Attorney Client Privileged Communication
November 21, 1994

DCN: 12144

MEMORANDUM

To: Chairman Dixon

From: Mary Ann Hook. General Council

I. INTRODUCTION

This memorandum discusses the legal aspects of the Base Closure and Realignment Commission's Consideration of redirects and re-opening. Included are excerpts from the Base Closure Act, its legislative history, past actions by the 1991,1993 commission and the Secretary of defense (SecDef) and arguments surrounding the subject of redirects and re-openings.

The term redirect and reopening are used colloquially by the base closure community yet there are no legal or even written definitions published by the commission or department of defense (DOD). The commission generally refers to a redirect when the secretary of Defense or the Base Closure Commission recommends changes to a previous recommendation that is now law. For example, the SecDef recommends a different receiver site of a squadron or unit than the one directed by a previous base closure round. A redirect can be proposed to change actions recommended for realignment or a closure

The term reopening generally refers to when the base's status changes from a closure to a proposal to keep open all or part of the base. The words "redirect and reopen" have not been used by the Secretary of Defense. The proposed recommendations are called "changes to previously approved BRAC recommendation" For purposes of this memorandum. These proposed changes will be referred to as redirects and reopening.

II. THE LAW

The base closure act does not explicitly address whether the commission has the authority to review and make changes to previous commission recommendations that have become the law. The languages of the 1990 act address the role of the commission to make recommendation on the closure and realignment of bases. The Commission can change the secretary's recommendation on military installations if the commission follows the public hearing requirements and the finds the deviated substantially from the force structure and final criteria.[1]

The law and its legislative history does support the theory that after years of stalemate and delay in congress's ability to close bases. The commission was created in order to provide a fair process to result in the timely closure and realignment of military instillations inside the United States.[2] The commission was designed to remedy a

[1] Title XXIX of P.L 101-510. The Defense base Closure and Realignment Act of 1990. As amended Section 2903 (d).
[2] Id section 2901(b)

previous failing of the previous closure process. "The closure and realignment takes a considerable period of time and involve numerous opportunities for challenges in court [3]"In 1992. The report of the House Armed Services committee called the Commission process fair and expedited procedures for closures of military installations in the United States.[4]

The law requires the Secretary of Defense to consider all military instillations inside the United States equally without regard to whether the instillation has been previously considered for closure or realignment.[5] DOD issued guidance regarding this provision to its military departments and defense agencies.

> This guidance requires them to treat to: treat all bases equally. Must consider all bases equally in selecting bases for closure or realignments under the Act. Without regard to whether the instillation has been previously considered for closure or realignment by the Department. This Policy does not apply to closure or realignment that fall below threshold or to the 86 bases closed under P.L. 100-526 (the 1998 commission).[6]

This guidance, published in the federal register does not prohibit the secretary from considering previous closure actions proposed by the commission and now enacted into law it merely requires that the secretary review all others equally.

Congress has amended the Base Closure Act numerous times since its enactment in 1990. Amendments include a jurisdiction issue. (Removing the Army Corp of engineer from base closure's Jurisdiction) and increased openness (requirements that certified data be submitted to the congress within a 24 hour period). With Congress proactive role in monitoring the process. It can be argued that if the commissioner or the secretary past actions on redirects and reopening in 1991 and 1993 were objectionable that congress would have responded by amending the law. In fact, there was an opportunity to limit the authority of the Commission to reconsider decisions of prior commissions under certain enumerated circumstances. Cong Rec. s11950 (August 7, 1992). This amendment failed.

For the sake of argument, How far could the Commission go before Congress would act to curtail its jurisdiction? Could the Commission on its own initiative Recommended as part of realignment. The construction of base? The commission did on its own. Absent from the Secretary of Defense. Vote to close or "halt construction "of a Naval Marine Corps air facility that was being built in Johnstown. P.A.[7] Could the commission have halted construction Johnstown and recommended construction of an air facility elsewhere?

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[3] Conference Report National Defense Authorization act for fiscal Year 1991. p.705
[4] House Report National Defense Authorization act for fiscal year 1993 p.299
[5] The Base closure Act section 2903 © (3) (A)
[6] Federal Register. Vol 56 #32 Friday February 15, 1991.
[7] The Defense Base Closure and Realignment Commission 1993 Report to the President pp.1-29-1-39

III. SECRETARY OF DEFENSE GUIDANCE ON CHANGES TO RECOMMENDATIONS

The office of the secretary of defense issued guidance in May 5, 1992 memorandum to the services regarding when changes to previously approved BRAC decision should be recommended to the commission. The guidance required changes be necessitated by revision to force structure. Mission or organization since the commission recommendation was made. "In a letter from Mr. David Berteau. Office of the secretary of defense to Mr . . . . Courter regarding guidance of service recommendation being forwarded to the Commission. Mr. Berteau wrote that the change would be accepted if the department wood significantly benefits either in cost savings or military value"[8] or if it is required to implement a new base closure recommendation.

