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MEMORANDUM TO CHAIRMAN COURTER

FROM: Sheila C. Cheston, General Counsel  
RE: Community Requests to Open Military Installations

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This memorandum addresses briefly the issue whether the Defense Base Closure and Realignment Commission (the "Commission") has the authority to respond affirmatively to a community's request to consider for "opening" a military installation ordered closed under prior BRAC legislation, and ultimately to recommend to the President that the installation be opened.<sup>1</sup> As more fully set forth below, the language of the 1990 Defense Base Closure and Realignment Act, as amended (the "1990 Act"), the legislative intent of the 1990 Act and practical considerations all suggest the conclusion that the Commission may not have that authority, at least absent extraordinary circumstances.

1. The Language of the 1990 Act.

Nothing in the plain language of the 1990 Act expressly supports the proposition that the Commission has authority to recommend, at a community's request, that a military installation be opened or remain open (even if the installation is closed, or in the process of being closed, pursuant to previous BRAC legislation). The language of the 1990 Act addresses exclusively the closure and realignment<sup>2</sup> of domestic military installations: The statute is entitled the "Defense Base Closure and Realignment Act of 1990" (Sec. 2901(a) (emphasis added)); its purpose is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States" (Sec. 2901(b) (emphasis added)). It establishes the "Defense Base Closure and Realignment Commission" and provides that the Commission shall have the duties set forth in the Act.

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<sup>1</sup> This memorandum is not, and is not intended to be, a full analysis of the issue, and does not address all arguments that would be made if this issue were being fully briefed.

<sup>2</sup> "Realignment," for purposes of the 1990 Act, includes "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." Sec. 2910(5) (emphasis added).

Subparagraph 2903(d), entitled "Review and Recommendations by the Commission," outlines the Commission's duties and role in the statutory process. It provides:

(1) after receiving from the Secretary of Defense a list of military installations the Secretary recommends for closure or realignment, the Commission shall hold hearings on the recommendations (Sec. 2903(d)(1));

(2) the Commission may make changes to the Secretary's list of military installations for closure or realignment (including adding installations for closure or realignment, increasing the extent of a realignment, and removing installations from the list) provided it finds a substantial deviation and satisfies other statutory criteria (Secs. 2903(d)(2)(B), (C) and (D)); and

(3) the Commission shall, by July 1, 1993, transmit a report to the President "containing the Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendation for closures and realignments of military installations inside the United States" (Sec. 2903(d)(2)(A)).<sup>3</sup>

Nowhere in the 1990 Act does it provide that the Commission has the authority to consider, and recommend to the President, that a military installation not included in the Secretary's recommendations be opened, reopened or kept open; and no language in the Act appears to contemplate or assume that the Commission has

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<sup>3</sup> Subparagraphs 2903(d)(2)(C) and (D) require that the Commission give 30 days notice and conduct a public hearing if it intends to add a military installation to the Secretary's list of installations recommended for closure or for realignment, or to increase the extent of a recommended realignment -- that is, if the Commission intends to take previously unidentified actions that could affect substantially the local community. The list of actions that trigger the notice and hearing requirement does not include adding a military installation for purposes of opening or reopening it, even though that action too could affect substantially the local community. Although these provisions do not speak directly to the issue whether the Commission can add a military installation to the Secretary's list for purposes of reopening it, their silence with respect to base openings may lend indirect support to the conclusion that Congress did not intend for the Commission to have the authority to reopen installations at a community's behest.

such authority. It can also be said that nothing in the Act explicitly provides that the Commission does not have this authority. However, there is little in the statute or its legislative history to suggest that one should read this authority into the Act's silence and, as discussed immediately below, to do so would very arguably run counter to the apparent legislative intent.

## 2. Legislative History.

The legislative history of the 1990 Act, amendments to the Act, and its 1988 predecessor, confirm that the legislation was intended "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." 1990 Act, Sec. 2901(b) (emphasis added). The legislation was enacted against a backdrop of years of frustration with the government's inability to close military installations in a timely, efficient and equitable manner. The difficulties lay not with the opening of bases, but with their closure and the attendant loss of jobs and economic benefits.

The legislation was intended to achieve two broad goals: (1) to establish a mechanism that would ensure that bases would actually be closed and/or realigned; and (2) to establish a process that would ensure that bases would be closed in a fair and prompt fashion. Thus, the 1990 House Report states: the 1990 Act is intended to create a "fair, impartial base closure process." 1990 House Report at 21. The 1990 Conference Report notes that the 1990 Act was specifically designed to address the concern that "closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court." 1990 Conference Report at 705. It provides further: the Act was intended to establish "an independent, outside commission [that] will permit base closures to go forward in a prompt and rational manner." *Id.* Similarly, the 1992 House Reports states: "The process established by this Act created fair and expedited procedures for closing military installations in the United States." 1992 House Report at 298.

