorandum discusses those issues.

Background on the base closure commission

The 2005 Defense Base Closure and Realignment Commission is an "independent commission", consisting of nine members, including a Chairman, nominated by the President and confirmed by the Senate. Under the statute, nominations to the Commission must be submitted to the Senate by March 15, 2005. The Commission is to meet in calendar year 2005. The terms of the members, and the Commission itself, terminate on April 15, 2006.

The Chairman and the other members are not full-time employees; they are paid on a daily basis for days they perform services, and they receive travel and per diem expenses. It is expected that their actual service will be fewer than 130 days in a year, which makes them "special government employees" for the purposes of the criminal statutes and regulations governing conflict of interest. Special government employees are subject to certain of the criminal statutes only to the extent that they participated personally and substantially as employees in particular matters. Those serving fewer than 60 days in a year are also exempt from the one-year bar on certain post-employment communications with the department in which they served. Special government employees are also partially or wholly exempt from regulatory constraints on such things as outside employment and political activity.

The Committee has not insisted on divestiture by special government employees whose nominations fall within the Committee's jurisdiction, such as the Regents of the Uniformed Services University of the Health Sciences. Rather, it has allowed recusal in situations in which

a personal financial interest exists.

The members of the Commission, while not full-time employees, perform government services. The following summarizes the Commission's role in the base closure process.

- By May 16, 2005, the Secretary of Defense must transmit to Congress and publish a list of installations recommended for closure or realignment. The recommendations must be based upon criteria specified in the statute, and a force structure plan and inventory which were earlier submitted to Congress.
- The Commission is to have access to all information used by the Secretary in making his recommendations.
- The Commission holds public hearings on the Secretary's recommendations.
- Not later than September 8, 2005, the Commission transmits its findings and conclusions, based upon its review and analysis of the Secretary's recommendations, to the President. Additions to the Secretary's recommendations require a site visit and an affirmative vote of at least seven members of the Commission.
- By September 23, 2005, the President must approve or disapprove the Commission's recommendations.
 - If the President approves the recommendations, he must forward them to Congress by November 7, 2005.
 - If he disapproves the recommendations, he must provide the Commission with his reasons for disapproval.
 - > Thereafter, by October 20, 2005, the Commission must submit revised recommendations to the President.
 - > If the President approves the revised recommendations, he forwards them to Congress.
 - > If the President does not transmit an approved set of recommendations to Congress by November 7, 2005, the closure process is terminated.
- If the President submits approved recommendations to Congress, the recommendations will take effect unless Congress passes a resolution of disapproval (and overrides the anticipated Presidential veto) within 45 days after

the President submits the recommendations (or by the sine die adjournment of Congress).

As illustrated by the foregoing, the Commission is an integral part of the decision-making process, not merely an advisory body. Therefore, Commission Members are subject to the basic conflict of interest requirements in 18 U.S.C. 208, which apply to part-time (special government) as well as full-time employees. Thus, members may not take actions that would have a direct and predictable effect on matters in which they have financial interests.

Generally, government employees may avoid statutory conflict of interest problems through: (1) divestiture; (2) recusal; or (3) a statutory waiver based upon a determination that the financial interests are not so substantial as to effect the integrity of the individual's government service. A waiver may be granted by the official who appointed the employee, or by the Office of Government Ethics for a class of employees.

Normally, the Committee has required Department of Defense appointees to use divestiture as the vehicle for eliminating conflicts of interest. The Committee has on occasion accepted recusal, rather than waiver, when the matter involved a closely-held, nonmarketable financial interest and the recusal would not substantially impair the ability of the nominee to fulfill the duties of office. As noted above, the Committee has accepted recusal and not insisted upon divestiture when dealing with part-time positions under its jurisdiction.

The Committee normally receives only the Standard Form 450, an abbreviated statement of a nominee's financial interests, for nominees to part-time positions. In our judgement, the Commission's functions are of such importance and sensitivity that nominees should provide the Standard Form 278, the full financial report, rather than the Form 450. The Form 278 was provided to the Committee when nominees for the 1991, 1993, and 1995 Commissions were considered. With the Form 278, the Committee will have information on the nominees' holdings equal to that it receives on nominees for full-time civilian positions in the Department of Defense.

Procedures used in the past to address conflict of interest issues in the base closure process

In many cases, the issue of whether a base closure or realignment decision would have a direct and predictable effect on a particular nominee's financial interests is a matter that cannot be determined until the Secretary's base closure list is announced, an announcement that is not due until May 16. It is likely that Committee action, confirmation, and appointment of the Commission members will have taken place by then. Accordingly, we recommend that the Committee follow the same procedure used during the 1991, 1993, and 1995 base closure rounds, which was worked out at that time between the Committee and the Department.