IV. 1993 COMMISSION'S CHANGES TO PREVIOUS RECOMMENDATIONS

The commission receives and redirects and reopening in the 1993 round from the secretary of defense (SecDef). Most of these redirects were driven by the cost savings that could be projected if the redirect became law.[9] The commission reviewed each redirect and reopening on its own merit and on a case by case basis as it reviews all SecDef recommendations. In other words, the redirect and reopening received no more or less scrutiny that other Sec Def recommendations. The commission did an additional analysis to determine if the services met the OSD or individual service guidance on changing a previously recommended commission action... Although it was the commission's conclusion that in some cases the redirect did not meet he OSD guidance.[10] These results were not relevant for the commission's purpose since the guidance is internal to DoD and did not relate to the commission's charge to find substantial deviation from one force structure and final criteria.

The commissions policy on revisiting past base closure decisions is driven by a respect for the finality of the process –and an understanding that flexibility is essential due to changes in the military environment. Recalculation of cost and when Sec Def new recommendations conflict or make the previous closures or realignment impossible to implement.

The 1993 Commission did not on its own propose changes to previously recommended closures or realignment that were not recommended or at least generated by a 1993 recommendation from SecDef.[11] The 1993 Commission recommended a revision to 1988 commission recommendation for the presidio of San Francisco. The Sec Def recommended a redirect of the sixth Army from the Presidio to NASA Ames instead of the 1998 Commission recommendation to move it to fort Carson. In reviewing this

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[8] 26 March, 1993 Letter to Mr. Courter Principle Deputy A.S.D Production and Logistics.
[9] Internal memo by commission Air Force Team Leader Frank Cirrillo Regarding redirects. 3, April 1993
[10] Id
[11] In reference to the carswell recommendation in 1993. See The Defense Base Closure and Realignment Commission 1993report to the President. pp.1-83.1-84

Proposed change. The commission determine that there was very little difference in the operating cost of staying at the presidio of San Francisco or moving to NASA Ames. There fore it was more economical for the six army to remain at the presidio.[12] The 1993 commission found substantial deviation changes the secdef recommendations and recommended a change to the 1998 Commission recommendation. [13]

The strongest argument to allow the commission t have a screening or more rigorous standard for the secretary's recommendation on redirects and reopening is to prevent the Sec Def from revisiting the decisions just because they contrary to his original recommendations. What more in anticipation of a redirect. The Sec Def may delay implementing a closure or realignment for the year and three quarters of a year between rounds of closures.[14]

Anticipating that the 1995 round may generate redirects. The commission discussed applying a different or additional standard to redirect in 1995. The proposed standard could reflect guidance issued by the secretary of defense in May 1992 and March 1993 as discussed earlier in this memorandum. Chairman Courter presented this idea to the to the senate armed services committee in 1993 believing it would require an amendment to the commission statute. No such provisions was added by the senate thus indirectly supporting argument that the senate rejected placing a higher different burden on the commission consideration of the secretary changes to previous commission recommendations.

V. REOPENINGS

The 1993 commission struggled with the concept of "reopening "a previously recommended base for closure the issue of "reopening" can be divided into three categories of based on the source of the recommendation.

- Those recommended by the Secretary of Defense in his recommendation to the commission.
- Those initiated by the commission alone absent any recommendation of the secretary.
- Those initiated solely by the community whose base was closed in a previous round of closures.

A. Secretary of Defense Recommendations

Some Members of Congress requested that the 1993 Commission reconsider the Luring AFB closure. Loring is slated for closure as a result of the commission recommendations

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[12] The Defense Base Closure and Realignment Commission. 1993 Report to the President pp 1-12. 1-13
[13] Id

[14] The Secretary of Defense has two years to initiate a base closure or realignment and six years for completion from the date that the presidents transmit the report to congress. P.L 510 The Defense Base Closure and Realignment Act of 1990 Sec. 2904(a) (3) (4).

to the commission. The commission publicly discusses whether it should even consider a reopening based solely on the request of the community and the community's advocates. During the debate Chairman Courter said that the service secretaries reexamine decision of their own and were not reticent about making recommendation for redirects.[15] The Commission did not further examine the merits of reopening of Loring AFB.

The Commission has accepted reopenings.[16] From the Secretary of Defense and reviewed them in the same manner as other recommendation unless there is an amendment to the law. The commission cannot apply a standard to reject a recommendation other than to find substantial deviation from the final criteria and force structure.

B. Commission's Initiative

The 1993 Commission investigated reopening of a previously recommended closed base. MCAS Tustin as an alternative to a secretary of defense's recommendation. The secretary provided an alternate scenario that did not require a reopening of a previously closed based. When the secretaries recommendation was transmitted to the commission. The commissions began looking at alternative scenarios. Reopening Tustin was part of one scenario generated by the Commission staff. (The Source of such an idea is not always easy to determine.) It was also advocate strongly by a community that would benefit from the change. The Tustin community opposed reopening MCAS Tustin because it has invested substantially in a base reuse program.[17] At the final deliberation the commission did not vote for the opinion that included reopening MCAS Tustin.

Whether the commission can on its own and contrary to the secretary of defense's recommendations. Make a recommendation to the president that the reverses and earlier proposal and reopen a base slated for closure is a difficult issue. There is precedent for it in the actions of the 1993 Commission.

