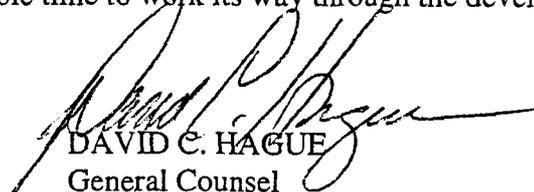


BRAC/GC/dch
May 23, 2005MEMORANDUM FOR THE CHAIRMAN
DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Subj: SECDEF AUTHORITY TO EFFECT CHANGE ICW NG AND ANG FACILITIES

Encl: (1) Ltr from Chairman to AG of U.S.

1. The enclosed letter from you to the U.S. Attorney General requests his legal opinion regarding the authority of the Secretary of Defense to close, realign, or otherwise change the status of National Guard and Air National Guard facilities. Two provisions of the United States Code referenced in the enclosure indicate that the Secretary can take such actions only with the consent of the governor of the state in which the facility is located. The BRAC statute, as amended, arguably gives the Secretary authority to effect such changes. Other statutes may also be interpreted to give him that authority and/or limit the ability of state governors to interfere in actions by the Secretary. I have not, however, identified any unquestionable authority to support the Secretary's belief that he has the subject authority.
2. I have sought information from DoD General Counsel about any position they have taken on the issue but have received no reply. I have had better fortune in my contact today with the Congressional Research Office. Their American Law Division is preparing an opinion on the issue due for release to interested parties in the Congress this week. I am told that we will likely be able to get a copy of the opinion. We are also checking with the National Guard Bureau legal office to determine if they have developed a position on the issue that they are willing to provide to us.
3. You will recall that Under Secretary Wynne stated in this testimony last week that DoD believes the matter to have been settled in the 1995 BRAC. Others mentioned at the hearings that the process and decisions had been coordinated with state adjutants general. That involvement and concurrence may be deemed tantamount to approval by governors, especially if the adjutants general have delegated authority to act in such matters.
4. A favorable response to your request of the Attorney General for an opinion seems unlikely. He will probably have the same concern DoD appears to have about providing executive branch legal support to the independent (of the legislative and executive branches) BRAC Commission. He may also have already advised the President on the issue and be unwilling to divulge information he considers protected by the attorney-client privilege. If he is willing to issue an opinion, it will probably take considerable time to work its way through the development and release process.



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23 MAY 2005

Chairman:
The Honorable Anthony J. Principi

Commissioners:
The Honorable James H. Bliley
The Honorable Philip E. Coye 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 Eken Turner, USAF (Ret.)

Executive Director:
Charles Battaglia

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.

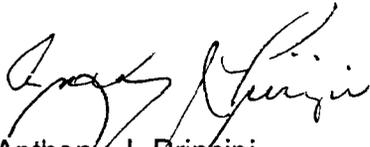
I ask for your opinion on this issue: does the Federal government, acting through the Defense Base Closure and Realignment Act of 1990, as amended, possess the authority to carry out the proposed realignments and closures of Army National Guard and Air National Guard installations in the absence of a 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