Under that procedure, the following actions would be taken:

(1) At the time the Secretary's list is announced, the Commission's General Counsel, (assuming one is appointed by that time), working with the DOD General Counsel and the Office of Government Ethics, will review the financial holdings of each member of the Commission and advise the member whether recusal or other remedial action (divestiture or waiver) is necessary.

(2) The Commission's General Counsel will advise the Committee of the results of the review and the actions taken by the members of the Commission.

(3) The Commission's General Counsel will establish a procedure that will provide for similar reviews, and information to the Committee, when and if the Commission considers taking action with respect to installations not on the Secretary's list.

In the base closure rounds held in the 1990s, application of this procedure resulted in some members recusing themselves from the consideration of certain installations, other members being granted waivers because of the nature and the breadth of their holdings, still others being required to divest certain holdings, and at least one member resigning from the Commission because he was unwilling to divest himself of certain interests.

In a letter dated February 22, 1993, BRAC Commission Chairman Courter provided the following additional information concerning the operation of the recusal process:

When it has been determined by the Commission's General Counsel that a Commissioner has a potential conflict of interest and the recommended remedial measure is recusal in regards to the base, to avoid a conflict of interest or perception of a conflict, the Commission will adopt the following policy: the Commissioners shall be prohibited from participation in any and all discussions, debate and actions regarding the base in question. Additionally, Commissioners will not participate in any discussions, debate or actions involving bases that are being considered as substitutes to the first base in question. The prohibition regarding substitute bases will take effect the moment the additional base(s) is/are being considered as substitute(s) to the original base.

We would anticipate that the 2005 Commission would operate under similar constraints with regard to individual members who are recused from consideration of particular bases.

Conclusion

The Office of Government Ethics agreed with this procedure in the 1991, 1993, and 1995 BRAC rounds. In our judgement, these arrangements appropriately balance the necessity for adjustments caused by the statutory schedule of the Commission, the criminal conflict of interest statutes, and the Committee's accepted conflict of interest practices.





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July 14, 2005

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Dear Senator Warner:

I wish to further inform you concerning the status of the Commissioners and staff members of the Defense Base Closure and Realignment (BRAC) Commission on ethics-related matters. I reported to you by letter of May 23, 2005, that the BRAC Commission was in compliance with the ethics review requirements mandated by statute and applicable regulations. Pursuant to that review, appropriate ethics waivers were issued, and recusals by certain Commissioners were entered into the record.

In response to the possibility of adding military installations that do not appear on the Secretary of Defense's list of recommendations for closures and realignments, an additional ethics review has now been completed. As a result, new ethics waivers have been issued in consultation with the Office of Government Ethics and the Department of Defense's Office of General Counsel. Except as noted in my letter to you of May 23, 2005, all Commission members remain able to participate fully in the BRAC process.

In addition, a rigorous ethics training program for all BRAC Commission staff members along with a full review of their financial disclosure statements has been completed. Thus, the Commission is now and will remain in full compliance with all mandatory ethics laws and regulations. Continued vigilance and self-reporting will ensure that any future conflicts of interest that may arise with respect to the Commissioners or staff members will be quickly identified and remedied.

You may be assured that the public integrity requirements of the Commission have been fully met.

Senator Levin has been informed by separate correspondence of the satisfactory completion of this ethics review.

DAVID C. HAGUE
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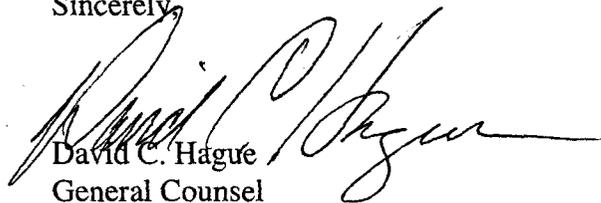
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Senator Warner has been informed by separate correspondence of the satisfactory completion of the ethics review of the members of the BRAC Commission.

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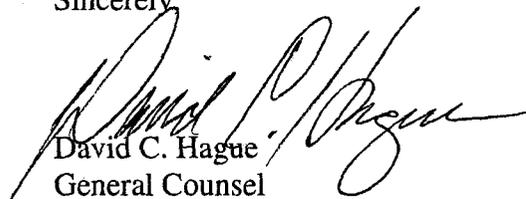
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