Arguments in support of allowing the commission to reopen a base on its own initiative include two points First the law does not explicitly restrict it nor has congress reacted to past commission action by amending the statute. Secondly, although the deference should be given to the SecDef the commission had authority to change the secretary's recommendation. Therefore why should a reopening be different?

Arguments against the commission reopening a base on its own initiative are centered on the presumption of finality and implementing timely closures. If the SecDef determines it is vital to reopen the base. Or that a reopening is the only or best option. Than it is assumed from past performance that he would recommend it to the commission. Another reason to prohibit the commission from initiating reopening is if the commission has the

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[15] Transcript may 21,1993 hearing of the 1993 Base Closure Commission p.792
[16] See recommendation on Rickenbacker. Columbus Ohio and Carswell. TX in The Defense Base Closure and Realignment Commission 1993 Report to the President. Pp 1-88 and 1-84.
[17] Id pp 1-17. 1-18

ability it will be lobbied incessantly by communities grasping for one last chance to save their bases.

C. Community Request

The policy of the Commission has allowed communities full access as Chairman Courter said, "a seat at the table." The public has access to all nonclassified materials in its possession received from DoD, the Armed Services and outside sources. Communities have become sophisticated advocates of their positions to save their bases from closure or realignment. They are adversarial toward communities with which their bases are competing. The communities are so sophisticated that they often provide scenarios to the Commission analysts to keep their community from closure or realignment by advocating the closures of other bases. The communities attend their adversaries' hearings and look for the "Achilles" of the competition. Many advocates or lobbyists communicate with the Commission on a daily basis during the intense research and analysis period of Marcy to July.

Although Congress intended an open process, there is no role defined in the statute that provides that communities are equivalent to the authority of Secretary of Defense – or the Commission when it comes to issuing recommendations that must be reviewed by the Commission.

The Commission staff encourages and welcomes information from communities who have bases under consideration by the Commission's lists. Should the Commission allow a community, who had "its day in court" a second hearing by a Commission with new obligations, a Commission which may not be aware of all the information that was presented when the original decision was made?

In 1993, the question of reopening a base when a community along brings forth the argument was answered by the Commission publicly in a hearing on May 21, 1993. (See earlier discussion on Loring AFB.) The particulars of reopening the base were not discussed. The Commission debated whether the Commission should even investigate reopening of a base strictly at the insistence of a community. The Commission declined the request, found that the Secretary of Defense was aware of the particulars of the case and, since he did not send a recommendation to the Commission regarding this particular reopening, the Commission should not hear the case. Mr. Courter said that only under extreme cases should the Commission reopen a base.[18] This discussion clearly provided deference to the Secretary in deciding on redirects/reopenings.

VI. CONCLUSION AND RECOMMENDATION

The law and its legislative history speak about the importance of finality attaching to the Commission's decisions. In past Commissions, this expectation of finality has been balanced with the need for flexibility for a changing military environment, recently

[18] Transcript. May 21, 1993 Hearing of the 1993 Base Closure Commission, pp. 786-93.

discovered cost savings, and/or new recommendations on closures or realignments that would hamper or make impossible the implementation of a Commission's previous recommendations that is not low.

Deference should be given to the Secretary of Defense on redirects and reopenings. The Secretary of Defense is in the best position to recognize exigencies and recommend a redirect or reopening to the Commission. The Commission legally must consider all recommendations transmitted by the Secretary of Defense. Absent an amendment to the law, the Commission can not apply a separate standard to redirects and reopenings. There is no legal authority to reject a recommendation from the Secretary without undertaking the appropriate review and finds substantial deviation from the final criteria and force structure.

It is clear that in order for communities to aggressively pursue their reuse plans, the law that results from the Commission's recommendations must be considered final. This, coupled with the Commission's enormous work and limited time, demands at the very least a policy that the Commission: 1. Does not reexamine past base closure decisions initiated solely by a community, and 2. Considers reexamining decisions when initiated solely by the Commission only in extraordinary circumstances.

The consecutive rounds of closures were not intended as an appeal process for communities to reargue their cases. A policy that limits the Commission's consideration of redirects and reopenings to those sent over by the Secretary and only in rare and extraordinary situations initiated by the Commission gives the Secretary flexibility and provides discretion to the Chairman and the Commissioners for consideration of each recommendation on its merits on a case-by-case basis.

Attorney Client Privileged Communication
November 21, 1994

MEMORANDUM

To: Chairman Dixon
From: Mary Ann Hook, General Counsel
Re: Policy on Redirects and Reopening of Bases

I. INTRODUCTION

This memorandum discusses the legal aspects of the Base Closure and Realignment Commission's consideration of redirects and reopenings. Included are excerpts from the Base Closure Act, its legislative history, past actions by the 1991, 1993 Commission and the Secretary of Defense (SecDef), and arguments surrounding the subject of redirects and reopenings.