In addition, Congress has on at least two occasions resisted efforts by local communities and others to undo the decisions of prior BRAC Commissions. In drafting the 1990 Act, the committee:

"assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it. Some of those attempts [came] in Congress from those interested in keeping open a base recommended for closure. Other

attempts [came] from the Department of Defense. A new base closure process will not be credible unless the 1988 base closure process remains inviolate." 1990 House Report at 342.<sup>4</sup>

In 1992, Congress did not pass an amendment proposed by Senator Arlen Specter that would explicitly have required the Commission to reconsider decisions of prior Commissions under certain enumerated circumstances. Cong. Rec. S11959 (August 7, 1992).

### 3. Analysis

The language and intent of the 1990 Act relate exclusively to base closures and realignments. There is no mention of base openings. It is fairly clear that the Commission would not have the authority to recommend, at a local community's request, that the government expend funds to open a brand new base, to support a new mission or one currently located elsewhere. The more difficult issue is whether, at a community's request, the Commission can recommend that a base that is still in the process of being closed, pursuant to BRAC legislation, be kept open and receive a realignment from elsewhere. I suggest the better answer to that question is no, at least absent compelling national security or other circumstances. Regardless whether the base is yet fully closed, the law (prior BRAC legislation) requires that it will be closed in the near future. To reverse that decision, the Commission would still have to recommend that the base be opened and there is little if anything in the statute or its history to suggest the Commission has the authority to do that at a community's request.

In addition, if local communities could require the Commission to devote precious time and resources to reconsidering any and all decisions of a prior Commission to close a base, it would severely hamper and potentially paralyze the process. If BRAC legislation ordering the closure of a base were, in effect, subject to appeal in the next BRAC round by aggrieved communities, the legislative

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<sup>4</sup> At the same time, Congress made clear that the Air Force could not decline to carry out the 1988 recommendation concerning Norton Air Force Base (sec. 2925) and further required the Secretary of Defense to "direct each of the Secretaries of the military departments to take all actions necessary to carry out the recommendations of the Commission on Base Realignment and Closure and to take no action that is inconsistent with such recommendations" (*id.*).

intent to create "fair and expedited procedures for closing military installations in the United States" (1992 House Report at 298) would be significantly undermined.

#### 4. Countervailing Considerations.

A community interested in having the Commission reconsider a prior decision to close a military installation in its area might argue that (1) the Commission's authority to reconsider a decision of a prior Commission is the same regardless whether the reconsideration is proposed by the Secretary of Defense, the Commission itself or a local community; and, accordingly, (2) if the Commission considers the "redirects" on the Secretary's list, or at its own initiative, the Commission must also consider a community's proposed "redirect."<sup>5</sup>

More specifically, the community might argue as follows: under the 1990 Act, the Secretary is directed to transmit to the Commission "a list of the military installations inside the United States that the Secretary recommends for closure or realignment." Similarly, the Commission is directed to transmit to the President the Commission's recommendations for "closures and realignments." If "redirects" (and recommendations to keep open bases previously ordered closed, in particular) are "closures or realignments" for purposes of the Secretary's recommendations, then they must also be considered "closures or realignments" for purposes of the Commission's recommendations and "adds." Also, if the Commission can "add" redirects to the list at its own initiative, then it must properly consider redirects proposed by a community.

Numerous important distinctions can be drawn, however, (1) between the role and authority of the Secretary of Defense in the area of base closures/openings and those of a local community and (2) correspondingly, between the Commission's authority to consider a recommendation on the Secretary's list and a recommendation that originates with a local community:

-- Subject to congressional approval, the Secretary (unlike a local community) has the authority to open military installations wholly apart from the base closure process and without the Commission's blessing (provided, of course, the base opening is not

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<sup>5</sup> The Secretary's March 1993 recommendations include numerous "redirects," and a few proposals to reopen bases ordered closed in prior rounds (see, e.g., Carswell AFB and Rickenbacker AFB).

inconsistent with BRAC legislation<sup>6</sup>). Moreover, if the Secretary wants to open (or reopen) a base and realign an over-threshold mission to that base, then it must work through the BRAC process.

-- Under the 1990 Act, the Secretary (not local communities) provides the initial list of military installations on the basis of which the Commission is instructed to begin its investigative and deliberative process.

-- As a policy matter, the Secretary (unlike local communities) must have some flexibility to change our national military force and base structure to respond to changing world circumstances and strategic needs.

These and other distinctions suggest that it may be reasonable for the Commission to respond differently depending on whether the recommendation to reconsider a prior closure comes from the Secretary (and maybe the Commission itself) or a local community. While, as noted above, it would likely be inconsistent with the legislative intent to permit local communities potentially to paralyze the process by requiring the Commission to re-evaluate any or all decisions made in the prior round, it may not be unreasonable to assume that Congress intended to provide the Secretary of Defense with somewhat greater latitude in compiling his list of recommendations for the Commission to consider.<sup>7</sup>

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<sup>6</sup> The Secretary does not have the authority to disregard or thwart a BRAC legislative directive to close or realign a military installation.

<sup>7</sup> In addition, Congress passed the 1991 amendments to the Base Closure Act presumably with knowledge of the fact that the 1991 Commission considered redirects (though not reopenings) recommended by the Secretary, and without amending the Act to provide that the Commission could not consider redirects from the Secretary.