

United States Senate

WASHINGTON, DC 20510

June 17, 2005

Honorable Anthony J. Principi
Chairman, Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Mr. Chairman:

The Defense Base Closure and Realignment Act of 1990, as amended, provides for establishment of the 2005 Base Closure and Realignment (BRAC) Commission and its carrying out of certain statutory duties with respect to the closure and realignment of military installations. The Act is generally silent on the internal procedures to be followed by the Commission, leaving it up to the Commission to adopt its own internal rules of procedure.

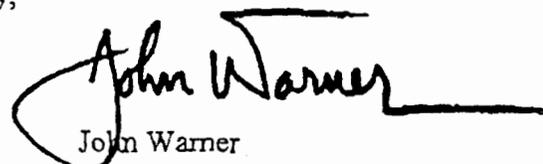
We are writing to express our concern with a possible interpretation of the Commission's procedural rules that may restrict the ability of the Commission to carry out its duties under applicable law. The procedural rule in question provides generally that actions taken by the Commission (other than certain actions which require seven affirmative votes by statute) must be approved by a majority of the Commissioners "serving at the time." We understand that this rule could be interpreted to require a minimum of five affirmative votes, regardless of the number of recusals by individual Commissioners, for any action of the Commission on a particular closure or realignment recommendation proposed by the Secretary of Defense.

We recognize the necessity for a recusal procedure for individual Commissioners in order to protect the Commission and individual Commissioners from conflicts of interest or the appearance of such conflicts. However, such an interpretation of the rule cited above may result in a situation in which a particular Commission action that is supported by a majority of the Commissioners who are actually voting on the matter would fail for want of five affirmative votes. This interpretation would undercut the ability of the Commission to act in accordance with the views of a majority of Commissioners voting on a particular matter.

We request that the Commission, which has the ability to modify its rules, do so in a way that clearly states that individual Commissioners who have recused themselves from a particular matter would be deemed to be not serving *with respect to that matter*. This will preserve the principle of majority decisionmaking by the Commission, while also enabling the Commission to carry out its statutory responsibilities in light of multiple recusals.

Sincerely,


Ted Stevens
Chairman, Subcommittee on Defense
Committee on Appropriations


John Warner
Chairman
Committee on Armed Services

BRAC/GC/dch
June 17, 2005

MEMORANDUM FOR THE CHAIRMAN AND COMMISSIONERS
DEFENSE BASE CLOSURE AND REALIGNMENT (BRAC) COMMISSION

Sub: COMMISSIONER PARTICIPATION IN DELIBERATIONS, REGIONAL AND
OTHER HEARINGS, AND SITE VISITS

Ref: (a) Defense Base Closure and Realignment Act of 1990 (as
amended)

Encl: (1) Procedural Rules of the 2005 Defense Base Closure and
Realignment Commission
(2) Memorandum to Commissioners of May 19, 2005
(3) Adding Installations to the Secretary's List for
Consideration and Review
(4) BRAC definitions
(5) Partial transcript of Commission May 19, 2005 hearing
(6) Ethics agreement signed by all commissioners

1. The following discussion is provided to assist in a
more complete and common understanding of the roles and
responsibilities of the commissioners in the BRAC process.

KEY STATUTORY PROVISIONS

2. Principal guidance for BRAC proceedings is contained in
reference (a), which provides, relevant to this discussion, the
following:

- The Commission shall be composed of nine members (the 1988
BRAC Commission had 12 members; other BRAC Commissions had
eight members).
- The Commission may make changes in any of the recommenda-
tions made by the Secretary if the Commission determines
that the Secretary deviated substantially from the force-
structure plan and final criteria in making his
recommendations.
- The Commission may not consider making a change in the
recommendations of the Secretary that would add a military
installation to the Secretary's list of installations
recommended for closure or realignment unless . . . the
decision to add the installation for Commission

consideration is supported by at least seven members of the Commission.

- The Commission may not make a change in the recommendations of the Secretary that would close a military installation not recommended for closure by the Secretary, would realign a military installation not recommended for closure or realignment by the Secretary, or would expand the extent of the realignment of a military installation recommended for realignment by the Secretary unless the decision of the Commission to make the change . . . is supported by at least seven members of the Commission.