The terms redirect and reopening are used colloquially by the base closure community, yet there are no legal or even written definitions published by the Commission or Department of Defense (DoD). The Commission generally refers to a redirect when the Secretary of Defense or the Base Closure Commission recommends changes to a previous recommendation that is now law. For example, the SecDef recommends a different receiver site of a squadron or unit than the one directed by a previous base closure round. A redirect can be proposed to change actions recommended for a realignment or a closure.

The term reopening generally refers to when the base's status changes from a closure to a proposal to keep open all or part of the base. The words "redirect and reopen" have not been used by the Secretary of Defense. The proposed recommendations are called "changes to previously approved BRAC recommendations." For purposes of this memorandum, these proposed changes will be referred to as redirects and reopenings.

II. THE LAW

The Base Closure Act does not explicitly address whether the Commission has the authority to review and make changes to previous Commissions recommendations that have become law. The language of the 1990 Act does address the role of the Commission to make recommendations on the closure and realignment of bases. The Commission can change the Secretary's recommendations on military installations if the Commission follows public hearing requirements and finds the Secretary deviated substantially from the force structure and final criteria.[1]

The law and its legislative history does support the theory that after years of stalemate and delay in Congress's ability to close bases, the Commission was created in order to provide a fair process to result in the timely closure and realignment of military installations inside

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[1] Title XXIX of P.L. 101-510, The Defense Base Closure and Realignment Act of 1990, as amended. Section 2903 (d).

the United States.[2] The Commission was designed to remedy a previous failing of the previous closure process. "the closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court."[3] In 1992, the Report of the House Armed Services Committee called the Commission process a fair and expedited procedure for closures of military installations in the United States.[4]

The law requires the Secretary of Defense to consider all military installations inside the United States equally without regard to whether the installation has been previously considered for closure or realignment.[5] DoD issued guidance regarding this provision to its military departments and defense agencies.

> This guidance requires them to: treat all bases equally, must consider all bases equally in selecting bases for closures or realignment under the Act, without regard to whether the installation has been previously considered for closure or realignment by the Department. This policy does not apply to closures or realignment that fall below threshold or to the 86 bases closed under P.L. 100-526 (the 1988 Commission).[6]

This guidance, published in the Federal Register does not prohibit the Secretary from considering previous closure actions proposed by the Commission and now enacted into law, it merely requires that the Secretary review all others equally.

Congress has amended the Base Closure Act numerous times since its enactment in 1990. Amendments include a jurisdiction issue, (removing the Army Corps of Engineer from Base Closure's jurisdiction) and increased openness (requirements that certified data be submitted to the Congress within a 24 hour period). With Congress' proactive role in monitoring the process, it can be argued that if the Commission's or the Secretary's past actions on redirects and reopenings in 1991 and 1993 were objectionable, that Congress would have responded by amending the law. In fact, there was an opportunity to limit the authority of the Commission when Senator Specter proposed an amendment in 1992 to require the Commission to reconsider decisions of prior Commissions under certain enumerated circumstances. Cong. Rec. s11950 (August 7, 1992). This amendment failed.

For the sake of argument, how far could the Commission go before Congress would act to curtail its jurisdiction? Could the Commission on its own initiative, recommend as part of a realignment, the construction of a base? The Commission did on its own, absent a recommendation from the Secretary of Defense, vote to close or "halt construction" of a Naval Marine Corps air facility that was being built in Johnstown, PA.[7] Could the Commission have halted construction at Johnstown and recommended construction of an air facility elsewhere?

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[2] Id. section 2901 (b).
[3] Conference Report, National Defense Authorization Act for Fiscal Year 1991, p.705.
[4] House Report, National Defense Authorization Act for Fiscal Year 1993, p.299.
[5] The Base Closure Act, section 2903 (c)(3)(A).
[6] Federal Register, vol 56, #32, Friday, February 15, 1991.
[7] The Defense Base Closure and Realignment Commission, 1993 Report to the President pp.1-29-1-30.

III. SECRETARY OF DEFENSE GUIDANCE ON CHANGES TO RECOMMENDATIONS

The Office of the Secretary of Defense issued guidance in a May 5, 1992 memorandum to the services regarding when changes to previously approved BRAC decisions should be recommended to the Commission. The guidance required that changes be "necessitated by revisions to force structure, mission or organization since the Commission recommendation was made." In a letter from Mr. David Berteau, Office of the Secretary of Defense to Mr. Courter regarding guidance of service recommendations being forwarded to the Commission, Mr. Berteau wrote that the change would be accepted if the Department would significantly benefit either in cost savings or military value [8] or if it is required to implement a new base closure recommendation.

IV. 1993 COMMISSION'S CHANGES TO PREVIOUS RECOMMENDATIONS

The Commission received redirects and reopenings in the 1993 round from the Secretary of Defense (SecDef). Most of these redirects were driven by the cost savings that could be projected if the redirect became law.[9] The Commission reviewed each redirect and reopening on its merits on a case-by-case basis as it reviews all SecDef recommendations. In other words, the redirects reopenings received no more or less scrutiny than other SecDef recommendations. The Commission did an additional analysis to determine if the services met the OSD or individual service guidance on changing a previously recommended Commission action.. Although, it was the Commission's conclusion that in some cases, the redirects did not meet OSD guidance,[10] these results were not relevant for the Commission's purposes since the guidance is internal to DoD and did not relate to the Commission's charge to find substantial deviation from the force structure and final criteria.

The Commission's policy on revisiting past base closure decisions is driven by a respect for the finality of the process - and an understanding that flexibility is essential due to changes in the military environment, recalculations of costs, and when the SecDef's new recommendations conflict or make the previous closures or realignments impossible to implement.

The 1993 Commission did not, on its own, propose changes to previously recommended closures or realignments that were not recommended, or at least generated by a 1993 recommendation from the SecDef.[11] The 1993 Commission recommended a revision to the 1988 Commission's recommendation for the Presidio of San Francisco. The SecDef recommended a redirect of the Sixth Army from the Presidio to NASA Ames instead of the 1988 Commission recommendation to move it to Fort Carson. In reviewing this

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[8] 26 March, 1993 letter to Mr. Courter from Principal Deputy A.S.D. Production and Logistics.
[9] Internal Memo by Commission Air Force Team Leader Frank Cirillo regarding redirects, 3 April 1993.
[10] Id.
[11] In reference to the Carswell recommendation in 1993, see The Defense Base Closure and Realignment Commission, 1993 Report to the President, pp. 1-83,1- 84.

proposed change, the Commission determined that there was very little difference in the operating costs of staying at the Presidio of San Francisco or moving to NASA Ames, therefore it was more economical for the Sixth Army to remain at the Presidio. [12] The 1993 Commission found substantial deviation, changed the SecDef's recommendation and recommended a change to the 1988 Commission recommendation.[13]

The strongest argument to allow the Commission to have a screening or more rigorous standard for the Secretary's recommendations on redirects and reopenings is to prevent the SecDef from revisiting the decisions just because they contrary to his original recommendations. What's more, in anticipation of a redirect, the SecDef may delay implementing a closure or realignment for the year and three quarters of a year between rounds of closures. [14]

Anticipating that the 1995 round may generate redirects, the Commission discussed applying a different or additional standard to redirects in 1995. The proposed standard could reflect guidance issued by the Secretary of Defense in May 1992 and March 1993 as discussed earlier in this memorandum. Chairman Courter presented this idea to the Senate Armed Services Committee in 1993, believing it would require an amendment to the Commission's statute. No such provision was added by the Senate thus indirectly supporting an argument that the Senate rejected placing a higher different burden on the Commission's consideration of the Secretary's changes to previous Commission recommendations.

V. REOPENINGS

The 1993 Commission struggled with the concept of "reopening" a previously recommended base for closure. The issue of reopenings can be divided into three categories based on the source of the recommendation.

- Those recommended by the Secretary of Defense in his recommendations to the Commission.
- Those initiated by the Commission alone absent any recommendation of the Secretary.
- Those initiated solely by a community whose base was closed in a previous round of closures.

A. Secretary of Defense Recommendations

Some Members of Congress requested that the 1993 Commission reconsider the Loring AFB closure. Loring is slated for closure as a result of the Commission's recommendation in 1991. In 1993, the Secretary of Defense did not mention Loring AFB in his recommendations to the Commission. The Commission publicly discussed whether

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[12] The Defense Base Closure and Realignment Commission , 1993 Report to the President, pp 1-12, 1-13.
[13] Id.
[14] The Secretary of Defense has two years to initiate a base closure or realignment and six years for completion from the date that the President transmits the report to Congress. P.L. 510 The Defense Base Closure and Realignment Act of 1990, Sec. 2904 (a) (3) (4).

it should even consider a reopening based solely on the request of the community and the community's advocates. During the debate, Chairman Courter said that the service secretaries reexamined decisions of their own and were not reticent about making recommendations for redirects. [15] The Commission did not further examine the merits of e reopening of Loring AFB.

The Commission has accepted reopenings, [16] from the Secretary of Defense and reviewed them in the same manner as other recommendations. Unless there is an amendment to the law, the Commission can not apply a standard to reject a recommendation other than to find substantial deviation from the final criteria and force structure.

B. Commission's Initiative

The 1993 Commission investigated reopening of a previously recommended closed base, MCAS Tustin, as an alternative to a Secretary of Defense's recommendation. The Secretary provided an alternate scenario that did not require reopening of a previously closed base. When the Secretary's recommendation was transmitted to the Commission, the Commission began looking at alternative scenarios. Reopening Tustin was part of one scenario generated by the Commission staff. (The source of such an idea is not always easy to determine.) It was also advocated strongly by a community that would benefit from the change. The Tustin community opposed reopening MCAS Tustin because it had invested substantially in a base reuse program. [17] At the final deliberations, the Commission did not vote for the option that included reopening MCAS Tustin.

Whether the Commission can, on its own and contrary to the Secretary of Defense's recommendations, make a recommendation to the President that reverses an earlier proposal and reopen a base slated for closure is a difficult issue. There is precedent for it in the actions of the 1993 Commission.

Arguments in support of allowing the Commission to reopen a base on its own initiative include two points. First, the law does not explicitly restrict it nor has Congress reacted to past Commission actions by amending the statute. Secondly, although deference should be given to the SecDef, the Commission has authority to change the Secretary's recommendations, therefore why should a reopening be different?