VOTING

3. With the exception of the seven-of-nine vote requirement (unique to the 2005 BRAC), no guidance is provided in the statute for voting - what constitutes a quorum, majority, etc. At its May 19, 2005 hearing, the 2005 BRAC Commission, following the practice of prior BRAC Commissions, adopted the procedural rules contained at enclosure (1). The rules have changed very little in the succession of BRAC Commissions. Addition of the seven-of-nine vote requirement to consider and add bases to the Secretary's list has been the only significant modification to the rules.

a. Highlights of the rules are:

- The Commission can meet at the call of the chairman or at the request of a "majority of the commissioners then serving."
- One or more commissioners can hold a public hearing, but five of nine "commissioners serving at that time" would have to be present to act on any closure or realignment recommendation.
- Seven of nine "commissioners serving at that time" would have to be present to consider and act to close an installation not recommended for closure by the Secretary, realign an installation not recommended for closure or realignment by the Secretary, or expand the extent of the realignment of an installation recommended for realignment by the Secretary.

- Any other issues that may arise during Commission meetings or hearings (motion to adjourn, extend time, etc.) are resolved "by a simple majority of commissioners present."

b. The first three situations described above specify that the number of commissioners required to act is:

- a "majority of the commissioners then serving" or
- five of nine "commissioners serving at that time" or
- seven of nine "commissioners serving at that time."

The fourth situation described above requires "a simple majority of commissioners present."

c. "Majority of the commissioners then serving" and "commissioners serving at that time" can only be understood to mean the full complement of commissioners, which is nine commissioners. Accordingly, so long as there are nine commissioners serving (the number eligible to vote is not relevant), the votes of at least five commissioners are always required to approve or disapprove recommendations by the Secretary or Commission.

d. If there is not a vote of five commissioners to approve a Secretary or Commission recommendation, the recommendation does not go forward to the President. A synopsis of the rules provided to the commissioners prior to their adoption at the Commission hearing of May 19, 2005 is contained at enclosure (2).

4. The seven-of-nine vote requirement only applies to "adds." "Adds" are additions to the Secretary's list of recommendations for closure or realignment, not changes to the recommendations that result in additions to the manpower, materiel or missions of an installation.

5. The seven-of-nine vote requirement comes into play only when the Commission recommends a greater loss (including closure) to a given installation than the Secretary recommended. (Those are "adds" in the statutory parlance.) That is, seven of nine votes are required when:

- closing an installation not recommended for closure by the Secretary,
- reducing the operations on a given base to a greater extent than was recommended by the Secretary, or

- reducing operations at a given base that was not recommended for reduction by the Secretary.

6. An installation involved in the "adds" process that is not recommended for either closure or realignment - but is in fact a "gainer," requires only five, not seven of nine votes. A summary of the "adds" process is contained at enclosure (3).

7. Certain actions that were either taken or considered in the past that no longer have relevance to the BRAC process include: disestablishment, redirection, relocation, reopening and moth-balling. These and other words important to understanding past and present BRAC processes are defined in enclosure (4).

RECUSALS

8. To avoid even the appearance of lack of impartiality and enhance the public's confidence in the BRAC process, four of our nine commissions have disqualified themselves by reason of real or perceived prejudice or conflict of interest from deliberating and voting on matters directly relating to installations in their home states.

9. Commissioners Bilbray, Coyle, Gehman, and Hansen recused themselves at the Commission's May 19, 2005 hearing in order to place the impartiality of the Commission beyond question. (The applicable portion of the transcript from the hearing is contained at enclosure (5).) Commissioners Bilbray and Hansen recused themselves for reasons identical to those that prompted Senator Dixon to recuse himself in 1995 when he served as Chairman of that BRAC Commission. Commissioners Coyle and Gehman recused themselves as a consequence of a binding ethics agreement that all commissioners signed during the vetting process associated with their nominations. A copy of the agreement is contained at enclosure (6).

10. Commissioners Coyle and Gehman recused themselves because of their participation in BRAC-related activity in California and Virginia respectively. Commissioners 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 or to installations in others states that are substantially affected by closures and realignments of installations in their home states.

11. Adopting a policy that controlled in past BRACs, the Chairman has determined that:

"When it is 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 a 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."

12. The Chairman has also determined as a matter of policy that we will make the greatest reasonable effort to minimize the number of direct and indirect conflicts but permit conflicted commissioners as necessary to participate in regional hearings (and site visits when the conflicted commissioner is not the only commissioner visiting). Participation is allowed even though the recused commissioners will be unable to deliberate and vote on all of the installations discussed at the hearings (site visits). Their direct exposure to as much information and as many concerned citizens as possible is recognized as being vitally important to the completion of the Commission task of open, fair, and comprehensive consideration of the final selection criteria, force-structure plan, and worldwide infrastructure inventory. Other commissioners at the hearing and staff will also gather data, so there is no real possibility that the recused commissioner(s) could be seen as filtering the Commission's view of an installation.