Arguments against the Commission reopening a base on its own initiative are centered on the presumptions of finality and implementing timely closures. If the SecDef determines it is vital to reopen the base, or that a reopening is the only or best option, than it is assumed, from past performance that he would recommend it to the Commission. Another reason to prohibit the Commission from initiating reopenings is if the Commission has the ability, it will be lobbied incessantly by communities grasping for one last chance to save their bases.

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[15] Transcript, May 21, 1993 Hearing of the 1993 Base Closure Commission, p. 792.
[16] See recommendations on Rickenbacker, Columbus, Ohio and Carswell, TX in The Defense Base Closure and Realignment Commission, 1993 Report to the President, pp. 1-88 and 1-84.
[17] Id. pp 1-17, 1-18.

C. Community Request

The policy of the Commission has allowed communities full access and as Chairman Courter said, "a seat at the table." The public has access to all nonclassified materials in its possession received from DoD, the Armed Services and outside sources. Communities have become sophisticated advocates of their positions to save their bases from closure or realignment. They are adversarial toward communities with which their bases are competing. The communities are so sophisticated that they often provide scenarios to the Commission analysts to keep their community from closure or realignment by advocating the closures of other bases. The communities attend their adversaries' hearings and look for the "Achilles" of the competition. Many advocates or lobbyists communicate with the Commission on a daily basis during the intense research and analysis period of March to July.

Although Congress intended an open process, there is no role defined in the statute that provides that communities are equivalent to the authority of Secretary of Defense -- or the Commission when it comes to issuing recommendations that must be reviewed by the Commission.

The Commission staff encourages and welcomes information from communities who have bases under consideration by the Commission's lists. Should the Commission allow a community, who had "its day in court" a second hearing by a Commission with new obligations, a Commission which may not be aware of all the information that was presented when the original decision was made?

In 1993, the question of reopening a base when a community alone brings forth the argument was answered by the Commission publicly in a hearing on May 21, 1993. (See earlier discussion on Loring AFB.) The particulars of reopening the base were not discussed. The Commission debated whether the Commission should even investigate reopening of a base strictly at the insistence of a community. The Commission declined the request, found that the Secretary of Defense was aware of the particulars of the case and, since he did not send a recommendation to the Commission regarding this particular reopening, the Commission should not hear the case. Mr. Courter said that only under extreme cases should the Commission reopen a base.[18] This discussion clearly provided deference to the Secretary in deciding on redirects/reopenings.

VI. CONCLUSION AND RECOMMENDATION

The law and its legislative history speak about the importance of finality attaching to the Commission's decisions. In past Commissions, this expectation of finality has been balanced with the need for flexibility for a changing military environment, recently discovered cost savings, and/or new recommendations on closures or realignments that

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[18] Transcript, May 21, 1993 Hearing of the 1993 Base Closure Commission, pp. 786-93.

would hamper or make impossible the implementation of a Commission's previous recommendation that is now law.

Deference should be given to the Secretary of Defense on redirects and reopenings. The Secretary of Defense is in the best position to recognize exigencies and recommend a redirect or reopening to the Commission. The Commission legally must consider all recommendations transmitted by the Secretary of Defense. Absent an amendment to the law, the Commission can not apply a separate standard to redirects and reopenings. There is no legal authority to reject a recommendation from the Secretary without undertaking the appropriate review and finds substantial deviation from the final criteria and force structure.

It is clear that in order for communities to aggressively pursue their reuse plans, the law that results from the Commission's recommendations must be considered final. This, coupled with the Commission's enormous work and limited time, demands at the very least a policy that the Commission: 1. Does not reexamine past base closure decisions initiated solely by a community, and 2. Considers reexamining decisions when initiated solely by the Commission only in extraordinary circumstances.

The consecutive rounds of closures were not intended as an appeal process for communities to reargue their cases. A policy that limits the Commission's consideration of redirects and reopenings to those sent over by the Secretary and only in rare and extraordinary situations initiated by the Commission gives the Secretary flexibility and provides discretion to the Chairman and the Commissioners for consideration of each recommendation on its merits on a case-by-case basis.

Privileged and Confidential
Attorney Client Communication
Attorney Work Product
Draft -- May 10, 1993

MEMORANDUM TO CHAIRMAN COURTER

FROM: Sheila C. Cheston, General Counsel

RE: Community Requests to Open Military Installations

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.[1] 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 does not have that authority.

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[2] 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.

Subparagraph 2903(d), entitled "Review and Recommendations by

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[1] 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.

[2] "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).

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 remaining 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)).[3]

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 such authority. It can also be said that nothing in the Act

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[3] 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.

explicitly provides that the Commission does not have this authority. However, there is little, if anything, in the statute or its legislative history to suggest that one should take the rather extraordinary step of reading this authority into the Act's silence and indeed, 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.[4]

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

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[4] 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.).

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."[5]

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.

First, their arguments may go more properly to the issues whether the Commission can consider redirects from the Secretary (especially ones that involve prior decisions to close a military installation) or at its own initiatives, than to the issue whether the Commission can consider such requests from a community as well.

Second, distinctions can be drawn (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

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[5] 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).

course, the base opening is not inconsistent with BRAC legislation[6]). 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. Furthermore, 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.[7]

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[6] The Secretary does not have the authority to disregard or thwart a BRAC legislative directive to close or realign a military installation.

[7] 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.

Attorney Client Privileged Communication
November 17, 1994

MEMORANDUM

To: Chairman Dixon
From: Mary Ann Hook General Counsel
Re: Policy on Redirects and Reopening of Bases

I. INTRODUCTION

refers to the instance

This memorandum ~~is to~~ discusses the policy of the Commission for considering redirects and reopenings. A redirect is when the Secretary of Defense or the Base Closure Commission recommends to changes a previous recommendation that is now law, ~~by altering~~ for example by altering the receiver site of a squadron or unit as directed by previous base closure rounds and recommending another location. A redirect can result from a previously recommended realignment or a base closure. A reopening is when a base's status changes from a previous closure to a reopening. The word reopening is a term used by the Commission. The Secretary of Defense did not use the word reopen in his recommendations to change previous base closure recommendations.

Base did not use redirect

The base closure law does not explicitly address whether the Commission can review changes to previous recommendations. However, there are indications in the legislation and its history that Congress emphasized the importance of timely closures of bases when it established the Commission.[1]

The Commission recognizes the presumption of finality that must attach to each round of base closure recommendations that are accepted by the President and subsequently become law. Otherwise, the communities would never be able to plan reuse, and the Commission could never do its work within the timelines required by law. However, along with this presumption, is the recognition that circumstances change, costs can be underestimated and there should be some flexibility for the Secretary of Defense to modify the recommendations under certain circumstances.[2]

II. SECRETARY OF DEFENSE GUIDANCE ON REDIRECTS

May 5

The Office of the Secretary of Defense issued guidance in an April 3, 1992 memo to the services regarding when redirects[3] should be recommended to the Commission. The guidance required that changes be "necessitated by revisions to force structure, mission or organization since the commission recommendation was made." In ~~April~~ March of 1993, David Berteau, Office of the Secretary of Defense, issued guidance at a meeting regarding forwarding service recommendations to the Commission. He said that the change would

[1] The Defense Base Closure and Realignment Act of 1990, Title XXIX of P.L. 101-510, 1990, section 2901 (b)

[2] Transcript of May 28, 1993 hearing pp.

[3] It should be noted that the Secretary of Defense sends reopenings in the guise of a redirect. The term reopening is a Base Closure Commission term.

realignment

be accepted if the Department would significantly benefit either in cost savings or military value.[4] or if it is required to implement a new base closure or realignment recommendation.

III. 1993 COMMISSION ON REDIRECTS

The Commission received redirects in the 1993 round from the Secretary of Defense (SecDef). Most of these changes were driven by the cost savings that could be projected if the redirect became law.[5] The Commission reviewed each redirect on its merits on a case-by-case basis just as it reviews all SecDef recommendations. In other words, the redirects received no more or less scrutiny than other SecDef recommendations. The Commission did an additional analysis to determine if the services met the OSD or individual service guidance. Although, it was the Commission's conclusion that in some cases, the redirects did not meet OSD guidance,[6] this information was not relevant for the Commission's purposes since the guidance is internal to OSD and does not relate to Commission decision making. DoD

The Commission's policy toward revising past base closure decisions was respectful of the finality of the process. The 1993 Commission did not on its own propose any changes to previously recommended closures or realignments that were not, at least in part, recommended to the Commission by SecDef.
The Commission did not separate the SecDef's recommendations on redirects or reopenings to apply a different scrutiny of review. With no guidance in the law regarding the Commission's jurisdiction or ability to reject a Secretary of Defense recommendation other than by finding substantial deviation from the force structure plan and final criteria, the Commission treated all recommendations from the Secretary equally.

Anticipating that the 1995 round may generate a great number of redirects, the Commission discussed the idea of applying a different standard to redirects in 1995. The proposed standard would reflect the intent guidance that was issued by the Secretary of Defense in April 1992 and March ~~April~~ 1993. The Commission proposed this idea to the Senate Armed Services Committee in 1993, believing such a change would require an amendment to the Commission's enabling statute. No such provision was added by the Senate thus supporting the position that the Senate considered placing a higher or different burden for redirects and decided against it.

IV. REOPENINGS

The Commission struggled with the concept of reopening previously closed bases in 1993. The reopenings can be divided into three categories depending on the source of the recommendation.

- Initiated by the community whose base was closed.

[4] Memo by Frank Cirillo regarding redirect, April 1993. 26 Mar 92 letter to Members from Personal Party Affairs
[5] Memo by Frank Cirillo regarding redirects, April 1993.
[6] Id.

- Recommended by the Secretary of Defense in his recommendations to the Commission.
- Initiated by the Commission as an option or addition to the Secretary's list of recommendations.