DAVID C. HAGUE
General Counsel

An Evaluation of the Proposed Change to the Commission's Dispositive Voting Rule

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Proposed Change to the Voting Rule

- A proposal has been made for the Commission to adopt a recusal-based rule, where “Commissioners who have recused themselves from a particular matter would be deemed to be *not serving with respect to that matter.*”

Existing Bright-Line Voting Rule

- For dispositive action, “a majority of the members ... serving” must vote
- Contained in procedural rules adopted by the Commission
- The “majority of the members ... serving” rule
 - Has remained unchanged since 1991
 - Has been consistently interpreted since 1991
 - Has effectively required 5 votes since 1991

Dispositive Action (Less “Addds”)

- Action on
 - “(a) the recommendations of the Secretary submitted to the Commission in accordance with the Act,
 - “(b) the Commission’s report to the President in accordance with the Act, or
 - “(c) a revised list of recommendations in accordance with the Act”

Statutory Revisions for 2005

- The Defense Base Closure and Realignment Act of 1990 was amended for the 2005 Commission to require:
 - 9 rather than 8 commissioners
 - 7 of 9 votes to “add” a closure or realignment
- The Act was not amended to alter the bright-line “majority of the members ... serving” rule requiring 5 votes for dispositive action in effect since 1991

Effect of Statutory Revisions I

- Introduction of the “7 of 9” “add” rule
 - Without 7 votes, there is no “add”
 - Admits no exceptions regardless of absences, recusals, or attrition of Commissioners
 - Consistent with the bright-line “majority of the members ... serving” rule that had been present in the Commission rules since 1991, which admitted no exception other than attrition

Effect of Statutory Revisions II

- Expansion from 8 to 9 Commissioners:
 - Diminished the “parliamentary advantage” enjoyed by the Department of Defense recommendations in a body of 8
 - 5 of 9 votes is easier to obtain than 5 of 8
 - Reduced the likelihood of a tie vote
 - Tie votes (4 to 4) resulted in failure of motion
- Under expanded 9-member Commission, 5 votes are still required to carry a motion

Comparison of Bright-Line Rule to Recusal-Based Rule

Voting Members	9	8	7	6	5
“Adds” under Statute	7	7	7	7	7
Proposed Change	7	7	7	7	7
Bright-Line Rule	5	5	5	5	5
Proposed Change	5	5	4	4	3
Difference in Votes			1	1	2

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Incidence of Recusals Correlated with Voting Rule Comparison

Voting Members	9	8	7	6	5
Incidence	100	67	18	5	0
“Adds” under Statute	7	7	7	7	7
Proposed Change	7	7	7	7	7
Bright-Line Rule	5	5	5	5	5
Proposed Change	5	5	4	4	3

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Change

- **Must be justified in context**
 - Current bright-line rule is consistent with expectation established by past practice
 - Current rule is consistent with bright-line “7 of 9” statute rule
 - Proposed recusal-based change would please some stakeholders by improving their perceived position, but displease others by degrading their perceived position

Advantages of Bright-Line Rule

- “Majority” is determined by an unchanging, objectively established count, not by shifting, subjectively established recusals
 - Later legal challenges will find no traction attacking the bright-line rule, but may make headway against the subjective judgment of individual recusals
- “Substantial participation” need not be defined

Drawbacks of Recusal-Based Rule

- Recusals will become determinative of the entire Commission's threshold of action
- As the number of recusals increase, the size of the majority will decrease
 - With 3 recusals, “4 of 9” would constitute a majority
 - With 4 recusals, “3 of 9” would constitute a majority

Drawbacks of Recusal-Based Rule

- Political pressure on individual Commissioners to exercise or withdraw recusals in particular cases will escalate dramatically
 - Exposure to potential criminal liability
 - Perceptions of political manipulation of what was designed to be an objective process

Drawbacks of Recusal-Based Rule

- Intemperate statements by individual Commissioners will have greater impact on the legitimacy of the Commission's work as whole
 - Receive greater scrutiny
 - Provide basis for recusal and legal challenge
 - Rejoinders and rebuttals will increase perception of political manipulation

Drawbacks of Recusal-Based Rule

- “Substantial participation” will become a matter of interminable public debate

Recommendation

- Make no change to the existing bright-line rule
- Provide Senators Warner and Stevens with this brief via counsel
- Respond to Senators Warner and Stevens via public letter reassuring them and the public that the Commission will not be hobbled by multiple recusals