A. Community Request

The General Counsel's opinion was that only under extremely rare and unusual circumstances should the Commission consider a reopening initiated by a community. To consider a base for reopening merely at the insistence of the community and not by the Secretary is outside the purview and scope of the Commission (see attached memo for analysis and recommendation).

In 1993, the question of issue of reopening a base when a community brings forth the argument was answered by the Commission publicly in a hearing on May 28, 1994. The particulars of reopening the base were not discussed rather whether the Commission should even investigate reopening of a base strictly at the insistence of a community. The Commission declined the request and found that since the Secretary of Defense was aware of the particulars of the case and since he did not send a recommendation to the Commission regarding this particular reopening, the Commission should not hear the case. Mr. Courter said that only under extreme cases should the Commission reopen a base.[7] This discussion clearly provided deference to the Secretary in deciding on redirects/reopenings.

?

MAY 21, 1993

B. Secretary of Defense Recommendations

The Commission has accepted redirects, including what could be considered reopenings,[8] from the Secretary of Defense and reviewed them in the same manner as other recommendations. To change this review would be contrary to earlier Commission policy and would put the services in a quandary since they are expecting the remedy to be available. Additionally, it could be argued that unless there is an amendment to the law, the Commission can not apply a standard to change a recommendation other than to find substantial deviation from the final criteria and force structure. In further support of this position is the fact that in 1993, no action was taken by the Senate to add such a requirement even when it was brought to its attention by the Commission.

The strongest argument for the Commission to alter its position and treat redirects differently and to apply a more rigorous standard is because a redirect allows the services an option to accepting the Commission's earlier decision. In anticipation of a redirect, the process of implementing a closure or realignment is held in abeyance for two years pending the next round of closures when the service can offer its change. This delay is contrary to the issue of finality that is so strongly argued by proponents of the Commission

[7] Transcript of May 28, 1993 hearing pp.

[8] See recommendations on Richenbacker, Columbus, Ohio and Carswell, Tx in Defense Base Closure and Realignment Commision, 1993 Report to the President, pp. 1-88 and 1-84.

and should be discouraged. Since this is the last round of closures, under Public Law 101-510, this point is moot. Yet why even mention if no future rounds the point should be considered for future base closure rounds.

C. Commission's Initiative

The Commission did investigate reopening of a previously closed base as an alternative to a Secretary of Defense's recommendation. The Secretary provided a alternate scenario that did not require reopening of a previously closed base. In fact, it is unclear whether the
5 Navy/Marine Corp, made its recommendation to the Secretary even reviewed the idea of reopening a base or whether it discarded the possibility since the base was slated for closure.

When the Secretary's recommendation was transmitted to the Commission, the Commission began looking at alternatives. Reopening a base was an ~~idea~~ SCENARIO generated by the Commission staff and not by the community, although counsel admits this a fine line to draw. In the end, the Commission did not vote to reopen the base. However, the option was presented to the Commission. The case was decided on the merits of the arguments rather than a clear decision not to reopen a previously closed base although that issue may have been a factor.

Whether the Commission can, on its own - not at the suggestion of the Secretary of Defense and in fact contrary to his recommendations - research and recommend to the President a reversal of its earlier proposal and reopen a base slated for closure is a difficult issue.

The arguments in support of allowing the Commission to reopen a base on its own initiative include:

- There is nothing in the law restricting it.
- If the Commission has jurisdiction to add a base or change a recommendation due to substantial deviation it should have the option of reopening.
- If the Secretary was always accurate in assessing military value and therefore always knew when it was the correct approach to close or realign, then why has the Commission been provided the option to change and/or veto the Secretary on any of the recommendations?
- Why, if it makes the most military and cost sense, should the Commission be limited in reopening?

The answer to all the questions is that the presumptions of finality and timely closures are essential to the base closure process. If indeed the Secretary of Defense determined it vital to reopen the base, than it would be recommended to the Commission as a redirect. Deference should be given to the Secretary of Defense when it involves a reopening. (see attached memorandum for more indepth analysis)

As a side note, from a public policy standpoint, if the Commission has the ability to generate openings, the Commission will be lobbied incessantly by high paid lobbyists by communities hoping for one last chance to save their bases.

IV. CONCLUSION

The presumptions of finality in process should be considered by the Commission as it decides how to proceed on redirects and reopenings. The finality of the process must be respected. In order for communities to begin pursuing their reuse plans they need to know the decision to close is final. The Commission has an enormous amount of work to complete each round of closures. It is feasibly impossible to reexamine past decisions and meet the requirements for 1995 unless there is an amendment to the law allowing more time and guidance.

Deference should be given to the Secretary of Defense on redirects and reopening. When there are extraordinary situations that require a redirect or reopening, the Secretary of Defense is the best position to recognize them and forward the recommendations to the Commission. Only in very limited circumstances, if at all, should the Commission revisit its own decisions on redirects and reopenings.

Unless there is an amendment to the law, the Commission can not apply a separate standard to redirects and reopenings that are included in the recommended forwarded to the Commission by the Secretary of Defense. There is no authority to reject a recommendation from the Secretary even if it is a reopening- unless we first go thorough the appropriate review and find substantial deviation from the final criteria and force structure.